Takings Law Review
*Murr v. Wisconsin* and Relevant Parcel Analysis

APA Colorado Chapter Conference / October 5, 2017
Telluride

Your Presenters

**Brian Connolly**
Otten Johnson Robinson Neff + Ragonetti, P.C.
Denver, Colorado

**Don Elliott**
Clarion Associates LLC
Denver, Colorado

**Marcus McAskin**
Michow Cox & McAskin LLP
Greenwood Village, Colorado
Program Outline

- Review takings law
- Review of “parcel as a whole” rule and relevant parcel analysis
- *Murr v. Wisconsin*
- Implications for planners
- Questions and answers

A Little Refresher on “Takings” Law
(A favorite of sabre-rattlers)
Refresher on “Takings”

A “regulatory taking” is a government regulation that “goes too far” -- i.e. so far that the court feels it is like a condemnation of the property, and is therefore unconstitutional unless compensation is paid. This happens when:

The Basic Test

A regulatory “Taking” has occurred if the government denies you all “reasonable economic use” of the property (Penn Central)

- Which leads to debates about:
  - What is “All Reasonable Economic Use”
  - What is “The Property”

Refresher on “Takings”

The word “Takings” is easy to say,
But “Takings” cases are very hard for the property owner to win because:

- The test is not whether the regulation denied you a particular economic use of the property -- (i.e. the one you wanted) -- it’s whether you were left with NO reasonable economic use of the property
- Takings are NOT measured by what the property owner says the regulation “took” -- they are measured by what uses of the land you have left
- The regulation almost never leaves you without a reasonable economic use of the property
- Evidence of what you paid for the property, what money you are making from the property now, how hard you tried to sell it or rent or lease it for any permitted use will contribute to what a “reasonable economic use” is
- The courts presume that what you are doing now is a reasonable economic use”
Refresher on “Takings”

What is NOT a Regulatory Taking?

*Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)* held that the regulatory takings doctrine protects only “reasonable, investment-backed expectations”

- NOT pipe dreams – there is no right to achieve your expectations or the assumptions behind your purchase of the property
- NOT “highest and best use” – that’s an appraisal concept – no one has a legal right to the highest and best use of their property
- NOT the right to develop property with problems as if it didn’t have those problems

Refresher on “Takings”

Let’s look at five special cases

Plaintiffs sometimes win “Takings” claims if

1. There is a “physical taking” (*Manhattan Teleprompter v CATV*)
   - Like making you accept a cable TV box on your building
   - Does not apply to requirements for easements for public utilities
   - Does not apply to public safety requirements

2. The government denies you ALL use of the property (*Lucas v. South Carolina Coastal Commission*)
   - I.e. your only permitted use of your property is for birdwatching
   - This almost never happens
   - And even if it does, there is no taking if the regulation only prevents a nuisance (*The Mill*)
Refresher on “Takings”

Nollan and Dolan and Koontz . . Oh My!

IF the regulation exacts land or money from the property owner, then the property owner may win a “Takings” in three other situations.

3. There is no “rational nexus” between the regulation and the public good that the regulation aims to promote (Nollan v. California Coastal Commission)
   - A requirement to give the government an access easement along your beachfront cannot possibly promote the stated goal of reminding people that the beach is there

4. The regulation is not “roughly proportional” to the impact of the development being regulated (Dolan v. Tigard)
   - A small expansion of a hardware store does not generate enough additional use of a trail to require the property owner to donate that trail segment to the city.
Refresher on “Takings”

Don’s Theory

- Requiring public access to your land may be treated the same as if you required the dedication of that land to the government
- The right to exclude people from your land is a fundamental right of ownership
- Tigard OR was overturned when it tried to force Ms. Dolan to dedicate a missing link in the trail system as a condition to expanding her hardware store – because her expansion probably created few new users of the trail
- I think the case would have come out the same way if Tigard said “keep your trail land – just let the public use it”

Refresher on “Takings”

5. The government tries to attach “unconstitutional conditions” to an application, and then denies the application when the property owner will not agree to those conditions (Koontz v. St. John’s River Water Management District)

- Both the Nollan and Dolan cases involved local government requests for dedication of LAND attached to development APPROVALS
- The Koontz case involved a local government (unsuccessful) request for payment of MONEY that resulted in a development DENIAL
Refresher on “Takings”

- Coy Koontz wants to fill in some wetlands as part of a development project, and water district requires that he either (1) fill in less wetlands, or (2) pay the district MONEY that it will use to create new offsetting wetlands nearby. When landowner refuses both options, district DENIES the permit, and landowner sues, citing Nollan and Dolan.

- Supreme Court holds that
  1. Nollan’s “rational nexus” and Dolan’s “rough proportionality” requirements apply to exactions of money (but does not clarify whether that also includes formula / non-negotiated exactions)
  2. The same rationale applies when a permit is denied because the property owner will not accept “unconstitutional conditions” attached by the government (even though no “taking” has taken place.

