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Eminent Domain—City ordinance rezones landowners' property

Landowners claim rezone constitutes an unconstitutional regulatory taking

Citation: *Thun v. City of Bonney Lake, 416 P.3d 743 (Wash. Ct. App. Div. 2 2018)*

WASHINGTON (05/01/18)—This case addressed the issue of whether a city ordinance that rezoned landowners' property from com-

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mercial to residential and conservation was an unconstitutional regulatory taking.

The Background/Facts: Karl J. and Virginia S. Thun, Thomas J. Povolka, William and Louise Leslie Revocable Trust, and Virginia Leslie Revocable Trust (collectively, "Thun") owned approximately 36 acres of property in the City of Bonney Lake (the "City"). A majority of Thun's property was located on a steep hillside that sloped into the Puyallup River Valley. The slopes varied from 20% to 40% or greater and "posed a high landslide risk."

Prior to 2005, Thun's property was zoned C-2 (commercial), which permitted a maximum of 20 residential units per acre. In 2005, the City adopted Ordinance 1160 (the "Ordinance"), which rezoned more than 30 of Thun's 36 acres from C-2 to RC-5 (residential/conservation). RC-5 zoning authorized only one residential unit per five acres. In adopting the Ordinance, the City noted that its purposes were to: (1) comply with Washington's Growth Management Act ("GMA"), which requires cities to adopt developmental regulations that "provide open space between urban growth areas and that protect critical areas, including areas susceptible to erosion or sliding," (RCW 36.70A.160); (2) "manage areas that are steep and prone to geologic instability"; (3) "protect tree cover on areas that cannot be densely developed due to steepness"; and (4) "protect the magnificent [visual] entry to [the City.]"

Eventually, Thun filed suit against the City, arguing that the Ordinance's rezone of Thun's property constituted an unconstitutional regulatory taking. After a proposed condominium complex on Thun's property was denied under the rezone, Thun estimated that the City's rezone reduced the value of his property from $6 per square foot, or $2.50 in certain areas, to $0.35 per square foot.

The City argued that Thun had "failed to meet the threshold requirement of a regulatory takings claim." In an as-applied takings claim, such as that made by Thun, the claimant must meet a threshold requirement of showing that the regulation (i.e., here, the Ordinance) "went beyond preventing a public harm to producing an affirmative public benefit." The City argued that Thun was unable to make that showing.

The trial court agreed with the City. Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the court granted the City's motion for summary judgment, dismissing Thun's claim. The court found that the Ordinance's rezone sought "to prevent a harm by safeguarding the public interest in health, safety, and the environment, and [did] not impose on [Thun] a requirement to provide an affirmative health benefit."

Thun appealed.

DECISION: Judgment of Superior Court affirmed.

The Court of Appeals of Washington, Division 2, agreed with the trial court and with the City, holding that Thun's regulatory takings claim failed because Thun failed to meet the threshold requirement of a regulatory takings claim.

The court explained that regulatory takings claims could be challenged as unconstitutional regulatory takings under article I, section 16 of the Washington Constitution. Article I, section 16 provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made." The court further explained that there are two types of unconstitutional regulatory takings challenges to land use regulations: facial and "as applied" challenges. "Facial takings challenges allege that the application of the challenged regulation to any property constitutes a taking because it destroys a fundamental attribute of property ownership." "As applied takings challenges allege that the challenged regulation constitutes an unconstitutional regulatory taking as applied to a specific parcel of property."

Here, Thun raised an as applied takings challenge. As the City had argued, in bringing an as applied takings claim, the claimant must make a threshold showing that "the challenged regulation goes beyond preventing a real public harm that is directly caused by the prohibited use of the property to producing an affirmative public benefit." The court explained that "one landowner should not be forced to bear the economic burden to confer a benefit upon the public, the cost of which rightfully should be spread over the entire community." However, the court said that landowners do not have the right to use their property in a manner that injures the community. Thus, "[i]f the challenged regulation merely safeguards the public interest in health, safety, the environment, or fiscal integrity, there is no taking . . . ."

Here, the court found that the evidence in the case made "clear that the predominant goal of the Ordinance was to prevent a real public harm that is directly caused by the prohibited uses of Thun's property." "By restricting high density developments on the steep slopes of Thun's property, the City [was] able to protect the public from the safety and environmental concern that landslides and erosion present."

Thun had argued that the Ordinance required Thun to provide an affirmative public benefit by preserving the entry to the City—which had nothing to do with safeguarding the public interest in health, safety, the environment, or fiscal integrity. But the court found that although the public may benefit from the preservation of the City's "magnificent entry," that fact did "not reduce or remove the effect of the Ordinance of safeguarding the public from harm." Moreover, the court noted that Thun was still permitted to develop his property, just not in a manner that would be injurious to the community.

