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Regulatory Takings: Analyzing Governmental Invasions of Private Property Rights

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Abstract: The complicated arena of takings jurisprudence has confused lawyers, scholars, and courts for well over a century. Generally, a taking is deemed to have occurred when a governmental body takes a property right away from a private individual without providing just compensation. However, courts are unlikely to find that a regulation constitutes a taking if the regulation benefits the greater good of the public. Takings come in several varieties, most notably, “invasions” which include physical occupation and “total takings”, which deprive landowners of all economic value of their property. This article discusses how takings law has evolved into its present state.

Land use and environmental regulations are frequently challenged as governmental takings of private property. The New York State Constitution, Article I § 7, states that “private property shall not be taken without just compensation.” In 1922, Justice Holmes stated that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393. Fifty years earlier, the Supreme Court established that an invasion of an owner’s possessory interest by a government action can constitute an inverse condemnation, requiring compensation. That case, *Pumpelly v. Green Bay*, 80 U.S. 166, (1871), involved a government public works project that caused the flooding of petitioner’s property.

The subtlety of this category of regulatory takings case was probed recently in *Bormann v. Board of Supervisors*, 584 N.W.2d 309, (1998). The U.S. Supreme Court refused to review this decision, leaving intact the ruling of the Iowa Supreme Court, which found that a state agricultural district statute constituted a regulatory taking. The statute gave farmland owners in formally established agricultural districts immunity from nuisance actions by their neighbors for certain intrusive conditions such as noise, dust, smoke, and odors created by farming operations. The statute effectively denied neighbors the right to bring a private nuisance case that was provided by the common law and statutes of the state.

The Iowa Supreme Court found that the effect of the creation of the agricultural district by the county Board of Supervisors was to give farmers an easement over adjacent properties, by allowing them to produce offensive conditions and, through those conditions, invade the neighbors' land. The statute allowing the creation of agricultural districts by the Board of Supervisors and providing immunity from nuisance suits "resulted in the Board's taking of easements in the neighbors' properties for the benefit of the [farmers]." The right of one owner of land to maintain a nuisance on another owner's land is an easement under Iowa law. The Iowa Supreme Court saw this aspect of the state's right to farm statute as a governmentally sanctioned invasion of private property. The court refers to these types of regulations as "per se" takings. Since the plaintiff's did not request compensation in the *Bormann* case, the remedy awarded by the court was the invalidation of the immunity section of the statute since "the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation." As a result of this ruling, farmers may not invoke the immunity provisions of the law to defend themselves against their neighbors' nuisance actions.

One of the reasons that regulatory takings cases cause so much confusion is that they cover so many different contexts. For the purpose of analyzing the differences among these cases, it is helpful to categorize and label them. Courts, for example, use highly deferential standards of review when they consider a takings challenge brought against regulations that are designed to protect the public from physical harm or that broadly distribute the benefits and burdens of the regulatory regime. In these cases, courts emphasize the presumption of constitutional validity that such regulations enjoy and impose an onerous burden of proof upon the challengers. When regulations take all economically beneficial use of the land or invade the owner's possession, once that fact is demonstrated, the courts are more suspicious of the regulation and treat the regulator much more summarily.

In *Bormann*, the Iowa court cited the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, (1992) for the proposition that "there are two categories of regulations that require compensation without any further inquiry into additional factors, such as the economic impact of the governmental conduct on the landowner or whether the regulation substantially advances a legitimate state interest." These two categories include regulations that involve a permanent physical invasion of the property or deny the owner all economically beneficial use of the land. These categories are often called "total takings" and "invasion" cases, referred to occasionally as "per se" takings.

Pumpelly and *Bormann* are *invasion* cases, instances where governmental action causes a violation of the petitioners' possession, effectively taking away their exclusive right to exclude others. *Lichfield v. Bond*, 186 N.Y. 66, 1906, is an early New York Court of Appeals case that sets forth the basic doctrine involved when a physical invasion is caused by state action. The challenged act was a governmental land survey that caused physical damage to the plaintiff's property. The Court noted that "there is immunity from liability for entry upon private lands, only to the extent that the entry or

occupation is temporary, or the infliction of damage is incidental and incipient or preliminary. If the occupation is to be permanent or the damage is to be substantial, then the state and those assuming to act under it must invoke those powers [such as the eminent domain authority] under which such things may be lawfully done." The court found that the acts of the surveyors went beyond these incipient matters, amounted to the practical appropriation of a strip of the plaintiff's land, constituted unauthorized trespass, and gave rise to liability.

A New York City law that required a landowner to permit a cable television company to install its equipment upon her property was found to be a regulatory taking in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, (1982). The landowner had not applied to the City for any land use permit. She simply was required by the local law to allow the cable company access to her site and to permit equipment that occupied one-eighth of a cubic foot of space to be permanently attached to her building. The U.S. Supreme Court noted that "when the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

The Court explained that a permanent occupation caused by a government regulation effectively abrogates a property owner's expectation that he will be undisturbed in the possession of his property. This situation is regarded more seriously by the courts than the mere regulation of the use of property, because the owner may have no control over the timing, extent and nature of the invasion. For these reasons, the Court held that weighing the utility of the government invasion against the rights invaded, a process involved in other types of takings cases, is not necessary.

