Taking By Regulation: The Coin Lands On Its Edge—Again

By Gideon Kanner

From time to time, this column has taken a look at the indecisive progress in the courts of the vexing question of regulatory takings: When does a regulation so restrict a landowner's property rights as to become an effective "taking," and, given such a taking, does the owner get "just compensation," or is he only entitled to a judicial declaration that the onerous regulation is invalid? For the second time in the past two years the U.S. Supreme Court ducked this issue in *San Diego G. & E. Co. v. City of San Diego,* U.S.— (49 U.S. Law Week 4327).

In the *San Diego* case the landowner sued claiming that the city's use of its zoning regulations, combined with an inconsistent general plan, deprived it of the use to which the property could be put. The trial court agreed and awarded substantial damages. The California Court of Appeal affirmed. However, shortly thereafter, the California Supreme Court decided *Agins v. City of Tiburon* 598 P. 2d 157 (1979), affirmed on other grounds, 447 U.S. 225 (1980), in which it made a bombshell ruling that no matter how egregious the government's conduct effecting a regulatory taking, the owner could not recover damages, but could only get a judicial declaration that the regulation is invalid. The U.S. Supreme Court affirmed *Agins* without reaching this issue; the high court made up a new rule that a landowner who had not applied for a building permit may not challenge the constitutionality of a zoning ordinance as applied to him. Since Agins had not done that (prior law had suggested the contrary), he lost. Meanwhile, back in California that state's Supreme Court applied its own *Agins* decision to the *San Diego* case, and remanded it back to the Court of Appeal for reconsideration in light of *Agins*. The Court of Appeal, however, in a startling development, did not just address the issue of remedies, but reversed the entire judgment and remanded the case back to the trial court for retrial of the question of whether there had been a taking. The landowner then appealed to the U.S. Supreme Court which, after a full hearing on the merits, dismissed the appeal as not being from a final judgment. The decision was 5 to 4, with Justice Blackmun writing for the majority (Justice Rehnquist concurring separately), and Justice Brennan for the dissenters.

The court reasonsed that since the California Court of Appeal remanded the case back to the trial court for a redetermination of facts going to the question of taking, the case was not final and there was no occasion to address the question of remedies. This ruling is quite confusing because only two years ago, in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), the court had before it an identical procedural situation (there the New York Court of Appeals remanded the case back to the trial court to determine whether there had been a taking). Yet, in *Penn Central* a divided U.S. Supreme Court dealt with the taking issue on the merits, with none of the justices expressing any qualms about the finality of the state court judgment. That, coupled with the U.S. Supreme Court's long-standing record of avoiding this issue altogether, or at most asserting that this is an area of the law without formulas, in which *ad hoc* decisions are made on a case-by-case basis, leads to the justified surmise that the high court simply does not want to address this issue, notwithstanding the chaotic conditions that prevail in the pertinent law throughout the country.

Even so, the *San Diego* case is different; it contains a rather clear signal as to how the court is likely to rule. The four dissenters, after disagreeing with the majority on the question of the judgment's finality, proceeded to discuss the issue of remedies. They concluded that the "just compensation" called for by the taking clause of the Fifth Amendment applies to regulatory takings as well as to others. As soon as a taking occurs—reasoned the court—the owner has already suffered a constitutional violation, and the self-executing character of the constitutional guarantee triggers the right to compensation. Moreover, noted Justice Brennan, ". . . the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches [of government]." The dissent went on to dispose of a frequently-heard argument of regulatory bodies; they express concerns that a finding of a taking may require them to purchase the entire fee simple title of the landowner, even though the regulation effected the taking of a smaller property interest, or perhaps only a temporary taking. This argument, it must be noted, is unsound and courts of several states (as well as the U.S. Supreme Court and the lower Federal courts) had already taken a different approach before *San Diego* reached the Supreme Court. Nonetheless this argument was successfully used in California to frighten that state's courts into believing that awarding "just compensation" for regulatory takings would make the planning process too expensive (ignoring in the process the self-evident fact that such liability can only be imposed for constitutional violations, and thus the "too expensive" reasoning is in effect a plea that constitutional violations be made convenient and cheap). Justice Brennan observed in response that the entity whose regulation effects a taking may retreat by amending the unconstitutional regulation, thereby paying only for interim damages, or it may—if *it* chooses—retain the regulation or condemn the property, in which case the payment of full fair market value would be its choice. Besides, noted Justice Brennan, vindication of constitutional rights cannot be defeated by an argument that it is cheaper to violate them.

Ordinarily, dissenting opinions provide cold comfort to the losers, but in the *San Diego* case there is an extra ingredient that gives this dissent a peculiar force. Although Justice Rehnquist joined the majority, he did so by a separate opinion which begins by noting: "If I were satisfied that this appeal is from a 'final judment' . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion." And so, it appears that the court's majority favors the "just compensation" remedy in regulatory takings, as in all others. It remains to be seen if and when the court will accept other such cases and deal with them on the merits. If so, and barring a change in the court's composition, it may well be that the final answer so long and so anxiously awaited by the country will turn on the inquiry whether 4 + 1 = 5. In the meantime, it would seem prudent to assume that the handwriting is on the wall, and to retreat from the policy of constitutional brinksmanship pursued by regulatory agencies, particularly in California. For if Justice Brennan's dissent is indeed an adumbration of the court's position, future impairments of landowner's constitutional rights may prove to be expensive.

