The Rocky Mountain Land Use Institute's Eleventh Annual Conference

An Overview of Regulatory Takings & the Recent Palazzolo Decision

Friday, March 8, 2002

8:30 – 11:10 a.m.

Lowell Thomas Law Building

Moderator: Professor Edward H. Ziegler

Panelists: Professor David L. Callies

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Passive Resistance to the United States Supreme Court's Takings Jurisprudence: A Growing and Ominous Trend

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for the Panel presenting:

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In assessing the impact of recent U. S. Supreme Court takings cases, perhaps each of us is captive of a too limited range of viewpoints and experiences that raise takings questions. Recall the story of the blind Indian sages who each described the elephant (incorrectly) as a mighty tree, a great wall, a powerful snake, on the basis of the small part of that great animal they had hold of. Perhaps we too on the basis of preconceptions, where we live, and who we happen to talk to characterize the national response to the Supreme Court's takings jurisprudence incorrectly or in an unduly skewed manner–I certainly confess the possibility of such error.

Having stated this cautionary reservation, I would simply note that the piece of the elephant I am holding suggests that there is a great deal of "passive resistance" to recent Supreme Court takings cases. I think this is unfortunate and I arrive at this conclusion sadly, but what I see in countless settings is a growing zeal for pushing the regulatory envelope–an "in your face" response to recent Supreme Court takings cases by state and local governments (and many courts) that reminds one of the responses by New Jersey municipalities to the Mt. Laurel cases a generation ago. Regulators at the federal level and from Maine to California seem to be saying to the Supreme Court–these are your takings cases–enforce them if you can. I would be happy to be proved wrong; happy to be shown to be too pessimistic; happy to hear that those who can see the whole elephant are persuaded that the last 25 years of Supreme Court takings cases is forging a new national paradigm, a healthier balance between private property rights and land use control objectives. But there is little evidence to support these happier conclusions; there is, on the other hand, considerable evidence supporting the thesis I have laid out.

To begin with, the very fact that the U. S. Supreme Court has examined, re-examined, and explicated takings questions as frequently as they have over the last 25 years is evidence that people are not listening; the list of cases is long and growing longer; it logically begins with Penn-Central[1] in 1978, and proceeds to Mr. Justice Brennan's

1981 dissent in San Diego Gas[2] and from there to a range of cases we are all familiar with: Loretto (1982)[3], Keystone (1987)[4], First English (1987)[5], Nollan (1987)[6], Lucas (1992)[7], Dollan (1994)[8], Suitum (1997)[9], Monterey (1999)[10], Palazzolo (2001)[11], and now the court has before it Tahoe-Sierra Preservation Council.[12] In each of these cases some governmental instrumentality had arguably pushed the regulatory process "too far", to that point where a "regulatory taking" could be said to have occurred.[13] Some of the above noted cases, while elaborating important takings principles, sustained the regulatory measures being challenged; but most of the noted cases struck down, modified, and/or remanded the challenged regulations.

Beyond these direct and obvious takings cases, the Supreme Court has dealt with an increasing number of cases that raise takings questions indirectly; each of these cases involve some degree of regulatory over-reaching that required Supreme Court correction. For example, see Solid Waste Agency of Northern Cook County v. Army Corps of Engineers[14] (striking down the corps definition of navigable waters and thus the scope of its regulatory control over wetlands); Village of Willowbrook v. Olech[15] (striking down municipal unequal treatment and excessive easement demands); Florida Rock Industries, Inc. v. United States[16] (here the Supreme Court denied cert. and let stand a Court of Claims holding that utilized a partial taking approach to regulations that gave rise to a significant diminution in value); Whitney Benefits, Inc. v. United States [17] (here again the Supreme Court denied cert. and let stand a Court of Claims conclusion that Surface Mining Control Act provisions that reduced the value of mineral lease holdings to zero constituted a taking). It should be noted that this case preceded Lucas, but the signal it sent was ignored. This line of cases could be extended but the point is sufficiently made–directly and indirectly the Supreme Court, and sometimes lower federal courts, have sought to delineate the outer limits of permissible regulation; these pronouncements have been ignored or read narrowly ("passively resisted") by those imbued with what I have characterized as regulatory zeal.[18]