Refresher on “Takings”

Don’s possible solution (It probably can’t hurt)

“During its consideration of a potential development, the Planning Commission may consider alternative potential conditions to mitigate impacts of the development. No discussion of potential conditions shall be deemed an attempt or intent to impose any condition that would violate the federal or state constitutions, statutes or regulations. Discussions of potential conditions to mitigate impacts do not reflect actions by the Planning Commission unless and until the Commission takes formal action to attach that condition to a development approval.”
So – assuming that:
• It’s not a physical taking under Teleprompter
• It’s not a denial of ALL use of the land under Lucas
• Rational nexus exists per Nollan
• Rough proportionality exists per Dolan
• There has been no denial based on unconditional conditions per Koontz

We’re back to the general Penn Central test:

A regulatory “Taking” has occurred if the government denies you all “reasonable economic use” of the property
Relevant Parcel Analysis

- Often referred to as the “parcel as the whole” rule; or
- What is the proper unit of property against which to assess the effect of the challenged governmental action?

Relevant Parcel Analysis

- Colorado and federal courts have long recognized that takings claims may be framed so that the challenged regulations appear to have taken “all economic value” of some distinct part of the overall bundle of property rights.
- To compare the effect of the regulation on something less than the entire parcel may render the *Penn Central* test meaningless.
Defining the Relevant Parcel

- Effect of normal “setback requirement”

- 5,000 sf lot.
- Local regulation has 20’ front yard, 10’ rear and side yard setbacks
- Building envelope = 2,100 square feet
- - 58% reduction in value of entire parcel, or 100% loss of value for the 2,900 square feet rendered unbuildable?

Relevant Parcel Analysis

Value “taken” from property

Value of property remaining

(Challenge is how to define the denominator of the above fraction)
Relevant Parcel Analysis

- The larger the parcel to be considered, the more difficult the task for a plaintiff to show an impact on use and value
- Plaintiffs will typically try to define the relevant parcel as narrowly as possible

Relevant Parcel Analysis

- US Supreme Court has repeatedly held that the relevant parcel to be examined is not just the “affected portion” of the property, but the entire parcel, or the “parcel as a whole”
- Sometimes referred to as the non-segmentation or non-severance rule
Relevant parcel analysis

- Review of some important cases that form the basis of jurisprudence on the relevant parcel (or “parcel as a whole”) analysis:
  - Penn Central - Lucas
  - Keystone Bituminous - Concrete Pipe
  - Andrus v. Allard - Animas Valley (CO)
  - Tahoe-Sierra

Penn Central (1978)

- New York applied historic preservation laws to deny the owners of the Grand Central Terminal the right to construct a 50-story office tower on top of terminal
Penn Central

• In rejecting takings claim, Court wrote: “takings jurisprudence does not divide a single parcel into discrete segments”
• In deciding whether a particular governmental action has effected a taking, courts focus on: (1) character of action; and (2) the nature and extent of the interference with rights in the parcel as a whole (here the whole “tax block”)

Penn Central
Penn Central

- Other important facts in case
- Original Terminal Plan proposed a potential 20-story add-on:
  - Compare to 50-story option
  - Owner never applied for the 20-story “option”
  - Owner owned many other hotels and properties in immediate vicinity of Terminal
  - TDRs from Terminal site available for use

Andrus v. Allard (1979)

- Involved a challenge to a ban on the sale of artifacts made from bald eagles and other federally protected birds
Andrus v. Allard

- Although the ban extinguished the right of the claimants to sell the artifacts that Court held: **NO TAKING**

- “. . . where an owner possesses a full bundle of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.”

- Claimants retained the right to possess & donate the property – no taking even though the most profitable use of the property (the sale of artifacts) was banned.

Keystone Bituminous Coal (1987)

- Challenge to Pennsylvania’s Bituminous Mine Subsidence and Land Conservation Act

- Act prohibits coal mining that causes subsidence damage to pre-existing public buildings, dwellings, cemeteries and other land uses
Keystone

• Discussion of Petitioners’ two alternative definitions of the relevant parcel

• Discussion of Court’s analysis and holding in *Keystone*
**Lucas v. South Carolina (1992)**

- State’s 1988 Beachfront Management Act barred property owner (Lucas) from building on two residential lots purchased in 1986 (for $975k)
- Denial of “all economically viable use of land” constitutes a categorical taking, equivalent to physical appropriation of land
- Discussion of Footnote 7 in Lucas – potential support for “affected portion” standard?
- Relevant parcel was not disputed in Lucas

---

**Concrete Pipe (1993)**

- Unanimous Supreme Court applied the “parcel as a whole rule” to reject a takings challenge to a federal law that imposed liability on employers who withdrew from pension plans
- Court reaffirmed that plaintiffs may not unfairly manipulate their property interests to demonstrate a compensable takings
- Not a land use case, but relied on Penn Central and Keystone and it applies to regulatory takings cases
**Tahoe-Sierra (2002)**

- Involved two temporary moratoria, the effect of which precluded any development for a period of 32 months
- Court: can’t “effectively sever” the 32 months of restriction during temporary moratoria
- Every delay does not equal total ban

