ANDREWS LITIGATION REPORTER

THOMSON WEST

Environmental

COMMENTARY

REPRINTED FROM VOLUME 24, ISSUE 22 / JUNE 4, 2004

Back in the Regulatory Taking Saddle *'Agins'*: *Chevron USA, Inc. v. Bronster*

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A recent decision by the U.S. Ninth Circuit Court of Appeals surprised many observers by defending property rights against undue government control. The decision, *Chevron USA, Inc. v. Bronster*, 363 F.3d 846 (9th Cir. April 1, 2004), applied a legal test that is based on legal precedent that has been relied upon infrequently by the courts. This new/old or old/new test may open the door for increased regulatory takings litigation.

The test, derived from the United States Supreme Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), provides an alternative to the more common regulatory takings test found in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The Ninth Circuit, which usually is hostile to regulatory takings claims, set a precedent that experts believe will now encourage other courts to rule in a similar fashion, by affirming a U.S. District Court decision finding a taking of Chevron's property without just compensation. The *Chevron* determination likely will revitalize and energize proponents of regulatory takings cases.

It is a fundamental constitutional principle that government cannot take private property for public use without the payment of just compensation. U.S. CONST. amend. V. Whether the taking is an actual physical occupation of land (or other property), or a so-called "regulatory taking" (i.e., where the value of private property is affected by statutory law, regulation, or permitting schemes), government is obligated to compensate a property owner when it is determined that the government action has "taken" private property.

Government regulation of private property is premised on the existence of an implied constitutional power — known as the "police power"— to protect the "public safety, health and morals." *See e.g.*, *Lawton v. Steele*, 152 U.S. 133, 136 (1894). When the police power is applied to private property, the result is often a reduction in the property's value. This diminution in value has been justified in very practical terms:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

In the seminal case of *Pennsylvania Coal Co. v. Mahon*, however, Justice Oliver Wendell Holmes, speaking for the Court, specified that "while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a 'taking.'" 260 U.S. at 415 (emphasis added). Virtually all of takings law is based on attempting to determine when government action has "gone too far."

In *Chevron*, the State of Hawaii enacted Act 257 in 1997 which, among other things regulates the maximum rent an oil company can charge dealers who lease their service stations. More specifically, Act 257 capped the rent that Chevron and other oil companies could collect from lessee-dealers at 15% of the dealer's gross profit on gasoline sales and 15% of the dealer's gross sales on products other than gasoline, plus a percentage increase equal to any increase the oil company may be required to pay on its ground lease.

Chevron sued, alleging that under the Act 257 mandate, Chevron would lose money — the maximum rent it could collect would be less than its expenses for the properties it leased in Hawaii. After significant preliminary skirmishing, *Chevron U.S.A., Inc. v. Cayetano*, 57 F.Supp.2d 1003 (D. Hawaii 1998), *vacated and remanded, Chevron USA,*

Inc. v. Cayetano, 224 F.3d 1030, 1032 (9th Cir. 2000), the case went to a trial in District Court.

A trial was held on February 26, 2002 and the District Court found for Chevron. The court ruled:

> that Act 257 will not decrease retail gasoline prices. In fact, it will cause retail gasoline prices to increase. Act 257 will also discourage oil companies from investing in lessee-dealer stations. It will create no incentive for lessee-dealers to continue operating their stations through lower operating costs. Instead, Act 257 will create a premium that lessee-dealers can recognize upon selling their leases. Act 257 will not advance the goal of lowering gasoline prices. 198 F.Supp.2d 1182, 1183 (D. Hawaii 2002).

Quoting from *Agins*, the District Court found that "Act 257 effects a regulatory taking if it does not "substantially advance a legitimate state interest." *Id.* at 1192. In this case, Act 257 did not substantially advance a legitimate state interest, thus the statute effected a taking of Chevron's property. The Ninth Circuit affirmed and ruled that the District Court applied the correct standard. 363 F.3d at 850.

The test applied by the Ninth Circuit relies on U.S. Supreme Court precedent set in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). This is significantly different than the test ordinarily applied in regulatory takings cases under the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

The familiar test in *Penn Central* requires the court to rule on three factors, commonly known as the *Penn Central* test: The court must evaluate: "[1] The economic impact of the regulation on the claimant and, [2] particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [3] So too is the character of the governmental action."

Agins — and now the Ninth Circuit — requires a favorable finding of one of two "prongs" of its test: The court must find either that the law effects a taking [1] "if the ordinance does not substantially advance a legitimate state interest, or [2] denies an owner economically viable use of his land." 447 U.S. at 261. If the statute or governmental determination fails either prong of the test, then the law effects an unconstitutional regulatory taking.

The state-defendant raised the question of the viability of the *Agins* test which was resolved in favor of the plaintiff. The *Chevron* court noted that although the test has not been relied upon often, it has been frequently cited by the Supreme Court as good law, including in the Supreme Court's two year old decision in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg. Planning Ag.*, 535 U.S. 302 (2002). *See* 363 F.3d at 852.

While *Chevron* was a rent control case, it is likely that plaintiffs will seek to apply the test in other types of regulatory takings cases. *Agins* was a zoning case (in which the plaintiffs lost). Cases that have found a taking, relying upon the test in *Agins*, have included a handful of zoning cases, *see e.g. Tandy Corp. v. City of Livonia*, 81 F.Supp.2d 800 (E.D. Mich. 1999) and a case in which the right to use a motorboat was found to be a part of a riparian owner's rights *Stupak-Thrall v. Glickman*, 988 F.Supp. 1055 (W.D. Mich. 1997).

In particular, cases in which laws, regulations or governmental determinations are based on non-economic factors — such as aesthetics or where the determination will only benefit a small number of individuals — likely will be targets of an *Agins/Chevron* attack.

Experts in the field of regulatory takings agree that for certain cases in which the *Agins/Chevron* test applies, this may be an easier test to meet than the three-prong *Penn Central* test. Determining whether a particular statute fails to substantially advance a legitimate state interest (by showing it has no or limited public benefit) will become a part of most takings cases in the future. *Penn Central's* focus on the economic impact of the regulation or statute is not a focus of the *Agins/Chevron* test, although such an analysis likely will still be a part of most takings cases.

Practitioners on the plaintiff's side will want to include an *Agins/Chevron* count (that the governmental action at issue fails to substantially advance a legitimate state interest) in many regulatory takings claims. Opponents of such actions are now forewarned that they must rebut such claims. One thing is for certain, regulatory takings law continues to grow and surprise even those most familiar with it.

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