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Governmental Takings, Court of Appeals: Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry

U.S. CONST. amend. V:

[N]or shall private property be taken for public use without just compensation.

N.Y. CONST. art. I, § 7:

Private property shall not be taken for public use without just compensation.

COURT OF APPEALS

Anello
v.
Zoning Board of Appeals of the Village of Dobbs Ferry[1]
(decided February 18, 1997)

Petitioner, Rose E. Anello, was denied a variance from the Village of Dobbs Ferry Zoning Board of Appeals (hereinafter "the Board").[2] She was not permitted to build a single-family dwelling on her property because it was located in an area considered to be environmentally sensitive.[3] The petitioner maintained that the Board's denial of a variance rendered her property unusable, depriving her of any property interest.[4]

Petitioner appealed, claiming that she should be compensated on the ground that the ordinance, instructing the Board to deny variances that may adversely effect the condition of the environmentally sensitive area, worked a taking of her property.[5]

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[1] 89 N.Y.2d 535, 678 N.E.2d 870, 656 N.Y.S.2d 184, *cert. dismissed*, 118 S. Ct. 2 (1997).

[2] *Id.* at 539, 678 N.E.2d at 870-71, 656 N.Y.2d at 184-85.

[3] *Id.* at 539, 678 N.E.2d at 870, 656 N.Y.2d at 184.

[4] *Id.*

[5] *Id.* at 539, 678 N.E.2d at 871, 656 N.Y.2d at 185.

The Takings Clause of the United States Constitution[6] and the New York Constitution[7] mandate that the government may not take property without paying the owner just compensation.[8]

The New York Court of Appeals affirmed the Appellate Division's ruling that the petitioner was not entitled to just compensation.[9] The court concluded that petitioner was on notice of the pre-existing ordinance when she had purchased the property.[10] Therefore, the denial of the variance did not constitute a taking of property for which the petitioner was entitled to just compensation.[11]

The Village of Dobbs Ferry had enacted a "steep slope" zoning ordinance concerning property on the sides of hills.[12] "To determine whether a lot was large enough to be developed, the ordinance required a percentage reduction of the property's gross area depending upon the degree of the property's slope, which yielded the buildable area."[13] Consequently, the buildable size of the lot was reduced according to the degree of the incline.[14] The petitioner applied for a variance from the "steep slope" ordinance to build a single-family dwelling; however, the variance was denied by the Board.[15] The Board reasoned that petitioner "'acquired the property over two years after the "steep slope"

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[6] U.S. CONST. amend. V. The Fifth Amendment states in pertinent part: "nor shall private property be taken away for public use, without just compensation." *Id.*

[7] N.Y. CONST. art. I, § 7. Article I, section 7 provides in pertinent part: "Private property shall not be taken for public use without just compensation." *Id.*

[8] *Id.*

[9] *Anello*, 89 N.Y.2d at 539, 678 N.E.2d 871, 656 N.Y.S.2d at 185.

[10] *Id.* at 540, 678 N.E.2d at 871, 656 N.Y.S.2d at 185.

[11] *Id.*

[12] *Id.* at 539, 678 N.E.2d at 870, 656 N.Y.S.2d at 184. The ordinance was designed "to protect environmentally sensitive lands, preserve the Village's natural resources and promote the orderly development of land . . . with excessively steep slope areas." *Id.* (citing Dobbs Ferry Village Code § 30-35 D).

