Washington and Lee Law Review

Volume 36 | Issue 2 Article 11

Spring 3-1-1979

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included the assets attributable to Kimbrell's, the district court correctly keyed damages to the parent's assets.

The Fourth Circuit expressed undue concern over the financial strain which those found liable may incur in multiple suits for Truth in Lending violations. A major concern supporting the court's decision was the potential $1.5 million recovery which could have resulted if consumers in each of Furniture Distributors' subsidiaries brought suit and claimed damages calculated on the parent's net worth.[53] Ultimately, *Barber* will allow large corporations to escape substantial liability for Truth in Lending violations by limiting awards to one percent of the net worth allocable to a subsidiary. Further, the Fourth Circuit's decision encourages the establishment of subsidiaries as a means of avoiding substantial damages.

The "creditor's" net worth issue is a technical one and is important primarily to large enterprises operating through subsidiaries. Although commentators predicted much litigation over the issue at the time of the Act's amendment,[54] the question has received little attention. This result is attributable to the fact that a class action is rarely a superior means of adjudicating Truth in Lending controversies, and few classes receive certification.[55] Nevertheless, the *Barber* decision indicates the Fourth Circuit's reluctance to impose large penalties for violations of statutes such as the Truth in Lending Act.

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VII. CONSTITUTIONAL LAW

Federalism in De Facto Taking Analysis

In *Donohoe Construction Company v. Montgomery County*[1] the Fourth Circuit denied compensation under the fifth amendment for state-imposed burdens[2] on a developer's property interests.[3] The Fourth Circuit predicated its decision in part on recently emerging principles of federalism,[4]

[53] *See* 577 F.2d at 224. The one-year statute of limitations imposed by the Act, 15 U.S.C. § 1640(e) (1976), would likely prevent exorbitant multiple recoveries since no other suits had yet been filed against the defendants with regard to the violations alleged in the instant case. The *Barber* court dismissed this point in a footnote, reasoning that ". . . it is the potential overall recovery which concerns us, not the likelihood that it will be realized." *Id.* at 224 n.21.

[54] *See* Evans, *supra* note 48, at 13.

[55] *See* Weathersby v. Fireside Thrift Co., 5 CONS. CRED. GUIDE (CCH) ¶ 98,640 at 88,181 (N.D. Cal. 1975) (noting Congress' failure to provide mechanism enabling courts to handle Truth in Lending class actions).

[1] 567 F.2d 603 (4th Cir. 1977), *cert. denied*, 98 S. Ct. 3123 (1978).

[2] *Id.* at 609. *Donohoe* dealt with both state and county action. *See* note 8 *infra*. Since the power of local government in land planning exists only as delegated by the state, no distinction will be made between municipal, county and state action as an exercise of state power. *See* Thomson v. Lee County, 70 U.S. (3 Wall.) 327, 330 (1865) (political subdivisions of a state exercise only powers delegated by the state).

[3] 567 F.2d at 609.

[4] *Id.*, n.17; *see* note 41 *infra*.

reaffirming state discretion in land use planning.[5] The *Donohoe* decision may signal the Fourth Circuit's increasing reluctance to subject local land management policy to federal review under the compensation clause of the fifth amendment.[6]

The *Donohoe* litigation arose after a series of land use restrictions frustrated Donohoe Construction Company's (Donohoe) attempt to build an office tower on property in Montgomery County, Maryland.[7] Donohoe bought the tract in March 1973, in spite of a pending county zoning proposal designed to curtail commercial development of the tract.[8] Shortly after the purchase Donohoe applied for a building permit, submitting a subdivision plan with its application.[9] Montgomery County denied Donohoe's subdivision plan in August 1973 for lack of adequate sewer service.[10] In April 1974 the county rejected Donohoe's building permit application.[11] In May 1974 Montgomery County set aside funds to acquire Donohoe's land for a park sometime in 1975, and in July 1974 the county rezoned the area to prevent construction of commercial office buildings.[12] At this point, Donohoe filed suit in federal court alleging that Montgomery County had deprived the use of its property without just compensation in violation of the fifth and fourteenth amendments.[13]

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[5] 567 F.2d at 609.

