ENVIRONMENTAL,
LAND USE,
AND NATURAL RESOURCES LAW

REGULATORY TAKINGS UPDATE

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Real Estate Bar Association (REBA)



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CRITERIA FOR VALID LAND USE RESTRICTIONS

When is a regulation *not* a taking?

- Government restriction fits within the Commerce Clause of the federal government or police power (health, safety or welfare) of the state, regional or local government.
- Means chosen to implement the restriction are closely related to accomplishing the valid purpose supporting it.
- Restriction does not unduly interfere with the claimant's reasonable, investment backed expectations based on current conditions.
- There is an "essential nexus" between permit conditions and any exaction and the reason for them.
- There is a "rough proportionality" of the impacts dealt with and the permit condition or exaction.
- There is no undue impact on the landowner, determined by balancing the impact on the landowner with the public purpose supporting the restriction.

Contrast With…

- *Penn Central* traditional three-factor balancing test
- *Lucas* per se or categorical taking or physical invasion



LIMITATIONS ON TAKINGS REMEDIES

- It is difficult for a landowner to prove that a regulatory taking has occurred, even harder to collect money.

- No state has more than a handful of cases declaring that a land use regulation rises to the level of a taking, and most merely invalidate it.

- Starting in 1987, the U.S. Supreme Court began to hear many regulatory taking cases. Since then it seems to solicit them.
- Plaintiffs lose the vast majority of takings cases. Headlines about Supreme Court cases assert far beyond what the cases actually say.



SEMINAL SUPREME COURT CASES ON REGULATORY TAKINGS



SEMINAL SUPREME COURT CASES

- *Pennsylvania Coal Co. v. Mahon*, 43 S. Ct. 158 (1922)
- *Penn Central Transportation Co. v. City of New York,* 98 S. Ct. 2646 (1978)
- *Loretto v. Teleprompter Manhattan CATV Corp.,* 102 S. Ct. 3164 (1982)
- *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985)
- *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 107 S. Ct. 1232 (1987)
- *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 107 S. Ct. 2378 (1987)
- *Nollan v. California Coastal Commission,* 107 S. Ct. 3141 (1987)
- *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992)
- *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992)
- *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992)
- *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994)
- *Eastern Enterprises v. APFEL,* 118 S. Ct. 2131 (1998)
- *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999)
- *Good v. United States,* 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000)
- *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002)

Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987)



Facts: Landowners sought building permit to expand their home. California Coastal Commission (CCC) conditioned the permit on whether the landowners would grant a lateral easement across their beach for the public, claiming the new construction would impair the public's visual access of the beach.

Holding: 5-4 decision, opinion by Justice Scalia. Reversed.

Conditioning a building permit that would not affect beach access, on the grant of a public easement, was an improper taking. Court invalidated permit condition.

Reasoning:

- The condition did not survive a constitutional challenge because the required exaction lacked an **essential nexus** with the Coastal Commission's legitimate interest in preserving the public right to view the beach.
- The permit condition was ***not*** a taking because it deprived the landowners of all practical land use (the impact test), but because the restriction *failed to further the public purpose* that the Coastal Commission had advanced as justification for the coastal permit program: visual access of the beach.

Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987)

LESSONS LEARNED

- A land use regulation must "substantially advance" a valid state interest.
- The government must establish a clear relationship between a restriction on land use, such as the limit on house construction in the coastal zone involved in the case, and the legitimate police power purposes to protect the public health, safety, welfare, or morals.
- This "essential nexus" was missing because the construction on the Nollan's property would not affect beach access, and therefore grating an easement was not related to an issue caused by the building.



Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)

Facts: Owner of a plumbing and electric supply store applied for a permit to expand her building and pave a parking lot. The city of Tigard, OR, had a land use plan and a Community Development Code that aimed to manage flooding. The City Planning Commission granted the permit subject to conditions: dedication of land within a floodplain to have a "greenway," and a bicycle path. Landowner appealed.

Landmark Case



Holding: 5-4 decision, opinion by Chief Justice Rehnquist.

Reversed and remanded.

There must be an essential nexus existing between the legitimate state interest and the permit condition imposed.

If a nexus existed, then exactions imposed by respondent must be roughly proportionate to the projected impact of the proposed development, determined by individualized findings.

Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)

Reasoning:

- The Court applied a two-step test:
  - Step 1: Whether the permit condition had an "essential nexus" with the proposed development.

