

## **QUESTION 6**

City Council (City) amended its zoning ordinance to rezone a single block from “commercial” to “residential.” City acted after some parents complained about traffic hazards to children walking along the block. The amended ordinance prohibits new commercial uses and requires that existing commercial uses cease within three months.

Several property owners on the block brought an action to challenge the amended ordinance.

In the action, the court ruled:

1. Property Owner A, who owned a large and popular restaurant, had no right to continue that use, and had time to move in an orderly fashion during the three-month grace period.
2. Property Owner B, who had spent \$1 million on engineering and marketing studies on his undeveloped lot in good faith prior to the amendment, was not entitled to any relief.
3. Property Owner C, whose lot dropped in value by 65% as a result of the amended ordinance, did not suffer a regulatory taking.

Was each ruling correct? Discuss.

## QUESTION 6: SELECTED ANSWER A

### Constitutional Protection

The Constitution prohibits wrongful government/state action, not private action. State action allows constitutional protections to arise.

### State Action

The state action here is the City Council amending its zoning ordinance.

### Takings Clause

The power of the government to take private property for public use is known as eminent domain. The takings clause of the 5th Amendment to the US Constitution provides "no property shall be taken for public use without just compensation." The government must provide just compensation for any property taken for a public use. Since the *Kelo* decision the US Supreme Court has interpreted a public use broadly and deemed a public use to even include "economic development" as well as the classic highway, military base, etc. The Takings Clause applies to states and local entities through the 14th Amendment. Regulations are not usually considered takings but can be in certain circumstances.

Here there was no physical taking of any land by the government for a 'public use'. The City Council amended the zoning ordinance to change a block from commercial to residential. The property of the block was not actually seized, but rather the activity on the property was regulated. The property owners will argue this regulation constitutes a regulatory taking.

### Regulatory Taking

A regulatory taking is that which deprives the owner of the economic use of his property. A regulatory taking is often found when a regulation deprives the owner completely of any substantial economic use. A regulatory taking analysis can be applied to the states and local entities through the 14th Amendment. (See Florida Water District.)

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

#### 1. Property Owner A

Property Owner A will argue the City Council's amended zoning ordinance constituted a regulatory taking violated the right to a Non-conforming use.

#### Regulatory Taking of the Restaurant

*See Rule above*

To determine if a regulatory taking occurred Property Owner A will demonstrate the economic impact of the regulatory taking on the property. Here the Owner operated a popular restaurant on the premises. The impact of the regulation on the land is severe as location is vital for [a] popular restaurant. The actual economic impact of the ordinance on the property value itself would need to be determined if there is value in land that has a restaurant on it and must be remodeled or rebuilt to conform with the residential requirement.

Property Owner's reasonable expectation on the return on investment for the property. If the owner has a popular restaurant and has been there for a long period of time then the economic return expected out of the property to be achieved can be argued to have occurred then the court decision is supported. However if the restaurant is newly open and popular for this reason, the owner has likely not achieved the expected return on investment for the restaurant. Restaurants are capital intensive and it takes time to recoup the capital costs.

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street. The government will argue it only had to show a rational basis for the decision.

### **Non-Conforming Use**

A non-conforming use occurs when a business or residence is in existence and within the proper use of a city ordinance, at which point the ordinance subsequently changes and the current use of the property becomes in violation of the current code. The non-conforming use must be permitted to continue unless substantial threat to public safety/health is at stake. The non-conforming use may continue as long as the business or use does not cease or a change in ownership of the property occurs.

In this case the restaurant business can only operate as a non-conforming use. Owner A should have been permitted to continue using the property as a popular restaurant. There was no significant threat to public safety or health. In fact the restaurant was likely feeding many residents due to its popularity. Traffic hazards are not necessarily related to the commercial uses on the property.

**Conclusion:** The Court was incorrect in ruling that the property owner had no right to continue that use. There was no emergency or threat to public safety to not permit a non-conforming use.

## 2. Property Owner B

### Property Interest

A party that makes substantial investment and obtains the necessary permits for a development based on the current zoning ordinance is entitled to complete the project within a reasonable amount of time even if the zoning ordinance changed in the meantime. Once the government has granted the permission, and the party has then relied on that permission it may not be taken away arbitrary by new ordinances. If such action occurs the party may rely on the governing zoning and ordinances at the time the project was permitted and began.

In this case Property B substantially relied on commercial zoning ordinance based on his investment of \$1 million on engineering and marketing studies. This investment was for the undeveloped land based on the commercial zoning ordinance. This is a significant sum, and the Owner may even claim he detrimentally relied on the previous ordinance, but such an argument would not be upheld.

