Real Property and Financial Services Section
Hawaii State Bar Association

Newsletter

October 1994

FROM THE CHAIR

On October 31, Sandy Furukawa "retired" after 28 years at the Bureau of Conveyances, the last 4 as Registrar. Many of us credit Sandy with being the person who tamed the backlog tiger at the Bureau, and she will certainly be missed. The exciting part of Sandy's "retirement" is that on November 1 she is going to Russia for 6 months to assist in implementing a system of documentation of land titles and recordation. Private land ownership is of course unknown in modern Russia, and Sandy was retained by a U.S. consulting firm to assist in bringing free world concepts of land ownership and recordation to post Cold War Russia. As you know, the Board of the Section has appointed a sub-committee to study the abolition or limitation of the Land Court system, and those of us on this subcommittee, of which Sandy is a member, were surprised to learn from Sandy that the Russians are leaning toward a Torrens system of recordation. When she told me this, I asked, only partially tongue-in-cheek, whether she thought we could just export the entire Land Court system to Russia. On behalf of the Section, I wish Sandy well. I already have Sandy's commitment to speak about her experience at a seminar upon her return.

This issue contains the second of two papers written by University of Hawaii law school students who received a cash prize for their outstanding research papers. The paper summarized in this issue was written by Ben Majoe, a Senior at the Richardson School of Law, for Professor David Callies Spring 1994 seminar on Land Use and Development.

Nancy N. Grekin, Chair
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RONALD YASUO SHIGETANI

Ronald Yasuo Shigetani, 52, of Honolulu, died on June 8, 1994. He was born in Honolulu and graduated from Punahou School, Cornell College and Cornell University Law School. He was a decorated Viet Nam combat veteran of the U.S. Navy.

Ron's 21-year professional career was spent with the Carlsmith law firm as an associate and partner with a practice emphasizing complex real estate transactions and related title and conveyancing matters. Ron established a conveyancing department at the law firm serving most of the major title and escrow companies in the State of Hawaii. He was an expert in residential leasehold conversion, representing hundreds of Hawaii homeowners in acquiring fee simple title to their residences.

Ron always served his clients diligently and well. He was always considerate and understanding, even when dealing with opposing counsel. He was always helpful to others, whether they were other lawyers or staff in the firm, other lawyers outside the office seeking some assistance, escrow or title companies, or real estate brokers. Ron is survived by his wife, Lois M. Bruce; sister, Kate Y. of Honolulu; brother, Padraic I. of Los Angeles; and son, Michael, and daughter, Kimi, both of Washington State.

THE RIPENESS BARRIER AFTER LUCAS v. SOUTH CAROLINA COASTAL COUNCIL: STILL INTACT AS A GOVERNMENTAL DEFENSE AGAINST TAKINGS CLAIMS.

By Ben Majoe

INTRODUCTION

Ripeness doctrine substantially limits when federal courts will hear regulatory takings cases. This carries special significance in Hawaii, where a landowner must survive complex permit regulations necessary to develop land. The classic case of Williamson County Regional Planning Commission v. Hamilton Bank outlines two separate requirements to satisfy ripeness.[1] First, the property owner must have obtained a "final, definitive position" regarding the use of his property.[2] Satisfaction of the first prong triggers the second prong of Williamson County. Williamson's second prong instructs the property owner to seek compensation through available state procedures.

In 1986, a year after Williamson County, the United State Supreme Court also decided MacDonald, Sommer & Frates v. Yolo County [3] on ripeness grounds. In MacDonald, the Court found the developer's takings claim to be unripe since he had not received a final decision from the county on what development would be permitted.[4] The developer failed to show that it had, with its one application, done enough. Indeed, he needed to filed another application. The Court, however, did impose some limits on the reapplication requirement. For example, a property owner is not required to resort to "futile" procedures. In sum, under MacDonald, where the circumstances indicate that a "meaningful application" could have been made, but has not been, the case is unripe.

