Pace Environmental Law Review

Volume 7
Issue 2 *Spring 1990*

Article 2

April 1990

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## I. Introduction

The United States Supreme Court has handed down, over the decade from 1977 to 1987, seventeen cases[1] dealing with the interrelationship of police power regulation and a "taking" under the fifth amendment.[2] In analyzing these decisions and the conflicting views of the justices expressed in their lengthy majority, dissenting, and concurring opinions, there emerges a thread which seems to have been consistently followed. That thread is rooted in the fee simple ownership of real property. It holds that when a challenged action exercised under the guise of regulation actually constitutes the taking of one of the elements of the bundle of rights making up the fee simple ownership of the property, a *per se* taking occurs. This taking requires the payment of just compensation for its appropriation.

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1. Pennell v. City of San Jose, 485 U.S. 1 (1988); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); FCC v. Florida Power Corp., 480 U.S. 245 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Hodel v. Irving, 481 U.S. 704 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); United States v. Cherokee Nation, 480 U.S. 700 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Andrus v. Allard, 444 U.S. 51 (1979); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

2. U.S. CONST. amend. V.

## II. The United States Supreme Court Cases

In arriving at this fundamental doctrine, the Court has distinguished between the accoutrements which flow from fee simple ownership and the thing itself which is owned. This distinction is illustrated in *Loretto v. Teleprompter Manhattan CATV Corp.*[3] In *Loretto*, the Court held that a statute, authorizing the installation of a television cable wire on a minuscule space of a landlord's building, allowed the state to take a strand of the bundle of rights.[4] In so doing, the state exceeded the police power authority to regulate. Thus, the state had, in fact, taken part of the fee simple for which it was required to pay just compensation under the fifth amendment.

In *Hodel v. Irving*,[5] Congress enacted legislation which mandated that small shares of land left to Indians by intestacy or devise would escheat back to the tribe.[6] A unanimous Court held that the escheat of a fragment of the total fee title to the property was a *per se* taking.[7] In both *Kaiser Aetna v. United States*[8] and *Nollan v. California Coastal Commission*,[9] the Court held that there was, *inter alia*, some element of a *per se* taking in the imposition of what amounted to an implied easement of use by the public.

Moreover, in *First English Evangelical Lutheran Church v. County of Los Angeles*,[10] the Court refused to decide whether or not a *per se* taking had occurred. The Court de-

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3. 458 U.S. 419 (1982). *Loretto* illustrates the most extreme frontier of what constitutes the taking of a stick from the bundle.

4. *Id.* at 438.

5. 481 U.S. 704 (1987).

6. *Id.* at 707. *See also* Indian Land Consolidated Act of 1983, Pub. L. No. 459, Title II, § 207, 96 Stat. 2515, 2519 (1983) (amended 1984).

7. *Id.* at 717.

8. 444 U.S. 164 (1979). The *Kaiser* Court held that the government's imposition of a navigational servitude requiring public access to a pond was a taking where the owner had reasonably relied on government's consent to connect the pond to navigable water. *Id.* at 180.

9. 483 U.S. 825 (1987). In *Nollan*, the Court found that the California Coastal Commission did not advance a legitimate state purpose by imposing the condition that a landowner grant the public an easement. *Id.* at 841.

10. 482 U.S. 304 (1987).

cided that if the California courts, on remand, did hold that such a taking had occurred, then just compensation was required to be paid, even if the taking was only temporary.[11]

In contrast, in six cases ruled upon during the same ten year period, the Court held that depriving an owner of one of the accoutrements of ownership, without impairing the fee title in any way, did not constitute a taking. For example, in *Penn Central Transportation Co. v. City of New York*,[12] the Court held that depriving an owner of the right to build an addition to a designated landmark was not a *per se* taking, particularly since the owner had the right to use the air rights to build on adjoining parcels.[13] In *Andrus v. Allard*,[14] the Court held that barring the right to sell the legally-acquired feathers of an endangered eagle species was not a taking, since the ownership of the feathers was in no way infringed upon.[15] In *United States v. Cherokee Nation*,[16] the Court held that where land was taken pursuant to the federal navigational servitude, it did not constitute a taking because the government always had that right and the exercise of it could not be deemed a taking.[17] In *Keystone Bituminous Coal Association v. DeBenedictis*,[18] the Court held that barring the right to remove coal in certain subsurface areas, to avoid subsidence of the surface land, did not impair the ownership of that right.[19] The prohibition merely barred the right to remove a small portion of the coal.[20] In *FCC v. Florida Power Corp.*,[21] the Court held that the FCC's limitations on the rental of power