The courts often require there be some permission granted or approval of a project by a review board before a developer can be found to substantially rely on the zoning ordinance. It is not enough to have a good faith belief that your use will be permitted in [the] future, some certainty must be acquired by permit or council approval. Unfortunately for Property Owner B the facts do not indicate he submitted his plan for the undeveloped property to local official for review. No applications submitted, and unfortunately the owner will be unable to mitigate losses if all the studies were based on commercial use.

**Conclusion:** The court's ruling was likely correct based on the Property Owner B's failure to obtain government permission for future investment. Owner B is not entitled to any protection as he would have been if permits were granted before the City Council amended the zoning ordinance.

### 3. Property Owner C

#### Regulatory Taking

*See Rule Above*

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

#### Economic Impact

The economic impact of the residential zoning ordinance on Owner C's property is significant. There was 65% drop in value because of the new ordinance. This is over

half of the value. However, even with a severe economic drop in value the property maintains some viable economic use if it retains 35% of its value. The courts when granting a regulatory taking prefer to see no economic benefit from the property because of the regulation. Based on these facts the economic impact to the ordinance favors the City Council.

#### Expectation on Investment Return

This analysis depends on Property Owner C's reasonable expectation on the return on investment for the property. This is a fact specific analysis. Given the fact that the property value decreased by 65%, this was not likely an expectation of the Owner. Even in a severe economic recession property losing over half of its value is substantial and not reasonably expected.

This factor supports the lot owner's claim.

#### Burdens Distributed

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street.

**Conclusion:** The court should have ruled that the lot owner suffered a regulatory taking if the reduced expectation on investment and distributed burdens were severe enough.

## QUESTION 6: SELECTED ANSWER B

### Zoning Powers

The Supreme Court has historically granted great deference to municipalities engaged in creating zoning ordinances. (See *Euclid v Ambler Realty*). Generally, local government has the police power to enact zoning ordinances so long as they are reasonably related to a legitimate government purpose, namely, that they relate to protecting the general welfare, safety, or health of the community.

Here, the city enacted the zoning amendment to change a commercial to residential area in response to traffic that may have endangered children. Clearly, the zoning ordinance is related to a legitimate government interest in protecting children pedestrians. On these grounds, it would most likely be upheld.

However, the facts indicate that the ordinance only applies to "a single block." This raises the specter of spot zoning, which may be impermissible if used to single out landowners or make a handful of landowners bear a disproportionate burden that the public at large should have to bear. In contesting zoning that appears to unlawfully inhibit a landowner's use of his property, a landowner may bring a takings claim challenging the constitutionality of the zoning ordinance on its face or as applied. As demonstrated in *Euclid*, a facial challenge is bound to fail--zoning has been upheld for decades. But an "as-applied" challenge can be viable, and is discussed below.

### Takings

Under the 5th amendment and applied to the states via the 14th amendment, the government may not take private property without just compensation. Typically, a government taking is through eminent domain, where the government must show a valid public purpose for the taking and compensate the landowner for the land the government takes for the public purpose.

Here, the ordinance does not employ eminent domain, and as such is analyzed under takings jurisprudence.

### Physical Takings

Any government statute that incurs a physical occupation of a landowner's land or real property (including airspace) must be compensated (*Lorretto Teleprompter*). Here, however, the ordinance does not install or require imposition of any government presence within any property owner's physical space, so this strict rule is unavailable to the plaintiffs.

### Regulatory Takings

Courts have held that an ordinance that is so burdensome, or that unduly burdens a single landowner in order to benefit the public at large, may be a regulatory taking, and must be compensated. Under *Lucas*, a regulation that incurs a "total economic wipeout", meaning that it deprives a landowner of any economically beneficial use of his land, is a regulatory taking and must be compensated. The one exception to the total wipeout rule is if the ordinance is based on preexisting common law in the state (*Lucas*).

Here, the ordinance rezones the use of land from commercial to residential, and is thus most likely not based on common law principles. In *Lucas*, the court recognized an argument that an ordinance restricting beach development could be based on common law principles, if it sought to mitigate nuisance. But the facts here are not analogous. Nonetheless, the ordinance has also not incurred a total economic wipeout. Property owners A, B, and C all may still make use of their property in economically beneficial ways, even though those uses are not the ones they anticipated.