II. HOW DID LUCAS AFFECT TRADITIONAL RIPENESS ANALYSIS?

A. Facts of the Case

Before examining the impact of Lucas on ripeness doctrine, it is worth discussing the facts that gave rise to Lucas. In 1977, the South Carolina legislature enacted a coastal zone management act.[5] The act required a landowner to obtain a permit from the South Carolina Coastal Council ("Council") before developing any coastal land located within a so-called "critical area."[6] In 1986, David Lucas purchased two residential lots on which he intended to erect single family homes.[7] The lots were located on the Isle of Palms, a barrier island in Charleston County, South Carolina.[8] At that time, neither lot was located in a "critical area" and, thus, the Council required no permit for the proposed homes.[9] In 1988, however, the state legislature enacted the Beach-front Management Act ("the Act"), which expanded the area subjected to developmental restraints.[10] The Act prohibited construction of any occupiable improvements in the Isle of Palms.[11]

B. United States Supreme Court handling of Ripeness

As Lucas' two lots were affected, he brought suit, claiming that the Act denied him all economically beneficial use of his property and thus was a taking.[12] The Council argued that the Court should not address the merits of the takings claim because the Act had been amended since commencement of the action to allow for issuance of special permits for beachfront construction in certain circumstances. Lucas had failed to obtain such a permit.[13] A majority of the Court, however, held that Lucas nonetheless had a ripe temporary takings claim on the basis of deprivation suffered during the period preceding amendment of the statute.[14]

The Court apparently relied on three factors in finding Lucas' claim ripe. First, the "special permit" procedure did not exist during the period when the taking occurred. The Council implemented the special permit procedure only after Lucas appealed to the South Carolina Supreme Court. Second, the Council stipulated that, during this period, any other efforts to obtain approval for development would have been futile. Third, the South Carolina Supreme Court's decision rejecting Lucas' takings claim on the merits barred him from seeking relief, in state court, for the temporary taking.[15]

Does Lucas now imply that courts will now adjudicate takings claims on their merits rather than on threshold ripeness grounds? The remainder of this article is devoted to that question.

III. THE FIRST PRONG: FINAL DECISION

Federal courts continue to focus on the ripeness inquiry, resulting in the disposition of most cases without reaching the merits. In particular, they continue to observe the methods of analyzing ripeness issues created by the Supreme Court in Williamson and MacDonald. This section therefore focuses on how federal courts have applied the final decision prong set forth in Williamson County.

A. Applications for Development Permits

Some federal courts apparently have no qualms in holding that the denial of one application for a permit is insufficient to constitute a "final decision." One of the clearest post-Lucas examples of this is Southview Associates v. Bongartz.[16] In Southview, the Second Circuit interpreted Lucas to have no bearing on whether Southview had obtained a final decision. Nor did the court find that Lucas undermined the validity of either Williamson or MacDonald. Instead, the court applied Williamson and MacDonald to the facts and held that Southview failed to secure a final decision.

Clearly, the court emphasized that the submission and denial of only one application for a permit, did not preclude Southview from submitting another proposal in this case.[18]

Of course, not all denials of an application for a permit require the landowner to submit a second permit application. Thus, in Glendon Energy Company v. Borough of Glendon, the district court concluded that the final decision prong is met where "no city ordinance provisions exist[ed] to permit a party whose conditional use permit had been denied to appeal to the zoning hearing board."[19]

B. Application for a Variance or Special Exception

It is equally clear that failure to appeal revocation of a use permit or seek a variance to the zoning ordinances does not meet the final decision requirement. The Third Circuit's recent decision in Taylor Investment v. Upper Darby Township confirms this observation.[20] There, the Township revoked the plaintiff's ("Taylor") use permits on grounds they were issued erroneously based on false and misleading applications.[21] Taylor did not reapply for a use permit, appeal the revocation to the Township Zoning Board, or seek a variance to the Township's zoning ordinances. Instead of taking one of these actions, Taylor filed a 42 U.S.C. § 1983 civil rights action claiming he had been denied his due process rights. Taylor unsuccessfully argued that Williamson applied only to takings claims. Rather, the Third Circuit held that the finality rule applies, even where the claim is premised on substantive due process or procedural due process theories.[22]

The Nevada district court in Carpenter v. Tahoe Regional Planning Agency reached a somewhat different result.[23] In this case, the plaintiff submitted an application for a building permit for a family dwelling. Unfortunately, the TRPA temporarily suspended issuance of all permits. Plaintiff's suit followed.

