Whose Property Is It? The Latest on Regulatory Takings

by R. Michael Joyce, Esq.

It is the core debate surrounding the entitlement of real estate development projects: who sets the limitation on development and how far can the limits go? Inherent in this controversy is the interest of state and local governments to exercise land use controls to promote essential public interests. Competing with this interest are the rights of landowners, who find themselves hurdling ever-rising regulatory barriers delaying, adding-to costs, or barring development altogether—in some cases, effectively "taking" their property. Fueling the controversy is the inexact rendering of the Constitution's Fifth Amendment which prohibits the appropriation of private property without just compensation. In the last 12 years the United States Supreme Court has, in the minds of many critics, actively pursued a policy geared toward restricting the government's right to regulate. However, permits remain in governmental hands. With the latest Supreme Court decision on regulatory takings, the controversy continues.

In *City of Monterey v. Del Monte Dunes* 526 U.S. __ , 119 S.Ct. 1624 (1999), the United States Supreme Court capped nearly 13 years of litigation involving a developer, a city, and a 37-acre oceanfront parcel. In the five years prior to filing the action, the developer had submitted 19 different site plans and received five different denials. Attached to each denial was the City of Monterey's demand for even greater restrictions on the proposed 190-unit housing development project, until the developer gave up and took it to court. A key question from the case was presented to a jury in the United States District Court for the Northern District of California: had the City's

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actions denied the developer the economically-viable use of the property, or did the City's decision to reject the development serve a legitimate public purpose?

The jury awarded the developer $1.45 million in damages and the City appealed to the United States Supreme Court which, in May of this year, upheld the award.

GOVERNMENTAL TAKINGS: THE CONSTITUTIONAL BACKGROUND

The framework of this issue is the Constitution's Fifth Amendment, which prohibits the taking of private property for public use without just compensation. This prohibition is made applicable to the states by way of the Fourteenth Amendment. Underlying the power of regulation is the inherent right of governmental bodies to exercise their "police power," that is, a liberal warrant to regulate private activity to protect the health, safety, and welfare of the public. The fundamental legal authority for state and local governments to regulate real property matters was articulated by Justice William O. Douglas in *Berman v. Parker*, 348 U.S. 26, 33 (1954):

> "The concept of the public welfare is broad and inclusive... the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

Adding to the interpretive nature of the argument is the opposing boundary. The limitation on government's right to regulate was articulated by Oliver Wendell Holmes in *Pennsylvania Coal v. McMahon*, 260 U.S. 393, 415 (1922):

> "The general rule... is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."

Until the late 1980s, the Supreme Court's rulings limited the application of the takings doctrine, in matters involving governmental regulation of property rights, to either physical invasions or regulations tantamount to the deprivation of practically all use and enjoyment of the property. *See*, Philip Weinberg, *Del Monte Dunes v. City of Monterey: Will the Supreme Court Stretch the Takings Clause Beyond the Breaking Point?*, 26 B.C. Envtl. Aff. L. Rev. 315 (1999). In 1887, the Supreme Court ruled that a law barring the manufacture or sale of alcoholic beverages was a valid exercise of the state's police power, even though it deprived the owner of the usage of his property, *Mugler v. Kansas*, 123 U.S. 623, 661-662 (1887). The Court held that the state statute which declared that brewing was an improper activity did not involve a taking, because the prohibited activity was the equivalent of a public nuisance. *Id.* at 673.

Later, the Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) upheld a zoning ordinance precluding development of anything other than single-family dwellings in a suburb of Cleveland, even though it deprived the owner of nearly three-quarters of the value of the parcel. Furthermore, in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), the Court found no taking when the City of New York denied a permit to build an office tower over New York City's Grand Central Terminal on the basis that the denial was a mere reduction in the value of the land and did not destroy the owner's "reasonable investment-backed expectations."

