LEGAL

THE "TAKING ISSUE" REVISITED— STILL NO RESOLUTION IN SIGHT.

by Gideon Kanner

From time to time this column has been taking a look at the courts' attempts to grapple with the "taking issue"—the claim of constitutional taking resulting from property regulations so severe that the owner is deprived of its beneficial use or value. Although the U.S. Supreme Court has shown some renewed interest in this topic after decades of silence, resolution, both in terms of substantive rules that can be predictably applied and in terms of remedies, we seem no better off than a decade ago. Earlier this year the high court decided *San Diego Gas & Electric Co. v. City of San Diego,* 101 S. Ct. 1287, in which both issues were raised. But those in the professions who were awaiting a definitive resolution were disappointed again. By a paper-thin 5 to 4 majority the court dismissed the appeal because it concluded that the state court judgment appealed from was not final. The state court of appeal had remanded the matter for further trial to determine whether a taking had occurred, so that relief by non-monetary remedies would be available under California law, and this was viewed by the Supreme Court as a non-final decision. This disposition is confusing, to say the least. Only two years ago, the high court decided the Grand Central Terminal case (*Penn Central Transportation Co. v. City of New York,* 438 U.S. 104) which came up in the same procedural posture (i.e., the New York Court of Appeals had remanded the case for retrial of the issue of whether a taking had occurred). Yet, in *Penn Central* the court decided the matter on the merits with neither the court's majority nor any of the dissenters questioning the finality of the judgment being reviewed.

And so, as of this writing, resolution of the "taking issue" remains officially banished to the outer reaches of the by now traditional *ad hoc,* case by case basis, with the U.S. Supreme Court taking (and making) every opportunity to avoid dealing with the issue on the merits. But that is only the official, or technical state of the law. Actually, the *San Diego* case has provided us with a clear insight into the thinking of the Justices. Four of the justices dissented from the court's decision to dismiss the appeal as non-final. They saw the matter as final under California law, because in last year's *Agins* case (*Agins v. City of Tiburon,* 598 P. 2d 25, aff'd. on other grounds, 447 U.S. 255) the California courts ruled that a landowner may never recover just compensation for regulatory property takings and his only remedy would be to have the courts declare the regulation invalid. Thus, reasoned the *San Diego* dissenters, the remedy issue was as final as it could get in the California courts, and there was no point in awaiting the resolution of the retrial issues.

With that as a premise, the dissenters turned to the issue of remedies, and concluded that the constitutional requirement that just compensation be paid for takings of private property meant just what it said. The dissenting opinion, written by Justice Brennan, reviewed prior "taking" cases, concluding that the Court had recognized that land use regulation may be so onerous as to constitute a "taking." It dismissed the argument of the California court in *Agins,* and the New York court in *Fred F. French Investment Co. v. City of New York,* 350 N.E. 2d 381 (1976), that the use of the word "taking" in this context was merely a metaphor for exceeding the limits of the police power and did not imply any right to damages. This, said Brennan, was "tampering with the express language of the [*Pennsylvania Coal*] decision."

The government's intention to take or not to take the property is irrelevant. The effect in either case is to deprive the owner of the use of his land and, usually, to put it to a public use—if only as preserved open-space.

As to the remedy, Brennan was clear: "This Court has consistently recognized that the just compensation required in the Fifth Amendment is not precatory: once there is a 'taking', compensation must be awarded." In this sense, the fact that a regulatory "taking" is temporary and might be rescinded by the government, does not make it any less of a "taking." Compensation is still obligatory for the time the property was "taken."

While a court has no power to order the regulator to condemn the property and assume permanent ownership, neither can it ignore the fact that the landowner's rights have been violated in the interim if the government rescinds the regulation or if it is declared invalid. Brennan concluded, "The constitutional rule I propose requires that, once a court finds a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."

As for the policy considerations urged in support of the invalidation-only approach, the dissent contended that fiscal liability for excessive land-use regulation might encourage a more rational decision making by regulators and a greater deference to the constitutional rights of property owners. "After all, a policeman must know the Constitution, then why not a planner?"