If one looks at state court, legislative, and municipal actions the story is much the same. The highest court of California true to its traditions recently gave us Ehrlich v. City of Culver City[19] (sustaining both mitigation fee and public art exactions as valid conditions of development approval); these exactions were sustained after the U. S. Supreme Court had granted cert. in this case [20]and remanded the proceedings for reconsideration in light of Dolan. The heavy-handedness of California regulatory measures and the judiciary's willingness to sustain these measures[21] is legendary and well documented.[22]

But California is not alone; Maine's highest court in MC Associates v. Town of Cape Elizabeth[23] sustained the towns wetlands buffer and minimum lot size controls[24] that reduced the value of a lot of record from $80,000 to $3,000; they held there was no categorical taking and no need to consider whether there was a taking under Penn Central analysis; finally, they refused to reconsider or remand their holding (as their own rules would have allowed) in light of Palazzolo which was handed down only a few days after the Maine court's ruling.

Maine's highest court has also recently sustained the municipal enactment of building caps, Home Builders Association of Maine v. Town of Eliot.[25] In and of itself this is not so remarkable, but unlike the sustaining of such measures in almost every other state that has considered this issue, there is no requirement that the cap be predicated on a comprehensive plan, no requirement that it be a measured response to past inordinate growth that could no longer be assimilated, no durational time limit to the cap–they can presumably be imposed indefinitely, and no requirement that any particular cap be related to infrastructure–water, sewer, school, road limitations. Maine towns, without guidance from the court, and without regard for the takings issues posed, may simply pick a number, a rate of development that suits their individual fancy. And they have; the Town of Bremen recently adopted a cap allowing eight (8) building permits a year to issue. In

response to this seemingly untenable position, the Maine legislature considered a responsible bill[26] tendered by the State Planning Office–it was not adopted, but was committed to the Natural Resources Committee of the Legislature for further study; to-date it has not reemerged in any form. Maine is also a state that has recently considered the extensive use of 20 acre minimum lot sizes, barring all development on 50 acre wetland sites, putting 4.5 million acres of forest land in "forest use only" zones, imposing per lot impact fees totaling tens of thousands of dollars–all without regard to the takings implications of these actions, and without any state law to moderate or bar such courses of conduct.[27]

Lest the reader conclude that I am picking on California and Maine, let me quickly note that there are any number of other states that have imposed large minimum lot size requirements, usually to prevent urban sprawl and/or to protect farm or woodland areas. Pennsylvania has sustained a 50 acre minimum lot size, see Codorus Township v. Rodgers;[28] Illinois has sustained a 160 acre minimum lot size, see Wilson v. County of McHenry;[29] and one of the major zoning treatises states that lot sizes of from 10 to 640 acres have been sustained in various parts of the country.[30] And Maine is not alone in its zeal to protect (or over-protect) wetlands; a generation of law students has grown up examining New Jersey's experience in Loveladies Harbor, Inc. v. U.S.; [31] in a similar vein, New Hampshire has given us Sibson v. State;[32] Michigan has given us K & K Construction Inc. v. Dept. of Natural Resources,[33] and both before and after the Supreme Court's holding in Lucas, South Carolina has aggressively pursued it's beachfront and wetlands policies without much regard to takings issues, see Esposito v. South Carolina Coastal Council and McQueen v. South Carolina Department of Health and Envir. Control, Office of Ocean and Coastal Resource Mgmt.[34]

A zealous approach to land use regulation, one that often ignores the rights of property owners and recent Supreme Court takings cases, can be found in any number of other settings; Those involved in the telecommunications industry know they face over-regulation. In spite of federal legislation[35] designed to preempt (or at least soften the effect of) local controls that make the siting of communications towers, transmissions lines, etc. difficult, if not impossible, the industry is constantly in court seeking access to communities that have imposed an array of barriers to the siting of these essential facilities. The December, 2001 Annual Index issue of Land Use Law & Zoning Digest notes 16 such cases for the year, arising in 9 different states in all parts of the country. It is also true that the use of property by manufactured housing,[36] the use of historic properties,[37] the use of property for lower and middle income multi-family housing,[38] the use of property for waste disposal and/or recycling facilities[39] almost always excites a level of regulatory scrutiny that ignores current takings law and/or that in other ways is unfair to the landowner. If the proposed use is not denied outright, it is almost invariably subject to more stringent regulatory impositions than are other, more preferred, land use undertakings.[40]

