League for Coastal Protection Natural Resources Defense Council Planning and Conservation League Sierra Club

March 10, 2000
The Honorable Chief Justice Ronald M. George
Honorable Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102- 4712
Re: *Syed Mouzzam Ali vs. City of Los Angeles* S085680

Dear Chief Justice George and Associate Justices:

The organizations listed above respectfully urge this Court to grant the City of Los Angeles' petition for review in the above-entitled case. The Court of Appeal ruled that a government decision made in excess of legislative authority resulted in a compensable taking under the California and the United States Constitutions. Amici respectfully submit that this decision was based on a mistaken understanding of regulatory takings law and urge this Court to grant review to resolve whether "an action of a government agency that exceeds its statutory authority [can] be a compensable taking." Petition for Review, City of Los Angeles at 2. These organizations participated as amici in the *Landgate* case, and our brief advocated essentially the same interpretation of the takings clause as we now present in support of the city's petition for review in this case. *See Landgate, Inc. v. California Coastal Com.*, 17 Cal.4th 1006, 1027, n. 7, 73 Cal. Rptr.2d 841, 953 P.2d 1188 (1998).

Amici adopt and incorporate by reference the statement of the facts presented by the City of Los Angeles.

I. Introduction and Summary

It is important to emphasize at the outset that the decision of the Court of Appeal and the city's petition for review actually raise two closely related, but separate issues. First, the Court of Appeal assumed that a legally erroneous government action can provide the basis for a valid taking claim. This assumption is not consistent with prior decisions of this Court indicating that a legally erroneous government action can never provide the basis for a valid taking claim. Nor is it consistent with the statement by the U.S. Supreme Court that a taking claim can only be based on a "proper" government action. The Court should grant review to resolve the uncertainty about this issue created by the Court of Appeal decision.

Second, the Court of Appeal compounded its mistake by asserting that the invalidity of a government action can itself provide an affirmative basis for a finding of a taking. The appellate court said that the city's action in this case resulted in a taking *because* the city's action "was so unreasonable from a legal standpoint as to be arbitrary." If a legally erroneous government action can never provide the basis for a finding of a taking, as just discussed, then this theory of liability has no logical place in takings doctrine. Furthermore, the alleged arbitrariness of government action appears to represent a due process issue, not a takings issue. Thus, even if the invalidity of a government action does not completely bar takings liability, the Court of Appeal was wrong to think that an action can be said to effect a taking because it is "arbitrary."

In reaching its conclusion, the Court of Appeal relied on this Court's *dictum* in *Landgate, Inc. v. California Coastal Com.*, 17 Cal.4th 1006, 73 Cal. Rptr.2d 841, 953 P2d 1188 (1998), in which the court suggested that a taking could lie if the government's decision was "so unreasonable form a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." The test applied by the Court of Appeal exacerbates the

existing confusion and uncertainty about whether the alleged arbitrariness of government action provides a legitimate basis for a finding of a taking. *See* Justice Kennard's concurring opinion discussing this issue in *Santa Monica Beach, Ltd. v. Superior Court*, 81 Cal.Rptr.2d 93, 108-113 (1999). This Court should grant review in order to resolve this issue as well. Of course, if the Court reaffirms the traditional view that an erroneous government action can *never* provide the basis for a valid taking claim, it will be unnecessary to address whether error itself can provide an affirmative ground for takings liability.

If the Court of Appeal decision is allowed to stand, it will provide new grounds for expansive monetary claims against cities and towns and other units of government. As a result, circumstances which should be challenged on other bases, such as under the due process of clause or as torts, will be treated as takings for public use where no public use is actually involved. Amici urge this Court to review the instant decision and to rule that the takings clauses in the California and United States Constitutions do not apply to government actions taken in error. The takings clause cannot properly be interpreted to cover government actions which are not for a "public use."

II. The Court of Appeal's Decision

In *Ali v. City of Los Angeles*, 77 Cal. App.4th 246, 91 Cal. Rptr. 2d 458, ---- P2d ---- (1999) (hereafter *Ali*), the Court of Appeal for the Second District found that the city's legally erroneous denial of a demolition permit in violation of the Ellis Act was "so unreasonable from a legal standpoint" that it constituted a temporary regulatory taking. The court based its decision on *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (hereafter *First English*). In that case, the Supreme Court held that when the government works an actual taking of property, subsequent government action cannot relieve it of the duty to pay compensation for the period during which the taking was effective. The Court of Appeal recognized that the Supreme Court in *First English* excepted such "normal delays" as "obtaining building permits, changes in zoning ordinances, variances and the like" from its holding. 482 U.S. at 321. The Court of Appeal further recognized that, in *Landgate*, this Court held that the "normal delay" exception precluded a finding of a taking when the government denied a development approval based on an assertion of jurisdiction in excess of statutory authority. Nonetheless, the Court of Appeal believed that the *First English* "normal delay" exception, as interpreted in *Landgate*, did not govern this case because *dictum* in *Landgate* said the exception did not apply in a case where the government's action "was so unreasonable from a legal standpoint as to be arbitrary." *Ali*, 91 Cal. Rptr.2d at 464. Relying on this exception-to-the-exception theory, the Court of Appeal concluded, '[b]ecause the delay temporarily deprived Ali of all use if its property and was not a normal delay in the development process, it was a temporary regulatory taking which required compensation under First English." *Id.* at 465.

