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Regulatory Takings, Fifth Edition, by Steven J. Eagle

Publication 61876

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HIGHLIGHTS

- Case law and statutes are current through September 2017.

Ch. 1, *Property Rights and Their Sources*

Property Rights and Property Interests—Rights Created by Law. In *Land of Lincoln Mut. Health Inc. Co. v. United States*, 129 Fed. Cl. 81 (Fed. Cl. 2016), the U.S. Court of Federal Claims declared unequivocally that a party’s statutory right to payment is not a recognized property interest under the Fifth Amendment’s Takings Clause. *See* § 1-7(g)(1).

In another case, which addressed the emerging issue of the appropriate regulation of Transportation Network Companies (TNCs) such as Uber, Lyft, and Sidecar, the district court in *Boston Taxi Owners Ass’n v. City of Boston*, 180 F. Supp. 3d 108 (D. Mass. 2016) considered a claim by taxicab owners that Boston’s failure to impose the city’s taxicab regulations on TNCs constituted a taking of taxi operators’ property

without just compensation. The court, however, found no regulatory taking. For discussion, *see* § 1-7(g)(1).

Just Compensation Clause—Enhancements and Special Benefits. In *Strode v. City of Ashland*, 886 N.W.2d 293 (Neb. 2016), the Nebraska Supreme Court ruled that a property owner suffered no compensable regulatory taking absent any evidence that a regulatory load limit on a railroad bridge decreased the economic value of the owner’s property. In addition, while the owners were precluded from using the bridge to transport their goods in semitrailer trucks that exceeded a certain tonnage, and transporting goods under the bridge meant only trucks of a limited height could be used, any such injury to the property owner was no different than that suffered by the general public. *See* § 1-12(e).

Just Compensation Clause—Federal Government’s Espousal of Foreign Claims. A new section has been added discussing the issue of just compensation in cases involving the federal government’s espousal and settlement of individuals’ claims against a foreign government. A claim is espoused when the government makes it the subject of a formal reparation claim to be paid to the United States by the foreign government responsible for the injury. For coverage, *see* § 1-12(j).

Ch. 5, *Regulations Protecting Social Rights and Values*

Real Property Regulation for the Protection of Morals and Adult Entertainment. In *Sutton v. Chanceford Twp.*, 186 F. Supp. 3d 342 (M.D. Pa. 2016), a federal district court in Pennsylvania rejected a regulatory takings claim asserted by shopping center owners who wished to use a portion of their property for an adult cabaret featuring nude female dancers. For discussion, *see* § 5-6.

Ch. 7, *Analytical Issues in Regulatory Takings Litigation*

Deprivations of Use and Value—Defining “Complete” Deprivation of Economic Use. In *Kinderace LLC v. City of Sammamish*, 194 Wash. App. 835 (Wash. Ct. App. 2016), *cert. denied*, 137 S. Ct. 2328 (2017), an intermediate Washington appellate court affirmed dismissal of a property owner’s regulatory takings claim against a city that refused a “reasonable use exception” for property subject to updated environmental restrictions. For discussion, *see* § 7-3(a)(4).

Deprivations of Use and Value—Enduring “Harm vs. Benefit” Distinction—Subsequent Cases on Complete Deprivation. In *Love Terminal Partners v. United States*, 126 Fed. Cl. 389 (Fed. Cl. 2016), the Court of Federal

Claims found a *Lucas* categorical taking of a valuable commercial leasehold. After lengthy and complex proceedings involving rights in an airport terminal, the court resolved remaining issues at trial and concluded that a federal statute, the Wright Amendment Reform Act of 2006 (WARA), destroyed all economically beneficial and productive use of a leasehold in aviation-related acreage. *See* § 7-3(b)(3).

Development of the Relevant Parcel Concept—“Parcel as a Whole” Analysis.

In *Murr v. Wisconsin*, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017), the U.S. Supreme Court returned to the long-vexed “relevant parcel” issue and granted certiorari on the following 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 majority opinion concluded that “no single consideration can supply the exclusive test for determining the denominator” in a regulatory takings analysis, that is, the denominator of the “takings fraction” employed in comparing the value taken from property with the value that remains. The Court then identified the following three factors to be weighed as a preliminary matter to determine the relevant parcel under a regulatory takings analysis:

- Courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law;
- Courts must look to the physical characteristics of the landowner’s property; and
- Courts should assess the value of the property under the challenged

regulation, with special attention to the effect of burdened land on the value of other holdings.

For coverage, *see* § 7-7(b)(2).

Ch. 8, Regulatory Takings Remedies

Regulatory Takings Adjudications—Transferability of Constitutionally Protected Property Interests—General Principles of Alienability of Property Rights. In *Lynch v. California Coastal Commission*, the California Court of Appeal held that the Coastal Commission was reasonable in conditioning a permit for the reconstruction of a seawall by imposing a 20-year limitation. The California Supreme Court granted review and its decision, reported at 3 Cal. 5th 470 (Cal. 2017), was anticipated as an important statement on the broad issue of the extent to which agencies and localities can prevent the formation of what otherwise would be vested rights so as to facilitate potential future regulation. However, the state supreme court side-stepped that issue and affirmed the court of appeal on other grounds after concluding that the landowners had forfeited their claims by constructing their seawall before resolution of their

case. *See* § 8-4(c)(1).

Regulatory Takings Adjudications—Transferability of Constitutionally Protected Property Interests—Land Use Restrictions. In *Zweber v. Credit River Twp.*, 882 N.W.2d 605 (Minn. 2016), the Minnesota Supreme Court resolved a procedural dispute that had derailed a landowner's 42 U.S.C. § 1983 constitutional challenge to a county's denial of his application for re-subdivision of a parcel under development. The court ruled that when neither the landowner's Section 1983 nor his regulatory takings claims required examination into the validity of a quasi-judicial decision by a local government entity, the district court had jurisdiction over the owner's constitutional claims. If the validity of a quasi-judicial decision were at issue, then exclusive certiorari review jurisdiction would have rested with the state court of appeals instead. *See* § 8-4(d).

Appendix

The Appendix at the end of the publication, which sets out selected primary sources, has been updated with recent changes to these sources.

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