

**“Recent Developments In Regulatory Takings:  
The Law After *Lingle*”**

*presented by*

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With its June 23, 2005 announcement of its decision in *Kelo v. City of New London*, the United States Supreme Court set off a storm of controversy which has spread to nearly every state house in the country. The *Kelo* decision, approving the City of New London’s use of eminent domain to take private property from one landowner and turn it over to another for stated the public purpose of “economic development”, has refocused the nation’s attention on bedrock principles of private property ownership. Yet, the heated debate prompted by *Kelo* has overshadowed another significant Supreme Court decision which promises to have lasting implications on the rights of private property owners to remain free from heavy-handed government regulation.

On May 23, 2005, a month prior to *Kelo*, the Supreme Court handed down its ruling in *Lingle v. Chevron U.S.A., Inc.*, addressing so-called “regulatory takings.” Whereas *Kelo* dealt with the government’s formal exercise of the power of eminent domain, *Lingle* addresses the circumstance where property rights are appropriated on an ad hoc basis through regulation. In certain instances, the government’s regulation of private property may be so onerous it effectively destroys the owner’s right to use their property. Unlike the situation in *Kelo*, however, no compensation has been paid to the owner for what has been taken.

More than eighty years ago, then-Justice Oliver Wendell Holmes, Jr. announced the deceptively simple standard that “while property may be regulated to a certain extent, if regulation goes to far it will be recognized as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). From that point on, the Supreme Court has been consumed with trying to answer that devilishly simple question – “how far is too far?” Since Justice Holmes’ pronouncement in *Pennsylvania Coal*, the Court has embarked on a decades-long quest to fashion a hard-and-fast rule to answer the question “how far is too far?” Yet, a true takings litmus test has, for the most part, eluded the Court. Instead, eighty years of decisions have left us with a number of tests to evaluate when the government has gone too far.

The Court’s decision in *Lingle*, therefore, came as a bit of a surprise. In reviewing a particular regulation’s impact on private property, the Supreme Court took a rare glimpse back through its regulatory takings decisions. In so doing, the Court offered a long awaited comprehensive statement of its landmark takings decisions as well as the basic reasoning behind them. Perhaps the greatest surprise of all, however, was that *Lingle* was decided by a unanimous Court – a rarity in takings cases, which tend to sharply divide the Court along

ideological lines. See, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

The case involved a challenge by Chevron U.S.A., Inc. to a statute adopted by the State of Hawaii limiting the rent that oil companies could charge dealers leasing company-owned service stations. *Lingle*, 544 U.S. 532, 125 S.Ct. at 2078. About half of Hawaii's 300 gas stations are leased from oil companies. Given the Hawaii's economic and geographic isolation, and concerned about the effects of market concentration on retail gas prices, the statute was ostensibly aimed at trying to control high rents on gas stations which were, arguably being passed on to the consumer. *Id.* The regulation was declared to be a taking by the Ninth Circuit Court of Appeal, which concluded that the rent cap did not substantially advance the state's legitimate interest in keeping gas prices down. *Lingle*, 544 U.S. 536, 125 S.Ct. at 2080.

The Ninth Circuit's decision rested squarely on the Supreme Court's decision in *Agins v. City of Tiberon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). In 1980, the Supreme Court in *Agins* had declared that a regulation amounts to a compensable taking of property if the regulation fails to "advance a legitimate state interest." *Id.* at 260, 100 S.Ct. at 2138.

### **Court-Endorsed Takings Tests Reaffirmed**

Writing for the full Court, Justice O'Connor re-examined each of the several takings tests in turn. The *Lingle* Court first recognized two classifications of regulatory action which will categorically be treated as a taking under any circumstance. Accordingly, where government action requires an owner to suffer a permanent physical invasion of their property – no matter how minor – a taking will be found to have occurred. *Lingle*, 544 U.S. at 538, 125 S.Ct. at 2081; *Loretto Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A similar categorical rule still holds that a taking will result in cases where regulations completely deprive an owner of *all* economically beneficial use of their property. *Id.*; *Lucas v. south Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)(emphasis in original). The *Lingle* Court also reaffirmed the standard for takings in the special context of land use exactions – unconstitutionally onerous dedications of private property required in return for a discretionary governmental approval such as a development permit. *Lingle*, 544 U.S. at 538; 125 S.Ct. at 2082; *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)(permit to expand a store and parking lot conditioned on the dedication of a portion of the property for a greenway and bike/pedestrian path); *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)(permit to build a larger residence on beachfront property conditioned on dedication of an easement allowing the public

to traverse a strip of the property between the owner's seawall and the high tide line).