Having found that Thun failed to meet the threshold requirement of showing that the Ordinance went beyond preventing a real public harm to producing an affirmative benefit, the court concluded that Thun failed to establish a regulatory takings claim and that his claim was therefore properly dismissed.

See also: *Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 829 P.2d 765 (1992) (holding ordinance went beyond preventing public harm, and unfairly allocated burden for public benefit on individual property owners).*

Case Note:

The City had also argued that Thun's regulatory takings claim was not ripe for review because Thun had not received a final governmental decision regarding the permitted uses of his property. The court determined that it could waive the final governmental decision requirement of prudential ripeness.

Billboard/Repair of damaged structure—Advertising company rebuilds nonconforming billboard structure after its blown over in windstorm

County says reconstructed billboard required local authorization, but advertising company claims reconstruction is exempt from local regulation

Citation: *Lamar Advertising Company v. County of Los Angeles, 22 Cal. App. 5th 1294, 232 Cal. Rptr. 3d 394 (2d Dist. 2018)*

CALIFORNIA (05/08/18)—This case addressed the issue of whether a billboard owner was entitled under California statutory law and/or local permitting exceptions to reconstruct a nonconforming billboard structure without local regulation after it was blown over in a windstorm.

The Background/Facts: Lamar Advertising Company ("Lamar") owned a billboard that was located alongside a freeway in Los Angeles

County (the "County"). With a permit issued by the County, the billboard had been erected in 1967 by Lamar's predecessor. Lamar later acquired ownership of the billboard.

In 1995, the County adopted an ordinance banning billboards in the area where Lamar's billboard was located. Under that ordinance, Lamar's billboard become a "non-conforming" structure with a five-year amortization period after which Lamar had to either remove the billboard or secure a permit from the County allowing the billboard to remain.

The five-year amortization period passed, and Lamar neither removed the billboard or secured a permit for the billboard. The County did not seek to remove the billboard.

In November 2008, a windstorm blew over the billboard and one of its support poles to which an electrical box was attached. Lamar subsequently installed a new and smaller advertising face, new lateral supports, a new electrical box and wiring, and a new catwalk.

In April 2009, the County Department of Regional Planning (the "Department") issued a notice of violation to the owner of the property on which Lamar's billboard was located. The notice stated that the billboard was in violation of local zoning ordinances. In June 2009, the Department ordered the removal of the billboard.

Lamar appealed the Department's order. It argued that it was entitled to rebuild the billboard under California statutory law. California's Outdoor Advertising Act (the "OAA") (Bus. & Prof. Code, § 5200 et seq.) regulates advertising displays (i.e., billboards) adjacent to interstate or primary highways in California. Section 5230 of the OAA authorizes local agencies to impose restrictions on billboards that are equal to or greater than those imposed by the State Act if imposed in compliance with section 5412. Section 5412 provides that, "no advertising display which was lawfully erected anywhere within this state shall be compelled to be removed, nor shall its customary maintenance or use be limited . . . without payment of compensation . . . ." Thus, under section 5412, once a billboard is erected, the owner may undertake "customary maintenance" without interference from local authorities unless the owner is compensated for any loss. "Customary maintenance" is defined in Regulation 2270 as "any activity performed" on an advertising display "for the purpose of actively maintaining the Display in its existing approved physical configuration and size dimensions at the specific location" approved on the CalTrans permit.

Lamar maintained that its reconstruction of the billboard was "customary maintenance" under OAA section 2270, and therefore OAA section 5412 prohibited the County from regulating the rebuilding of its billboard without compensation. In other words, Lamar argued that section 5412 prohibited the County from "limiting" the repairs to its billboard through the permitting process.

The County argued that because the entire advertising display fell over in the windstorm, the billboard was completely destroyed and its re-erection was a "placement." The OAA expressly recognizes local authorities' power to regulate the "placement" of a billboard (see §§ 5229, 5231). OAA section 5231 allows local authorities to require a permit for placement of a billboard. OAA section 5225 defines "placement" as not only erecting but "maintaining" billboards.

Lamar also argued that a County ordinance—LACC section 22.56.1510—exempted Lamar's reconstruction from the permitting process. LACC section 22.56.150 provides that a non-conforming structure that is "damaged or partially destroyed" may be restored to the condition it was immediately prior to the damage or destruction, provided certain conditions are met.

The trial court held that: (1) The re-erection of the billboard was not "customary maintenance" such that the OAA exempted the work from local and state regulation, but was rather a "placement" subject to local permitting requirements; and (2) Substantial evidence supported a finding that the billboard was completely destroyed, not "partially destroyed or damaged" and thus could not be repaired without a permit under LACC section 22.56.1510.

Lamar timely appealed.

DECISION: Judgment of Superior Court affirmed.

