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Regulatory Takings:

Battle Rages On Despite Two Decades Of Court Rulings

By John M. Armentano

Over the past two decades or so, the U.S. Supreme Court has issued numerous significant rulings dealing with government regulations affecting private property. The cumulative impact of the Court's rulings in *Agins v. City of Tiburon*,[1] *United States v. Riverside Bayview Homes, Inc.*,[2] *Keystone Bituminous Coal Assn. v. DeBenedictis*,[3] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[4] *Nollan v. California Coastal Comm'n*,[5] *Yee v. Escondido*,[6] *Lucas v. South Carolina Coastal Council*,[7] and *Dolan v. City of Tigard*,[8] among others, have made many local and state government officials with land use, zoning and environmental planning responsibilities feel as if every move they make is subject to being examined, criticized, challenged, and, perhaps, overturned in federal court on the basis of awesome constitutional principles. In addition, attorney's fees are generally awarded to successful litigants in federal civil rights suits under 42 USC 1983.

Even the decision by the Supreme Court in *Suitum v. Tahoe Regional Planning Agency*,[9] in which the majority focused on a procedural matter, has been seen by many as substantively significant because of a separate three-Justice opinion challenging long recognized practices regarding the transfer of development rights in the regulatory takings setting.

No doubt many also have concluded that a procedural decision by the Court this past May, in *City of Monterey, Calif. v. Del Monte Dunes at Monterey Ltd.*,[10] where the Court found that a jury properly had been allowed to rule on a regulatory takings claim, struck a blow against government regulation, based on the common belief that juries now are more likely than judges to make findings of fact against the government. The extremely limited appellate review of jury findings, of course, will generally result in mass affirmances.

Yet the struggle between government officials who seek to impose reasonable regulations on property use and those who argue for unfettered rights is not so one-sided as the alarmists, or the property rights advocates, might want the country to believe.

That point was driven home in *Good v. United States*,[11] a decision issued several weeks ago by the U.S. Court of Appeals for the Federal Circuit. In its opinion, the court found that the property owner who had filed a taking claim against the govern-

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ment lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking. The court reached this conclusion because it determined that the owner had known that his property was subject to existing regulations when he had purchased it. Significantly, the court also based its decision on its belief that the owner could not have been "oblivious" to the "trend" of "ever-tightening land use regulations" taking place around the time he had purchased the land. Although the federal appellate court did not do so, it quite easily could have cited to four 1997 decisions by the New York Court of Appeals that essentially reached the same conclusion, i.e., that property owners may not seek damages by challenging zoning ordinances or other municipal regulations on "taking" grounds if the regulations were in effect when they purchased the property.[12]

Constitutional Context

Regulatory taking claims stem from the provision in the Fifth Amendment to the U.S. Constitution that declares that private property shall not "be taken for public use, without just compensation."[13] The government can "take" private property by either physical invasion or regulatory imposition.[14]

It long has been recognized that although property may be regulated to a certain extent, if regulation goes "too far," it will be recognized as a taking.[15] The U.S. Supreme Court has set out several factors that have particular significance in determining whether a regulation effects a taking, i.e., goes "too far."[16] These factors are

(1) the character of the government action;

(2) the extent to which the regulation interferes with distinct, investment-backed expectations; and

(3) the economic impact of the regulation.

The expectations factor was at issue in *Good*.

Facts Of *Good*

The *Good* case began when Lloyd A. Good, Jr., purchased a 40 acre tract of undeveloped land on Lower Sugarloaf Key, Fla., in 1973, as part of a much larger real estate purchase. The tract consisted of 32 acres of salt marsh and freshwater wetlands and eight acres of uplands.

Good began attempting to develop the property in 1980 — more than seven years after he had purchased it — and submitted a permit application to the U.S. Army Corps of Engineers in March 1981, as was required for dredging and filling navigable waters of the United States. The Corps granted the requested permit in May 1983 and a modified permit in January 1984. Under both permits, the authorized work had to be completed within five years.

Good's efforts to get state and county approval for his project used up most of the five-year time limit on the two federal permits. Good therefore requested that the Corps extend the time limits of the permits. The Corps denied Good's request to reissue the permits without changes, but granted a new permit allowing substantially the same development on October 17, 1988.

Apparently despairing of ever obtaining state approval for his 54-lot plan, Good submitted a new, scaled-down plan to the Corps in July 1990. However, between the time the Corps had issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species under the Endangered Species Act;[17] thereafter, the silver rice rat also was listed as an endan-

gered species.[18] Based on the presence of these two animals on Good's land, the Corps denied Good's 1990 permit application on March 17, 1994. At the same time, the Corps notified Good that his 1988 permit had expired.

In July 1994, Good filed suit, alleging that the Corps' denial of his permit worked an uncompensated taking in violation of the Fifth Amendment. The Court of Federal Claims granted summary judgment in favor of the government, and Good appealed.

