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THE TAKINGS CLAUSE: THE EVOLVING AND UNCERTAIN STANDARDS APPLICABLE TO CITIES AND TOWNS

*Cynthia M. Pols**

Since 1985, the Supreme Court has made several major rulings of importance to cities and towns concerning the application of the takings clause of the U.S. Constitution to land use regulation. Two of the most recent of these rulings arise from land use disputes in California and could well lead to new restrictions on the regulatory authority of state and local governments. These cases do not set definitive and comprehensive rules on takings. Instead, they establish some outside limitations on state and local regulation and leave many of the important issues to future litigation. However, they provide indications of the Supreme Court's general direction on the issue and they establish new rules on several important questions.

For cities and towns, increased litigation arising from state and local activities relating to zoning, planning, historic preservation, growth and development control, and environmental conservation and protection should be expected. The probable targets of litigation include: down zoning, on- and off-site dedications, linkage programs, impact fees, and construction moratoria.

I. BACKGROUND

A. The Takings Clause

The takings clause is contained in the fifth amendment of the U.S. Constitution. It provides that "private property" cannot "be taken for public use, without just compensation" and applies to state and local government under an 1897 interpretation of the fourteenth amendment.¹ It has served as an unclearly defined check on regula-

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1. *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

tion by all levels of government, including the federal government. It is important to keep in mind that the takings clause does not limit the ability of a city or town to make an outright purchase of property through the exercise of the power of eminent domain. In those situations, because the property owner receives just compensation through the condemnation process, the taking is valid under the fifth amendment. The difficult question for the courts is: When does governmental action cross the constitutional dividing line into forbidden territory and become an illegal taking? In this uncertain environment, the issue for city and town officials is what types of regulatory activity will be considered so restrictive of the use of property as to constitute a regulatory taking.

B. Recent Developments

During a period of renewed interest in the issue, the Supreme Court has established three important takings clause rules in the last three years. First, procedural rules have been established which prevent premature actions by property owners to recover compensation under the takings clause. Property owners cannot secure relief under the takings clause until government has rendered a final and conclusive decision *and* an effort to obtain just compensation through proper state procedures has been made and rejected. Second, a property owner is entitled to recover monetary damages for unconstitutional takings whether the taking is temporary or permanent. And third, a regulation which is not narrowly and carefully tailored to accomplish a clearly defined governmental objective is especially vulnerable to a takings clause challenge.

Of equal importance are the questions which remain open in the wake of the recent decisions by the Supreme Court. The courts have yet to clearly define the circumstances in which a city or town can deprive a landowner of the entire economic value of his or her property without violating the compensation requirement of the takings clause. The courts have yet to define clearly the exceptions to the takings clause. In certain areas — most clearly in the safety area — state and local governments appear to have broad discretion to regulate without infringing the takings clause. Less certain, however, is the relationship between the takings clause and other types of regulation such as health and public welfare regulation. In fact, the Supreme Court could some day decide that certain governmental interests are less deserving of protection from takings clause challenges than others. The critical question of how far a regulation can go

under the takings clause is diminishing the economic value of the property to the landowner without actually extinguishing that value is unanswered too.

II. WHAT ARE THE PROCEDURAL RESTRICTIONS ON BRINGING A TAKINGS CLAIM?

The Supreme Court has established some procedural rules for takings clause claims. These rules limit the circumstances in which a takings clause claim can be adjudicated by a court and generally protect cities and towns from premature takings clause challenges. In the key case on procedure, *Williamson County Regional Planning Comm'n v. Hamilton Bank*,² the Supreme Court found that a premature takings claim by a landowner failed under the constitutional principle of ripeness.

As the ripeness doctrine was applied by the Supreme Court in the takings context, action by the relevant governing body must be final before the action is reviewable under the takings clause by a court. For purposes of this case, which involved a challenge to the application of a zoning ordinance, this ruling meant that the landowner was required to apply for a variance before a court could decide whether a taking had occurred. Thus, governmental actions will not be ripe for review until a final decision regarding the application of the regulations to the property at issue has been reached. In the Court's view, a determination of whether all reasonable beneficial use of the property has been denied and an injury inflicted cannot be made until the government has taken a final and definitive position on the matter. A second procedural obstacle to the utilization of the takings clause set out in the *Williamson County* case is that the landowner must have invoked state procedures for obtaining compensation — for example, an inverse condemnation action — before a takings claim can be brought. The exception to this rule is where those procedures are shown to be unavailable or inadequate.

