Public Law for Public Lawyers

Case law Update: Kirby v. NCDOT

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I. Overview of Regulatory Takings Case Law

A. U. S. Cases

The concept that there can be a regulatory taking—that a land use regulation can be so restrictive as to constitute a taking of private property—was first set forth in 1922 in *Pennsylvania Coal v. Mahon*.[1] The often-quoted conclusion of Justice Holmes in this case was, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[2]

Even modest physical invasions of property require compensation, as the right to exclude others from property is an essential attribute of property. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[3] the Court held that a regulation requiring an apartment building owner to allow cable television cables to be placed on the roof was a taking, and in *Kaiser Aetna v. United States*,[4] a requirement that members of the public be allowed access to and use of an upland pond proposed to be connected to navigable waters was held to be a taking.

Regulations that eliminate all economically beneficial uses of a property are also a taking. In *Lucas v. South Carolina Coastal Council*,[5] the Supreme Court held that in those rare instances

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1. 260 U.S. 393 (1922). *See also* Dellinger v. City of Charlotte, 114 N.C. App. 146, 441 S.E.2d 626 (1994), *review granted*, 336 N.C. 603, 447 S.E.2d 388, *dismissed, review improvidently granted*, 340 N.C. 105, 455 S.E.2d 159 (1995). The Court has long ruled that land use regulations preventing noxious land uses and uses that are nuisances or threats to public health and safety are not takings, even if property values are substantially reduced. Goldblatt v. Hempstead, 369 U.S. 590 (1962) (restricting quarry excavation even though preexisting mine was thereby rendered useless); Miller v. Schoene, 276 U.S. 272 (1928) (requiring destruction of diseased ornamental trees to protect apple orchards on other property); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (limiting property to residential uses even though a 75 percent reduction in property value resulted); Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919) (requiring removal of preexisting oil storage tanks near residences even though it rendered existing business impractical); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (requiring preexisting use mining clay and manufacturing bricks to be closed even though property value was reduced by more than 90 percent); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (requiring preexisting livery stable to be closed when city expanded around it); Murphy v. California, 225 U.S. 623 (1912) (outlawing use of property for billiard hall); Mugler v. Kansas, 123 U.S. 623 (1887) (outlawing use of preexisting brewery equipment lawfully in use before prohibition).

2 . *Mahon*, 260 U.S. at 415.

3 . 458 U.S. 419 (1982).

4. 444 U.S. 164 (1979). Total removal of a core property right, such as the right of descent, can also be a taking. Hodel v. Irving, 481 U.S. 704 (1987).

5. 505 U.S. 1003 (1992. In cases where the regulation leaves even a modest residual value in the land, courts have generally declined to apply the *Lucas* categorical taking rule. *See, e.g.*, Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003) (wetland regulation that reduced value by 98.8 percent not a categorical taking).

where property is rendered worthless by a regulation, a taking has occurred regardless of the fact that a legitimate governmental objective led to the regulation. The Court held that there are only limited exceptions to this rule in "total takings" situations. If the regulation prevents a use that would otherwise be forbidden under the state's background common law principles of nuisance and property law, there is no taking.[6]

However, determining just when a taking has occurred absent the extraordinary situations of a physical invasion or a total deprivation of value has proven elusive. The courts must examine each challenged regulation on a case-by-case basis to consider the character of the governmental action and the economic impact on the landowner.[7] Justice Brennan summarized the Court's analytic framework in these situations in *Penn Central Transportation Co. v. New York City*:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."[8]

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.[9]

When conducting a taking analysis, the property as a whole, not just the regulated portion or the time period of the regulation, must be considered by the court.[10]

B. North Carolina Cases

The court in 1938 examined a Greensboro setback ordinance involving the height of

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6. *See, e.g.*, Stevens v. City of Cannon Beach, 317 Or. 131, 854 P.2d 449 (1993) (upholding denial of permit for seawall, noting state law on customary use of ocean beaches is part of background principles of state property law).

7. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. 104 (1978).

8 438 U.S. 104, 123-24.

9. 438 U.S. 104, 123–24 (citations omitted). See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), for discussion of what constitutes a reasonable investment-backed expectation.

10. Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993).

walls allowed on property lines. In *In re Parker*,[11] the court found no taking, though the individual project involved might cause no harm and the operation of the ordinance might seriously depreciate the property's value. The court noted that an individual's right to use of his or her property was subordinate to the general welfare and "incidental damage to property resulting from governmental activities or laws passed in the promotion of the public welfare is not considered a taking of the property for which compensation must be made."[12]

A decade later the court elaborated on this point in a challenge to a Charlotte zoning requirement prohibiting a restaurant in a residential zoning district. Justice Sam Ervin wrote that "[i]f the police power is properly exercised in the zoning of a municipality, a resultant pecuniary loss to a property owner is a misfortune which he must suffer as a member of society."[13]

Helms v. City of Charlotte[14] involved two very small lots along a creek that had been rezoned from an industrial district to an exclusively residential district. The court held that reduction in value alone did not constitute a taking: "The mere fact that a zoning ordinance seriously depreciates the value of the complainant's property is not enough, standing alone, to establish its invalidity."[15] The court also held, however, that to avoid a taking claim, the ordinance must not preclude all practical use of the land, thereby rendering the property "valueless." In this instance the court was clearly concerned that the city was not allowing the business or commercial use of the lots for which they were suited but had limited use to a residence; there was no evidence on the record that a small "shotgun" residence on this particular site could be sold for more than its construction cost. The court remanded the case for findings on whether the ordinance left any reasonable and practical use of the lot.

The court upheld Asheville's floodplain zoning ordinance in *Responsible Citizens v. City of Asheville.*[16] The test articulated there for a taking analysis was (1) whether the ends sought to be achieved were within the police power and (2) whether the means by which they were obtained were reasonable. Protecting public safety was held to be a permissible objective, and preventing floodway obstructions and requiring flood-proofing were held to be reasonable means of accomplishing this.

In *Finch v. City of Durham*,[17] the court examined the taking issue in the context of reviewing a "down zoning" and reaffirmed the basic test for a taking: there is no taking unless the owner is deprived of practical use of the property and the property is rendered of no reasonable value. Deprivation of previously held development rights and diminution of value do not in and of themselves constitute a taking. The court found that the ordinance had a reasonable nexus to the legitimate public objective of maintaining the integrity of the adjacent single-family residential neighborhood, that alternative rezonings such as clustered residential had been proposed by the city but not pursued by the owner, and that the property in any event retained practical use and

11. 214 N.C. 51, 197 S.E. 706, *appeal dismissed sub nom.* Parker v. City of Greensboro, 305 U.S. 568 (1938).

12. In re Parker, 214 N.C. at 57, 197 S.E. at 710.

13. Kinney v. Sutton, 230 N.C. 404, 411–12, 53 S.E.2d 306, 311 (1949).

14. 255 N.C. 647, 122 S.E.2d 817 (1961).

15. *Id.* at 651, 122 S.E.2d at 820.

16. 308 N.C. 255, 302 S.E.2d 204 (1983).

17. 325 N.C. 352, 384 S.E.2d 8 (1989).

reasonable value.

Cases challenging the application of other land use regulations have produced similar results in the court of appeals. In *Weeks v. North Carolina Department of Natural Resources & Community Development*,[18] the court held that a limitation of permissible pier length does not deprive a riparian owner of all reasonable use of property and is thus not a taking. *King v. State*[19] involved the denial of state permits to the plaintiff, who wanted to place fill in wetlands in order to build a road and subdivide an 8-acre peninsula in Topsail Sound. The court held that the denial was not a taking because the state had established that practical development alternatives existed.[20] Likewise, in *Guilford County Department of Emergency Services v. Seaboard Chemical Corp.*,[21] the court held that denial of a special use permit for a hazardous waste facility in a watershed area was not a taking because many other uses of the site were permissible. In *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*,[22] the court rejected a takings challenge to state regulations prohibiting permanent oceanfront erosion control structures, holding there was no property right to construct such structures. Further, the court noted that in any event the plaintiff was aware of this regulatory limitation prior to acquiring title or constructing the threatened hotel and condominium structure, and this prior knowledge foreclosed a taking or inverse condemnation claim.[23]

II. The Official Map Act

In 1987 the General Assembly adopted the Roadway Corridor Official Map Act (later renamed the Transportation Corridor Official Map Act) (sections attached below as Appendix).

The law, codified at G.S. 136-44.50 to 136-44.54, allows transportation corridors to be identified by those entities responsible for public road and transportation improvements – cities, NCDOT, regional transportation authorities, the NC Turnpike Authority, and the Wilmington MPO for two projects. The law requires duly noticed public hearings and formal adoption of the maps, with adopted maps filed with the applicable county register of deeds.