[6] *See* text accompanying notes 42-44 *infra*.

[7] 567 F.2d at 605.

[8] *Id.* The Montgomery County Council was the principal defendant in *Donohoe* although the case actually concerned cooperative action by four state and county agencies. A master plan drafted by the Maryland-National Capital Park and Planning Commission (Park Commission) governed the land in controversy. *Id.* n.1. The Montgomery County portion of the plan is overseen by the Montgomery County Planning Board (Planning Board), comprised of those members of the Park Commission appointed by the Montgomery County Council. *Id.* n.2. The Montgomery County Council in turn has final authority over land use in Montgomery County. *Id.* at 606. The fourth agency involved was the Washington Suburban Sanitary Commission (Sanitary Commission), charged with managing public sewage facilities in Montgomery County. *Id.* at 605 n.3.

[9] Donohoe intended to raze two existing houses and to combine the lots for its office building. *Id.* at 605. If a tract is enlarged or subdivided a subdivision plan must be submitted to keep county plat records current. *Id.* at 606 n.4. The subdivision plan must be cleared before a building permit can issue. *Id.* at 606. *See also* MD. ANN. CODE art. 66B § 5.01 (1957); MONGOMERY COUNTY CODE § 50-20 (1972).

[10] 567 F.2d at 606. A moratorium on new sewer hook-ups was in effect in Montgomery County. *Id.* n.6. A federal district court had previously upheld the moratorium as a constitutional exercise of state power to protect the public health. *See* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm., 400 F. Supp. 1369, 1383 (D. Md. 1975).

[11] 567 F.2d at 606.

[12] *Id.*

[13] The fifth amendment forbids that "private property be taken for public use without just compensation." U.S. CONST. amend. V. The fifth amendment constrained at first only the federal government and not the states. Munn v. Illinois, 94 U.S. 113, 124 (1876); Barron v. Baltimore, 32 U.S. (7 Pet.) 465, 466 (1833). However, the Supreme Court applied the spirit and then the letter of the fifth amendment in cases of state expropriations by incorporating its principle in the due process clause of the fourteenth amendment. *See* Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (fifth amendment's prohibition of expropriation without compensation incorporated in the meaning of due process) (dictum); Smyth v. Ames, 169

The lower court concluded that Montgomery County's actions exceeded permissable regulation and amounted to an expropriation of Donohoe's property, by "preventing any reasonable economic use of [Donohoe's] land."[14] The Fourth Circuit reversed, directing entry of judgment for Montgomery County.[15] Although the Fourth Circuit attributed the disparity between its result and that of the lower court to a differing interpretation of the facts, the Fourth Circuit's desire to promote local land planning underlay its decision, while the lower court addressed primarily the effect of the land regulation on Donohoe's interests.[16]

Before addressing the merits of the case, the Fourth Circuit disposed of two jurisdictional issues.[17] The Fourth Circuit first held that Donohoe's complaint raised a federal question cognizable in federal court.[18] The Fourth Circuit then determined that the controversy involved no potentially dispositive issues of state law, making abstention inappropriate.[19] Having asserted its jurisdiction the Fourth Circuit turned to the question

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U.S. 466, 522 (1897) (due process clause prohibits state taking property without compensation); Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236 (1896) (fifth amendment prohibition of expropriation a "principle of universal law" reflected in due process clause). U.S. CONST. amend. XIV § 1. *See also* Slavitt, *Just Compensation Updated,* 48 CONN. B.J. 241, 242 (1973). Unlike the fifth amendment, the fourteenth amendment is expressly binding on the states. *Ex Parte* Virginia, 100 U.S. 339, 346 (1879); U.S. CONST. amend. XIV § 1.

[14] 567 F.2d at 606. The lower court opinion is unreported. The Fourth Circuit cited pertinent portions. *Id.* at 606 n.10; 607, 608 n.15. The lower court entered judgment for $461,042.14, assessing the market value of Donohoe's land at $378,888, plus $82,154.14 in expenses for holding the property during the litigation. *Id.* at 605, 606 n.10.

