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by Patrick C. McGinley

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The Takings Clause of the Fifth Amendment prohibits governmental taking of private property for public use unless just compensation is paid to the owner. U.S. CONST. amend. V, cl. 4. More than 70 years ago in *Pennsylvania Coal v. Mahon,* 260 U.S. 393, 415 (1922), Justice Holmes, speaking for the Court, observed that "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" that requires the governmental actor to compensate the landowner. However, the Court in *Pennsylvania Coal* also recognized that governments possess police powers to protect important public health and safety interests and that governments could not operate if compensation were required for every exercise of the police power that might diminish the value of private property.

Since the Court's *Pennsylvania Coal* decision, one of the most complex, confusing, and contentious debates in constitutional law has focused on determining when, in Justice Holmes's words, an exercise of the police power has "gone too far." In this Takings Clause case, the extent to which government may regulate the use of private property without triggering the just compensation requirement is hotly contested once again.

The case asks when a government's land use regulation has so interfered with a landowner's use of his or her property that a claim for just compensation may be considered ready — in legal parlance, ripe — for adjudication. In prior cases, the Supreme Court has indicated that a lawsuit seeking compensation for an unconstitutional taking is not ripe for judicial decision unless and until the governmental agency enforcing the regulation has reached a final, definitive position regarding how it will apply the regulations at issue to the land involved. Now, the Court has an opportunity to delineate when land use regulation has so affected rights of property ownership that the landowner is entitled to seek court adjudication of a claim for just compensation.

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BERNADINE SUITUM V. TAHOE REGIONAL PLANNING AGENCY
DOCKET NO. 96-243

ARGUMENT DATE:
FEBRUARY 26, 1997
FROM: THE NINTH CIRCUIT

Case at a Glance

A planning agency in the Lake Tahoe, Nevada, area banned construction in environmentally sensitive areas, including Bernadine Suitum's residential lot, to protect the Lake's water quality. Unable to use the property, Mrs. Suitum filed suit seeking compensation. The case was dismissed because she had not tried to sell development rights granted by the agency in recognition of the construction ban. At issue in this case is the point at which federal courts must hear a landowner's case when land use regulation bars all, or virtually all, use of the land.

ISSUE

Must the owner of a residential lot first sell or attempt to sell development rights and apply for planning agency approval of the sale of those rights before a Takings Clause claim is ripe for judicial review, when the planning agency already has concluded that no viable use of the land will be permitted?

FACTS

Many state, regional, and local governments have recognized that development of land for industrial, commercial, residential, and other uses can have serious adverse environmental impact. Such adverse effects may harm other important public interests including a community's economic development, tax base, and quality of life.

Various techniques have been used in land use regulation to minimize environmental harm. In this case, the Tahoe Regional Planning Agency (the "TRPA" or the "Agency") enacted a comprehensive regulatory scheme directed at protecting the quality of Lake Tahoe's waters.

The TRPA was created in 1969 by an interstate compact between California and Nevada after both states became alarmed at the deterioration of Lake Tahoe's water quality. The compact required the TRPA to adopt and enforce a regional plan of resource conservation and orderly development.

Notwithstanding creation of the TRPA, the Lake's water quality continued to decline. In 1980 the compact was amended extensively to reflect an urgent concern over mounting threats to the ecology of the region.

Pursuant to the amended compact, the Agency adopted a new regional plan in 1987. The 1987 plan contained regulations relating to residential development in the Lake Tahoe Basin. Central to this case, the plan created a special classification for property located within a stream environment zone ("SEZ"), defined as an environmentally sensitive area that conveys surface water from upland areas into Lake Tahoe and its tributaries. SEZs account for 17,700 acres of the 205,250 acres that make up the Lake Tahoe Basin.

Vegetation contained in the SEZs filters pollution-causing runoff and maintains soil stability. Any disruption of the land in an SEZ releases contaminants into Lake Tahoe and surrounding waters. The 1987 plan emphasized the importance of the SEZs and their essential role in achieving environmental thresholds for water quality, vegetation preservation, and soil conservation. Consequently, while the 1987 plan contained a system for gradual development of unbuilt residential lots in the Lake Tahoe Basin, it prohibited development on lots located in the SEZs.

