

HOT TOPICS: FEDERAL MANDATES AND LOCAL ZONING

Federal Constitutional Issues: Takings and Eminent Domain

17th Annual Planning & Zoning Workshop

Sponsored by

The Cleveland Section of the

Ohio Planning Conference

September 30, 2005

Cleveland Convention Center

Cleveland, Ohio

By:

R. Todd Hunt, Esq.

Walter & Haverfield LLP

www.walterhav.com

The Tower at Erieview

1301 East Ninth Street, Suite 3500

Cleveland, OH 44114-1821

216.781.1212

216.575.0911 (fax)

216.928.2935 (direct dial)

e-mail: rthunt@walterhav.com

X. CONSTITUTIONAL ISSUES: INVERSE CONDEMNATION AND TAKINGS

By
R. Todd Hunt, Esq.
Walter & Haverfield LLP

A. Inverse Condemnation/Regulatory Takings

The challenge may occur either in the federal court or in Ohio courts. The federal cases generally apply the Fifth Amendment to the United States Constitution which is applicable to the states through the Fourteenth Amendment and prohibits a government from taking private property for public use without just compensation. It states: “Nor shall any person be deprived of life, liberty or property, without due process of law; nor shall private property be taken for use, without just compensation.”

Article I, Section 19, of the Ohio Constitution provides:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purposes of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for the public use, a compensation therefore shall first be made in money, or first secured by deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

1. Federal Cases. The United States Supreme Court has formulated a disjunctive test when analyzing the takings clause in a zoning context. Land use regulations may constitute a taking if the land use regulation either (i) fails to substantially advance legitimate state interests or (ii) denies the economically viable use of the land.

The sequence of Supreme Court cases can be stated as follows:

- (a) *Penn Central Transportation Co. v. City of New York* (1978), 438 U.S. 104. Application of City’s “landmark” law does not affect a “taking” of private property by the government without just compensation where (i) the law does not interfere with the owner’s present uses of the building; (ii) the law does not necessarily prohibit occupancy of any of the air space above the landmark building and (iii) the law does not deny all use of the air rights above the landmark.

- (b) *Agins v. City of Tiburon* (1980), 447 U.S. 255, 260. Owners of a five acre parcel of unimproved land brought an action against the City after the City adopted zoning ordinances placing the land in a residentially planned development and open space zone which would permit the owners to build between one and five single-family residences on the tract. Without exhausting administrative remedies, the property owners brought a facial challenge against the zoning ordinance alleging taking of property without just compensation in violation of the Fifth and Fourteenth Amendments. The court held that the ordinance substantially advanced a legitimate governmental goal; that the property owner will share the benefits and burdens of the City's exercise of such police power; and, although the ordinance limited development, the City neither prevented the best use of appellants' land nor extinguished a fundamental attribute of ownership. The application of a general zoning law to a particular property effects a taking only if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.
- (c) *Palazzolo v. Rhode Island* (2001), 533 U.S. 606. The owner of waterfront property claimed that state wetlands regulations deprived him of all economically beneficial use of the property. The state supreme court decided that claim was invalid based upon the undisputed fact that a non-wetlands portion of the property had development value, and further ruled that the property owner's post-regulation acquisition of the property prevented him from recovering under the multi-factor *Penn Central* test for an incomplete regulatory taking. The U.S. Supreme Court affirmed the state court's conclusion that the owner had not been deprived of all economic use, based upon the evidence of the property's residual development value. However, a fractured majority of the Court rejected the state court's ruling that post-regulation acquisition of title was fatal to a *Penn Central* claim. The lead opinion, which expressed three of the Justices' views, reasoned that the date of a takings claimant's acquisition of property rights in relation to the date of a regulation's enactment should not be determinative of whether unreasonable governmental limitations on the use and value of land can be challenged. Such a rule would effectively limit the state's obligation to exercise reasonably its authority to regulate property through enforcement of valid zoning and land-use restrictions, and would alter the nature of property, since the prior owner could not transfer to a successor the interest that he possessed prior to the regulation. Furthermore, the opinion noted, a regulatory takings challenge does not necessarily ripen at the time of enactment of the regulation, so it would be illogical and unfair to bar such a claim simply because of the post-enactment transfer of ownership. On remand, the state court was to apply the *Penn Central* factors to the claim.

- (d) *Lingle v. Chevron U.S.A. Inc.* (decided 5/23/05), 544 U.S. _____, 2005 U.S. LEXIS 4342.

Facts: The State of Hawaii Legislature passed Act 257 which limited the rent oil companies may charge dealers leasing company-owned service stations. The law was passed due to concerns about the effects of market concentration on retail gasoline prices -- i.e., lower rents may create more service stations, more competition, less overhead for retailers and less markup on gasoline. Chevron, one of the largest oil companies in Hawaii, filed a declaratory judgment action against Gov. Lingle and the State to declare that the rent cap effected a Fifth Amendment taking of property and to obtain an injunction against its application to Chevron. The District Court applied the first prong of the *Agins, supra*, test for a taking -- where the government regulation of private property "effects a taking if [it] does not substantially advance legitimate state interests". 477 U.S. at 260. The District Court held the rent cap effects an uncompensated taking violating the Fifth (and Fourteenth) Amendment because Chevron showed the rent cap does not substantially advance Hawaii's asserted interest in controlling retail gasoline prices. The Ninth Circuit affirmed.