Zoning By Initiative — Is It Legislative?

Editor's Note: This case is reprinted from the Chapter 1 Newsletter.

ARNEL V. CITY OF COSTA MESA
28 Cal. 3d 511

In 1977, Arnel Development Co. proposed to construct a 50-acre development in Costa Mesa consisting of 127 single-family residences and 539 apartment units on land *zoned for such uses.* The plans were approved by the city. A neighborhood association opposed the Arnel project and circulated an initiative petition to rezone the Arnel property and two adjoining properties (68 acres total) to single-family uses, only. The initiative measure passed at the municipal election on March 7, 1978; thereafter, the city refused to process a final tract map for the Arnel project or issue building permits. Arnel filed a civil complaint.

The trial court upheld the initiative, but the Court of Appeal reversed, holding that the "rezoning of specific relatively small parcels of privately owned property is essentially *adjudicatory* in nature rather than *legislative.*" If the initiative rezoning measure is legislative, it is clearly within the powers of the people under California Constitution, Article IV, Section 1, and Article 2, Section 11. If the initiative rezoning measure is adjudicative, as the Court of Appeal determined, it was beyond the powers of the people because such acts require notice and an opportunity to be heard under the State Zoning Act, and due process clauses of the California and U.S. Constitutions.

In December 1980, the California Supreme Court reversed the Court of Appeal, upheld the Costa Mesa initiative, and held that *zoning ordinances whatever the size of parcels affected are legislative acts* (majority opinion by Justice Tobriner). The court noted that " a decision that some zoning ordinances depending on the size and number of parcels affected and perhaps other factors, are adjudicative acts, would unsettle established rules which govern enactment of land-use restrictions, creating confusion which would require years of litigation to resolve." The Court stated that it is not self-evident that 68 acres is a relatively small parcel since some cities have entire zoning classifications comprising less than 68 acres; and, further, the rezoning of "relatively small" parcels, specifically when done by initiative, may well signify a fundamental change in city land-use policy.

The *Arnel* case appears to be merely the latest extension of a long controversy in the California courts, beginning in 1929 with *Hurst v. City of Burlingame,* over whether the people of California cities and counties may directly zone or rezone real property by initiative legislation. The basic problem is that direct zoning legislation does not afford affected landowners due process notice and opportunity to be heard. A zoning proposal is simply drafted, necessary signatures are obtained, and the proposal is put on the ballot to be decided yes or no. There are no safeguards for the property owner, study and reports by experts, or possibility of modification by planning commissions or local legislative bodies.

Perhaps the *Arnel* case provided the court with the best set of facts to date on which it could create an exception to its general rule that any initiative is legislative and therefore a noticed hearing is not statutorily or constitutionally required. But the supreme Court said no. The consequence at the moment is that direct zoning in California by initiative is a valid method for the people of general law cities to prevent types of development considered undesirable.

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Zoning Case Is Presented

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San Diego Gas & Electric v. City of San Diego
U.S. Supreme Court – Decided March 24, 1981

Facts

SDG&E (Company) owns 412 acres in Sorrento Valley. It planned to build a nuclear power plant on 214 acres. The property was zoned Industrial and Agricultural. All was to be Industrial under the master plan. In 1973 the City of San Diego (City):

1. Downzoned the property;
2. Adopted an open space plan and proposed that the property be acquired for a park; and
3. Proposed a bond issue to obtain funds to buy this and other property.

The bond issue failed. Company sued City for damages for inverse condemnation, mandamus and declaratory relief.

Holdings of Lower Courts

The trial court dismissed the mandamus claim but held the City was liable in in-

verse. The jury awarded damages of more than $3 million. On appeal the California Court of Appeal affirmed.

The California Supreme Court granted a hearing, then transferred the case back to the Court of Appeal for reconsideration in light of its holding in *Agins v. City of Tiburon,* 24 Cal3d. 266. (An owner denied of substantially all use of his property by a zoning regulation is not entitled to an award of damages in inverse. His remedy is in mandamus to get the regulation invalidated.)

The Court of Appeal reversed the judgment of the trial court and held Company could recover no damages in inverse. It did not, however, invalidate the zoning ordinance or open space plan holding that "factual disputes precluded such relief on the present state of the record." Company appealed, the U.S. Supreme Court.

Issue

Do the Fifth and Fourteenth Amendments require that compensation be paid for the "taking for public use" by down zoning?

Holding of the Supreme Court

The court never really answered the question posed above. Four Justices held that the decision appealed from (Appellate Court) was not final since it did not decide whether any taking in fact had occurred, and further proceedings are needed below.

One Justice (Rehnquist) voted with the majority on technical grounds, although he felt that Company should be compensated.

Dissenting Opinion

Four Justices dissented. They felt that the Appellate Court's decision was final – i.e. the court had decided there can be no taking in a case involving zoning. The dissenting Justices felt that political power regulations such as zoning ordinances and other land use restrictions can destroy the use and enjoyment of property just as effectively as a formal condemnation or physical invasion of property. In the dissenting Justices' view, Company should be compensated.

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