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More on 'Takings'

Property Owners Set Back in High Court Rulings

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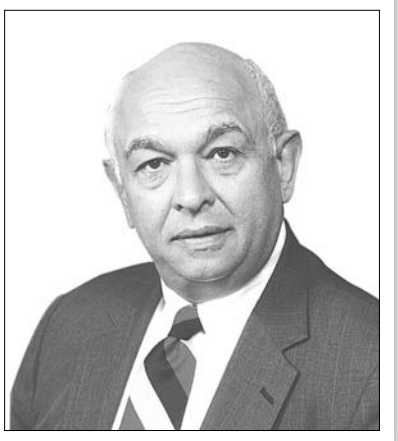
ZONING AND LAND USE PLANNING



Two decisions on "takings" issues[1] rendered within days of each other last month by the U.S. Supreme Court, rejecting arguments asserted by property owners, are likely to have a significant effect on land use and environmental practice in New York.

On June 20, in the lesser-publicized ruling, *San Remo Hotel, L.P. v. City and County of San Francisco*, the Court rejected the reasoning of the 2003 decision by the U.S. Court of Appeals for the Second Circuit in *Santini v. Connecticut Hazardous Waste Management Service*[2] that held that parties who litigate state law takings claims in state court involuntarily cannot be precluded from having those very claims resolved by a federal court. The Supreme Court's *San Remo* opinion ensures as a practical matter that litigants who go to state court to seek compensation for a taking—as now required by a well-entrenched line of Supreme Court decisions—likely will be unable to later assert their federal takings claims in federal court.

Then, three days later, in *Kelo v. City of New London*, the Court broadly interpreted "public use" within the meaning of the Fifth Amendment's Takings Clause, highlighting the broad power local governments in New York and elsewhere have with respect to the doctrine of eminent domain—but also triggering public concern, and perhaps, ultimately, even a strong legislative reaction.[3]

Together, these two Supreme Court decisions suggest that property owners and their attorneys should freshly analyze their legal and business strategies relating to takings claims and "just compensation," and that they should continue to pay close attention to all developments in these areas.

'San Remo'

The petitioners in *San Remo*, who own and operate a hotel in San Francisco, California, initiated litigation in response to the application of a city ordinance that required them to pay a $567,000 "conversion fee" in 1996 to convert all of the rooms in their hotel into tourist use rooms. After the California courts rejected the petitioners' various state law takings claims, they advanced in federal district court a series of federal takings claims that depended on issues identical to those that had previously been resolved in the state court action. To avoid the bar of issue preclusion, the petitioners asked the district court to exempt from the reach of the full faith and credit statute, 28 U.S.C. §1738,[4] claims brought under the Takings Clause of the Fifth Amendment.

The petitioners predicated their argument on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*,[5] which held that takings claims are not ripe until a state fails "to provide adequate compensation for the taking." The essence of the petitioners' argument was that because no claim that a state agency had violated the federal Takings Clause can be heard in federal court until the property owner had been denied just compensation through an available state compensation procedure, federal courts should be required to disregard the decision of the state court to ensure that federal takings claims can be "considered on the merits in…federal court." Therefore, they argued, because they had reserved their claims,[6] the federal courts should review the reserved federal claims de novo,

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regardless of what issues the state court may have decided or how it may have decided them.

The petitioners relied heavily on the Second Circuit's decision in *Santini*. There, the circuit court determined that parties "who litigate state-law takings claims in state court involuntarily" pursuant to *Williamson County* cannot be precluded from having those very claims resolved by a federal court. The Second Circuit reasoned that "[i]t would be both ironic and unfair if the very procedure that the Supreme Court required [plaintiffs] to follow before bringing a Fifth Amendment takings claim…also precluded [them] from ever bringing a Fifth Amendment takings claim." The petitioners in *San Remo*, in essence, contended that federal courts should not apply ordinary preclusion rules to state court judgments when a case is forced into state court by the ripeness rule of *Williamson County*. The Ninth Circuit rejected that argument in *San Remo*, and the Supreme Court granted certiorari to resolve the conflict between the Second and Ninth Circuits.

The Supreme Court's Ruling

The Supreme Court rejected the petitioners' contention and affirmed the Ninth Circuit's decision. The Court stated that federal courts "are not free to disregard 28 U.S.C. §1738 simply to guarantee that all takings plaintiffs can have their day in federal court." For one thing, the Court pointed out, in this case the petitioners had effectively asked the state court to resolve the same federal issues they asked it to reserve.

The Court also pointed out that both the petitioners and *Santini* ultimately depended on an assumption that plaintiffs have a right to vindicate their federal claims in a federal forum. However, the Court declared, issues actually decided in valid state court judgments "may well deprive plaintiffs" of the "right" to have their federal claims relitigated in federal court—even when a plaintiff would have preferred not to litigate in state court, but was required to do so by statute or applicable rules.