[13] *Id.*

[14] *Id.*

[15] *Id.*

law came into effect and therefore had full knowledge that the lot was unbuildable and non-conforming."'[16] In addition, the Board discovered that according a variance to construct a dwelling might impose a significant hardship on the environmentally sensitive area.[17] Moreover, the ordinance reflected the exercise of the villages' police powers[18] which relate to the safety and public health of the neighborhood.[19] Accordingly, the application of the ordinance and the denial of the variance precluded all use of the petitioner's lot.[20]

The Court of Appeals began its analysis by addressing the reasoning behind the holding of the Appellate Division.[21] In *Khan v. Zoning Board of Appeals*,[22] respondent, Shahid U. Khan, purchased property deemed to be partially located in a "flood plain" area.[23] According to the Village zoning ordinance, a permit to build on the "flood plain" area could not be issued, unless a variance was obtained from the Village Board of Trustees.[24] Thus, respondent sought the issuance of a variance.[25] Shortly after his request, the ordinance was amended to include a regulation "limiting development and restricting new construction on environmentally sensitive areas," such as flood areas.[26] Due to the newly enacted regulation, the respondent was denied a

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[16] *Id.*

[17] *Id.*

[18] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991). The Court noted that "[t]he State traditional police power is defined as the authority to provide for the public health, safety and morals and such a basis for legislation has been upheld. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

[19] *Anello*, 89 N.Y.2d at 539, 678 N.E.2d at 870, 656 N.Y.S.2d 184.

[20] *Id.*

[21] *Id.*

[22] 87 N.Y.2d 344, 662 N.E.2d at 782, 639 N.Y.S.2d 302 (1996).

[23] *Id.* at 347, 662 N.E.2d at 783, 639 N.Y.S.2d at 303.

[24] *Id.* at 347, 662 N.E.2d at 783-84, 639 N.Y.S.2d at 303-04.

[25] *Id.*

[26] *Id.* at 347-48, 662 N.E.2d at 784, 639 N.Y.S.2d at 304. The Village Planning Board subtracted the "base site area" from the "resource protection land" which equaled the "net buildable site area." *Id.* at 348, 662 N.E.2d at 784, 639 N.Y.S.2d at 304.

variance,[27] and the respondent's property was, in essence, rendered completely unbuildable.[28] The Appellate Division, in *Khan*, held that "since the respondent owned the subject property in "single and separate ownership"[29] prior to the enactment of the ordinance rendering it non-conforming, respondent had a vested right to use the property for residential purposes."[30]

The *Khan* court refused to adopt a rule protecting landowners in "single and separate ownership" situations,[31] stating that "a municipality may in reasonable exercise of its police powers change its zoning to control land use and development."[32] The municipality may or may not include exemptions, within its ordinance, to alleviate the effects these changes may cause owners of property held in "single and separate ownership."[33] In the absence of an exemption, a property owner may obtain relief by engaging in the procedure of procuring a variance.[34] The court then concluded "since the owner's constitutional rights are amply protected by the availability of such proceedings, there is no legal basis for overriding the municipality's legislative choice. . . ."[35]

In *Kim v. City of New York*,[36] plaintiff, Soon Duck Kim, purchased property ten years after the City of New York changed the legal grade of the street abutting the property.[37] Although the legal grade had been changed, the physical grade had not been changed.[38] Kim did not have actual notice of the map, indicating

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[27] *Id.* at 348-49, 662 N.E.2d at 784-85, 639 N.Y.S.2d at 304-05.

[28] *Id.*

[29] *Id.* at 34, 662 N.E.2d at 781, 639 N.Y.S.2d at 301. In *Khan*, the court explained that the "single and separate ownership" exception protected landowners of long-term property, which was conforming prior to the newly-enacted amendment, from rendering the property unusable. *Id.*

[30] *Id.* at 349. 662 N.E.2d at 784-85, 639 N.Y.S.2d at 304-05.

[31] *Id.* at 350, 662 N.E.2d at 785, 639 N.Y.S.2d at 305.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] 90 N.Y.2d 1, 681 N.E.2d 312, 659 N.Y.S.2d 145 (1997).

[37] *Id.* at 3-4, 681 N.E.2d 312, 659 N.Y.S.2d at 146.

