CONDEMNATION AND TAX CERTIORARI

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Temporary Regulatory Takings

We admit to being puzzled by the recent decision of *Friedenburg v. State of New York*, 2008 N.Y. Sup. Ct. 05882 decided by the Appellate Division, Second Department on June 24, 2008. The issue was the valuation date of the taking.

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'Friedenburg v. New York'

The state contended it was a 1995 date when the New York State Department of Environmental Conservation (DEC) denied an application for a permit to build a one-family house on waterfront property by reason of the Tidal Wetlands Act (ECL §25.0101 et seq.) and the Appellate Division in a prior proceeding had determined that the denial constituted a "taking."

Claimant contended it was the 2005 date when the DEC filed its acquisition map and title vested in the state of New York. Claimant had brought an action, after denial of its application for a permit, to compel the DEC to either issue the requested permit or commence a condemnation proceeding as is provided in the Tidal Wetlands Act.

In *Friedenburg v. New York State Department of Environmental Conservation*, 3 AD3d 86, 767 NYS2d 451 (2d Dept., 2003), the Appellate Division affirmed the lower court's finding that "The denial of the permit was a compensable taking."

So what puzzles us? The loose use of terms when a taking was adjudicated. Both decisions used the same words to describe something different.

When the state was seeking a valuation date of 1995, it was contending that there was a taking in fee on that date. When the Appellate Division rejected that as the date of title vesting, it was saying a fee title first passed 10 years later when there was a de jure appropriation.

Then what was the "taking" in 1995 and what about the period between the denial of the permit which the court had termed a "taking" and the de jure appropriation?

What is clear is that there were two takings, each of a different interest. That first taking was what is called a temporary regulatory taking. While it becomes clear what was meant by the decision when one reads the briefs, unless you do so—and not rely on the decision alone—there is bound to be confusion. Claimant was quite clear in making the distinction. We assume all will be made clear when the issue of compensation is before the court.

Case law indicates that a regulatory taking, as distinct from a physical invasion of the property, results not in a taking in fee but in a temporary taking. Thus, in *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), in an action for an inverse condemnation alleging a temporary taking by reason of an interim ordinance which prohibited constructing a building on the property involved, the Court held, contrary to the holding by the California courts, that the county had to pay damages for the period the property was, in effect, made sterile. As the Court said:

> temporary takings which, as here, deny a landowner all use of his property are not different in kind from permanent takings, for which the Constitution clearly requires compensation.... The United States has been required to pay compensation for leasehold interests shorter than this.... While this burden results from governmental action that amounted to a taking, the just compensation clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period...invalidation of the ordinance or its successor ordinance after that period of time, though converting the taking into a "temporary" one is not a sufficient remedy to meet the demands of the just compensation clause.

Prior to this time, when an ordinance, statute or action was deemed equivalent to a taking, no damages were awarded, there merely being a declaration of the invalidity of the offending act (see *Fred F. French Investing Company Inc. v. City of New York*, 39 NY2d 587, 595, 385 NY2d 510 (1976).) This is exactly what the California courts had done in this case, holding there could be no claim for damages unless, after the court had ruled and ordered a cessation of the acts, it continued anyway.

When Balancing of Interests Does Not Apply

Later, the Supreme Court went back to the theme of regulatory takings in *Lucas v. South Carolina Coastal Council*, 565 U.S. 1003 (1992), in which Judge Antonin Scalia, writing for the majority of the Court, described the two instances where the balancing of interests discussed in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978), did not apply, thus a per se taking. They are physical invasion of property and "where regulation denies all economically beneficial or productive use of land."

Of interest in the context of what we are discussing here involves the ripeness issue in that case. Subsequent to the initiation of the lawsuit, which was to declare a per se taking, the offending statute was amended to make it possible for the claimant to secure a building permit. Because the lower court declined to find the case not ripe for disposition on the merits, the Supreme Court also dealt with the case on the merits noting that even if a permit was later granted there still was a right to compensation for the temporary takings between the enactment of the regulation and its amendment.

Thus, it was to be expected, with the Supreme Court speaking definitively on this subject, that the New York Court of Appeals would reverse course from *Fred F. French Investing*, supra and follow its lead. We find this expressed, in *Manocherian v. Lenox Hill Hospital*, 84 NY2d 385 (1994). In this case, the court invalidated a statute which required the property owner to offer renewed leases to Lenox Hill Hospital for apartments occupied by some of its employees. Without going into the reasoning, the Court struck down the statute as a regulatory taking without just compensation citing, *Seawall Associates v. City of New York*, 14

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NY2d 92, 107, cert. den. 493 U.S. 976, *Nollan v. California Costal Comm.*, 483 U.S. 825 (1987) and *Lucas v. South Carolina Coastal Council*, supra, among others and remitted the case to the New York State Supreme Court "to resolve rights and remedies among the parties."

In *Seawall*, the Court deemed the offending Local Law the equivalent of a physical taking (as well as a regulatory taking) and thus a per se taking, meaning no balancing test was required. In a footnote it related it to "a taking, for whatever time period it is in effect." This brings us back to what the cases have deemed a "temporary taking" until the offending regulation or statute or act is invalidated.

