

FEATURE CASE

Texas Supreme Court Applies *San Remo* to Bar Garbage Company's Reg-Take Claim Due to Prior Litigation

If a landowner loses a regulatory takings challenge to a zoning ordinance, can the owner get a second bite at the litigation apple simply by seeking a variance and then challenging the variance denial?

Not in Texas. So says the State's high court in *Hallco Texas, Inc. v. McMullen County*, 2006 Tex. LEXIS 1331 (Tex., Dec. 29, 2006) (publication pending).

In 1991, Hallco bought 128 acres of land situated less than two miles from Choke Canyon Lake, the reservoir that supplies drinking water to the City of Corpus Christi. It intended to operate a industrial waste landfill on the site. Shortly after Hallco's purchase, the county adopted a resolution opposing use of the site as a landfill due to the hazards posed to the water supply, and in 1993 the county enacted an ordinance banning waste disposal within three miles of the lake. Hallco contends that prior to the ban, it spent more than \$800,000 preparing the site for use as a landfill.

In 1995, Hallco filed a takings challenge to the ordinance in state court. A state appeals court ruled against Hallco, concluding that it lacked a cognizable property interest in the disposal of waste because the disposal was subject to a state permitting process.

Two years later, Hallco requested a variance to the ordinance, arguing that the ban lacked a scientific basis and that it had been singled out for unfair treatment, but the county took no action. Hallco then sued again in state court to challenge the refusal to grant a variance, asserting a state law takings claim, reserving a federal takings claim, and adding a claim under the Texas Private Real Property Rights Preservation Act. Hallco argued it suffered losses exceeding \$20 million.

In a 5-3 ruling, the Texas Supreme Court concluded that the second suit is barred by claim preclusion (also known as *res judicata*). It didn't matter to the court that the prior suit was a facial challenge and the pending suit was as-applied because the claims both arose out of the same subject matter. The court also rejected Hallco's argument that its as-applied challenge wasn't ripe at the time it litigated its facial challenge, concluding that nothing in the ordinance suggested any exceptions would be made, thereby making all claims ripe upon enactment. According to the court, the "ordinance's wholesale prohibition, the manner in which it would be applied, and the nature of the damage suffered" were all clear at the time of the prior suit. The variance request was actually little more than a request that the county reconsider its longstanding position.

While expressing sympathy for Hallco's contention that it was unfairly singled out, the court observed that Hallco could have argued in the prior suit that the ordinance failed to advance a legitimate government purpose, but it failed to do so. Thankfully, the court further noted that at least under the federal Constitution, this theory of takings liability is no longer valid in the wake of *Lingle v. Chevron* (2005). The judgment from the prior suit barred relitigation regardless whether it was correct as a matter of law.

Finally, relying on the U.S. Supreme Court's ruling in *San Remo Hotel v. San Francisco* (2005), the majority ruled that *res judicata* also barred Hallco's federal takings claim, even though Hallco had attempted to reserve that claim. Although *San Remo* involved issue preclusion (collateral estoppel) and not claim preclusion, the court concluded that the federal Full Faith and Credit Act applies to both doctrines and requires that the prior state court judgment be given preclusive effect.

The dissent disagreed with the majority regarding whether the challenged ban was absolute or allowed for exceptions, and it expressed concern that taking claimants could be "whipsawed" by ripeness requirements. The dissent also contended that while *Lingle* makes clear that the "substantially advance" test is not a stand-alone test for takings liability, it is still relevant to the overall analysis to consider whether the county unfairly singled out Hallco in a way that failed to advance the public interest.

In the end, respect for finality and the need to prevent repetitive litigation prevented Hallco from litigating serial lawsuits against the county. Moreover, the court observed that county protections for a public water supply should "hardly ever give rise to takings liability." The case thus serves as a splendid example of how local governments can use arguments based on both procedural fairness and the important objectives underlying land use controls to defeat takings claims.

KUDOS OF THE MONTH

Indiana Supreme Court Analyzes Original Meaning of the Fifth Amendment

Takings challenges to airport overflights typically focus on whether the overflights are so low and frequent as to prevent use and enjoyment of the land, and the recent challenge to operations at Indianapolis International Airport is no exception. But in the course of disposing of this lawsuit, the Indiana Supreme Court engaged in a remarkable analysis of what it called “First Principles: Origins of the Fifth Amendment,” a discussion highly relevant to all sorts of reg-take cases.

In *Biddle v. BAA Indianapolis, LLC*, 2007 Ind. Lexis 57 (January 23, 2007), the court began its analysis by observing that during the Revolutionary Era, “there was widespread belief in the power of the common good (called ‘republicanism’) and in the trustworthiness of legislatures.” As a result, none of the first state constitutions required compensation for takings. According to the court, the three original state constitutions that addressed takings (Maryland, New York, and North Carolina) did so by simply requiring that land seizures be authorized by a legislative act. Similarly, George Mason’s influential Virginia Declaration of Rights provided only that Virginians could not be “taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected.”

To be sure, the federal Constitution does require just compensation for takings, but this provision was added in large measure in response to the military’s practice of impressing horses and other property, and it was understood by the Founding generation as applying only to physical seizures of property by the federal government. Interestingly, although the Takings Clause is now applied to the States through the Fourteenth Amendment, the *Biddle* court discloses that when the Congress debated that amendment, it also considered and rejected a takings clause expressly applicable to the States.

Turning to *Pennsylvania Coal Co v. Mahon* (1922), the *Biddle* court reconciled the concept of a regulatory taking with the narrow original understanding of the Fifth Amendment by limiting regulatory takings to the rare situation in which regulation “deprives an owner of all or substantially all economic or productive use” of the land. This limitation is akin to the unanimous ruling in *Lingle v. Chevron* (2005) that regulation works a taking only if it is so severe as to constitute the “functional equivalent” of an actual expropriation of property.

The *Biddle* court concluded that the overflights at issue, which occurred at 1300 feet or more above ground, did not work a taking because they did not amount to a practical destruction of the claimants’ land and allowed for many valuable uses despite the noise caused by the aircraft. Beyond this specific ruling, however, *Biddle*’s nuanced analysis of the original understanding of the Takings Clause is welcome news that should prove useful in reg-take cases across the board.

EYE ON WASHINGTON

Court Rejects Takings Challenge to Water Reductions Designed to Protect the Environment

In *Stockton East Water District v. United States*, 2007 U.S. Claims LEXIS 38, No. 04-541L (Fed. Cl., Feb. 20, 2007), the U.S. Court of Federal Claims rejected takings and breach of contract claims brought by California water districts, municipalities, and other water providers in the San Joaquin Valley. The suit challenged reductions in water allocations between 1993 and 2004 below the amount specified in contracts in 1983 for the appropriation of water from California’s New Melones Dam. The reductions were compelled by a new federal law requiring that more of the water be used for fish, water quality, and other environmental needs.

Although the vast bulk of the opinion addresses the contract claims, the court expressly rejected the plaintiffs’ takings claim. It quoted prior precedent holding that takings analysis “has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim.” Moreover, the court observed that taking claims rarely succeed in the context of government contracts because the government is acting in its proprietary capacity, rather than in its sovereign capacity. Such was the case here, and the court denied liability.

The ruling is welcome news in view of prior rulings from this court that applied new-fangled takings theories, including physical takings theories, to the reduction of water allocations.

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