COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Docket No. SJC-10626 / 2009-P-0822

CLEALAND B. BLAIR, ET AL.
PLAINTIFFS/APPELLANTS
v.
MASSACHUSETTS DEPARTMENT OF CONSERVATION
AND RECREATION
DEFENDANT/APPELLEE

ON APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT IN WORCESTER COUNTY

BRIEF OF AMICUS CURIAE CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUE PRESENTED

Does Article 10 of the Massachusetts constitution provide greater rights to its citizens in connection with regulatory takings than those guaranteed in the federal constitution?

STATEMENT OF INTEREST OF AMICUS CURIAE

The City Solicitors and Town Counsel Association (the "CSTCA") is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. CSTCA's mission is to promote better local government through the advancement of municipal law.

The CSTCA's primary concern in this case is to ensure that municipalities throughout the Commonwealth are not subject to regulatory takings claims which could result if this Court were to conclude that Article 10 of the State Constitution provides compensatory rights beyond those granted under the Fifth Amendment of the United States Constitution.

STATEMENT OF FACTS

The CSTCA adopts the statement of facts set forth in the brief of the Massachusetts Department of Conservation and Recreation.

STATEMENT OF PROCEEDINGS

The CSTCA adopts the statement of proceedings set forth in the brief of the Massachusetts Department of Conservation and Recreation.

ARGUMENT

I. Introduction

The Plaintiffs (hereinafter referred to as the "Blairs") object to the application of a state water resource protection statute to the use their land. The statute prevents the Blairs from improving a certain segment of their property adjacent to a drinking water resource. They have been allowed to utilize most of their land as a residence with valuable appurtenant improvements but contend that their inability to improve a strip of land immediately adjacent to a pond constitutes a regulatory taking in violation of Article 10 of the Massachusetts Declaration of Rights.

In this litigation, the Blairs have waived any claim under the Fifth Amendment[1] of the federal constitution presumably because they recognize that existing federal and state jurisprudence construing the Fifth Amendment does not support their claim.

[1] Appellants' Brief page 5. The Fifth Amendment is applicable to the states through the Fourteenth Amendment.

They argue instead that Article 10 of the Massachusetts constitution affords them greater rights than the Fifth Amendment.

The City Solicitors and Town Counsel Association of Massachusetts submits this amicus brief to argue that Article 10 does not provide landowners with any rights greater than the Fifth Amendment. First and foremost, the words used in both constitutions do not denote any difference in the protections against taking private property for public use. Furthermore, no valid reason exists to overturn existing Massachusetts jurisprudence on the issue of regulatory takings.

II. The texts of the takings clause in the Fifth Amendment and in Article 10 of the state constitution have the same meaning.

Whenever this Court considers whether a provision of the state constitution is more expansive than the federal constitution, it looks to the text, history and prior interpretations of the provision. Commonwealth v. Mavredakis, 430 Mass. 848, 858 (2000). Comparing Article 10 to the Fifth Amendment reveals no material differences in the text of both provisions with respect to reasonable compensation for takings of private property. The Fifth Amendment simply states,

"nor shall private property be taken for public use, without just compensation." Article 10 describes various liberties and responsibilities of the citizens of the commonwealth but only two clauses in the Article relate to takings. The first clause states,

> [N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people…

The second relevant clause in Article 10 states,

> [a]nd whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore...

In their argument the Blairs misplace emphasis on the first clause which says that "no part" of a person's property can be taken "without his own consent, or that of the representative body of the people." The obvious intent of that sentence is to forbid the taking of private land by executive fiat without the consent of the elected representatives of the people. In this case, the Watershed Protection Act was certainly the product of legitimate legislative action.

The relevant part of Article 10 which addresses the right to compensation for a taking states, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore." The meaning of that sentence is identical to the takings clause of the Fifth Amendment. The only difference in the two provisions is that the federal provision uses the term "taken" while the state constitution uses "appropriated". The brief of the Massachusetts Department of Conservation and Recreation filed in this matter amply demonstrates those two terms are synonymous in this context.[2]

The Blairs disregard the patent similarity of the two provisions regarding fair compensation for takings and misdirect the Court's attention to the words "no part of the property" in the clause of Article 10 making legislative approval a prerequisite for a taking of private property. Their approach is misleading because a person is only entitled to fair compensation under the Fifth Amendment when a "part" of his property is physically taken for public

[2] Brief of Appellee, pages 29-31.

purposes. If the federal government were to take a portion of a person's land for a public purpose that permanently deprived the owner of his right to physically occupy the land, then regardless of how small the portion, the owner would have to be compensated.

> When the government physically takes possession of an interest in property for some public purpose it has a categorical duty under the Just Compensation Clause, to compensate the former owner, regardless of the whether the interest that is taken constitutes an entire parcel or merely a part thereof. (emphasis added).

26 Am Jur 2d Eminent Domain §10 citing Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003). Thus, with respect to conventional takings, it has always been the law under both the federal and the state constitutions, that "no part" of a private property could physically be appropriated to public use without just compensation.

The Blairs accurately point out that Massachusetts courts have never expressly addressed the issue of whether Article 10 is more protective of property rights than the Fifth Amendment. In view of the extensive discussions of regulatory takings in Massachusetts decisions, the absence of any argument

based solely on Article 10 suggests that prior litigants have regarded the two constitutional provisions to be identical. Moreover, when Massachusetts courts have discussed regulatory taking claims based upon the federal constitution, they have observed that landowners have been unable to advance any reason to hold that the state constitution is more favorable to landowners. Quinn v. Rent Control Board of Peabody, 43 Mass. App. Ct 35, fn. 17 (1998); Steinbergh v. City of Cambridge, 413 Mass. 736, 738 (1992) (noting that in the context of regulatory takings, this Court has established guiding standards for due process under the state constitution that are substantially the same as those established under the federal constitution).

