Takings and Environmental Regulations

by Arthur H. Siegal

A recent Michigan Court of Appeals[1] decision stated a number of basic principles regarding the law of takings:

compensation is automatically awarded when the government physically invades a landowner's property and . . . where a regulation denies all economically beneficial or productive use of one's land.[2]

However, compensation is not awarded when a land use regulation merely results in a diminution of a property's value[3] because, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law."[4] These principles set the stage for a debate over government regulation, the likes of which have not been seen since the Federalist Papers, because the great percentage of regulations challenged as regulatory takings are those adopted to protect the environment.[5]

Basic Principles

Both the U.S. and Michigan constitutions prohibit the govemment from taking private property without just compensation.[6] As noted above,[7] a decline in value or restriction of use may constitute a taking even if it does not affect the entire property.[8] Whether the impact of government action on a specific piece of property requires the payment of just compensation is essentially an ad hoc factual inquiry.[9] Relevant factors include: (1) economic impacts and "interference with reasonable investment backed expectations;" (2) character of government action; and (3) the existence of various alternative uses.[10]

Economic Impacts

In *Bott v Natural Resources Comm'n*,[11] the Michigan Supreme Court held that a change in the common law of navigational servitude would constitute a taking of riparian property rights without compensation because the change would elimnate the previously private character of the wates signifcantly reducing its market value. When a regulatory action completely negates the property's value, a taking is likely.[12]

"Nexus" Needed

In *Nollan v California Coastal Comm'n*,[13] the U.S. Supreme Court held that the California Coastal Commission's plan to condition the issuance of building permits on the granting of a public easement across the applicant's beach constituted a taking because the easement condition lacked a sufficient nexus with the legitimate public purpose of the permit system.

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The plaintiff sought a permit to replace his existing bungalow with a three bedroom house. The permit was granted on the condition that the plaintiff grant a public easement across his beach. The Court assumed, without deciding, that the legitimate state interest that the California Coastal Commission sought to advance was the protection of "the public's ability to see the beach."[14] The Court held that a governmental condition on the use of private property must be related to, and must advance a legitimate state interest. See also *Peterman v DNR, supra*, where the court held that the DNR's construction of a boat ramp which caused significant erosion of plaintiff's land did not have a nexus because the ramp could have been built without destroying plaintiff's property.[15]

The Least Intrusive Path

In a recent, widely publicized case, *Dolan v City of Tigard*,[16] the Supreme Court held that a local ordinance requiring a store owner to dedicate as a public "greenway" part of her property within a 100-year floodplain and another part of her property as a bicycle/pedestrian path in return for local approval of her proposed expansion was an uncompensated taking in violation of the U.S. Constitution.

The Court found an "essential nexus" between the city's requirements and Dolan's proposed development because her development could increase both flooding along the floodplain and traffic in the area. However, the Court held that the city had not shown any "rough proportionality between the city's demands and the impacts of Dolan's development because: the city could not (A) justify its demand for a public greenway when a private greenway would provide the same flood control; and (B) support its requirement of a path except by a weak statement that the path "could" lessen the traffic congestion that was expected.

In *Jones v East Lansing-Meridian Water & Sewer Auth'y*,[17] the court found that a government well pumping

program that interfered with the plaintiffs' wells was unreasonable when other alternatives were available. The court found a taking because the legitimate public interest was advanced in an unreasonable manner.

The plaintiffs in *Jones* drew water for residential purposes from an aquifer underlying their property. The defendant authority tapped this aquifer with 25 wells and began pumping large amounts of water. The location of the authority's wells was purely an economic decision and no inquiry was made into the effects on the plaintiffs' wells and no alternatives were studied. The plaintiffs challenged the authority's action as a nuisance and a taking. The trial court held the interference with the plaintiffs' was slight and did not constitute a taking or a nuisance. The appellate court reversed, recognizing that a legitimate public purpose may not be advanced in an unreasonable manner.[18] The court found "that it was unreasonable for the Authority to initiate a program in complete disregard of the effects its actions had on neighboring landowners, especially where viable alternatives for achieving the same ends were available . . ."[19] Thus, the court concluded that a taking had occurred.

A taking will generally not be found if the regulation permits a reasonable alternative use on the property.[20] There was no reasonable altemative use for the plaintiff's landfill in *Browning-Ferris* because the property had been used as a landfill for years and was unfit for any other purpose. The court found that the plaintiff's property had been taken when the defendant city denied the landfill an operating permit.

In *Loveladies Harbor v United States*,[21] the court of appeals followed the recent trend in takings law,[22] holding that a taking which requires compensation would be found if: (A) there was a denial of economically viable use of the property; (B) the property owner had distinct investment-backed expectations; and (C) the property interest taken was vested by state property law in the owner and was not subject to regulation under state nuisance law.

