# REGULATORY TAKINGS -- PAST, PRESENT AND (?) FUTURE

**by David E. Dearing***

## Introduction

A legal issue that looms over many programs affecting land use and the environment is that of regulatory takings. Under the Fifth Amendment to the United States Constitution, the federal government cannot "take" private property for public use without paying "just compensation" to the owner. As a result of the Fourteenth Amendment, the same restriction applies to actions of state and local governments. In addition, most state constitutions contain a similar provision.

The more common type of taking occurs when the government exercises its power of eminent domain in order to condemn property. In contrast, a regulatory taking occurs when the government regulates private property so extensively that, in effect, it "takes" the property. [1]

With increasing frequency, landowners are filing lawsuits asserting that a land use or environmental restriction imposed by a law, regulation or administrative decision amounts to a regulatory taking. Traditionally, it was extremely difficult for a landowner to win such a case; however, recent decisions from the federal courts have made it somewhat easier for landowners to prevail.

## Jurisdictional Considerations

A disgruntled landowner can bring a regulatory takings claim against the federal government either in the Court of Federal Claims (formerly known as the Claims Court and, prior to that, as the Court of Claims) under the Tucker Act, 28 U.S.C. 1491 (a)(1), or in a U.S. district court under the Little Tucker Act, 28 U.S.C. 1346 (a)(2). Virtually all such cases are brought in the Court of Federal Claims, however, since the Little Tucker Act imposes a $10,000 ceiling on monetary awards against the federal government in district court. Because injunctive relief is not available in a federal taking case, [2] the Court of Federal Claims' general lack of power to issue injunctions is not a factor in selecting a forum.

Both the U.S. district courts and the Court of Federal Claims can award attorneys' fees and costs to a successful plaintiff in a takings case against the federal government. Such awards are authorized by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. [3]

Where state or local action is involved, the landowner must first exhaust his state court remedies. If the landowner is unsuccessful on the state level, he can seek *certiorari* from the U.S. Supreme Court on the ground of the alleged federal constitutional violation. [4]

## Recognizing a Regulatory Taking

Specifically, a regulatory taking can occur in one of four ways: (1) when a regulatory action does not serve a legitimate governmental interest; (2) when a regulatory action denies a landowner an economically viable use of his property; (3) when there is no logical connection between the purpose of the regulatory program and a condition in a permit; and (4) when the requirements imposed in a permit condition are excessive in relation to the impact of the permitted activity.

It is well established that protection of the environment and limitations on land use generally are legitimate governmental interests. [5] Thus, where environmental or land use regulation is involved, a landowner must base a regulatory takings claim on one of the other three grounds.

## Denial of Economically Viable Use

The landowner who seeks to demonstrate a denial of economically viable use must prove that the value of his property has been virtually destroyed. Typically, the landowner tries to show that in the absence of the relevant law, regulation or administrative decision, the property would be suitable for industrial, commercial, or residential development and would have a value of thousands of dollars per acre. He then tries to show that government's action has limited potential uses of the property so severely that it has only nominal value. Although there is no "bright line," in cases

where the landowner has prevailed the courts usually have found at least a 90 per cent diminution in fair market value. [6] Obviously, expert testimony from real estate appraisers is essential.

The landowner also must show that the regulatory program in question has interfered with "distinct investment-backed expectations." In other words, he must show that at the time he acquired the property, the regulatory program would not have blocked his development plans, and that he reasonably relied on that fact. [7]

In determining the landowner's financial loss, the courts traditionally have considered "the property as a whole." For example, a claimant's property might consist of fifty acres of wetlands and ten acres of non-wetlands. If the claimant could make a profit or recoup his investment by developing the ten non-wetland acres, the courts would find that a taking had not occurred, even if government regulation had reduced the value of the wetland acreage to zero.

