

SIGNIFICANCE OF RECENT TAKINGS RULINGS FOR IMPLEMENTATION OF THE GEORGIA PLANNING ACT

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Abstract. At a joint meeting of the Georgia and South Carolina Planning Associations in the fall of 1994, a number of planners expressed dismay that city and county attorneys are advising elected officials against the adoption of such traditional zoning tools as setbacks and buffers as well as more innovative surface and groundwater protection options due to recent U.S. Supreme Court rulings. While these decisions impose limits on controls, they also affirm the public interest in, and legitimacy of, land use regulation. They should not discourage the use of carefully drafted regulations and policies protecting water resources critical to the economy and environmental health of a community. This piece discusses the recent Supreme Court cases and outlines a variety of water resource protection tools with suggestions on how local governments can avoid, or prevail in, legal challenges to them.

INTRODUCTION

The Georgia Constitution provides local governments with broad "home rule" powers to plan, zone, and otherwise regulate environmental threats. The Georgia Planning Act of 1989 specifically authorizes local governments to provide protection for ground and surface water resources, including wetlands, beyond that required by state law. Though many cities and counties have merely adopted minimum standards developed by the Georgia Environmental Protection Division, some have taken or are considering much more ambitious steps to protect water resources. These include overlay zoning, conditional or special use permits, performance standards, cluster development, and density bonuses. When drafted precisely, these regulations should withstand "takings" and other legal challenges. Other tools such as infrastructure planning and pricing, acquisition of sensitive resources, and the use of conservation easements, should be employed as well.

U.S. SUPREME COURT DECISIONS

Background

The Fifth Amendment to the United States Constitution prohibits the federal government from taking private property

for public use without compensating the owner. The Fourteenth Amendment extends this prohibition to state governments. Traditionally governmental "takings" were limited to actual physical invasions of property-- to build roads or schools, for example. In 1922 the U.S. Supreme Court determined that pervasive regulation may constitute a taking even where the land has not been physically appropriated. "The general rule, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). Courts have been grappling with the question of how far is "too far" on a case-by-case basis ever since.

The courts typically consider at least two factors in determining whether a takings has occurred: the economic impact of the regulation on the property owner and the public purpose promoted by the regulation.

Lucas

Specific points of inquiry under the factor of economic impact include the degree of reduction in property values due to regulation, whether the owner knew of the regulations when he purchased the property, whether the loss claimed is the speculative value of future development, and whether the owner can make a reasonable return on his investment by engaging in uses permitted under the regulation (Duerksen et al. 1994). In 1992 the U.S. Supreme Court considered all of these points in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). Lucas purchased two beachfront lots zoned residential at a price of \$975,000 in 1986. He planned to build two houses, one for his family and one for resale. In 1988, the South Carolina Coastal Council adopted comprehensive coastal protection regulations including a ban on construction between the most landward point of erosion at any time during the past forty years and the ocean. The Lucas lots fell within this band.

Lucas is significant for several reasons. First, the court creates a category of per se takings where a regulation denies all economically viable use of land allowed by the owner's title. Furthermore, it suggests that though takings challenges have traditionally failed where a regulation affects only a small portion of a parcel, it might be appropriate to find a taking where total economic use of that portion of the parcel is precluded. (Eustis, 1993). In a subsequent case not

involving land, however, the Supreme Court reaffirmed the rule that a takings analysis must view the property as a whole. *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993).

Though *Lucas* makes clear that a taking occurs where all economic use of a property is foreclosed, it provides little guidance in the more common case where regulation merely reduces property values. For now the courts will continue to address these cases on an individual basis.

Dolan

The second factor considered by the courts is whether and how a regulation promotes a valid public purpose. A number of cases have held that the protection of environmentally sensitive areas such as floodplains and wetlands is a valid public purpose. This view was confirmed by the U.S. Supreme Court in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

The Dolans own an electrical and plumbing supply store in the central business district of a Portland suburb. They applied for a permit to relocate (on the same lot) and expand the store and to expand the parking lot. The city granted them a permit subject to the conditions that they dedicate a portion of the property lying within the 100-year floodplain of a creek for improving a storm drainage system and an additional fifteen foot strip of land adjacent to the floodplain for a pedestrian/bike pathway. The court first determined that preventing flooding and reducing traffic congestion are legitimate public purposes. It then found that a nexus existed between preventing flooding and limiting development within the creek's floodplain and between reducing traffic congestion and providing for alternative means of transportation.

The court then looked at whether the degree of the exaction demanded by the permit conditions bore the required relationship to the projected impact of the proposed development. It found that the town had substantiated the need for prohibiting floodplain development and requiring that 15% of a site be left in open space; these regulations were reasonable. The town failed, however, to justify how requiring that the floodplain greenway be dedicated for public access furthered the aim of floodplain protection. It also found that the town had not met the burden of demonstrating that the additional number of vehicle and bicycle trips generated by the Dolans' expansion reasonably related to the pedestrian/bicycle easement requirement; Tigard had merely claimed the pathway "could" offset some of the traffic demand.