Wetland Regulation

The Wetland Act recognizes that the determination that a piece of property is a regulated wetland may effect a taking of property without just compensation and authorizes a person denied a wetland development permit to bring suit.[23] Although the Wetland Act provides these remedies, it is rare that a property owner is successful in using them. See *Harkins v Department of Natural Resources*, *supra*. However, in *K & K Constr., Inc. v Department of Natural Resources*,[24] the Michigan Court of Claims found MDNR's denial of a wetland permit effected a taking and ruled that the Wetland Act's provisions regarding takings which limit the value of property taken, are unconstitutional because "it is solely the province of the court to determine just compensation."[25] The court also determined that MDNR's rejection of the plan resulted in the plaintiffs' loss of use of the property for several years and constituted an interim taking.[26]

In *Loveladies*, Loveladies Harbor, a real estate developer, purchased 250 acres of largely wetland property in New Jersey in the 1950's. Loveladies developed most of the property, leaving 51 acres undeveloped of which 50 were wetland. Following adoption of the federal law regulating wetland development, Loveladies submitted numerous (and progressively less ambitious) development proposals. Ultimately, the state approved a plan under which Loveladies would develop 12.5 acres (including the one dry acre) and the remainder would be subjected to an easement preventing development in perpetuity. When Loveladies sought federal approval and the state objected and the permit was denied. Loveladies brought suit.

As to whether there was a denial of economically viable use of the property, the debate centered on the "property" to be evaluated - was it Loveladies' original 250 acres, the 12.5 acres which were the subject of the permit application or something in between. The court held that the acreage to be evaluated depended on the facts of each case. Because New Jersey had thoroughly reviewed and permitted the development of the first 199 acres without imposing any limitations relating to wetlands, the court held that the 51 acres was the appropriate "property" to be evaluated. Because Loveladies had dedicated 38.5 acres to the state, the court held that denying the permit for the remaining 12.5 acres effectively denied Loveladies economically viable use of its property and affirmed the $2.6 million plus judgment.

The court in *Volkema*, drew heavily on the analysis in *Loveladies*. In *Volkema*, the plaintiff bought 45 acres of land and then leased or sold all but 24.6 acres. The plaintiff sought to develop a water park on the remaining 24.6 acres, 4.3 of which were wetlands which the plaintiff sought to fill. When the pemmit was denied, plaintiff brought suit. The trial court found no taking and the court of appeals affirmed. The court of appeals relied on *Loveladies* for the proposition that the proper parcel to be evaluated for a taking was the 24.6 acre parcel which the plaintiff owned and planned to develop.[27] The court noted that in *Loveladies*. only the 12.5 wetland acres had any value to the plaintiff. Here, the entire parcel had value and this should not be ignored. The court also looked to the *Bevan*

case[28] to hold that the "full bundle of property rights" associated with plaintiff's land must be evaluated in determining whether there is a taking. Because plaintiffs had not shown that their property was now valueless, the court held that the trial court had correctly held that there had been no compensable taking.[31]

Pending Legislation

In 1995, Rep Sikkema, R-Grandville introduced a bill that could have radically changed the standards used to determine if a regulation has effected a taking. As originally introduced, the bill would have required the Michigan Attorney General to develop guidelines to assist state agencies to identify and evaluate government actions that might result in a taking. As introduced, the bill would require the criteria to consider that: (1) a taking might occur "even though it constitutes less than a complete deprivation of all use or value" or that it was temporary; (2) that the "mere assertion of a public purpose is insufficient to avoid a taking;" and (3) undue delays in decision making that interfere with private property use may be a taking." The bill would also require a formal assessment of each govemment action which details the government's evaluation. The bill would also have restricted the sources of funds to pay takings compensation and allowed the recovery of attorney's fees in establishing a taking.

A "slimmed down"[30] version of that bill was enacted in early March[31] which now requires the attorney general, with the DNR, Environmental Quality and Transportation, to develop guidelines to assist in the identification and evaluation of government actions (which includes permitting and licensing decisions, proposed rules, and rule and statute enforcement). Before a government action occurs, the departments will be required to consider the likelihood that the action might result in a taking requiring compensation.

A bill[32] is also pending in the Michigan Legislature which would require MDEQ and MDNR staff to undergo "takings training." Another bill introduced near the end of 1995[33] would amend the Michigan condemnation procedures act to, among other things, clarify the condemnee's rights and the condemnor's obligations when the condemnation relates to only a portion of a property.