III. Review Is Needed to Resolve Important Questions of Law.

A.Prior Decisions of This Court Are Generally Supportive of the City's Position and Stand in Contrast to the *Ali* Decision.

The Court of Appeal decision raises an important question about the scope of the federal and state takings clauses, that is, can a government action made in excess of statutory authority support a legitimate claim for financial compensation under the federal and state takings clauses? The answer to this question, based on governing precedent and fundamental principles of takings doctrine, should be "no."

Both the California and United States Constitutions address uncompensated takings of private property for "public use." Because the legislature has primary authority to determine what is or is not a public use, *see Berman v. Parker*, 348 U.S. 26, 32 (1954), actions taken in excess of

statutory authority cannot be understood as serving a public use. In its prior decisions which address the relevance of legal validity in a takings suit, this Court has indicated that the validity of the government action is an essential precondition for a valid taking claim. Recent statements by the U.S. Supreme Court are in accord with this principle.

In *Customer Co. v. City of Sacramento*, 10 Cal.4th 368, 41 Cal. Rptr.2d 658, 895 P2d 900 (1995) (hereafter *Customer*), this court rejected the takings claim of a convenience store owner for damages to its store and contents as a result of police action in apprehending a felony suspect. This court advised that Article I, section 19 of the California Constitution was not intended and has not been interpreted "to impose a constitutional obligation upon the government to pay `just compensation' whenever a governmental employee commits an act that causes loss of private property." *Customer*, 10 Cal.4th at 378. As part of the analysis, this Court reviewed the history of Article I, section 19 and said the original version of the Constitution only applied to private property "taken for public use," and the later "or damaged" language was not intended to expand the scope of the provision, but was added to clarify that the government was obligated to pay compensation for property damaged in connection with construction of public improvements, even if there was no physical invasion of the damaged property. *Id.*, at 378-79. *See also* Justice Kennard's concurrence in which she notes that "if the word 'use' in the constitutional text is given its ordinary meaning, the just compensation clause by its own terms no longer threatens absolute liability for any and all government interference with private property." *Id*., at 400.

The Court of Appeal decision is also inconsistent with this Court's decision in *Miller v. City of Palo Alto*, 208 Cal. 74, 77, 280 P. 108, 109 (1929). In that case, the Court rejected the property owner's view that his property had been "damaged" within the meaning of the Constitution as a result of a fire caused by the city's allegedly negligent disposal of incinerated garbage. It said:

There is no merit in appellants' contention that the injury of which they complain constitutes a taking of private property for public use. A public use is `a use which concerns the whole community as distinguished from a particular individual or a particular number of individuals; public usefulness, utility or advantage; or what is productive of general benefit; a use by or for the government, the general public or some portion of it.'

Miller v. City of Palo Alto, 208 Cal. at 77 (citation omitted). In basing rejection of the plaintiffs' claim on the fact the city's allegedly negligent act was not one constituting a public use, this Court announced a holding that "has been followed repeatedly and uniformly in the more than 60 years that have elapsed since [the *Miller*] decision was rendered," *Customer*, 10 Cal.4th at 381, *i.e.*, that "negligent conduct of public employees or a public entity does not fall within the aegis of section 19... ." *Id*.

These rulings are supported by language in U.S. Supreme Court decisions indicating that the takings clause is limited to legally valid government actions. For example, in *First English*, the Court recognized that the purpose of the takings clause is "not to limit the governmental interference with property rights per se," as it would be if the takings clause were concerned with the arbitrariness of government action, "but rather to secure compensation in the event of *otherwise proper* interference amounting to a taking." 482 U.S. at 315 (emphasis added). In the recent case of *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), five justices of the U.S. Supreme Court, writing separate opinions, embraced the same view. *See id. at 2157 (Kennedy, J, concurring in part and dissenting in part); id.* at 2161 (Breyer, J., dissenting, joined by three other justices) ("at the heart of the [takings clause] lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public good.'").

In sum, precedent prior to the Court of Appeal decision in *Ali* suggested one could successfully argue that the matter of government error and its relationship to takings for public use was settled and that established law precludes takings suits of this kind. Now the issue is in question, and this

Court's review is needed to remove uncertainty about the correct application of the takings clause to legally erroneous government actions.

B.Dictum in This Court's *Landgate* Decision Requires Clarification and Offers Further Reason to Review the Decision in *Ali*.

