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## **Supreme Court, New York County, Uhlfelder v. Weinshall**

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**SUPREME COURT OF NEW YORK  
NEW YORK COUNTY**

Uhlfelder v. Weinshall<sup>1</sup>  
(decided August 24, 2005)

Plaintiffs, owners and operators of newsstands in New York City, challenged the enforcement of Local Law 64<sup>2</sup> which affected “the ownership, installation and maintenance of, and placement of advertisements on, newsstands.”<sup>3</sup> Plaintiffs sought to preliminarily enjoin the city from enforcing Local Law 64 by alleging that “Local Law 64 effects a taking of their property without just compensation in violation of *Article I, section 7 (a)*<sup>4</sup> of the state constitution.”<sup>5</sup> The

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<sup>1</sup> No. 04-109890, 2005 N.Y. Misc. LEXIS 1812, at \*1 (Sup. Ct. Aug. 24, 2005).

<sup>2</sup> N. Y. Local Law No. 64 Int. 569-A (2003).

<sup>3</sup> *Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*1. Specifically, Local Law 64 amends the Administrative Code of the City of New York “sections 20-228, 20-229, 20-231, and 20-241.1.” *Id.*, at \*2 n.1. As a result of Local Law 64, plaintiffs seek injunctive relief, money damages, and declaratory relief from the RFP for a single franchisee. *Id.*, at \*4.

<sup>4</sup> *Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*12; N.Y. CONST. art. I, § 7 (a) provides: “Private property shall not be taken for public use without just compensation.”; U.S. CONST. amend. V provides in pertinent part: “. . . nor shall private property be taken for public use, without just compensation.”

<sup>5</sup> *Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*12. In addition to plaintiffs’ cause of action alleging a violation of the Takings Clause,

[p]laintiffs contend that Local Law 64 is overly broad and vague, and grants the City unfettered discretion in determining whether, and to whom, a license to engage in free speech will be granted, in violation of the *First Amendment of the United States Constitution and Article I, § 8 of the New York State Constitution* . . . will compel new dealers to engage in in-voluntary advertising in violation of their free speech rights under federal and state constitutions; violates the *equal protection and due process clauses of the federal and state constitutions*; and was implemented in violation of the community-input (ULURP) and environmental-study (SEQRA/CEQR) requirements.

*Id.*, at \*4.

trial court, relying on both state and federal constitutional authority,<sup>6</sup> denied defendants' summary judgment motion, finding that plaintiffs sufficiently stated a claim for a regulatory taking without just compensation.<sup>7</sup> However, the court subsequently denied plaintiffs' motion for a preliminary injunction because while "Local Law 64 may effect a taking, plaintiffs may be compensated financially for their alleged loss; therefore, a preliminary injunction [was] not appropriate."<sup>8</sup>

Newsstand operators and owners challenged the constitutionality of Local Law 64, alleging that the enforcement of this law would destroy the secondary market for their existing newsstands and subsequently render them worthless.<sup>9</sup> The development of Local Law 64 stemmed from a 1994 city task force initiative "to develop a master plan to reduce congestion from sidewalk obstructions, and to better regulate the streetscape of New York City."<sup>10</sup> Among other things, Local Law 64 mandated the replacement of existing newsstands with new newsstands owned by a single franchisee.<sup>11</sup> Moreover, current licensees were permitted to

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<sup>6</sup> *Id.*, at \*12 n.12.

<sup>7</sup> *Id.*, at \*14. Defendants' summary judgment motion was granted to the extent that the six other causes of action were dismissed. *Id.*, at \*19. In addition, plaintiffs' motion for an order compelling discovery in motion sequence 003 was denied as moot. *Id.*, at \*18.

<sup>8</sup> *Id.*, at \*14 (citing 1659 Ralph Ave. Laundromat Corp. v. Ben David Enter., LLC, 762 N.Y.S.2d 288 (App. Div. 2d Dep't 2003)).

<sup>9</sup> *Uhfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*13.

