MPT – February 2015 – Selected Answer 1

MEMORANDUM

TO: Esther Barbour FROM: Examinee DATE: February 24, 2015
RE: Daniel Harrison matter

QUESTION PRESENTED

Whether Abbeville's denial of Harrison's rezoning application can give rise to an inverse-condemnation theory in Franklin under either state or federal law.

BRIEF ANSWER

Franklin recognizes at least three types of regulatory takings. Harrison will not be able to prove the first type of regulatory taking, a "total regulatory taking," because the regulation did not deprive his property of all economic value. Harrison will probably be able to prove the second type of regulatory taking, a "partial regulatory taking," because the City's action unreasonably interfere with Harrison's land under the Penn Central test. The third recognized type of regulatory taking, a "land use exaction," is not relevant here since the City has not demanded that Harrison take some action that is disproportionate to the impact of the development. A fourth type of regulatory taking, evaluated under the "substantial advancements" test, may exist here. But it is unclear whether that test still exists in Franklin, and Harrison should not rely on its availability to his detriment.

ARGUMENT

1. The City's action does not constitute a total regulatory taking because the regulation did not deprive the property of all economic value.

A total regulatory taking occurs when a property owner is required to sacrifice all economically beneficial uses of the land in order to serve the common good. Under the United States Supreme Court decision in Lucas, the appropriate inquiry is whether the value of the property has been completely and totally eliminated. Lucas. Critically, this test does not consider whether the land can be profitably developed, and it does not consider investment-backed expectations. Moreover, it is important to note that, as a threshold matter, the fact that this plot had been rezoned before Harrison bought it does not prevent him from brining a takings claim. Palazzolo.

In Newpark Limited v. City of Plymouth, the Franklin Court of Appeal applied to the Lucas framework to hold that Plymouth's denial of a rezoning application did not constitute a total regulatory taking. In that case, the City had limited certain land to one-acre-minimum lots. The court denied the plaintiff's claim that this constituted a total regulatory taking. Although the court agreed that single-family residential use might increase value, it found that the land at issue was not totally without value because it still had a value of $2000 per acre. Franklin. It is also

In this case, the facts are similar to Newpark in that the City has denied a zoning reapplication that arguably would have enabled the land to be used for a more profitable purpose. The regulation enabled only residential use, but Harrison wishes to the use the property for a truck-driving school. The school would create a profit of $200,000, while residential use would result in a loss of $10,000-15,000. Under Lucas and Newpark, the residential restriction does not constitute a total taking for at least three reasons.

First, the land retains some value even after the regulation. An appraiser has valued it at $20,000 per acre, but this figure assumes continued industrial use. According to the realtor, it is more likely that the land will be valued at
$5000 per acre once developed and once the residential zoning is factored in. Harrison could argue that the $5000 figure

actually overstates the value of the land, since he will have to pay $75,000 in renovation and destruction costs on the current building, and since his tax liability on the land could be $10,000- 15,000 a month. Moreover, Harrison could argue the $5000 figure is below the $10000 per acre he paid for the land. These factors certainly limit the value of the land, and Harrison could argue that, since the tax liability will exceed the maximum profit allowable under the current zoning, the value of the land has been totally taken. But, as the Court explained in Newpark, "the takings clause does not require the government to guarantee the profitability of every piece of land subject to its authority." The Newpark court was clear that the mere fact that costs "would exceed the potential for revenue" does not make a case for a total regulatory taking under Lucas. Similarly, the Newpark court was clear that the fact that a proposed tract could "not be profitable" under current conditions did not mean that the regulation was a total taking, an argument which dispenses with Harrison's theory about his tax liability exceeding his likely revenue. For all of these reasons, Harrison's total-takings argument with likely fail. Moreover, the realtor also concluded that the land is worth a few hundred dollars per acre even if nothing is done or changed. This may be enough to ensure that "some" value remains even after the regulation. The fact that Harrison paid more than the land is worth is irrelevant because "the government has no duty to underwrite the risk of developing and purchasing real estate."

Newpark.