Outside of these three relatively narrow categories of regulatory action, the *Lingle* Court declared that all other regulatory takings challenges under the Fifth Amendment's Takings Clause are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 S.Ct. 2446, 57 L.Ed.2d 631 (1978). *Lingle*, 544 U.S. at 538, 125 S.Ct. at 2081. In *Penn Central*, the Court conceded that given the fact intensive nature of the inquiry to determine "how far is too far", no set test is possible. Instead, the *Penn Central* Court committed the determination of a regulatory takings question to an ad hoc investigation which must be tailored to the particular facts unique to the case. *Id.* at 124, 98 S.Ct. at 2646. Among the considerations relevant to the question of "how far is too far" the Court identified three that were particularly relevant: (1) the economic impact of the regulation on the subject property; (2) the extent to which the regulation interferes with the owner's distinct investment-backed expectations; and (3) the character of the regulation – does it bestow some benefit upon the public at the owner's expense, or does it prevent some harm to the public. *Id.*

### **The *Agins* "Substantially Advances" Standard is Rejected**

In the wake of *Lingle*, these are the only remaining tests endorsed by the Supreme Court in determining if a regulation "has gone too far" and has effectively taken private property. The *Agins* test utilized by the Ninth Circuit (that a taking has occurred where property is subject to a regulation that fails to advance a legitimate state interest) was not among these Supreme Court-endorsed standards.

In reviewing and reaffirming the various takings standards listed above, the Court noted that one of these tests was unlike the others. The *Agins* test differed from the others in one important respect. While the other Court-endorsed tests focused on the impact of an otherwise valid regulation upon a specific property, the *Agins* test ignored the property impact entirely and zeroed in on the legitimacy of the regulation itself. *Lingle*, 544 U.S. at 542, 125 S.Ct. at 2084. This shift in focus troubled the Court. The Fifth Amendment's taking clause is meant "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*, quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1563, 4 L.Ed.2d 1554 (1960). A property owner subject to an otherwise valid regulation serving a legitimate state interest may nevertheless find himself singled out and just as unreasonably burdened as an owner subject to an ineffective or arbitrary law. *Id.* The *Agins* test, simply had no bearing on the original question of whether a regulation has "gone too far" and so overburdened private property so as to require compensation.

In dispensing with the 26 year old *Agins* rule, the Supreme Court has attempted to disentangle regulatory taking law from substantive due process. Recognizing as much, the Court found that *Agins*' focus on the means and ends of legislation was an inquiry more appropriate to an analysis of whether a regulation has violated an owner's due process rights. If a regulation is found to be so ineffective that it simply serves no legitimate public purpose or is completely arbitrary and capricious, it is invalid regardless of its impact on the regulated property. The Court concluded that no amount of compensation to the landowner can authorize an arbitrary and illegitimate act by the government. *Id.*

As a final concern, the Court questioned the practical application of the *Agins*. Since the rule would conceivably require the courts to scrutinize legislative enactments and substitute their judgments for that of elected officials and the expertise of administrative agencies, the *Lingle* Court found *Agins* problematic. *Lingle*, 544 U.S. 544-45, 125 S.Ct. at 2085.

### **Regulatory Takings in the Wake of *Lingle***

After *Lingle*, all regulatory takings, except land use exactions, physical occupations and total deprivations of property, are confined to the ad hoc takings analysis under *Penn Central*. Accordingly, in most cases, the Courts will determine whether a taking has occurred after consideration of: (1) the economic impact of the regulation on the subject property; (2) the extent to which the regulation interferes with the owner's distinct investment-backed expectations; and (3) the character of the regulation – does it bestow some benefit upon the public at the owner's expense, or does it prevent some harm to the public. *Penn Central*, 438 U.S. at 124. However, practice has shown that the *Penn Central* test isn't all it's cracked up to be. Most landowners find that the standard is difficult to overcome, and most governments have grown adept at tailoring their decisions to evade liability under at least one of the *Penn Central* factors.