The court held that the Fifth Amendment requires a "rough proportionality" between the exaction and the projected impact of the proposed development-- "not a precise mathematical calculation but some sort of individualized determination that the required dedication is related both in nature and extent to the development's impact."

The Dolan court reaffirmed the public interest in land use regulation and the validity of most of the requirements imposed on the Dolans. This is good news for local governments considering the enactment of floodplain controls. The court warned, however, that a government seeking to condition building approval on dedication of land for public access must demonstrate why the developer rather than the public should pay for that access.

First English Evangelical Lutheran Church

Another U.S. Supreme Court case that has made local government attorneys nervous is *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*. The church challenged county floodplain development restrictions preventing it from reconstructing a camp that had been destroyed by flooding. The Supreme Court stated that if the regulation did constitute a taking of private property, the local government could be liable for monetary damages for that period of time that the regulation was in effect. The court sent the case back to the California courts which determined that a taking had not occurred as the public interest in protecting human life and property from flooding outweighed the economic impact on the landowner.

Only a couple of federal appeals courts have addressed the issues of measuring damages for temporary takings. In one case the city was required to pay a percentage of the loss of value of the property for the time it was regulated. In the other, the city paid a percentage of the amount of investment the landowner would have put in to the property during the time development was prohibited by regulation. (Duerksen et al., 1994).

LOCAL REGULATORY PROTECTION

The U. S. Supreme Court cases mentioned above as well as lower court decisions provide some guidance to local governments in drafting water resource protection policies. First, the government's comprehensive plan should recognize the economic and environmental grounds for protecting the community's water resources and thus provide a basis for any subsequent regulations. Second, the regulations should not effectively restrict all economic use of property. A river overlay zone that allows most agricultural activities as well as recreational activities in a rural community, for example, provides for economic use of that property. Third, the regulations should include procedural safeguards that provide for their waiver in those few cases where they will impose extreme financial hardships on a landowner. This might include a situation where a floodplain ordinance on a particularly narrow tract of land precludes all economic use of the tract or where a landowner has invested considerable effort and money in a development project prior to adoption of the regulation prohibiting development. So long as these

rules are followed, the following tools for water resource protection should withstand judicial scrutiny.

Overlay Zoning

Overlay zoning recognizes a special zoning district encompassing one or more sensitive features. The special district overlays standard zoning districts in the affected area and contains additional development requirements.

Any activity located in the area covered by the overlay zone must comply with the requirements of both the overlay zone, including design standards and use restrictions to protect a specific resource, and the underlying standard zoning district.

In order to reduce administrative costs, the developer may be required to submit a study documenting whether or not his project falls within the overlay zone. Madison County is currently considering adopting an overlay river corridor district to protect the Broad River in northeast Georgia.

Conditional or Special Use Permits

These permits allow land uses that have potential adverse impact on natural resources subject to a site review and compliance with requirements intended to mitigate or reduce overall environmental impacts. Many local governments now require special use permits for landfills, for example, in order to protect water resources and adjacent land uses. The ordinance establishing special use permits must clearly specify the standards the decision-making body will consider in determining whether a permit shall be granted. Several decisions to withhold special use permits in Georgia have been struck down by the courts in recent years due to the failure of the ordinance to articulate those standards.

Franklin County in northeast Georgia has recently adopted a special use permit requirement for the land disposal of industrial, hazardous, radioactive and biomedical wastes. The permit applicant must provide the county commission with detailed information about the proposed disposal activity and the soil, geologic, hydrogeologic and topographic features of the site. Using a permit fee paid by the applicant, the commission may hire a consultant to evaluate the application.

A permit will not be issued if the activity is determined to pose a risk to the groundwater or surface water quality of the community.

Performance Standards

The community may not care where development occurs so long as design standards prevent adverse impacts. Medford Township, New Jersey has developed rigorous performance standards for development within 300 feet of wetlands. These include no increase in surface water runoff into the wetland; no change in the normal seasonal flow patterns or water table within the wetland; no increase in erosion resulting in increased sedimentation in the wetland; no change in the natural chemistry of ground or surface waters in the wetland; and no loss of wetland habitat or decrease in diversity or

change in wetland species composition. (World Wildlife Fund, 1992).

Cluster/Planned Use Development

This zoning tool allows for the reduction of individual lot sizes below the minimum normally allowed if a substantial portion of the development is preserved in perpetuity as open space through a restrictive covenant or conservation easement. Clustering can be used to avoid development in or adjacent to wetlands and concentrate that development on less sensitive portions of the parcel.

