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THE UNITED STATES SUPREME COURT

AND

THE TAKING ISSUE

FOR: The Association of State Floodplain Managers

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and

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INTRODUCTION

This paper is a follow-up to an article jointly authored by Jon Kusler, Esq. and Edward A. Thomas, Esq., which appeared in the Natural Hazards Observer (Vol. XII, No. 1, Sept. 1987). The State Association of Floodplain Management requested that co-author Thomas supply footnotes suitable for use by attorneys confronted by real life dilemmas springing from recent U.S. Supreme Court rulings on governmental taking of private property in violation of the Fifth Amendment to the U.S. Constitution. The paper, including footnotes, should serve as a good source for further legal research, but is of course not designed to be a comprehensive legal analysis of the subject.

This term the U.S. Supreme Court decided three cases in which land use regulations were alleged to be a taking of property.[1] Two of these dealt with hazard-related regulations.[2] In all three landowners argued that the regulations violated that portion of the Fifth Amendment to the U.S. Constitution which provides "private property (shall not) be taken for public use without just compensation:"[3] Of these three cases, the most significant to hazard-related regulations, Keystone Bituminous Coal Association v. DeBenedictis (Keystone) was generally ignored by the press.[4] Two other cases Nollan v. California Coastal Commission, (Nollan) and First Evangelical Lutheran Church of Glendale v. Los Angeles (Lutherglen) were widely and erroneously reported as significantly curtailing the ability of state and local governments to regulate land uses.[5]

1. Keystone Bituminous Coal Ass'n v. De Benedictis, _____U.S_____, 107 S.Ct. 1232 (1987) (hereinafter referred to as Keystone Coal) First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Ca. ____U.S.____, 107 S.Ct. 2378 (1987) (hereinafter referred to as Lutherglen); Nollan v. California Coastal Commission, ____U.S., 107 S.Ct 3141 (1987) (hereinafter referred to as Nollan).

2. Keystone Coal, and Lutherglen.

3. See, Keystone Coal, 107 S.Ct. at 1236; Lutherglen, 107 S.Ct. at 2382; and Nollan, 107 S.Ct. at 3144.

4. The author was unable to uncover a single reference to the case in the popular press. No doubt there was some mention of the case and the author would appreciate being informed of such citations.

5. See, e.g., The Washington Post, June 10, 1987 at p. A1, The Boston Globe, June 25, 1987 p. 63.

What did the cases hold? What did they change? What actions should hazard managers take in light of the decisions?

KEYSTONE COAL -- FACTS AND HOLDING

Beginning in 1966 Pennsylvania adopted legislation which prohibited the mining of coal which would cause subsidence of residences, public buildings, or cemeteries. The articulated reason for this regulation was to protect the health, safety, and general welfare of the public.[6] The U.S. Supreme Court held that the value of the coal companies' property was not so substantially reduced as to become an unconstitutional taking despite the impact of the regulation in preventing the removal of some 27 million tons of coal constituting 50% of the available coal in some circumstances.[7] The court cited a long line of Supreme Court decisions over the last seventy years upholding highly restrictive regulations where issues of public health or safety or prevention of nuisances were involved.[8]

Significance

This case validated state regulations almost identical to those overturned by the Court in the 1922 Supreme Court decision, Pennsylvania Coal v.

6. 107 S.Ct. at 1237, 1238.

7. id, at 1249.

8. id, at 1244 (citing Mugler v. Kansas,) 123 U.S. 623 (1887); Plymouth Coal Co. v Pennsylvania, 232 U.S. 531; Hadacheck v. Los Angeles, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); and Powell v. Pennsylvania, 127 U.S. 678 (1888).