At the same time, the Supreme Court rulings did acknowledge a taking where a regulatory infringement either deprived the owner of any realistic use of the property or involved the physical invasion of the property. In *Pennsylvania Coal Co. v. McMahon*, 260 U.S. 393, 413 (1922), the Supreme Court overturned a statute designed to prevent mining by the owner of the subsurface rights, finding that the regulation "has very nearly the same effect for constitutional purposes as appropriating or destroying it." In another example, in *United States v. Causby*, 328 U.S. 256, 261 (1946), the Court found a taking where overflights of military aircraft reduced the value of a farm, in effect causing a physical invasion of the property. Likewise, in *Kaiser Aetna v. the United States*, 444 U.S. 164, 179-180 (1979), the Court found a taking when a permit issued by the United States Army Corps of Engineers, authorizing the dredging of the mouth of a privately-owned lagoon, required the public to be given access to the lagoon.

Despite these examples, prior to the late 1980s, it was very difficult to establish a regulatory taking unless the regulation was so pervasive as to prevent any realistic use of the property, or, even more extreme, the regulation constituted a physical invasion of the property. The basic standard to determine whether a regulatory taking has occurred was outlined in *Agins v. City of Tiburon*, 447 U.S. 255, (1979). This case held that a regulation amounts to

a taking if it does not substantially advance a legitimate state interest or it denies the owner the economically viable use of the land. *Id.* at 260.

LANDMARK CASES: SETTING PRECEDENCE

In the late 1980s, a number of Supreme Court cases began what many consider to be a dangerous erosion of governmental regulating powers.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), in an opinion written by Justice Antonin Scalia, the Court found a compensable taking when the California State Coastal Commission imposed, as a condition for a coastal permit, the obligation that the landowner dedicate public access along the beach in front of the property owner's home. The requirement was based on the objective of preserving the view to the ocean from the adjacent inland areas. The Court held that there was no essential "nexus" between lateral access to the beach and preserving views of the ocean from the highway behind the residence. *Id.* at 837.

In that same year, the Supreme Court's ruling in *First English Evangelical Lutheran Church vs. County of Los Angeles*, 482 U.S. 304, 318 (1987), further established a right to compensation for regulatory takings based upon the Fifth Amendment. In the aftermath of a flood which destroyed all of the buildings of a church-owned facility for retarded children, the County of Los Angeles adopted an interim ordinance prohibiting construction or reconstruction of any buildings in a designated flood protection area. The decision in this case overruled California precedent, holding that a property owner aggrieved by an invalid regulatory taking was only entitled to set aside the regulation. *Id.* at 312.

Later, in *Dolan v. City of Tigard*, 512 U.S. 374, (1994), the Court struck down a condition imposed upon an owner seeking the expansion of a plumbing supply store, which would have required the owner to dedicate approximately 10 percent of the parcel for flood drainage and a path for pedestrians and cyclists. The Court held that the required dedication was not "roughly proportionate" to the city's goal of avoiding construction in a flood plain and attempting to limit automobile traffic by encouraging the use of bicycling. *Id.* at 391.

In both *Nollan* and *Dolan*, the Court negated requirements that the landowner open its property to physical invasion by strangers as a condition of development approval.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court answered the question of whether a governmental authority could justify depriving the owner of all economic value of the owner's land by claiming the protection of public safety. The *Lucas* case involved a state statute which prohibited construction of permanent residences on South Carolina's beachfront areas, predicated on concerns of coastal erosion and flooding. The Court ruled that when a regulation effectively deprives the owner of all reasonable investment-backed expectations, the governmental entity is required to compensate the owner. *Id.* at 1034.

Critics of the Supreme Court's rulings in *Nollan*, *Dolan*, *Lucas*, and *First English*, all of which limited state and local governments' ability to implement land use controls, have variously characterized the decisions as an "assault" on the ability of government to exercise land use controls, or as part of a grander plan to require the government to pay compensation whenever its regulations impose a significant impingement upon a property right. *See*, Weinberg, *supra*, and Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of Progress So Far*, 25 B.C. Envtl. Aff. L. Rev. 315 (1998). These same critics charge that judicial activism drives the majority rulings of *Nollan*, *Dolan*, *Lucas*, and companion decisions. These critics interpret the outcomes as an extraordinary expansion of the takings clause of the Fifth Amendment to unnecessarily restrict the government's regulatory powers.