Because *Lucas* is unavailing, a takings analysis would go to the *Penn Central* multi-factor balancing test, in which the government determines if an ordinance incurs a taking based upon: the government interest to be advanced, the nature of the government regulation, and the degree of interference with the landowner's "investment back expectations."



### Variances and Amortization

Lastly, landowners may also seek relief through variances and amortizations if they do not wish to bring a constitutional claim under *Penn Central*. A variance can be Area or Use. An area variance allows a nonconforming use to vary by the area used; a Use variance allows a nonconforming use in an area that is not zoned for that purpose. Use variances are typically harder to secure, and the landowner must show an undue burden if the use variance is not granted.

An amortization allows a nonconforming use to persist until ownership of the property changes, and prohibits the owner from expanding or changing his permitted nonconforming use. Amortization works to mitigate the impact of a sudden zoning change, which could deprive the landowner of economic use of their property and also reduce the likelihood of a takings lawsuit.

### **Application to Property Owners A, B, and C**

#### Property Owner A

Here, the court has granted the property owner a mere 3 month period to move out of the premises or change it. Under *Lucas*, the property owner most likely does not have a claim. He has not experienced a total economic wipeout because he can still sell the land for residential development.

Under *Penn Central*, he has a stronger claim. The government interest in protecting children is strong, but it zones a single block, thus making property owner A largely bear this burden rather than the community as a whole. Further, the restaurant is popular, viable, and most likely has significant investment backed expectations--namely, its physical assets and cooking equipment. Although the government does not need to ensure that the new restaurant location is equally as profitable, the strict and narrow application of the zoning amendment gives the restaurant a factual advantage if it chooses to bring a takings claim.

To avoid a takings challenge under *Penn Central*, the court would have been wise to issue a use variance just for the property or an amortization, allowing the owners to continue operating until they finally closed by their own accord. As is, only allowing 3 months to move and in light of an ordinance that appears to single out the owners, the court risks a viable takings claim.

Conclusion: the court can uphold the ordinance and three-month grace period because the zoning appears to be a valid government action. But these are draconian measures and a three month grace period is very short. It might consider permitting an amortization or use variance to avoid a takings claim under *Penn Central*. An amortization would reduce the economic impact while allowing the area to gradually conform to the zoning the city enacted.

#### Property B

Here, the property owner has an undeveloped lot, so his loss is minimal. Under *Lucas*, he can probably sell the lot and earn a profit, and based on the jurisprudence in *Euclid*, a zoning ordinance is still viable even if it changes the permissible uses and devalues a property significantly.

But the owner has also invested \$1 million in assessing his lot in "good faith" prior to the amendment. *Euclid* makes it clear that the zoning ordinance can still be upheld. However under *Penn Central*, this huge investment backed expectation gives serious weight to a takings claim. As mentioned above, the government objective is valid--public safety--but the nature of the government action is targeted and intrusive because it only applies to a single block. By contrast, in *Penn Central*, the court upheld a development restriction on a historical building because it found that the owner could build elsewhere, and moreover, everyone else in New York was equally burdened by the restriction. Here, only the block is burdened; a handful of landowners are bearing a burden for the whole city, but they are not being compensated. Because *Penn Central* is a fact-based inquiry, and the investment backed expectations here are so high, the landowner has a fairly strong case.

Nonetheless, the court's decision is valid--the owner is not entitled to relief, despite his investments because he can still sell his land. But in the interest of precluding a subsequent takings claim, the court might permit the owner to submit an area variance to the zoning board. Depending on what he had planned to use the lot for, the traffic impacts of that use, and how that lot would conform with surrounding uses and traffic, an area variance may still achieve the city's goals while avoiding a costly takings lawsuit and providing relief.

### Property C

Here, the court properly ruled that the landowner did not suffer a regulatory taking. There has been no total wipeout, so the land is still valuable for residential uses. Further, the facts indicate that there are not investment-backed expectations. As such, the Penn Central analysis merely considers the impact--65% reduction in value--as well as the valid government interest in protecting children. Overall, there is no valid regulatory claim.

Lastly, *Euclid* is directly on point and confirms the court's holding. A city may enact zoning using its police powers and to further the general safety, welfare, or health of the community, even when the ordinances greatly reduce the value of property owner's land. In *Euclid*, the owner's land was greatly devalued because he could not use it for industrial purposes, but the supreme court nonetheless upheld the zoning ordinance. Here, there was no regulatory taking. It is also unclear if a variance of any kind would provide relief, as the facts do not indicate the type of harm the property owner has experienced or his current use of the land.