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Regulatory Takings

The Second Department Explains the Standards

When a property owner is denied a permit to develop property, the owner may seek relief in the courts. If a court finds that the permit denial was supported by substantial evidence, then it must determine whether the restriction constitutes an unconstitutional taking requiring “just compensation.”

About a decade ago, in *Lucas v. South Carolina Coastal Council*,¹ the U.S. Supreme Court stated that, although regulatory takings jurisprudence has traditionally “eschewed any set formula ... preferring to engage in essentially ad hoc, factual inquiries,” there are at least two “categories” of regulatory action that require compensation “without case-specific inquiry advanced in support of the restraint.”

Physical and Economic

The first category is a physical invasion of the property. The second is where regulation denies all economically beneficial or productive use of land.

The Court stated in *Lucas* that “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his [or her] property economically idle, he [or she] has suffered a taking.” In such a situation, a categorical taking is found without regard to the government’s justifications for the regulation.

More recently, in *Tahoe-Sierra Preserv. Coun. v. Tahoe Regional Planning Agcy.*,² the Court clarified the distinction between a physical taking and a regulatory taking and limited a *Lucas* analysis to extraordinary circumstances in which the government deprives a property owner of all economic uses. The basis for this

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distinction, the Court declared, is found in the text of the Fifth Amendment. In the Court’s view, the plain language of that amendment requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But, the Court ruled, the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of his or her private property.

Making a Distinction

In a footnote, the Court provided guidance on how to identify the distinction. In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret

the word “taken.” When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident and the analysis is more complex.

Physical takings, according to *Tahoe-Sierra*, are as “old as the Republic” and, for the most part, involve the straightforward application of per se rules. The Supreme Court observed that its regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by “essentially ad hoc, factual inquiries” designed to allow “careful examination and weighing of all the relevant circumstances.”

The Court went on to instruct that it is “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking; and vice versa.” The basis for this fundamental distinction is because 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.”

The *Tahoe-Sierra* Court clarified an aspect of its holding in *Lucas* that stated that compensation is required when a regulation deprives an owner of “all economically” beneficial uses of the owner’s land. The Court declared that the holding in *Lucas* was “limited” to the “extraordinary circumstances” when no productive or economically beneficial use of land is permitted. To emphasize the word “no” relative to productive use, the Court pointed to a footnote in *Lucas* that explained that the categorical rule would not apply if the diminution in value were 95 percent instead of 100 percent. Anything less than a “complete elimination of value” or a “total loss,” the Court acknowledged, would require the kind of analysis applied in *Penn Central Transp. Co. v.*

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City of New York,³ which requires an examination of various factors such as the economic impact of the regulation, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of the governmental action.

In sum, the Court held that it was “clear that the categorical rule in *Lucas* was carved out for the ‘extraordinary case’ in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry.”

Recently, the Appellate Division, Second Department had occasion to apply this standard in a case arising from the application of New York State wetlands regulations. In *Friedenburg v. New York State Dep’t of Environmental Conservation*,⁴ the Second Department found that a taking of less than 100 percent of the value of property could be considered a taking under the Fifth Amendment, thereby requiring the payment of monetary compensation. The appellate court’s ruling also demonstrates how courts should evaluate takings claims where less than the full value of a parcel of property is affected.

The real property at the center of the controversy was approximately 2.5 acres in area, located within a residential zone in the Village of Southampton on Long Island. All but a small upland portion of the parcel was classified as tidal wetlands. The property had been purchased in 1962 by Gwendolyn Londino, who died in the early 1980s; at the time of the decision, the land was owned by her estate, under the control of her executors.

Wetlands Act

When Ms. Londino had purchased the property, its wetland areas could legally have been filled in, and there were essentially no restrictions to prohibit the construction of a single family home. In 1973, however, New York State adopted the Tidal Wetlands Act⁵ and the Department of Environmental Conservation (DEC) thereafter determined that virtually all of Ms. Londino’s land should be designated as tidal wetlands.