The concept that property must be evaluated as a whole has been under attack in recent years. [8] Indeed, the concept was flatly rejected by the Claims Court in *Loveladies Harbor, Inc. v. U.S.* [9]. In that case, the plaintiffs purchased 250 acres of land in 1956. Much of the property consisted of wetlands. In the years prior to serious wetland regulation, plaintiffs developed 199 acres for residential purposes. In 1982, the Corps of Engineers denied a Section 404 Clean Water Act permit for the filling of some of the remaining wetlands.

In the ensuing court battle, the Claims Court refused to follow the traditional rule of considering the property as a whole. It disregarded the handsome profit realized from the 199 acres, and considered only the impact of the permit denial on the undeveloped area. The court found that the permit denial for all practical purposes had limited the use of the remaining 51 acres to a conservation or recreation area, reducing their worth from $2.6 million to a nominal value. The court ruled that this constituted a taking and awarded the plaintiffs $2.6 million plus interest.

On appeal, the Court of Appeals for the Federal Circuit affirmed the Claims Court decision. The Federal Circuit specifically endorsed the lower court's refusal to consider the property as a whole. [10] Although the government did not seek *certiorari,* in future cases it will probably continue to argue that the court must consider the property as a whole. The issue will remain unsettled until the Supreme Court rejects or reaffirms the traditional rule; however, for the time being, *Loveladies* sets a disturbing precedent for the government.

## Temporary Takings

Another setback for the government in this area in recent years has been the courts' acknowledgment that a delay in issuing a permit can effectively prevent a

landowner from making an economically viable use of his property in the short run. This concept -- known as a "temporary taking"-- recognizes that even though a regulatory body eventually issues a permit, it may have acted unconstitutionally by unreasonably delaying the permit decision. The cases that address temporary takings indicate that the concept applies only to "extraordinary" delays, *i.e.*, those that stretch on for several years. [11]

## Lack of Nexus

A 1987 Supreme Court decision, *Nollan v. California Coastal Commission*, [12] established that a regulatory taking occurs when there is no nexus between a permit condition and the purpose of the regulatory program under which the condition is imposed.

The Nollan family wanted to construct a home that would partially block the public's view of the ocean. Under California law, the project required a permit from the Coastal Commission. The Nollans applied for and received the necessary permit; however, the Coastal Commission attached a condition to the permit requiring the Nollans to grant a public easement across a portion of their property, giving access to a nearby public beach. The Supreme Court found that this constituted a taking, since the permit condition addressed physical access to the beach, while the purpose of the state regulatory program was merely to preserve visual access.

This decision sharply limited the scope of mitigation conditions that can be attached to an environmental or land use permit. For example, a mitigation condition attached to a wetlands permit must be designed to benefit the aquatic environment rather than to serve an agency's individual notion of the public good.

## Lack of Rough Proportionality

A 1994 Supreme Court case, *Dolan v. City of Tigard*, [13] held that a regulatory taking occurs when the requirements imposed in a permit condition are excessive in relation to the harm caused by the permitted activity. In that case, the Court ruled that a local government cannot require dedication of land as a condition in a building permit, unless it makes specific findings that the dedication is roughly proportional to the impact of the new construction.

*Dolan* involved land designated for a floodway and a bicycle path; however, the same reasoning clearly applies to the more common practice whereby local governments routinely require dedications for street right of ways, when an applicant seeks a building permit or zoning variance. Nevertheless, many local governments have ignored the decision and continue to require dedication without any effort to make specific findings concerning impact. Applicants often acquiesce in this unconstitutional practice, either out of ignorance or a desire to avoid delays in obtaining approvals.

## Pending Legislation

At the time of this writing, two measures are pending in Congress that would change the rules of the takings game on the federal level -- a House Bill that would make it somewhat easier for landowners to prevail in these cases, and a Senate Bill that would absolutely revolutionize the law of takings.

The Private Property Protection Act is part of HR 9, commonly known as the Regulatory Reform Legislation. This bill passed the House during the last session and is currently in Senate Committee. It focuses on federal agency actions affecting water rights in the western states and wetlands.