Held: The test for determining whether a regulation effects a Fifth Amendment Taking is not the test under the *Agins* case to the effect that the regulation does not substantially advance legitimate state interests. This necessarily leaves three formulas under U.S. Supreme Court precedents for determining regulatory takings.

The first is the second prong of the former disjunctive test in *Agins* for a taking that the regulation completely deprives an owner of "all economically beneficial use" of the owner's property.

The second formula is where the government's action requires the owner to suffer a permanent physical invasion of the owner's property, however minor, and therefore compensation must be paid.

A third type of taking involves the *Penn Central, supra*, regulatory taking challenge where the Court identified several factors that have particular significance, but most importantly: (1) the economic impact of the regulation on the claimant and particularly the extent to which the regulation has interfered with distinct investment-backed expectations; and (2) the character of the government action -- i.e., whether it amounts to a physical invasion or affects property interest through an adjustment of the benefits and burdens of economic life to promote common good. The Court noted that in each of these situations, the Court has identified regulatory actions that are functionally equivalent to the classic taking in

which government directly appropriates private property or ousts the owner from his/her domain.

The Court explained away the *Agins* "substantially advances" test as essentially dicta and an oversight by the Court in the *Agins* case. The Court reiterated that the "substantially advances test" is derived from the substantive due process, not takings, precedents of the Court. Significantly, Justice Kennedy's concurrence reiterates that the Court's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate substantive due process. The Court goes to great lengths to distinguish all of its other takings cases since *Agins* to explain that it has never found a takings based upon the "substantially advances" formula.

- (e) *San Remo Hotel, L.P. v. City and County of San Francisco* (decided June 20, 2005), 545 U.S. _____, 2005 U.S. Lexis 4848.

Overview: Developers urged that persons alleging takings claims should be given two chances to assert such claims, first in state court and then in federal court. The U.S. Supreme Court ruled that the federal full faith and credit act, 28 USC §1738, requires federal courts to apply normal principles of issue preclusion to state court findings and conclusions once a takings claimant returns to federal court after first seeking compensation in state court. This ruling upholds the Court's earlier ruling in *Williamson County v. Hamilton Bank*, 437 U.S. 172 (1985), in which the court held that no federal takings claim arises against a local government until the claimant seeks compensation in state court. The court in *Williamson* stated: "If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation."

Facts: The action was brought by the San Remo Hotel in response to the application of a city ordinance that required it to pay a \$567,000 "conversation fee" in 1996. The ordinance was an attempt by the city to maintain and provide affordable rental housing for elderly, disabled and low income persons. San Remo had first filed a mandamus action in state court in 1993 but failed to prosecute that action for five years. It then stayed the state court lawsuit and filed a takings suit in federal court. The federal district court dismissed San Remo's facial challenge to the ordinance as being time barred since the ordinance had been in place for twelve years, but the court also dismissed San Remo's "as-applied" takings claim because the hotel had failed to seek compensation in state court as required by the *Williamson* case. San Remo appealed to the 9th Circuit Court of Appeals and lost. San Remo then returned to state court in 1998

and added takings claims to its mandamus action. It litigated those claims through the California state judicial system, finally losing in the California Supreme Court.

Following its loss on the merits in state court, San Remo then returned to federal court to file a federal takings claim identical to its state claims. The federal district court then dismissed the case giving full faith and credit to the California court's decisions ruling that federal and California takings law are co-extensive. The 9th Circuit affirmed.

Holding: The U.S. Supreme Court held that it will not create an exception to the full faith and credit statute in order to provide a federal forum for litigants seeking to advance federal takings claims. The court stated: "State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex, factual, technical and legal questions related to zoning and land-use regulations." The court did note that a takings claimant may seek a federal takings claim in state court "in the alternative". Although the vote was 9 – 0 in favor of the city and county in this case, four justices concurred in an opinion written by Chief Justice Renquist. The concurrence agrees with the majority that a takings claimant should not have two bites at the apple but questioned whether claimants should first seek compensation in the state court before filing in federal court.

2. Ohio Cases

- (a) *State ex rel. R.T.G., Inc. v. State of Ohio* (2002), 98 Ohio St.3d 1. In a 4 to 3 decision authored by Justice Lundberg Stratton and concurred in by Justices Sweeney, Pfeifer and Resnick in December, 2002, the Ohio Supreme Court decided a regulatory takings case based upon Article I, Section 19 of the Ohio Constitution. In R.T.G., the State of Ohio declared 883 acres as "unsuitable for mining" ("UFM"). It was determined by the State that R.T.G.'s surface mining of the property could adversely affect the aquifer of water wells in the area.

R.T.G. then filed a mandamus action to compel the State to appropriate the coal rights that the State's UFM designation prevented R.T.G. from mining upon both the land held by R.T.G. in fee simple (500 acres) and the coal rights owned or leased on adjacent lands (300 acres). The case was eventually heard as an original mandamus action in the Court of Appeals. The Court of Appeals magistrate held:

- (i) The “UFM” did not take the property owned in fee simple since it only prevented the mining of the coal, but the surface estate of the property still had value. This was based on a Penn Central analysis that 100% of the value of the property had not been taken;
- (ii) The magistrate held the “UFM” did, however, take 100% of the coal rights in the 300 acres of property, but no compensation was due because mining would “constitute a nuisance” under the holding in *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003.