[38] *Id.*

the change, filed in the Borough President's office.[39] However, the filing of it constituted constructive notice of the legal grade at the time he purchased the property.[40] Two years after his purchase, the plaintiff was informed that the City was planning to raise the street to the established legal grade.[41]

While the plaintiff had an obligation to maintain lateral support to the legal grade of the street, he did not.[42] Therefore, the City itself placed the fill on the land.[43] Plaintiff claimed that the City's action in filling the street to the legal grade constituted a taking of his property; therefore, compensation should be afforded.[44] The New York Court of Appeals held that plaintiff was not entitled to just compensation, reasoning that plaintiff acquired the title to the property subject to the pre-existing obligation to maintain lateral support to the legal grade of the street.[45]

Similarly, in *Gazza v. New York State Department of Environmental Conservation*,[46] petitioner, Joseph F. Gazza, purchased land that had been partly designated wetlands.[47] The area was zoned residential; however, due to certain wetland regulations, a variance had to be obtained in order to construct a single-family home.[48] Petitioner was denied a variance because of the adverse affect the construction of a residence would have on the wetlands contained on the property.[49] Upon denial of the variance, the petitioner claimed this was a taking of his property interest.[50] The Court of Appeals held that the petitioner was unable to establish a taking because "he never owned an absolute right to build on his land without a variance."[51] The court further

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 14, 681 N.E.2d 319, 659 N.Y.S.2d at 152.
[44] *Id.* at 4-5, 681 N.E.2d at 313-14, 659 N.Y.S.2d at 146-47.
[45] *Id.* at 5, 681 N.E.2d at 314, 659 N.Y.S.2d at 147.
[46] 89 N.Y.2d 603, 679 N.E.2d 1035, 657 N.Y.S.2d 555 (1997).
[47] *Id.* at 608, 679 N.E.2d at 1036, 657 N.Y.S.2d at 556.
[48] *Id.*
[49] *Id.* at 609, 679 N.E.2d at 1037, 657 N.Y.S.2d at 557.
[50] *Id.* at 611, 679 N.E.2d at 1038, 657 N.Y.S.2d at 558.
[51] *Id.* at 615, 679 N.E.2d at 1040, 657 N.Y.S.2d at 560.

stated that "since the enactment of the wetland regulations, the only permissible uses for the subject property were dependent upon the regulations which were a legitimate exercise of police power."[52] In addition, "[p]etitioner cannot base a taking claim upon an interest he never owned. The property interests owned by the petitioner are defined by those state laws enacted and in effect at the time he took title . . . ."[53]

In response to the petitioner's contention, that the denial of a variance by the Board worked a taking of her property, the court determined that a regulatory taking had not occurred. The *Anello* court noted that the petitioner "never acquired an unfettered right to build on the property free from the "steep slope" ordinance."[54] Furthermore, the "steep slope" ordinance had been in effect for two years prior to the petitioners' purchase of the property. Thus, "this statutory restriction encumbered petitioner's title from the outset of the ownership and its enforcement does not constitute a governmental taking of property."[55]

In *Anello*, *Kim*, and *Gazza*, the Court of Appeals held that neither restrictive regulations nor physical invasion resulted in a taking when the owners bought their land after the regulations were enacted. Furthermore, the *Anello* court observed that the petitioner never challenged the constitutionality of the ordinance. Instead, she asserted that the ordinance worked a taking as applied to her property.[56] The *Anello* court concluded that the rule articulated in all three opinions would enhance certainty.[57] It would cause purchasers of land burdened with restrictions to

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[52] *Id.*

[53] *Id.* at 615-16, 679 N.E.2d at 1040, 657 N.Y.S.2d at 560.

[54] Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry, 89 N.Y.2d 535, 539-40,678 N.E.2d 870, 871, 656 N.Y.S.2d 184, 185 (1997).

[55] *Id.* at 540, 678 N.E.2d at 871, 656 N.Y.S.2d at 185. *See also* Basile v. Town of Southhampton, 89 N.Y.2d 974, 678 N.E.2d 489, 655 N.Y.S.2d 877 (1997). In *Basile*, the property was zoned residential, however, regulations permitted no use of the property, except as a wetland. *Id.* at 975-76, 678 N.E.2d at 490-91, 655 N.Y.S.2d at 878-79. The Court of Appeals held this was not a "taking" reasoning that the petitioner bought the property with the wetland regulation in place and had notice. *Id.*

[56] *Anello*, 89 N.Y.2d at 540, 678 N.E.2d at 871, 656 N.Y.S.2d at 185.

