

## High Court Must Simplify Law of Regulatory Takings

By John Echeverria and Bill Higgins

The law of regulatory takings has become much too complicated in California.

In 1998, the Supreme Court produced a novel list, containing a grand total of 13 different, potentially relevant factors for determining whether a restriction on the use of land or other property represents a violation of the Takings Clause.

Some observers hoped that this aspect of the decision in *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4<sup>th</sup> 761 (1998), would not be interpreted as establishing an actual framework for legal analysis. But this is precisely the unfortunate approach that the Courts of Appeal have followed, most recently in *Massingill v. Department of Food & Agriculture*, 102 Cal. App. 4th 498 (2002).

Without restating the entire lengthy list (the list's length is part of the problem), some of the factors include: whether the regulation interferes with interests that are sufficiently bound up with the reasonable expectation of the claimant to constitute property for Fifth Amendment purposes; whether the regulation affects the existing or traditional use of the property and thus interferes with the owner's primary expectation; the state's interest in the regulation, in particular whether the regulation is reasonably necessary to the effectuation of a substantial public purpose; and whether the property owner's holding is limited to the specific interest that the regulation abrogates or is broader.

The basic problem with this 13-factor "test" is that it is so long and complicated, and points in so many different, and even contradictory, directions, that it does not supply a meaningful rule of law. Land owners and government officials cannot order

their affairs; lawyers cannot give sensible advice; judges cannot predictably decide cases based on this kind of multifaceted direction from the appellate courts.

Granted, the 13-factor test partly mirrors the confusion in takings law created by the U.S. Supreme Court. But that problem hardly is addressed in a constructive manner by a list that seeks to capture every potential strand of thinking appearing in modern takings jurisprudence.

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The emergence of the 13 factors is even more confounding upon examination of its origin. Put simply, it is dicta. The entire discussion of the 13 factors was unnecessary for the decision in *Kavanau*, which was a substantive due process case, not a takings case. Several of the *Kavanau* factors were themselves based on dicta from other cases. Indeed, some factors, such as "whether the regulation 'prevent[s] the best use of [the] land,'" flatly contradict numerous California and U.S. Supreme Court opinions. A more straightforward approach, based on the traditional analysis established by the U.S. Supreme Court in *Penn Central Co v. New York City*, 438 U.S. 104 (1978), generally should suffice for the review of takings challenges to use restrictions (not including exactions, which raise separate issues).

First, assuming the claimant has some property interest to begin with, the courts should look to the "economic impact" of the regulation, taking into account the U.S. Supreme Court's repeated statements that even regulations that prevent an owner from exploiting as much as 90 percent of a property's hypothetical unregulated

value may not rise to the level of a taking.

This economic-impact standard reflects both the deference that the courts owe the elected branches and the difficulty of knowing whether a restriction actually imposes an unfair burden on a particular property owner.

As the California Supreme Court recently said in *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 2002, every takings claim should be evaluated in light of the "interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good."

Second, the courts should consider whether a regulation is consistent with the owner's "reasonable investment-backed expectations," either because the owner can basically continue her long-established use of the property or because the claimant bought the property with actual notice of the restrictions that she is now challenging as a taking.

Third, the courts should consider the "character" of the government action, which focuses, primarily, on whether the government has singled out a specific landowner to bear some public burden or whether, instead, the regulation applies broadly across the community, creating not only burdens, but also a corresponding reciprocity of advantage for all concerned.

Regulatory takings law can and should be that simple.

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