Upon objections to the magistrate’s report filed by R.T.G., the Court of Appeals adopted the magistrate’s report except with respect to the “nuisance” issue and proceeded to compel the State of Ohio to appropriate the tracts of land upon which R.T.G. had coal rights only.

Upon appeal to the Ohio Supreme Court, the Court held:

- (i) The appropriate statute of limitations on a takings claim should be six years, pursuant to Ohio Revised Code 2305.07, because when the state takes one’s property, it is impliedly contracting with the owner that it will pay “just compensation”. In the case at bar, the UFM was placed on the property by the State in 1994 and the mandamus action was filed in 1998. The Court considered but rejected the relators’ argument that there should be a 21-year statute of limitations based on a theory of a claim for the possession of real property under Revised Code 2305.04. The Supreme Court stated that this analysis was not appropriate because the claim did not involve one of possession of the real estate, but rather a claim for monetary damages.

Note: As a result of this holding, the Ohio legislature adopted a specific statute of limitations for both physical and regulatory "takings" claims in Ohio of four years. Rev. Code §2305.09. (H.B. 161, effective 6/2/04).

- (ii) The Court held that the UFM constituted a regulatory taking under the *Lucas, supra*, holding since 100% of the economic value of the “relevant parcel” had been taken. The Court held that coal rights are severable from fee ownership; that state law defines property rights, not federal law; and a state constitution can provide greater rights than the federal constitution. Therefore, the “relevant parcel” is the “vertical” parcel of all of the coal rights, whether owned in

fee simple, leased or as mineral rights, if those rights have been taken, and compensation is due.

- (iii) As to the “nuisance” issue, the Court held that coal mining is not a “qualified nuisance”, pursuant to the Lucas, *supra*, holding, since mining can be accomplished safely and it was not demonstrated that the aquifer was affected by the mining.
- (iv) Both attorneys fees and costs were awarded to R.T.G., which is permissible in a mandamus action.

- (b) *State ex rel. Preschool Dev., Ltd. v. Springboro* (2003), 99 Ohio St. 3d 347. This case was brought by the property owner, a daycare facility, to compel the City to appropriate the property under the State’s eminent domain procedures in O.R.C. Chapter 163 for the City’s denial of its right of access from the property to the abutting public highway.

Distinguishing its earlier case of *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203, the Ohio Supreme Court held that requiring the property owner and its patrons to drive 207 feet to and from a neighbor’s curb cut and along a City easement to access the property was not a compensable taking of the property under the federal and state constitutions. The Court stated in its opinion that the elimination of a direct curb cut from the property to the abutting state highway “...did not substantially or unreasonably interfere with its access.” In its 1996 opinion in *OTR, supra*, the Court held that a compensable taking had occurred where the City eliminated all means of access to one street abutting the property, even though the property owner had access to other public streets through driveways and a contiguous parcel owned by OTR.

B. Temporary Regulatory Takings

A property owner may claim a taking has occurred for the temporary deprivation of property rights.

1. Federal Cases

- (a) *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987), 482 U.S. 304. After a flood destroyed all of the buildings at a church-owned facility, the County of Los Angeles adopted an interim ordinance barring the construction or reconstruction of any buildings or structures in a designated flood protection area which included the land on which the facility had stood. (The interim ordinance remained in place for approximately six years.) The Supreme Court held that:

- (i) where a regulation takes all use of a property, the property owner is entitled to compensation for the period before the courts finally determine that the regulation effects a “taking” of property;
- (ii) “temporary takings” which deny a property owner all use of property are not different in kind from permanent takings;
- (iii) no subsequent action by the government such as amending or withdrawing the challenged regulation can relieve the governmental duty to provide compensation for the period during which the taking was effective; and
- (iv) the invalidation of the ordinance in question without payment of fair value for the use of the property during the period in which the Church was denied such use would be a constitutionally insufficient remedy.

Note: However, the U.S. Supreme Court did not rule on the merits of the takings issue and remanded the case to the California state courts. On remand, the state appellate court found no taking because ordinance substantially advanced legitimate public safety interest (the property was located in a flood plane), did not deny landowner all use of property, and only imposed reasonable limitations on use of land for a reasonable period during which state could study any possible uses for land which would be compatible with public safety.

(b) Moratoria: When are they a “Taking” of Property?

- (i) Moratorium. A temporary moratorium upon issuance of building permits, or even upon proceeding with approved development, may be valid if it is of appropriately limited duration, and if it is in response to a sufficiently strong public necessity.
 - (a) Moratoria have been upheld as a proper planning tool in Ohio for some period of time. *November Properties, Inc., et al. v. City of Mayfield Heights, et al.*, 1979 Ohio App. LEXIS 10604.
 - (b) *Dawson Builders, Inc. v. City of Mentor* (May 11, 1981), Lake App. No. 8-062, 1981 WL 4377, 1981 Ohio App. LEXIS 14147 (unreported).
- (ii) Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002), 122 S.Ct. 1465, 2002 U.S. LEXIS 3028. In the *Lake Tahoe* case, the Lake Tahoe Regional Planning Agency had instituted two moratoria totaling 32 months on development around Lake Tahoe to study the impacts of development on the

lake and to develop regulations going forward for environmentally sound growth. A group of 449 landowners alleged that they should be compensated under the “takings” clause of the Fifth Amendment for the period of time they were deprived of all economic use of the property -- i.e., the moratorium period.