III. The relevant parcel analysis used by this Court in regulatory taking cases should not be changed.

The Blairs wrongly suggest that the words "no part" in Article 10 invalidate all of this Court's prior analysis of the "relevant parcel" in determining when a regulatory taking has occurred. See Giovanella v. Conservation Commission of Ashland, 447 Mass. 720, 725 (2006). The issue of the "relevant parcel" only arises when a court must determine whether a

regulation on land has had the effect of a taking. The term has never been used in conventional taking cases where a landowner permanently loses possession of his property.

Courts did not recognize the concept of regulatory takings until long after both the Massachusetts and federal constitutions had been adopted. In 1922 the Supreme Court of the United States first recognized that a governmental regulation could be the equivalent of an uncompensated taking of private property in violation of the Fifth Amendment. Writing for the majority in Pennsylvania Coal Co. v. Mahon, 260 U.S 393, 415 (1922), Justice Holmes said that "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."

This Court recently reviewed and consolidated its views on regulatory takings in Gove v. Board of Appeals of Chatham 444 Mass. 754, 761-762 (2005) holding that regulatory taking claims should be analyzed under one of the three following approaches[3]. First, where a regulation causes a "permanent physical

[3] The landowner in Gove, supra, did not pursue a separate appeal under Article 10 of the Massachusetts Declaration of Rights. Gove at 755.

invasion" of private property, the owner is entitled to compensation. Loretto v Teleprompter Manhattan CATV, 458 U.S. 419 (1982). Second, a regulatory taking occurs where a regulation deprives an owner of "all economically beneficial use" of private property, except to the extent that background principles of nuisance and property law independently limited the owner's use of the property." Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Finally, where the first two approaches are inapplicable, regulatory taking claims are governed by the flexible economic impact factors set forth in Penn Central Transportation Co. v. New York City. 438 U.S. 104 (1978).

Nothing in this case suggests that the Water Resource Protection Act has caused a permanent physical invasion of the Blairs' property. The state has not taken possession of the buffer zone around the pond. Thus, the Blairs' regulatory taking claim must be evaluated by the "all economically beneficial use" test described in Lucas v. South Carolina Coastal Council Id. or the flexible economic impact analysis described Penn Central Transportation Co. v. New York City Id.

The Blairs argue that Article 10 expands their right to compensation for a regulatory taking and requires a different approach to the "relevant parcel" analysis when applying the factors described in Lucas and Penn Central.

They suggest that if any part of their land is adversely impacted by a regulation, that portion of their land has been taken. The Blairs' argument fails to recognize that government has always had the right to regulate private property to some extent in the legitimate exercise of police powers to protect the public health and safety. This Court has said,

> we do not apply our precedent from the physical takings context to regulatory takings claims. Not every regulation affecting the value of real property constitutes a taking, for Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change.

Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 754, 762 (2005) citing Lingel v. Chevron, USA, Inc., 125 S. Ct. 2074 (2005) (internal quotation marks omitted)

This Court fully discussed the "relevant parcel" analysis in Giovanella v Conservation Commission of Ashland, Id.[4]. The Court clearly limited the "relevant parcel" analysis to regulatory taking claims.

> In order to measure the economic impact of a regulation under either the *Lucas* or *Penn Central* decisions, we must first define the unit of property on which that impact is to be measured. We then compare the value of that property before and after the alleged taking. The heart of both tests becomes defining the unit of property at issue, often called the "relevant parcel." 447 Mass. at 725 (emphasis added)

Neither the federal nor the state constitution expressly includes the term regulatory taking. Thus, rather than being a measure of how much land has been taken, the concept of the "relevant parcel" is only considered in determining whether a taking has occurred at all. A regulation may affect a part of someone's land without necessarily being characterized as a taking. Nothing in the language of Article 10 suggests that the determination of when a regulatory taking has occurred should be different from what courts have decided under the Fifth Amendment. Furthermore, the Blairs have not presented any

[4] Giovanella did not assert a separate Article 10 claim. Giovanella at 721 fn. 1 Id.

compelling reason to set aside the sound public policy upon which Massachusetts courts have based all of their previous regulatory taking decisions.

IV. Adoption of the Blairs' approach to regulatory takings would disrupt important land use regulations which are beneficial to the public.

If the Blairs are successful in characterizing set back regulations under the Watershed Protection Act as a regulatory taking, then zoning and wetland set backs requirements that are ubiquitous throughout the commonwealth would be at risk. The public interest served by such set back requirements has been long recognized in Massachusetts. Eg. Slack v. Building Inspector of Wellesley, 262 Mass. 404 (1928); Nectow v. Cambridge, 260 Mass. 441 (1927); Lovequist v. Conservation Commission of Dennis, 379 Mass 7 (1979). This Court recognizes a reasonable presumption of constitutionality of legislative enactments. See Talbot v. Hudson, 82 Mass 417, 422 (1860). The Blairs have failed to advance any convincing argument that would overcome that presumption with respect to the Watershed Protection Act or the many similar land use regulations in effect all over Massachusetts.

If the State Constitution is interpreted to provide compensation (absent a physical occupation) beyond the limits of the Federal Constitution, then every municipality could be subject to damages because of their local bylaws and ordinances which provide for land use regulations. Such havoc is not what the founders of the Constitution intended.

CONCLUSION

For the reasons stated and upon the authorities cited, the decision of the Superior Court should be affirmed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, Thomas J. Urbelis, hereby certify that the foregoing brief complies with all rules of court that pertain to the filing of such briefs, including but not limited to the requirements imposed by Rule 16 and 20 of the Massachusetts Rules of Appellate Procedure.

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