Finally, it should be noted that U.S. Supreme Court cases such as Williamson County Regional Planning Comm. v. Hamilton Bank,[41] MacDonald, Sommer, & Frates v. Yolo County, [42]and Abbott Laboratories v. Gardiner[43] designed to deal with "finality", "ripeness", "exhaustion" and related doctrines have become little more than traps for the unwary property owner who would assert a takings claim. The problem has been widely recognized and widely commented upon, see Desiderio, Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse, 31 Urb. Law. 195 (1999). No less a figure than Professor Daniel Mandelker (hardly an apologist for property rights absolutists) has drafted necessary reform legislation.[44] It is sorely needed.

Conclusion:

One would think that governmental agencies (at whatever level) prepared to press the regulatory envelope, prepared to passively resist the spirit and substance of the last 25 years of Supreme Court takings jurisprudence would realize they cannot (at least not for long) have it both ways. They cannot on one hand promulgate regulations that arguably go "too far" and then, on the other hand, block judicial resolution of the takings cases their actions have spawned. If these regulators succeed to any significant extent in this duplicitous strategy, it will only embolden property rights absolutists who are already pressing on many fronts for a far more draconian (property rights oriented) interpretation of the 5th Amendment's takings clause;[45] it will encourage into existence state and/or federal property rights legislation defining a taking in some one-dimensional arbitrary manner, i.e., "a 50%, 30%, or 20% reduction in value brought about by a regulatory measure."[46] Most of us do no want such legislation; it would take down a wide range of regulatory measures that we regard as essential; it would impose huge costs on government and/or open the door to less responsible developers and to those with insufficient concern for the environment.[47] But these seem to me to be the inevitable risks of continued resistance to the last 25 years of the Supreme Court's takings jurisprudence. In my view the risks are too great[48]—we need to end the "passive resistance" now or face consequences that we almost certainly will not like.

[1] Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

[2] San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981).

[3] Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419 (1982). The idea that relatively small property interests could be intruded upon (taken) without running afoul

of the 5th Amendment was again rejected in Hodel v. Irving, 481 U.S. 704 (1987)(striking down legislation that sought to bar the devise of small Sioux Indian land holdings; the forced escheat of these small holdings to the tribe was held to be a taking).

[4] Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470 (1987).

[5] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U. S. 304 (1987).

[6] Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

[7] Lucas V South Carolina Coastal Council, 505 U.S. 1003 (1992).

[8] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[9] Suitum v. Tahoe Regional Planning Agency, 520 U. S. 725 (1997).

[10] City of Monterey v. Del Monte Dunes, 526 U. S. 687 (1999).

[11] Palazzolo v. Rhode Island, 533 U.S. 606 (2001). In light of Palazzolo, the Supreme Court has remanded McQueen v. South Carolina Department of Health and Envir. Control, Office of Ocean and Coastal Resource Mgmt., 121 S. Ct. 2581 (2001); the state's highest court had determined that regulations prohibiting bulkheading and

filling was, under the circumstances, not a taking, 530 SE2d 628 (S.C. 2000).

[12] Tahoe-Sierra Preservation Council, Inc. et al. v. Tahoe Regional Planning Agency, Sup. Ct. Doc. No. 00-1167, on appeal from the 9th Cir., see 216 F3d 764 (9th Cir 2000), en banc rehearing denied, 228 F3d 998 (9th Cir 2000); but see the dissenting opinion in the latter disposition–it underscores the major thesis of this paper.

[13] See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[14] 531 U. S. 159 (2001).

[15] 528 U.S. 562 (2000).

[16] 513 U.S. 1109 (1995); the underlying Court of Claims case is reported in 18 F3d 1560 (Fed Cir. 1994).

[17] 502 U.S. 952 (1991); the underlying Court of Claims case is reported in 926 F2d 1169 (Fed. Cir. 1991).