As part of its regulation of the use of private residential land, the TRPA also created a system of transferable development credits that property owners must possess in order to build. Thus, while property situated in SEZs must be kept in its natural state, owners were awarded development credits which they could sell.

Bernadine Suitum's undeveloped residential lot fell wholly within an SEZ. As an owner of SEZ land, Suitum was allocated four development credits that she could attempt to sell to other owners of non-SEZ land that could be developed for residential use. Purchasers of those credits are allowed to develop their property more extensively than would have been possible had they not bought the credits. For example, acquiring additional credits might allow a non-SEZ property owner to construct a considerably larger house than would be possible without the credits.

The Agency's regulations provide that landowners in Suitum's situation, whose property lies within an SEZ, may appeal the SEZ designation to its governing board. Suitum did so but without success.

Suitum, however, made no attempt to sell the credits that had been allocated to her by the TRPA. Although the Agency's approval is not required in order for a landowner in Suitum's situation to seek to sell development credits, the Agency must review and approve the purchaser of the credits before any sale is finalized. This approval process confirms the eligibility of the buyer to use the credits being purchased. In addition, before any sale of credits may be approved, the TRPA requires that the seller execute and record deed restrictions permanently removing the SEZ-situated land from any future development. The seller is also required to execute an instrument providing for the perpetual maintenance of the SEZ land in its natural state.

No further administrative review of the decision placing Suitum's property within an SEZ was available under the Agency's regulations, and the regulations did not include any provision for seeking variances, waivers, or other exceptions from a final SEZ determination by the Agency's governing board. After losing her administrative appeal, Suitum filed suit in federal district court, claiming various constitutional violations. In particular, Suitum alleged that the TRPA had taken her property without just compensation in violation of the Takings Clause and that she was entitled to just compensation.

Suitum argued that the various development-rights credits available under the TRPA's 1987 plan had no value and that the development-rights transfer program provided no remedy for the unconstitutional taking of her property. She asserted that marketing the development-rights credits would have been futile and was not a prerequisite to filing suit.

The district court, in an unreported decision, concluded that Suitum's case was not ripe for adjudication. The court held that because Suitum had failed to pursue transfer of her development-rights credits, there was an insufficient basis on which it could determine how the TRPA's regulations applied to her property and whether the reach of the regulations constituted an unconstitutional taking.

Suitum appealed the district court's decision to the Ninth Circuit which affirmed. The appeals court held that the transfer of development-rights credits constitutes a use of SEZ property within the regulatory scheme. The Ninth Circuit reasoned that until Suitum uses the property in the manner permitted by the regulations, that is, until she attempts to transfer the development-rights credits allocated to her, a trial court would be unable to make a determination that a taking had occurred. In essence, the Ninth Circuit, like the district court, concluded that Suitum's case was not ripe for adjudication. 80 F.3d 359 (9th Cir. 1996).

The Ninth Circuit's decision is now before the Supreme Court which granted Suitum's petition for a writ of certiorari. 117 S. Ct. 293 (1996).

Case Analysis

Suitum first argues that the TRPA's denial of her building plan was final, thus her constitutional claims were ripe for adjudication under the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985). In *Williamson County,* the Court held that a Takings Clause claim based on land use regulation is not ripe until the regulatory agency has reached "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191.

Suitum contends that the essential concern of the Court in *Williamson County* as well as in later cases has been an "insistence on knowing the nature and extent of permitted development" before adjudicating a Takings Clause claim. *See, e.g., MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 351 (1986). She argues that the TRPA's decision bars her from any development whatsoever and that the Agency's allocation to her of transferable development-rights credits in no way alters the fact that it has taken a final and definitive position that she may not develop her land for any purpose.

Suitum also maintains that the TRPA's decision prohibiting her from using her property is final. It was not necessary, therefore, for her to sell or attempt to sell the development-rights credits in order for a court to determine the economic impact of the Agency's regulation. On this point, Suitum insists that generally accepted appraisal methods could have been used at trial to determine the extent to which the value of her property had been diminished because of the Agency's land use regulations.

Suitum closes by arguing that the Ninth Circuit's acceptance of the TRPA's transferable development-rights scheme undermines the Court's categorical takings rule which holds that land use regulation that totally extinguishes a property owner's right to use the property is a *per se* taking under the Takings Clause requiring just compensation. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019 (1992).

