The DEATH of the SUBURBS

PART III

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THE TROUBLE WITH REGULATION

If you owned a piece of property and the government acquired it, you would of course be entitled to compensation. This is a concept that dates back at least to the time of the *Magna Carta* and is protected by the Fifth Amendment of the Bill of Rights which simply states "… nor shall private property be taken for public use, without just compensation."

For centuries, the takings clause and its antecedents were intended to require compensation when private property was physically acquired. But what happens when the value of land is "taken" by the effect of a law? Is compensation required? This is the problem of regulatory taking—when a regulation affects the value of property without actual, physical appropriation. It is upon this area of jurisprudence that modern regulatory and environmental law is founded and only recently has there been clear guidance from the Supreme Court.

The first great takings case was heard by the Supreme Court in 1922 and it wasn't until 2005 that the takings law was substantially clarified.

PENNSYLVANIA COAL

The granddaddy of all takings cases is Pennsylvania Coal v. Mahon (260 U.S. 393) decided by the Supreme Court in 1922. The Pennsylvania Coal Company owned extensive tracts of land in northeast Pennsylvania. It sold the surface rights but retained the rights to mine the subsurface coal. In July 1889, there was a mine collapse caused by "robbing the pillars." Subsequently, Pennsylvania enacted a law requiring the company to retain pillars of unmined coal to prevent surface subsidence. After the State adopted the regulation, *Pennsylvania Coal* argued that the inability to mine the pillars (only 2% of coal—a negligible amount) was a taking. Writing for the Court, Justice Holmes held the statute to be unconstitutional and wrote one of the most quoted of Supreme Court maxims:

"… (t)he 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."

But of course the question is: *How far is too far?*

EUCLID V. AMBLER REALTY

Shortly after *Pennsylvania Coal*, in 1926, the Supreme Court heard the first zoning case. Although three-quarters of the value of Ambler Realty's land in Euclid, OH was "taken" by zoning to low-density residential use, the Court upheld the concept of zoning as a permissible exercise of the Police Power and not an unconstitutional taking. In that case, the court found that the regulation had not gone too far.

"What happens when the value of land is "taken" by the effect of a law? Is compensation required?"

PENN CENTRAL

It was 50 years before the Supreme Court took up another takings challenge and it was a doozy. Penn Central owned the beautiful *Beaux Art* Grand Central Terminal and proposed building an enormous, 50-story tower in the *Bauhaus* style in the air space above.

The property had been designated a "landmark" by the New York City Landmarks Preservation Commission, which refused to approve plans for construction. Penn Central argued that denial of its plans constituted a taking. The Court held that denial of the right to use air space did not constitute a taking and further opined that the determination of a taking under the Fifth Amendment had to be made on a case-by-case basis with three prongs of consideration:

- The economic impact of the regulation
- The extent of regulatory interference with "distinct investment backed expectations"
- The character of the government action

The Court also held that the use of the existing station constituted a reasonable return on Penn Central's economic interests.

LORETTO

New York City passed a law requiring landlords to install cable TV facilities on the roof of their buildings as part of a citywide network to bring cable service to the entire city. The case wound its way to the Supreme Court where the City argued that the Court should apply a balancing test and that the harm to the landlord was *de minimis* in comparison to the community benefit, but the Court decided otherwise. It held that there was a per se rule requiring compensation whenever there is a permanent physical occupation of property without regard to the importance of the public benefit or how minor the harm to the owner.

LUCAS

In another case, David Lucas bought two lots on the Isles of Palms, a barrier island in South Carolina where he intended to build homes. At the time he purchased the lots, they were not subject to coastal zone building restrictions, but a law adopted after his purchase prohibited any permanent structures on his property. Lucas sued, claiming that the prohibition was a taking which deprived him of all economically viable use of his property. In an opinion authored by Justice Scalia, the Supreme Court reversed the lower court and adopted a new *per se* "categorical" takings rule holding that a taking occurs whenever a land use regulation deprives a land owner of all economically beneficial use.

NOLLAN AND DOLAN

The Nollans owned Pacific Coast beachfront property and wanted to demolish an existing bungalow to build a new, three-story home. In exchange for the permit, the California Coastal Commission demanded a lateral easement across the Nollan's property. The Coastal Commission argued that the easement was required to promote the legitimate state interest caused by the "blockage of the view of the ocean" resulting from the construction of the larger home. Writing for the Court, Justice Scalia said there was no rational nexus, that is, there was no linkage between the blockage of the view and the demand for the access easement and so struck down the requirement.

In a companion case, *Dolan v. City of Tigard* 512 U.S. 374, Mrs. Dolan wanted to double the size of her plumbing supply-store in the City of Tigard, OR. The City proposed a pedestrian/bicycle path to encourage alternatives to cars in the congested business district and required Mrs. Dolan to dedicate part of her property for public use.

To justify this exaction, the City argued that the path would relieve congestion on nearby streets. In addition to restating the essential nexus requirement, the Court adopted a "rough proportionality" test requiring that the permit requirement be roughly proportional to the impact generated.

LINGLE V. CHEVRON

In *Lingle v. Chevron* USA Inc. 544 U.S. 528 (2005) the Supreme Court clarified takings jurisprudence.

After Hawaii enacted a statute limiting the rent oil companies could charge their lessee/operators, Chevron sued. In her last opinion while on the Court, Justice O'Connor analyzed the state of the law and wrote that while the Supreme Court decisions were not unified, they did have a common touchstone.

"Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates property or ousts the owner from his domain."

So, where are we? Takings jurisprudence has finally gelled into a reasonably coherent form as a result of the *Lingle* case. In her opinion, Justice O'Connor identified four theories upon which a compensable finding of a regulatory taking can be based:

1. "Where government requires an owner to suffer a permanent physical invasion of their property" however minor, it must provide compensation—*Loretto*
2. Where government has completely deprived an owner of "all economically beneficial use" of his property, a taking has occurred, except to the extent that "background principles of nuisance and property law" independently restrict the owner's use of the property—*Lucas*
3. For regulatory takings, that take less than all, the three prongs of Penn Central must be considered—*Penn Central*, and
4. For exactions, a demand for land, money or improvements made as the condition of a permit, the permit condition must have a rational nexus and be roughly proportional to the impact of the proposal—*Nollan and Dolan*

Justice O'Connor's opinion in *Lingle* may become the one for which she is most famous, but even with that clarification, the Supreme Court has failed to answer the original question: when *exactly* has a regulation gone too far?

The answer seems to be that each case must be judged on its own individual merits according to the principles laid out by the Court.

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