[18] This zeal is painfully apparent in many of the western states as federal agency and environmental interests square off against landowner interests with respect to a widening range of issues–the allocation of water rights, the protection of endangered species, the protection of Indian claims, the use of public domain lands. All of these settings can, and frequently do, raise takings problems. A full elaboration of these debates and the litigation that these issues have produced is beyond the scope of this brief paper, but see Miller, Public Lands and Waters: Who Will Prevail–Man or Beast?, 31 The Urban Lawyer 883 (1999).

[19] 12 Cal.4th 854, 911 P2d 429 (Cal. 1996).

[20] 512 U.S. 1231 (1994).

[21] See generally, Berger, Los Angeles Daily Journal, Takings Seen Through the California Looking Glass, (Feb. 2, 1995)(this Journal on an

almost bi-weekly basis has for over ten years documented, and critically commented upon, national and California takings issues). See also Daniel Curtin's remarks prepared for the 10th annual RMLUI conference, April 20, 2001; Mr. Curtin (on pg. 3 of his remarks) cites an array of California cases, all of which raise takings questions– Associated Home Builders, 4 Cal. 3d 633 (1971)(no right to subdivide); Trent Meredith, Inc. v. Oxnard, 114 Cal. App.3d 317 (1981)(development is a privilege); Nash v. Santa Monica, 37 Cal.3d 97 (1984)(no right to go out of business); Griffin Dev. Co. v. Oxnard, 39 Cal.3d 256 (1985)(no right to convert an apartment to a condominium); Terminal Plaza Corp. v. San Francisco, 177 Cal. App. 3d 892 (1986)(no right to convert residential hotel units to other uses); Russ Bldg. Partnership v. San Francisco, 199 Cal. App. 3d 1496 (1987)(transit fee exaction on developments of new office space is sustained). The Curtin paper, see pgs. 9-15, also contains a useful discussion of the (more than15 year) history of Ehrlich's dealings with Culver City to change his use of the property.

[22] See Berger, Silence at the Court: The Curious Absence of Regulatory Takings Cases From California Supreme Court Jurisprudence, 26 Loy. of L. A. L. Rev. 1133 (1993).

[23] 773 A2d 439 (Me. 2001).

[24] The record in the case indicates that the proposed development, a single-family house, was not in the wetland but was in the 250' wetland buffer area; moreover, engineering submissions (acknowledged by the court) indicated that state and local plumbing code requirements for building on less than full-size lots would be met, but given the towns steadfast refusal to issue a building permit for development of the lot, these plumbing code permits were not in hand at the time the taking challenge was brought; the court characterized this omission as a failure to meet a prima facie requirement for development approval. This element of the court's reasoning is also at odd with Palazzolo and cold have been, should have been, reconsidered in light of the latter holding.

[25] 750 A2d 566 (Me. 2000).

[26] See LD 1643, 120th Maine Legislature, March 13, 2001; also Delogu, The Legislature's response to Home Builders v. Town of Eliot, Maine Lawyers Review, Aug. 29, 2001.

[27] See Delogu, The Law of Takings Elsewhere And, One Suspects, in Maine, 52 Me. L. Rev. 324 (2000) particularly notes 16 and 121.

[28] 492 A2d 73 (Pa. 1985).

[29] 416 NE2d 426 (Ill. 1981).

[30] See, Rohan, Zoning and Land Use Controls §56.02[1] (supp. 1999). See also Rose, Farmland Preservation Policy and Programs, 24 Nat Res. J. 591 (1984); Coughlin & Keene, The Protection of Farmland: An Analysis of Various State and Local Approaches, 33 Land Use Law & Zon. Dig. (June, 1981)(the leading states using large lot zoning are California, Oregon, Wisconsin, Minnesota, South Dakota, Iowa, Illinois, Pennsylvania, and Maryland); Popp, A Survey of Agricultural Zoning: State Responses To The Farmland Crisis, 24 Real Property, Prob. & Trust J. 371 (1989); Comment, Judicial Acquiescence in Large Lot Zoning: Is It Time To Rethink The Trend?, 16 Colum J. Env. L. 183 (1991).

[31] 28 F3d 1171 (Fed. Cir. 1994).

[32] 336 A2d 239 (N.H. 1975).

[33] 575 NW2d 531 (Mich. 1998).