Suitum emphasizes that the TRPA's regulations require her to sell her development-rights credits, and, when she effectuates a sale, she is required to execute deed restrictions extinguishing all development rights in the property and requiring the land to be maintained permanently in its natural state. In this context, the Ninth Circuit's requirement that she first attempt to sell the development credits allocated to her negates *Lucas's* holding that a taking has occurred when a landowner's development rights are completely extinguished. Says Suitum, under existing Supreme Court precedent, there was no reason for the lower courts to dismiss her Takings Clause claim on ripeness grounds when it is obvious that a complete taking of her property had occurred.

The TRPA responds with the contention that Suitum has misconstrued the holding of *Williamson County.* The Agency argues that *Williamson County* requires more than a final administrative decision in order for Suitum's case to be ripe for adjudication.

The Agency argues that in *Williamson County* and other cases the Court has focused on deriving economic benefit from property affected by land use regulation and has defined economic benefit broadly. In the Agency's view, the Court has placed particular emphasis on the value of the land and investment-backed profit expectations, rather than on whether or not construction is permitted.

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The Agency relies on language from *Williamson County* that "until the commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether respondent will be unable to derive economic benefit from the land." 473 U.S. at 191. Similarly, the Agency asserts that because Suitum failed to reasonably pursue the sale of her development rights, it was impossible for the district court to determine if she would be unable to derive any economic benefit from her land as regulated.

The TRPA emphasizes that in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), the Court held that the existence of a valuable, transferable development right was sufficient to negate the Takings Clause claim in that case. Similarly, in this case, the district court had before it evidence that the development-rights credits granted Suitum had significant market value that could be used to obtain economic benefit. Thus, no judicial determination could be made that a taking had occurred unless and until Suitum made a reasonable effort to sell those rights.

The TRPA also responds that Suitum is wrong in suggesting that the Ninth Circuit's decision effectively nullifies the Court's holding in *Lucas. Lucas,* the Agency asserts, held that only when an owner of land is deprived of all economically beneficial or productive use of the land has there been a categorical or *per se* taking triggering the Takings Clause requirement of just compensation. Thus, reasons the TRPA, the district court first had to ascertain if Suitum's property had been deprived of all economically beneficial or productive use before it could find a categorical taking of property under *Lucas.* But, reiterates the Agency, the district court could not undertake this analysis because Suitum had not attempted to make any use of the development-rights credits.

While Suitum relies on *Lucas's* emphasis on land use regulation that leaves a landowner without any economically beneficial or productive options by requiring that the land remain in its natural condition, the Agency contends that construction is only one of many uses to which property may be dedicated. As opposed to the situation in *Lucas* in which it was undisputed that the property was rendered valueless by land use regulation, Suitum's property, argues the Agency, may retain considerable economic value, the extent of which cannot be determined unless and until she makes a reasonable effort to sell her transferable development rights. In other words, Suitum actually never received a final Agency decision concerning the use of her property because she did not attempt to sell her development-rights credits. It is for that reason alone, argues the Agency, that her case was not ripe for adjudication.

SIGNIFICANCE

Limitations on the rights of private property ownership have been the subject of heated debate during the last decade and have led to the enactment of private property protection laws in many states. Proponents of land use regulation to benefit public interests such as environmental protection oppose such legislation, claiming that the Constitution already strikes an appropriate balance between protecting public and private property rights.

At least since *Penn Central,* some governmental land use planners and environmental regulators have attempted to soften the impact of land use regulations on property owners by creating transferable development rights and similar "compensatory" mechanisms. Bernadine Suitum's case gives the Supreme Court an opportunity to review these regulatory strategies to determine the extent to which they may be used to negate a Takings Clause claim.

If the Court affirms the Ninth Circuit's decision that courts cannot determine whether a taking has occurred until a landowner has made a reasonable effort to sell transferable development rights and the land use regulatory agency has been approached to approve the sale, land use planners will have a green light to continue their creative attempts at regulating land use without running afoul of Takings Clause proscriptions. And if the Court decides that Suitum's claim was ripe and should have been heard by the district court, the decision will provide guidance as to when federal courts can dispense with an agency's definition of a final administrative decision and adjudicate a Takings Clause claim.

