

How Far Is Too Far?

by John Ronayne, Esq.

A perennial and difficult question for local planners is how far the government can go in reducing the development potential (and hence the value) of property through the imposition of land use regulations without putting itself at risk for a “takings” claim. If successful, a takings claim may require the payment of substantial compensation to the landowner for the loss of value to the land, and, in some circumstances, the payment of the land owner’s legal fees. But whether successful or not, takings litigation is likely to be expensive to the municipality.

Unfortunately, the law of takings is not always as clear cut as we would like. As the U.S. Supreme Court observed in *Penn Central v New York*, 438 U.S. 104 (1978) “... whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely ‘upon the particular circumstance [in that] case.’”

But neither are we completely without guidance. The U.S. Supreme Court and most, if not all, State Supreme Courts have looked at the takings issue many times over the years. Notwithstanding some twists and turns along the way, we at least have a pretty good idea of *how to analyze* taking questions; and that’s of great value to municipalities.

First, a little background. The “takings issue” arises from the Fifth Amendment of the U.S. Constitution which provides, as one of the essential rights of all Americans: “nor shall private property be taken for public use without just compensation.” The Fifth Amendment, initially applicable only to the Federal Government, was made applicable to State and local government by the Fourteenth Amendment of the U.S. Constitution, which provides: “... nor shall any State deprive any person of life, liberty or

property, without due process of law.” There are comparable, sometimes even more specific and demanding, provisions in many State constitutions.

Under the Fifth and Fourteenth Amendments, it is perfectly permissible for state and local governments to take private property for appropriate public purposes, but only if “just compensation” is paid.

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This principle is illustrated most clearly in the case of “direct condemnations” (the words “taking” and “condemnation” being synonymous in this context), such as the taking of land for a public street or public school, or the taking of distressed properties as part of a redevelopment plan. These would normally be permissible takings of private property for public purposes *and* compensation would be paid as a matter of course – the debate usually being limited to the question of “how much” compensation.

Far less clear-cut are so-called “regulatory takings” or ‘inverse condemnations’ (again, essentially synonymous). These may arise when a governmental entity or agency imposes substantial limitations (through zoning, wetlands regulations, or some other type of land use regulation) on the use of a parcel of property, thus diminishing its value.

The government entity would usually like to view its actions as a simple exercise of its “police powers,” for which no

compensation is required. Property owners, in contrast, may well take the view that if a land use limitation significantly reduces the development potential (and thus the value) of their land, just compensation must be paid.

The grandparent of today’s regulatory takings jurisprudence is a case called *Pennsylvania Coal v. Mahon*, 260 U.S. 393, decided by the U.S. Supreme Court in 1922. The Court recognized that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” However, the Court added a critical caveat: “the general rule, at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Thus the question left us, “how far is too far?”

THE PENN CENTRAL CASE

Fast forward to 1978, when the U.S. Supreme Court dramatically re-entered the world of land use regulation with a decision which still defines takings law today: *Penn Central v. New York*, 438 U.S. 104. The *Penn Central* case involved the Penn Central Railroad Company’s desire to erect an office tower on top of Grand Central Terminal, a beautiful Beaux Arts-era structure it owned. The problem was that the New York City Landmarks Preservation Commission had designated the Terminal as a protected historic “landmark,” and rejected Penn Central’s request to build a tower over it.

At issue before the Supreme Court was the question of whether the ordinance from which the Landmarks Commission derived its authority was invalid because it purported to authorize an uncompensated taking of Penn Central’s air rights, and whether the City should be required to compensate Penn Central for the loss of those rights.

The Supreme Court both upheld the Landmarks Commission's authority and found that no taking had occurred (and thus no compensation was required).

In reaching its decision, the Court utilized a three-part analysis – an analysis which still provides the basic framework for determining whether a compensable taking has occurred.