    In contrast with Nollan, where the court found that the imposed condition was an out-and-out plan of extortion, here the Court said that permit conditions were no such gimmicks. Indeed the prevention of flooding were legitimate public purposes that could be legitimately used by the commissions permitting program to restrict private property uses. To the court this was an "obvious nexus."

  - Step 2: Is there a "rough proportionality" relationship between the conditions and the impact of the development?

    The Court ruled that the City's findings and subsequent conditions were insufficient to justify the exactions because, although by their nature they substantially advanced the city's legitimate goals, they failed to do so by their degree.

NOTE:

In 1994, the case was remanded back to Supreme Court of Oregon, which in turn remanded the issue back to the City of Tigard.

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001)

Facts:

Resource management council passed regulations designating salt marshes as coastal wetlands. Landowner then acquired property that included some salt marsh. Landowner brought suit, claiming this was a taking since landowners wasn't allowed to fill wetlands.

Issue decided:

Can a Petitioner have standing to claim a taking since he acquired the property after the fact?

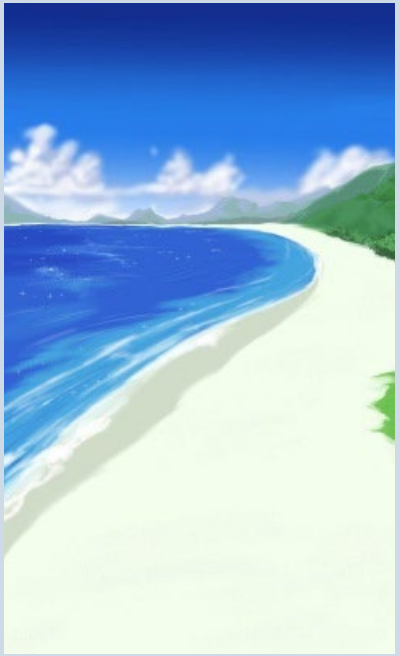
Holding:

Several concurrences and dissents. Opinion by J. Kennedy.
Affirmed in part, reversed in part, and remanded.

A claimant does not waive his right to challenge a regulation as an uncompensated taking by purchasing affected property after the enactment of the regulation.

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001)

Reasoning: "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."



Aftermath: In 2005, on remand the Rhode Island Superior Court found there was no taking.

NOTE: SCOTUS mentioned *Palazzolo* five times since the decision, but three of those times the court cited J. O'Connor's concurrence.

Stop the Beach Renourishment, Inc. v. Florida D.E.P., 130 S. Ct. 2592 (2010)

Facts: A storm changed coast by eroding the beach. Town wanted to add sand to the beach to counter erosion. Beachfront owners claimed state was taking their property by nourishing beach that belonged to private owners. Private owners brought suit.

Holding: 8-0 decision—J. Stevens recused, opinion by J. Scalia

Affirmed. No taking occurred, Florida DEP's approval to restore eroded beach did not deprive landowners of their littoral rights. However, Justices differed on whether a *judicial taking* could take place.



Stop the Beach Renourishment, Inc. v. Florida D.E.P., 130 S. Ct. 2592 (2010)

Do judicial takings exist?

Scalia, **Roberts**, **Thomas**, and **Alito**: Yes**.** "If a court declares that what was once an established right of private property no longer exists, it has taken that property in violation of the Takings Clause."

LESSONS LEARNED:

- Governmental erosion, recreation, transportation, and navigation projects continue to enjoy a green light where they do not implicate private real estate rights
- They Court continues to be free to interpret and apply state property law, even redefine and modernize it, without being subject to legal attack in federal court for judicial takings claims.
- The decision has long-term consequences on adapting to climate change.

Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013)



Facts:

Landowner applied for permits to develop his property. Offered to deed a conservation easement on part to mitigate environmental effects. The district demanded a bigger easement, or payment as permit conditions.

Holding: 5-4 decision, opinion by Justice Alito . Reversed and remanded.

Nollan-Dolan requirements apply when agencies impose conditions upon issuing land-use permits, even if the permit is ultimately denied for failure to comply with such conditions.