11. *Id.* at 321. The *First English* Court held that an interim ordinance prohibiting any construction in an interim flood protection area effected a taking of all use of the property. Any subsequent governmental action could not relieve the government of its duty to provide compensation for the period the taking was effective. *Id.*

12. 438 U.S. 104 (1978).

13. *Id.* at 137.

14. 444 U.S. 51, 65-66 (1979). *Andrus* was not a real property case.

15. *Id.*

16. 480 U.S. 700 (1987).

17. *Id.* at 704.

18. 480 U.S. 470 (1987).

19. *Id.* at 501.

20. *Id.*

21. 480 U.S. 245 (1987).

transmission poles to cable television companies was a proper exercise of the police power.[22] In so doing, the Court was careful to point out the difference between the cable wires in *Loretto*, where the space involved was taken entirely, and the pole rentals in *Florida Power*, where the utilities retained the full ownership and the poles were merely regulated as to their rental.[23] In *Pennell v. City of San Jose*,[24] the Court reaffirmed the holding of many of the earlier federal and state court cases which found that the regulation of rents charged for the use of real property was a proper method of police power regulation and was not a *per se* taking.[25]

Thus, the basic thread in the skein of reasoning which is fundamental to a resolution of land use issues is that, where the purported regulation actually takes a portion of the bundle of rights making up the ownership of the property, a *per se* taking occurs for which just compensation must be paid. But this basic foundation for the determination of the validity of a land use regulation, although absolute in and of itself, is by no means exclusive. This foundation is augmented by other defects in the regulatory process such as illegal authorization for the act, excessiveness, lack of a nexus which would serve a legitimate police power purpose, and the multitude of other bases available to support a finding that the purported regulatory act lacks due process.

Where the basic element of *per se* taking has not occurred, the resolution of land use disputes becomes more complex and less categoric. Thus, in the absence of a *per se* taking where the alleged excessive regulation does not advance a legitimate state interest (i.e. nexus), denies an owner economically viable use of the land, or significantly impairs "investment backed expectations," the courts have held that a taking has occurred. A taking would not be found, of course, where the regulation requires the removal of a nuisance because an

22. *Id.* at 254.
23. *Id.* at 251-52.
24. 485 U.S. 1 (1988).
25. *Id.* at 11-12.

owner never has the right to maintain a nuisance.[26]

In this connection, it is instructive to analyze the determinations of the California courts in *First English* and *Nollan*, after the Supreme Court's 1987 rulings. In *First English*, where the use of the property was impaired but there was no physical intrusion or taking of part of the title to the property, the California court held that there was no taking because the moratorium left the owner with *some* use.[27] The California court found that the property was still usable for camping, hiking, and similar activities. Therefore, there was no need for permanent construction and the bar to the construction of any buildings did not in and of itself constitute a taking.[28] In addition, the California court held that there was a strong public purpose in the effort of the locality to control floods which justified the exercise of the police power to protect the health, welfare, and safety of the public.[29] The court also discussed the requirement for it to weigh the "public" against the "private" interests involved and the "reciprocity of advantage" elements involved in the case but did not base its opinion upon these considerations.[30]

In *California Coastal Commission v. Superior Court*,[31] the California court refused to recognize any inverse condemnation claims asserted under the *Nollan* doctrine on the ground that since the claimant failed to file a timely writ of mandate (within sixty days of the decision by the Commission), the issue of compensation was barred by *res judicata*.[32] The California court further held that, by complying with the condition imposed by the California Coastal Zone Commission, the owner had waived his right to recover damages at a later date.[33] The court based its decision upon the United

26. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (no taking was found where a brickyard business was inconsistent with neighboring uses).

27. 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989).

28. *Id.* at 1367, 258 Cal. Rptr. at 902.

29. *Id.* at 1370, 258 Cal. Rptr. at 904.