Second, even after the regulation, Harrison can use the land for other uses. In Lucas, the court mentioned that the ability to camp or picnic or live on the land conferred some value, as did the mere right to exclude others. Here, Harrison retains those uses.
Third, it may be possible that the Harrison tract can be used for a church, medical or dental clinic, or business office with a special-use permit from the City. This would entail substantial renovation costs, but could also generate significant long-term revenue if this area of town is further developed.
Because the land is worth at least something even after the regulation, this action does not constitute a total regulatory taking. Harrison has not been left with only a "token interest." Newpark. Rather, there is some value in the land--it just happens to be less value than the "highest and best use."

2. The City's action constitutes a partial regulatory taking because it goes too far and unreasonably interferes with Harrison's use of the land.

A partial regulatory taking occurs when there is not a complete or physical taking, but the regulation goes "too far" and causes an unreasonable interference with the landowner's use of the land. For such a taking to occur, the regulation must, at a minimum, reduce the value of the property. However, some regulations that reduce the value of the land will not constitute partial regulatory takings. In order to make that determination, the United States Supreme Court developed a three-prong test in Penn Central. That test considers (1) the economic impact of the regulation, (2) the regulation's interference with the landowner's reasonable investment-backed expectations, and (3) the character of the governmental action. These factors are balanced together to determine whether a partial regulatory taking has occurred. Franklin Courts use the Penn Central test to evaluate regulatory takings because the provisions of the Franklin and federal Constitutions governing takings are very similar. See Newpark, Sheffield.

In this case, a court would likely find that the rezoning did constitute a partial regulatory taking of the value of the land. The threshold prerequisite is met since the zoning did reduce the value of the land. If zoned industrial, it could be worth $200,000, but, zoned residential, it will not be worth more than $5000 per acre. Moreover, there are significant costs associated with destruction and renovation. And the taxes, at $10,000-$15,000 per month, are considerable.

Moreover, the first Penn Central factor weighs in favor of Harrison. That factor inquires into the severity of the economic loss. As mentioned above, the industrial value of the land is 20,000 per acre, and the residential value is estimated at 5000 per acre (not including 15,000-20,000 in development costs per acre). Thus, the value of the land has been reduced at least 75% by the regulation (and by more if renovation and development costs are considered). This reduction is significant under the first Penn Central factor. Unlike the Venture Homes v. Red Bluff case, in which the value of the land was only reduced by 4% because of the zoning, the value reduction in this case is quite significant.

The second Penn Central factor also favors Harrison because the zoning interfered with Harrison's reasonable investment-backed expectations. Unlike in the Red Bluff case, where the City had not rezoned to prohibit a current or proposed used, the City in this case did rezone to change uses. Admittedly, Harrison purchased the property after it had been zoned residential and thus was on notice that he may not be able to use it for industrial purposes. But the Franklin Supreme Court in the Sheffield case noted that the "primary expectations" of the landowner are relevant to determining interference with investment-backed expectations. In this case, Harrison's primary expectation was that he would be able to use the land for commercial purposes. The reasonability of his belief that he would be able to use the land for a "grandfathered" commercial

purpose is demonstrated by the fact that other bidders also big significantly above the residential value of the land, which lends support to the idea that a reasonable investor would expect that the land could continue to be used for commercial purposes. Moreover, as explained by the Newpark court, historical uses are very important when determining whether expectations are reasonable. Here, the historical use was more akin to what Harrison proposed to do than it was to what the City proposed the land be used for.

The third Penn Central factor asks whether a regulation harms a particular property disproportionately (which would weigh in favor of the landowner) or was a general zoning ordinance (which would weigh in favor of the city). Although more details are needed, it appears from the file as though the zoning ordinance enacted in 1994 applies to this tract particularly and is not general or city-wide. But there is no evidence that the zoning ordinance was enacted to benefit one private party, as was the case in the Red Bluff case. Thus, the sub- factors within the third-factor could be interpreted as pointing in different directions. In any event, the third factor is the least important Penn Central factor.
Because at least two of the Penn Central factors favor Harrison, a court would likely find that the City's action constituted a partial regulatory taking.