Reasoning:

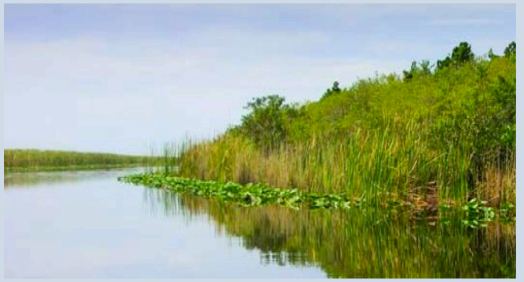
Limiting the applicability of the standard to exclude either the denial of permits or the exaction fees would create a path towards circumvention.

Dissent: J. Kagan, with Ginsburg, Breyer, and Sotomayor, disagreed that the Nollan-Dolan standard applies to monetary exactions because this would result in an additional amount of litigation and undermine local efforts to regulate land use. However, the dissenters did agree that the Nollan-Dolan standard should apply to the denial of permits.

Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013)

LESSONS LEARNED

- Supreme Court extended the *Nollan-Dolan* "essential nexus" and "rough proportionality" tests to monetary exactions and fees related to issuance of land-use permits.
- Case left the burden of proof and heightened scrutiny requirements still unclear, as it expressly reserved judgment on whether Koontz's claim would be successful.
- On remand, the Florida District Court affirmed and adopted its earlier decision by reinstating the trial court's award to the Koontz estate of $376,154 as compensation for the Water District's "temporary taking" of the property from 1999 to 2005. St. John's River Water Management Dist. v. Koontz, 2014 Fla. App. LEXIS 6371 (5th Dist. Apr. 30, 2014).



Arkansas Game and Fish Commission v. U.S., 133 S. Ct. 511 (2013)

Facts: An Arkansas state agency alleged that federal flood control activities which induced temporary flooding, had damaged timber products on state-owned property.

Holding:

- 8-1 decision, opinion by J. Ginsberg. Reversed and Remanded.
- Recurrent flooding caused by these government actions was not automatically exempt from compensation liability under the Takings Clause, even if it is temporary in duration.

Aftermath: On remand, the court found there was a taking. The plaintiff was awarded $176,428.34 in restoration damages, and $5,602,329.56 as compensation for timber loss.



Arkansas Game and Fish Commission v. U.S., 133 S. Ct. 511 (2013)

NOTE:

This decision highlights that all takings claims are case-specific and that compensation may be sought for temporary takings.

AFTERMATH:

The U.S. Army Corps operated a flood-control project to control the risk of flood damage to downtown Houston and the Houston Ship Channel. Hurricane Harvey slammed Texas in August 2017. The Corps was faced with a choice of how to operate the project: release water and flood downstream properties, or don't release water and flood upstream properties. Ultimately, the Corps released some water, flooding both upstream and downstream properties.

As of October 27, 2017, property owners filed at least 61 lawsuits in the U.S. Court of Federal Claims asserting a taking under *Arkansas* precedent, because complaints allege that flooding of their properties wouldn't have occurred but for the Corps' decision.

Horne v. U.S. Department of Agriculture, 135 S. Ct. 2419 (2015)

Facts: The second of two cases. First case went to SCOTUS on jurisdictional grounds, second concerning takings. Petitioners were raisin farmers from California alleging that the government had committed a taking by fining them for failure to turn over part of their crop in order to regulate market prices.

Holding: 5-4 decision, opinion by J. Roberts. 9th Circuit reversed.

Parties deemed to have violated an agricultural marketing order and were subsequently fined could bring their takings claims in Federal District Court without having to first pay the fines.

This clarified that takings claims can be used as a defense, not necessarily for seeking damages against an administrative enforcement order.

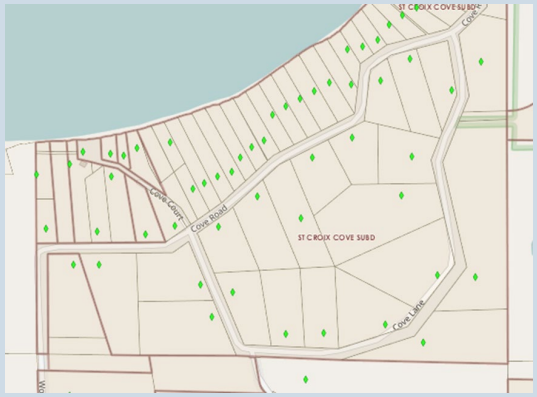
Horne v. U.S. Department of Agriculture, 135 S. Ct. 2419 (2015)

Reasoning: The fine caused a present injury and the statutory scheme was the proper avenue to pursue a Takings claim.