Mahon,[9] a case which has heretofore been viewed as one of the classic text-book statements defining the outer limits of government power to regulate land.[10] In Keystone, the Court emphasized the fact that while the state regulations might be similar to those overturned in Pennsylvania Coal, the purpose for which the new rules were adopted was to serve a community-wide need unlike the previous rules which were designed to benefit individuals.[11] The holding in Keystone strongly endorses regulations which substantially reduce a landowner's property values where the regulations serve important health and safety or prevention of nuisance goals.[12] Although this case dealt with regulations addressing a relatively uncommon hazard--subsidence, the rationale of the Court applies equally to earthquake, flood, mudslide, landslide and other types of hazard-reduction regulations.[13]

LUTHERGLEN -- FACTS AND HOLDING

In 1978 a catastrophic flood in Los Angeles destroyed Lutherglen, an outdoor recreation camp for handicapped children, owned by the First English

9. 260 U.S. 393, 43 S.Ct. 158 (1922).

10. See, e.g., A.J. Casner and W. Leach, Cases and Text on Property, (1984) at 1115; O. Browder, Jr, R. Cunningham, and A. Smith, Basic Property Law, (1984) p. 1074.

11. 107 S.Ct. at 1242.

12. This statement, while only the author's professional opinion is bolstered by a review of the cases cited in Footnote 8. supra.

13. "(P)rohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any sense, be deemed a taking... of property...." 107 S.Ct. 1244 quoting from Muglar v. Kansas, 123 U.S. at 657 (1887).

Evangelical Lutheran Church.[14] Shortly thereafter LA County adopted interim floodplain regulations prohibiting reconstruction and new construction in the floodplain.[15] Twelve of Lutherglen's twenty-one acres were affected by the ordinance. The twelve affected acres contained the area in which all the camp's buildings had been located.[16] First Lutheran Church sued LA County on several theories including a request for money damages for an unconstitutional taking of property.[17] The single issue reviewed by the U.S. Supreme Court was whether the California Courts had acted properly in summarily dismissing, without trial, that portion of the Church's complaint which requested money damages for the period during which a taking might have occurred.[19]

Lutherglen never went to trial on the facts, and the California Courts decided neither the validity of the interim moratorium on construction in the area, nor the validity of a permanent ordinance permitting greater land use later adopted by LA County.[20]

14. 107 S.Ct. at 2381.

15. id, at 2381, 2382.

16. id, at 2381.

17. id, S.Ct. at 2382.

18. id, at 2383.

19. id, at 2384, 2385, citing Agins v. Tiburon, 447 U.S. 255 (1980).

20. id, at 2382, 2383, 2384, 2385.

The U.S. Supreme Court held that First Lutheran Church was entitled to have their day in court to litigate their suit for dollar damages if they could indeed show that they had been "deprived of all use of their property."[21]

Significance

This case was of great interest to legal scholars who have long been fighting in Law Review Articles about the propriety of the California rule that a plaintiff in a taking case could not seek dollar damages.[22] The value of the case to a state or local official who is attempting to properly and safely regulate land is less clear.[23] The case in no way discusses whether the ordinance in question was a taking. As noted by Chief Justice Rehnquist in the majority decision:

> "(W)e have accordingly 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 a safety regulation."[24]

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21. id, at 2389.

22. See, e.g., Williams, Smith, Siemon, Mandelken, and Babcock "The White River Junction Manifesto" 9 Vt. L.R. 193 (1984); Berger and Kanner "Thoughts on the White River Junction Manifesto: A Reply to the Gang of Five's" Views on Just Compensation for Regulators Taking of Property," 19 Loyola L.A. 685 (1986).

23. Technically this case is without value as a precedent in states such as New Hampshire which have rejected the California line of cases which held that the sole remedy for a landowner aggrieved for invalidation of that regulation. See, Burrows v. City of Keene, 121 N.H. 590 (1981).

24. 107 S.Ct. at 2384-2385.