30. *Id.* at 1371, 258 Cal. Rptr. at 905.

31. 210 Cal. App. 3d Supp. 1488, 258 Cal. Rptr. 567 (Cal. App. Dep't Super. Ct. 1989).

32. *Id.* at 1496-97, 258 Cal. Rptr. at 570.

33. *Id.* at 1496, 258 Cal. Rptr. at 570.

States Supreme Court decision in *Nollan*, which was announced subsequent to compliance by the owner with the dictates of the Commission.[34]

## III. Procedure for the Enforcement of Rights

These cases cast light upon the broad discretion available to a court in its analysis of the basic question of whether or not the action taken by the locality constitutes a *per se* taking or a failure of due process requiring just compensation under the Constitution. The adjective procedures available for enforcing the rights of aggrieved parties in this process are many and varied and they depend, to a considerable degree, upon the nature of the claimed deficiency in the regulatory process employed.

Thus, where a *per se* violation can be established, the remedy would appropriately lie in an action for damages in inverse condemnation as well as in a claim for injunctive relief. Where the taking is effectuated by statute, as in *Loretto*,[35] a facial attack upon the statute in an action for declaratory judgment could afford a proper remedy. Where, however, the regulatory action does not rise to the level of a *per se* taking, but is illegal or excessive and consequently is lacking in due process, the most frequently used forms of action would be declaratory judgment and injunction as well as *mandamus*.

Another action was successfully pursued in the New York courts in *Kahmi v. Town of Yorktown*.[36] *Kahmi* was a suit for money had and received by the municipality under a local ordinance which required the development of park land or a money equivalent for site approval of a residential development.[37] In that case, the developer had paid the money exaction under protest in order to proceed with the development without delay and then sued for its recovery.[38] The court held

34. *Id.* at 1501, 258 Cal. Rptr. at 573.
35. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
36. 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989).
37. *Id.* at 427, 547 N.E.2d at 347, 548 N.Y.S.2d at 145.
38. *Id.*

that the local ordinance under which the exaction was imposed lacked proper enabling authority from the state and therefore was unenforceable.[39] The court ordered the money to be repaid to the developer.[40]

However, under modern practice, the remedy afforded by the century old Civil Rights Act of 1871[41] (commonly referred to as section 1983) is being recognized by practitioners in the field as more suitable than the long established and well-settled remedies referred to above. Under section 1983, the plaintiff would be entitled to a remedy against an action taken under color of state or local law which violates a person's federal or state constitutional rights. This procedure avoids the troublesome "ripeness" or "exhaustion of administrative remedies" problem encountered in *Agins*,[42] *San Diego*,[43] *Williamson County*,[44] and *MacDonald*[45] and has the advantage of permitting a suit to be brought in either state or federal court. It also allows the recovery of attorney fees along with monetary damages, injunctive relief, and costs.[46] In some instances, even punitive damages may be awarded.[47] In addition, the right to sue under section 1983 has been upheld for violations of "property" rights as well as "personal" rights.[48] A governmental agency has been found to be a "person"[49] even though, under the recent ruling in *Will v. Michigan Department of State Police*, neither a state agency nor an employee acting in an official capacity was considered a "person."[50] Nevertheless,

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39. *Id.* at 429, 547 N.E.2d at 349, 548 N.Y.S.2d at 147.

40. *Id.* at 427, 547 N.E.2d at 347, 548 N.Y.S.2d at 145. *See also* Albany Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989) (decided at the same time as *Kahmi*).

41. 42 U.S.C. § 1983 (1982 & Supp. V 1987).

42. Agins v. City of Tiburon, 447 U.S. 255 (1980).

43. San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981).

44. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

45. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986).

46. Texas Teachers Ass'n v. Garland School Dist., 489 U.S. 782 (1989); Blanchard v. Bergeron, 489 U.S. 87 (1989).

47. Smith v. Wade, 461 U.S. 30 (1983).

48. Lynch v. Household Fin. Co., 405 U.S. 538 (1972).

49. Monell v. Department of Social Servs., 436 U.S. 658 (1978).

50. 109 S. Ct. 2304 (1989).

all local agencies making most land use decisions, and local and state officials acting in their individual capacities are subject to section 1983 actions.