<sup>10</sup> *Id.*, at \*2. It is worthwhile to mention that prior to Local Law 64, in 1997, the City Council enacted Local Law 29. *Id.*, at \*2-3. Local Law 29 sought to enforce a Coordinated Street Furniture Franchise (CSFF) in support of the same 1994 master plan. *Id.* Several newsstand operators challenged the law in federal court and a preliminary injunction barring Local Law 29 was granted because it was found to permit "unlimited discretion to terminate a newsstand concession." *Id.*, at \*3 (citing *Gasparo v. City of New York*, 16 F. Supp. 2d 198 (E.D.N.Y. 1998)).

<sup>11</sup> *Id.*, at \*3. Local Law 64 not only required newly constructed newsstands that are in

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operate the new newsstands, at no cost, while new licensees had to pay the cost of constructing the newsstand in addition to the regular license fee.<sup>12</sup>

Plaintiffs based their claim on state constitutional law, but reserved their right to assert a federal constitutional claim in the future.<sup>13</sup> According to plaintiffs, they each invested between \$15,000 and \$35,000 to construct or purchase their newsstands with the hope that they would sell their newsstands to new licensees once they left the business.<sup>14</sup> However, with the enforcement of Local Law 64, plaintiffs alleged that their newsstands would be “rendered valueless, and, but for the change of law, would have had substantial value.”<sup>15</sup> Defendants cross-motivated for summary judgment to dismiss plaintiffs’ complaint in its entirety<sup>16</sup> asserting the following three arguments:

[First,] merely losing the right to resell the newsstand structures does not effectuate a taking . . . . [Second,] requiring some plaintiffs to move their businesses does not constitute a taking because they will be able to relocate elsewhere . . . . [Third,] there is no taking at issue because ‘there is no limit on the number of newsstands in the City.’<sup>17</sup>

The *Uhlfelder* court found that while the plaintiffs’ Takings

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compliance with the Americans with Disabilities Act, other requirements regarding advertising, location of newsstands, and fees were established. *Id.*, at \*3-4.

<sup>12</sup> *Id.*, at \*4.

<sup>13</sup> *Id.*, at \*12 n.12 (citing *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 121 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 104 (2004)).

<sup>14</sup> *Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*12.

<sup>15</sup> *Id.*, at \*12.

<sup>16</sup> *Id.*, at \*4.

Clause claim survived summary judgment, their motion for a preliminary injunction was inappropriate and thus, denied.<sup>18</sup> In determining whether the plaintiffs sufficiently asserted a regulatory takings claim, the court recognized that “state and federal law . . . utilize similar [constitutional] standards” and further, that “New York courts routinely cite and apply the reasoning of the federal courts.”<sup>19</sup> To this end, the court turned to United States Supreme Court jurisprudence which established that the analysis for a real property takings claim applied to a takings claim grounded in personal property.<sup>20</sup> Then, the court discussed the two types of takings claims, physical and regulatory, and determined that this case was controlled by the regulatory classification.<sup>21</sup>

Accordingly, the court applied the two constitutional requirements utilized in *Dawson v. Higgins*, that “ ‘the challenged actions must be such that they fail substantially to advance a legitimate State interest or deprive the owner of economically viable use of his property.’ ”<sup>22</sup> First, the court held that Local Law 64’s

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<sup>17</sup> *Id.*, at \*13.

<sup>18</sup> *Id.*, at \*14.

<sup>19</sup> *Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*12 n.12 (citing *Wantanabe Realty Corp. v. City of New York*, 315 F. Supp. 2d 375, 401 (S.D.N.Y. 2003); *Friedenburg v. New York State Dept. of Env’tl. Conservation*, 767 N.Y.S.2d 451 (App. Div. 2d Dep’t 2003)).

<sup>20</sup> *Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*13 (citing *Andrus v. Allard*, 444 U.S. 51, 67 (1979)) (additional citation omitted).

