

It's Time for Courts to Limit Takings Rulings

By John D. Echeverria

During the last decade, the U.S. Supreme Court has been engaged in a relentless program to expand state and local government liability under the takings clause of the Fifth Amendment. This year's leading property rights case -- *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, (No. 97-1235) raises the question: Just how far will the Supreme Court take its regulatory takings agenda?

As a matter of original understanding, the takings clause ("nor shall private property be taken for public use, without just compensation") only applied to direct appropriations and was never intended to apply to regulations at all.

Nevertheless, in the 1920's, about a century and a half after the adoption of the Bill of Rights, the Court invented the notion of "regulatory takings," and it has been struggling, with only limited success, to give some content to this doctrine ever since.

The most significant expansion of regulatory takings doctrine that has so far occurred under the activist Rehnquist Court resulted from *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), which established the idea of a "temporary" regulatory taking.

No Way Back.

What happens when a city believes it is exercising legitimate regulatory authority, but a court later determines that the regulation goes "too far" and therefore constitutes a taking? Can the government repeal the regulation and thereby eliminate the taking? The Court's answer was "no." Even if it repeals the regulation, the government must pay compensation for a "temporary taking."

First English has imposed an arctic chill on local regulatory activity, particularly in the land use area. If a town fails to use its regulatory authority to protect a neighborhood from excessive traffic congestion resulting from over-development or contributes to higher and more severe flooding by authorizing unwise construction in the flood plain, the government faces little risk of liability in a suit brought by the citizens of the community.

On the other hand, if the government over-regulates and mistakenly crosses the line between regulation and a taking, it can be liable to a developer for many millions of dollars. Today, local community planning is largely driven by developers rather than by homeowners and the general citizenry, and *First English* is the reason why.

A New Challenge

Del Monte Dunes now raises the possibility of another major expansion of regulatory takings doctrine. In this case, which was argued on October 7th, the City of Monterey, California, challenged a \$1.45 million compensation award for a "temporary taking." This award is based in part on the claim that the city relied on inadequate scientific information in rejecting a 190-unit condominium project as unreasonably harmful to the environment.

The decision of the Ninth U.S. Circuit Court of Appeals in this case represents a significant extension of municipal liability under the *First English* doctrine. The Supreme Court will have to decide whether or not it will endorse this expansion.

To date, the regulatory takings doctrine has remained true to the limitation, grounded in the language of the Fifth Amendment, that the takings clause's compensation requirement is triggered only when government acts for a "public use." When government condemns land for a public facility, or even when government imposes an otherwise valid regulation that amounts to an appropriation, the public is simply being required to pay for the public benefit received. Now, however, the Court is being asked to expand the takings concept to cases in which government is not achieving any public benefit, but instead is alleged to have acted arbitrarily or otherwise without any lawful authority.

This proposed expansion of the First English decision would push takings doctrine even further afield from the original understanding of the clause. It would transform it into a damages remedy that would cover all types of government errors and mistakes. And, indeed, it would further chill the ability of local government to plan and regulate land use in an even-handed fashion.

The Supreme Court's decision last term in *Eastern Enterprises v. Apfel* 118 S.Ct. 2131 (1998), suggests that a slim majority of the Court may be prepared to reject this potential further expansion of takings doctrine. Justice Anthony M. Kennedy, who cast the decisive 5th vote against the taking claim in that case, embraced the notion that the takings clause provides a remedy for public appropriations of private property for "public use." But allegedly arbitrary and otherwise wrongful conduct, he said, raises an issue under the due process clause, not the takings clause.

Another Sign of Hope

The same impulse can arguably be read into the U.S. Supreme Court's decision October 5th, to deny the petition for certiorari in *Landgate, Inc v. California Coastal Commission* (No. 98-183). In that case, the California Supreme Court, by a 4 to 3 vote, rejected the claim that the California Coastal Commission effected a temporary taking by erroneously asserting jurisdiction over a coastal development project.

In a celebrated article that was published fifteen years ago, a group of respected land use experts urged the Court to reject the concept of "temporary takings." See *The White River Manifesto*, 9 *Vermont Law Review* 193 (1984). In their piece, the authors argued that, "[a]t the present time, in many areas the cards are stacked against the neighbors and they are the ones who really need judicial help," and "any change which results in an across-the-board shift in power away from local government to landowners and developers is highly suspect."

This 1984 statement is even truer today than it was at the time when it was written.

Eventually, the Supreme Court will have to decide at just what point takings claims go too far. Perhaps that time is now.