On a related question in another case, the Court found that a landowner is required to show that he or she sought approval for virtually all possible economic uses before a takings claim will be considered by a court. In this 1986 case, *MacDonald, Sommer & Frates v. Yolo County*,³ the Supreme Court ruled that the landowner must have sought a permit for less intensive uses than originally pro-

2. 473 U.S. 172 (1985).

3. 477 U.S. 340 (1986).

posed and that these requests must have been denied before the decision will be considered final for purposes of judicial review. The reason the Supreme Court established this requirement is that "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." The ruling in the *Yolo County* case affirms the continuing vitality of a favorable ruling for cities and towns by the Supreme Court in the *Penn Central Transp. Co. v. New York City*,⁴ case. That case involved the application of an historic preservation law to Grand Central Station in New York City. In that case, the Supreme Court found the takings claim to be premature under the ripeness doctrine. Although a landmarks commission had denied a request for the right to construct a 50-story office building above the terminal, the property owners had made no effort to obtain approval for alternative plans such as a smaller building.

These recent victories on procedural questions have built-in deficiencies. They provide procedural protections which can be invoked to postpone a final decision on the question of whether there has been a taking. Other recent rulings — particularly the ruling on liability for temporary takings — suggest that such delays could be costly if a court ultimately finds that a taking has occurred.

III. WHAT IS THE REMEDY FOR A VIOLATION OF THE TAKINGS CLAUSE?

The 1987 decision on the remedies question has greatly increased the liability potential for cities and towns. The Supreme Court established clear and certain rules on the question of the remedy for a violation of the takings clause in *First English Evangelical Lutheran Church v. County of Los Angeles*.⁵ In this decision, the Court ruled that the takings clause entitles a property owner to compensation for economic losses during the entire time period in which the constitutionally defective regulation was in effect. In making its ruling, the Supreme Court focused on the compensation requirement of the takings clause. The takings clause requires *compensation* for a taking; it does not prohibit a taking of private property for governmental use. Under this analytical approach, the rule followed by the California courts (and some other states) of invalidating the defective regulation did not in any way satisfy the compensation requirement of the takings clause.

4. 438 U.S. 104 (1978).

5. 107 S.Ct. 2378 (1987).

This ruling does not mean that the city or town is required to pay the property owner for the full value of the property. Rather, the landowner is entitled to compensation for the losses incurred from not being able to put the property to economic use. In many cases, the losses may be small in relation to the actual value of the property or the losses may be difficult to prove. The *First English* case involved a broad constitutional challenge to a county ordinance prohibiting the construction of new buildings in a flood protection area. The California courts had originally ruled that the landowner could ask the court to invalidate the ordinance under the takings clause, but could not collect damages for the period in which the regulation was in effect.

Before the *First English* decision, a city or town which lost a takings case could simply rescind or revise the challenged regulation and was not required to compensate the property owner unless the regulation was continued in effect after the court determination. (It should be noted, however, that, for some states, the remedies rule established in the *First English* case was not new. The rule that property owners must be reimbursed for temporary takings had already been implemented in a number of states at the time of the *First English* decision by state courts.) The Supreme Court's ruling grants property owners whose property interests are adversely affected by a regulatory taking legal rights generally comparable to those of property owners whose land is actually condemned for public use through the eminent domain process. In the *First English* case, the Court adopted Justice Brennan's reasoning in a dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*,⁶ as the majority rule. A major criticism of the Supreme Court's decision in the *First English* case is that it establishes a severe penalty but provides no guidelines for ascertaining whether a law or regulation has crossed the takings line. In dissent, Justice Stevens pointed out that the immediate impact of the decision for cities and towns is likely to be a "litigation explosion." The litigation threat, according to Justice Stevens, could well impair the ability of state and local officials to regulate the use of land.

IV. WHAT IS A TAKING?

The question at the heart of the constitutional debate is where the line should be drawn between a taking and permissible govern-

6. 450 U.S. 621 (1981).

ment regulation. The seminal decision in this area and the source of many of today's problems was rendered by the Supreme Court more than 50 years ago in *Pennsylvania Coal Co. v. Mahon*,⁷ In that case, Justice Oliver Wendell Holmes observed in what was little more than an aside, "[I]f regulation goes too far, it will be recognized as a taking." Since this ruling, the courts have made a number of largely unsuccessful efforts to draw the line between a taking and permissible regulation.