The Court of Appeal, Second District, Division 8, California also rejected Lamar's arguments, and held that Lamar wasn't entitled—under OAA section 2270 or LACC section 22.56.1510—to rebuild without local regulation its windblown billboard.

Agreeing with the trial court, the appellate court first held that Lamar's reconstruction of the billboard did not constitute "customary maintenance" allowed without local interference under OAA section 2270, and thus was not exempt from local regulation. The court noted that section 2270's definition of "customary maintenance" mandated that customary maintenance not alter the billboard's "existing approved physical configuration and size dimensions." Here, however, the court found that Lamar altered the size dimensions of the billboard and added several new components to the physical configuration. Accordingly, the court concluded that Lamar's re-erection of the billboard was not exempt from local regulation under OAA section 2270, but rather amounted to a "placement" subject to County permitting requirements (OAA section 5231).

Also agreeing with the trial court, and disagreeing with Lamar, the appellate court concluded that LACC section 22.56.1510—which allowed for restoration of "damaged or partially destroyed" structures—did not entitle Lamar to reconstruction of the billboard. The court so concluded upon finding that Lamar's billboard had been "completely

'destroyed,' not just 'damaged' or 'partially destroyed' " because the entire advertising surface had blown off of the support posts and was replaced in its entirety.

See also: *Viacom Outdoor, Inc. v. City of Arcata, 140 Cal. App. 4th 230, 44 Cal. Rptr. 3d 300 (1st Dist. 2006).*

Case Note:

Lamar had also cited OAA section 2271, which provides that a billboard is "destroyed and not eligible for customary maintenance" when it remains unrepaired for more than 60 days after notice of its damage. Lamar argued that its billboard was not "destroyed" because it was repaired within 60 days, and therefore the reconstruction was not a "placement," but only customary maintenance. The court rejected this argument, finding OAA section 2271 created a limited exception to an owner's right to conduct customary maintenance and defined when an owner would forfeit the right of customary maintenance and the loss of a CalTrans permit. It did not, found the court, define the term "destroyed" for all purposes, and did not address the County's requirement that Lamar apply for a permit prior to rebuilding the billboard.

Injunction—Resident constructs garage that encroaches on zoning setback area and county right-of-way abutting a road

County seeks permanent injunction, requiring resident to remove garage

Citation: *County of Boone v. Reynolds, 2018 WL 1597632 (Mo. Ct. App. W.D. 2018), reh'g and/or transfer denied, (May 1, 2018)*

MISSOURI (04/03/18)—This case addressed the issue of whether a County was entitled to a permanent injunction, requiring a resident to remove a newly constructed garage.

The Background/Facts: Sometime before June 21, 2013, Seth Reynolds ("Reynolds") began construction on a detached garage near his home in Boone County (the "County"). The garage measured forty-by-forty feet and sat approximately eighteen-to-twenty feet off of the edge of a County paved road. Reynolds first started the garage construction without first obtaining a building permit. However, after installing

the footings and piers of the garage, Reynolds was notified of the need for a building permit. Reynolds applied for and received a building permit on June 21, 2013.

Four days later, Uriah Mach ("Mach"), a land-use planner for the County, informed Reynolds via an email that Reynolds's garage was located too close to the road and would need a variance for the setback violations. Reynolds did not respond, and Mach then sent two related letters about Reynolds' violations and need to take action. Reynolds failed to respond to the County's notifications, and instead proceeded with the completion of construction of the garage.

Sometime in 2015, Reynolds finally applied to the County Board of Adjustment (the "Board") for a variance for the setback violations. The Board declined Reynolds' request.

Thereafter, Reynolds refused to bring his property into compliance with the right-of-way and zoning regulations, and the County then filed a petition for permanent injunction against him. The County sought a permanent injunction, "mandating that [Reynolds] comply with [the County] zoning regulations, and that he remove the accessory building [ie., garage], [a] fence, and [a] satellite dish from . . . the right of way area . . . the setback area . . . [and] the area in front of the main building."

The trial court found that Reynolds had "unlawfully constructed and maintains on his property an unlawful accessory building abutting [the road], together with a fence and a satellite television receiver dish between that building and [the road], all in violation of [County] Ordinances and which all unlawfully encroach on the 25-foot setback area established by the [County] Zoning Regulations and upon the [County's] right of way abutting [the road] in front of that property." The court entered a permanent injunction, requiring Reynolds to "remove in its entirety that building, that fence, and that satellite receiver dish from the [County] setback area and [County road] Right of Way within 60 days of the date of th[e] Judgment and . . . permanently restrained and enjoined [Reynolds] from building or maintaining any structures in that setback area or in that right of way in the future."