In the late 1980s, her executors applied for a tidal wetlands permit for the construction of a single family residence. After extensive administrative proceedings, the department denied the application, finding that the septic system of the proposed project would cause the release of sewage effluent containing pathogenic bacteria and viruses into the waters of Shinnecock Bay and into the nearby wetlands.

The executors thereafter filed a proceeding seeking an order annulling the Department of Environmental Conservation’s determination

and directing the issuance of the state wetlands permit. In the alternative, they asked that the department’s action be regarded as a taking of property without just compensation, and that the department be ordered to commence condemnation proceedings. The department agreed to permit certain activities on the property, including installation of a floating dock and ramp to be used for mooring and docking up to three boats, and it asked the trial court to dismiss the complaint. The court denied the motion and held a hearing on the petition.

In its decision after the hearing, the court concluded that the executors had established that the pre-regulation value of their property was \$665,000. Moreover, it continued, the Department of Environmental Conservation had demonstrated that the property had a residual market value of \$31,500 if it was used as a means of gaining access to the waters of Shinnecock Bay. The court then found that a value of only \$31,500 represented a diminishment of the market value of the executors’ property of over 95 percent. This constituted a compensable taking. The department appealed.

Appellate Ruling

The Second Department first ruled that because the executors’ property retained at least a five percent residuary value, the Department of Environmental Conservation’s denial of the permit for a single family dwelling did not constitute a categorical or per se taking of the property. However, the court continued, the executors did establish a regulatory taking using the Penn Central balancing test.

As Justice Sondra Miller, speaking for the court, pointed out, there was significant testimony regarding the economic impact the regulation had on the subject property, and regarding the fact that the regulation left only a residual value. Indeed, the Appellate Division observed, the trial court found that the property was reduced in value by 95 percent from its non-regulated value — a “near total or substantial decrease in value.”

Importantly, the Second Department also declared that even if it were to find that the property’s value was \$50,000, yielding a loss of 92.5 percent, its conclusion would not change. An overall loss of 92.5 percent is a “significant reduction in the value of the property,” and could support a finding that the property’s economic value had been destroyed — especially given the fact that Ms. Londino has acquired the property before the wetlands regulations had been enacted. The court concluded that the executors had demonstrated, beyond a reasonable doubt that the regulation and denial of the permit had

destroyed all but a bare residue of the economic value of the property.

Public Purpose

The Second Department then rejected the Department of Environmental Conservation’s argument that its “legitimate reasons” for regulating tidal wetlands prevented the executors from succeeding on a takings claim. The appellate court conceded that the purpose and function of a regulatory imposition may be relevant to drawing the line between mere diminution in value and a partial taking, but stated that that did not suggest that when government acted in pursuit of an important public purpose, its actions were excused from liability. The Appellate Division then found that the executors had been left with a situation where their only viable choice was to leave the property in its natural state. In other words, they were “bearing all the burden of the regulation” and were entitled to compensation.

The Second Department agreed with the department that Supreme Court lacked jurisdiction to entertain the claim for damages as such a determination must be made in the Court of Claims.⁶ Accordingly, it concluded, if the department decided to acquire the property under the exercise of its powers of eminent domain, which was its only option other than granting the executors’ permit application,⁷ any further proceedings to determine the compensation to be paid to the executors had to be conducted in the Court of Claims.⁸

Conclusion

The *Friedenburg* decision is important in that it demonstrates that a takings claim can be viable in the regulatory takings arena even where the property retains some residual value. The diminution in value must be great and the petitioner must prove — beyond a reasonable doubt — that the *Penn Central* balancing test is in its favor. As reflected in *Friedenburg*, the dollars-and-cents economic proof is critical to the takings calculus under *Penn Central*.

1. 505 U.S. 1003 (1992).

2. 535 U.S. 302 (2002).

3. 438 U.S. 104 (1978).

4. 3 A.D.3d 86 (2d Dep’t 2003).

5. Environmental Conservation Law Article 25, L. 1973, ch. 790.

6. See Court of Claims Act § 9(2).

7. See ECL 25-0404.

8. There was no discussion of a possible temporary taking claim under *First English Evangelical Lutheran Church v. Los Angeles*, 107 S.Ct. 2378 (1987).