What followed was a claim against the state of New York in the Court of Claims for the regulatory taking in which the Court of Claims, affirmed by the Appellate Division, awarded damages "equal to Claimant's loss in operating the subject apartments as rental units over this nine-year period," in addition to other damages. *520 East 81st Street Associates v. State of New York*, 288 AD2d 67, 732 NYS2d 407 (1st Dept., 2001), mod. in part and affirmed in part 49 NY2d, 43 750 NYS2d 51 (2002).

It is to be noted that the previously mentioned *Seawall* case had resulted in a successful claim against the city of New York for lost profits during the period the Local Law was in effect, grounded in it being a temporary regulatory taking. *Aube Realty Co. v. City of New York*, 223 AD2d 416, 636 NYS2d 767 (1st Dept., 1996).

This brings us back to *Friedenburg v. State of New York*, supra. That case had been preceded by *Friedenburg v. New York State Department of Environmental Conservation*, 3 AD3d 86, 767 NYS2d 451 (2d Dept., 2003), in which the refusal to issue a permit to build on the land was deemed a "taking" and directing, pursuant to the statutory provisions, that either the permit be granted or a condemnation proceeding be started. The Appellate Division affirmed the lower court finding that "the denial of the permit was a compensable taking."

The case which generated this column was in the condemnation proceeding itself where the state claimed that the "taking" described in the earlier decision was of a fee title, which was why it sought to fix the valuation date when the permit was denied. The Appellate Division found the fee title was taken when the de jure appropriation was accomplished 10 years later in 2005. But, since there was a "taking" in 1995, as found by the Appellate Division in the earlier case and as there could not be two fee takings, the "taking" in 1995, by definition, was a "temporary regulatory taking" for the 10-year period between 1995 and 2005.

Use of the Term 'Taking'

The problem in these decisions is that the courts use the term "taking" in a general sense and do not say of what. The consequences from a fee taking and a temporary regulatory taking are different. In the former one is paid damages, while in the latter, one is paid the value of the property.

While in the cases we have discussed, we have seen separate actions for damages following temporary regulatory takings, none of them was followed by a de jure taking of a fee title. What is missing from the *Friedenburg* decision is how compensation is to be made for the 10-year temporary regulatory taking. However, that issue was not before the Court. That is yet to be determined. Is it to be included in the damages to be fixed in the condemnation proceeding or does it require a separate action. Judicial economy would suggest the former as part of the claimant's just compensation. In *Friedenburg v. State of New York Department of Environmental Conservation*, supra, the Court said:

> The Petitioners' arguments inter alia, as to the type and extent of damages recoverable because of such purported taking need not be addressed at this juncture. Those arguments need not be determined until such time, if at all, that the issue of compensation becomes relevant.

Similar Cases

Let us assume it is to be adjudicated in the condemnation. The problem is in finding precedent. There are similar cases, such as *Ley v. State of New York*, 28 AD2d 945, 281, NYS2d 685 (3d Dept., 1967), aff'd. 25 NYS2d 887 (1969), which is not helpful as it was decided prior to the U.S. Supreme Court cases discussed herein (we were claimant's attorneys). There, work was done by the state blocking off the only road leading to a Carvel stand followed seven months later by an appropriation of the property. In the interim, the unoccupied building was destroyed by vandals. Claim was made for the rental value during the two periods, as well as the value of the destroyed property. The Court stated there could only be one "taking" and picked the earlier date as the one and awarded payment for the destroyed building and fixtures plus interest from that date.

We know of another case, unreported, which also dealt with fixing damages between the date of a temporary regulatory taking and the date the state appropriated the property. (see *Turiano v. State of New York*, Ct of Claims, July 7, 2000). We were attorneys for the property owner. Coincidentally, the Tidal Wetlands Act was involved. This appropriation also was prior to the within discussed Supreme Court cases.

In 1972, prior to the Tidal Wetlands Act, the property owner, pursuant to conditions contained in Letters Patent he had received from the state of New York to marshlands in Little Neck Bay, sought to improve the property. The city, wishing to build a park, rescinded his work permit. Litigation ensued which was adjourned waiting a condemnation which was to follow. In 1978, the owner received a letter from the DEC that it, not the city, which had run into financial difficulties, wished to acquire the property for a park and that pursuant to ECL §25-0403(2) that this letter notice was sufficient ground "for denial of any permit for any activity regulated by the Tidal Wetlands Act." It further stated: "This advice intends to indicate that the State does not wish to have you engaging in development activities on the property."

However, it took the state until 1984 to appropriate the property while the owner was hung out to dry and to be in violation of the conditions in the Letters Patent, which required work to be done in the wetlands.

In the condemnation, the state unsuccessfully challenged the title of the owner for failing to comply with the conditions in the Letters Patent, (see *Turiano v. State of New York*, 519 NYS2d 180 (Ct. of Claims, 1987). In that proceeding, a claim was made for damages for the period from the state's letter in 1978 to the date of the appropriation. The court found "a de facto taking" by the state in 1978 (what we now call a "temporary regulatory taking") and awarded interest on the award from 1978 as the damages for same while fixing the value of the property appropriated as of 1984, the date of the appropriation. Since interest is awarded as a substitute for the use of the property, interest was used as a substitute for rental value. Since the case was not appealed, it remained undisturbed.

Conclusion

While there may be other cases involving a temporary regulatory taking followed by a full fee taking, we are not aware of any. We are curious as to how it will be handled in the instant case.