More importantly, if the Court deems Suitum's case ripe for judicial consideration, it will at least implicitly call into question the viability of land use regulators' attempts to avoid Takings Clause claims through devices like transferable development rights. Such a holding also would clarify the Court's categorical Takings Clause analysis first articulated in *Lucas.* Thus, when land use regulations effectively prohibit all viable economic use of an owner's property, any attempt by government regulators to avoid a Takings Clause claim through devices like the TRPA's transferable development rights will be to no avail. Such a ruling would put environmental and land use regulators on notice that severely restricting or prohibiting use of real property may trigger obligations to compensate the

landowner, a constraint that would greatly impede the ability of state and local governments to regulate land use in order to further environmental and other important public interests.

Attorneys of the Parties

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For Tahoe Regional Planning Agency (Richard James Lazarus; Georgetown University Law Center; (202) 662-9129).

Amicus Briefs

In support of Bernadine Suitum

Joint brief of the American Farm Bureau Federation and the Nevada Farm Bureau Federation (Counsel of Record: Timothy S. Bishop; Mayer, Brown & Platt; (312) 782-0600);

Building Industry Association of Washington (Counsel of Record: Richard M. Stephens; Groen & Stephens; (206) 453-6206);

Joint brief of the Defenders of Property Rights, the American Homeowners Foundation, and the American Land Rights Association (Counsel of Record: Nancie G. Marzulla; Defenders of Property Rights; (202) 868-4197);

Institute for Justice (Counsel of Record: William H. Mellor; (202) 955-1300);

Joint brief of Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, Sunnyvale Properties, Ltd., and the Section 28 Partnership (Counsel of Record: Charles L. Siemon; Siemon, Larsen & Marsh; (407) 368-3808);

Joint brief of the National Association of Home Builders and the Building Industry Legal Defense Foundation (Counsel of Record: John J. Delaney; Linowes and Blocher; (301) 588-8580);

Tahoe Lakefront Owners' Association (Counsel of Record: Meriem L. Hubbard; Zumbrun & Findley; (916) 641-0015);

Tahoe-Sierra Preservation Council, Inc. (Counsel of Record: Lawrence L. Hoffman; (916) 582-8542).

In support of the Tahoe Regional Planning Agency

American Planning Association (Counsel of Record: Brian W. Blaesser; Robinson & Cole; (617) 5578-5900);

Columbia River Gorge Commission (Counsel of Record: Lawrence Watters; Columbia River Gorge Commission; (509) 493-3323);

Joint brief of 11 land use economists (Counsel of Record: John D. Echeverria; National Audubon Society; (202) 861-2242);

League to Save Lake Tahoe (Counsel of Record: E. Clement Shute, Jr.; Shute, Mihaly & Weinberger; (415) 552-7272);

Joint brief of the National League of Cities, National Governors' Association, Council of State Governments, National Conference of State Legislatures, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, and the U.S. Conference of Mayors (Counsel of Record: Richard Ruda; State and Local Legal Center; (202) 434-4850);

Joint brief of the National Trust for Historic Preservation in the United States, Municipal Art Society of New York, and the City and County of San Francisco (Counsel of Record; Jerold S. Kayden; (617) 496-0830);

Joint brief of the States of Nevada, Hawaii, Maryland, Montana, and Vermont (Counsel of Record: C. Wayne Howle, Deputy Attorney General of the State of Nevada; (702) 687-4170);

The State of New Jersey (Counsel of Record: Rachel J. Horowitz, Deputy Attorney General of the State of New Jersey; (609) 633-8119);

The City of New York (Counsel of Record: Leonard J. Koerner; Office of the Corporation Counsel of the City of New York; (212) 7688-1037);

The State of New York (Counsel of Record: John J. Sipos, Assistant Attorney General of the State of New York; (518) 474-8480);

The United States (Counsel of Record: Walter Dellinger, Acting Solicitor General; Department of Justice; (202) 514-2217);

Joint brief of Pete Wilson, Governor of the State of California; James M. Strock, Secretary of the California Environmental Protection Agency; and Douglas P. Wheeler, Secretary of the California Resources Agency (Counsel of Record: Michael A. Mantell; California Resources Agency; (916) 653-5656).