The "character of the governmental action" prong of *Penn Central* has its roots in the oft-cited axiom from the Supreme Court's 1960 decision in *Armstrong v. United States*:

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

*Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

The focus under this prong of the analysis is the public policy underlying the government's action. In evaluating the character of the governmental

regulation, the court must “inquire into the degree of harm created by the claimant’s proposed activity, its social value and location, and the ease with which any harm stemming from it could be prevented.” *Walcek v. United States*, 49 Fed.Cl. 248, 270 (2001). A key distinction in this regard is made between regulations designed to confer a public benefit as opposed to those aimed at preventing a public harm. The owner’s liberty interest must be balanced against the government’s need to protect the public through the imposition of a restraint. *Cienega Gardens*, 331 F.3d at 1340. Where a regulation confers a public benefit at the expense of the landowner rather than preventing a public harm, the balance tips in favor of the landowner.

The Court must also analyze the impact of the government’s action upon the property owner’s distinct or reasonable investment-backed expectations. As a general proposition, an owner’s reasonable investment-backed expectations are formed at the time the property is purchased, and his expectations are shaped by the regulatory regime in place at that time. *Appolo Fuels, Inc. v. United States*, 381 F.3d, 1338, 1349 (Fed.Cir. 2004). Where an owner has purchased in the face of an existing regulatory prohibition, it may be said that the market has already discounted for the restraint, such that the purchaser will have difficulty showing a loss in his investment attributable to the regulation. *Good v. United States*, 198 F.3d 1355 (Fed.Cir. 1999); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177-79(Fed.Cir. 1994). However, a regulation’s existence prior to purchase, is not fatal *per se* to establishing a reasonable investment-backed expectation. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

Additionally, the owner’s expectation must be more than a unilateral expectation or abstract need. *Loveladies*, 28 F.3d at 1177. The test is an objective, fact-specific inquiry into what, under all the specific circumstances of the case, the owner should have anticipated in making his investment in the property. *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed.Cir. 2003).

Finally, the reviewing court must analyze the economic impact of the regulation upon the property owner to “ensure that not every restraint imposed by the government to adjust the competing demands of private owners [will] result in a taking.” *Loveladies*, 28 F.3d at 1176. This prong evaluates the change in fair market value of the property as a whole which results from the government’s action. *Walcek*, 49 Fed.Cl. at 258. The reviewing court must compare the value that has been taken from the property with the value that remains in the property. *Keystone Bituminous Coal Ass’n. v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). The economic impact “is often expressed in the form of a fraction, the numerator of which is the value of the subject property encumbered” by the regulation, while the denominator represents the value of the property without the offending regulation. The property, in this respect, is valued as a whole. Walcek, 49 Fed.Cl. at 258. This analysis is usually

accomplished through appraisal testimony establishing the property's value through comparable sales. *Good*, 39 Fed.Cl. at 106.

The economic impact must be severe enough to tip the scales in favor of the landowner. While there is no automatic numerical threshold, a good rule of thumb would be a diminution in value comfortably exceeding 50-60%. See, e.g. *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 645, 113 S.Ct. 2264, 2291, 125 L.Ed.2d 539 (1993) (no taking found in case of a 46% diminution in value); *Cane Tennessee, Inc. v. United States*, 57 Fed.Cl. 115, 125-29 (2003) (finding that a 46.6% diminution in value did not result in a severe-enough economic impact); *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed.Cir. 1990) (finding a taking in the case of a 77% diminution in value).

The impact of the *Lingle* decision (now only a year old) on takings jurisprudence has yet to play itself out. By discarding the *Agins* test, the Court has begun to disentangle the Takings and Due Process Clauses of the Fifth Amendment which have been confused and intermingled by court decisions for years. However, the existing law on substantive due process challenges is in need of attention. Often referred to as better on paper than in a courtroom, substantive due process cases have been notoriously difficult to win. However, while *Lingle* may sort out the competing philosophical arguments, it also narrows the remedies available to a landowner subject to unreasonably burdensome regulation. Whereas before he might seek to be compensated for his losses, the landowner facing an ineffective or arbitrary regulation after *Lingle* is limited to invalidating that regulation under the Due Process Clause. Only time will answer the question of whether *Lingle* represents a further erosion of private property rights under the Takings Clause or signals the reemergence of the Due Process Clause in property rights litigation.