

# The *Pointe Gourde* principle and its effect on economic development takings

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## **Abstract**

In expropriation cases, the compensation question often occupies centre stage. Moreover, the way it is resolved largely influences the perceived legitimacy of the interference. When the expropriation order affects the value of the taken property, the question of compensation becomes particularly tricky. Many jurisdictions employ so-called “elimination rules” in such cases, to ensure that changes in value due to the expropriation scheme are disregarded. In this paper, I consider elimination rules in UK and Norwegian law, and I focus particularly on situations when expropriation takes place to further economic development. The policy reasons for elimination rules become less clear in such situations, and it has been argued that mechanisms for benefit sharing should be used instead. For a concrete example of such a mechanism, I look to recent case law on expropriation for commercial hydropower in Norway, developed by the district ‘appraisal courts’, special judicial bodies that rely largely on the discretion of lay people.

I discuss how the Norwegian Supreme Court has partly confirmed and partly rejected the new approach. In particular, I note how they have applied an elimination rule similar to what is known as the “Pointe Gourde” principle in common law, to reject benefit sharing for some case types that the appraisal courts have judged differently. I analyse these developments against the debate on the Pointe Gourde principle in the UK, arguing that the rule is often inappropriate when expropriation benefits a commercial scheme.

## 1 Introduction

The distinguishing feature of an economic development taking, as that notion has typically been used, is that it gives a third party an opportunity to profit commercially. This may even be the primary aim of the project, with the public benefiting only indirectly through potential economic and social ripple effects. In the absence of compulsion, owners who contribute property to development projects of this kind would naturally expect a share in the profit resulting from profitable use of their land. However, in most jurisdictions, including the US, the UK and Norway, the rules used to calculate compensation following condemnation typically prevents benefit sharing of this kind.<sup>1</sup>

The most important common law mechanism responsible for this is referred to as the *Pointe Gourde* principle, named after a .... case.<sup>2</sup> In short, it states that any changes in value due to the expropriation ‘scheme’ is to

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<sup>1</sup>See, e.g., **fennell04**

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be disregarded when calculating compensation. Depending on whether the scheme increases or decreases the value of the land, this principle will lead to a corresponding increase or decrease in the level of compensation payable to owners. Hence, the principle has both a positive and a negative dimension, the policy reasons for which do not necessarily coincide.

However, in ‘classical’ cases, when land is taken for non-commercial projects, the core idea behind both dimensions of the principle are easily justified within a narrative of corrective justice. If an expropriation scheme increases the value of land that is taken, the fact that the scheme required the land to be taken in the first place means that the additional value cannot easily be construed as the owner’s ‘loss’. Without the scheme, there would be no additional value. Hence, the negative dimension of the principle appears sound. On the other hand, if the scheme decreases the value of the land that is taken, this is undoubtedly an additional ‘loss’ for the owner, compared to the situation he would have been in had the taking not occurred. Hence, a claim for additional compensation appears well-reasoned.

Complications arise, however, as soon as one asks about the scope of the principle. Consider, for instance, the situation that arises if private land is taken to build a stretch of road, one which represents the last stage of a comprehensive transport plan that has caused a dramatic surge in local property prices over several years. Should the owner be compensated based on what the value of his land would have been if the transport plan as a whole was never implemented? What if the exact location of the final stretch of road was not specified in the transport plan? More generally, is it really so obvious that an owner whose land is taken for an important public project

must accept to be worse off than his neighbours, who enjoy the positive effect of the project?

Problems of scope have been flagged as highly problematic by the Supreme Court of England and Wales, with a partial clarification offered in the case of *Waters*. In this paper, I will focus instead on the special issue that arises when land is taken for commercial projects. In such cases, I argue, there is an evolving consensus among academics and professionals alike that the negative dimension of the *Pointe Gourde* principle is lacking in good policy reasons, at least if it is understood broadly. The question arises how such cases are to be resolved. I look at various proposals that have been made based on a corrective justice approach to compensation. I note, in particular, that several recent proposals from this strand correspond to rules that have actually been applied in Norway for more than 100 years, in cases involving expropriation of waterfalls for hydropower production. I go on to identify shortcomings of these approaches, by showing how, in the Norway at least, the corrective justice perspective, and the focus on clear and unambiguous rules, tends to disproportionately benefit the commercial third party that benefits from takings.

I then argue that the intractable challenges raised by the *Pointe Gourde* principle in the context of economic development takings shows, more than anything else, that a corrective justice approach to such takings is inadequate, and should be replaced by an approach that focuses on the owners' *right to participate, qua owner*, in for-profit projects involving their land. I illustrate the possible consequence of recognizing such a right, by considering a recent case where waterfall owners were compensated on the premise that if the

expropriation had not taken place, they would have cooperated with the commercial developer in carrying out the project. I then conclude that while a compensatory approach to participation rights can work in individual cases, fair benefit sharing is impossible unless, in the majority of cases, the right to participate is translated into frameworks of *actual*, possible *compulsory* participation, which can remove the need for expropriation altogether.

## 2 Blablablba

In particular, various *elimination rules* are typically in place to ensure that compensation is based entirely on the pre-project value of the land that is being taken.<sup>3</sup> The policy reasons for such rules is that they ensure that the public does not have to pay extra due to its own special want of the property. After all, this is one of the main purposes of using eminent domain in the first place; to ensure that the public does not have to pay extortionate prices for land needed for important projects. However, when the purpose of the project is itself commercial in nature, there appears to be a shortage of good policy reasons for excluding this value from consideration when compensation is calculated. This is especially true when, as in the US, compensation tends to be based on the market value of the land taken. Why should a commercial condemner's prospect of carrying out economic development with a profit be disregarded from the assessment of market value? In any fair and friendly transaction among rational agents, one would expect benefit sharing in a case like this. Yet for economic development backed up by eminent domain,

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<sup>3</sup>ackerman06.

the application of elimination rules ensures that all the profit goes to the developer.

Some authors have argued that failures of compensation is at the heart of the economic takings issue and that worry over the public use restriction is in large part only a response to deeper concerns about the “uncompensated increment” of such takings.<sup>4</sup> In addition to the lack of benefit sharing, previous work has identified two further problems of compensation that also tend to become exasperated in economic development cases. First, the problem of “subjective premium” has been raised, pointing to the fact that property owners often value their own land higher than the market value, for personal reasons.<sup>5</sup> For instance, if a home is condemned, the homeowner will typically suffer costs not covered by market value, such as the cost of moving, including both the immediate “objective” logistic costs as well as more subtle costs, such as having to familiarize oneself with a new local community. Second, the problem of “autonomy” has been discussed, arising from the fact that an exercise of eminent domain deprives the landowner of her right to decide how to manage her property.<sup>6</sup>

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<sup>4</sup>**fennell04**.

<sup>5</sup>**fennell04**.

<sup>6</sup>Discussed in **fennell04** For a general personhood building theory of property law, see **radin93** For a general economic theory of the subjective value of independence, see **benz08**