MEMORANDUM

To Senate Transportation Committee
From John Echeverria
Date: March 7, 2025
Re: S. 4 Would Result in Unconstitutional Takings of Private Property

This memorandum explains why S. 4 would result in unconstitutional takings (or expropriations) of private property under the U.S. and Vermont Constitutions.[1] Given that there are over 500 miles of legal trails in Vermont, S. 4 would likely result in takings of private property rights from hundreds of Vermont landowners.

The Basics of Constitutional Takings Doctrine.

The U.S. Supreme Court has recognized that government regulations and other types of government action restricting the use of private property may result in takings of property rights. The Supreme Court has instructed that in determining whether a use restriction effects a taking courts should generally apply a multi-factor balancing test focused on the economic impact of the use restriction, the extent of the restriction's interference with investment-backed expectations, and the character of the government action. *See Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). For the rare situation where a restriction on use is so severe that it destroys the economic value of the property, the Supreme Court has established a categorical takings rule that almost invariably leads to the conclusion that the use restriction effects a taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

By contrast, the U.S. Supreme Court has established a very different standard for so-called "physical takings." When the government physically takes private property, "the Takings Clause imposes a clear and categorical obligation to provide the owner with Just Compensation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021). The Supreme Court has said that

[1] The "Takings Clause" of the U.S. Constitution states: "Nor shall private property be taken for public use, without just compensation." U.S. Const. V. The Takings Clause of the Vermont Constitution states: "That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. ch.1, art. 2. The Vermont Supreme Court generally interprets the Vermont Takings Clause in accord with U.S. Supreme Court precedent interpreting the federal Takings Clause. However, the Vermont Supreme Court explained in *Gladchun v. Eramo*, 217 Vt. 481, 490 (2023), that "the Vermont Constitution vigorously protects private-property ownership," and that "Vermont's unique character and history" supports "a robust commitment to private-property ownership." Thus, the Vermont Supreme Court might interpret the Vermont Takings Clause as providing more protection for private property rights than the federal Takings Clause. However, the U.S. Supreme Court's precedents interpreting the federal Takings Clause are sufficient to demonstrate that S. 4 would result in an unconstitutional taking.

government can effect a physical taking in several different ways. First, "[t]he government commits a physical taking when it uses its power of eminent domain to formally condemn private property." *Id*. Second, it effects a physical taking "when the government physically takes possession of property without acquiring title to it." *Id*. And lastly, and of most direct relevance to the unconstitutionality of S. 4, "the government effects a taking when it occupies property." *Id*.

The constitutional protection against government occupations of private property is rooted in the longstanding recognition that "the power to exclude" is "one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV,* 458 U.S. 419, 435 (1982). *See also Cedar Point Nursery,* 594 U.S. at 150 (observing that "we have stated that the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property"), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–180 (1979); *Echeverria v. Town of Tunbridge*, 325 A.3d 98, 105 (Vt. 2024) (observing that "[o]ne of the main rights attaching to property is the right to exclude others"), quoting *State v. Wood*, 148 Vt. 479, 486 (1987), in turn quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

The U.S. Supreme Court has provided considerable guidance on the scope of the rule that physical occupations are categorical takings of private property, The Court has recognized that government effects a physical taking not only when government itself occupies property, such as by building a project that floods private land, *see United States v. Cress,* 243 U.S. 316 (1917), but also when government enacts a law or adopts a regulation authorizing third parties to occupy private property without owner permission. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (government order allowing the public to pass through private beachfront property). In addition, the Supreme Court has made it clear that physical occupations are categorical takings "whether [they are] permanent or temporary," *Cedar Point Nursery*, 594 U.S. at 153, and "even if they are intermittent as opposed to permanent." *Id*.

In the recent case of *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), the Supreme Court identified three narrow exceptions to the categorical takings rule for physical occupations. First, the Court said that "trespasses," which the Court defined as "isolated physical invasions [] not undertaken pursuant to a granted right of access," are not takings. *Id*. at 159-160 (citing a "truckdriver parking on someone's vacant land to eat lunch," see *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991), as "an example of a mere trespass").

Second, the Court explained that "government-authorized physical invasions will not amount to takings" if "they are consistent with longstanding background restrictions on property rights." 594 U.S. at 160. Background restrictions on property rights can serve as defenses to takings claims based on either use restrictions or physical takings. *See Lucas* v. *South Carolina Coastal Council,* 505 U.S. at 1028-1029 (stating that the government does not take a property interest when it merely asserts a "pre-existing limitation upon the landowner's title"). In the

context of physical occupation takings claims, the *Cedar Point Nursery* case explains, one relevant background restriction is the common law privilege that "allow[s] individuals to enter property in the event of public or private necessity." 594 U.S. at 160-161, citing Restatement (Second) of Torts § 196 (1964) (entry to avert an imminent public disaster); § 197 (entry in an emergency situation to avert serious harm to a person, land, or chattels). The *Cedar Point Nursery* case states that another background restriction applicable to physical occupations is the privilege held by law enforcement officers to enter onto private property to execute an arrest or search warrant. *Id*.

