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Regulatory Takings: Governments Can Avoid Successful Challenges

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Abstract: Many local officials have the misguided belief that their utilization of land use regulation is greatly impeded by private rights to develop. However, land use regulations have a strong assumption of validity, with courts unlikely to overturn the regulations unless they are clearly erroneous or unreasonable or have no connection to a valid public interest. In addition to explaining development rights, this article provides the reader with insightful information on how local legislatures enact regulations while avoiding regulatory takings challenges.

What Local Leaders Hear

Local officials charged with regulating the private use of the land often believe that they are highly vulnerable to regulatory takings litigation. They are told that if their regulations diminish the market value of private land or if their land use decisions prevent the highest and best use of the land, they will suffer, and perhaps lose, a regulatory takings challenge. Attorneys for applicants and regulated owners refer to their client's "right to develop" suggesting that there exists a high legal threshold for evaluating a land use law that limits that right in any measurable way. A corollary of this belief is the understanding that land use regulations must assign significant development rights to properties throughout the community, no matter what the environmental conditions are there or how important is the need to confine most development to appropriate and defined areas.

These beliefs are communicated to us regularly at the Land Use Law Center as we work with local leaders in our various land use training programs. They are corroborated by the attention given to regulatory takings in the many conferences or workshops for practitioners and academics where the nuances of takings cases are discussed at length. It is possible that the sheer volume of talk and

writing about takings jurisprudence conveys this impression of pervasive vulnerability.

In fact, the opposite is true. The overwhelming majority of land use laws and decisions do not raise regulatory takings questions. Most local land use regulations are generally applicable to all similarly situated parcels in a district or area and these are granted great deference by the courts. They are said to balance the burdens and benefits of a broadly applicable regulatory program and are only vulnerable if unreasonable. They are found to be reasonable if designed to achieve a valid public purpose, the circumference of which is broadly defined. "The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." *Berman v. Parker*, 348 U.S. 26, 37 (1954). Most zoning regulations are characterized as achieving "reciprocity of advantage" for all landowners who are then "compensated" for the burden on their right to develop by the benefits of a well planned community.

This assertion would surprise the typical local lawmaker or planning board member who has been threatened with litigation because a land use law or land use decision will diminish the market value of the land in question. Yet, in 1926 the first zoning decision of the U.S. Supreme Court validated a local land use law that diminished the value of the land by over 66 percent. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In this seminal case, diminution in value was not an issue. Local officials who hear about recent victories of the property rights advocates at the Supreme Court level are surprised to learn that its most conservative jurist, Justice Scalia, has written that "[i]t is true that in at least some cases the landowner with 95% loss will get nothing" and that the instances in which regulations deprive landowners of *all* economical uses and hence are total takings are "relatively rare situations." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018-1019 n8 (1992).

What the Right to Develop Means

Broadly Applicable Regulations

Most land use laws are broadly applicable to similarly situated properties and distribute the burdens and benefits among the owners of property in the community for the benefit of the public. The application of a general zoning law to a particular property effects a regulatory taking if either: (1) the ordinance "denies an owner economically viable use of his land" or (2) "the ordinance does not substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255 (1980). There is a heavy burden placed on the challenger to prove that the law does not achieve a legitimate public end or that it leaves no economic value. "[T]he property owner must show by 'dollars and cents' evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return." *St. Aubin v. Flacke*, 68

N.Y.2d 66, 77 (1986). The regulation must take all but a “bare residue of value” according to the New York Court of Appeals. *Id.*

In addition, land use laws are presumed to be constitutional and valid and courts give deference to local lawmakers and board decisions. In *Bonnie Briar Syndicate, Inc. v. Mamaroneck*, 94 N.Y.2d 96 (1999), the Court of Appeals upheld the rezoning of plaintiff's property from residential to solely recreational use because the regulation bore a reasonable relation to the legitimate objectives of the regulation: furtherance of open space, recreational opportunities, and flood control.

Particularized Regulations

A small percentage of land use laws are particularized regulations, those that single out a few properties to bear the burden of the regulation, while the public as a whole is benefited. Included in this category are those that regulate fresh water or tidal wetlands or ridgelines, for example, or historic or landmark buildings. These run the risk of offending the *Armstrong* principle that regulations should not single out a few to bear burdens for the many; the opposite of reciprocity of advantage. *Armstrong v. United States*, 364 U.S. 40 (1960). Regulations burdening relatively few landowners may receive more extensive judicial analysis when challenged as a regulatory taking. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the court adopted a multifactor balancing test that examines the character of the regulation (if all properties in that class are uniformly or similarly burdened, there is less chance of a taking), its impact, and its interference with the landowner's investment-backed expectations. The fact that the regulation was pre-existing when the land was purchased is a factor considered. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). New York courts routinely uphold complex, special purpose regulations like wetland controls and historic district restrictions as long as they permit some economically viable use of the land.

