Local Government Law Bulletin

NUMBER 29
JULY 1987

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Temporary Damages for a Regulatory "Taking"

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California

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The United States Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California* [No. 85-1199, 55 L.W. 4781 (June 9, 1987)] dropped a blockbuster on local governments, according to early newspaper accounts. But on reflection, it appears that the decision was little more than a squib.

The case (hereinafter referred to as "the *Church* case"), came to the Court in such a way as to present only one issue for its decision: When a local government adopts a police-power regulation that is held to be an unconstitutional "taking," must it pay a property owner compensation for the restrictions imposed on his property during the period between adoption of the regulation and the judicial decision finally invalidating that regulation? The court said "Yes" in an opinion written by Chief Justice Rehnquist with Justices Brennan, Marshall, Powell, Scalia, and White concurring. (Justice Stevens filed a dissenting opinion, in which Justices Blackmun and O'Connor concurred in part.) The court did *not* decide whether the ordinance involved in this case was an unconstitutional taking of the subject property, saying:

> We reject appellee's suggestion that . . . we must . . . resolve the takings claim on the merits before we can reach the remedial question. However "cryptic" . . . the allegations with respect to the taking were, the California courts deemed them sufficient to present the issue. We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property . . . or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887). These questions, of course, remain open for decision on the remand we direct today.

Since the ordinance involved was a flood-plain regulation that prevented rebuilding on a tract where a major flood had recently washed away five buildings and other facilities on the plaintiff's campground, it appears unlikely that the California courts will in fact find it unconstitutional.

Regardless, it seems clear that the Supreme Court did not intend to expand the range of cases in which a "taking" is found. On 12 occasions in its opinion (including the quotation above) the majority refers to ordinances depriving the owner of "all use" of his

property; this will be very difficult to prove in the average case involving land-use regulations. And even when "all use" is precluded, the Court recognizes (again in the quotation above) that for standard police-power reasons (furtherance of public health, safety, and general welfare) regulations may be constitutional.[1]

The Court made clear that it was not requiring that the government fully acquire the regulated property:

> We do not, as the Solicitor General suggests, "permit a court, at the behest of a private person, to require the . . . Government to exercise the power of eminent domain . . . ." We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

The Court further noted: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, change in zoning ordinances, variances, and the like which are not before us."

The Court did not deal with the mechanics of determining the compensation to be awarded for a temporary taking, except insofar as its justification for the basic decision relied almost totally on cases dealing with short-term physical takings of property, but it quoted *United States v. Causby*, 328 U.S. 256, 261 (1946), to the effect that "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." It also noted holdings in *Danforth v. United States*, 308 U.S. 271 (1939), and *Agins v. Tiburon*, 447 U.S. 255 (1980), which denied compensation, and said, "[T]hese cases merely stand for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and depreciation in value of property by reason of *preliminary activity* is not chargeable to the government." (Emphasis supplied.)

Justice Stevens's dissenting opinion was longer than the majority's.

"One thing is certain," he said. "The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive. But the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process."

Justice Stevens focused on four points. First, since the church sought only compensation (and did not request invalidation of the ordinance), the superior court granted a motion to strike provisions in the complaint setting forth the basic facts concerning the ordinance requirements without first deciding whether the facts alleged a "taking," and the higher California courts assumed that there had been such an allegation. On this record, the Supreme Court should simply have noted that the complaint did not allege a taking under the federal Constitution and dismissed the appeal.

Second, he claimed that all ordinances that would constitute takings if allowed to remain in effect permanently would not necessarily constitute takings if effective only temporarily, and this ordinance should have been examined on that basis.

Third, he charged that the Court incorrectly assumed that the California Supreme Court had already decided against monetary relief for a temporary taking and then used that conclusion to reverse a judgment that was otherwise correct under the Court's own theories.

And fourth, he said that the Court erred in concluding that the Takings Clause rather than the Due Process Clause was the primary constraint on use of unfair and dilatory procedures in the land-use area.

But Justice Stevens was on the losing side.

