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Restrictive Covenants

A Conservation Requirement May Be a Taking

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The Fifth Amendment to the U. S. Constitution's "just compensation" provision is implicated when a local government encroaches upon or occupies real property for public use.[1] The U.S. Supreme Court also has recognized that, even if the government does not seize or occupy property, a governmental regulation can amount to a taking if it "goes too far."[2] For example, a regulation that denies a landowner all economically beneficial use of his or her property is a per se total regulatory taking (unless the government can demonstrate that the regulation, as applied, prevents a nuisance or is part of its background principles of property law).[3]

A regulation that falls short of eliminating all economically viable uses of the encumbered property may still result in a taking based on the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.[4]

Additionally, under the so-called "*Nollan/Dolan*" doctrine, a taking may occur where the government seeks to require a concession or "exaction" as a condition for approval of a land-use permit.[5]

Recently, the Court of Appeals considered whether a local government committed an unconstitutional taking when it conditioned site plan approval on a landowner's acceptance of a development restriction consistent with the municipality's preexisting conservation policy, but unconnected with the site plan impact. The Court, in *Smith v. Town of Mendon*,[6] decided by a 4-3 vote that such restriction was appropriate. The majority's view, which severely limited the "exaction" analysis, suggests that there may be little to nothing left to the *Nollan/Dolan* standard in New York.

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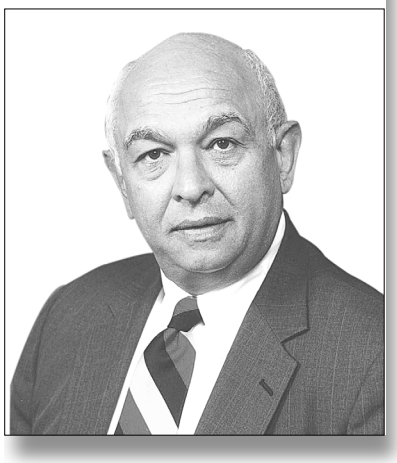
ZONING AND LAND USE



Conservation Restriction

The case was brought by Paul and Janet Smith, who owned almost 10 acres along a protected creek in the Town of Mendon, in upstate New York. The lot included several environmentally sensitive parcels, some portions of which were within areas classified by the town code as Environmental Protection Overlay Districts (EPODs). Because of these environmental restrictions, the Smiths' property was very restricted, statutorily, in terms of the number of houses that could be constructed on it.

In December 2001, the Smiths applied to the town planning board for site plan approval to construct a single family home in the non-EPOD portion of their property. The board granted approval for the construction but conditioned final site plan approval upon the filing of a conservation restriction pursuant to which the Smiths would be prohibited in the EPODs from "construction, including, but not limited to structures, roads, bridges, drainage facilities, barns, sheds for animals and livestock and fences," the "clear-cutting of trees or removal of vegetation or other ground cover," changing the "natural flow of a stream" or disturbing the stream bed, installing septic or other sewage treatment systems, and using motorized vehicles. All of these activities were prohibited by the EPOD legislation and none involved ameliorating the impact of the proposed house.

Thus, the board required that a portion of the Smiths' land, already protected by the EPOD rules and regulations, should also be protected by a restrictive covenant. The board wanted to have the conservation restriction specifically recorded so that other buyers would be on notice that the property was subject to restraints that would limit its use. Moreover, without explanation, the board found that the restriction would provide another meaningful way of protecting the EPODs. The Smiths went to court, asserting that the condition was an unconstitutional exaction.

The Court of Appeals rejected the Smiths' claims and held that it did not constitute a taking. The majority opinion, by Judge Albert M. Rosenblatt, noted that, because the property was not dedicated to the government, and because the property right involved was "trifling compared to the rights to exclude or alienate," a taking had not occurred. The Court found it to be very important that the Smiths retained the right to exclude others from the entirety of their parcel.

The Court also analyzed the Smiths' rights under the EPOD legislation and the conservation restriction that the board had imposed. The EPODs, the Court stated, granted wide discretion and permitted some development in the EPODs and even included the possibility of a variance. In analyzing the restriction, the Court noted that the restriction would not appreciably diminish the value of the Smiths' property, and the Smiths still had economically viable use of it. Further, in a telling comment, the Court noted, "In exchange for their acceptance of the restriction, the Smiths would garner a permit to construct a single family home on their property."

One might argue that because the Smiths had close to 10 acres of property on which to build their house, whether or not they had a right to a permit should not depend upon accepting the conservation restriction. The majority, however, noted that a single dwelling on a protected

10-acre parcel is a valuable, marketable asset, and it found that it was not clear that the conservation restriction would affect the property at all. In addition, the majority held that the conservation restriction substantially advanced a legitimate governmental purpose: environmental preservation, a public good that the Court had embraced in *Bonnie Briar Syndicate Inc. v. Town of Mamaroneck*.[7] Finally, the Court made short shrift of the fact that the owners had to periodically open their land to governmental inspection, i.e., they had to surrender their right to exclude from their property.

