



## Zoning and the Fifth Amendment: When do Zoning Regulations “Go Too Far”?

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The Michigan Court of Appeals recently rejected a landowner’s challenge of a zoning restriction as a regulatory taking requiring just compensation under the Fifth Amendment. In *Grand/Sakwa of Northfield, LLC v. Twp. of Northfield*, 304 Mich. App. 137, 851 N.W.2d 574 (Mich. Ct. App. 2014), the court held that a township’s denial of an application to rezone land from agricultural to single-family residential did not constitute a regulatory taking based on the three-part *Penn Central* balancing test.

Both the United States Constitution and the Michigan Constitution prohibit the government from taking private land for public use without providing just compensation to the landowner. A government taking is commonly thought of as a physical taking of a landowner’s property. However, the United States Supreme Court first recognized in 1922 that “if regulation goes too far it will be recognized as a taking.”[1] A regulatory taking occurs when a government regulation limits the use of private property to such a degree that it effectively deprives the property of any value.

The Supreme Court has recognized regulatory takings in two situations: (1) when a regulation leaves the landowner with no economically viable use of the land, known as a categorical taking;[2] and (2) based on the balancing test established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

With respect to the first category, a categorical taking only occurs when a regulation “denies all economically beneficial or productive use of land.”[3] For example, the Supreme Court held that a law prohibiting the owner of beach front property from erecting any permanent structures on the property rendered the property valueless, and therefore constituted a categorical taking under the Fifth Amendment.[4]

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If the regulation does not deprive the property of all economic value, courts will analyze the regulation under the *Penn Central* balancing test. *Penn Central* involved a challenge to New York City's Landmark Preservations Law, which prevented the Penn Central Transportation Company from constructing a skyscraper on top of Grand Central Station. The Court held that the application of the law did not constitute a taking based on a three-part balancing test. This test requires courts to consider (1) the character of the state action; (2) the economic impact of the regulation; and (3) the extent to which the regulation has interfered with a distinct investment-backed expectation.

*Penn Central* has been interpreted to place a high burden of proof on landowners challenging a regulation under the takings clause. As one federal appellate judge observed, "few regulations will flunk this nearly vacuous test."<sup>[5]</sup>

#### **GRAND/SAKWA V. NORTHFIELD - FACTUAL BACKGROUND**

In January of 2002, the plaintiffs purchased a large tract of agricultural land in Michigan that had been farmed for over 100 years. The plaintiffs applied to rezone the property from AR (agricultural) to SR-1 (single family residential) to develop the land. Although the township board initially approved the rezoning, township residents subsequently organized a referendum that overruled the rezoning and left the property zoned AR. The plaintiffs filed suit against the township, alleging that application of any zoning classification more restrictive than SR-1 constituted a regulatory taking. Shortly after the lawsuit was filed, the township board rezoned the property from AR to LR (Low Density Residential District).

The trial court ultimately ruled in favor of the township and determined that the LR zoning did not constitute a regulatory taking. The plaintiffs appealed.

#### **COURT OF APPEALS' ANALYSIS**

The plaintiffs did not claim a categorical taking under *Lucas*, but argued that the trial court should have found a taking under the *Penn Central* balancing test. The Michigan Court of Appeals held that the trial court was correct in holding that the zoning classification was not a taking.

#### **Character of the state action**

The appellate court first held that the trial court did not err by finding that the first prong of the *Penn Central* test weighed in favor of the township. The court noted that zoning ordinances are generally permissible and that local governments may enact zoning restrictions to promote the general welfare, even if they adversely affect a landowner's property interests.

#### **Economic impact of the regulation**

The court also found sufficient evidence to weigh the second prong of the *Penn Central* test in the township's favor. Both parties stipulated that the LR zoning created a loss of the value that the plaintiffs would have received had the property been zoned SR-1. However, the court held that while a comparison of the values is



relevant to the analysis, it is not controlling. The only preexisting rights associated with the property in question were those permissible under AR zoning. The township's initial decision to rezone the property to SR-1 never took effect because it was superseded by the referendum. Thus, there was never any vested right to develop the property under any zoning classification other than AR. The LR zoning, although more restrictive than what the plaintiffs preferred, actually expanded the owners' preexisting land use rights. There was therefore no significant diminution in value of the land to weigh in the plaintiffs' favor.

**Extent to which the regulation has interfered with distinct investment-backed expectations**

With respect to the third prong, the plaintiffs argued that although they purchased land that was zoned AR, they purchased it with the reasonable expectation that the zoning classification would change. The court rejected this argument, asserting that an individual who purchases land that is subject to zoning limitations with the intent to seek a modification of those limitations "accepts the business risk that the limitations will remain in place or be only partially modified." Thus, the trial court did not err in finding that the third factor favored the township.

Finally, the court rejected the plaintiffs' argument that rezoning the property to LR violated their due process and equal protection rights. To show a violation of substantive due process, a plaintiff must prove (1) that there is no reasonable governmental interest being advanced by the present zoning classification, or (2) that the ordinance is unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area under consideration. The court held that the township's goals of controlling growth and maintaining open space were legitimate, the method chosen was not arbitrary or capricious, and the plaintiffs' property was not improperly singled out under the circumstances.

**CONCLUSION**

As this case demonstrates, courts have given substantial deference to decisions by local governments to enact zoning regulations. For a landowner to successfully challenge a zoning ordinance, courts will generally require proof that (1) the ordinance left little or no economically viable use of the land, (2) there is no legitimate government interest being advanced by the zoning classification, or (3) the classification is purely arbitrary and capricious. Developers must be cautious in purchasing land, as the court has clearly indicated that the purchaser assumes the risk that an application for rezoning will be denied. Local governments have broad discretion to enact reasonable zoning regulations that further legitimate government interests, such as controlling growth and maintaining open space.

Please contact a Foster Swift municipal or real estate attorney with any questions regarding the constitutionality of zoning regulations.

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[1] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[2] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).



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[3] Id. at 1015.

[4] Id.

[5] Dist. Intown Props. Ltd. P'ship v. Dist. of Columbia, 198 F.3d 874, 886 (D.C. Cir. 1999).