

COURTS ISSUE GOOD NEWS FOR FLOODPLAIN MANAGEMENT

by Edward A. Thomas, Esq.

Michael Baker, Inc.

“Challenge US”

Over the past few years there has been a considerable amount of discussion about when a regulation—such as those used to manage floodprone areas—goes so far in restricting a property owner’s ability to develop his or her property that it becomes a “taking” of that property in contravention of the property rights guaranteed in the Constitution of the United States. Recent decisions by the U.S. Supreme Court, the New York Court of Appeals (the highest court in New York State), and the Massachusetts Supreme Judicial Court have clarified the law on takings in ways that are extremely favorable to hazard regulators in general, and floodplain managers in particular.

Background

The Fifth Amendment to the U.S. Constitution states “nor shall private property be taken for public use without just compensation.” Some famous court cases clarified this guarantee, notably *Pennsylvania Coal Company vs. Mahon*, 260 U.S. 293 (1922), which stated that a government regulation that restricts a property owner’s freedom to use his or her property to such an extent that such regulation can constitute a “taking.” In such instances, courts rule that compensation must be awarded to the property owner. After such a ruling, the regulation in question is often rescinded or watered down.

Recent U.S. Supreme Court Cases

Tests for a Taking

The United States Supreme Court recently issued a ruling in the case of *Lingle v. Chevron*, No. 04-163, decided May, 23, 2005. The case itself involved a Hawaii law that set up rent control for gas stations. The significance for floodplain managers is that the unanimous opinion of the Court clearly sets forth the bases for ruling in favor of a property owner’s claim of regulatory taking.

(1) **Physical invasion of the property**, as in *Loretto v. Teleprompter Manhattan*, 458 U.S. 419 (1982). The *Loretto* case involved a New York City requirement that all residential buildings must permit a cable company to install cables, and a cable box the size of a cigarette pack. The Court held that any physical invasion must be considered a taking.

(2) **A total, or near-total regulatory taking**, as exemplified by the case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In this case, plaintiff Lucas was completely prohibited from building a home on the only vacant lots left on an otherwise fully developed barrier beach just outside Charleston.

(3) **A significant, though not nearly total taking**, as exemplified by *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), where historic preservation regulations prevented the railroad from building above Grand Central Station in New York City to the full height permitted by the overlay zoning. The company was provided transferable development rights, and the Court held that this historic preservation regulation was not a taking.

(4) **Land use exactions not related to the articulated government interest**, as in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The Coastal Commission conditioned a permit to expand an existing beachfront home on the owner's granting an easement to allow the public to cross his beachfront land. The articulated government interest was that the lateral expansion of the home would reduce the amount of beach and ocean visible to the public from the road. The Court indicated that preserving public views from the road really did not have an essential connection (or nexus) with allowing folks to cross a beach. The Court also cited *Dolan v. Tigard*, 512 U.S. 374 (1994), a case in which someone wanted to expand a plumbing store and the community wanted the store to give the community some adjacent floodplain property and an easement for a bike path in return for the possible increase in traffic caused by the store's expansion. As in *Nollan*, the court in *Dolan* had basically indicated that there was really no relationship between the government's interest (in reducing traffic) and the exaction it attempted to impose (space for a bikepath).

An important omission from the newly approved "tests" for a taking was an earlier test used in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In that case, the Court had established a two-part test for determining a taking: (1) whether the regulation substantially advances a legitimate state interest, and (2) whether the regulation denies the owner an economically viable use of the land. In the recent *Lingle* ruling, the Court specifically indicated that it will no longer use the first part of that test. The removal of the "substantially advances a legitimate state interest" takings test is a huge help to floodplain managers, and to planning in general. In essence, the question of whether an action by a legislative body "substantially advanced a legitimate state interest" had been providing a mechanism by which courts could second-guess the relative merits of enacted laws. In this opinion, the Supreme Court is indicating that it will defer to legislative decisions unless there is no real relationship between what the legislative body desires and the action taken, or there is some other due process or equal protection issue. This is explained in the *Nollan* and *Dolan* decisions and also in Justice Kennedy's concurring opinion in *Lingle*.

The Court summed up its reasoning in *Lingle* by stating that the four tests it listed ". . . all aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property." This clear statement by the highest court in the nation tremendously supports both the principles of the National Flood Insurance Program (NFIP) and No Adverse Impact floodplain management. Both the NFIP and NAI strive to help communities and property owners develop safely and properly without causing harm to others. Neither the NFIP nor NAI principles cause or

support a government's ouster of owners from their land (or appropriation of that land), so regulations or policies that follow those principles would not be considered takings.