In finding the plaintiff's claim ripe for decision, the court posed two questions. First, had the plaintiff done everything she could have done to get a final answer to her building permit request?[24] Second, had the defendant engaged in every procedure that might ultimately result in plaintiff being granted a building permit?[25] According to the court, the plaintiff had met her burden of showing that she had done everything she could to get a building permit.[26] At the same time, the Agency admitted it never acted on plaintiff's application.[27] As the court put it, "an application in perpetual limbo is the same as an application which has been denied."[28] Thus, the plaintiff succeeded in demonstrating her case as ripe for decision.

The district court in Celentano v. City of West Haven reached a somewhat different conclusion.[29] There, the court rejected Celentano's argument that a civil rights challenge to a mistaken zoning designation obviates the need for a final decision by a local agency.[30] Celentano had brought a 42 U.S.C. § 1983 action, alleging that the open space designation of his property was a mistake illegally maintained, in retaliation for his political and legal opposition to the town's other land use decisions.

Relying in part on Williamson,[31] the court held it could not determine whether the defendants acted arbitrarily and capriciously towards Celentano, until it understood how the Planning and Zoning Commission and the City applied the zoning process to his property.[32] Clearly, the court demanded that Celentano formally apply for a variance and receive a formal rejection.

The Washington case of Birkenfeld Trust v. Bailey provides a similar result. There, the court upheld the validity of open space designations contained in a management plan for the Columbia River Gorge National Scenic Area.[33] The court found the plaintiffs' takings claim to be unripe prior to the application of the restrictions to a given parcel of land and the exhaustion of administrative remedies provided by the Act.[34]

In sum, federal courts have been unwavering in their application of the final decision requirement despite the Lucas decision. At a minimum, the decisions continue to indicate that landowners should make more than one application, or appeal for use permits regardless of whether it serves only a symbolic purpose. But this in turn begs the question: does the "anti-development" political bias inherent in many governmental bodies make it "futile" for a landowner to seek a final decision ad infinitum? This theme is picked up by the discussion of the "futility exception" in Part IV of this article.

IV. THE "FUTILITY EXCEPTION"

Recent post-Lucas litigants have argued that anti-landowner biases in local governmental bodies make it futile to seek a final decision. They argue that Lucas undercut the one "meaningful" application requirement. In particular, Lucas implies that if there is no chance an application will be granted, the application can hardly be considered meaningful. In Lucas, the Court held that requiring a landowner to submit a development plan prior to challenging a state anti-development statute "would have been pointless," for the statute would have foreclosed development under any circumstances.[35] As discussed below, however, deciding when it is "pointless" to continue seeking a permit is very much a fact dependent analysis tied to the discretionary whims of the individual court.

A. Local Procedural Bias

The courts have made it clear they will not accept mere assertions that potential administrative relief is "futile" under the circumstances. In Rivervale Realty Co., Inc., v. Town of Orangetown, New York, the court determined that Rivervale did not pass the final decision requirement

because Rivervale failed to seek a variance from an ordinance.[36] Rivervale argued that seeking a variance would be futile, because it had repeatedly requested relief prior to the adoption of the ordinance and particularly because of procedural bias by the local authorities.[37]

The court held that the futility exception had been very narrowly construed to require at least one "meaningful application" for a variance.[38] In addition, Rivervale could not assert bias absent evidence of bias or intentionally discriminatory conduct by the town defendants.[39] Thus, the court adhered to the general rule in United States v. O'Brien, that bias in connection with a legislative enactment is primarily judged on an objective basis. Since Rivervale failed to meet the final decision prong, the court did not consider whether Rivervale satisfied Williamson's second prong.