Similar legislative efforts are afoot in the U.S. Congress. A bill was introduced last year that would require the federal government to compensate property owners whose property value has been diminished by 20 percent or more by a regulatory law. This bill was passed by the House in March of 1995.[34] The Senate has a similar bill pending where compensation would be triggered by a 33 percent drop in value.[35]

Conclusion

The recent trend has been to allow more development and view regulatory actions as takings and this trend appears likely to continue. It is likely that case law and legislation will continue to make the path to deterrnining what regulatory actions constitute compensable takings and which do not, an uneven one.

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Footnotes

1 *Volkema v Department of Natural Resources*, 214 Mich. App. 66; 542 N.W.2d 282 (1995) lvto approved
2 *Id.* at 69-70. See also *Blue Water Isles. Co. v Department of Natural Resources*,171 Mich. App. 526; 431 N.W.2d 53 (1988)
3 See *Harkins v Department of Natural Resources*,206 Mich. App. 317,520 N.W.2d 653 (1994 Iv den 447 Mich. 1017 (1994), where the court of appeals rejected plaintiff's argument that an unconstitutional taking occurred because his property's value would double if he were allowed to fill the entire wetland as he had originally requested. The court stated that an owner deprived of the most profitable use of his property is not necessarily entitled to compensation.
4 *Id.* at 70, quoting *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992)
5 The magnitude of this issue is placed in context when the recently resolved Nordhouse Dunes case is reviewed. There, the DNR barred development of oil and gas wells in a portion of the Nordhouse Dunes, depriving the mineral rights owners of the value of their property. The mineral rights owners sued and ultimately received a judgment of roughly $120 Million, including interest. A settlement was finally reached at the end of 1995 with the state paying almost $100 Million to acquire the mineral rights. Amazingly, the state announced during the settlement negotiations that it would consider permittinq the oil and gas drilling it had previously barred.
6 U.S. Const. amend. XIV; Mich. Const. 1963, art. X, § 2
7 In fact, a taking may also be found where a government action has direct but consequential impacts upon private property. See. e.g., *Peterman v Department of Natural Resources*, 446 Mich. 177; 521 N.W.2d 499 (1994), cert. der. 115 S. S. Ct. 898 (1995)
8 See *Loveladies Harbor. Inc. v United States*, 21 Cl. Ct. 153 (1990), aff'd 28 F.3d 1171 (1994); *Florida Rock Industries. Inc. v United States*, 21 Cl. Ct. 161 (1990), vacated and remanded on other grounds 18 F.3d 1560 (1994)
9 *Blue Water Isles*, 171 Mich. App. at 536
10 *Id.* at 536-37
11 415 Mich. 45; 327 N.W.2d 838 (1982), See also *Browning - Ferris Indus. v City of Maryland Heights*, 747 F. Supp. 340 (ED Mo 1990), where the court held that a city's refusal to renew a 17-year-old solid waste landfill permit to a non-conforming use effected a taking of the landfill's property, stating that the landfill owner "had a vested property right" and because B.F.I. continued to maintain the use of the property after the incorporation of the city and passage of its various ordinances, the city's denial of a permit based upon these regulations constituted a taking of private property without compensation.
12 See *Lucas*, supra at n4
13 483 U.S. 825 (1987)
14 483 U.S. at 835
15 This case really should have been decided on the "least intrusive path" analysis discussed below.
16 512 U.S. _ 114 S. Ct. 2309 (1994)
17 98 Mich. App. 104; 296 N.W.2d 202 (1980)
18 98 Mich. App. at 108, lv der
19 *Id.* at 109
20 *Recreational Vehicle United Citizens Ass'n v City of Sterling Heights*, 165 Mich. App. 130; 418 N.W.2d 702 (1987)
21 28 F.3d 1171 (D.C. Cir. 1994)
22 Evidenced by the cases of *First English Evangelical Lutheran Church of Glendale v County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas*, supra.
23 MCL §281.721
24 No. 88-12120-CM (Mich. Ct. Cl. Sept. 8, 1993). app pend, No. 168393
25 Slip op. at 1-2
26 The court's order is currently on appeal to the Michigan Court of Appeals.
27 The other 20.4 acres had been sold and developed even before enactment of the Wetlands Act.
28 *Bevan v Brandon Twp.*, 439 Mich. 1202; 475 N.W.2d 37 (1991), cert den, 502 U.S. 1060 (1992)
29 But see the case of *Florida Rock, supra*, where the court stated, "If a property owner owns a 100 acre tract, and the government takes 95 acres . . . no one would argue that the five acres remaining somehow precludes . . . just compensation." 18 F.3d 1569.
30 Some might say "watered down."
31 1996 Public Act 101
32 House Bill 5483, pending in the Senate.
33 Senate Bill 778
34 HR 925
35 S 605