On Horne, the Ninth Circuit determined on the narrow issue that the Marketing Order was not a physical per se taking under the Fifth Amendment, observing that courts are not institutionally equipped to modify complex regimes. *Horne v. USDA*, 750 F.3d 1128 (9th Cir. 2014). On September 8, 2014, Horne filed a petition for a Writ of Certiorari to the Supreme Court, alleging, among other claims, that the Ninth Circuit erred in holding that the categorical requirement of just compensation for property expropriated by the government does not apply to personal property. *Petition for a Writ of Certiorari, Horne v. U.S. Dep't of Agriculture*, No. 14-275 (Sept. 8, 2014).

NOTES: This case rejects the argument that takings claims are not ripe due to lack of final agency action.

Murr et al. v. Wisconsin et al., 137 S. Ct. 1933 (2017)



Facts:

- Murrs owned adjacent lots, each >1 acre.
- 1976 ordinance vested substandard lots but required merger of adjacent lots under common ownership
- The Murrs claimed the ordinance resulted in an unconstitutional uncompensated taking.

Issue:

Should the lots be viewed as a single parcel when concluding whether a taking took place?

Murr et al. v. Wisconsin et al., 137 S. Ct. 1933 (2017)

Holding: 5-3 decision (Gorsuch did not participate), opinion by Kennedy.

No taking where state law and local ordinance "merged" nonconforming, adjacent lots under common ownership, meaning the property owners could not sell one of the lots by itself.

Discussion:

3-factor test to determine lots are viewed as one parcel:

1) treatment of land under state and local law;
2) physical characteristics of the property;
3) prospective value of the regulated land.

Lessons Learned:

Limit of only one house on both parcels was not a taking

Knick v. Township of Scott, PA, 139 S. Ct. 2162 (2019)

Background:

- Knick had several home burial sites on her property
- Ordinance required public access to private burial sites during daylight hours
- Inspector threatened penalties if Knick obstructed the public from her land.
- Knick brought § 1983 action against township, alleging that ordinance violated her Fifth Amendment rights.

Theories:

- The ordinance is a "physical" taking because the town required access over private property and unconstitutionally requires Knick to open her property to the world.
- The ordinance is a "facial" taking because the access obligation is unconstitutional and should be invalidated immediately.

Knick v. Township of Scott, PA, 139 S. Ct. 2162 (2019)

Supreme Court overrules Williamson County case requiring claimant pursue state remedies before bringing federal court takings claim



Holding:

- The Supreme Court, Chief Justice Roberts, held that property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it, and therefore may bring his/her claim in federal court under § 1983 at that time; overruling *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).
- Vacated and remanded.

Cedar Point Nursery et al. v. Hassid et al., 141 S. Ct. 2063 (2021)

- California reg allowed union organizers access to farmer's property for 3 hours per day for 120 days a year.
- The growers asserted it was an unconstitutional taking
- Can physical access to private property required by regulation be a *per se* taking if not permanent or continuous?
- The Court said that less than continuous occupation goes to the amount of compensation payable, not to whether or not it is a *per se* taking.
- Regulations which restrict property use and are not a *per se* taking are addressed on a balancing test involving the economic impact of the regulation, interference with reasonable investment backed expectations, and the character of the government action.



Facts, Issues and Holding

Cedar Point Nursery et al. v. Hassid et al., 141 S. Ct. 2063 (2021)



Lessons Learned

- The right to exclude reaffirmed as one of the most important property rights.
- Supreme Court recently noted the importance of this right to exclude in blocking the moratorium by the Center for Disease Control on evictions.

Pakdel v. City & Cnty. of San Francisco, 141 S. Ct. 2226, (2021)

- Supreme Court set a new Finality Rule for challenging a regulatory taking. "Once the government is committed to a position…the potential ambiguities evaporate and the dispute is ripe for judicial resolution."



- A property owner has an actionable 5th Amendment takings claim when the government takes their property without paying for it and so may bring suit in federal court under section 1983 at that time, without "exhausting" state court suits. *Knick v. Township of Scott, Pennsylvania*, 862 F. 3d 310 (2019)



- It used to be the law that courts must know the extent of a regulation's interference with property rights prior to making any adjudication on its validity. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)



- Decision is being read as "you can go direct to federal court without exhausting your state remedies."