There is a distinction in the takings clause standards applicable to a regulation restricting a property owner's use of the property and a regulation allowing for the physical occupation of property. In *Loretto v. Teleprompter*,⁸ the Supreme Court recognized this distinction and found a permanent physical occupation to be subject to very strict scrutiny under the takings clause. The wide open area of the law is the standards applicable under the takings clause to regulations which restrict the use of property. Since the *Pennsylvania Coal* ruling, the courts have made repeated efforts to draw a line between a taking and permissible regulation. Recent rulings, including a ruling in early 1987, reflect a general reluctance on the part of the Supreme Court to define particular types of regulations as a taking. For example, in the 1978 *Penn Central* case, the Court refused to find the application of a very restrictive landmarks law to be a taking.

In *Agins v. City of Tiburon*,⁹ the Supreme Court laid out the general parameters of the applicable test. Under that test, a land use regulation may be considered a taking if it "does not substantially advance legitimate [governmental] interests . . . or denies an owner economically viable use of his land." The *Agins* test has been clarified by the Supreme Court in two recent rulings, one of which was favorable for municipalities, the other adverse.

In the favorable ruling, *Keystone Bituminous Coal Association v. DeBenedictus*,¹⁰ decided by a 5 to 4 vote on March 9, 1987 and with a strong dissent, the Supreme Court focused on the nature of the governmental interest underlying the regulation. The case involved a takings challenge to a Pennsylvania environmental law which had been construed by a state agency as requiring that 50 percent of the coal beneath certain types of structures be kept in

7. 260 U.S. 393 (1922).

8. 458 U.S. 419 (1982).

9. 447 U.S. 255 (1980).

10. 107 S.Ct. 1232 (1987).

place to ensure support for the surface of the land. The Court attempted to draw a distinction between the *Keystone* case and the 1922 *Pennsylvania Coal* case by finding that the earlier case involved only a dispute between owners of private property and did not implicate health or safety considerations. The Court found the nature of the government's action, the state was responding to a threat to the common welfare, to be critical. The purpose of the regulatory program at issue in the case was to protect public health, the environment, and the fiscal integrity of the area. The Court also found it important that the property owner had failed to show that he or she could not profitably engage in business operations. On an issue of central importance to cities and towns, the Court refused to allow property to be broken down into segments in takings clause challenges. Under the approach proposed by the property owner, each segment of a piece of property would have been treated as a separate piece of property for purposes of the takings clause. The Court firmly rejected the idea that there could be a taking of discrete parts of a single piece of property. Several examples of the types of regulations which would survive takings clause scrutiny under this approach were cited by the Supreme Court. They include building setback requirements, limitations on the percentage of a lot which can be occupied by buildings, and prohibitions on the building of structures within a certain distance of the property line. In many respects, this decision tracks the Supreme Court's ruling nearly 10 years ago in the *Penn Central* case where the Court refused to treat air rights as a separate piece of property for takings clause purposes.

Chief Justice Rehnquist issued a strong dissent which must be accorded extra weight in light of the bare majority in support of regulation in the *Keystone* case and the evolving nature of takings clause law. He objected to the concept of a broad exception to the takings clause for health, welfare, and safety regulations which parallels police power regulation. He also suggested that "identifiable segments" of a piece of property could be subject to a taking even if other parts of the piece of property were usable.

The ruling in the *First English* case, while primarily remedies-oriented, also highlights the gaps in the law of takings. In the *First English* case, the Court worked around two standards-related issues and left them for further clarification by the lower courts on remand in the *First English* case and other cases. First, the Court made no finding on the question whether the property owner was denied all use of property under the flood control regulation involved in the

case. It simply assumed for purposes of deciding the case that the property owner had been denied all economically viable use of the property. In fact, the county may prevail in lower court on remand by showing that the property was still usable under its regulatory program. Second, the Supreme Court also pointed out that the denial of all use of the property by the county would be permissible if the regulations were enacted for safety reasons. In other words, there is a broad "safety" exception to the takings clause under which cities and towns can establish regulations which deprive the landowner of the economic benefits normally associated with property ownership. However, the scope of this safety exception has not been clearly defined, and the Court was silent on the critical question of whether a comparable exception exists for health and/or public welfare regulation.

In the last case of the 1987 Term on the takings issue, the Court established a rule which fails to recognize the realities of governance at the local level where policies are frequently the result of compromise and consensus building and the public record is frequently replete with the discussion of competing and inconsistent objectives. In *Nollan v. California Coastal Commission*,¹¹ the Court established what could prove to be a very difficult requirement in the land use area. In an opinion authored by Justice Scalia, it reached back to the 1980 *Agins* case to flesh out what is meant by the requirement that a regulation must "substantially advance" a governmental interest to avoid challenge under the takings clause. It found in a 5 to 4 decision that there must be a close and precise relationship between the regulation at issue and the governmental objectives which underlie the regulation.