The Private Property Protection Act explicitly abolishes the traditional rules that require a court to consider the property as a whole and require a landowner to show a near total loss of property value before prevailing. Under the bill, when an agency action diminishes the value of any portion of a property by 20 per cent or more, the government must pay compensation equal to the diminution in value. If the diminution is greater than 50 per cent, at the landowner's option, the government must buy the affected portion of the property at fair market value.

The Private Property Protection Act requires an aggrieved landowner who seeks compensation to send a written request to the agency. The agency at its option may then

attempt to negotiate the claim. If no agreement is reached, the landowner can take the agency to arbitration or to court.

Successful plaintiffs will be entitled to awards of attorneys' fees and costs. Any payments or judgments must come from the annual appropriation of the agency involved. Obviously, this provision provides a strong incentive to the agencies to avoid anything that might be considered a taking.

The Senate bill is S.605, the Omnibus Property Rights Act of 1995. It focuses on federal agency actions affecting wetlands and endangered species. This act lowers the threshold for a taking to only a 33 per cent diminution in the value of any portion of a property, as opposed to the 20 per cent diminution provided in the Private Property Protection Act; however, the Omnibus Act overall is clearly a stronger property rights measure.

The Omnibus Act significantly increases the jurisdictional options for aggrieved landowners. First, it provides that there be no dollar limit on takings actions brought in the U.S. district courts. Second, it authorizes the Court of Federal Claims to invalidate any act of Congress or any federal regulation found to constitute a taking. Third, it would allow a landowner to challenge the same government action in both a U.S. district court and the Court of Federal Claims simultaneously, a practice currently forbidden by 28 U.S.C. 1500.

As in the Private Property Protection Act, any payments or judgments would come from the regulating agency's annual appropriation. Finally, the Omnibus Act imposes numerous new procedural requirements on federal agencies, including the preparation of a private property taking impact analysis prior to any agency action "likely" to cause a regulatory taking.

## Conclusion

In sum, the federal courts have modified the law of regulatory takings in recent years, giving landowners a better chance of prevailing in lawsuits. It remains to be seen whether the massive changes contemplated by pending legislation will become law, but at present the momentum is clearly on the side of private property rights advocates.

* David E. Dearing is an attorney in Indianapolis, Indiana.

## Endnotes

1. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316-317 (1987).

2. *U. S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-129 (1985).

3. 42 U.S.C. 4654(c); *See Florida Rock Industries, Inc. v. U.S.*, 23 Cl.Ct. 653 (1991), *vacated and remanded on other grounds*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S.Ct. 898 (1995).

4. *See First English Evangelical Lutheran Church*, 482 U. S. at 312, n.6.

5. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485-486 (1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978).

6. *E. g., Loveladies Harbor, Inc. v. U.S.*, 21 Cl. Ct. 153, 160 (1990), *aff'd* 28 F.3d 1171 (Fed. Cir. 1994) (99 per cent); *Bowles v. U.S.*, 31 Fed. Cl. 37, 50 (1994) (91.8 per cent).

7. *Penn Central Transp.*, 438 U.S. at 130; *Deltona Corporation. v. U.S.*, 657 F.2d 1184, 1193 ( Ct.Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982) .

8. *See Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1016-1017 n.7 (1992).

9. 21 Cl.Ct. 153 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994).

10. 28 F.3d at 1180-1181.

11. *First English Evangelical Lutheran Church of Glendate v. County of Los Angeles*, 482 U.S. 304, 322 (1987); *1902 Atlantic Limited v. U.S.*, 26 Cl.Ct. 575, 581 (1992); *Dufau v. U.S.*, 22 Cl.Ct. 156, 163-164 (1990), *aff'd* 940 F.2d 677 (Fed. Cir. 1991) (Table).

12. 483 U.S. 825 (1987).

13. 114 S.Ct. 2309 (1994).