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Governmental Takings, Court of Appeals: Gazza v. New York State Department of Environmental Conservation

Gazza v. New York State Department of Environmental Conservation[73] (decided February 18, 1997)

Petitioner, Joseph F. Gazza, a landowner who purchased property in a residentially zoned district in Southampton, New York was denied permission to build a single family home on his property, since it had been partially inventoried as tidal wetlands by defendant, the New York State Department of Environmental Conservation [hereafter "DEC"].[74] Petitioner brought an article 78 proceeding[75] to review the DEC's determination, arguing that the denial of a building variance pursuant to environmental regulation[76] effects an unconstitutional taking in violation of the Fifth Amendment of the United States Constitution[77] and Article

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[73] 89 N.Y.2d 603, 679 N.E.2d 1035, 657 N.Y.S.2d 555, *cert. denied*, 118 S. Ct. 58 (1997).

[74] *Id.* at 608-09, 679 N.E.2d at 1036-38, 657 N.Y.S.2d at 556-58.

[75] N.Y. ENVTL. CONSERV. LAW § 25-0404 (McKinney 1997). This section provides in pertinent part:

> Any person aggrieved by the issuance, denial suspension or revocation of a permit may within thirty days from the date of commissioner's order seek judicial review pursuant to article 78 of the civil practice law and rules in the supreme court for the county in which the tidal wetlands are located . . . .

Id.

[76] N.Y. COMP. CODES R. & REGS. tit. 6, § 661.6 (a) (1997). This section sets forth New York's wetlands development restrictions as follows:

> No person shall undertake any new regulated activity on any tidal wetland or any adjacent area except in compliance with the following restrictions: (1) the minimum setback of all principal buildings and all other structures that are in excess of 100 square feet . . . shall be 75 feet landward from the most landward edge of any tidal wetland . . . (2) the minimum setback of any on site sewage disposal septic tank . . . shall be 100 feet landward . . . .

Id.

[77] U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of . . . property without due process of law;

I, section 7 of the New York State Constitution[78] for which he must be justly compensated.[79]

Petitioner based his claim on two theories: (1) although he knew when he purchased the property that the wetland regulations burdened it, he was not bound by such knowledge since he did not suffer a regulatory taking until the variance was denied[80]; and (2) the requirement that petitioner prove every element of his claim beyond a reasonable doubt[81] in order to overcome the presumption of constitutionality that attaches to the wetlands regulations places upon him an onerous burden which denies him equal protection under the law.[82]

The court rejected petitioner's claims.[83] It held that because petitioner knew that there were wetlands limitations on the property when he purchased it, he did not own an interest in the right to build a residence on the property which could be taken away.[84] The court declined to review whether the standard of proof was too burdensome on the petitioner, but held that even with a lesser standard such as the preponderance of the evidence standard, petitioner would have failed to meet his burden to show that the regulations and denial of a permit constituted a "taking" under either federal or state standards of proof.[85]

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nor shall private property be taken for public use without just compensation." *Id.*

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

[79] Gazza v. New York State Dep't of Envtl. Conserv., 89 N.Y.2d 603, 608, 679 N.E.2d 1035, 1036, 657 N.Y.S.2d 555, 556 (1997).

[80] *Id.* at 611, 679 N.E.2d at 1038, 657 N.Y.S.2d at 558.

[81] *Id.* (citing St. Aubin v. Flacke, 68 N.Y.2d 66, 76, 496 N.E.2d 879, 885, 505 N.Y.S.2d 859, 865 (1986) (stating that a "landowner who claims that a land regulation has effected a taking of his property bears a heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt.")).

[82] *Gazza,* 89 N.Y.2d at 611, 679 N.E.2d at 1038, 657 N.Y.S.2d at 558.

[83] *Id.* at 608, 679 N.E.2d at 1036, 657 N.Y.S.2d at 556.

[84] *Id.* at 616, 679 N.E.2d at 1040, 657 N.Y.S.2d at 560.

[85] *Id.* at 611, 679 N.E.2d at 1038, 657 N.Y.S. at 558.

