ASTON'S MINING LAW CASE REVIEWS™

R. LEE ASTON

Ph.D., D. Eng., J.D., Attorney-at-Law
Mining & Geological Engineer
Aston Mineral Law & Engineering Div.,
Aston Law Offices-Ga.,Va., Ind.,Mont.-Attorneys-at-Law
P.O. Box 34, Elberton, Georgia 30635 USA
E-mail: leeaston@negia.net

Aston's Complimentary Case Review # 12-10-02

Jurisdiction : United States **Colorado Court of Appeals**

COLORADO SUPREME COURT RULES ON REGULATORY "TAKING" OF A MINING PROPERTY

In *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs*, 8 P.3d 522 (Colo. App. 2000), the effect of a county land use plan on real property lying within a river valley caused the landowner, a sand and gravel company (hereafter, AVSG), to bring an inverse condemnation action against the county, alleging that the restrictions placed on its property pursuant to the plan, resulted in a greatly diminished property value and use, and consequently was a compensable taking.

At the trial court level, the trial court determined that the plan did not effect a compensable taking holding that a regulation must foreclose all reasonable use of the property for it to effect a taking. It held that because AVSG failed to prove that the plan rendered property economically idle, the plan did not effect a taking. On appeal, court of appeals agreed with the trial court's definition of the property at issue, agreeing that while certain rights in the land may not be severed, the land may be geographically severed to ascertain the economic viability of the most severely affected portion of the land. It further agreed with the trial court's determination that a taking can only occur when there is a total deprivation of reasonable use of the land. The court of appeals remanded the case because it found that the trial court may have placed an inappropriate burden of proof on AVSG. The plaintiff AVSG petitioned the Colorado Supreme Court for *certiorari* to review their case asserting that the court erred in holding that the economic use test is dispositive in a regulatory takings claim and in refusing to examine mineral rights separately. The county filed a cross-petition asserting that the court of appeals erred in limiting its focus only to the River Corridor property rather than examining the plan's effect on Tract B as a whole.. Review was granted.

Background Facts :

In 1961, AVSG purchased 46.57 acres of real property in La Plata County, Colorado. AVSG intended to use the land for sand, gravel, and heavy mineral mining. There were no county, state, or federal regulations governing sand and gravel operations at the time the land was purchased In

1979, AVSG divided the original property into two tracts: Tract A, comprising 4.65 acres, and Tract B, comprising 41.92 acres. Tract B is the parcel at issue here.

In 1993, La Plata County (hereafter, the County) adopted the Animas Valley Land Use Plan (hereafter, the Plan). The Plan sought to regulate development and activities within certain areas out of concern for flood control and aesthetic concerns likely aimed at increasing tourism. At that time, AVSG had a permit to mine roughly eight acres of Tract B and two acres of Tract A. The county designated these ten acres as "industrial district" land (Industrial property) pursuant to the plan. Under this designation, AVSG was permitted to continue its sand and gravel operation. The county designated the remaining acreage as "river corridor district" land (River Corridor property). Although some agricultural, residential, professional office, and tourism uses are permitted (either by right or by special permit), mining of sand, gravel, and heavy minerals is not permitted on land with this designation.

Following the county's categorization of the parcel, AVSG requested that the county designate all of Tract B as Industrial property rather than just eight acres of it, The county denied this request. AVSG then sought relief in the district court. The district court denied AVSG's request for relief, as well as its subsequent motion to reconsider. No appeal was taken from this judgement. [Animas Valley Sand & Gravel, Inc., v. Board of County Commissioners of The County Of La Plata, Colorado, 38 P.3d 59, 62 (Colo. 2001)] The Colorado Supreme Court granted a review of the case.

The Colorado Supreme Court's Analysis :

The issues granted review were :
(1) Whether a compensable regulatory taking can occur under Colo. Const. art. II, § 15, when the complained of regulation "goes too far" and substantially diminishes the value of the property, even in circumstances where the property retains some economically viable use.
(2) Whether a regulation that prohibits the mining of property constitutes a compensable taking of the property owner's mineral rights under Colo. Const. art. II, § 15.
(3) Whether, in analyzing a portion of property to determine if a land use regulation results in a "taking,", the court must consider the impact of the challenged action on the property as a whole.