Although the case involved a regulatory takings claim and not a direct challenge to the legality of such a moratorium on development, the U.S. Supreme Court stated with respect to the use of moratoria as a planning tool:

A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process. Unlike the “extraordinary circumstance” in which the government deprives a property owner of all economic use, Lucas, 505 U.S., at 1017, moratoria like Ordinance 81-5 and Resolution 83-21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or “interim development controls” as they are often called, are an essential tool of successful development. Yet even the weak version petitioners’ categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values.

Consequently, the question was not whether moratoria are *per se* legal but whether the government imposing the moratorium owes compensation to the landowner. The Court held that in this case it did not, but a case-by-case analysis of the facts of each case must be performed to answer such a question.

The Supreme Court held that two temporary moratoria totaling 32 months did not constitute *per se* a takings claim requiring compensation under the Fifth Amendment takings clause because of, among other factors:

- (a) These two moratoria did not present “classic” takings in which the government directly appropriated private property for the government’s use.
- (b) Instead, the interference with property rights arose from a public program adjusting the benefits and burdens of economic life to promote the common good.

- (c) The Supreme Court’s prior decisions did not support, and explicitly rejected, a categorical takings rule under such circumstances.
- (d) Under the Court’s prior regulatory takings requirement to focus on “the parcel as a whole”, the starting point for the analysis in the *Tahoe* case ought to be to ask whether there was a total taking of the entire parcel -- instead of disaggregating an affected parcel into temporal segments corresponding to the two moratoria.
- (e) The takings clause interest in protecting individual property owners from bearing public burdens, which in all fairness and justice ought to be borne by the public as a whole, did not justify the Supreme Court’s creating a new *per se* takings rule under any of the three theories asserted in the case at hand.

The Court noted that for purposes of determining whether a taking has occurred, temporary moratoria should be treated like permit delay cases. 122 S.Ct. 1486 n. 31. (The impact, if any, of *Lake Tahoe* on permit delay takings claims was analyzed in *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002). (That appellate court decided that *Lake Tahoe* had not changed the previous law, that the takings clause only applies where there are extraordinary delays in the permitting process.)

- (iii) Moratoria are often used when local governments must respond to new uses of land proposed within the jurisdiction – e.g., telecommunication towers and sexually-oriented/adult entertainment businesses. The courts have generally recognized such moratoria as acceptable. *See, e.g., Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996) (City’s six-month moratorium on issuing permits for wireless telecommunications facilities did not violate Section 704 of the 1996 federal Telecom Act.)
- (iv) The Ohio Attorney General has recently opined that townships may, in certain circumstances, have the authority to enact temporary moratoria.

“A board of township trustees is authorized by R.C. 519.02 to zone for the purpose of promoting the public health, safety and morals. The development and maintenance of an infrastructure sufficient to serve the needs of a township’s population meet this purpose, and may support a temporary moratorium on the construction of residential units, depending upon the terms of the particular zoning resolution, as well as the circumstances of the moratorium’s enactment.”

* * *

“A temporary moratorium on development does not deprive the property of all of its economic value, and therefore, the balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) must be applied to determine whether a compensable taking has occurred.”

OAG Opinion 2003-024 (July 25, 2003).

Query: Whether Ohio House Bill 148, effective in August, 2004, which amends the enabling statute, Ohio Revised Code 519.02, to permit township to pass zoning regulations that are now based upon the “general welfare” of the township and the public “convenience, comfort and prosperity” provides additional support for township moratoria?

2. Ohio Cases

Prior to *Goldberg*, the Ohio Supreme Court had adopted a conjunctive test for a property owner to challenge a zoning ordinance, whether or not a takings claim was asserted. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, which was modified by *Goldberg*, had held that a party who attacks the constitutionality of a zoning ordinance must demonstrate, beyond fair debate, that (i) the ordinance was arbitrary and unreasonable, having no substantial relation to the public health, safety and welfare and (ii) the zoning ordinance denied the owner an economically viable use of its property.

- (a) *Goldberg Co., Inc. v. City of Richmond Heights* (1998), 81 Ohio St.3d 207. In *Goldberg*, the Court modified the conjunctive test set forth in *Gerijo* and appeared to have aligned the Ohio Supreme Court with the United States Supreme Court in applying a single-pronged test to challenge the constitutionality of a zoning or land use regulation “on its face” or “as applied” to the property. *Goldberg* was not a takings case. The Court reaffirmed that a property owner challenging the constitutionality of a zoning ordinance bears the burden of proof and must prove unconstitutionality beyond fair debate. The Supreme Court held that a property owner can successfully challenge a zoning ordinance if he proves that the ordinance “is clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals or general welfare of the community”. Nevertheless, the Court in *dicta* stated that the two-pronged, disjunctive test set forth in *Agins, supra*, applies to takings claims – i.e., the property owner may prove either the regulation: (i) fails to substantially advance legitimate state interests (i.e., the protection of the health, safety, general welfare) or (ii) the ordinance denies the landowner economically viable use of the property.
- (b) *State ex rel. Shemo, et al. v. Mayfield Hts.* (2002), 96 Ohio St.3d 379 (decided October 2, 2002). This was actually the fifth time Shemo had been reviewed by the Ohio Supreme Court:

- (i) *Shemo I. (Shemo v. Mayfield Hts. (2000), 88 Ohio St.3d 7.)* The first case involved an appeal of the initial zoning decision. The City stipulated at the trial level that the U-1 residential zoning classification as applied to the property was invalid. Over property owner's objection, the City rezoned the property to a U-2-A residential Planned Unit Development. The trial court found that the U-2-A zoning classification was unconstitutional as applied to the property. After an appeal of that decision by the City, the Common Pleas Court held that the property owner's proposed retail use of the property as described in its site plan was reasonable. (The property owners had requested multi-family zoning in their original complaint, but later refiled it in 1995 to request retail zoning.) The trial court ordered the property owners to make improvements to a roadway as specified in the site plan, for the City to facilitate the improvements and the City and municipal officers were enjoined from interfering with the property owner's proposed retail use of the property and the installation of road improvements. This decision was appealed to the Court of Appeals which reversed and to the Ohio Supreme Court which again reversed and reinstated the decision of the Common Pleas Court.
- (ii) *Shemo II. (State ex rel. Shemo v. Mayfield Hts. (2001), 92 Ohio St.3d 324.)* The property owners filed a petition for a writ of mandamus to compel the City to grant final approval of the road improvements and to compel the City to commence state court appropriation proceedings to determine the value of the taking of the property. The Court dismissed the action without prejudice to refile because the property owners failed to comply with affidavit requirements of the Court for a mandamus action.
- (iii) *Shemo III. (State ex rel. Shemo v. Mayfield Hts. (2001), 93 Ohio St.3d 1.)* The property owners refiled the mandamus action asking the Court to compel the City to commence state court appropriation proceedings, to grant final approval of the road improvements, including access, and to grant all other approvals and permits necessary for the retail development per the trial court's order. The Court granted the writ of mandamus to compel the City to approve all plans, but it did not rule on the request to compel state appropriation proceedings.
- (iv) *Shemo IV. (State ex rel. Shemo v. Mayfield Hts. (2002), 95 Ohio St.3d 59). (Decided April 10, 2002.)* The property owners again sought to compel the City to commence appropriation proceedings for the City's temporary taking of its property. The time period

requested for the “temporary taking” was from March 19, 1992 (the date of the filing of the original complaint to declare the zoning unconstitutional) to August 20, 2001 (the date the City permitted street access to the property).

The Court held that because the City had stipulated that the initial U-1 residential zoning was unconstitutional and the trial court held that the U-2-A Planned Unit Development was unconstitutional, that the City was collaterally estopped from raising the first prong of the *Agin*s test – whether the existing zoning substantially advanced a legitimate state interest. The Court also clarified its dicta in *Goldberg, supra*, by stating that “satisfaction of either prong of the *Agin*s test establishes a taking” – either the ordinance does not substantially advance legitimate state interests or it denies an owner economically viable use of its land.

The Court rejected the City’s claim that a taking could not have occurred because the property owners purchased the property knowing that the challenged U-1 single-family residential zoning existed on the property and the City did nothing to further restrict that use after plaintiffs’ acquisition of it. The Court relied upon the U.S. Supreme Court’s fractured holding in *Palazzolo, supra*, on this issue.

Concerning the “temporary takings” claim, the Ohio Supreme Court relied upon *First English Evangelical Lutheran Church, supra*.

. . . where the government’s activities have already worked a taking of all use of the property, no subsequent action of the government can relieve it of the duty to provide compensation for the period during which the taking was effective. (Emphasis added.)

“The *First English* court stated that damages for ‘temporary’ takings, that is, resulting from interim ordinances, or presumably, from ordinances intended to be permanent but later invalidated by courts as a taking and therefore effectively transformed into an interim ordinance, are to be ‘measured by the principles normally governing the taking of a right to use property temporarily’, that is, in the same way as in eminent domain actions for temporary use of the property.” 8 Rohan & Reskin, *Nichols on Eminent Domain* (3 Ed. 2001), Section 14E-23, quoting *First English*, 482 U.S. at 318.

The Ohio Supreme Court stated that the measure of damages was for the period from March 19, 1992 when the property owner filed its declaratory judgment action challenging the use to U-1 zoning classification until August 20, 2001 when the City Council enacted a resolution removing the emergency use restriction for one road providing access to the proposed retail development. The Ohio Supreme Court held that under the first prong of the *Agins* test, the property owner established a temporary taking during the time that the U-1 and U-2-A zoning classifications were unconstitutionally applied to its property. The case was remanded to the trial court for a measure of the diminution in value of the use of the property during the period of the temporary take.¹

- (v) *Shemo V. (State ex rel. Shemo v. Mayfield Hts. (2002), 96 Ohio St.3d 379). (Decided October 2, 2002.)*

Immediately after the decision in *Shemo IV*, the City filed a motion for reconsideration in the Ohio Supreme Court raising several issues with the Court's opinion in *Shemo IV*: (1) The opinion effectively overruled the case of *Superior Uptown, Inc. v. Cleveland* (1974), 39 Ohio St.2d 36, which held that "[a] cause of action for money damages can not be maintained against a municipality for losses sustained as a result of the adoption of a rezoning ordinance which is subsequently held invalid"; (2) the opinion did not use the proper analysis for a takings claim and take into consideration all factors related to the property, the economic effect and expectations of the owners, and the character of the City's action; and (3) the length of the period for the compensable taking should be shortened to start after the road access issue was resolved and should not extend beyond the two-year statute of limitations in Ohio Rev. Code 2744.04.