A local law that regulated the use of single room occupancy buildings in New York City was found to be a per se regulatory taking in *Seawall Associates v. New York*, 74 N.Y. 2d 92, (1989). The property owner purchased such a building with plans to demolish it and construct a new commercial structure. The regulation, adopted subsequent to the purchase, prohibited the demolition and conversion of the building, required its rehabilitation as a single room residential facility, and mandated that the owner lease the units to certain types tenants as defined by the law.

The Court of Appeals was particularly concerned by the requirements of the law that coerced an owner, who was not in the business of leasing apartments, to rent to particular tenants. The Court noted that a private "owner suffers a special kind of injury when a stranger invades and occupies the owner's property, and property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." The Court pointed out that "the right to exclude others has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." "Where, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required."

The offensive characteristic of the local law invalidated in *Seawall* is that it forced the owner to accept certain types of tenants in its building. Where rent control statutes have been challenged as regulatory takings, they normally survive, in part, because the property owner is not coerced by them into accepting particular tenants, not of his choosing. In *Yee v Escondido*, 503 U.S. 519, (1992), the issue was whether local rent control ordinances, coupled with California state law restrictions, amounted to physical occupation of mobile home park owner's property, entitling him to compensation under the takings clause. The California state law limits the basis upon which a park owner may terminate a mobile home owner's tenancy. The local law set rents back to their 1986 levels and prohibited rent increases without the approval of the city council. The Yees, the owners of the mobile home park, alleged that the rent control law resulted in a physical invasion of their property. The law granted to the tenants of mobile homes presently in the park, as well as the successors in interest of such tenants, the right to physically occupy and use the real property of the plaintiff.

The Supreme Court of the United States held that the rent control ordinance did not amount to a physical taking of the park owner's property. The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land. The ordinance never compelled the park owners to suffer physical occupation of their property since the owners had already voluntarily rented their land to the mobile homeowners, and in the regulations compelled the park owners to continue to rent their property to tenants.

Courts in New York have also held rent control and stabilization provisions to be constitutional, absent a showing that the law coerces owners to accept particular tenancies. The Court of Appeals upheld an amendment of the provisions that extended the definition of "family-member" for the purpose of defining who could take over a rent controlled or stabilized apartment in *Rent Stabilization Association of New York City, Inc., v. Higgins*, 83 N.Y.2d 156, (1993). Under the regulation, family-members cannot be evicted from premises upon the tenant's death or departure. This provision was challenged as a regulatory taking because it requires owners to suffer a physical invasion of their property. Following *Yee*, the Court held since the owner voluntarily acquiesced in the use of its property for rental housing and since the regulations may require the owner to accept a new occupant, but not a new use, the owners did not establish a permanent physical occupation.

The two types of per se takings cases, physical invasions and total takings, were merged, in a sense, in the U.S. Supreme Court's *Lucas* decision, mentioned above. In *Lucas*, the court found that all of the economically beneficial uses of the plaintiff's property were prohibited by a beachfront regulation. The majority noted that a regulation that totally deprives an owner of the land's beneficial use "is from the landowner's point of view, the equivalent of a physical appropriation." Recently two New York cases have been decided involving interesting applications of the doctrine that has emerged from the total takings category.

In *Bernard v. Scharf*, 675 N.Y.S.2d 64 (1998), the Appellate Division found that requirements in New York City's Housing Maintenance Code that required a landlord to invest \$4 million to restore a building to create a \$1 million value denied the owner a reasonable return on his investment and constituted a total taking. (The order of the Appellate Division was reversed in February by the Court of Appeals on the ground of mootness.) In *Briarcliff Associates, Inc. v. Town of Cortlandt*, 8/21/97 NYLJ 27, (col. 6), a change in zoning from regulations that allowed mining operations to provisions that allowed only residential uses was challenged by the petitioners as a total taking. Because of the physical limitations of the site, the 128 acre parcel could only be used as a large lot for the construction of one or two homes. The court found that the site could not be used residentially in an economically beneficial manner. The zoning amendments prohibited its use as a quarry – its historical use. The court, citing *Lucas*, found that the effect of the regulations was to require that the land be left “economically idle.” Once these facts were determined by competent proof, the court concluded summarily that the plaintiff had suffered a taking, exposing the town to damages potentially exceeding \$17 million..

Practitioners should be careful not to apply the standards and procedures that the courts use in these per se takings cases to other types of cases. In fact, very few takings cases involve per se takings. Where a land use regulation is broadly applicable or where the aim of a regulation is to protect the public from a demonstrable injury, very different approaches are taken by the judiciary. Courts in the regulatory taking arena exercise situated judgments, and the approaches they take vary markedly depending on the situation encountered.