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The Newsletter from

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CIVIL RIGHTS UPDATE

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Governments on the state and local level have, by virtue of the Constitution, the power to take property for public use, such as to expand a public road or to create a park. Such a taking is known as a "condemnation." See New York's Eminent Domain Procedure Law.

Sometimes, government occupies private property without either paying for it or commencing a condemnation proceeding to determine the property's value. The landowner may commence a proceeding to secure just compensation. Where the litigation is commenced by the landowner, the case is known as one of "inverse condemnation."

Sometimes government does not intend to physically occupy or encroach on private property, but, instead, takes an action, such as rezoning, that has the effect of depriving the property of all or substantially all of its value. This situation is referred to as a "regulatory taking" and triggers 42 U.S.C. § 1983, plugging into the Fifth Amendment's "Just Compensation Clause."

THE SUPREME COURT'S RECENT DECISIONS ON GOVERNMENTAL POWER TO "TAKE" LAND

THE 2004-2005 LAND USE DECISIONS

The 2004-2005 term of the United States Supreme Court, in addition to being remembered as the last of Chief Justice William Rehnquist, will be remembered as one in which the High Court handed down several important decisions related to the government's power to regulate and/or take private real property.

The Kelo Decision

Kelo v. City of New London, __U.S.__, 125 S.Ct. 2655 (2005) was a blockbuster decision of the U.S. Supreme Court's recent term. The City of New London, Connecticut used its power of eminent domain to take private property in a neighborhood that had been declared blighted by urban decay to give it to a private developer pursuant to a planned economic development of the area. The project to be built by the developer involved a hotel, restaurants, shopping, a public and private marina, residences, and a research and development space for Pfizer Inc. Some plaintiffs had lived in the neighborhood for generations and stood to lose their homes.

The issue in the case was whether the Fifth Amendment allows government to take private property for the purpose of transferring it to private entities for the purpose of economic development. The Court divided 5-4, with the majority (Stevens, Kennedy, Souter, Ginsburg, and Breyer) holding that the government has such power and the minority (O'Connor, Rehnquist, Scalia, and Thomas) arguing that it does not. According to the majority, where government takes property for a "public purpose," such as for the creation of jobs and generation of tax revenue, the Fifth Amendment is satisfied. The economic development plan for New London met the "public purpose" test. In addition to espousing the "public purpose" test, the Court in Kelo prescribed an extremely deferential standard for a court to determine what meets that test. The findings of public benefit by the City of New London, the Court said, were entitled to great weight.

In the wake of Kelo, one is hard pressed to see an outer boundary for what is deemed a "public purpose," particularly where the government deems the taking to be proper. Such definition will have to await future cases, which are sure to come.

Two Other Significant "Takings" Decisions This Term

In two cases this past term, the Court narrowed the availability of a federal remedy for a claimed regulatory taking.

In Lingle v. Chevron U.S.A. Inc., __U.S.__, 125 S.Ct. 2074 (2005), the Supreme Court closed the door on one potential avenue for a regulatory taking plaintiff.

In addition to allowing for compensation when a government action has deprived property of all its value, in Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138 (1980), the Supreme Court had declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests. . . ." Under that standard, regardless of whether a property's value was destroyed, a court could find a taking where a government acted outside of its permissible interests. In Lingle, the Supreme Court reconsidered that prong of takings jurisprudence, and reversed itself. While the failure to substantially advance a legitimate government interest, the Court said, may implicate the Due Process Clause, it does not amount to a *taking* of property requiring just compensation.

Finally, in San Remo Hotel, L.P. v. City and County of San Francisco, __U.S.__, 125 S.Ct. 2491 (2005), the Supreme Court issued a determination that could severely limit the potential for federal court regulatory takings case. In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108 (1985), the Supreme Court held that takings claims are not ripe until a State fails "to provide adequate compensation for the taking." In San Remo, plaintiff brought a federal action alleging a regulatory taking, and then asked the federal court to abstain pending a determination in a state court lawsuit. In the state action, plaintiff raised federal issues and lost, then sought to return to federal court. The federal court dismissed the suit, finding that the federal issues were decided in California court.

San Remo is an interesting lesson of the overlap between state and federal jurisprudence in the taking arena and on the nuts and bolts of *res judicata* and collateral estoppel, two theories for dismissing lawsuits. It also highlights not only the pitfalls for plaintiffs attempting to navigate the Williamson exhaustion requirement in regulatory takings cases, but also the opportunity for defendants to claim that plaintiff has already had its one bite of the apple.

Conclusion

The tension between governmental interests and private interests in the area of "takings" is intensified by the Kelo decision and it is inevitable that more litigation will ensue as the Courts continue the effort to maintain the delicate balance.