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## A COUNTY COUNSEL'S ADVICE RESULTS IN A TAKING OF PRIVATE PROPERTY

By Ronald A. Zumbrun\*

L. Eric Chambliss, a civil service employee of the Alameda County Counsel's office, had risen to the position of Senior County Counsel. He was responsible for advising the Alameda County Board of Supervisors and its agencies on the legality and application of Measure D, approved by the voters of Alameda County on November 7, 2000. Measure D, an "open space" ballot initiative, prohibits development outside the urban growth line in Alameda County, substantially changing Alameda County's land use policy, particularly in rural areas, and reducing the scope of the County's urban growth boundary.

Lockaway Storage specializes in developing and improving self-storage facilities. In 2000, Lockaway purchased an eight-acre parcel of land in Castro Valley which came with an existing conditional use permit for the construction of a storage facility. After Lockaway purchased the parcel, Measure D was adopted, thereby precluding all development outside the urban growth line where Lockaway's property was located.

Section 3 of Measure D states that the provisions of Measure D do not apply if they deprive any person of constitutional or statutory rights or privileges. Section 22

further states that Measure D only applies to proposed development which has not received all discretionary approvals and permits prior to the effective date of the ordinance. Lockaway Storage had received the last discretionary permit prior to the effective date of Measure D.

Between August 2000 and September 2002, Lockaway worked earnestly and in good faith to satisfy the County's many construction requirements and expended over \$400,000 in pursuit of obtaining the necessary grading and building permits in addition to its \$800,000 land cost.

On July 2, 2002, then Alameda County Zoning Administrator Darryl Gray gave assurances to Lockaway's Project Manager Dave Michael that the project was being implemented as required. On August 30, 2002, Mr. Michael wrote a letter to Darryl Gray confirming the prior discussion and that in any event Gray would be willing to issue a letter stating that Lockaway was in compliance with its use permit.

Nonetheless, on March 6, 2003, the Alameda County Board of Supervisors met and incorrectly ruled that Measure D was applicable to Lockaway's project, thus halting construction. Although Measure D was

adopted by the voters in late 2000, the County had waited almost two years to inform Lockaway that it intended to apply Measure D to its project.

Meanwhile, Senior County Counsel Eric Chambliss was actively advising the Board of Supervisors' staff and related county agencies that Measure D did apply to Lockaway and recommended that construction be stopped. Subsequently, on April 4, 2003, Lockaway, represented by The Zumbrun Law Firm, brought suit against the County and certain individual County employees.

At trial, Darryl Gray denied giving the earlier assurances and also denied receiving the August 30, 2002 letter from Dave Michael. Fortunately, Gary Brown, a former Lockaway employee, corroborated Mr. Michael's testimony and produced a construction log that specified in detail Gray's earlier statements. The Court found that Mr. Gray's "testimony in this regard, like his testimony on several other material points, lacks credibility."

As I wrote in my September 2008 viewpoint article, a settlement of that portion of the case dealing primarily with Chambliss' conduct and personal liability was reached, and on July 22, 2008, the Alameda County Board of Supervisors agreed to a \$500,000 settlement, leaving the balance of the case against the County intact.

The issue of the County's liability for the conduct of its employees and its Board of Supervisors remained and proceeded to trial. Because of the earlier \$500,000 settlement, the issues at trial were limited to the time period between September 22, 2002, and April 15, 2005 (application of Measure D). The trial was bifurcated with the issue of liability being decided by the court and then followed by a jury trial on the issue of damages.

Lockaway, owned by general partners Michael Shaw and Michael Garrity, had first prevailed on their Writ of Mandate granted by Superior Court Judge James A. Richman

(subsequently appointed to the Court of Appeal). Judge Richman determined that Lockaway's project fell squarely within the protections of Measure D's grandfather clause and that the County acted unreasonably by ignoring that clause. County Counsel subsequently instructed staff not to issue the permit but conceded when contempt charges were brought.

On March 16, 2009, a six-day trial began before Alameda County Superior Court Judge John M. True III. The primary issue was whether the County's conduct amounted to a temporary taking under the Fifth Amendment of the United States Constitution, thereby requiring that Lockaway be compensated.

Following extensive post-trial briefing and argument, the Court filed its final Findings, Conclusions, and Order on September 22, 2009 and held that the factors of significance for a temporary taking are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. The character of the government action also is a relevant consideration.

The "inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests. ... These inquiries are informed by the purpose of the Takings Clause, which is to prevent 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.'"

The Court ruled that there is really no dispute between the parties that Plaintiffs purchased the property for \$800,000 with a singular, distinct expectation: that they would be able to utilize their conditional use permit to develop the property, just as they had many others, by building a storage facility. The price Plaintiffs negotiated and paid for the property was directly related to that expectation, as was the effort subsequently

expended on acquiring the necessary ministerial permits to build on it. Plaintiffs' witnesses testified without contradiction that expenditures of over \$400,000 were made during the relevant period in order to get to the point at which ground could be broken. "Plaintiffs were not and are not in the business of, e.g., hog ranching or oil drilling; they build storage facilities."

The Court further concluded that Measure D, as implemented by Defendant in the factual setting described, materially interfered with Plaintiffs' distinct, investment-backed expectations. That Plaintiffs had a specific plan to develop the property when they purchased it in August 2000, and that they even met with County representatives prior to the close of the sale, distinguishes this case from other regulatory takings cases in which the courts have found the expectation of economic benefit to be too vague.

The Court also concluded that Measure D, as applied, had a substantial, negative economic impact on Plaintiffs' use of the property. By the time Defendant actually got around to informing Plaintiffs that Measure D would have stopped their project in its tracks back in December 2000, Plaintiffs were clearly committed to building a storage facility.

As to the character of the governmental action the Court stated: "The unique – and, frankly, mystifying – aspect of the government's regulatory conduct ... is Defendant's showstopping U-turn starting with the September 23, 2002 ... meeting at which it took the eleventh-hour position that nothing Plaintiffs did – or could have done – since way back in December of 2000 when Measure D became effective, would have made any difference in the outcome of the permit process. When this trap door closed on Plaintiffs, the 'character' of the government's conduct revealed itself."

The Court finally commented that, "all along, Plaintiffs' project was destined to fail the regulatory process by operation of the terms of Measure D which had gone into effect almost two years prior. Moreover, in doing so, Defendant utterly failed to analyze, account for, or even mention, the safe harbor language in Section 22 of the measure. This unexplained – and inexplicable – doctrinal shift put Plaintiffs into a box from which they could not extricate themselves. More to the point, it takes the case out of the 'normal-if-mistaken-regulatory-activity' paradigm and turns it into a taking."

The case has now been set for trial before a jury starting March 22, 2010 to determine the damages due Lockaway as a result of the liability for takings found by Judge True. Lockaway has shown that Measure D as applied had a substantial negative impact on Plaintiffs' use of their property. This includes the lost income resulting from the delay, increased construction costs, carrying costs of the project, as well as the interest on the initial investment. Plaintiffs claim that the damage caused by Defendant's interference with their investment-backed expectations and its economic impact effectuated a temporary taking exceeding \$2 million.

Combined with the \$500,000 settlement for the actions of Chambliss and other County personnel, the taxpayers of Alameda County will take quite a hit for its overreaching civil servants and their Board of Supervisors. The taxpayers certainly deserve better.

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