<sup>21</sup> *See Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*13. “A physical taking occurs where governmental action results in the permanent physical occupation, either by the government itself or a private, government-authorized party, ‘to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.’ ” *Id.* (quoting *Dawson v. Higgins*, 610 N.Y.S.2d 200 (App. Div. Dep’t 1994), *cert. denied*, 513 U.S. 1077 (1995)). Here, the plaintiffs merely held licenses to use the locations on which their newsstands were placed. *Id.* Thus, plaintiffs had no interest in real property and no requisite “occupation” had taken place. *Id.*

<sup>22</sup> *Id.* (quoting *Dawson*, 610 N.Y.S.2d at 207).

regulation of the sidewalks and streetscape of the city “clearly advances a legitimate state interest.”<sup>23</sup> Then, the court turned to the more difficult question regarding the deprivation of an economically viable use.<sup>24</sup> Here, the court reasoned that the plaintiffs’ alleged total loss may be sufficient to meet the requisite economic deprivation for a regulatory taking.<sup>25</sup> Moreover, the court found that the defendants “failed to meet their burden of establishing as a matter of law that there can be no regulatory taking.”<sup>26</sup> Thus, summary judgment regarding the Takings Clause claim was denied.<sup>27</sup>

Finally, the court addressed whether plaintiffs’ motion for a preliminary injunction was warranted.<sup>28</sup> According to the New York State Constitution, takings are only prohibited if they are enforced without just compensation.<sup>29</sup> Although Local Law 64 provided the new newsstands free of charge,<sup>30</sup> plaintiffs’ claim focused on the newsstand operators’ inability to recoup their original newsstand investments.<sup>31</sup> The court recognized plaintiffs’ potential loss, but denied their preliminary injunction motion with respect to the takings claim, holding that “plaintiffs may be compensated financially for their alleged loss.”<sup>32</sup>

The United States Supreme Court in, *Nollan v. California*

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (quoting *Dawson*, 610 N.Y.S.2d at 207).

<sup>25</sup> *Id.*, at \*14.

<sup>26</sup> *Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*14.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (citing N.Y. CONST. art. I, § 7(a)).

<sup>30</sup> *Id.*

<sup>31</sup> *Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*14.

<sup>32</sup> *Id.*

*Coastal Commission*, addressed the issue of whether conditioning a land use permit upon requiring an uncompensated easement on real property represented a valid Takings Clause claim.<sup>33</sup> In *Nollan*, the plaintiffs submitted an application to defendant requesting a permit to demolish their existing bungalow and replace it with a new home that was similar to the homes in the neighborhood.<sup>34</sup> The plaintiffs' beachfront property was located between two public beach areas.<sup>35</sup> Given plaintiffs' location, the defendant proposed granting the land-use permit upon the condition that plaintiffs give the public an uncompensated easement to pass across their beach.<sup>36</sup> Further, the defendant alleged that this condition was in furtherance of the state's interest in "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shoreline, and preventing congestion on the public beaches."<sup>37</sup> Plaintiffs brought suit arguing, "that imposition of the access condition violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment."<sup>38</sup> The trial court ruled in favor of the plaintiffs on statutory grounds and effectively avoided the constitutional issue.<sup>39</sup> Defendant appealed this decision and the California Court of Appeals reversed, finding that "although the condition diminished the value of the Nollans' lot, it did not deprive

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<sup>33</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987).

<sup>34</sup> *Id.* at 828.

<sup>35</sup> *Id.* at 827.

<sup>36</sup> *Id.* at 828.

<sup>37</sup> *Id.* at 835.

<sup>38</sup> *Nollan*, 483 U.S. at 829.

them of all reasonable use of their property.”<sup>40</sup>

Upon appeal to the United States Supreme Court, Justice Scalia held that the easement violated the Fifth Amendment because the Court recognized that when an easement is enforced as a condition to the approval of a permit, “there is heightened risk that the purpose is avoidance of the compensation requirement.”<sup>41</sup> The Court applied its long standing constitutional rule that a “land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’”<sup>42</sup> First, the Court dismissed defendant’s argument that the conditional easement was a lawful exercise of police power, rather than a taking, because the purpose of the easement did not serve the state interest to preserve the public’s view of the beach.<sup>43</sup> Then, the Court held that a Takings Clause violation existed and further, that “if [the defendant] wants an easement across the Nollans’ property, it must pay for it.”<sup>44</sup>

In *Andrus v. Allard*, the Supreme Court applied its reasoning from regulatory takings cases involving real property to a personal property takings claim.<sup>45</sup> At issue were two conservation statutes

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<sup>39</sup> *Id.* at 829.

<sup>40</sup> *Id.* at 830.

<sup>41</sup> *See id.* at 841-42.

<sup>42</sup> *Id.* at 834 (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978)).