Regulatory Takings: Ripeness: Exhaustion and Finality

More recently the 10th Circuit applied and enunciated these finality principles in *North Mill Street, LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021).

"The finality requirement does not require landowners to exhaust administrative procedures, or to 'submit applications for their own sake.' . . . Instead, a “final decision” has been reached and a regulatory takings claim becomes prudentially ripe for judicial resolution '[o]nce the government is committed to a position.'



SELECT STATE AND FEDERAL REGULATORY TAKINGS CASES



Gove v. ZBA of Chatham, 444 Mass. 754 (2005)

Facts: In 1985, Chatham bylaw banned construction of homes in the coastal floodplain. Gove contracted to sell property in 1998, but prospective buyers would not purchase if they could not build a house on it. Gove brought suit claiming bylaw was a taking.

Both Trial and Appeals Courts ruled:



Storm Waves in Chatham, MA, March 2014
Source: http://www.vosizneias.com/159636/2014/03/26/chatham-ma-storm-brings-high-winds-across-eastern-massachusetts-maine/

- Ban related to legitimate state interests (flooding, potential harm to human life).
- Ban did not deny the owner all economically beneficial use (commercial use still allowed, just not residential).
- Ban did not deprive the owner of investment-backed expectations.

SJC upheld the Appeals Court.

Gove v. ZBA of Chatham, 444 Mass. 754 (2005)

- SJC's ruling in *Gove* was prescient just weeks before Hurricane Katrina ravaged New Orleans and three states.

- Timing of the ruling served to underscore the importance of local land use controls avoiding flood hazards.

- Ruling also illustrated the difficulty of landowners prevailing on regulatory takings claims in full *Penn Central* trials.



Source: BBC News

Sacramento Grazing Association, Inc. v. United States, (U.S. Court of Federal Claims, Washington, D.C. No. 04-486 L)

Issue:

Is cattle ranching corporation using USFS lands in New Mexico entitled to a financial payment from the taxpayers because the USFS's efforts to control the damage the corporation's cattle were doing to the public lands a taking of private property rights in water in violation of the U.S. Constitution?



Sacramento Grazing Association, Inc. v. United States, (U.S. Court of Federal Claims, Washington, D.C. No. 04-486 L)

Discussion:

Court of Claims applied the *per se* physical takings theory and concluded that any restriction on the plaintiff's ability to access water at any single location within the company's grazing allotment resulted in a taking.

Under this analysis, it was irrelevant if water flowing down the stream passed through the fences and then became available to the cows to drink downstream, or if the plaintiff's cows never lacked for adequate water at all.

Because the holder of a water right has no right to exclude, the theory that the government can take a water interest by somehow physically occupying the interest does not compute.

California Bldg. Indus. Ass'n v. City of San Jose, Calif. 136. S. Ct. 928 (2016) *(cert denied)*

City housing ordinance required a minimum of 15% low-income units in all new residential developments with 20 or more units—restriction to be in place for 45 years.



California Bldg. Indus. Ass'n v. City of San Jose, Calif. 136. S. Ct. 928 (2016) *(cert denied)*

Lessons Learned

- Case implicated an unsettled issue under the Takings Clause: Does *Nollan*/*Dolan* test apply where the alleged taking arises from legislatively imposed conditions rather than administrative?
- Justice Thomas concurrence: "I continue to doubt that the existence of a taking should turn on the type of governmental entity responsible for the taking."
- Ultimately, still an unsettled issue whether and how the *Nollan*/Dolan permit conditions test would apply to ordinance or statutes.

Assateague Coastal Trust, Inc. v. Schwalbach
448 Md. 112, 136 A.3d 866 (2016)

- Riparian owner sought variance from county ordinance to build a pier through a marsh designated as a Critical Area. Owner proved he could not exercise traditional riparian benefits there, so variance was granted.
- Environmental group sued to challenge as not meeting the variance test.



Assateague Coastal Trust, Inc. v. Schwalbach
448 Md. 112, 136 A.3d 866 (2016)

Lessons Learned

- The Court of Appeals of Maryland noted "unwarranted hardship" standard used for a variance is not as strict as a "constitutional taking" standard.

