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Summary of Nevada Department of Transportation v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41 (June 25, 2015)

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Nevada Department of Transportation v. Eighth Jud. Dist. Ct.,
131 Nev. Adv. Op. 41 (June 25, 2015)[1]

CONSTITUTIONAL LAW: TAKINGS CLAUSE

Summary

The Court determined, pursuant to the U.S. Constitution, as well as the Nevada Constitution, there was no taking of Ad America's property because the Nevada Department of Transportation publicly disclosed its plan to comply with federal law, the City independently acquired property that was part of Project Neon, and the City rendered land use application decisions conditioned on coordination with the Nevada Department of Transportation for purposes of Project Neon.

Background

Project Neon

The Nevada Department of Transportation (NDOT) is the lead agency for Project Neon, a multi phase highway and interstate improvement project through the Las Vegas metropolitan area. The project was originally developed in 2003, and has been amended on multiple occasions. In 2011, NDOT estimated Ad America's property would be affected in 2028. NDOT publicly filed all amendments to Project Neon.

Ad America

Ad America acquired a piece of property between 2004 and 2005, which would eventually be affected by the Project Neon development. In 2007, Ad America planned to renovate the property and use it as high-end commercial and office space with multi-level parking. However, the City Council warned against this development because of Project Neon.

In 2007, Ad America began informing its tenants they would eventually be affected by Project Neon. While rental incomes remained steady until 2010, they began to drop sharply in 2011. As of August 2012, Ad America could no longer pay its mortgage on the property.

Procedural History

Ad America filed and inverse condemnation action against NDOT and The City of Las Vegas,[2] claiming economic harms stemming from the unjust taking of its property. NDOT filed a motion requesting the valuation date of the property be set as May 3, 2011. Ad America filed an opposition, requesting the court use the date October 24, 2007, the date of the alleged acquisition. NDOT and Ad America both filed motions for summary judgment on the takings issue.

Ultimately, the district court granted Ad America's summary judgment motion, determining NDOT had committed to taking the property on October 24, 2007. At the time, it was undisputed that any physical taking or occupation of Ad America's property had occurred. In its appeal, NDOT is requesting a writ of mandamus to grant summary judgment in its favor.

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[1] By Jessica Gandy.

[2] The City was listed as a party in the suit, but never served.

Discussion

Writ Considerations

A writ of mandamus is available "to control an arbitrary or capricious exercise of discretion."[3] Typically, an appeal is an adequate remedy and the Court often declines to challenge interlocutory district court orders.[4] However, writ petitions are considered when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition."[5]

The NDOT writ petition has merit and was heard for three reasons. First, the petition raises important issue regarding Nevada's takings law. Second, the petition presents important policy question as to whether an agency could enter into a long-term project dependent on federal funding. Third, the petition has merit on the basis of judicial economy. Addressing the issues raised by Project Neon will preempt similar questions raised by similar long-term, multi-phase projects in the future.

In its petition, NDOT argues there was no physical taking of Ad America's property, nor were there any regulatory restrictions placed on the property, therefore no taking took place as the property was not needed until 2028 *if* federal funding was available at that time. Ad America responded there was a de facto moratorium of development of Project Neon properties rendering it useless.

Takings

Both the U.S. Constitution and the Nevada Constitution protect private citizens against government takings of property.[6] Although these constitutions provide significant rights, they must be balanced against the needs of the state and local governments to serve the public.[7]

Federal Takings Jurisprudence

As there are an infinite number of ways a state or federal government may encroach on one's personal property, there is no "magic formula" to determine whether a taking has occurred.[8] There are some circumstances which are always considered a taking: "A direct appropriation or physical invasion or private property," a government regulation authorizing physical invasion or property or "completely depriv[ing] an owner of all economically beneficial use of her property," or an unlawful exaction in exchange for a land use permit.[9] None of these circumstances applied to Ad America because there was no physical taking or invasion, no regulations were passed affecting the property, no land use permit was filed, and Ad America

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[3] Int'l Game Tech., Inc. v. Second Jud. Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).
[4] Id. at 197;; Smith v. Eighth Judicial Dist. Court, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997).
[5] Int'l Game Tech., 124 Nev. at 197-98, 179 P.3d at 559.
[6] U.S. CONST. amend. 5, NEV. CONST. art. 1, § 1, NEV. CONST. art. 1, § 8, cl. 6, McCarran International Airport v. Sisolak, 122 Nev. 645, 670, 137 P.3d 1110, 1127 (2006).
[7] *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S____, ____, 133 S. Ct. 2586, 2594-95 (2013) (explaining that there is a need to protect land-use permit applicants given their vulnerability in the face of government discretion granting or denying their application and a need to protect the public from the burden of additional costs from the proposed development); see also Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law. . . ." (internal quotation omitted)).
[8] Arkansas Game &Fish Comm'n v United States, 568 U.S. ___, ___, 133 S. Ct. 511, 518 (2012).
[9] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537-38 (2005), Koontz, 570 U.S.,
133 S. Ct. 2586

continued to collect revenue from the property; while this revenue was reduced, Ad America was not deprived of *all* economic benefit.

