



THE DAILY RECORDER

Official Newspaper for the City of Sacramento

901 H St., Suite 312, Sacramento, Calif. 95814 ♦ (916) 444-2355 ♦ Vol. 97, No. 220 ♦ 75¢ ♦ Monday, November 12, 2007

NINTH CIRCUIT RESURRECTS DUE PROCESS PROTECTIONS FOR PROPERTY OWNERS

By Ronald A. Zumbrun*

On November 1, 2007, the Ninth Circuit restored the ability of private property owners to access the substantive due process protections of the Fourteenth Amendment of the United States Constitution: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law....” A property owner’s substantive due process rights are violated when government action (such as denial of a permit) is arbitrary or unreasonable. A separate constitutional provision, the Fifth Amendment, also precludes the government from taking private property for public use without just compensation. For years, the Fifth Amendment was considered the only recourse available for arbitrary and unreasonable conduct. In a case argued by J. David Breemer of Pacific Legal Foundation, *Crown Point Development, Inc. v. City of Sun Valley*, a Ninth Circuit Court of Appeals panel unanimously lifted that restriction.

The historic interplay between the Fifth and Fourteenth Amendments in the context of land use litigation exemplifies the United States Supreme Court’s characterization of substantive due process as a treacherous field for the courts. *Crown Point Development* is the latest twist in the tale.

In a 1996 case, *Armendariz v. Penman*, the Ninth Circuit *en banc* held that the Fifth Amendment’s takings clause preempted the broader protections encompassed by substantive due process. The property owner in that case was therefore precluded from maintaining a substantive due process claim against the City of San Bernardino, which had boarded up low-income housing units and evicted tenants out of a high crime area for the ostensible purpose of reducing urban blight. The property owners contended that one of the purposes of the sweep was pretextual: to enable a private commercial developer to acquire contiguous property on the cheap, bulldoze the low-income housing units, and replace them with a planned shopping center.

The property owners also contended that the City of San Bernardino failed to notify affected property owners in advance that the sweep would occur, did not inform owners of the time of the closures nor the reason why the buildings were being shut down, and did not identify specific code violations until after the sweep was completed and the buildings closed. Among other causes of action, the property owners contended that the City of San Bernardino’s conduct was arbitrary and capricious in violation of their

due process rights under the Fourteenth Amendment.

In denying the property owners' claim for relief under substantive due process, the Ninth Circuit held that the Fifth Amendment provided an explicit textual source of constitutional protection against the particular sort of government behavior at issue. The Fifth Amendment, and not the more "generalized notion of substantive due process," was to be the guide for analyzing the property owners' claim. If, indeed, the City of San Bernardino's purpose was to deprive the plaintiffs of their property, either by forced sale or driving down the market value of the properties for the benefit of a private developer, a taking under the Fifth Amendment would occur because the "public use" requirement would not be satisfied.

In the wake of *Armendariz*, other challenges to excessive government regulation of private property were restricted to the Fifth Amendment, and not the broader protection of the Fourteenth Amendment. In *Macri v. King County*, for example, the Ninth Circuit in 1997 held that the denial of a property owner's application to subdivide property was actually a Fifth Amendment takings claim, not a claim of substantive due process. At the time, the United States Supreme Court had determined that land use regulations which fail to substantially advance legitimate state interests or deny an owner economically viable use of the property effect a Fifth Amendment taking. Thus, a claim seeking invalidation of an onerous regulation or arbitrary governmental conduct for failure to substantially advance legitimate state interests would preclude an alternative claim for violation of substantive due process.

In 2005, however, the United States Supreme Court in *Lingle v. Chevron U.S.A. Inc.* held that the failure of government conduct to substantially advance legitimate state interests is no longer an appropriate

test for determining whether a regulation effects a Fifth Amendment taking. Although this takings test had been formulated by the United States Supreme Court in 1980 in *Agins v. Tiburon*, the Court concluded that it no longer plays a role in a Fifth Amendment takings analysis because the Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."

Just compensation for a taking of private property is mandated by the Fifth Amendment, whenever property is taken. The Fifth Amendment takings clause itself presupposes that the government conduct is in furtherance of a public use. Under *Lingle*, the Fifth Amendment inquiry now "focuses directly upon the severity of the burden that government imposes upon private property rights" because "the 'substantially advances' inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."

Although the United States Supreme Court in *Lingle* did not discuss *Armendariz* and its progeny, it expressly concluded that the "substantially advances" formula "prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." The court emphasized that the "substantially advances" formula was derived from due process, not takings, precedents. Justice Anthony J. Kennedy, in a concurring opinion, likewise emphasized that the decision in *Lingle* "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."

Lingle thus set the stage for *Crown Point Development*, wherein the Ninth Circuit undertook a fresh assessment of the continuing relevance of *Armendariz* in the land use context, with specific focus on

claims involving arbitrary and unreasonable governmental conduct. The Ninth Circuit panel unanimously acknowledged that “*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct.” Because there is no longer a “specific textual source in the Fifth Amendment” for protecting a property owner from conduct that furthers no legitimate governmental purpose, a property owner’s contention that government action is arbitrary or unreasonable can once again be analyzed under the rubric of substantive due process. Accordingly, the Ninth Circuit concluded that a developer may state a claim for relief based on alleged arbitrary or unreasonable denial of a permit application, independent of the Fifth Amendment. The court emphasized, however, that *Armendariz* has only been undermined “to the limited extent that a claim for wholly illegitimate land use regulation is not foreclosed.”

One of the benefits of restoring substantive due process protections for property owners is that government conduct can now be examined by a jury. In California, the determination of inverse condemnation liability is a role for the court. However, the determination of whether government conduct is arbitrary or unreasonable in the context of substantive due process can be a role for the jury. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, a 1999 case, the United States Supreme Court confirmed that the jury’s role in vindicating constitutional rights brought under 42 U.S.C. § 1983 (the federal statute granting plaintiffs the right to sue for violations of due process) has “long been recognized by the federal courts.”

In that case, the high court concluded that a jury could resolve the question of whether a city’s decision to reject a particular development plan substantially advanced a legitimate public interest, viewed in the light of the protracted history of the development process. (The property owners submitted repeated development proposals consistent with zoning requirements and the city’s recommendations, yet received repeated denials.) Pursuant to *Lingle* and *Del Monte Dunes*, these land use questions are now to be resolved under the rubric of substantive due process, not the Fifth Amendment, and by a jury if the property owner so chooses.

It is hoped that the holdings in *Lingle* and *Crown Point Development* will provide much needed certainty for property owners and governmental entities and secure a less treacherous path for both while navigating through the land use litigation process.

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