Inverse condemnation is a claim for relief brought by a landowner against a government defendant in which the landowner seeks compensation for a taking of its property, even though the governmental entity has not instituted formal condemnation proceedings. A taking may be effected by the government's physical occupation of the land, or by regulation. While a landowner is not entitled to the most beneficial use of his land, extensive regulatory interference warrants compensation. The "general rule" at least is, "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).]

The Court stated, "Takings jurisprudence balances the competing goals of compensating landowners on whom a significant burden of regulation falls and avoiding prohibitory costs to needed government regulation. Citing *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), "The Takings Clause assures that the government may not force 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"

Issue No. 1 :
A recent decision from the United States Supreme Court causes us to conclude that the court of appeals erred in its conclusion for the first issue. (See *Palazzolo*, 150 L. Ed. 2d 592, 121 S. Ct. 2448.)

The United States Supreme Court has established two *per se* tests under which a regulation can effect a taking absent a physical encroachment onto the land. First, a regulation constitutes a

per se taking when it "does not substantially advance legitimate state interests." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). Second, a *per se* taking occurs when a regulation "denies an owner economically viable use of his land." This second *per se* rule is at issue here. What has been unclear, until recently, however, is whether, in the absence of a *per se* taking, there nonetheless can be a taking pursuant to a second, fact intensive, inquiry.

"The United States Supreme Court has noted that whether or not a taking has occurred "depends largely 'upon the particular circumstances in the case'." *Penn Cent.*, 438 U.S. at 124. In *Penn Central*, the Court listed the economic impact of the regulation, the regulation's interference with investment-backed expectations, and the character of the governmental action as three such factors . In the most recent of these cases, *Lucas,* 505 U.S. 1003, the Court found that the regulation deprived the landowner of reasonable economic value. The Court did imply, however, that in situations in which a reasonable value remains, a second inquiry is appropriate: "An owner [for whom economic value remains] might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, 'the economic impact of the regulation on the claimant and … the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Lucas*, 505 U.S. at 1019. [Id. @ 65.]

"The most recent pertinent U.S. Supreme Court decision resolves any doubt that there is a two-tiered inquiry in regulatory takings cases. If a landowner fails to meet its burden of proving a *per se* taking, he can still prove a taking under a fact-specific inquiry. [See *Palazzolo*, 2001, 150 L. Ed. 2d 592, 121 S. Ct. 2448.]

In *Palazzolo*, the petitioner claimed a regulatory taking after the State of Rhode Island designated his land as coastal wetlands property. The trial court rejected his claim and the Rhode Island Supreme Court affirmed. [*Palazzolo v. State,* 746 A.2d 707 (R.I. 2000)]. One of the bases for the state supreme court's conclusion was that under the wetlands designation, the land retained a value of $ 200,000, and thus, the regulation did not render the land valueless. The United States Supreme Court affirmed the state court's determination that an economically viable use of the land remained. Nonetheless, the Court remanded the case for further determination under a fact-specific inquiry to complete the analysis. [*Palazzolo*, 121 S. Ct. at 2465.] The Court noted:

"Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. Id. at 2457 [**17] (citing Penn Cent., 438 U.S. at 124).

Thus, *Palazzolo* endorses a two-tiered inquiry in a regulatory inverse condemnation claim. First, a court must determine whether a per se taking has occurred. Second, if a landowner is unable to prove a *per se* compensable takings claim (because the regulation has a legitimate purpose and his land has not been rendered economically idle), the landowner still may be able to prove a taking has occurred under a fact-specific inquiry.

Although the *Palazzolo* Court did not address what level of interference a government regulation must have caused to constitute a taking under a fact-specific inquiry, a mere decrease in property value is not enough. This is true because a landowner is not entitled to the highest and best use of his property. n4 Reading *Palazzolo* together with the Court's prior precedent, it is apparent that the level of interference must be very high.

"We draw this conclusion from several sources. … See Lucas, 505 U.S. at 1019 n.8 (in which the Court references the *Penn Central* factors in response to the dissent's criticism that under the economic viability test " '[the] landowner whose property is diminished in value 95% recovers nothing,' while the landowner who suffers a complete elimination of value 'recovers the land's full value.' " We look to a number of cases in which the Court determined that even a significant

reduction in the value of land did not amount to a taking.[See, e.g., Agins, 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (no taking with an eighty-five percent reduction in value]; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926) - no taking with a 75 percent reduction in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915) (no taking with a 92.5% diminution in value). Finally, we note that in *Palazzolo,* the Court ordered a fact-specific inquiry when the regulation diminished the value of the petitioner's land by over 93 percent. [121 S. Ct. at 2456, 2457.]