B. Unavailability or Inadequacy of Administrative Relief

Taking a slightly different approach, the Ninth Circuit in Levald, Inc. v. City of Palm Desert, focused on whether it would have been futile to seek state court relief at the time the taking occurred. In applying Williamson's first inquiry, the court held that a regulatory taking occurred at the time the ordinance was enacted - in 1986.[40] California did not recognize actions for inverse condemnation based on regulatory takings, until after the Supreme Court's 1987 decision in First English Evangelical Lutheran Church v. County of Los Angeles.[41] Thus, the Ninth Circuit held that even though Levald did not seek remedies in state court, Levald did not have to do so; it would have been futile to seek state court relief at the time the taking occurred.[42] On the other hand, the Seventh Circuit in Triple G Landfills v. Board of Commissioners of Fountain County, affirmed the district court's invalidation of a county ordinance which added a second layer of regulations beyond those required by the state.[43] There, a landfill operator ("Triple G") mounted a facial attack against a county ordinance, which, required prospective landfill operators who had already obtained a state permit to submit another permit application to the county.[44]

In finding Triple G's claim ripe for review, the Seventh Circuit rested its decision on the inquiry set forth in Abbott Laboratories. First, are the issues sufficiently focused so as to permit judicial resolution without further factual development? Second, would the parties suffer any hardship by the postponement of judicial action?[45] The Seventh Circuit, however, limited the Abbott analysis to facial attacks upon the validity of the ordinance itself.[46] Had this been a regulatory takings claim, Triple G would have been precluded from filing suit until the County had rendered a final decision on its application.[47]

C. Failure to Pursue State Court Judicial Remedies

It is equally clear, that futility cannot be demonstrated in the absence of a denial of state judicial remedies. In Gamble v. Eau Claire County, the Seventh Circuit held that a landowner forfeits whatever constitutional rights she may have with respect to an alleged taking if she fails to pursue state judicial remedies in a timely fashion.[48] Here, the plaintiff had in fact sought a judicial review of the decision by the county board of land use appeals. Unfortunately, her appeal was dismissed for failure of service and apparently could not be refiled. Yet, the court remained unsympathetic to her predicament. Instead, the Seventh Circuit emphasized that she could have pursued an inverse condemnation suit, but she waited too long.[49]

In short, the burden of proof to demonstrate futility remains a heavy one, particularly where beneficial uses are authorized on the face of the regulations. Generally speaking, futility cannot be demonstrated by mere allegations of procedural bias in local governmental bodies. The landowner, however, need not pursue administrative procedures which are unavailable or inadequate at time the taking occurred. Assuming the landowner has met the first prong, his takings claim may become impaled on the second prong of the ripeness doctrine.

V. THE SECOND PRONG: COMPENSATION

There are few cases dealing with Williamson's compensation prong since many landowners fail to overcome the "final decision" obstacle posed by the first prong. As noted above, some lower federal courts find it easy to dismiss takings claims where the property owner has failed to seek "just" compensation through available state procedures. This has remained intact despite Lucas.

A. State Inverse Condemnation Procedures

In Wendt v. County of Yakima, a landowner claimed that the county's nuisance abatement act on his property constituted a regulatory taking.[50] In this case, the county had demanded that the plaintiffs make their property accessible to a "cleanup" contractor. Relying in part on Williamson County, the court found that the plaintiffs failed to show the unavailability or inadequacy of an inverse condemnation in state court.[51]

Similarly, in Christensen v. Yolo County Board of Supervisors, the Ninth Circuit affirmed the district's dismissal of the plaintiff's regulatory takings claim on ripeness grounds.[52] The Ninth Circuit acknowledged that Lucas did not require an application for a development permit or variance where it would be pointless.[53] Nevertheless, the Ninth Circuit distinguished Lucas from the facts in Christensen. The court noted that compensation had been available under California law for inverse condemnation claims based on regulatory takings since the Supreme Cou

decided First Evangelical Lutheran Church v. County of Los Angeles in 1987.[54] Since Christensen failed to seek compensation through an inverse condemnation action in state court, the Ninth Circuit affirmed the district court's dismissal of Christensen's claim as unripe.[55]

In sum, it seems to make sense that a court cannot determine whether or not a "taking" has occurred, unless the landowner has unsuccessfully attempted to secure compensation from the state. This appears to be the conclusion of most federal courts which have addressed the issue.

VI. CONCLUSION

In sum, the ripeness hurdles facing landowners who wish to enforce their constitutional right to just compensation for overburdensome governmental regulations remain formidable. In federal courts at least, the continued viability of the Williamson and MacDonald ripeness tests make it extremely difficult for a landowner to bring takings claims, until he has exhausted state inverse condemnation procedures and other forms of administrative relief.

