Fordham Environmental Law Review

Volume 6, *Number* 3 2011 *Article* 4

Recent Takings Deisions and Their Impact on Historic Preservation

Lisa M. Jaeger*

*

RECENT TAKINGS DECISIONS AND THEIR IMPACT ON HISTORIC PRESERVATION

*LISA M. JAEGER**

This Essay will focus on whether or not recent regulatory takings cases undo what was done in *Penn Central Transportation Co. v. New York City*,[1] and specifically whether the designation of property as a historic landmark can violate the Takings Clause.[2] Indeed, this is a live issue; it was not killed by *Penn Central*, and people with real property continue to challenge such designations. For example, Eunice Shriver-Kennedy recently sued the town of Palm Beach to prevent its landmarks preservation commission from designating the Kennedys' Palm Beach estate a historic landmark.[3] Thus, this case is evidence that historic designation of property can, and in fact does, give rise to claims of unconstitutional takings.

The takings issue has perplexed many a court, including the Supreme Court when it decided *Penn Central*. In that case, the Court did not hold that historic designation could never violate the Fifth Amendment. Rather, *Penn Central* essentially stands for two points: (1) the designation of Grand Central Station in New York City was not an unconstitutional taking, and (2) New York's law of historic designation, as applied to that case, was a legitimate exercise of the police power.

Penn Central is cited in every takings case to this day for the notion that a fact-based inquiry is the most essential key to understanding each particular takings case. I remind you of Justice Brennan's famous quote, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than disproportionately concentrated on a few persons."[4]

More recently, the issue presented in *Penn Central* was faced by the Pennsylvania Supreme Court in *United Artists' Theater Circuit, Inc. v. City of Philadelphia*.[5] The facts of the two cases were essentially similar. The Boyd Theater was designated a historic landmark by the Philadelphia Historical Commission.[6] The designation required the

* Deputy Counsel, Defenders of Property Rights, Washington, D.C.; J.D. 1990, Widener University School of Law. Defenders of Property Rights is a non-profit legal defense foundation dedicated to the defense of property rights.

1. 438 U.S. 104 (1978).

2. U.S. CONST. amend. V.

3. Jon Glass, *Rose Kennedy Sues to Keep Mansion Off Landmark List*, PALM BEACH POST, Jan. 21, 1995, at A1.

4. *Penn Central*, 438 U.S. at 124.

5. 595 A.2d 6 (Pa. 1991), *rev'd on reh'g*, 635 A.2d 612 (Pa. 1993).

6. *United Artists'*, 595 A.2d at 7.

owners of the theater to preserve both the interior and the exterior of the building at their own expense, under threat of criminal penalty.[7] The owners challenged the designation under the takings clause of the Pennsylvania Constitution.[8] The Supreme Court of Pennsylvania heard the case twice.

In 1991, when it first heard the case, the court decided that the designation was an unconstitutional application of the city's historic preservation program.[9] As a result of that decision, the phones were flooded. The Pennsylvania Attorney General called the court. The National Trust for Historic Preservation responded vociferously, of course, as did a number of other persons and organizations, including state representatives. Eventually, the court agreed to rehear the case.

Two years later, the court reversed itself, finding that the Philadelphia ordinance was not unconstitutional.[10] However, it side-stepped the takings issue, holding only that the legislature had exceeded its authority by regulating not only the exterior but also the interior of the building.[11]

Therefore, the *Boyd Theater* case came close to bucking *Penn Central* directly. Note, however, that the court was careful to point out that "[t]here may be circumstances in which the mere designation of property as historic would constitute a taking due to the extreme financial hardship resulting from such designation."[12]

Since *Penn Central*, there have been several other important takings decisions in addition to the *Boyd Theater* decision. First, *Lucas v. South Carolina Coastal Council*[13] stands for the proposition that if a government regulation deprives a private property owner of all economically beneficial use of his or her property, the property owner is entitled to compensation from the government.[14] Second, according to the analysis in *Nollan v. California Coastal Commission*[15] and *Dolan v. City of Tigard*,[16] a governmental regulation must substantially advance a legitimate state interest to refute a property owner's claim for just compensation under the Takings Clause.

Of course, *Lucas* did not address whether a private property owner is entitled to compensation when government regulation affects less

7. *Id.* at 11 (citing PHILADELPHIA, PA., PHILADELPHIA CODE, § 14-2007(1)-(8) (1989) (Philadelphia Historic Buildings, Structures, Sites, Objects, and Districts Ordinance)).

8. PA. CONST. art. I, § 10.

9. *United Artists'*, 595 A.2d at 6. The court avoided confronting *Penn Central* as contrary precedent by deciding the case under the takings clause of the Pennsylvania Constitution rather than its counterpart in the United States Constitution.

10. *United Artists'*, 635 A.2d at 612, 620.

11. *Id.* at 621.

12. *Id.* at 618-19 n.3.

13. 112 S. Ct. 2886 (1992).

14. *Id.* at 2900.

15. 483 U.S. 825 (1987).

16. 114 S. Ct. 2309 (1994).

than an entire parcel of real estate. However, whether compensation is constitutionally required for such "partial takings" was the focus of *Florida Rock Industries, Inc. v. United States*,[17] which has been discussed at length elsewhere in this issue.[18]

Given the state of Fifth Amendment regulatory takings jurisprudence, the door is open for takings challenges to regulatory schemes like those considered in *Lucas*, *Nollan*, and *Dolan*. There is no principled distinction between historic preservation laws and the environmental or land-use regulations that were invalidated in these cases.

In summary, one should begin the evaluation of a takings claim with the realization that even under the Supreme Court's *Penn Central* analysis, it is possible that a historic preservation ordinance could effect an unconstitutional taking. Furthermore, under *Lucas*, if a landmark designation deprives a property owner of all economically beneficial use of that individual's property, there has been a compensable taking. Finally, under *Nollan* and *Dolan*, a permit condition, related to a landmark designation, that does not substantially advance a legitimate state interest, will require compensation to a claimant.

In closing, I would like to point out that when one considers the legitimacy of historic designation, the easy cases are Mount Vernon, or Monticello, or buildings that were designed by very prominent architects. However, these are typically not the type of historic preservation cases that the judiciary faces. In most cases, the questions being posed involve designations of buildings or landmarks of, at best, minimal "historic value." But these designations impose the kind of obligations on private property owners that the Supreme Court has held to violate the Takings Clause. Thus, when a private property owner is forced to bear a burden that "in all fairness and justice, should be borne by the public as a whole"[19] because of the historic designation of his or her property, that individual may seek just compensation for an unconstitutional taking.

17. 18 F.3d 1560 (Fed. Cir.), *cert. denied*, 115 S. Ct. 898 (1995).

18. The *Florida Rock* decision is discussed at greater length in many of the Articles published in the section of this book on *Takings and Our Federal Foundational Environmental Statutes*.

19. Armstrong v. United States, 364 U.S. 40, 49 (1960).