Petitioner purchased a 43,500 square foot parcel located in the Village of Quogue, Town of Southampton for $100,000, with full knowledge that 65% of the property had been previously inventoried as tidal wetlands by the DEC.[86] According to district court findings, the purchase price reflected the fact that a variance would be required to build a residence on the property.[87] Otherwise, as Petitioner himself indicated, the parcel would have been worth $396,000.[88]

Subsequent to his purchase, petitioner applied to the DEC for two setback variances which, if granted, would have allowed him to build a single family residence and a septic system at a specified distance from the tidal wetlands boundary.[89] After a hearing, an Administrative Law Judge recommended that the application be denied.[90] The DEC adopted the judge's report, concluding that "the petitioner had not sustained his burden of showing that the variances would have no adverse impact on the tidal wetlands. . . ."[91] The commission found that the proposed construction threatened both humans and marine life, that flooding problems would ensue, and that contaminants from the septic system would threaten the area.[92] However, they suggested the petitioner consider alternate uses for the property, as

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[86] *Id.* at 608, 679 N.E.2d at 1036, 657 N.Y.S. at 556.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 609, 679 N.E.2d at 1036, 657 N.Y.S. at 556.

[91] *Id. See* N.Y. COMP. CODES R. & REGS. tit. 6, § 661.11 (1997). This section provides in pertinent part:

> [T]he department [of environmental conservation] shall have authority in connection with its review of an application for permit under this Part to modify the application of any provisions in such a manner that the spirit and intent of the pertinent provisions shall be observed, the public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse impact on the present or potential value of any tidal wetland . . . .

Id.

[92] *Gazza*, 89 N.Y.2d at 609, 679 N.E.2d at 1037, 657 N.Y.S.2d at 557.

recommended by the Administrative Law Judge, including the construction of a parking lot, dock or catwalk.[93]

Petitioner then unsuccessfully sought judicial review of the DEC's determination.[94] The district court dismissed petitioner's claim that the DEC's decision constituted an unconstitutional "taking," holding that the petitioner failed to show that the property had lost "but a bare residue" of its economic value.[95] It based its decision, in part, on the testimony of a real estate appraiser at the hearing, who valued the property, as restricted, at approximately $80,000, not much less than the original purchase price of $100,000.[96] Furthermore, since the petitioner knew there were limitations on the wetlands when he purchased the property, the court held that he had no "reasonable investment backed expectation" that he could build a residence there.[97] The Appellate Division affirmed the dismissal on similar grounds.[98]

In reviewing petitioner's claims on appeal, the Court of Appeals looked to the intent of the legislature in enacting the tidal wetlands legislation, noting that it was designed to strike a balance between economic and ethical considerations, permitting reasonable economic use of wetlands, while also preserving and protecting them.[99] Next, the court laid out a two step process it utilizes in reviewing such legislation: (1) to determine whether the permit denial is supported by substantial evidence and (2) to determine in the same hearing whether the restriction constitutes

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[93] *Id.* at 609, 679 N.E.2d at 1036, 675 N.Y.S.2d at 556.

[94] *Id.* at 609, 679 N.E.2d at 1037, 675 N.Y.S.2d at 557.

[95] *Id.* at 610, 679 N.E.2d at 1037, 675 N.Y.S.2d at 557.

[96] *Id.*

[97] *Id.* at 610-11, 679 N.E.2d at 1037, 657 N.Y.S.2d at 557 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992)).

[98] *Id.* (rejecting petitioner's takings claim noting that "central to this appeal is the fact that at the time he purchased the property, the petitioner knew of the wetlands restrictions that 'burdened' it.").

[99] *Id.* at 612, 679 N.E.2d at 1038, 657 N.Y.S.2d at 558. *See also* Spears v. Bearle, 48 N.Y.2d 254, 422 N.Y.S.2d 636, 397 N.E.2d 1304 (1979) (stating that the legislature designed the Freshwater Wetlands Act to "secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state.").

an unconstitutional taking requiring compensation.[100] As the Petitioner conceded that the permit denial was supported by substantial evidence, the main analysis turned on whether the denial of a permit placed such an onerous burden on the property to constitute an unconstitutional taking.[101]