[34] Esposito is at 939 F2d 165 (4th Cir. 1991); McQueen is at 530 SE2d 628 (S.C. 2000).

[35] The Telecommunications Act of 1996, 47 U.S.C. §253.

[36] See Town of Chesterfield, v. Brooks, 489 A2d 600 (N.H. 1985); Geiger v. Zoning Bd. of North Whitehall Twp, 481 A2d 1249 (Pa. 1984); Barre Mobile Home Park, Inc. v. Town of Petersham,

592 F.Supp. 633 (Mass. 1984), affirmed without opinion, 767 F2d 904 (1st Cir. 1985); Robinson Township v. Knoll, 302 NW2d 146 (Mich. 1981).

[37] See Sameric Corp. of Delaware, Inc. v. City of Philadelphia, 142 F3d 852 (3d Cir. 1998). Land Use Law & Zoning Digest for the year 2001 notes 8 historic cases arising in 6 different jurisdiction during that one year.

[38] Though obviously more than takings issues are involved here, there has been a concerted fourteen year effort by Yonkers, New York to bar the construction of desegregated low-income housing, see U.S. v. Yonkers Board of Education, 837 F2d 1181 (2d Cir. 1987); and U.S. v. Secretary of Housing and Urban Development, 239 F3d 211 (2d Cir. 2001). The fact that a number of states have found it necessary to pass "Anti Snob Zoning Laws" is evidence that municipal governments in these jurisdictions (without regard to current takings law) over-regulate low income and affordable housing to the point of near, or actual, exclusion–a state remedy was needed, see Mass. Gen. Laws c.40B, §§20-23, Conn. Gen. Stat. §8-30g (1999).

[39] See Rollins Env. Services v. Parish of St. James, 775 F2d 627 (5th Cir. 1985); Village of Wilsonville v. SCA Services, Inc., 426 NE2d 824 (1981); Toms v. Bd. of Supervisors, 553 A2d 507 (Pa. 1989).

[40] Cf. Wilson, Nasty Motives: A Consideration of Recent Federal Damage Claims in Land Use Cases, 31 The Urban Lawyer 937 (1999); Delogu, NIMBY is a National Environmental Problem, 35 So. Dak. L. Rev. 198 (1990).

[41] 473 U.S. 172 (1985).

[42] 477 U.S. 340 (1986).

[43] 387 U.S. 136 (1967).

[44] See H.R. 1534, a 1997 bill presented to the House Judiciary Committee of the U.S. Congress. One must believe that legislation along

these lines will sooner or later be adopted if procedural roadblocks to judicial resolution of takings cases continue. See also, Whitman, The Ripeness Doctrine in the Land-Use Context: The Municipality's Ally and the Landowner's Nemesis, 29 The Urb. Law. 13 (1997).

[45] See Erm, The "Wise Use" Movement: The Constitutionality of Local Action on Federal Lands under the Preemption Doctrine, 30 Idaho L. Rev. 631 (1994); Perry, Law West of the Pecos: The Growth of the Wise Use Movement and the Challenge to Federal Public Land-Use Policy, 30 Loy. L.A. L. Rev. 275 (1996); Christopher, Cattle Ranch with Park Rangers: The Battle for a Tallgrass Prairie National Park in Kansas, 18 Stan. Env. L. J 211 (1999).

[46] See Cordes, Leapfrogging the Constitution: The Rise of State Takings Legislation, 24 Ecology L. Q. 187 (1997); Ellickson, Takings Legislation: A Comment, 20 Harv. J. L & Pub. Policy 75 (1996); Rose, A Dozen Propositions on Private Property Rights, Public Rights, and the New Takings Legislation, 53 Wash. & Lee L. Rev. 265 (1996).

[47] See Delogu, supra note 27, particularly Section V. The Consequences of Failing To Grasp The Full Range of Factors And Other Considerations in Regulatory Takings Cases, and f.n. 124.

[48] The recent passage in Oregon of Measure 7 (though stalled in Oregon's courts for the moment) should suggest to any reasonable person that my assessment of the risks of failing to embrace the Supreme Court's takings jurisprudence are accurate, see 61 Oregon State Bar Bulletin 9 (June, 2001).