1. The Regulation's Purpose

The first consideration is the degree to which the regulation in question bears a reasonable relationship to a legitimate and substantial public purpose, including, most commonly, the promotion of "the health, safety, morals, or general welfare" of the public (i.e., the so-called "police powers").

If a particular regulation is not reasonably necessary to the effectuation of a substantial public purpose, it is more likely to constitute a taking. On the other hand, if a regulation is clearly related to protecting or furthering an important public objective, a court will be less likely to find a taking.

2. The Economic Impact on the Property Owner

The second consideration is the nature and extent of the economic impact on the property owner, including the extent to which the regulation in question blocks the property owner's reasonable investment-backed expectations.

Some broad parameters can be found in considering economic impacts. For example, if a regulation leaves the property owner with no economically viable use of the property, and the value of the property is thus reduced essentially to zero (or even if the reduction in value is not complete, but is still drastic), it is likely a court will find there to be a taking, at least in the absence of an overwhelming and immediate public need.

Now let's add an important wrinkle. A finding of a taking is also likely if the property owner reasonably expected to develop his property in a particular way under the regulations in effect at the time of his acquisition of the property and made a substantial investment in the property based on those original expectations. Then, the imposition of a new reg-

ulation which frustrates those expectations may well constitute a taking.

But there are two important qualifications to the above. First, this does not mean that the property owner must be permitted to achieve the greatest value that could conceivably have been squeezed out of his property under the pre-existing regulations. Courts will consider only a property owner's *reasonable expectations* at the time. In the Penn Central Railroad's case, for instance, its reasonable expectations were of building and operating a railroad terminal, not of adding an office tower.

Second, courts will also take into account alternative economic advantages which the regulation may provide. Again, this was important in *Penn Central*. New York City's regulations provided for the air rights to be transferable for use on other properties in the area. In other words, the air rights still had economic value.

There is one more important aspect of the Supreme Court's economic analysis in the *Penn Central* case. The Court clearly indicated that the various development related rights associated with a parcel should be considered *as a whole* and not as separate strands.

The Railroad had argued that its air rights should be considered separately as the thing taken. This would have greatly strengthened its claim since (putting aside the transfer of development rights question) its air rights were arguably wiped out in their entirety. The Court disagreed, indicating that it is the overall package of permitted uses and the overall value of the whole property that should be considered.

3. The Character of the Government's Action

The third key takings consideration articulated in the *Penn Central* decision is the *character of the government's action*.

1 This concern was prominent in the Supreme Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (providing public access to a beach via an easement over residential property constituted a taking) where the Court stated, "we think a 'permanent physical occupation' has occurred ... where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed."

This involves a range of disparate, and not always clearly expressed, factors. For example, regulatory schemes that authorize physical incursions onto property are much more likely to constitute takings.¹ Another area courts are sensitive to is when regulation of private property serves to benefit the government acting in an entrepreneurial capacity, protecting its own "business" activities to the exclusion of private competition.

Finally, the courts sometimes appear to weigh the relative burden of a regulation on the private property owner compared to the public benefit. For example, one gets the sense that the U.S. Supreme Court in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (upholding the Tahoe Agency's imposition of a building moratorium during which a regional water quality plan was developed), felt that the 32 month hiatus in development was a small burden on people who had held their lots without development for an average of 25 years, especially given the strong public interest in preserving the unique natural beauty of Lake Tahoe.

SUMMING UP:

The principles set out some twenty-five years ago by the U.S. Supreme Court in its *Penn Central* decision remain (as Justice Stevens has observed) the "polestar" for legislators, planners, land use lawyers, and others on the issue of regulatory takings.² The question remains, and will likely long remain, how far is too far?" ♦

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2 Justice Stevens, speaking for the Court in the *Tahoe* decision. 535 U.S. 302. *Editor's Note:* For an excellent look at the background of the *Penn Central* case, see Jerold S. Kayden's "Celebrating *Penn Central*" in the June 2003 issue of *Planning* magazine.