Initially, the court emphasized the long recognized principle that a property interest must exist before it may be "taken."[102] It relied on *United States v. Willow River Power Co.*,[103] which held that a company did not have a legally protected property interest in the high-water level of the St. Croix River even though petitioner relied on such water to maintain the efficiency of its hydroelectric plant.[104] Since the company never had a legal property interest in the level of the water, the court held they were not due compensation from the United States for raising the water level.[105] Likewise, in the case at bar, the court held that the Petitioner never owned an absolute right to build a residence on his land without a variance.[106] The limitation on the property existed at the time petitioner bought the property.[107] Therefore, he could not validly base a takings claim on an interest he never owned.[108]

However, the court noted, the State exercise of its police power of eminent domain is limited by a showing that it has a valid legislative purpose.[109] For example, in a New York case, *Vernon*

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[100] *Gazza*, 89 N.Y.2d at 612-13, 679 N.E.2d at 1039, 657 N.Y.S.2d at 559.

[101] *Id.* at 613, 679 N.E.2d at 1039, 657 N.Y.S.2d at 559.

[102] *Id.*

[103] 324 U.S. 499 (1945).

[104] *Id.* at 502-03 (stating "economic uses are rights only when they are legally protected rights.").

[105] *Id.* at 511.

[106] *Gazza*, 89 N.Y.2d at 615, 679 N.E.2d at 1040, 657 N.Y.S.2d at 560; *See also* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976) (stating that "the 'value' of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put . . . .").

[107] *Id.* at 616, 679 N.E.2d at 1040, 657 N.Y.S.2d at 560.

[108] *Id.*

[109] *Id.* at 614, 679 N.E.2d at 1039, 657 N.Y.S.2d at 559.

Park Realty v. City of Mount Vernon,[110] the Court of Appeals held that a purchaser of land may test the validity of a zoning ordinance, even though he was aware of the restriction at the time of purchase.[111] An invalid ordinance is still invalid regardless of whether the purchaser had knowledge its existence.[112] Although this might have been a valid argument in the case at bar, the court noted, Petitioner did not claim that wetlands regulation was beyond the State's power.[113]

Next, the court went on to reject Petitioner's claim under an alternative federal analysis.[114] The court relied on the Supreme Court case, *Penn Central Transp. Co. v. City of New York*,[115] which set forth several factors to be considered in evaluating a "takings" claim: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with reasonable investment backed expectations, and (3) the character of the governmental action.[116]

Specifically, *Penn Central* held that the economic impact on the landowner may be reflected by the economic viability of the property post-regulation.[117] However, a diminution in property value alone will be insufficient to establish a taking.[118] In applying these principles to *Gazza*, the court found that a minor diminution in property value (from the original purchase price) of $20,000 was not so significant as to constitute a taking.[119]

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[110] 307 N.Y. 493, 121 N.E.2d 517 (1954).

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

[112] *Id.*

[113] *Gazza*, 89 N.Y.2d at 614, 679 N.E.2d at 1040, 657 N.Y.S.2d at 560.

[114] *Id.* at 616, 679 N.E.2d at 1041, 657 N.Y.S.2d at 561.

[115] 438 U.S. 104 (1978) (holding that the refusal of the New York City Landmark Preservation Commission to approve plans for construction of a fifty story office building over Grand Central Terminal did not constitute an unconstitutional taking).

[116] *Id.* at 124.

[117] *Id.* at 138 n.36.

[118] *Id.* at 131.

[119] Gazza v. New York State Dep't of Envtl. Conserv., 89 N.Y.2d 603, 619, 679 N.E.2d 1035, 1043, 657 N.Y.S.2d 555, 563 (1997).