At issue in the *Nollan* case was the imposition of an access requirement by a state agency as a condition for the grant of a permit to demolish an existing bungalow and build a larger structure on property located directly on the California coast. The permit was granted on the condition that the public be provided with an easement to pass laterally across the beachfront portion of the property. The state commission found the access requirement to be necessary because the construction of the new and larger house would block the view of the ocean, increase private use of the beach, and burden the public's ability to gain access to the beach. The Court focused on the fact that the access requirement meant that individuals would

11. 107 S. Ct. 3141 (1987).

have a permanent and continuous right to use the property for passage along the beach. If a permit had not been required for construction of the building, then, according to the Court, the state could have obtained access rights only by purchasing an easement from the landowner for access-along-the-beachfront purposes. Justice Scalia clarified the general test established by the Court in the 1980 *Agins* case and found that not only must the state interest involved by "legitimate," but the regulation must also "substantially advance" that interest. In other words, the Supreme Court transformed the *Agins*' test into a tough two-pronged test. First, the governmental objective must be legitimate, a test which Justice Scalia acknowledged the Supreme Court has yet to elaborate. Second, there must be a clear and precise connection between the regulation and the state interest — the "substantially advances" component of the test.

The California Coastal Commission had found several reasons for imposition of the access condition. First, the new house, because of its larger size, would limit the public's ability to see the ocean. The wall-like effect of structures would interfere with the desire of passers-by to use the beach and create barriers to the use of the public beach. Second, the new house, because it was bigger than the original house, would increase private use of the beach. The purpose of the lateral access requirement was to counterbalance these new burdens and was similar to permit requirements imposed on the use of other nearby coastal properties. The Court found that the "lack of nexus between the condition" and the purpose of the regulation "converts the purpose to something other than what it was." The Court thereby signalled its willingness to second-guess state and local governments on whether the means selected to realize governmental objectives is the most reasonable and whether the relationship between the means and the end is sufficiently well-defined and close. For example, it suggested that such requirements as a height or width limitation on the house or a ban on the construction of fences would have been more reasonable methods to ensure visual access of the ocean than the approach used by the state agency.

The Court questioned how a requirement enabling people on the beach to walk along the beach (by traversing the beachfront portion of the landowner's property) could in any way mitigate obstacles to viewing the beach from ashore. Further, the access requirement did not appear to relieve in any way overcrowding of the beach. The state's case was somewhat weakened by objectives which the Court saw as incompatible: on the one hand, the commission was concerned

about barriers to the use of the beach; on the other hand, it was trying to relieve beach overcrowding in imposing the access requirement. In a strong dissent, Justice Blackmun pointed out the rigid nature of the Court's new requirement. The close and exacting relationship between benefits accruing to the public from a regulatory requirement and the burdens imposed on the property owner appears to go well beyond the requirement typically required by state courts that the connection be rational or that the condition be reasonably connected to the benefit.

V. CONCLUSION

The development and refinement of takings law is likely to continue in the courts for many years. The Supreme Court has given the lower courts more than enough to digest and has provided property owners with ample reason to invoke the takings clause in disputes with governing bodies. While litigation is likely to increase — after all, uncertainty spawns litigation — it does not follow that liability will automatically increase. It is likely that developers and other property interests will make exaggerated claims as to the scope and meaning of the recent rulings. They will make black-and-white statements that the takings clause prohibits various governmental actions in an effort to obtain approval for projects with a minimum of regulation. City and town officials can also expect to hear equally forceful arguments on the other side. Such groups as environmental and no growth forces, advocates of historic preservation, and other groups with a stake in an aggressive regulatory program will contend that the cases are narrow and not applicable to the particular regulation at issue. In this climate of uncertainty and conflicting claims, detailed knowledge of the recent developments in the takings law is the best protection for city and town officials.

In closing, it should be noted that the Supreme Court could address the takings issue in the 1988 Term and could create many more problems for cities and towns. The takings case now pending before the Court on appeal, *Pennell v. City of San Jose*,¹² involves a challenge to a city rent control program and could provide the Court with an opportunity to speak to the issue of economic regulation in the takings context.

12. 107 S. Ct. 1346 (1987).