Although it is important, the case is not a landmark decision "for which the developers have been waiting".[25] It is a highly technical case addressing a single, narrow issue - available remedies for a taking. It is also a highly complicated case which raises more questions than it answers. The confusing nature of the decision and the many unanswered questions detract substantially from its precedent value. However, because of widespread misunderstanding about the case, it seems destined to produce a considerable amount of confusion and litigation.[26]

THE NOLLAN CASE -- FACTS AND HOLDING

The Nollans requested permission from the California Coastal Commission in 1982 to replace a small bungalow on their oceanfront property with a much larger house. The Coastal Commission approved the permit subject to the condition that the Nollans grant an easement to the public to pass laterally across their beach.[27] The Commission's rationale for requiring such easements was essentially that the expansion of the Nollan's house would block the public view of the beach from the street,

25. At least it is not in the author's opinion. Some developers and attorneys think otherwise. See, e.g. "Dartmouth Blocks Road Near Brook - Developer's Lawyer Says He'll Sue to Get Approval" New Bedford Standard Times, June 16, 1987; and W. Fulton, "A New Era for Private Property Rights", California Lawyer, November, 1987, p. 26.

26. "One thing is certain. The court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive." Lutherglen, 107 S.Ct. at 2389-2390 (1987) (Stevens, J., dissenting).

27. Nollan, 107 S.Ct. at 3143.

thus creating a psychological barrier to the public's use of the beach, and because the expansion of the Nollan's property along with other development in the area would increase private use of the beach thus burdening the public ability to walk along the shore.[28]

The Supreme Court indicated that the outright taking of an uncompensated easement would be an unconsitutional taking of property in this context. However, the Court stated that conditioning a building permit on the granting of such an easement would be permissible provided the government regulation passed a two-part test: 1) the regulation must advance a substantial government interest, and 2) not deny the owner economically viable use of his land.[29] In the Nollan case, the Court indicated that the requirement conditioning the Nollan building permit on their grant of an easement along the beach essentially advanced none of the purposes articulated for the requirement. The Court states "(I)t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollan's property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers the 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them...."[30]

28. id, at 3143-3144

29. id, at 3146

30. id, at 3149

In summary, the Court stated: "unless the permit condition serves the same government purpose as the development ban the building restriction is not a valid regulation of land but 'an out-and-out plan of extortion.'"[31]

The Court specifically noted that it would have been constitutionally permissible to condition the development permit on height restrictions, width restrictions, a ban on fences, or even the requirement that the Nollans provide a viewing spot on their property for passersby.[32]

Significance of Nollan

The case involved a unique set of facts in that outright public use was desired for the dedicated land, and there was little apparent relation-

31. id, at 3148.

32. id, at 3147. The Court pointedly noted that "(s)uch a requirement, (providing a viewing spot on the property) constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner...of property rights that serves the same ends." id, at 3148. However, the suggestion that sometimes it is possible for a government entity to physically occupy private property without payment of compensation is really quite noteworthy especially considering the fact that physical occupation of property is almost always viewed as a taking. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982).

ship between the restriction and the stated goals of the regulation.[33] In contrast, hazard regulations which require setbacks, dedication of drainageways, "onsite detention areas", or "fees in lieu of" installation of storm drains or detention areas do not permit public access and use of private land and are clearly related to hazard reduction goals.[34] However, the case does indicate an increased willingness of the Court to scrutinize the public purpose served by regulations and the connection between the regulation and the purpose.[35]

LESSONS OF THESE CASES

Hazard managers can draw several lessons from these three cases viewed in the context of other Supreme Court and lower court decisions over a period of years:

33. The author considers one of the most remarkable aspects of the case to be the argument in the dissent that "the State could rationally have decided that the measure adopted might achieve the State's objective." 107 S.Ct. at 3151 (1987) (Brennan, J., dissenting). Clearly there was really no relationship whatsoever between the articulated objective of the California Coastal Commission and the property right the Commission attempted to extract from the Nollans. The case is extraordinary in how far several of the Justices were willing to go to avoid second-guessing a government agency.