The Court rejected all of the City's arguments and on its own initiative found that the *Tahoe* case did not apply to the issues in this case. First, the Court summarily stated that its prior case of *Superior Uptown, Inc.* was distinguishable because it was a direct action for damages, not a mandamus action, and was an issue dealing with sovereign immunity.

Second, the Court in essence held that an analysis of all of the *Penn Central* case factors led to the conclusion that there was a taking.

¹ *Tahoe* was decided 13 days later.

Third, the Court said the *Tahoe* case is inapplicable because the moratorium in *Tahoe* substantially advanced a legitimate state interest, unlike the delay here.

Fourth, the Court did shorten the period of the compensable taking from June, 1995 to April, 2001 – i.e., from when the owners requested the retail zoning on the property in a refiled complaint up to the date of the rezoning by the City to retail.

Finally, the Court did not opine on the merits of the argument that the two-year statute of limitations limited damages in the case since the City failed to raise this defense and, therefore, waived it. It will be interesting to see in the future whether the two-year statute of limitations for 42 U.S.C. §1983 actions will apply in federal 5th Amendment “takings” cases. (See *R.T.G., Inc., supra*, re six-year statute of limitations for State Constitutional “takings” claims.)

The City later filed a Petition for Writ of Certiorari in the U.S. Supreme Court raising two issues for review:

- (i) Whether a land use restriction that does *not* substantially advance a legitimate public purpose can be deemed on that basis alone, to effect a taking of property requiring the payment of just compensation under the Fifth Amendment?
- (ii) Whether the *sole* remedy available to an owner of property encumbered by a zoning restriction that does not substantially advance a legitimate public purpose is the invalidation of the restriction as a deprivation of property prohibited by the Due Process Clause of the Fourteenth Amendment (as opposed to the Fifth Amendment’s “taking” clause)?

The U.S. Supreme Court denied certiorari on March 10, 2003. 123 S.Ct. 1484; 155 L.Ed.2d 226.

(vi) Cuyahoga County Probate Court Case

The case to determine the amount of compensation for the takings was filed in Cuyahoga County Probate Court by the City as directed by the Ohio Supreme Court. A dispute arose as to whether all of the property owners were proper parties to the Probate Court case. The Probate Court ruled all plaintiff owners are proper

parties in spite of the fact not all owners were plaintiffs in the takings case. An interlocutory appeal was filed by the City in the Court of Appeals with respect to the proper parties to the Probate Court action which would, of course, affect the amount of damages. The Court of Appeals dismissed the City's appeal and the Ohio Supreme Court declined to hear the City's appeal. The case is back before the Probate Court for a jury trial on the issue of the amount of compensation and the parties are millions of dollars apart on the amount of damages.

- (c) *State ex rel. Duncan v. City of Mentor Council* (2005), 105 Ohio St.3d 372. The Ohio Supreme Court reversed the Court of Appeals which had dismissed the landowner's mandamus action for lack of a final decision by the City on whether the parcel could be built upon under *Williamson County*, 437 U.S. 172. The Ohio Supreme Court held that there were issues of material fact as to whether the City Planning Commission's decision was final since it was based upon deed restrictions. The case is interesting from a factual standpoint. Dicta in the case regarding the test for a takings claim in Ohio, however, may be questioned now that *Lingle*, *supra*, was decided by the U.S. Supreme Court one month later.

C. USE OF EMINENT DOMAIN/DIRECT TAKING FOR URBAN RENEWAL AND ECONOMIC DEVELOPMENT

1. Municipal eminent domain authority

- (a) Article XVIII, Sec. 3, Ohio Constitution: authority to exercise "all powers of local self-government"

Construed to include powers of eminent domain – *State ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13.

- (b) Article I, Sec. 19, Ohio Constitution: property owner must be compensated where private property taken for public use

These constitutional powers are self-executing, cannot be limited by statute.