<sup>43</sup> *Nollan*, 483 U.S. at 836-37. The Court reasoned that the permit condition “utterly fail[ed] to further the end advanced as the justification for the prohibition.” *Id.* at 837. Thus, “unless the permit condition serve[d] the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use.” *Id.*

<sup>44</sup> *Id.* at 841-42.

<sup>45</sup> *See Andrus*, 444 U.S. at 64-68.



“designed to prevent the destruction of certain species of birds.”<sup>46</sup> The appellees were in the business of trading Indian artifacts,<sup>47</sup> and many of these artifacts consisted of feathers from birds that were protected under the conservation statutes.<sup>48</sup> Appellees argued that the “statutes do not forbid the sale of appellees’ artifacts insofar as the constituent birds’ parts were obtained prior to the effective dates of the statutes.”<sup>49</sup> In the alternative, if the statutes applied, they would be in violation of the Fifth Amendment.<sup>50</sup>

The Court held that the “Secretary could properly permit the possession or transportation, and not the sale or purchase, of pre-existing bird artifacts” when constructing the Migratory Bird Treaty Act.<sup>51</sup> Then, the Court turned its attention to the Fifth Amendment claim that the “prohibition wholly deprives [appellees] of the opportunity to earn a profit from those relics.”<sup>52</sup> In holding that the prohibition of the sale of the artifacts did not amount to a takings violation, the Court relied on cases which dealt with real property. Specifically, the reasoning in *Penn Central Transportation Co. v. New York City*<sup>53</sup> and *Pennsylvania Coal Co. v. Mahon*<sup>54</sup> guided the Court’s analysis of appellees’ property rights as a whole when

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<sup>46</sup> *Id.* at 52-53. The specific statutes at issue were the Migratory Bird Treaty Act and the Eagle Protection Act. *Id.*

<sup>47</sup> *Id.* at 54.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 54-55.

<sup>50</sup> *Andrus*, 444 U.S. at 55.

<sup>51</sup> *Id.* at 64.

<sup>52</sup> *Id.*

<sup>53</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)

<sup>54</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

determining if a taking occurred.<sup>55</sup> The Court's decision turned on the crucial fact that the "appellees retain[ed] the rights to possess and transport their property, and to donate or devise the protected birds."<sup>56</sup> Thus, while the prohibition on selling the artifacts arguably prevented appellees of their most profitable use, the Court held that no Fifth Amendment violation occurred because the property retained some value.<sup>57</sup>

New York courts have consistently applied federal court reasoning to determine whether or not a regulatory taking occurred.<sup>58</sup> In *Friedenburg v. New York State Dept. of Env'tl. Conservation* (DEC), the property at issue was a 2.5 acre parcel consisting of mostly tidal wetlands.<sup>59</sup> Petitioners applied for a permit to build a single family residence and were denied approval by the DEC.<sup>60</sup> Subsequently, petitioners brought suit seeking an annulment of the permit denial or, in the alternative, a Takings Clause violation.<sup>61</sup>

Applying the Supreme Court's balancing test established in *Penn Central*, the court found that petitioners demonstrated a valid takings claim.<sup>62</sup> Here, the petitioners' "property was reduced in value by 95% from its nonregulated value."<sup>63</sup> The court found that

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<sup>55</sup> *Andrus*, 444 U.S. at 65-66.

<sup>56</sup> *Id.* at 66.

<sup>57</sup> *Id.* at 66-68.

<sup>58</sup> *See Friedenburg*, 767 N.Y.S.2d at 456-62.

<sup>59</sup> *Id.* at 453.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 458-59. The three factors established in *Penn Central* are: " 'the economic impact of the regulation, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of the governmental action.' " (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124) (additional citations omitted).