Filing an official map with the register of deeds had several key impacts. Work must begin on environmental impact statements or preliminary engineering within one year of adoption of the maps. G.S. 136-44.50(d). More importantly for this case, once filed the law prohibits approval of building permits or new subdivisions within the corridor. G.S. 136-44.51(a). This provision was in many respects the focus of the *Kirby* case. However, the next subsection of the law provides that no application for a building permit or plat approval may be delayed more than three years. G.S. 136-44.51(b). The law also allows for variances to be

18. 97 N.C. App. 215, 224–26, 388 S.E.2d 228, 233–35, *review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990).

19. 125 N.C. App. 379, 481 S.E.2d 330, *review denied*, 346 N.C. 280, 487 S.E.2d 548 (1997).

20. The court concluded that the *Lucas* test for a taking—a deprivation of all economically beneficial or productive use of the property—was similar to the *Finch* standard of determining whether the property was left with a practical use and a reasonable value. *King*, 125 N.C. App. at 386, 481 S.E.2d at 334.

21. 114 N.C. App. 1, 441 S.E.2d 177, *review denied*, 336 N.C. 604, 447 S.E.2d 390 (1994).

22. 134 N.C. App. 217, 517 S.E.2d 406 (1999).

23. The court cited the holding in *Lucas* that there is no taking if a logical antecedent inquiry into the nature of the owner's estate would reveal that the proscribed uses were not part of his title to begin with. *Lucas*, 505 U.S. 1003, 1027 (1992).

granted if no reasonable return can be made from the land (G.S. 136-44.52) and allows land owners to petition for initiation of acquisition if the limits on development impose an undue hardship (G.S. 136-44.53).

III. The *Kirby* Decision

Landowners affected by a 1997 official map designation for a proposed thirty-four mile long loop road around northern Winston-Salem sued the state, alleging the act made their property unmarketable and was an unconstitutional taking of their property. In 2015 the state Court of Appeals ruled the law gives NCDOT the right to establish what is essentially an easement restricting the use of property as a precursor to acquisition and is thus an exercise of eminent domain that requires just compensation. In June 2016 the state Supreme Court agreed that filing a corridor protection map under the official map act is an exercise of the power of eminent domain rather than an exercise of the police power, thus necessitating compensation. *Kirby v. N.C. Dept. of Transportation*, ___ N.C. ___, 786 S.E.2d 919 (2016).

The court emphasized that property "clearly includes the rights to improve, develop, and subdivide, which were severely and indefinitely restricted" by the Official Map Act. 786 S.E.2d at ___. The court noted that police power regulations must have an appropriate connection to protection of life, health, and property, while the eminent domain power takes property because that action is advantageous or beneficial to the public. Here the Map Act is directly tied to condemnation of land for transportation projects. The principal public benefit is reduction in acquisition costs rather than prevention of injury under the police power. Thus the court held the filing of an official map is an act of eminent domain rather than a legitimate police power regulation. The court remanded the matter for a determination of damages, to be measured by the diminution in fair market value of the land as a whole immediately before and after the taking.

The General Assembly in 2016 responded by suspending the official map act program. S.L. 2016-90 (H. 959) amends G.S. 136-44.50 to place a one year moratorium (until July 1, 2017) on the adoption of any new corridor official maps and to rescind all previously adopted maps. This law also amends the interest that must be paid between the condemnation and entry of judgment on these cases from 8% to the prime lending rate. This law also directs NCDOT to study the development of a new process that equitably balances the governmental interest in protecting transportation corridors from development and the property rights of landowners. A final report of the study, with findings and recommendations, is to be presented to the legislature by July 1, 2017.

APPENDIX

§ 136-44.51. Effect of transportation corridor official map.

(a) After a transportation corridor official map is filed with the register of deeds, no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor. The Secretary of Transportation or his designee, the director of the Wilmington Urban Area Metropolitan Planning Organization, the director of a regional public transportation authority, or the director of a regional transportation authority, as appropriate, shall be notified within 10 days of all submittals for corridor map determination, as provided in subsections (b) and (c) of this section.

(b) In any event, no application for building permit issuance or subdivision plat approval for a tract subject to a valid transportation corridor official map shall be delayed by the provisions of this section for more than three years from the date of its original submittal to the appropriate local jurisdiction. A submittal to the local jurisdiction for corridor map determination shall require only the name of the property owner, the street address of the property parcel, the parcel number or tax identification number, a vicinity map showing the location of the parcel with respect to nearby roads and other landmarks, a sketch of the parcel showing all existing and proposed structures or other uses of the property, and a description of the proposed improvements. If the impact of an adopted corridor on a property submittal for corridor map determination is still being reviewed after the three-year period established pursuant to this subsection, the entity that adopted the transportation corridor official map affecting the issuance of building permits or subdivision plat approval shall issue approval for an otherwise eligible request or initiate acquisition proceedings on the affected properties. If the entity that adopted the transportation corridor official map has not initiated acquisition proceedings or issued approval within the time limit established pursuant to this subsection, an applicant within the corridor may treat the real property as unencumbered and free of any restriction on sale, transfer, or use established by this Article.