Third, the Supreme Court said that a government occupation of private property will not be a taking if it is imposed as a condition of the government's grant of some kind of benefit (such as a discretionary permit), provided the government could have declined to grant the benefit without effecting a taking and the condition serves the same police-power objective that would have been served by denial of the benefit. 594 U.S. at 161, citing *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).

Enactment of S. 4 Would Result in a Physical Occupation Taking.

Based on the rules governing physical takings claims laid out by the U.S. Supreme Court, it is clear that the enactment of S. 4 would effect a categorical physical occupation taking. Vermont landowners whose properties are crossed by legal trails hold fee simple interests in the lands beneath the trail paths. S. 4 would authorize town officials, or persons to whom towns delegate their authority, to invade these private lands indefinitely for the purpose of conducting maintenance activities on the lands. The fact that the invasions would be intermittent does not alter the conclusion that the invasions would be unconstitutional takings.

The Supreme Court has adopted a common-sense approach for evaluating whether a government authorization of an occupation effects a taking: whether, prior to the action alleged to effect the taking, the owner had the right to exclude the government and third parties from the property, and then the government took action to eliminate that right. For example, in *Cedar Point Nursery,* involving a takings challenge to a California regulation granting union organizers a right of access to raisin growers' processing facilities, the Supreme Court said there was a taking because, "without the access regulation, the growers would have had the right under California law to exclude union organizers from their property," but then "the access regulation took that right from them." 594 U.S. at 155. *See also Darby Development Company, Inc. v. United States*, 112 F4th 1017, 1034 (Fed Cir. 2014) (ruling that landlords stated a physical occupation taking claim based on a government order declaring a nationwide moratorium on evictions during the covid pandemic because, "absent the Order, they could have evicted (or 'excluded' from their property) at least some non-rent-paying tenants," and they "alleged that the Order, by removing their ability to evict non-rent-paying tenants, resulted in government-authorized invasion, occupation, or appropriation of their property") (internal quotations omitted).

So too in this case: Vermont property owners can now bar town officials or their agents from entering onto their private lands subject to legal trails because Title 19 of the Vermont statutes does not confer authority on towns to maintain legal trails and, therefore, any such entry is unauthorized and unlawful. If S. 4 were enacted, municipalities would become empowered to enter and occupy private property for the purpose of doing trail maintenance. The result is an obvious physical occupation taking.

None of the three exceptions to the categorical liability rule for physical takings identified in *Cedar Point Nursery* applies. Municipal trail maintenance pursuant to a new, specific legislative authorization would obviously not be a "mere trespass." There is no relevant background restriction on Vermont property rights that gives municipal officials a privilege to invade private property to conduct maintenance and, in any event, since 1986, Vermont statutes have reflected the legislature's clear decision to deny municipalities the authority to maintain legal trails. And S. 4 does not purport to require property owners to accept a physical invasion of their land as a condition of receiving some benefit conferred on them by the State.

Finally, it is of no consequence for the purpose of the takings analysis that municipalities currently possess the legal authority to regulate public recreational activities on legal trails. Assuming this municipal authority is equivalent to an easement, the easement would be limited in scope. Conferring a new authority on municipalities to enter private lands subject to trails for the purpose of conducting trail maintenance would require the creation of an additional easement. *See Preseault v. United States*, 100 F.3d 1525, 1550 (Fed Cir. 1996) (ruling that federal legislation permitting use of railroad easements as recreational trails effected a taking, stating: "The taking of possession of the lands owned by the [plaintiffs] for use as a public trail was in effect a new easement for that new use, for which the landowners are entitled to compensation."); *Smiley First, LLC v. Department of Transportation*, 492 Mass. 103, 116 (2023) (ruling that easement condemned by Massachusetts transportation agency for relocation of railroad facilities displaced by road construction did not encompass project to construct test track and a new building for storage of railway vehicles, and therefore the new project involved an "additional taking" for which compensation was required); *Keokuk Junction Ry. Co. v. IES Industries, Inc*., 618 N.W.2d 352 (Iowa 2000 ) (public easement acquired for highway construction purposes did not permit construction of electric power lines in the easement right-of-way without payment of additional compensation).

Conclusion

For the foregoing reasons, it is clear that S. 4 would effect an unconstitutional taking of private property rights. If you have any questions about this analysis, or if I can provide additional information that would be useful to you, please do not hesitate to contact me.