There is no reason to believe that the Lucas decision substantially lowers ripeness barriers for an aggrieved landowner. In Lucas, the unavailability of a special permit procedure made it easier for the Court to conclude that it would have been futile to seek a final decision.[56] Lucas seems to imply that if special permit procedures are available, a property owner will have the burden of proving that he applied for and was denied a permit.

Likewise, there is nothing in Lucas to suggest that landowners no longer need to seek just compensation through available state procedures. Briefly, where state inverse condemnation procedures are available, the courts have been unyielding in their demand that landowners first seek compensation via those procedures. This arguably reflects the traditional view that a court cannot determine whether a "taking" has occurred, unless the landowner has unsuccessfully attempted to secure compensation from the state.

Measured against current post-Lucas trends, the future does not bode particularly well for landowners seeking to bring takings claims. Parenthetically, the difficulty in bringing takings claims is needed to ensure that federal courts adjudicate only cases where landowners have genuine claims. On the other hand, the time and effort necessary to obtain a final decision and seek compensation can be unduly burdensome on landowners. It is therefore critical that courts view ripeness not simply from jurisdictional perspective, but also as a prudential concern. This is the best lesson we can take from Lucas.

ENDNOTES

1 473 U.S. 172, 105 S.Ct. 3108 (1985).
2 Id. at 186.
3 477 U.S. 340, 106 S.Ct. 2561 (1986).
4 Id. at 347.
5 Id. at 353 n.8.
6 Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2889 (1992)(citing S.C.Code Ann. §§ 48-39-10 to -220 (Law.Co-op.1987), amended by Act 634 of 1988, S.C.Code Ann. §§ 48-39-10 to -360 (Law. Co-op. Supp.1992)).
7 Id.
8 Id.
9 Id.
10 Id.
11 Lucas, 112 S.Ct. at 2889 (citing S.C.Code Ann. §§ 48-39-10 to -360 (Law. Co-op. 1987 & Supp.1992)).
12 Id. at 2889-90.
13 Id. at 2890.
14 Id. at 2890-91.
15 Id. at 2891.
16 Id. at 2890-92 & n. 3.
17 980 F.2d 84 (2nd Cir. 1992).
18 Id. at 98.
19 Id.
20 Id.
21 836 F.Supp. 1109, 1116 (E.D. Pa. 1993).
22 938 F.2d 1285 (3d. Cir. 1993).
23 Id.
24 Id. at 1289.
25 Id. at 1292.
26 804 F.Supp. 1316 (D. Nev. 1992).
27 Id.
28 Id. at 1323.
29 Id.
30 Id.
31 Id.
32 Id. at 1324.
33 815 F.Supp. 561 (D.Conn. 1993).
34 Id.
35 815 F.Supp. at 561.
36 473 U.S. at 193, 105 S.Ct. at 3120.
37 815 F.Supp. at 567.
38 827 F.Supp. 651 (E.D. Wash. 1993).
39 Id. at 665.
40 Roberts, Ripeness After Lucas at 18.
41 ___ U.S. ___, ___ n.3, 112 S.Ct. 2886, 2891 n.3 (1992).
42 816 F.Supp. 937, 942 (S.D. N.Y. 1993)
43 Id. at 943.
44 816 F.Supp. at 943.
45 Id. at 944.
46 391 U.S. 367, 88 S.Ct. 1673 (1968).
47 816 F.Supp. at 943.
48 Id. at 686.
49 482 U.S. 304, 107 S.Ct. 2378 (1987).
50 998 F.2d at 686.
51 977 F.2d 287 (7th. Cir. 1992).
52 977 F.2d at 288.
53 Abbott Laboratories v. Gardner, 387 U.S. 137, 87 S.Ct. 1507 (1967).
54 387 U.S. at 149, 87 S.Ct. at 1515.
55 977 F.2d at 289.
56 Id.
57 5 F.3d 285 (7th Cir. 1993).
58 Id.
59 No. CY-92-3037-JBH, 1993 WL 29160, at *2 (E.D. Wash. Jan. 15, 1993).
60 Id. at 11.
61 995 F.2d 161 (9th Cir.)
62 Id. at 163.
63 Id. at 164.
64 Id.
65 112 S.Ct. at 2890-92 (1992).

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