[15] *Id.* at 605.

[16] *Id.* The Fourth Circuit viewed the facts as insufficient to support a finding of de facto taking. *Id.*

[17] 567 F.2d at 607.

[18] *Id.* Federal courts have jurisdiction only over claims that Congress has conferred authority on them to hear. U.S. CONST. art. III § 1, 2; Insurance Co. v. Dunn, 86 U.S. (19 Wall.) 214, 226 (1874) (Congress gives federal courts authority it deems fit to confer). Congress granted federal courts the authority to resolve controversies raising a federal question, such as issues arising under the Constitution. 28 U.S.C. § 1331 (1976); Hagans v. Levine, 415 U.S. 528, 542 (1974) (federal jurisdiction exists in cases presenting a federal question); Bell v. Hood, 327 U.S. 678, 684 (1962). The Fourth Circuit defined the federal question in *Donohoe* as the limitations placed on state condemnation and zoning powers by the fourteenth amendment. 567 F.2d at 607. Montgomery County argued that since the County had not yet acquired Donohoe's land no taking occurred, no violation of the fifth and fourteenth amendments resulted, and hence the case presented no federal question. *Id.* The Fourth Circuit noted a taking may encompass more than physical deprivation, *see* text accompanying notes 21-26 *infra,* and that where a complaint raises allegations that may or may not state a federal claim, a federal court should take jurisdiction to decide the merits of the controversy. 567 F.2d at 607.

[19] 567 F.2d at 607. Federal courts may abstain from exercising their jurisdiction if there exists a potentially dispositive issue of state law, thus making a constitutional decision unnecessary. Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496, 498 (1941); *see* Alabama Pub. Serv. Comm. v. Southern Ry., 341 U.S. 341, 347 (1951) (abstention in recognition of state court's greater familiarity with local situation); Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943) (abstention to allow state resolution of conflicts in state policy and interpret state law).

of whether Donohoe suffered an unconstitutional deprivation of property without just compensation.[20]

In fulfilling its function of promoting the public welfare, a state may exercise the power of eminent domain.[21] The fifth amendment obligates a state to compensate landowners for expropriated property.[22] The state also may serve public interests by land use regulation,[23] which often diminishes the value of property, but is uncompensable under the fifth amendment.[24] A difficulty arises when the landowner complains of regulatory burdens that virtually deprive him of his entire interest in the land. Depending on the purpose and effect of the burden and the extent of the state's gain and the landowner's loss, courts may find that a de facto taking of the land occurred and accordingly direct payment of compensation.[25] Each case turns on the court's interpretation of the facts.[26]

Both the district court and the Fourth Circuit acknowledged that Montgomery County injured Donohoe's property interests.[27] The lower

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[20] 567 F.2d at 607.

[21] The capacity of the state to take private property through the power of eminent domain is undisputed. United States v. Jones, 109 U.S. 513, 518 (1883). Eminent domain is a form of the state's police power since it serves the common good. Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); *see* Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553, 559, 560-61 (1972) [hereinafter cited as Stoebuck, Eminent Domain]. *See generally* W. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN, 167-71 (1976) [hereinafter cited as STOEBUCK, TAKINGS].

[22] *See* note 13 *supra.*

[23] Any restriction on land use deprives the owner of some interest and is in that sense a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting); *accord,* STOEBUCK, TAKINGS, *supra* note 21, at 170. *See also* Sax, *Takings and the Police Power,* 74 YALE L. REV. 36, 62 & 75 (1974) [hereinafter cited as Sax].

[24] Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (zoning to exclude industry held to be regulatory and uncompensable); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (prohibiting coal extraction deprived owner of his property interest but was nonetheless uncompensable); *see* note 26 *infra.*

[25] Taking without formal condemnation proceedings is called a de facto taking, de facto condemnation, or inverse condemnation. Baumgardner, *Takings Under the Police Power—The Development of Inverse Condemnation As a Method of Challenging Zoning Ordinances,* 30 SW.L.J. 723, 724 (1976). These terms are sometimes used interchangeably. *See, e.g.,* Richmond Elks Hall Assoc. v. Richmond, 561 F.2d 1327, 1330 (9th Cir. 1977).