<sup>63</sup> *Friedenburg*, 767 N.Y.S.2d at 459.

this near total loss of value was so severe that it was “clear that a taking [took] place . . . pursuant to the [*Penn Central*] balancing test.”<sup>64</sup>

In *Dawson v. Higgins*, the New York Supreme Court held that a 20-year provision exception to owner-occupancy eviction did not result in an unconstitutional taking of the plaintiffs’ property.<sup>65</sup> In this case, Dawson purchased a brownstone building which he knew contained two rent-controlled tenants.<sup>66</sup> At the time of the transaction, the Rent and Rehabilitation Law and New York State Division of Housing and Community Renewal (DHCR) regulations allowed a landlord to evict rent-controlled tenants under certain circumstances.<sup>67</sup> Specifically, a landlord was authorized to evict a tenant if the landlord sought to recover possession of the housing for owner occupancy reasons.<sup>68</sup> However, only seven months after Dawson purchased the building, the owner-occupancy eviction provisions were amended.<sup>69</sup> The amendment prohibited a landlord from evicting for owner occupancy reasons if the tenants were either 62 years of age or older, disabled, or “resided in the building for 20 years or more.”<sup>70</sup> Since Dawson’s two tenants were protected by the 20-year eviction provision and thus, were “no longer subject to eviction on owner-occupancy grounds,” Dawson claimed that this

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<sup>64</sup> *Id.* at 461.

<sup>65</sup> *See Dawson*, 610 N.Y.S.2d at 207-08.

<sup>66</sup> *Id.* at 203.

<sup>67</sup> *Id.* The New York City Rent and Rehabilitation Law was “originally Administrative Code §§ Y41-1.0 *et seq.*, [and] now [is] §§ 26-401 *et seq.*,” and DHCR’s regulations “are set forth in 9 NYCRR Part 2200 *et seq.*” *Id.*

<sup>68</sup> *Id.* at 204 (citing Administrative Code § 26-408 [b] [1]; 9 NYCRR Part 2204.5 [a]).

<sup>69</sup> *Dawson*, 610 N.Y.S.2d at 204.

amounted to a regulatory taking.<sup>71</sup>

Upon appeal, the Appellate Division affirmed the lower court's decision that the 20-year eviction provision was constitutional.<sup>72</sup> Similar to *Nollan*, the *Dawson* court analyzed the plaintiffs' claim against the two regulatory Takings Clause requirements used to evaluate violations of the New York and federal constitutions.<sup>73</sup> In applying these requirements, the court found that "[c]learly, the residency status protected by the challenged regulation advances a legitimate state interest."<sup>74</sup> Moreover, the court held that the plaintiffs did not prove adequate economic deprivation because: (1) the plaintiffs purchased the premises knowing it was subject to a highly regulated system of rent control; and (2) the 20-year amendment at issue represented a regulation similar to those already existing.<sup>75</sup>

In conclusion, *Uhlfelder* re-affirmed that the United States and the New York State Constitutions are in agreement with respect

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* In addition to the regulatory takings claim, Dawson alleged a physical taking, a due process violation under the state and federal constitutions, and an involuntary servitude under the Federal Constitution. *Id.*

<sup>72</sup> *Id.* at 204. The lower court held the amendment constitutional because this case involved "pre-existing relationships voluntarily assumed by the property owner." *Id.*

<sup>73</sup> *Id.* The rule applied states as follows: "To constitute a regulatory taking the challenged actions must be such that they fail substantially to advance a legitimate state interest or deprive the owner of the economically viable use of his property." *Id.* (citing *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1065 (N.Y. 1989), *cert. denied*, 493 U.S. 976 (1989); *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987)).

<sup>74</sup> *Dawson*, 610 N.Y.S.2d at 208. The court reasoned that the 20-year provision provided a necessary protection to long-term tenants because "[a]fter a long residency a tenant takes root in the community and his or her forced removal from familiar surroundings causes, at the very least, severe disruption." *Id.*

<sup>75</sup> *Id.* at 207-08. Specifically, the court reasoned that the plaintiffs' "investment backed expectation" was not frustrated given their knowledge of the existing regulations that protect tenants. *Id.*

to regulatory Takings Clause claims. Moreover, regardless of whether the takings claim is grounded in personal or real property, the analysis is the same. Although the plaintiffs stated that they “reserved their right to assert federal claims once their state remedies have been exhausted,”<sup>76</sup> their state decision will be dispositive on any future federal takings claim. Thus, if an action fails to advance a legitimate state interest or deprive the “economically viable use” of one’s property, that action violates the Takings Clause of both the United States Constitution and the New York State Constitution.

*David Schoenhaar*

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<sup>76</sup> *Uhlfelder*, 2005 N.Y. Misc. LEXIS 1812, at \*12 n.12.