It should be emphasized that the Court stated that *Williamson County* does not forbid plaintiffs from advancing federal claims in state courts. As the Court observed, the requirement that aggrieved property owners must seek

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"compensation through the procedures the State has provided for doing so" does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the federal Constitution. There is a court to hear such claims, although it may not be a federal court.[7] This is a natural, although discouraging, extension of the stated reluctance of federal courts to act as a "zoning board of appeals."[8]

It also should be noted that four Justices concurring in the judgment —Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Thomas—stated that the Court should reconsider the *Williamson County* doctrine: whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts. Should a majority of the Court overrule this aspect of *Williamson County*, sometime in the future, the federal courts will again be available to takings plaintiffs asserting federal claims. For the present, however, a plaintiff must first proceed in state court and as a practical matter should still reserve its right to proceed in federal court on the federal claim in the event that the circuit seeks to distinguish *San Remo* on the basis that it involved a situation in which the same federal issues were raised in the state and federal courts. In other words, if the plaintiff raised only state issues in the state court, and makes a reservation, *San Remo* may not bar the later assertion of the reserved federal claim in federal court.

The 'Kelo' Case

The federal courts were available to property owners in *Kelo v. City of New London*, but ultimately to no avail. This case arose in 2000, when New London approved a development plan that, as described by the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." In assembling the land needed for this project, the city's development agent purchased property from willing sellers and proposed to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. A number of property owners declined to sell property that was in the area of the proposed development. New London sought to condemn that property and include it in the revitalization area.

The question before the Supreme Court was whether the city's proposed disposition of this property (obtained from the owner by eminent domain) for the purpose of private economic development qualified as a "public use" within the meaning of the Takings Clause.

Justice Stevens, writing for a divided Court, examined past Court decisions on this issue and observed that they have "evolved over time in response to changed circumstances." The Court's earliest cases embodied "a strong theme of federalism," emphasizing the "great respect" owed to state legislatures and state courts in discerning local public needs. Over the past century, Justice Stevens continued, the Court's public use jurisprudence "has wisely eschewed rigid formulas and intrusive scrutiny" in favor of affording legislatures "broad latitude" in determining what public needs justify the use of the takings power.

The Court then declared that New London's determination that the area of the city in which it sought to exercise eminent domain was sufficiently distressed to justify a program of economic rejuvenation "is entitled to our deference." In the majority's view, the city had "carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue." The Court pointed out that, to effectuate this plan, New London invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. It then ruled that, because that plan "unquestionably serves a public purpose," the takings challenged here satisfied the public use requirement of the Fifth Amendment.

Interestingly, the Court rejected the property owners' request that it adopt a bright line rule that economic development does not qualify as a public use, noting that promoting economic development is a traditional and long accepted function of government. It also refused to adopt the property owners' argument that it should require a "reasonable certainty" that the expected public benefits of the economic development would actually accrue, noting that when the legislature's purpose is legitimate and its means are not irrational, "empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."

The Future

Of course, although the Court's *Kelo* decision essentially applied a rational basis standard of review, it did not alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

It also is important to keep in mind that many states impose "public use" requirements that are stricter than the federal baseline set forth in *Kelo*. Some of these requirements have been established as a matter of state constitutional law,[9] while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. Under California law, for instance, a city may only take land for economic development purposes in blighted areas.[10] Restrictions under state law on the eminent domain power would be proper under *Kelo*, which only deals with the scope of the eminent domain power under the Fifth Amendment. The states are again given wide latitude under their own constitutions and laws—a paradoxical result from a decision that essentially says "here is the federal standard" but "states can restrict it."

Whether New York (or other states) will adopt similar or other limits remains to be seen. Legislators may be emboldened by the dissenting opinion of Justice O'Connor, with whom the Chief Justice, Justice Scalia, and Justice Thomas joined, in which Justice O'Connor stated, "Are economic development takings constitutional? I would hold that they are not," and also warned that "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process." What is clear, though, is that the Court's decision upholding a broad interpretation of "public use" in *Kelo*, and its ruling in *San Remo* limiting takings plaintiffs' ability to assert compensation claims in federal court, were not the results that property owners had been seeking.

1. The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. This Clause is made applicable to the states by the Fourteenth Amendment. See *Chicago, B.&Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

2. 342 F.3d 118 (2d Cir. 2003).

3. See, e.g., Michael Cooper, "Albany: Law Sought to Restrict Property Seizure," NY Times, July 14, 2005, available at http://www.nytimes. com/2005/07/14/nyregion/14mbrfs.html?oref=login.

4. This statute has long been understood to encompass the doctrines of res judicata, or "claim preclusion," and collateral estoppel, or "issue preclusion." See, e.g., *Allen v. McCurry*, 449 U.S. 90 (1980).

5. 473 U.S. 172 (1985).

6. See *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964).

7. One might wonder whether such a statement would be made by the Supreme Court in the personal rights arena.

8. See, e.g., *Yale Auto Parts Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985); see also, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (Marshall, J., dissenting).

9. See, e.g., *County of Wayne v. Hathcock*, 684 N. W. 2d 765 (Mich. 2004).

10. Cal. Health & Safety Code Ann. §§33030-33037 (West 1997). See, e.g., *Redevelopment Agency of Chula Vista v. Rados Bros.*, 95 Cal. App. 4th 309 (2002).