[57] *Id.*

challenge the constitutionality of the pre-existing law rather than asserting a taking of an individual property interest, facilitating the transferability of title.[58]

In *Vernon Park Realty v. City of Mount Vernon*,[59] the court held that the "purchase of property with knowledge of the restriction does not bar the purchaser from testing the validity of the zoning ordinance . . . ."[60] The *Vernon Park Reality* case emphasized an important point.[61] The petitioner in *Anello* could have challenged the Village of Dobbs Ferry zoning ordinance, in addition to challenging the denial of the variance.[62]

The Court of Appeals recognized that the takings issue present in the *Anello* case did not apply under a Federal Constitutional analysis.[63] In *Penn Central Transportation Co. v. New York City*,[64] the Supreme Court articulated the traditional takings analysis, "the extent to which the regulation has interfered with distinct investment-backed expectation."[65] Similarly, in *Lucas v. South Carolina Coastal Council*[66] the Court held that when the

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[58] *Id.*

[59] 307 N.Y. 493, 121 N.E.2d 517 (1954).

[60] *Id.* at 500, 121 N.E.2d at 520.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] Penn Central Transportation v. City of New York, 438 U.S. 104 (1978). In *Penn Central,* an historic preservation ordinance prohibited building over Grand Central Station. 438 U.S. at 115-16. The Supreme Court stated that the ordinance as applied to Penn Central did not constitute a "taking," since Penn Central not only profited but also earned a "reasonable return" on investment. *Id.* at 136.

[65] *Id.* at 127 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1992)). In *Mahon*, a statute was enacted by the Pennsylvania legislature prohibiting the removal of coal if removing it would cause subsidence damage to buildings on the surface. *Id.* at 395. Defendant coal company owned the rights to mine the coal underneath the surface. *Id* at 412. The Court stated that an exercise of the police power results in a compensable taking if it goes to far. *Id.* at 415. The Court found that the statute went to far; resulting in a taking of the coal company's property. *Id.* at 414-16.

[66] 505 U.S. 1003 (1992). In *Lucas*, plaintiff purchased two beachfront properties intending to build upon them. *Id.* at 1006-07. Before he began

government deprives the owner of all economically beneficial use of the property it automatically constitutes a "taking."[67] In both *Penn Central* and *Lucas*, the issue before the Court was the impact of the newly enacted legislation.[68]

In *Anello*, the issue before the court was not the "impact of newly enacted regulations on a property owner's investment-backed expectations."[69] Rather, the issue was whether a pre-existing regulation applied to subsequent purchasers who claimed that the pre-existing ordinance worked a taking of their property. In relation to the Federal law, "if property owners were permitted to assert compensatory takings claims based on enforcement of pre-existing regulations, the traditional takings analysis would be rendered hopelessly circular."[70]

In concluding that the pre-existing regulation does not work a taking, the court recognized that if the prior owner does not assert a takings claim it is possible that the selling price of his property would be far less because of the restrictions imposed.[71] Furthermore, if the subsequent purchaser is compensated because it is found that the restriction worked a taking then "any compensation received by the subsequent owner for enforcement of the very restriction that served to abate the purchase price would amount to a windfall . . . ."[72]

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construction, the legislature enacted a statute that prohibited development of the land. *Id.*

[67] *Id.* at 1027.

[68] *Id.* at 1019; *Penn Central*, 438 U.S. at 136.

[69] Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry, 89 N.Y.2d 535, 541 n.1, 678 N.E.2d 870, 871 n.1, 656 N.Y.S.2d 184, 185 n.1 (1997).

[70] *Id.* at 540-41, 678 N.E.2d at 871, 656 N.Y.S.2d at 185.

[71] *Id.*

[72] *Id.*