---

**Tahoe-Sierra**

- Requires that the “aggregate be viewed in its entirety”
- Where an owner possesses a full “bundle” of property rights, the destruction of one “strand” of the bundle is not a taking. 535 U.S. at 327, *citing Andrus* 444 U.S. at 65-66.
**Tahoe-Sierra**

- Court clearly rejects petitioners’ attempt to sever the 32-month segment from the remainder of the fee simple estate
- “With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings.”
- A temporary restriction that causes a diminution in value is not a taking

---

**Colorado Supreme Court**

- *Animas Valley Sand and Gravel, Inc. v. La Plata County BOCC*, 38 P. 3d 59
- Overview of facts of case
  - County adopts Land Use Plan 30 years following acquisition of 46 acre property by mining operator (AVSG)
  - Plan zones 10 acres as “Industrial” (permitting mining activities)
  - Plan zones 36 acres as “River Corridor” (permitting some residential, office, and other uses but not mining activities)
Colorado - AVSG

• AVSG argued for two forms of conceptual severance:
  – Consider only property zoned as “River Corridor”; and
  – Separate the mineral estate from the full bundle of rights in the land

Colorado – AVSG

• Colorado Supreme Court (as to whole parcel rule) held:
  – Mineral rights should not be considered in isolation (trial court and Ct. of Appeals got this right)
  – Appropriate focus of a takings inquiry is the aggregated property rights
  – In determining economic impact of regulations, courts must look at the contiguous parcels of land owned by the petitioners, not just the portion affected (trial court and Ct. of Appeals got this wrong)
Relevant Parcel Analysis

- Relevant parcel generally means all contiguous property in common ownership, and includes both surface and subsurface estates if they are in common ownership.

Parcel as a Whole Rule

- Just a preliminary step
- Courts must then decide whether a taking occurred by
  - Determining whether the land use regulation fails to advance a legitimate state interest; and
  - Applying the *Penn Central* test (does the regulation prevent all economically viable use of the property)
Parcel as a Whole Rule

- Regulatory takings cases recognize that if regulations go “too far” they will be recognized as a taking.
- Cases are characterized by “ad hoc, factual inquiries, designed to allow careful consideration of all the relevant circumstances.”
- Supreme Court in *Murr* recognizes that there has been no clear guidance on how to identify the “relevant parcel.”

Murr v. Wisconsin
The Property

- Platted in 1959
- Family owned Lots E and F in 1963
- Cabin on Lot F, Lot E remained vacant
- Lot F owned by family business entity, Lot E owned individually by the Murrs
- Lot F conveyed to six Murr children in 1994
- Lot E conveyed to six Murr children in 1995
The Regulation

• St. Croix River designated as a National Wild and Scenic River in 1972
  – Wisconsin was required to develop a management and development program
  – State regulations prevent use of lots for buildings unless they have at least one acre of land suitable for development

• Local governments required to adopt parallel provisions; authorized to grant variances in case of unnecessary hardship

The Regulation

• St. Croix County adopted regulations in 1975 requiring net project area of 1 acre for new residential project

• Lots existing before 1976 could be developed as single-family residence if held in separate ownership
The Problem

• Lot E is 1.25 acres, but net project area is 0.5 acres due to floodplain, slopes, road right-of-way, and wetlands
• Murrs wanted to sell Lot E to fund a project to expand the cabin on Lot F

The Process

• Murr family sought a variance from the regulation
• Denied by St. Croix County Board of Adjustment
• Family appealed to St. Croix County Circuit Court
  – Asserted a regulatory takings claim
  – Granted summary judgment to St. Croix County
• Appeal to Wisconsin Court of Appeals, affirmed
• Wisconsin Supreme Court denied certiorari
• U.S. Supreme Court granted certiorari
The Question

In a regulatory taking case, does the “parcel as a whole” concept as described in Penn Central Transportation Company v. City of New York, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

The Decision

- Four factors to be employed in determining the “denominator”
  - Treatment of land under state and local law
  - Physical characteristics of the land
  - Prospective value of regulated land
- Consider reasonable expectations of owner—whether the property will be treated as one or two parcels
The Decision

No compensable taking

- State and local law treatment: Wisconsin law merged the property when it came under common ownership in 1995
- Property characteristics: topography and narrow shape of lots suggested that use would be limited
- Value: benefits of treating property as a whole; combined appraised value is higher than sum of two lots’ value

The Dissent

- State subdivision law should control what constitutes the parcel
  - Gaming the subdivision system is unlikely
- Majority confuses what constitutes the “property”
- Would remand to Wisconsin courts to determine whether Lot E is a proper subdivision lot under Wisconsin law, and whether it has been taken
Implications for Planners

Resources

Inverse Condemnation blog
(www.inversecondemnation.com)
Questions and Answers

Brian Connolly
(303) 575-7589 / bconnolly@ottenjohnson.com

Don Elliott
(303) 830-2890 / deliott@clarionassociates.com

Marcus McAskin
(303) 459-4621 / marcus@mcm-legal.com