3. The City's action did not constitute a violation of the "substantial advancement" takings test (if it is still recognized in Franklin).

A third takings test, called the "substantial advancements" takings test, asks whether an ordinance or regulation "substantially advances legitimate state interests." This test has been rejected by the United States Supreme Court, see Lingle, and its status in Franklin is unclear. In both the Red Bluff and the Newpark cases, the Court commented that the status of the test was unclear in Franklin. If this question is ultimately litigated, there is a good chance that the Franklin Supreme Court could rule that it does not apply in Franklin. In the past, Franklin courts have interpreted the Franklin and federal Constitutions similarly; thus, if given the chance, the Franklin Supreme Court might say that the substantial advancements takings test is invalid in Franklin because it is invalid in the federal system.

If a Franklin Court does find that the "substantial advancements" test still applies in Franklin, it will be unlikely to find that the 1994 rezoning fails this test. There is a strong case that the City's zoning regulation substantially advances any legitimate state interest because the nexus between the presumed purpose of the regulation and the state's goal is strong. In this case, there has been little residential growth in the area of Harrison's land since the 1960s. The land is near a baseball field and the airport, and is in a remote area of town with little growth and little traffic. Although more information is needed, it appears that the City may have rezoned the land in order to promote residential development in this area of town. If so, the regulation is probably reasonable--it may be providing an avenue for expansion of the city's population, increasing use of the park and airport, and distributing traffic in a way that will be better for the city as a whole. These concerns are similar to the ones that motivated the Franklin Court of Appeal to find that Red Bluff's proposed PUD 30 "substantially advanced" a legitimate state goal. In the Red Bluff case, the court found that a plan that promoted mixed-use, pedestrian-friendly, urban development had a reasonable nexus to the state's goal of enhancing it's citizens quality of life. Such efforts might decrease traffic, lower commute times, and encourage citizens to walk.

For these reasons, the City's action probably will not be found to violate the "substantial advancements" test.

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1)

In re Harrison

Background

In this case, Daniel Harrison's best chance at recovery for inverse condemnation theory would be to use the partial taking theory. There are two statutes on point dealing with this issue, as well as some applicable case law. First, the Franklin Constitution Article 1, § 13 states that, "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." Second, the Fifth Amendment to the United States Constitution states, "No person shall...be deprived of life liberty or property, without due process of law; nor shall private property be taken for public

use without just compensation." Franklin case law states that the Franklin Constitution prohibition against takings without just compensation is comparable to the United States Constitution prohibition; therefore, the courts will look to federal precedent to resolve an inverse condemnation issue. Newpark, Ltd. v. City of Plymouth (Franklin Ct. App. 2007).
Franklin courts have proclaimed three different types of takings, as well as the "substantial advancement" test to determine whether or not a taking has actually occurred such that a private owner may recover from the government. See Newpark; Venture Homes. The three tests are as follows: 1) a total regulatory taking, where the regulation deprives the property of all economic value; 2) a partial regulatory taking, where the challenged regulation goes "too
far"; and 3) a land-use exaction, which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development (e.g., a developer is required to rebuild a road but the improvements are not necessary to accommodate the additional traffic from the proposed development). Newpark. Further, an inverse takings claim might be based on the "substantial advancement" test; however, due to recent case law, this test my well be abolished. See Lingle v. Chevron, 544 U.S. 528 (2005). This test looks for a nexus between the effect of the ordinance being complained of and the legitimate state interest it is supposed to advance. Venture Homes. The test does not look to the actual purpose of the City's action. Id. As discussed below, Mr. Harrison's best chance at recovery would be to pursue an inverse condemnation claim under the partial takings test.