Forced Conveyances

Relatively few land use laws or decisions force the owner to convey an easement or portion of the title to the public to allow public access. These conveyance cases trigger stricter judicial scrutiny because the right to exclude – a fundamental property right – is implicated. Here the regulator must show that there is an essential nexus between the condition imposed and the public purpose that is to be achieved by the condition. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Courts also look for specialized studies showing that public benefits obtained by the condition imposed on the property are roughly proportional to the adverse impacts of the development on the community. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Applicability of this heightened degree of judicial scrutiny is limited to these conveyance cases. In

Bonnie Briar Syndicate, Inc. v. Mamaroneck, 94 N.Y.2d 96 (1999), the Court of Appeals explicitly restricted the use of the “essential nexus” test and the “rough proportionality” test to conveyance cases and rejected its applicability to general zoning regulations.

Total Takings

Courts also apply a heightened degree of scrutiny when reviewing a regulation that allows an owner no viable use of his property, a total taking. If a regulation or decision has the effect of taking all economic use and value, unless the same would be prevented by the background principles of state property law (such as nuisance), that regulation or decision is a per se taking. This reflects back on *St. Aubens*. A regulation that goes so far as to take that bare residue of value is, in effect, a total takings.

Conclusion

If land use regulations of all types were contained in a circle, the lion's share of that circumference is occupied by regulations and decisions that are beyond the reach of takings principles. Of that small percentage of them that are within the narrow band of vulnerable regulations, most will survive because of the judicial standard of deference, the fact that regulations can diminish the value of the property without offending property rights guarantees, the limited applicability of stricter scrutiny rules to forced conveyance cases, and the fact that very few land use regulations effect a total taking.

What then should local leaders be fearful of? To what extent are they vulnerable? The cases warn against regulations that prohibit all uses, regulations that randomly single out a few property owners to bear particular public burdens, regulations that exact a burden for impacts not caused by the proposed development, and the failure to do sufficient planning and studies when the goal is to require the landowner to convey an easement or portion of the title. How hard is it to draft and enforce regulations that avoid these vulnerabilities?

Avoiding a Regulatory Takings Challenge

There are number of precautions that local governments can take to avoid successful regulatory takings challenges:

- Adopt a comprehensive plan, keep it up to date, and back it up by studies. Be sure that local land use regulations conform to the plan. A regulation that is adopted specifically to further an objective of a comprehensive plan is likely to be found by a court to substantially advance a legitimate public interest.
- When adopting land use regulations, be sure that all similarly situated properties are similarly regulated. A regulation that limits the use of all

properties that are historic or that contain wetlands of a certain type will likely be found to distribute the benefits and burdens of the regulation as fairly and broadly as possible. Such regulations conform to the “principle of generality,” which puts courts at ease and tends to reduce fears that individual owners are being singled out.

- When the government imposes conditions on the approval of development projects which require owners to allow public access to their properties, individual studies must be conducted to show that the condition is both necessary to mitigate the project’s impact on the community and roughly proportionate to that impact.
- Where land use regulations might prevent all economically beneficial use of land owned by a particular individual, be sure that there is a mechanism readily available to the owner to obtain a hardship exemption from the strict application of the regulations. If the local government awards an exemption that allows some reasonable use of the property, an owner will not be able to claim that the regulatory regime destroys all but a bare residue of value.
- Instead of greatly limiting land uses through regulations, the community should explore the many innovative tools and techniques that local governments are encouraged to use under statutes adopted by the state legislature. Where the public objective can be accomplished, for example, by clustering development, by transferring development rights, by incentive zoning, or by purchasing conservation easements, burdens on landowners can be minimized and the chances of facing regulatory takings challenges reduced.

A landowner’s “right to develop” exists within the confines of the reasonable efforts of a community to achieve smart growth. By designating discrete geographical areas into which private market growth pressures are directed communities can then speed up local approvals and grant significant additional development rights to landowners. A community may desire to encourage development in the commercial centers, around transportation corridors, or in areas that it can service cost-effectively, but curtail development in areas designated for recreation, conservation, and environmental protection. Using incentive zoning, purchase of development rights, the transfer of development rights and other innovative mechanisms, these communities can respect realistic investment-backed expectations of landowners. In so doing, lands that serve critical environmental objectives or that are expensive to serve with infrastructure, can be preserved without fear of being challenged as takings.