One of the chief fears of the *Nollan*-era critics is Justice Scalia's theoretical precept that the state's requirement to impose access rights by strangers over private property, as a condition of a development permit, violated an "essential stick" in the bundle of rights that are commonly characterized as property. In that case, it was the right to exclude strangers from one's property. This holding of property rights consisting of individual component parts appears troublesome to the Supreme Court's critics since it would, if expanded, allow landowners to assert that any one or more of the component parts have been taken as a result of governmental regulations.[1]

DEL MONTE DUNES: THE IMPLICATIONS

Del Monte Dunes is a mixed-bag result for those advocating that state and local governments be limited by only minimal restrictions on their regulatory power, as well as those who would urge the Supreme Court to require compensation for any

restriction on ownership or impediment to development rights as a result of government regulation.

On the one hand, the Court specifically denied applying the *Dolan* test of "rough proportionality" to an action challenging a local authority's denial of a development permit. Instead, the Court leaves the test of "rough proportionality" to apply only to cases involving the imposition of exactions or conditions. On the other hand, the Court found it proper to submit to a jury the largely fact-based *Agins* test of whether the developer had been denied all economically-viable use of its land, or whether the city's decision did not substantially advance a legitimate public purpose.

Whether the potential for jury verdicts in cases involving regulatory takings will chill state and local governments from imposing land use controls on private property is an open question. The likely answer to the question, however, is, "doubtful," especially when considering that the developer of the *Del Monte Dunes* project spent five years in governmental processing before it could even establish that its case was ready for a legal challenge, and then had to wait another 12 years for final determination. The stamina and financial resources required to mount such a campaign is staggering.

Critics allege that compensation should continue to be available only for regulations involving physical invasions or de facto takings. However, the fact remains that in light of the painful delays and the difficult tests that must be met to overturn a governmental action, a project proponent is nearly always hopelessly out-matched in a case involving a project denial or challenged exaction or condition. Project proponents are also well aware that when critics of the *Nollan* decision stress the need to preserve government's right to regulate, it is often the disguised effort to grant government the unrestricted regulatory power to prohibit development altogether.

Fear of the government's ongoing willingness or ability to regulate, based on *Nolan*-era decisions, are misplaced or exaggerated: federal, state, and local governments are continually expanding their regulatory powers. All levels of government now routinely use their regulatory power to impose enormous and often crippling "indirect" taxes on property owners and the public at large. For example, federal, state, and local governments have imposed billions of dollars of indirect taxes on the American economy by forcing landowners (under pain of financial ruin) to spend on environmental remediation projects without, in many cases, any connection between the cleanup and the health danger which is said to justify them. In another example, The Americans With Disabilities Act will cause billions to be spent (and paid for by the public) to comply with specific regulatory requirements and for risk avoidance with respect to the open-ended claim opportunities against property owners which are embedded in the Act.

Although safeguarding the environment and ensuring that disabled Americans be included in the workplace are worthy and essential goals, government has largely abandoned the "direct" approach of raising taxes, with specific appropriations for designated projects. Instead, it has adopted broad-based regulations that impose billions of additional indirect taxes on the public in order to achieve loosely-defined legislative agendas. These regulations and indirect taxes rarely receive the open-air debate of law-making and the essential accountability factors which our democratic process requires.

CONCLUSION

The victories for property owners in the *Nollan*-era—invalidating the forced dedication of an easement for public use; invalidating a prohibition of all development rights for property; adding a right of compensation for a regulatory taking to the previously-existing sole remedy of declaring the regulation invalid—were nothing but nicks in government's regulatory armor. The *Del Monte Dunes* decision, which confirms the right to have a jury determine the question of whether a regulation advances a legitimate governmental interest or deprives an owner of the economically viable use of its land will do little to limit governments' regulatory appetite, but will no doubt add to the ongoing debate.[REI]

NOTES

1. Critics here do appear to strike a bull's-eye in arguing that the Supreme Court's decisions in the *Nollan* era reflect a good deal of "judicial activism." Clearly, the Supreme Court handpicked a number of decisions in order to expand the regulatory takings doctrine and in doing so not only expanded existing precedent, but also overlooked a number of procedural defects in the plaintiffs' cases. Kendall & Lord, *supra*.