[26] 567 F.2d at 608 n.13. The line between compensable and uncompensable burdens is difficult to draw, since the distinction results from conflicting policies. One policy is to preserve the sanctity of private property. 2 STORY, CONSTITUTION 547-48 (4th ed. 1873). Private property interests may be in conflict with the modern necessity of controlling land use, however, and a state cannot pay for every burden the state imposes. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). This tension between private interest and public need created a morass of decisions at both state and federal levels. *See* Dunham, *Griggs v. Allegheny County, A Perspective on Thirty Years of Supreme Court Expropriation Law,* 1962 SUP. CT. REV. 63, 64 n.2, 65; Payne, *A Survey of New Jersey Eminent Domain Law,* 30 RUTGERS L. REV. 1111, 1114, (1977). *See generally* Note, *Taking or Demanding by Police Power: the Search for Inverse Condemnation Criteria,* 44 S. CAL. L. REV. 1, 2 (1971). Efforts to reconcile de facto taking cases or formulate a test for separating compensable takings from uncompensable regulations have been unsuccessful. *Id. See also* Berger, *A Policy Analysis of the Taking Problem,* 49 N.Y.U.L. REV. 156, 166 n.5. (1974).

[27] 567 F.2d at 606 n.10; 609.

court considered Montgomery County's actions as a whole, viewing their cumulative effect as a de facto taking of Donohoe's property.[28] The Fourth Circuit chose to inquire further into the county's purpose in imposing each of the various burdens on Donohoe.[29] The court decided that the lower court failed to give sufficient weight to a pre-existing moratorium on new sewer connections in the area.[30] In light of the moratorium, the Fourth Circuit held that the county's refusal to issue a building permit, rejection of Donohoe's subdivision plan and subsequent re-zoning of the property were ostensibly intended to reduce sewage flow in the area, constituting an exercise of the state's power to protect the public health which could not be considered compensable.[31]

The Fourth Circuit consequently looked only to the burden imposed by county preparations for acquiring Donohoe's property to determine whether the county's actions amounted to de facto taking warranting federal intervention.[32] A prolonged threat of condemnation may unfairly diminish the market value of property before eventual government acquisition and can itself constitute a de facto taking.[33] The Fourth Circuit noted, however, that Donohoe's land lay under the "cloud of condemnation" for only six months.[34] Although the threatened condemnation substantially reduced the value of Donohoe's property, the Fourth Circuit held that six months was insufficient time to establish "strong and convincing evidence" that Montgomery County had abused its powers.[35] The Court concluded that to intervene so early and declare a de facto taking would disrupt legitimate planning efforts of local governments.[36]

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[28] *Id.* at 607-08.

[29] *Id.* at 608.

[30] *Id.* The Fourth Circuit was unwilling to reconsider the constitutionality of the sewer moratorium since none of the parties to the present litigation had any control over the moratorium. *Id.* at 608 n.14; *see* note 10 *supra.*

[31] 567 F.2d at 609.

[32] *Id.* at 608.

[33] *See, e.g.,* Richmond Elks Hall Assoc. v. Richmond, 561 F.2d 1327, 1329 (9th Cir. 1977) (delayed acquisition impermissably diminished land value); Foster v. City of Detroit, 254 F. Supp. 655, 666 (E.D. Mich. 1966) (city prolonged threat of condemnation to drive down value of property before acquisition). *See generally* Kratovil, *Zoning, A New Look,* 11 CREIGHTON L. REV. 433, 437 (1977); *see also* Sax, *supra* note 23, at 74; Hulen, *Abusive Exercises of the Power of Eminent Domain—Taking a Look at What the Taker Took,* 44 WASH. L. REV. 200, 221 & 224-26 (1971) [hereinafter cited as Hulen].

[34] 567 F.2d at 608.