The Court also should grant review to address the meaning of the *dictum* upon which the Court of Appeal relied in this case. This court ruled in *Landgate* that the Coastal Commission's erroneous assertion of jurisdiction did not effect a taking because it represented a "normal delay" within the meaning of *First English*. But the Court stated in *dictum* that "[i]t would be a different question if..[the Commission's] position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." *Landgate*, 17 Cal.4th at 1029.

This *dictum* creates confusion because the line between a merely erroneous action and an egregiously erroneous action is difficult to find and apply in practice. Indeed, the confusion is illustrated by this case, in which the Court of Appeal concluded that the city's action was "so unreasonable from a legal standpoint ' as to be arbitrary," notwithstanding the trial court's findings that the city "acted in good faith" and the city's action "was an attempt to further legitimate interests in protecting both its zoning integrity and the public." Petition for Review of City of Los Angeles, at 11 (quoting Joint Appendix XIV, p. 3896).

More fundamentally, if a government action must serve a "public use," as discussed above, it is impossible to see how illegal government action can be viewed as a taking for a "public use" within the meaning of the taking clause. Further, the implications of this *dictum* as interpreted by the Court of Appeal appear nonsensical, because the Court of Appeals appeared to conclude that a merely illegal government action cannot be a taking for "public use" under *Landgate* whereas an egregiously illegal action can be a taking for "public use" under *First English*.

There is substantial reason to doubt that review of the alleged arbitrariness of government action -- what has sometimes been termed a means-ends test -- represents a legitimate test under the takings clause. Justice Kennard, in a concurring opinion in *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th at 981, stated that it is a "fundamental" question whether this test is actually "an appropriate measure of whether a regulatory taking has occurred." She observed the test "originated outside of just compensation law in the realm of substantive due process." *Id*. at 975. In other words, this "means-ends" test, or whether the government action affecting property advances a legitimate state interest, is not native to takings analysis but is imported from the due process question of whether the government action is or is not arbitrary.

Other considerations also undermine the legitimacy of this ostensible test. Given the significant differences in language between the takings and the due process clauses, it is more logical to conclude that the constitutional tests under these clauses should be different rather than the same. *See Harmelin v. Michigan*, 501 U.S. 957, 978 n. 9 (1991). In addition, a takings test based on whether or not a government action is "arbitrary" is not consistent with the basic precondition for a taking claim that the government's action put property to a valid "public use." Finally, as a practical matter, the possibility that an owner could assert a claim under the takings clause based on arbitrary action creates the specter of windfall awards, including attorney fees, relative to what an owner might be able to obtain as actual damages in a properly asserted due process or tort claim.

It should be noted that a variant of means-ends analysis does govern review of so-called development exactions under the takings clause. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). But, as the U.S. Supreme Court recently determined in *City of Monterey v. Del Montes Dunes at Monterey*, ---- U.S.----, 119

S.Ct. 1624, ---- L. Ed.2d ---- (1999), that analysis "was not designed to address, and is not readily applicable to, the much different questions arising where ... the landowner's challenge is based not on excessive exactions but on denial of development." *Id.* at 1635. Outside of the specialized context of development exactions, which is not relevant to this case, mean-ends analysis under the takings clause would simply duplicate due process means-ends review. While the U.S. Supreme Court has not infrequently recited a means-ends takings test, *see, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the Court has never squarely relied on such a test (outside the exactions context) to uphold a finding of a taking. In fact, it is a due process test, not a takings test.

Lastly, the importance of this issue is demonstrated by the U.S. Supreme Court's decision last year in *City of Monterey v. Del Monte Dunes at Monterey Ltd.* The Court upheld a finding of a taking based on jury instructions incorporating the means-ends theory. However, every justice agreed that the question of the validity of the means-ends test was not before the court for the sole reason that trial counsel for the city had waived any objection to the jury instruction. *See* 199 S.Ct. at 1636; *id* at 1649 n. 2; *id* at 1660 n. 12. No justice affirmatively endorsed the validity of the means-ends test, and five justices wrote or joined in opinions expressly reserving judgment on the validity of the test. *See id.* at 1649 n. 2 (Scalia, J., concurring in part and concurring in the judgment) ("As the court explains, petitioner forfeited any objection to this standard..., and I express no view as to its propriety."); *id.* at 1660 n. 12 (Souter, J., concurring in part and dissenting in part; joined by Justices Breyer, Ginsburg and O'Connor) ("I offer no opinion on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clause of the Fifth and Fourteenth Amendment."). In short, *Del Monte Dunes* confirms that the legitimacy of a means-ends takings test is both an important and an open question. The court should grant review to resolve this "fundamental" issue.

IV. Conclusion

Leaving the Court of Appeal decision as a binding authority on takings liability for government decisions in excess of statutory authority would significantly enlarge the opportunities to seek public money for wrongs that are or should be the subject of a suit in tort or for violation of due process of law. On the other hand, this Court's review would provide an opportunity to clarify the existing confusion and develop clear and predictable means for the lower courts to address claims presented under the takings clause that should be tested under different legal theories. Accordingly, amici respectfully urge this court grant the city's petition for review.

Respectfully submitted,

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