- Court ruled legislative history intended these to be separate standards. Hardship means "without [a] variance, the applicant is denied 'a reasonable and significant use' that cannot be accomplished somewhere else on the property."



Kirby v. North Carolina Department of Transportation, 786 S.E.2d 919 (2016)



- NCDOT's recording of a Highway Corridor Map land bank prevented plaintiffs from improving, developing, and subdividing their property for an unlimited period of time.
- Supreme Court of North Carolina ruled this effectuated a taking of property rights by eminent domain, not police power, so the case was remanded for an inverse condemnation money damages trial.

Kirby v. North Carolina Department of Transportation, 786 S.E.2d 919 (2016)

Lessons Learned

- Though reduction of highway development costs is a laudable public policy, it triggers a right to seek damages by inverse condemnation.
- The NCDOT's Map Act imposed indefinite restraints on fundamental property rights.



Lynch v. California Coastal Commission (CA 2017)

Issue: Did conditions in seawall permit create an unconstitutional taking?

Facts:

- Permit limited to 20 years, must reapply to remove, modify or extend sea wall
- Restriction against any new development that needed sea wall for protection
- While case made its way, owners recorded deed restriction with conditions in permit and built sea wall
- Claim barred – "one who accepts the benefit of a permit also accepts its burdens"



Lynch v. California Coastal Commission (CA 2017)

Lessons Learned

- No “emergency exception” to acceptance of benefits ruling
- Time limit to allow Commission opportunity to consider “managed retreat” must wait for a more patient and less threatened landowner



West Virginia Lottery v. A-1 Amusement, Inc., No. 16-1047 (Nov. 13, 2017)

Facts:

State-run Lottery issued permits to the plaintiffs and then instructed them to use a different software program. Plaintiffs were informed using any other software would render their machines illegal. They were not prepared to change their software so brought a regulatory takings claim.

Outcome:

Court noted this was a taking of *personal* property, not real property, but this conclusion is consistent with the Supreme Court's view as to the broad definition of what constitutes an interest in property.

Court determined that the mandamus process for inverse condemnation should be applied to this case. Court declined to rule on the merits of whether the Lottery took the plaintiffs' personal property.

Diversified Holdings, LLP v. City of Suwanee, No. S17A1140 (Ga. Nov. 2, 2017)



Facts:

Property owner challenged city's refusal to rezone from commercial to allow for multi-family use. Property owner called it an "inverse condemnation claim." Property would be worth $6 million if zoned for multi-family, but only up to $1.5 million if it remained commercial.

Outcome:

The Court stated that "zoning is unlikely to be a fertile grounds for inverse condemnation claims," and concluded that because the relief Diversified requested was a rezoning to multifamily (and not damages), its claim was really a due process claim despite its inverse condemnation label.

Ocean Concrete, Inc. v Indian Rover County Bd. of Comm'rs 2018 WL 1313420 (FL App. 3/14/2018)

- Ocean relied on information from town officials prior to purchase of land for concrete plant and planning and permit review of the plant which was allowed by right.
- Public opposition caused town to amend zoning, which then prohibited the use with no grandfathering. Ocean appealed.
- Government regulation made Ocean's investment backed expectations unreasonable.
- **Court:** Owner wins, Remanded for trial on damages.
- Unfortunately, property foreclosed in the meantime.

Ocean Concrete, Inc. v Indian Rover County Bd. of Comm'rs 2018 WL 1313420 (FL App. 3/14/2018)

Lessons Learned

- Reliance on town officials is a common practice. Be careful.
- Assurances or promises not kept can be relevant evidence in a taking case or § 1983 case
- Even if you win, however, o much time goes by that the project may be dead.



Smyth v. Conservation Comm'n of Falmouth, 94 Mass. App. Ct. 790 (2019), *review denied*, 482 Mass. 1102 (2019), *cert. denied*, 140 S. Ct. 667 (2019)

- Owner inherited unimproved lot. Filed for approvals for new house under state Wetlands Protection Act and town Home Rule Wetlands Bylaw. Commission denied several requested variances from Bylaw requirements for building in or near protected Resource Areas.
- Appeals Court reversed Superior Court jury verdict of $640,000 on a claim that the Bylaw, as applied, created a "regulatory taking" of plaintiff's property.
- Incidentally, Appeals Court ruled for the first time in Massachusetts that there is no right to a jury trial on a regulatory taking claim.