Federal Circuit Ruling

In its decision, the Federal Circuit said that it was "common sense" that one who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the court continued, the owner presumably paid a discounted price for the property. Compensating the owner for a "taking" would confer a windfall, it stated. In this case, the court emphasized, Good had known of the necessity and the difficulty of obtaining regulatory approval when he had purchased the land. The court noted that the sales contract specifically stated that Good "recognize[s] that . . . as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations." In the court's view, Good thus had both constructive and actual knowledge that either state or federal regulations ultimately could prevent him from building on the property.

Good pointed out, however, that he was only denied a permit based on the provisions of the Endangered Species Act, when two endangered species were found on his property. He argued that because the Endangered Species Act had not existed when he had purchased the land, he could not have expected that he would have been denied a permit based on its provisions.

The Federal Circuit found that Good's position was "not entirely unreasonable," but concluded that it had to be rejected. It stated that in view of the "regulatory climate" that existed when Good had acquired his property, Good "could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land."

The appellate court stated that even in 1973, when Good purchased the property, federal law required that a permit be obtained from the Army Corps of Engineers to dredge or fill in wetlands adjacent to a navigable waterway. Moreover, the court added, by that time the Corps had been considering environmental criteria in its permitting decisions for a number of years.[19]

Indeed, the court stated, public concern about the environment resulted in numerous laws and regulations affecting land development during this period. The court noted that:

- in December 1973, the Endangered Species Act was enacted;
- in 1975, the Corps of Engineers issued regulations broadening its interpretation of its statutory authority to regulate dredging and filling in wetlands;[20]
- also in 1977, Florida enacted its own Endangered and Threatened Species Act;[21] and
- in 1979, Florida enacted the Florida Keys Protection Act, designating the Keys an Area of Critical State Concern.[22]

Despite what the court referred to as the "rising environmental awareness" that translated into "ever-tightening land use regulations," it emphasized that Good had waited seven years after purchasing the property to take steps to obtain the required approvals, watching the applicable regulations become more

stringent. Although the court stated that Good's "prolonged inaction" did not bar his takings claim, it found that it reduced his ability to fairly claim surprise when his permit application was denied. Good was aware at the time of purchase of the need for regulatory approval to develop his land, the court stated. In the court's view, Good also must be presumed to have been aware of the greater general concern for environmental matters during the period of 1973 to 1980.

The court therefore concluded that Good lacked a reasonable, investment-backed expectation that he would obtain the regulatory approval needed to develop his property. Accordingly, even though the challenged government action may have substantially reduced the value of Good's property, the court ruled that the government had properly been granted summary judgment on Good's regulatory taking claim. *Good* was a summary judgment case in the Federal Court of Claims. One can only speculate what would have resulted if a similar case had been brought against a different defendant under 42 U.S.C. 1983, tried before a jury under *Del Monte Dunes*, and reviewed on appeal by a circuit court with limited jurisdiction to review a jury verdict.

Conclusion

Takings jurisprudence today is anything but static. The *Good* rationale clearly limits a property owner's ability to claim a regulatory taking, and may effectively discourage and thwart significant taking cases. Of course, this certainly does not mean that regulatory taking claims will no longer be successful. It suggests, however, that the battles over the constitutional validity of regulations affecting private property will continue to be fought, and the choice of forum and method of trial will be critical.

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NOTES:

1. 447 U.S. 255 (1980).
2. 474 U.S. 121 (1985).
3. 480 U.S. 470 (1987).
4. 482 U.S. 304 (1987).
5. 483 U.S. 825 (1987).
6. 503 U.S. 519 (1992).
7. 505 U.S. 1003 (1992).
8. 512 U.S. 374 (1994).
9. 117 S.Ct. 1659 (1997).
10. 119 S.Ct. 1624 (1999).
11. 97-5138 (Fed. Cir. Aug. 31, 1999).
12. See Anello v. Zoning Board of Appeals, 89 N.Y.2d 535 (1997); Gazza v. New York State Dep't of Environmental Conservation, 89 N.Y.2d 603 (1997); Basile v. Town of Southampton, 89 N.Y.2d 974 (1997); Kim v. City of New York, 90 N.Y.2d 1 (1997); see, also, John M. Armentano, "Takings Claims: Property Owners Limited in Challenging Zoning Regulations," N.Y.L.J., March 5, 1997 at 5.
13. U.S. Const. amend. V.
14. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Lucas, 505 U.S. 1003.
15. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
16. Grand Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).
17. See 16 U.S.C. Section 1533 (1994); 55 Fed. Reg. 25,588 (June 21, 1990).
18. See 56 Fed. Reg. 19,809 (April 30, 1991).
19. See, e.g., Deltona Corp. v. United States, 657 F.2d 1184, 1187 (Ct. Cl. 1981).
20. See United States v. Riverside Bayview Homes, 474 U.S. 121, 123-124 (1985).
21. Fla. Stat. Ann. Section 372.072 (West 1997).
22. Fla. Stat. Ann. Section 380.0552 (West 1997).