From the regulators' point of view, there is, of course, no solace to be obtained from section 1983, but they are protected in a measure by the federal abstention doctrine. Under this doctrine, the federal courts would ordinarily refrain from taking jurisdiction on a purely local matter where a state court could issue a definitive ruling to terminate the controversy.[51] All of these considerations, taken together, would seem to indicate that the use of section 1983 should become the favored remedy of the aggrieved landowner where land use regulation is deemed to be excessive.

This is particularly so in view of the recent spate of cases where the courts have sought to curb the increasing excesses of local agencies seeking to accomplish ulterior purposes through land use regulation. An interesting illustration of the extent to which progress has been made in curbing abuses of this nature is found in the decision in *Seawall Associates v. City of New York*.[52] In that case, the New York Court of Appeals declared facially invalid, as both a physical and regulatory taking, Local Law 9.[53] The ordinance required New York City owners of single room occupancy (SRO) buildings to rent them under prescribed conditions and imposed substantial monetary penalties for noncompliance.[54] Although the attack on the statute in *Seawall* was facial and resulted in an invalidation of the statute, it might have resulted in an assessment of damages and attorney fees as well. This would have been possible if the action had been pursued under section 1983, where an owner is in a position to establish pecuniary damages as a result of the statute being improperly applied.

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51. Ranchos Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976); Canton v. Spokane School Dist. No. 81, 498 F.2d 840 (9th Cir. 1974).

52. 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

53. *Id.* at 106-07, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548.

54. *Id.* at 100, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544.

## IV. Measure of Damages

The intriguing issue which would then arise is what is the proper measure of damages. In *Williamson County*, the owner, a bank which had previously foreclosed on the developer, brought an action against the municipality on the ground that a zoning change had reduced the number of units which could be built on the site to such a degree that it became economically infeasible to proceed.[55] The trial court allowed the issue of damages to go to the jury, who awarded several hundred thousand dollars for the period of the illegal taking.[56] However, the court granted judgment notwithstanding the verdict in favor of the Williamson County Regional Planning Commission on the taking claim.[57] The court of appeals reversed and reinstated the jury verdict.[58] The United States Supreme Court reversed and remanded the matter on "ripeness" grounds.[59] Thus, the theory upon which the damages award was based amounted to a claim for loss of profits during the period of the invalid restriction.[60]

The usual measure of damages in a taking is the rental value of the property based upon its highest and best use during the period of the illegal restraint.[61] However, because of the fact that the governmental taking was involuntary on its part, it might well be appropriate for the measure of damages to consist of a computation of actual losses, i.e. lost profits plus the carrying costs. The standard adopted by the trial court for determining the extent of damages suffered in a taking case should be reflective of the usual law of damages applicable to involuntary takings, such as an award of damages

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55. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 n.12 (1985).

56. *Id.* at 183.

57. *Id.*

58. *Id.* at 184.

59. *Id.* at 200.

60. *See* Trevaskis, *Measure of Damages for Regulatory Takings*, PROB. AND PROP., Mar.-Apr. 1989, at 17.

61. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. General Motors Corp., 323 U.S. 373 (1945); United States v. Petty Motor Co., 327 U.S. 372, *reh'g denied*, 327 U.S. 818 (1946).

resulting from an improper act under the law of nuisance and other types of torts.

One of the suggestions made with respect to the problem of determining the amount of damages to be applied to involuntary taking situations has been to enact legislation which specifically sets forth the appropriate measure of damages. The legislative resolution of the problem would have the advantage of making clear to both the regulators and the regulated what their exposure would be in the event of excessive action on the part of the regulators. However, since the courts have only recently gone as far as they have in holding actions taken under the rubric of police power to be excessive, the whole subject of damages or the payment of just compensation requires a new look.

## V. Conclusion

It is interesting to speculate as to the impact the intervention of the Supreme Court will have on actions involving everyday land use decisions which affect neighborhoods in the cities, towns, villages, and hamlets of the United States. These land use decisions, exercised under the broad cloak of police power and generated by local emotional resistance to development and increases in taxes, are becoming more and more chaotic and unbridled as time goes on. Now that there has been judicial intervention at the highest federal levels, the question is to what extent can they be contained and given a more coherent direction in the future.