Reynolds appealed. Reynolds argued that the County was not entitled to a permanent injunction against him because the County failed to prove the two elements needed for a permanent injunction: (1) irreparable harm; and (2) lack of adequate remedy at law. Reynolds contended that there was no finding of harm to either the public safety or health. He also maintained that the existence of potential criminal penalties (i.e., the imposition of a fine for zoning violations) constituted an adequate remedy at law for the County. Reynolds further argued that the balancing of equities should have resulted in a ruling in his favor. Essentially, he argued that because the County was not using the right-of-

way at the time, it did not suffer any harm from the encroachment of his property upon it, while he would suffer great harm (in cost) if forced to tear it down.

DECISION: Judgment of Circuit Court affirmed.

The Missouri Court of Appeals, Western District, upheld the permanent injunction issued against Reynolds.

In so holding, the court rejected all of Reynolds' arguments.

With regard to Reynolds' argument that the County failed to show the elements necessary for a permanent injunction, the court explained that "[w]hile the threat of irreparable harm and lack of an adequate remedy at law must usually be specifically shown for injunctive relief to be granted, '[w]here a trespass is recurring and would involve a multiplicity of suits an injunction will lie to restrain it.' " In other words, under Missouri law, "irreparable harm need not be shown in the case of a repeated or continuing trespass." Here, the court found that "Reynolds's garage, satellite dish, and privacy fence plainly interfered with County's property interest in the right-of-way surrounding [the road,] and that interference was of a permanent and continuous nature." Thus, the court concluded that the County was not required to show any further harm, and rejected Reynolds' claim to the contrary.

The court similarly rejected Reynolds' claim that the existence of potential criminal penalties constituted an adequate remedy at law. The court said that under Missouri law, the right to an injunction to "prevent irreparable injury to property is not divested by the fact that the act to be enjoined may also be a violation of the criminal law. . . ."

Rejecting Reynolds' additional argument that the balancing of equities did not favor an injunction against him, the court noted that Reynolds' expenditure of money in construction of the garage was done with knowledge of his zoning violations. The court also explained that accepting Reynolds' position—that an injunction requiring removal of his garage was unwarranted because harm to him in removing the garage outweighed harm to the County that was not using the right-of-way on which his garage encroached—would result in a "patently unlawful appropriation of public land by private individuals."

See also: *Kugler v. Ryan, 682 S.W.2d 47 (Mo. Ct. App. E.D. 1984).*

See also: *Kansas City Gunning Advertising Co. v. Kansas City, 240 Mo. 659, 144 S.W. 1099 (1912).*

Zoning News from Around the Nation

CALIFORNIA

The state Senate is considering Senate Bill 828, which would "set more aggressive targets for local governments" with regard to periodically-set goals for low-income and market-rate housing.

Source: *The Mercury News; www.mercurynews.com*

CONNECTICUT

The state House of Representatives voted in April to approve an affordable-housing bill that would require "two dozen Connecticut communities to end their prohibition on multi-family housing." Currently, "only 20 of Connecticut's 169 cities and towns allow multi-family housing, which is defined as three or more units, as a right under their zoning regulations, two dozen bar it and the rest allow housing of three or more units by special permit." The bill requires zoning regulations to "provide for a variety of housing development opportunities to meet local and regional needs." The bill heads to the state Senate for consideration.

Source: *The CT Mirror; https://ctmirror.org*

ILLINOIS

The state House of Representatives unanimously passed a bill—HB4711, which reportedly "codifies appellate court precedence" to exempt from any legal zoning complaint between neighbors, the local unit of government that enacted the relevant zoning code. The bill now heads to the state Senate for consideration.

Source: *DuPage Policy Journal; https://dupagepolicyjournal.com*

MARYLAND

The Montgomery County Council has approved standards for installing small cell antennas in commercial and industrial areas. Under the new standards, new small cell antennas can be installed on existing utility poles and streetlights in mixed-use, commercial and industrial zones. The new standards also lessen setback requirements and lower the height limit for buildings where antennas can be installed in those zoning districts. Reportedly, "county officials remain concerned future state or federal regulations could preempt the new zoning regulations."

Source: *Bethesda Magazine; www.bethesdamagazine.com*

MASSACHUSETTS

With sales of retail marijuana to be legal on July 1, 2018, the City of Northampton is considering a proposed law that would cap the number of retail marijuana stores in the city.

Source: *Mass Live; www.masslive.com*

PENNSYLVANIA

Philadelphia's City Council is considering a bill that would mandate that residential construction developers provide more parking with new residential construction. The bill would "double the number of parking spaces developers are required to provide in many zoning districts." More specifically, the bill would require housing developments built in most multi-family zoning districts to provide six parking spaces (seven in industrial-residential mixed use zones) for every 10 units of housing. Current law only requires three spaces for 10 residences.

Source: *Philadelphia Business Journal; www.bizjournals.com*