

Real Estate *Update*

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Court's Correction

Justices Clarify Takings Standard

BY JOHN M. ARMENTANO

Twenty five years ago, in *Agins v. City of Tiburon*,¹ a case involving a facial takings challenge to certain municipal zoning ordinances, the U.S. Supreme Court declared that the application of a general zoning law to particular property effected a taking under the Takings Clause of the Fifth Amendment² if the ordinance did not “substantially advance legitimate state interests” or denied an owner economically viable use of the property. Because this statement was phrased in the disjunctive, *Agins*’ “substantially advances” test was read to announce a stand-alone regulatory takings test. Indeed, through reiteration in a half dozen or so decisions since *Agins*, this language has been enshrined in the Court’s Fifth Amendment takings jurisprudence.³ The “substantially advances” formula suggested a means-ends test: It asked, in essence, whether a regulation of private property was effective in achieving some legitimate public purpose.

Near the end of this past term, however, the Court unanimously rejected the “substantially advances” standard in the takings context. In *Lingle v. Chevron U.S.A. Inc.*,⁴ Justice Sandra Day O’Connor, writing for a unanimous Court, held that the “substantially advances” formula announced in *Agins* was not an appropriate test for determining whether a regulation effected a Fifth Amendment taking. Rather, it was more of a due process issue—i.e., did the regulation achieve some legitimate public purpose?

The unanimity of the decision—an unusual event in the takings area—is critical because now it may be said that the great areas of concern in takings law are no longer open issues.

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ZONING AND LAND
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The Takings Test

With the jettisoning of *Agins* as a takings case, the Court’s takings jurisprudence now has a number of distinct parts. The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.⁵ Indeed, for many years, it was generally thought that the Takings Clause reached only a “direct appropriation” of property, or the functional equivalent of a practical ouster of the owner’s possession.⁶

Beginning, however, with its 1922 decision in *Pennsylvania Coal Co. v. Mahon*,⁷ the Court recognized that government regulation (without physical invasion) of private property might, in some instances, be so onerous that its effect was tantamount to a direct appropriation or

ouster—and that such “regulatory takings” might be compensable under the Fifth Amendment. In this regard, Justice Holmes declared in *Mahon*, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

The Court’s decisions have set forth two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes because they go “too far.” First, as the Court indicated in *Loretto v. Teleprompter Manhattan CATV Corp.*, where government requires an owner to suffer a permanent physical invasion of property—however minor—it must provide just compensation.⁸ A second categorical rule, explained in *Lucas v. South Carolina Coastal Council*, applies to regulations that completely deprive an owner of “all economically beneficial use[s]” of his or her property.⁹ In *Lucas*, the Court held that government must pay just compensation for such “total regulatory takings” except to the extent that “background principles of nuisance and property law” independently restrict the owner’s intended use of the property.

Outside these two relatively narrow categories (and the special context of land use exactions discussed below), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*.¹⁰ The Court in *Penn Central* identified “several factors that have particular significance” for evaluating regulatory takings claims. Primary among those factors are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” In addition, the “character of the governmental action”—for instance, whether it amounted to a physical invasion or instead merely affected property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good”—might be relevant in discerning whether a taking had occurred. The *Penn Central* factors serve as the primary guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.

The three inquiries reflected in *Loretto*, *Lucas*, and *Penn Central* share a common touchstone: Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or effectively ousts the owner from his or her domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: a permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using his or her property—perhaps the most fundamental of all property interests. In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

Exactions

The Court went out of its way in *Lingle* to make it clear that its decisions in two landmark land use exactions decisions were not affected by its rejection of the *Agins* "substantially advances" test despite the fact that it cited to *Agins* in these two cases. As the Court explained, in both *Nollan v. California Coastal Comm'n*¹¹ and *Dolan v. City of Tigard*,¹² government demanded that a landowner dedicate an easement allowing public access to the owner's property as a condition of obtaining a development permit. In particular, in *Nollan*, a permit to build a larger residence on beachfront property was conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line; in *Dolan*, a permit to expand a store and parking lot was conditioned on the dedication of a portion of the relevant property for a "greenway," including a bike/pedestrian path.

In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a per se physical taking. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny. The Court in *Nollan* answered in the affirmative, provided that the exaction would substantially advance the same government interest that would furnish a valid

ground for denial of the permit. The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be "rough[ly] proportiona[l]" ... both in nature and extent to the impact of the proposed development."

'Entirely Distinct'

The Court explained in *Lingle* that although *Nollan* and *Dolan* quoted *Agins*' language, the rule those decisions established was "entirely distinct" from the "substantially advances" test. According to the Court, *Nollan* and *Dolan* both involved forced dedications of property so onerous that, outside the exactions context,

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they would be deemed per se physical takings and in neither case did the Court question whether the exaction would substantially advance some legitimate state interest. Rather, the issue was whether the exactions substantially advanced the same interests that land use authorities asserted would allow them to deny the permit altogether. As the Court declared, these cases involved a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."

Thus, the Court stated in *Lingle*, because the *Nollan* and *Dolan* decisions did not apply the "substantially advances" test, *Lingle* did not disturb these precedents. The unanimity of the *Nollan/Dolan* analysis in *Lingle* establishes the law in this area on a firm footing.

Lingle already has impacted land use planning cases. A few weeks after *Lingle* was decided, the Wisconsin Court of Appeals, in *Wisconsin Builders Ass'n v. Wisconsin Dep't of Transp.*,¹³ rejected a takings challenge to certain state law provisions establishing setback restrictions near state highways. The plaintiffs asserted that the restrictions amounted to a taking of an easement development all along affected state highways and, therefore, under *Nollan*, there had to be a nexus to a legitimate public purpose. The plaintiffs asserted that the

government's purpose was to condemn land without paying for it and that that was not a legitimate purpose.

The appellate court first found that to the extent the plaintiffs argued that the restrictions were invalid because they did not substantially advance a legitimate state interest, it did not have a viable argument because of *Lingle*. The appellate court also rejected the plaintiffs' argument that the setback restrictions could be analogized to the easements in *Nollan* and *Dolan*, noting that those cases involved easements and that it would not extend the *Nollan/Dolan* standard "to a context far removed from the facts of those cases." It then rejected the plaintiffs' facial challenge to the restrictions under *Nollan/Dolan*.

Though the Supreme Court's membership is in flux, the unanimity with which the Court decided *Lingle* and the subsequent rejection, in *Wisconsin Builders*, of a *Nollan/Dolan* claim suggests that the three primary takings tests—*Loretto*, *Lucas*, and *Penn Central*—are as a practical matter the most significant ones, with *Nollan* and *Dolan* being limited to the exaction arena. The *Lingle* ruling thus makes it clear that land use regulations will not be successfully challenged on takings grounds utilizing the *Agins* test. Rather, that test has now been imported into the substantive due process line of cases.

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1. 447 U.S. 255 (1980).

2. The Takings Clause, made applicable to the states through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), provides that private property shall not "be taken for public use, without just compensation."

3. See *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (citing cases).

4. 125 S.Ct. 2074 (2005).

5. See, e.g., *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (government's occupation of private warehouse effected a taking).

6. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

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

8. 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking).

9. 505 U.S. 1003 (1992).

10. 438 U.S. 104 (1978).

11. 483 U.S. 825 (1987).

12. 512 U.S. 374 (1994).

13. 2005 WL 1404983 (Wis. Ct. App. June 16, 2005).

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