- (c) Article XVIII, Sec. 10 authorizes acquisition or appropriation of property in excess of that which will be occupied by public improvement
 - (i) Excess may be sold – subject to restrictions needed to preserve public improvement

2. Urban Renewal

- (a) Urban redevelopment to eliminate deteriorated conditions and provide against recurrence is public purpose for which municipality may use eminent domain.
- (b) “We do not believe that anyone will seriously contend that the elimination of slum and other conditions of blight and provisions against their recurrence would not be conducive to the public welfare and a public purpose, and that the use of property in doing that would not be a use for a public purpose.” *Bruestle, supra*, at 27-28.
- (c) Test is whether *primary purpose* of property acquisition is for public welfare.
 - (i) If so, use of eminent domain powers is proper even where there is incidental non-public use or benefit.
 - (ii) Corollary: no prohibition against reconveyance of property properly acquired for urban renewal for appropriate public or private redevelopment. *Bruestle; Eighth & Walnut Corp. v. Public Library of Cincinnati* (1st App. Dist. 1977), 57 Ohio App. 2d 137.
- (d) Statutory authority for urban renewal
 - (i) Municipality not required to proceed under statutes for urban renewal.
 - (ii) *Bruestle* – “No provision of the constitution of Ohio authorizes the interference by general laws with the exercise of the power of eminent domain, to the extent that such power is granted to municipalities by Sections 3 and 10 of Article XVIII of that Constitution.” (Syllabus)

3. Redevelopment by Community Development Corporation (CDC)

- (a) R.C. Chapter 1728: CDC may apply to municipality for approval of project to redevelop blighted areas in accordance with community development plan approved by municipality and financial agreement between CDC and municipality.

R.C. §§1728.06, 1728.07
- (b) CDC remains subject to regulation by municipality for duration of financial agreement.

- (c) Municipality may lease or sell to CDC land it has acquired by eminent domain. R.C. §1728.03
- (d) Financial agreement must provide for relocation of persons, families, business concerns, and others that the project displaces. R.C. §1728.07(E).
 - (i) Relocation required for those displaced by eminent domain when private property appropriated for urban renewal pursuant to R.C. Ch. 1728 or R.C. §719.011.
 - (ii) R.C. Ch. 163 mandates relocation but only for federally-assisted projects or state highway improvements.

Where municipality appropriates private property for urban renewal purposes under Art. I, Sec. 19 and Article XVIII, Sec. 3 of Ohio Constitution, and no federal assistance involved, relocation assistance for displaced persons not required.

4. Implementation of Urban Renewal Project

- (a) “Deteriorated area” – section of real estate that is deteriorating and where development is stagnant and unproductive. *AAAA Enterprises, Inc. v. River Place Comm. Urban Redevelopment Corp.* (Franklin Cty. 1991), 74 Ohio App. 3d 170, 174.
- (b) Marked by deterioration, declining property values, lack of growth.

May include individual properties, structures in good condition – *AAAA Enterprises; Buestle v. Rich, supra; Grisanti v. Cleveland* (1961), 18 O.O. 2d 143, 179 N.E. 2d 798. Mere presence doesn’t mean area not deteriorated.
- (c) Distinction from slum: Slum is state of inferior housing, beyond repair.
- (d) Implementation of project involves analysis of use of land in relation to surrounding areas.
 - (i) Is it best and most efficient use of land?
 - (ii) *AAAA Enterprises*: City of Columbus Dept. of Development conducted field surveys detailing use and condition of each building, lot and property, landscaping and street layout prior to

Council determination that area was deteriorated and in need of redevelopment.

(iii) *See also Eikenbary v. City of Dayton* (2nd App. Dist. 1964), 3 Ohio App. 2d 295, 301: City's redevelopment plan based on and supported by studies made by City Plan Board.

(e) Standard of Judicial Review

(i) Ohio Supreme Court: Abuse of discretion is proper standard for judicial review of municipal council's determination that area is deteriorated justifying use of eminent domain. *AAAA Enterprises, Inc., supra*.

(ii) "Courts are required to and should be zealous in giving...determination by the city great weight" and it is wholly inappropriate for court to substitute its judgment for that of a city council which has determined that an area is deteriorated. *Eighth & Walnut Corp., supra*, 57 Ohio App. 2d at 147.

5. Economic Development

(a) Ohio Rev. Code § 719.011.

"Impacted cities" empowered to acquire land by use of eminent domain to create jobs and employment opportunities. Land may be sold or leased for development for industrial, commercial or research use.

Beware of competitive bidding procedures in Charter, however.

(b) Article VIII, §13, Ohio Constitution: if creation of jobs is the public purpose, municipal corporation or county may negotiate the acquisition of property without use of eminent domain even if not "impacted city." Also see R.C. Ch. 165.

(c) Under Art. VIII, Sec. 13 powers, public agency may sell or lease property acquired by eminent domain at a reduced price for purposes of economic development.

(d) *Kelo, et al. v. City of New London, et al.*, (decided June 23, 2005), 545 U.S. _____, 2005 U.S. LEXIS 5011.

(i) Facts and lower court ruling: After Pfizer announced it would build new research facility in "distressed" New London, City Council approved development plan and authorized appropriation

of property in a 90-acre development area consisting of residential and commercial areas, a closed U.S. Naval Center, and a regional water pollution control facility. The property to be developed was to be under the control of a nonprofit development company which would sell off parcels for private development. A state park was also included in the plan.

The goal of the development plan was “to create a development that would complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and the use of the city’s waterfront, and eventually ‘build momentum’ for revitalization of the rest of the city, including its downtown.”

A few residential landowners challenged the condemnations.

In reliance upon the Connecticut Supreme Court’s long established deferential approach to the review of condemnation cases, and U.S. Supreme Court case law applying a similar approach, the State supreme court held “[a]n economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development, constitutes a valid public use for the exercise of eminent domain power under both the Federal and Connecticut constitutions,” and upheld the City’s right to exercise eminent domain.