Strong Dissents

Judges Susan P. Read and Victoria A. Graffeo filed very strong dissents.[8] After a very thorough analysis of takings law, including the *Nollan/Dolan* standard, Judge Read declared that the exaction amounted to a "conservation easement." She pointed out, and the majority did not challenge, that conservation easements generally have been purchased or donated and she knew of no situation in which a board had imposed a conservation easement as a condition for the issuance of a routine permit. She summed up her dissent (in which Judge Robert S. Smith concurred):

> Nor is it relevant (or even certain) that this particular conservation easement may be worth little. The Town is compelling the Smiths to convey an interest in real property that the town would otherwise have to pay for, or which the Smiths might choose to donate for whatever tax advantages they would enjoy as a result. And of course, the arguably trivial value of this particular conservation easement is of no comfort to the next landowner who seeks a development permit from the government only to be met with a demand for what might be a very valuable conservation easement as a condition of approval. As we must always be aware, we are establishing the rule that will govern not just this case, but future cases.

Judge Graffeo did not reach the *Nollan/Dolan* balancing test, but simply stated that the condition imposed by the town was not necessary to mitigate any demonstrable effects of the site plan approval and thus constituted a taking under *Agins v. City of Tiburon*.[9] She observed that in light of the EPOD restrictions, there was absolutely no need to force this condition on the Smiths, simply for the development of one house on their property, which was not even in the EPOD area. She also chided the town for issuing a negative declaration under SEQRA in connection with the site plan project, to the effect that the project would not result in any significant adverse environmental impact, as long as the development did not occur in the EPODs. Judge Graffeo noted that, in its findings to impose the conservation easement, the town stated that it was necessary to mitigate any potential significant environmental impact on the site or the adjacent sites. The town argued that it was this adjacent area that the covenant was to "provide the most meaningful and responsible means of protecting the environmental resources" which were located in the EPOD. In other words, the impact of the covenant extended beyond the EPOD.

If Judge Read had reached the *Nollan/Dolan* analysis, she probably would not have found a nexus between the issuance of the building permit and the required covenant.

An Unusual Case

Under all the circumstances, this is a very unusual case, particularly in light of the covenant's applying to the EPOD area and potentially extending beyond the life of the EPOD ordinance.

In the *Smith* case, it seems that the conservation easement, as a development tool, was elevated to even supersede and extend beyond the statutory framework for environmental protection, even when it is not necessary to protect the impact of the proposed site plan.

It is significant that two judges of the Court of Appeals said:

> As a result of today's decision, the State and localities may compel conveyance of conservation easements as a condition for issuance of all sorts of routine permits, and, for proposes of determining whether just compensation is due, these conditions will not be subject to the heightened scrutiny of *Nollan/ Dolan*. This will no doubt come as unexpected and unwelcome news to many New York property owners.[10]

Further, in a very pointed observation concerning the precise issue before the Court—whether the conservation easement may be imposed on site plan approval of property when it does not relate to the site plan or its impacts—Judge Graffeo declared that she would invalidate the restriction on the ground that it was unrelated to the site plan and was not a corrective measure for a situation created by the site plan.

Once a conservation easement is exacted it may also be far from perpetual, irrespective of the language. In other words: a municipality could insist on a conservation easement from property owner "A" and then release it at a later date to owner "B" to develop the land that owner "A" was forbidden from developing. Recently, for example, a conservation easement in a local village on Long Island which was to "remain open in perpetuity and undeveloped"[11] was totally extinguished by a local government when a developer agreed to pay the municipality $1 million plus $192,000 for each of about 60 condominium units to be built on that property. Thus, it is clear that conservation easements can be very flexible, irrespective of language. Certainly one must wonder whether this was the intent of the legislation when conservation easements were created.

This case was obviously very thoroughly considered by the Court and, although some may see it as a blow against property rights in violation of the *Nollan/Dolan* rule in that there was no indication of a nexus between the site plan and the need for the exaction, it should also be viewed as an insight into the thinking of the judges on the "taking" issue and the extent of local government's power to impose restrictions.

Also, one might wonder whether this decision signals a change in the Court's views on impact fees in general, especially if it can be demonstrated that there is a nexus between the impact and the development. The Court has previously concluded that invalidating impact fees for highway purposes did not necessarily invalidate them in all situations.[12]

Further, the U.S. Supreme Court stressed this past Monday, in *Lingle v. Chevron U.S.A. Inc.*,[13] that any permanent physical intrusion "however minor" and "however minimal the economic cost" is a per se taking. This opinion casts serious doubt on the validity of the majority's reasoning in *Smith*, which upholds the required restriction imposing governmental inspections on the property upon 30 days' written notice.

1. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982).
2. *Pennsylvania Coal Co. v. Mahon*, 260 US 393 (1922).
3. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992).
4. See, e.g., *Penn Central Transp Co v. New York City*, 438 US 104 (1978).
5. See, *Nollan v. California Coastal Comm'n*, 483 US 825 (1987); *Dolan v. City of Tigard*, 512 US 374 (1994).
6. 4 NY 3d 1 (2004).
7. 94 NY 2d 96 (99).
8. Judge R. S. Smith also dissented but did not write an opinion.
9. 447 US 225 (1980).
10. 4 NY 3d, 25 (Read, and R. S. Smith, JJ dissenting).
11. Katie Thomas, "Tangled debate on thicket of trees," Newsday, March 20, 2005, at A16.
12. See, *Albany Area Builders Assn. v. Town of Guilderland*, 74 N.Y. 2d 372, 379 (1989).
13. No. 04-163 (May 23, 2005).