34. See, cases cited in n. 8 supra.

35. See, n. 33 supra.

--Regulations adopted for valid public purposes and with an adequate basis in fact may substantially reduce land values without effecting a a "taking."[36] Hazard-reduction regulations have universally been upheld as serving valid public purposes.[37]

--The impact of regulations must be evaluated for an entire piece of property (not just one portion) to determine whether a taking has occurred.[38] This means that hazard-related setbacks which affect only portions of a property are not likely to be considered a taking.[39]

--Public safety and prevention of nuisances is a paramount concern of government and no landowner has a property right to threaten public safety or causes nuisances. Control or abatement of even existing uses has often been sustained to achieve these objectives.[40]

--Regulations are a taking only if they deny all use or all economic use of an entire property including reasonable "investement-backed expectations."[41] Even then, regulations may be valid under certain circum-

36. Reductions in value for "nuisance like" activities are regularly upheld. See, e.g. cases cited in n. 8 supra

37. See, e.g., cases cited in n. 8 supra.

38. 107 S.Ct. at 1249.

39. Restrictions on building height have been upheld, see, Welch V. Swasay 214 U.S. 91 (1909); requirements that portions of the parcels be left unbuilt, see, Gorieb v. Fox, 274 U.S. 603, 608, (1927). In addition there is a specific discussion of permitted restrictions on use of property in Nollan 107 S.Ct. at 3144.

40. See, e.g.,cases cited in n. 8 supra.

41. 107 S.Ct. 1249.

stances where the only economic uses are nuisance-like[42].

In summary, there is little chance that hazard-related regulations of all types will be held a taking despite this trilogy of cases from the Supreme Court. Performance-oriented regulations such as building codes, floodway restrictions, and grading codes are particularly unaffected. Nevertheless, the decisions indicate an increased willingness of the Supreme Court to examine the nexus between regulations and regulatory goals. Attempts to require actual public use of private land will continue to be viewed with a particularly high level of scrutiny (is this really surprising?) And, these cases increase the possibility that regulatory agencies will be sued by developers (even if they do not win), particularly if the regulations in question are unusual or highly restrictive.[43]

In deciding whether or not to regulate, governments must consider not only the potential of developer's suits but their potential liability for increased hazard losses. If a government is faced with a decision whether to adopt performance-oriented hazard regulations or not to regulate with resulting damage to subdivisions, houses, and public works and potential law suits at that time, the choice from a purely legal perspective is clear: regulate. There is every indication that hazard-reduction regulations will continue to be upheld. On the other hand, local and state governments are being held liable at an alarming rate for hazard losses

42. See, e.g., cases cited in n. 8 supra.

43. See, Justice Stevens' thoughts on this quoted in n. 26 supra.

due to government actions which increase hazards or inactions (e.g., failure to enforce regulations, maintain storm sewers or dams, carry out necessary inspections)[44].

ACTIONS WHICH LAND USE REGULATORS SHOULD TAKE IN LIGHT OF THESE SUPREME COURT DECISIONS:

First - Stay calm. View the cases for what they are. Remain confident that soundly conceived and fairly administered land use regulations will continue to be sustained by the courts. There have been hundreds of state and federal court decisions upholding hazard-related land use regulations, yet there have been very few overturning such regulations. It is likely that even the prohibition on rebuilding which caused the controversy in Lutherglen will be sustained once the case goes to trial.

Second - Ask landowners or lawyers citing these cases if they have actually read the opinions. If they claim these cases generally hold wetland, flood-plain, or other land use regulations unconstitutional, it is likely they have not read the cases.[45]

44. See, e.g., Stewart v. Schneider, 376 So. 2d 1046 (LA., 1979); "Liability of Government Entity for Issuance of Permit for Construction Which Caused or Accelerated Flooding" 62 ALR 3d 514 (1975); and Myotte v. Village of Mayfield, 375 N.E. 2d. 816 (Oh. 1977).

45. Immediately following the inaccurate newspaper articles reporting on Lutherglen and Nollan, several government agencies, and private law firms informed the author that they had been asked about how to fill out the forms to claim money damages because local zoning prohibited the highest conceivable use of the land.