Background of the Decision

This case represents another step in what appears to be a coordinated drive by various organizations of real estate developers to secure restraints on state and local land-use regulations. Possibly sparked by the great increase in such regulations which has resulted from the environmental movement, the historic preservation movement, and the community appearance movement, the real estate industry has made determined efforts to relieve such pressures through expansion of the "vested rights" doctrine (see, e.g., G.S. 160A-385, 153A-344), requirements of compensation for regulation (see the federal billboard laws and G.S. 136-131.1, plus this case), and requirements of compensation when restrictions are tightened (see HB 1283 in the current session of the North Carolina General Assembly).

The best introduction to the legal issues posed in the *Church* case is Bosselman, Callies, and Banta, *The*

1. As an indication of just how difficult it may be to establish an unconstitutional taking, a quick review of the some 200 North Carolina appellate decisions in zoning cases turned up only one case—Helms v. Charlotte, 255 N.C. 647 (1961)—in which our courts have found a "taking." And even in that case, the "taking" applied only to *one property* in the city. In the only North Carolina appellate decision dealing with flood-plain regulation (the type of ordinance involved in the *Church* decision), the court upheld the constitutionality of the ordinance against a variety of "taking" claims, Responsible Citizens v. City of Asheville, 308 N.C. 255 (1983).

Taking Issue: An Analysis of the Constitutional Limits of Land Use Control (Washington: G.P.O., 1973). This work, prepared for the Council on Environmental Quality, Executive Office of the President, probes deep into history—extending back to the *Magna Carta*—in its exploration of the requirements of compensation for a taking. For those with less interest in the subject, a good introduction is furnished by Arvo Van Alstyne, "Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria," 44 *S. Cal. L. Rev.* 1 (1970).

During our early history it was felt that the Fifth Amendment's requirements of "due process" as a test of the validity of regulations and "just compensation" when property was taken were separate and distinct, and these requirements were thought to remain distinct components of the "due process" required of states by the Fourteenth Amendment. Justice Holmes's statement in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), that "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" is generally regarded as the first suggestion that an overly-restrictive regulation might lead to a requirement of just compensation. (It should be noted that Justice Brandeis, who generally operated in tandem with Justice Holmes, wrote a vigorous dissenting opinion in that case.) This was the inspiration for the more recent efforts to put more meat on these bare bones.

The more immediate predecessor of the *Church* decision was Justice Brennan's strong dissenting opinion in *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981), in which Justice Brennan was joined by Justices Marshall, Powell, and Stewart (also, Justice Rehnquist's concurring opinion stated, "I would have little difficulty in agreeing with much of what was said in the dissenting opinion by Justice Brennan"). Brennan said:

> In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation. This interpretation, I believe, is supported by the express words and purpose of the Just Compensation Clause as well as by cases of this Court construing it.

Those interests who had successfully sought such a ruling in *Agins v. Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), were emboldened by this dissent to seek another opportunity. First they made a serious effort in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and again in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. _____ (1986), only to be repulsed in each case by the Court's finding that the record was not ripe for decision on this point. Now, in yet another try, they have succeeded.

What have the opponents of land-use regulations achieved with this ruling? For at least the past decade it has been recognized that Section 1983 of the United States Code, Title 42, Chapter 21, affords persons the right to sue for damages, in either federal or state courts, both governmental units and officials who, under color of law, deprive them of "any rights, privileges, or immunities secured by the Constitution and laws." Furthermore, they can recover attorneys' fees. And in recent years practically every suit alleging unconstitutionality of local land use regulations and practices has been brought under this rubric. Thus the damages afforded under the *Church* decision are no "big deal."

The only beneficial impact of the *Church* decision will be felt if Congress should amend Section 1893 in a manner adverse to land-use litigants. In the absence of such amendment, the decision adds essentially nothing of value to the weapons of those litigants—except the publicity accorded the Supreme Court decision, which could frighten a few governing boards out of adopting novel regulations. That may be enough to constitute a "squib."

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