Economic Development as a "Public Use"

Kelo v. New London, U.S. Supreme Court, No.04-108, decided June 23, 2005, involves condemnation, that is, a "paid taking" of residences. The case has to do with whether economic development in a community is considered a "public use" for purposes of a taking as described in the Constitution. The five-to-four decision that, yes, economic development can be considered a public use, shows how much deference the majority of the Justices are willing to give to local decision makers who, in this case, had decided to condemn private land so that commercial redevelopment could take place. Pro-government and planning associations cheered the decision. However, it was also greeted by widespread public concern, outrage, and proposed legislative correction of the decision from groups concerned about the rights of minorities as well as property rights advocates. This widespread concern illustrates the extreme sensitivity of issues involving property rights. For floodplain managers, the primary lesson of this case is that the Court was willing to give enormous deference to local decisions about what is best for a community, thus offering support to the concepts and principles of No Adverse Impact floodplain management.

State Court Decisions Final

San Remo Hotel v. City and County of San Francisco, U.S. Supreme Court No. 04-340, decided June 20, 2005, was a unanimous decision in a case involving fees charged to permit the change of use of a hotel. It does not directly relate to hazard regulation. Nevertheless it is important to floodplain managers because it indicates that takings claimants who have already litigated in state court do not get another "bite at the apple" in federal court.

Recent State Cases

Identifying Hazards and Impacts

In *Gove v. Zoning Board of Appeals of the Town of Chatham*, Massachusetts Supreme Judicial Court, decided July 26, 2005, the Town of Chatham zoned several areas, including its Special Flood Hazard Areas (the area identified by the Federal Emergency Management Agency as being subject to at least a 1% annual chance of flooding), in such a way that a variance was required to build. Gove sold a 1.8-acre parcel of land on the condition that a building permit for a single-family home would be issued. The Town declined to issue the permit, and Gove sued, alleging a taking. In this decision, Massachusetts' highest court emphasized that the Town of Chatham had identified unique hazards on this erosion-prone coastal A-Zone property. The court found that the plaintiffs had not sufficiently shown that they could construct a home in this area without potentially causing harm to others.

The Town made a good case that this is not just any A-Zone property in an SFHA. It is on the coast adjacent to the V Zone, in an area that has experienced major flooding and is now exposed to the open ocean waves due to a breach in a barrier beach just opposite the site. Further, it is subject to both accelerated “normal” erosion and storm-related erosion.

This decision by the Massachusetts Supreme Judicial Court very much validates and supports the NFIP, the concept of No Adverse Impact floodplain management, and hazards-based regulation in general. While the decision is binding only on Massachusetts courts, it should have persuasive effect in other jurisdictions.

Conservation Easements

Smith v. Town of Mendon, 4 No. 177 New York Court of Appeals, decided December 21, 2004, involved a requirement by a town that, as a condition of issuance of a building permit, the property owner must grant a conservation easement for some portions of the site, including flood hazard areas, on which the Town had imposed conservation overlay zoning that severely restricted development. The owner did not propose to build on these environmentally sensitive areas, but at the same time did not want to limit any future activity by granting a conservation easement. New York’s highest court issued a sharply divided (4-3) opinion that upheld the Town’s requirement.

From a floodplain management perspective, the interesting thing is that there was no real argument in the case that the Town’s restriction on building in flood hazard areas was a taking. The plaintiff only argued against an easement that would restrict future development on other parts of the land, yet the court still upheld the community’s requirement aimed at protecting environmentally sensitive and hazard-prone areas.

Summary

Floodplain managers can be heartened by the decisions and opinions in three Supreme Court cases and those in two states, all of which support the concept of government management of areas prone to flooding.

- Four tests for a “taking” have been clearly delineated by the Supreme Court, all of which tend to restrict takings to fairly narrow circumstances.
- The Supreme Court has indicated that deference will be given to local decisions in matters of land use and community development—a stance helpful to floodplain management because it underscores the responsibility and prerogatives of localities for management of land within their jurisdictions.
- The high courts in two influential states have supported communities’ zoning, regulations and other management techniques intended to protect development from hazards, to prevent development from having adverse impacts on other property, and to preserve environmentally sensitive areas.

For additional information on legal aspects of floodplain management, please visit www.floods.org/.

Author's Note

This article is a pro bono presentation on behalf of the Association of State Floodplain Managers. It reflects the personal views of the author. The statements and views contained in this article are not legal advice, but rather a statement of general principles of law. The law, especially property law, is enormously driven by the individual facts of a situation as well as state and local law. For legal advice, see an attorney licensed in your jurisdiction.

This article is dedicated to my friend and mentor, attorney Jon Kusler, Ph.D., whose research and partnership served as the foundation of this work.

My thanks also to Michael Baker, Inc., which is providing generous financial support to enable me to conduct the research necessary to develop this article as well as the ongoing series of lectures on behalf of the ASFPM, which explains in more detail the concepts set forth here.