- (ii) Holding: The City’s proposed disposition of the homeowners property qualifies as a “public use” within the Takings Clause of the U.S. Constitution.
- (iii) Analysis: The court noted that the City could not take the petitioner’s land simply to confer a private benefit on a particular private party, but the takings at issue here was to be executed pursuant to a carefully considered development plan which was not adopted “to benefit a particular class of identifiable individuals”. The fact that some of the condemned land would not be open to use by the general public was consistent with the court’s prior holdings that embraced a broader and more natural interpretation of public use as “public purpose”. The Court said the City’s determination that the area at issue was sufficiently distressed to justify a program of economic development is entitled to *deference*. The property owners’ proposal that the court adopt a new bright-line rule that economic development does not qualify as a public use is not supported by precedent or logic. Promoting economic development is a traditional and long accepted

governmental function, and there is no principled way of distinguishing it from the other public purposes the court has recognized. The court also rejected the petitioners' argument that for takings of this kind the court should require a "reasonable certainty" that the expected public benefits will actually accrue. The court declined to second-guess the wisdom of the means the City selected to effectuate its plan.

- (iii) Commentary: This ruling is not "open season" for private developers to use local governments' condemnation powers for their own purposes. The court was specific that condemnations may not proceed "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." New London was indisputably in economic distress and its plan was carefully considered, comprehensive in nature and had been subject to thorough deliberation and approvals. Of specific note by the Supreme Court was that the City had not chosen a private developer or the private tenants at the time of the decision to exercise eminent domain, which reduced the risk that the use of eminent domain was for the benefit of a particular private interest. Particular note should be made of Justice Kennedy's concurring opinion which provided the fifth vote in favor of the City. His opinion lists standards for scrutinizing future condemnations.

In this opinion, the Supreme Court maintains its "rational basis" test rather than "reasonable certainty" test but actually tightens up its prior holdings with respect to the "public use" requirement of the Fifth Amendment. Even Justice Thomas' dissent acknowledges one hundred years of precedent for New London's position. This holding does not expand the current jurisprudence with respect to "public use" but actually limits prior precedents. Obviously, it did not go far enough for these property owners and property rights advocates.

- (e) *City of Brook Park v. Brook Park Community Urban Redevelopment Corporation, et al.*, Cuyahoga County Court of Common Pleas, Probate Division, Case No. 99 ADV 15039.
 - (i) Court held that pursuant to Ohio Constitution, Art. VIII, §13, economic development is a valid and proper public purpose as a matter of law.
 - (ii) Citing *State ex rel. Ryan v. City Council* (1984), 9 Ohio St.3d 126, 130, the court noted that urban renewal and economic development have never been held not to be "proper public purposes."

- (iii) In acquiring the International Exposition ("I-X") Center property, the court reasoned that the City of Brook Park was preserving the jobs created by the I-X Center and promoting the creation of new jobs at the I-X Center and in the surrounding area.
- (f) *City of Akron v. Pellegrino Piermarini, et al.*, Summit County Court of Common Pleas, Probate Division, Case Nos. 2000 CV 39; 2000 CV 40.
- (i) City approved a redevelopment plan for an area zoned for light industrial use and preceded to appropriate the defendants' properties after determining the properties were blighted and that the appropriations were necessary to create jobs, expand industry and promote the economic well-being of the city.
 - (ii) The court took a deferential approach noting that what constitutes a public purpose must be interpreted broadly.
 - (iii) Relying on case law from other states, court held that "economic development alone [is] a sufficient basis for public purpose for appropriation," and that blight and the condition of the land being appropriated is but one factor in determining the reasonableness of public purpose.
 - (iv) The parcels at issue were in deteriorating condition, and a majority of the acreage was vacant. In acquiring these parcels, the court found that the city was meeting its purpose of removing blight and encouraging economic development. The acquisition of the parcels would create and maintain jobs, and provide the city with the ability to improve and develop the property in unity with other similarly used city-owned properties.
 - (v) Applying a rational basis test the court held the plan was rational and reasonable, in that the primary purpose was the creation of jobs, which would benefit the city, while any benefit to private interests was incidental.
- (g) *City of Norwood v. Horney*, Case No. 05-0227, pending before the Ohio Supreme Court
City of Norwood v. Gamble, Case No. 05-0228, pending before the Ohio Supreme Court
- (ii) On February 22, 2005, the Ohio Supreme Court granted emergency motions for stay of the order of First District Court of Appeals and motions for injunctive relief in both cases blocking

the City from appropriating two (2) homes as part of the city's renewal plan designating a residential area as "deteriorated."

- (ii) The First District Court of Appeals (See *Gamble, et al. v. City of Norwood*, Hamilton App. No. C-040019, 2004-Ohio-4661, 2004 Ohio App. LEXIS 4242), dismissed the appeals of the Horneys and the Gambles finding that the trial court did not err in granting the City's motion to dismiss the parties' challenge to the City's designation of their property as subject to urban renewal on the basis that a property owner may bring a declaratory judgment action to challenge a blight/urban renewal designation provided that that a condemnation proceeding has not been instituted. Since the City had instituted condemnation proceedings against the Horneys and Gambles, the City's motion to dismiss was properly granted.