Regulatory Analysis (Penn Central Analysis)

In general, a court will only consider regulatory takings claims that are ripe and have exhausted all available remedies.[10] Ad America's claim was unripe because it had not filed any land-use applications with the City. Statements from Ad America's analyst, based on alleged statements from a City Council member, imply there was a de facto moratorium on development; however, NDOT was able to show 19 approved land-use applications in the Project Neon area during the same time frame.

Even if the court ignored the administrative requirements, Ad America would have to show three factors: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."[11] Here, Ad America could not prove these factors. The road widening amendment in question did not have an economic impact on Ad America or its investment-backed expectations, and widening roads is a common government action in heavily populated areas, akin to "promot[ing] the common good."

Even if the Court assumed all of these factors favored Ad America, which they did not, the Court could not find NDOT liable for the City's actions. There was no evidence to show NDOT had any influence on the city regulations, or the City decision to amend the Project Neon Master Plan.

Nonregulatory Analysis

The U.S. Court of Appeals for the Federal Circuit has ruled that even if there is no government regulation at issue, a taking has occurred if the government has "taken steps that directly and substantially interfere [ ] with [an] owner's property rights to the extent of rendering the property unusable or valueless to the owner;" however, this analysis should only be used in extreme cases.[12] The Ninth Circuit uses *Richmond Elks Hall v. Richmond Redevelopment Agency*[13] as an example of an extreme case of nonregulatory taking.

Here, the facts as presented did not meet the extremity of the *Richmond Elks* facts. Unlike *Richmond Elks,* Ad America's property was not scheduled for use until 2028, if at all; at the time of the alleged taking, not a single property had been acquired for Project Neon. Also unlike *Richmond Elks*, NDOT had not entered into any contracts with property owners for future takings. NDOT had only filed environmental assessments (in 2009) and an environmental impact statement (in 2010) estimating the need for Ad America's property in phase 5.

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[10] Williamson Ctny. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985); *see also* Hsu v. Cnty. of Clark, 123 Nev. 625, 635, 173 P.3d 724, 732 (2007) (indicating that an owner need not exhaust her administrative remedies when a regulation authorizes a permanent physical invasion of her property), Palazzolo v. Rhode Island, 533 U.S. 606, 625-26 (2001); *see also* State, Dep't of Taxation v. Scotsman Mfg. Co., 109 Nev. 252, 255, 849 P.2d 317, 319 (1993) (acknowledging that exhaustion of a taxpayer's administrative remedies is not required when doing so would be futile).

[11] Penn Cent., 438 U.S. at 124.

[12] Stueve Bros. Farms, LLC v. United States, 737 F.3d 750, 759 (Fed. Cir. 2013).

[13] 561 F.2d 1327 (9th Cir. 1977).

Further contrasting *Richmond Elks*, Ad America's loss of revenue was impacted by NDOT's required public disclosures, in compliance with federal law. Requiring NDOT to compensate Ad America in these circumstances would undermine long-term project planning.[14]

Finally, the empirical evidence did not show a loss similar to that in *Richmond Elks*. While Ad America did suffer financial loss, the property was not without value. Ad America failed to provide evidence showing the rental value of similar properties to prove its economic damages.

Nevada Takings Jurisprudence

Ad America claimed NDOT's actions constituted a taking under the Nevada Constitution and supporting case law, relying on *City of Sparks v. Armstrong*[15] to support its assertion. The Court clarified that *Armstrong* had been corrected by *Buzz Stew, LLC v. City of N. Las Vegas.*[16] Therefore, this standard was not applied.

Conclusion

Based on the analysis of the facts and the law, the Court found there were no facts demonstrating NDOT committed to a taking of Ad America's property that warranted compensation. Therefore, they court issued a writ of mandamus overturning the summary judgment in favor of Ad America and granting summary judgment in favor of NDOT on the issue of inverse condemnation.

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[14] Cf. NEV. CONST. art. 1, § 22, cl. 6 ("Property taken in eminent domain shall automatically revert back to the original property owner upon repayment of the original purchase price, if the property is not used within five years for the original purpose stated by the government.").

[15] 103 Nev. 619, 748 P.2d 7 (1987) (providing for just compensation when precondemnation activities are unreasonable or oppressive and diminish the market value of property).

[16] 124 Nev. 224, 181 P.3d 670 (2008).