Key "Takings" Decision from SCOTUS Involving Ag Businesses

Roger McEowen (roger.mceowen@washburn.edu) – Washburn University School of Law
June 2021
Agricultural Law and Taxation Blog, by Roger McEowen: https://lawprofessors.typepad.com/agriculturallaw/
Used with permission from the Law Professor Blog Network

Overview

The power to "take" private property for public use (or for a public purpose) without the owner's consent is an inherent power of the federal and state governments. However, the United States Constitution limits the government's eminent domain power by requiring federal and state governments to pay for what is "taken." The Fifth Amendment states in part "...nor shall private property be taken for public use without just compensation."

Whether a taking has occurred is not an issue when the government physically takes the property, with the only issue being whether the taking is compensable and the amount of compensation due to the landowner. However, for non-physical (regulatory) takings, the issue is murkier. At what point does government regulation of private property amount to a compensable taking?

Earlier this week, the U.S. Supreme Court addressed the issue of physical/non-physical takings in a case involving a California strawberry growing operation.

Takings and the constitution – it's the topic of today's post.

Background

The power to "take" private property for public use (or for a public purpose) without the owner's consent is an inherent power of the federal and state government. However, the United States Constitution limits the government's eminent domain power by requiring federal and state governments to pay for what is "taken." The Fifth Amendment states in part "...nor shall private property be taken for public use without just compensation." The clause has two prohibitions: (1) all takings must be for public use, and (2) even takings that are for public use must be accompanied by compensation. Historically, the "public use" requirement operated as a major constraint on government action. For many years, the requirement was understood to mean that if property was to be taken, it was necessary that it be used by the public – the fact that the taking was "beneficial" was not enough. Eventually, however, courts concluded that a wide range of uses could serve the public even if the public did not, in fact, have possession. Indeed, so many exceptions were eventually built into the general rule of "use by the public" that the rule itself was abandoned.

Actual physical takings of property by the government are easy to identify. When a non-physical taking has occurred is not as easy to spot.

Regulatory (Non-Physical) Takings

A non-physical taking may involve the governmental condemnation of air space rights, water rights, subjacent or lateral support rights, or the regulation of property use through environmental restrictions. How is the existence of a regulatory taking determined? There are several approaches that the Supreme Court has utilized.

Multi-factor balancing test. In a key case decided in 1978, the U.S. Supreme Court set forth a multi-factored balancing test for determining when governmental regulation of private property effects a taking requiring compensation. In *Penn Central Transportation Co. et al. v. New York City, 438 U.S. 104 (1978),* the Court held that a landowner cannot establish a "taking" simply by being denied the ability to exploit a property interest believed to be available for development. Instead, the Court ruled that in deciding whether particular governmental action effects a taking, the character, nature and extent of the interference with property rights as a whole are the proper focus rather than discrete segments of the owner's property rights. In 2005, the Court confirmed the multi-factor test and noted that the touchstone for deciding when a regulation is a taking is whether the restriction on property usage is functionally equivalent to a physical taking of the property. *Lingle, et al. v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).*

Total regulatory taking. In *Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992),* the landowner purchased two residential lots with an intent to build single-family homes. Two years later, the state legislature passed a law prohibiting the erection of any permanent habitable structures on the Lucas property. The law's purpose was to prevent beachfront erosion and to protect the property as a storm barrier, a plant and wildlife habitat, a tourist attraction, and a "natural health environment" which aided the physical and mental well-being of South Carolina's citizens. The law effectively rendered the Lucas property valueless. Lucas sued the Coastal Council claiming that, although the act may be a valid exercise of the state's police power, it deprived him of the use of his property and thus, resulted in a taking without just compensation. The Coastal Council argued that the state had the authority to prevent harmful uses of land without having to compensate the owner for the restriction.

The Supreme Court ruled for Lucas and opined that the state's interest in the regulation was irrelevant since the trial court determined that Lucas was deprived of any economically viable alternative use of his land. The *Lucas* case has two important implications for environmental regulation of agricultural activities. First, the *Lucas* court focused solely on the economic viability of the land and made no recognition of potential noneconomic objectives of land ownership. However, in the agricultural sector land ownership is typically associated with many noneconomic objectives and serves important sociological and psychological functions. Under the *Lucas* approach, these noneconomic objectives are not recognized. Second, under the *Lucas* rationale, environmental regulations do not invoke automatic compensation unless the regulations deprive the property owner of *all* beneficial use.

Under the *Lucas* approach, an important legal issue is whether compensation is required when the landowner has economic use remaining on other portions of the property that are not subject to regulation.