Among the stated purposes of the cluster zoning ordinance being considered by Walton County is "the protection of existing and potential drinking water supplies". The ordinance provides for the dedication of at least 50% of the total tract as common open space.

Density Bonuses

The developer may be allowed to increase permitted density in exchange for design concessions that will reduce overall environmental impacts. These might include a reduction in impervious surfaces, the creation of a park or open space, or establishment of natural buffers along a lake or river. The community must be careful to ensure that the impact of the density bonus on the sensitive resource won't outweigh the benefits achieved by the design improvements.

NON-REGULATORY POLICIES

Capitol Improvement Plans and Infrastructure Planning

Decisions that a local government makes in the area of infrastructure development-- expansion of sewer and water lines and roads-- can be critically important in water resource protection. By guiding publicly-funded infrastructure away from areas with critical recharge functions or high wetlands values, a local government may preclude development in these areas due to cost. The timing and location of infrastructure development is typically determined by a local Capital Improvement Program (CIP) that covers a five to ten year period.

A CIP should consider and incorporate the community's environmental protection goals. The Twin Cities of Minneapolis and St. Paul, Minnesota, for example, have adopted a policy prohibiting the construction of sewers into floodplains, major groundwater recharge areas, and areas designated for open space use as well as airport clear zones. Rampopo, New York used a 18-year CIP, combined with limits on residential development not served by public utilities, to control the town's growth rate and direction of growth. (World Wildlife Fund, 1992). The town developed a permit system for residential development. A permit was granted if the developer's proposal was rated a certain number of points based on availability of five services: sewers, drainage facilities, public parks, roads, and fire service. This

system withstood takings and exclusionary zoning challenges in New York's highest courts.

Pricing of sewer and water facilities and services can also encourage development away from sensitive areas. One example is a system of marginal cost pricing that consists of three factors: (1) a flat fee per connection that reflects the cost of building the water or sewer plant; (2) a charge for the cost of delivering the service which reflects the cost of extending the sewer line to the house (the longer the lines and lower the density, the higher the cost); and (3) a charge for actual use based on the short run costs of providing the service, usually measured by meter.

Acquisition of Sensitive Areas

In some cases, government acquisition may be the most equitable and effective means of protecting a recharge area, a wetland, a shore line, or other open space. Local governments are using a variety of innovative sources, as well as traditional general revenue funds, to fund acquisition and land maintenance programs.

Open space bond initiatives have been popular around the country. Mecklenburg County, North Carolina raised \$8.4 million for greenway acquisition from bonds from 1978 to 1991.

Boulder Colorado has raised \$79 million in sales tax to create a ring of 22,000 green acres around the city; much of this area is leased to farmers. Colorado Springs, Colorado has levied a 5% sales tax on bikes and biking equipment which generates \$60,000 per year to support trails and bikeways.

Real estate transfer taxes fund many local acquisition programs. Nantucket generates more than \$4 million per year for acquisition through a 2% transfer tax. Two small Rhode Island towns, Little Compton and New Shoreham, direct their transfer tax to land acquisition. Howard County, Maryland uses funds from a transfer tax to buy development rights to agricultural land.

In 1988 the Florida Keys began levying a 1% increase in hotel/motel room taxes as a tourist impact tax; half of the money generated is used for land acquisition. (World Wildlife Fund, 1992).

Other sources of funding for acquisition include wastewater and municipal water treatment agencies; improvement or special assessment districts; the federal Land and Water Conservation Fund Act of 1965 (matching grant); the federal Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) which provides matching funds for greenway acquisition and development, scenic easement acquisitions, and mitigation of water pollution due to highway runoff; the U.S. Corps of Engineers; and businesses and philanthropic foundations.

Conservation Easements

The use of conservation easements as an incentive for sensitive resource protection is increasingly popular in the

southeast. The concept is simple-- by voluntarily restricting development of property in order to protect conservation values recognized by the Internal Revenue Service, a landowner may realize substantial federal and state income tax deductions, as well as estate tax and local property tax benefits. This perpetual deed of conservation easement involves at least two parties-- the landowner and a land trust (a non-profit corporation which has received tax-exempt status from the IRS as a publicly-supported charitable organization) or a governmental body that agrees to monitor the property and enforce the restrictions in the easement. Easements of the Red Hills Conservation Association in southwest Georgia and northern Florida include provisions for sustainable timber harvesting to protect water bodies and wildlife and a Broad River Watershed Association easement in northeast Georgia prohibits subdivision and preserves the land in its natural state for perpetuity.

CONCLUSION

Though recent U.S. Supreme Court decisions limit the scope of noncompensable government regulation, a variety of planning, regulatory and incentive tools are still available to those progressive local governments that recognized the need to protect their critical water resources.

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