(c) No submittal to a local jurisdiction for corridor map determination shall be construed to be an application for building permit issuance or subdivision plat approval. The provisions of this section shall not apply to valid building permits issued prior to August 7, 1987, or to building permits for buildings and structures which existed prior to the filing of the transportation corridor, provided the size of the building or structure is not increased and the type of building code occupancy as set forth in the North Carolina Building Code is not changed.

§ 136-44.52. Variance from transportation corridor official map.

(a) The Department of Transportation, the regional public transportation authority, the regional transportation authority, the local government, or other entity listed in subsection (a) of G.S. 136-44.50 that initiated the transportation corridor official map shall establish procedures for considering petitions for variance from the requirements of G.S. 136-44.51.

(b) The procedure established by the State shall provide for written notice to the Mayor and Chairman of the Board of County Commissioners of any affected city or county, and for the hearing to be held in the county where the affected property is located.

(c) Local governments may provide for petitions for variances to be heard by the board of adjustment or other boards or commissions which can hear variances authorized by G.S. 160A-388. The procedures for boards of adjustment shall be followed except that no vote greater than a majority shall be required to grant a variance.

(c1) The procedure established by a regional public transportation authority or a regional transportation authority pursuant to subsection (a) of this section shall provide for a hearing de novo by the Department of Transportation for any petition for variance which is denied by the regional public transportation authority or the regional transportation authority. All hearings held by the Department of Transportation under this subsection shall be conducted in accordance with procedures established by the Department of Transportation pursuant to subsection (a) of this section.

(d) A variance may be granted upon a showing that:

(1) Even with the tax benefits authorized by this Article, no reasonable return may be earned from the land; and

(2) The requirements of G.S. 136-44.51 result in practical difficulties or unnecessary hardships.

§ 136-44.53. Advance acquisition of right-of-way within the transportation corridor.

(a) After a transportation corridor official map is filed with the register of deeds, a property owner has the right of petition to the filer of the map for acquisition of the property due to an imposed hardship. The Department of Transportation, the regional public transportation authority, the regional transportation authority, the Wilmington Urban Area Metropolitan Planning Organization, or the local government that initiated the transportation corridor official map may make advanced acquisition of specific parcels of property when that acquisition is determined by the respective governing board to be in the best public interest to protect the transportation corridor from development or when the transportation corridor official map creates an undue hardship on the affected property owner. The procedure established by a regional public transportation authority, a regional transportation authority, or the Wilmington Urban Area Metropolitan Planning Organization pursuant to subsection (b) of this section shall provide for a hearing de novo by the Department of Transportation for any request for advance acquisition due to hardship that is denied by an authority. All hearings held by the Department under this subsection shall be conducted in accordance with procedures established by the Department pursuant to subsection (b) of this section. Any decision of the Department pursuant to this subsection shall be final and binding. Any property determined eligible for hardship acquisition shall be acquired within three years of the finding or the restrictions of the map shall be removed from the property.

(b) Prior to making any advanced acquisition of right-of-way under the authority of this Article, the Board of Transportation or the respective governing board which initiated the transportation corridor official map shall develop and adopt appropriate policies and procedures to govern the advanced acquisition of right-of-way and to assure that the advanced acquisition is in the best overall public interest.

(c) When a local government makes an advanced right-of-way acquisition of property within a transportation corridor official map for a street or highway that has been determined to be a State responsibility pursuant to the provisions of G.S. 136-66.2, the Department of Transportation shall reimburse the local government for the cost of any advanced right-of-way acquisition at the time the street or highway is constructed. The Department of Transportation shall have no responsibility to reimburse a municipality for any advanced right-of-way acquisition for a street or highway that has not been designated a State responsibility pursuant to the provisions of G.S. 136-66.2 prior to the initiation of the advanced acquisition by the city. The local government shall obtain the concurrence of the Department of Transportation in all instances of advanced acquisition.

(d) In exercising the authority granted by this section, a local government is authorized to expend its funds for the protection of rights-of-way shown on a duly adopted transportation corridor official map whether the right-of-way to be acquired is located inside or outside the municipal corporate limits.