Smyth v. Conservation Comm'n of Falmouth, 94 Mass. App. Ct. 790 (2019), *review denied*, 482 Mass. 1102 (2019), *cert. denied*, 140 S. Ct. 667 (2019)

- Even though the value of the property if unbuildable ($60,000) was substantially less than if buildable ($700,000), the unbuildable amount was still more than the amount plaintiff's parents paid for it ($49,000), so that the compensation would be a "windfall."
- Court observed that there was no physical invasion of plaintiff's property and the regulation at issue did not single out the plaintiff's property, but was uniformly applicable throughout the Town.
- Decision illustrates formidable showing that claimant must make to prove property has been "taken" by a bylaw, ordinance, regulation or permit denial, so that he or she should be compensated by money damages.

Dabbs v. Anne Arundel Cty., 182 A.3d 798 (Md,. 2018), *cert. denied* 139 S. Ct. 230 (2018)

"IMPACT FEES" AS A TAKING

- Class action challenged how county collects money for roads, transportation, and public safety when applying and collecting development impact fees.
- This is pursuant to legislation, not land use permit ordinance, regulations or conditions.
- Supreme Court of Maryland declined to apply the *Nolan-Dollan* test to this area-wide legislative imposition of impact fees.
- Court reasoned that what some call the unconstitutional conditions doctrine does not govern legislative exactions.

Dabbs v. Anne Arundel Cty., 182 A.3d 798 (Md,. 2018), *cert. denied* 139 S. Ct. 230 (2018)

LESSONS LEARNED

Heightened Scrutiny Test

- Nolan/Dolan requires close nexus and rough proportionality where a taking is necessary to mitigate impacts caused by a proposed development.
- Not where the government action is by legislation.



South Grand View Development Company, Inc. v. City of Alabaster (11th Circuit June 21, 2021)



Facts, Questions Presented and Ruling

- Developer purchased land in 1994. Master plan approved a year later zoning for R-2, R-4 and R-7. Much of project built but recession halted development of 142 acres. City rezoned land to R-2 use which is economically unfeasible.
- Sued for taking and offered evidence of bad city motives. Court ruled evidence of motive should not have been introduced, but harmless error, since clear proof development not feasible.
- Found suit was ripe as zoning was final since it targeted the developer, was opposed by developer, had not been changed in years, and anyway administrative relief would have been futile.

South Grand View Development Company, Inc. v. City of Alabaster (11th Circuit June 21, 2021)

Lessons To Be Learned and Not To Be Learned

- In a takings analysis in court it is assumed that the government has acted in pursuit of a valid state purpose. You may try to prove otherwise but the "purpose" test is hard for the claimant to meet.
- Focus instead on the severity of the government action. Document interference with investment expectations that are reasonable in the circumstances.
- The takeaway is **NOT** that the government can have bad motives in zoning, because that can give rise to other types of claims, but rather you cannot introduce evidence of it in a takings case.



Bridge Aina Le'a, LLC v. Land Use Comm'n, 950 F.3d 610 (9th Cir. 2020), *cert. denied sub nom.* 141 S. Ct. 731 (2021)

- State of Hawaii zoned for agricultural use land that it knew was not viable or appropriate for such a use.
- At property owner's request, it rezoned it for urban use but, after Bridge Aina Le'a began developing it, the State illegally (as the Hawaii Supreme Court later held) "reverted" the land to agricultural use.
- Property owner filed state court action seeking declaratory, injunctive, and monetary relief, and raising federal and state constitutional due process, equal protection, and takings claims.

Bridge Aina Le'a, LLC v. Land Use Comm'n, 950 F.3d 610 (9th Cir. 2020), *cert. denied sub nom.* 141 S. Ct. 731 (2021)

Holdings:

- Reversion did not cause *per se* regulatory taking under *Lucas.*
- Reversion did not effect *Penn Central* regulatory taking.
- Prior state court judgment barred owner from re-litigating equal protection issue.
- Affirmed in part, reversed and vacated in part, and remanded.

The holding effectively eliminates property owners' ability to recover for temporary regulatory takings of property.