"Thus, the Court's current formulation of the fact-specific inquiry seems to contemplate a situation in which the property in question retains more than a de minimis value but, when its diminished economic value is considered in connection with other factors, the property effectively has been taken from its owner. It provides a safety valve to protect the landowner in the truly unusual case.

" First, as a threshold matter, it is unclear whether the plan itself has had any economic impact on AVSG's land. The extent to which the sand and gravel industry has been regulated independent of the plan must be established. The record reveals that AVSG has operated under a permit since 1985. There is no evidence, however, regarding how long and to what extent the sand and gravel industry, in particular, and land use, in general, has had to conform to regulations in Animas Valley. The trial court must determine to what degree the current restrictions on AVSG's property are attributable to the plan rather than to the accumulated state and federal regulations of the past several decades that have arisen from both a growing population and an increased awareness of the environmental consequences of industry.

The Court took notice that the Animas Valley Plan has an economic impact on the owner's use of the property by limiting its past and intended use. However, noting an admonishment from *Penn Central* 438 U.S. at 130, the U.S. Supreme has stated that landowners cannot establish a takings claim "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development … . Assuming at least some restriction can be attributed to the Plan, the trial court must then quantify the resulting diminution in value, if any, of the property. The court must ascertain the net value of the land's use before and after the plan, and compare these two values. It is not enough to simply quantify the value of the sand and gravel deposits that could not be mined as a result of the plan." (Id. @ 66.)

" If AVSG is able to prove a diminution in value that is both substantial and attributable to the plan, AVSG will then need to prove that its reasonable investment-backed expectations were adversely impacted by the plan. There is a dispute regarding the long-range investment expectations of AVSG. … In sum, if AVSG is to prevail, it must show that it falls into the rare category of a landowner whose land has a value slightly greater than *de minimis* but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation ." [Id.@ 67]

Issues 2 and 3 :

" Because both the *per se* economic viability test and the *Penn Central* factual test involve a comparative analysis between the value of the property before and after the regulation, the definition of the relevant parcel of land is key to the inquiry. "

The Mineral Rights Analysis :

Concerning AVSG's argument for defining the relevant portion of the affected property, the Court stated, "…two forms of conceptual severance are appropriate: first, a geographical severance separating out the thirty-three acres of River Corridor property from Tract B as a whole; second, a rights severance, separating out the mineral rights from the full bundle of rights

in the land. " The Court noted that the County conversely argued that the appropriate scope of a takings inquiry is the entire parcel that the landowner owns. Although the Court agreed that the "mineral rights should not be considered in isolation " , it found that " the appropriate scope of a takings inquiry is the entire parcel of property owned by AVSG, we find that the court of appeals and trial court erred in limiting the focus of their inquiries to merely the River Corridor property."

The Court found that an examination of one distinct right in the property, as the mineral rights, was inappropriate. It noted that the U.S. Supreme Court "has consistently held that in regulatory takings cases, a court must determine the regulation's effect on the full rights in the land." . Consequently, the Colorado Supreme held that in this case, ".the trial court and court of appeals were correct in holding that the appropriate focus of a takings inquiry is the property rights as an aggregate rather than merely the mineral rights." [Id. @ 68.]

Further, the Court noted, " AVSG contended that in assessing the economic effect of the Plan, a court should look to the diminution in value of only the thirty-three acres designated as River Corridor property rather than of the entirety of Tract B. Both the trial court and the court of appeals agreed with AVSG and identified the River Corridor property as the relevant focus of the takings inquiry. This was in error. The appropriate "denominator" for determining the economic impact of a regulation is the contiguous parcel of property owned by the landowner, not merely the segment most severely affected. The United States Supreme Court has held that in assessing a takings claim, a court must look to the regulation's effect on the property as a whole 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . . Thus, in determining the economic ramifications of a regulatory act, a court must look at the contiguous parcel of land owned by the petitioner, not merely the portion most drastically affected by the regulation. … the trial court and the court of appeals erred in identifying only the River Corridor property rather than Tract B in its entirety as the relevant parcel of land." [Id. @ 69.]

<u>The Colorado Supreme Court's Decision</u> :

The decision of the court of appeals was reversed with the case being remanded to the trial court with directions to retry the case with instructions to specifically apply the fact-specific inquiry to Tract B in its entirety.

****