Third - If you, as a regulatory agency, wish to minimize any chance of "taking", emphasize performance standards in your land use regulations.[46]

Fourth - Take the following normal precautions to avoid a "taking" which many of you have been using for years, especially when land values are high and impacts on the landowner are particularly severe:

1) Provide a variance or "special permit" procedure in regulations since such provisions are very rarely held to be a "taking" on their face, and they provide the regulatory agency with the opportunity to deal with extreme hardships.[47]

2) Emphasize health and safety considerations, and prevention of nuisances in your regulations and in your written findings for individual permit denials. Regulatory actions closely tied to these objectives are rarely held a "taking".[48]

46. Performance standards serve to emphasize: (a) that the regulations really involve regulating a hazard as opposed to implementing attempts to create parkland without payment to the owner and (b) that if the owner wishes to build all he/she need do is comply with the restrictions.

47. Use of a variance procedure also provides both the regulating agency and the property owner more time to work together to solve their differences since generally litigation cannot successfully be brought until all administrative steps have been followed by the applicant. See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

48. See, e.g., Keystone Coal, 107 S.Ct. 1232 (1987); and the cases cited in n. 8 Supra.

3) Link your regulations with national or statewide programs such as the Federal Flood Insurance Program. Courts have been particularly willing to sustain such regulations.[49]

4) Apply large lot zoning (e.g., 2-10 acres) to area-wide land use restriction where appropriate or possible, since courts have held that regulations which permit some reasonable use on an entire property do not constitute a "taking".[50]

5) Document with particular care the need for the regulations and the reasons for your permit denials in urban or other settings where land values are very high.[51]

6) Encourage pre-application meetings by permittees so that mutually acceptable project designs can be formulated.[52]

49. See, e.g., Texas Landowners Rights Association v. Harris, 453 F. Supp 1025 (D.C. 1978), aff'd. 598 F.2d 311, (1975), Cert. denied 444 U.S. 927 (1979); and Responsible Citizens v. City of Ashville, 302 S.E, 2d 204 (N.C. 1983).

50. See, e.g., Keystone Coal 107 S.Ct. 1232 (1987), and Agins V. Tiburon, 447 U.S. 255 (1980).

51. This is not so much a legal point as a practical advice to be more thorough in dealing with large projects. If there is a lot of money involved in a decision, legal action is more likely. At the same time, this does not mean that government agencies have license to step on the little guy with impunity. Regulations can also be attached on the grounds that the rules are enforced in an arbitrary or capricious manner. See, generally, 1 Am Jur 2d Administrative Law § 35.

52. The author believes that much needless litigation can be avoided through communication, negotation, and reasonable compromise. Even if the regulatory agency cannot or will not compromise, early frank discussion may prevent the developer from sinking so much money into a project that the developer must keep fighting in order to recover a substantial investment.

7) Apply your regulations in a consistent and equitable manner. Maximize the opportunity for notice and public hearing.[53]

8) If you adopt a moratorium, do so for a fixed period and make sure:

(a) the reasons for this extraordinary action are clear and legitimate, and (b) there is a viable variance procedure.[54]

9) Coordinate regulatory, tax and public works policies to insure that the fiscal burden on landowners for community services is consistent with permitted uses.[55]

10) Apply, in extreme circumstances, transferrable development rights to help relieve the burden on landowners.[56]

53. See, generally 1 Am Jur 2d Administrative Law § 35.

54. The Lutherglen Case would not have been decided had there been a variance procedure in the LA ordinance and the plaintiff had not exhausted all administrative remedies. See, 2 Am Jur 2d Administrative Law §§ 583-594

55. It is harder to make a good case that land is hazardous floodplain and subject to great restrictions if the land has been taxed for years as prime development property. See, also Heller, The Theory of Property, Taxation and Land Use Restrictions, 174 Wis. L. Rev. 751.

56. See, e.g., Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646 (1978).

11) Use acquisition rather than regulation where active public use is needed for land or a single landowner or group of landowners must bear disproportionate burdens for the public good.[57]

From a legal perspective, not much has changed. Be reasonable! Be confident!

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The views expressed in this paper are the authors, and do not necessarily represent the view of any organization or agency.

57. Be honest with yourself and with the landowner. If the community wants to buy a park, it should appropriate funds to do so just like the Consitution requires. See, U.S. Constitution, Amendment V.