

Taking Aim at Takings Claims

by Dwight H. Merriam, FAICP, CRE

Takings claims can create enormous potential liability for government and should not be taken lightly. It is just as important to recognize a valid takings claim as it is to know the ones that have no merit. In the following pages, I want to first provide an overview of basic principles, and then address some of the questions planning commissioners often have about takings.

Bear in mind that planning commissioners need to consult with their local counsel on an ongoing basis. My objective is to give you enough of a background so that you can make proper inquiry of your legal counsel. Remember, we actually have 51 constitutions in this country – one federal and 50 state. What might be legal under the federal Constitution may be unconstitutional under state law and vice versa. You need to know about both federal and state requirements.

TAKINGS BASICS

Fundamentally, the takings issue arises out of twelve simple words from the end of the Fifth Amendment of the Bill of Rights. “Nor shall private property be taken for public use without just compensation.”

There are two major categories of takings. One is direct condemnation, such as when the government uses its eminent domain power to take private property for a public use. This was the subject matter of the recently-decided case of *Kelo v. New London*, which has resulted in a firestorm of federal and state reaction to limit the government’s power to take private property for economic development. *Editor’s Note: For more on the Kelo decision, see page 20.*

The other broad category is inverse condemnation, or regulatory takings. These are the takings most often of

concern to planning commissioners.

Inverse condemnation takings come in three flavors:

First (but not foremost!) are the “physical invasion” cases where the government by regulation allows for public access to private property. A notorious case which made its way to the U.S. Supreme Court involved a woman who owned an apartment building, and was required by the state to provide space for a small junction box for cable television on the roof of her apartment building. The Court found that to be a physical invasion and consequently deemed it a *per se* (in itself) taking. Once a physical invasion by regulation has been found, the only question is how much the damages are.

HOW FAR CAN YOU GO IN
DECREASING THE
DEVELOPMENT POTENTIAL
OF PROPERTY BY
REGULATION?

A second flavor of inverse condemnation is found in those regulation cases where the government so restricts a property that it is rendered valueless. There has been just one of these cases to make its way to the U.S. Supreme Court, *Lucas v. South Carolina Coastal Council*, and by my reckoning only two later cases in any court decided similarly. These are called categorical takings.

In the *Lucas* case, the property owner with two waterfront lots was prohibited by regulation from doing anything on them. When a categorical taking of this type is found, the analysis and remedy are exactly the same as they are for the physical invasion type of taking. Once it is demonstrated that the property has been rendered valueless, the only

question is how much will be paid.

There are two minor exceptions which will exempt government from having to pay anything in a categorical taking case, but they are even rarer than the cases themselves. If the regulations are designed to prevent a public nuisance or the property owner never had the right to develop the property at all because of the existence of long-standing law (such as the public trust doctrine), compensation is not due.

Now, we get to the third and tastiest flavor, the partial regulatory taking. It is here that the courts have feasted. Nearly all regulatory takings are of this type. They are represented by one of the ultimate partial regulatory takings cases, *Penn Central Transportation Co. v. New York*, in which the Supreme Court held that it was not a taking when the New York City landmarks commission prohibited Penn Central from placing an office tower atop Grand Central terminal.

The *Penn Central* decision established a three-part test:

The first question that must be answered is the extent of the loss in value from the regulation, sometimes called the “diminution in value.” Planning commissioners frequently ask me how much is too much. The answer is that it depends. There are cases where there has been over a 90 percent reduction in value and no taking found. It is safe to say that, barring any state statutes for takings compensation, reductions in value of 70 to 80 percent are routinely found not to create takings.¹ Once you get to that level, however, you need to be especially careful to find ways to offset the

continued on page 4

¹ Several states have enacted laws providing that government actions triggering the reduction in a property’s value over a certain percent (often 50 percent) automatically require either compensation or the rescission of the regulation.