[35] 567 F.2d at 609. The Fourth Circuit distinguished three cases Donohoe offered in support of the lower court's ruling in its favor, concluding that the three cases evinced a pattern of government abuse in which the "cloud of condemnation" hung over the property for years, and that such a pattern of abuse was absent in this case. *See* Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977) (federal renovation project deprived owners of use of hotel for ten years); Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970) (Park Service in creating national seashore frustrated developer's attempted acquisition of right-of-way and would not purchase disabled developer's land for four years); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966) (proposed city housing project led to dilapidation of property and loss of tenants; land subject to condemnation for ten years).

[36] 567 F.2d at 609 n.17.

The *Donohoe* decision did not articulate a specific test to determine what magnitude or duration of a burden on property would constitute a de facto taking.[37] The decision did evince the Fourth Circuit's reticence to entangle itself in land controversies and willingness to encourage local land planning even if at some expense to the private owner.[38] Between the extremes of imposing liability for all state infringements of property interests[39] or allowing unbridled discretion to restrict land use,[40] the Fourth Circuit apparently favors state discretion. The Fourth Circuit noted that its decision was consistent with a concern for federalism manifest in recent Supreme Court cases.[41]

The assertion of federalism in *Donohoe* may indicate a general inhospitality in the Fourth Circuit to challenges of state discretion in land use planning.[42] Traditionally, landowners have preferred to seek protection for their property interests in federal instead of state court, believing state courts to be more tolerant of burdensome local government regulations.[43]

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[37] *Id.* at 609. The Fourth Circuit indicated only that Donohoe had not yet suffered a de facto taking, since in regulating Donohoe's land Montgomery County did not egregiously abuse its powers. *Id.*

[38] The District Court held Montgomery County had exceeded the limits of due process. *Id.* at 608 n.15. The Fourth Circuit reversed the District Court's decision without explicitly defining the boundary between compensable and uncompensable burdens. *Id.* at 609. *See* note 37 *supra.*

[39] *See, e.g.,* Richmond Elks Hall Assoc. v. Richmond, 561 F.2d 1327, 1332 (9th Cir. 1977).

[40] The polar extreme of refusing compensation for any regulatory burden has never been accepted by a court although advocated by some commentators. *See, e.g.,* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE, 246-253, 325 (1973). *See also* Berger, *The Accomodation Power in Land Use Controversies: A Reply to Professor Costonis,* 76 COLUM. L. REV. 799, 815 (1976) (conflicting schools of thought on imposing the duty to compensate for diminished property values).

[41] 567 F.2d at 609 n. 17. The Fourth Circuit cited National League of Cities v. Usury, 426 U.S. 833 (1976) and San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) as exemplary of a recent trend in the Supreme Court in favor of protecting state autonomy from encroachment by the national government. 567 F.2d at 609 n.17. In *National League of Cities,* the Supreme Court struck down congressional legislation specifying minimum wage provisions for state employment, since allowing Congress power to dictate state hiring practices would "if unchecked . . . allow the National Government [to] devour the essentials of state sovereignty." 426 U.S. at 855, *quoting* Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting). In *San Antonio School District,* the Supreme Court upheld the Texas system of financing public education in the face of a fourteenth amendment challenge, even though the Texas apportionment resulted in better facilities for wealthy school districts than for poor districts. 411 U.S. at 6. The Court recognized the system needed reform, but held nonetheless that in the interest of federalism the Texas legislature must be free to distribute funds in whatever rational manner it chooses. *Id.* at 58.

[42] *Donohoe* is cited in a recent Maryland district court decision in support of the very strict requirement that a government must deprive the landowner of all reasonable uses of his land before a taking occurs. *See* Kent Island Joint Venture v. Smith, 452 F. Supp. 455, 560 (D. Md. 1978). The District Court in *Kent Island* asserted that it lacked jurisdiction or in the alternative should abstain from exercising its jurisdiction over state land use controversies, supporting the inference that *Donohoe* represents a general reticence of the Fourth Circuit to intervene in state land use planning. *Id.*

[43] *See* Hulen, *supra* note 33, at 224. There is no evidence to support the belief that federal courts are more sympathetic to landowners in taking cases than state courts. *Id.* Federal