Unconstitutional conditions. In *Nollan v. California Coastal Commission,483 U.S. 825 (1987),* the plaintiff owned a small, dilapidated beach house and wanted to tear it down and replace it with a larger home. However, the defendant was concerned about preserving the public's viewing access over the plaintiff's land from the public highway to the waterfront. Rather than preventing the construction outright, the defendant conditioned the plaintiff's right to build on the land upon the plaintiff giving the defendant a permanent, lateral beachfront easement over the plaintiff's land for the benefit of the public. Thus, the issue was whether the state could force the plaintiffs to choose between their construction permit and their lateral easement. The Court held that this particular bargain was impermissible because the condition imposed (surrender of the easement) lacked a "nexus" with, or was unrelated to the legitimate interest used by the state to justify its actions - preserving the view. The Court later ruled similarly in *Dolan v. Tigard, 512 U.S. 374 (1994).* These cases hold that the government may not require a person to give up the constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property. The rule of the cases does not apply to situations involving impact fees and other permit conditions that do not involve physical invasions, but it would apply to monetary exactions where none of the plaintiff's property is actually taken. *See, e.g., Koontz v. St. Johns River Water Management District*, *133 S. Ct. 2586 (2013).*

State/Local Takings – Seeking a Remedy

For a landowner that has sustained a state/local regulatory (or physical) taking, can compensation be sought initially in federal court or must legal procedures be first pursued in state court with federal courts only available if compensation is denied at the state level? The U.S. Supreme Court answered this question in 1985. In *Williamson Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985),* the Court held that if a state provides an adequate procedure for seeking just compensation, there is no Fifth Amendment violation until the landowner has used the state procedure and has been denied just compensation. However, 28 U.S.C. §1738, would then be applied with the resulting effect that the failure to receive compensation at the state level generally meant that there was no recourse in the federal courts because of the preclusive effect of the landowner having already litigated the same issue(s) in the state courts. *See, e.g., San Remo Hotel L.P., v. City and County of San Francisco, 545 U.S. 323 (2005).*

The Court dealt with this "catch-22" in 2019 in *Knick v. Township of Scott, 139 S. Ct. 2162 (2019*, pointing out that there is a distinction between the substance of a right and the remedy for the violation of that right. It's the takings clause of the Fifth Amendment that establishes that the government can only take (either physically or via regulation) private property by paying for it. The government's infringement on private property is what triggers possible compensation. The Constitutional violation has occurred and a state court decision that makes the landowner financially whole simply remedies that violation. It doesn't redefine the property right. Thus, the majority opinion reasoned, laws confer legal rights and when those rights are violated there must be legal recourse. *See, e.g., Marbury v. Madison, 5 U.S. 137 (1803).* As the majority noted, "a government violates the Takings Clause when it takes property without compensation, and…a property owner may bring a Fifth Amendment claim [in federal court]… at that time."

Physical Takings

California case. Earlier this week, the Court again dealt with the takings issue in Cedar Point *Nursery, et al. v. Hassid, et al., No. 20-107, 2021 U.S. LEXIS 3394 (U.S. Sup. Ct. Jun. 23, 2021).* The lead plaintiff is a large strawberry growing operation in California, employing over 400 seasonal workers and about 100 full-time workers. A California labor regulation, based on the California Agricultural Labor Relations Act of 1975 that gives ag employees a right to self-organize, grants labor organizations a "right to take access" to an ag employer's property in order to solicit support for unionization. Cal Code Regs., tit. 8, §20900(e)(1)(C). Under the regulation, an ag employer must allow union organizers onto their property for up to three hours daily, 120 days per year. In the fall of 2015, at 5 a.m., members of the United Farm Workers entered the plaintiff's property without any prior notice being given. They entered the plaintiff's trim shed where hundreds of workers were preparing strawberry plants. The organizers used bullhorns to stir up the workers and encourage them to join in a protest. Other workers left the worksite. The plaintiff filed charges against the union for taking access without notice. In return, the union claimed that the plaintiff had committed an unfair labor practice similar to the claim it had made during the summer of 2015 against a California grower and shipper of table grapes and citrus.

The ag businesses believed that the union would try to enter their properties again in the future, they sued claiming that the access regulation was an unconstitutional per se physical taking of an easement that was given, without compensation, to union organizers. The trial court held that the regulation did not amount to a per se physical taking because it did not "allow the public to access their property in a permanent and continuous manner for whatever reason." Instead, the trial court held that the regulation was a non-physical taking to be evaluated under the muti-factor balancing test of *Penn Central.* A majority of the appellate court affirmed, identifying the various types of non-physical takings discussed above and again determining that the balancing test of *Penn Central* applied. The U.S. Supreme Court agreed to hear the case and reversed.

The Supreme Court determined that an actual physical appropriation of private property was involved. It was a per se governmental taking. The Court noted that the regulation didn't merely restrict the use of private property, it appropriated it for the use and enjoyment of third parties. One aspect of property ownership is the right to exclude others, and the Court determined that the ability of the union to take access of a part of an ag operation's private property took that right away. In addition, the right of access, even though temporary, still constitutes a taking. There was no benefit of the loss of a property right flowing back to the ag businesses.

Conclusion

The distinction between outright physical and non-physical takings is not always clear. But, the Court's decision in *Cedar Point Nursery* is a clear indication that the loss of the right to exclude others, even on a temporary basis, when no benefit inures to the property owner, is a fundamental property right that will be classified and protected as a physical taking with no balancing test required.