Total Regulatory Taking

A total regulatory taking is extensively discussed in Newpark. Citing to Lucas v. South Carolina Coastal Council, the court states "[A] total regulatory taking occurs when a property owner is called upon to sacrifice all economically beneficial uses in the name of the common good. Id.; 505 U.S. 1003 (1992). Further, the court states that the absence of a profit potential does not equate with impossibility of development. Newpark. The court will simply inquire whether, after governmental action, value remains in the property. Id. The deprivation must be tantamount to depriving the owner of the land itself. Id. The taking must leave the property with literally no economic viability. For example, in Wynn v. Drake, the Franklin Supreme Court found that no taking occurred when zoning left the owner with only recreational and horticultural uses. The Newpark court even stated that the right to exclude others from the land and alienate the land may constitute value. Newpark. In this case, Harrison will not be able to recover under the total taking theory. There government's denial of his request for rezoning must literally leave the property with no value. Here, while the property has fairly limited value, it still has some economic viability. This is evidenced by a few facts. First, the Committee even postulated that the land might be used for a church, medical or dental clinic, business office, or a day-care center. All of these things would result in profit. Second, Amy Conner, the real estate agent said that it would potentially be possible to receive $5,000 per lot if Harrison developed the lot. She also said that undeveloped, the land might sell for a few hundred dollars an acre. Even still, Harrison retains his property rights and is allowed to use the property for recreational use if he so pleases. There is clearly some value, albeit a small amount, in this property; therefore, the court will not consider this a total regulatory taking.

Partial Regulatory Taking

A partial regulatory taking is heavily discussed in Venture Homes. When deciding on the occurrence of a partial regulatory taking, the court will look at three factors: 1) the economic impact of the regulation; 2) the extent to which the regulation interferes with the property owner's reasonable investment backed expectations; and 3) the character of the governmental action. Venture Homes. The first factor, being the most important, deals with the economic impact suffered by the owner. In Venture Homes, the owner only suffered a 4% loss, which the court felt was not substantial. Venture Homes. Here, Mr.
Harrison paid $100,000 for the land (10,000/acre). An appraiser valued the land at $200,000 (20,000/acre) if used as Mr. Harrison intends. Other bids came in for the property from $20,000-$88,000 (2000/acre-8,800/acre). After the refusal to rezone the property, the property is at best worth $5,000/acre and at worst a few hundred per acre. Even if the court finds that Mr. Harrison assumed the risk of overpaying for the property, this large of a difference in value is likely to be considered substantial. The second factor looks to the interference with the owner's reasonable investment backed-expectations. Id. In Venture, there was no real interference that could be shown, so the factor was weighed against the owner. Id. Here, Mr. Harrison's entire purpose of buying the land has been interfered with. He can no longer do anything close to what he wanted to do. However, his expectations for the land must be reasonable. Here, Harrison believed that the land had been grandfathered in as not having to apply to the enacted zoning regulation. This appears reasonable under the circumstances given how the property was being used when he bought it. The third factor looks at the character of the governmental action and if it harms a particular property disproportionately. This factor doesn't seem to be applicable here to a large extent. The council is enforcing a regulation that applies to the whole area, not just this lot. It however, is the least important. Overall, the factors weigh in the favor of Mr. Harrison, and he would have a good chance at recovery under this theory.

Land Use Exaction

The third theory is a land use exaction, which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development. This theory does not

appear to be applicable, and it would not be a viable theory for Mr. Harrison.

Substantial Advancement Test (may be abolished in Franklin)

Finally, the "substantial advancement" test theory of recovery does not seem to be a good avenue to pursue for Mr. Harrison. As stated in Venture Homes, the test looks not at the actual purpose behind the government action, but at the nexus between the effect of the ordinance and the legitimate interest it is supposed to advance. Venture Homes. Here, the City Council stated that they were concerned about the proximity of the tract to the park, and suggested other uses. The facility contains dangerous asbestos too. There appears to be a nexus between the effect of the ordinance (not rezoning) and the legitimate interest it is supposed to advance (safety of the community). Therefore, this does not appear to be a good avenue to recover for Mr. Harrison.

Conclusion

In sum, the only chance Mr. Harrison has at recovery for an inverse condemnation suit would be to go forward under the partial regulatory takings theory. There was a substantial effect on his economic interest. He can no longer use the property as he wanted to. Finally, even though the third factor is not necessarily is his favor, it is the least important. Mr. Harrison should pursue an inverse condemnation claim under the partial regulatory taking theory as laid out in Venture Homes.