FBT Everett Realty, LLC v. Mass. Gaming Commission, 489 Mass. 702 (2022)

- Relatively rare decision from the Massachusetts Supreme Judicial Court on regulatory taking (yes, Virginia, there is a valid claim for taking) and impairment of contract (no, sorry, there is no valid claim).
- Case arose from financial disputes about the former Wynn casino, now operating as Encore Boston Harbor in Everett, MA.
- SJC handed a win to the former owners of the casino site, ruling their lawsuit could proceed against the Massachusetts Gaming Commission seeking to collect an additional $40 million for the Everett land

FBT Everett Realty, LLC v. Mass. Gaming Commission, 489 Mass. 702 (2022)

- Wynn's casino license was approved after it slashed the purchase price for the 35 acres on the Mystic River to $35 million, the estimated value of the land if the buyer were not building a casino.
- Superior Court's had dismissed FBT's claim the sharp price cut constituted an unjust "regulatory taking" by the Gaming Commission.
- Massachusetts SJC reversed citing jurisprudence from both the SJC and the Supreme Court.
- "The regulatory takings inquiry is a fact-intensive evaluation that should consider multiple factors, including not only reasonable investment-backed expectations but also the economic impact and character of the challenged regulatory action."
- "We note that the Court has expressly cautioned that interference with investment-backed expectations is only 'one of a number of factors that a court must examine'"

FBT Everett Realty, LLC v. Mass. Gaming Commission, 489 Mass. 702 (2022)

Lessons Learned

- "…Penn Central inquiry does not turn "exclusively" on regulation's economic impact and degree of interference with legitimate property interests…"
- "Investment-backed expectations … are not talismanic under Penn Central…"
- "All three Penn Central factors are important, or at least may be important in determining whether a regulatory taking occurred, and should be considered in the regulatory takings inquiry."



NECEC Transmission LLC v. Bureau of Parks and Lands, 281 A.3d 618 (Me. 2022), *as revised* (Sept. 8, 2022)

- Avangrid plans a $1B, 145-mile power line in Maine
- In November 2021, 59% of Maine voters approved a ballot measure blocking the partly-built project

Holding: In the context of large-scale infrastructure development, a claim of impairment of vested rights in violation of due process arises when:

- claimant holds a valid and final permit, license, or other grant of authority from a governmental entity that is not subject to any further judicial review; and
- claimant undertook substantial good-faith expenditures on authorized activity prior to enactment of retroactive law.

NECEC Transmission LLC v. Bureau of Parks and Lands, 281 A.3d 618 (Me. 2022), *as revised* (Sept. 8, 2022)

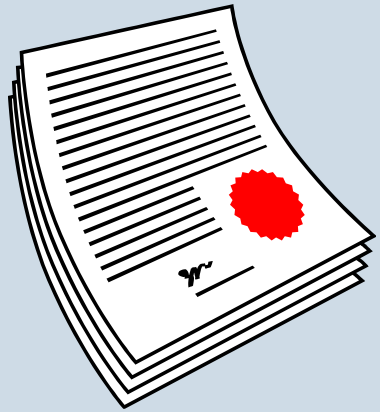
Lessons Learned

- Right to build cannot be taken away retroactively as long as the developer can show significant, visible construction in good faith, according to a schedule that was not created for purpose of generating a vested rights claim.
- This case is not over yet, but it appears Avangrid's reliance on permits and expenditure of $45M might be sufficient to meet the test.



PRACTICAL TIPS FOR BRINGING OR DEFENDING REGULATORY TAKINGS CLAIMS

- Critique permit denials and permit conditions under the trilogy of *Nollan, Dolan*, and *Koontz*
- Decide whether to bring the case in state or federal court.
- Assess if it's a per se taking. If not, plan on a lengthy trial under the Penn Central three-factor balancing test.
- Focus on the purpose, means, and impact of the regulation. Retain the services of expert witnesses.
- Attack land use restrictions both facially and as applied to the claimant's property.
- Relief may seek money, invalidation, or both. Decide what to seek: invalidation or compensation.



ARGUE THE LAW BUT READ THE BENCH

- Considering the U.S. Supreme Court Justices' perspectives on property rights is of utmost importance. Likewise your state Supreme Court. Understand their jurisprudence.
- Many Supreme Court decisions on regulatory takings involve a fair amount of editorializing by the Justices and announcing new standards.
- *First English*, *Palazzolo* and *Lucas* contain the Justices' points of view factoring into their reasoning. Decisions since then in *Nolan, Dolan* and especially *Koontz* show the rhetoric of the Justices at its finest!