Secondly, *Penn Central* considered an analysis of investment backed expectations particularly relevant.[120] In *Penn Central*, the Court held that regulation under New York City's landmark Preservation Law preventing the construction of a 50 story office building over Grand Central Terminal was not a taking.[121] A crucial part of the Court's decision was the fact that Plaintiff's investment backed expectations would still be realized, since utilizing the terminal as it was intended would not only be profitable, but Plaintiff would continue to bring in a reasonable return on his investment.[122]

In *Ruckelhaus v. Monsanto*,[123] the Court held that "reasonable investment backed expectations must be more than a unilateral expectation or an abstract need."[124] Therefore, it concluded, the Environmental Protection Agency's utilization of plaintiff's trade secrets regarding pesticides did not constitute a taking since plaintiff was advised that his data might be revealed during public hearings if necessary.[125]

In applying these tests to *Gazza*, the court held that petitioner could not have had a "reasonable investment backed expectation" that he would be granted a variance in order to build a residence.[126] Petitioner knew that the property was subject to the wetlands restriction, as reflected in the significantly low purchase price, and that there was the possibility that the DEC would deny his application for a variance.[127]

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[120] *Id.* at 618, 679 N.E.2d at 1042, 657 N.Y.S.2d at 562.

[121] *Penn Central*, 438 U.S. at 138.

[122] *Id.* at 136.

[123] 467 U.S. 986 (1984) (finding that the applicant for registration of pesticide had no reasonable investment based expectation that the Environmental Protection Agency would keep health, safety and environmental data submitted confidential beyond the limits prescribed by statute).

[124] *Id.* at 1005.

[125] *Id.* at 1006.

[126] Gazza v. New York State Dep't of Envtl. Conserv., 89 N.Y.2d 603, 619, 679 N.E.2d 1035, 1043, 657 N.Y.S.2d 555, 563 (1997).

[127] *Id.*

The character of the government action is a third consideration in a "taking" determination.[128] For example, complete physical occupations have been considered takings per se requiring just compensation.[129] In *Lucas v. South Carolina Coastal Council*,[130] a landowner who purchased two residential lots with the intention of building on the land, brought suit when the South Carolina Beachfront Act barred him from doing so.[131] The Court held that "when the real owner has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[132]

However, a partial limitation on property may not be considered a taking.[133] In *Goldblatt v. Hempstead*,[134] the Court held that a regulation that "deprives the property of its most beneficial use does not render it unconstitutional."[135] In *Gazza*, the court determined that the DEC's denial of a variance was not a taking since the property's economic value had not been completely extinguished and the land could still be used for the recreational purposes recommended by the Administrative Law Judge.[136]

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[128] *Id.* at 616, 679 N.E.2d at 1041, 657 N.Y.S.2d at 561 (citing Penn Central, 438 U.S. 104, 124).

[129] *Id.*

[130] 505 U.S. 1003 (1992).

[131] *Id.* at 1006-07.

[132] *Id.* at 1019.

[133] *Gazza*, 89 N.Y.2d at 618, 679 N.E.2d at 1042, 657 N.Y.S.2d at 562.

[134] 369 U.S. 590 (1962) (finding that a town ordinance regulating dredging and pit excavation was a valid police regulation, and did not constitute an unconstitutional taking of defendant's property).

[135] *Id.* at 592.

[136] *Gazza*, 89 N.Y.2d at 619, 679 N.E.2d at 1043, 657 N.Y.S.2d at 563. Petitioner argued that the economic value to the property was totally extinguished, since it was unlikely that he would be granted even a recreational variance from the local village in order to build a dock, parking lot or catwalk as suggested by the Administrative Law Judge. *Id.* However, the court rejected this argument, explaining that there was "ample and convincing evidence" to the contrary. *Id.*

In conclusion, a takings claim is likely to fail under the Federal and New York State constitutional standards when a petitioner was aware of the inherent limitations on the property at the time of purchase[137] and the governmental body had a valid legislative purpose for its regulation.[138] In addition, when a property has merely suffered a diminution in value,[139] the regulation has not interfered with the petitioner's reasonable investment backed expectations,[140] and the limitation does not entirely extinguish the Petitioner's economic and recreational use of the property, no taking will have occurred.[141]

Kim v. City of New York[142]
(decided February 18, 1997)

Plaintiff, Soon Duck Kim, and other property owners, appealed from the Supreme Court's decision denying plaintiffs' motion for summary judgment and granting the City of New York's [Hereinafter, "City"], cross-motion for summary judgment.[143] The Supreme Court concluded that no taking of the plaintiffs' property had occurred "because the City was authorized by New York City Charter § 2904[144] to compel [the] plaintiffs to raise

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[137] *Id.*

[138] *Id.* at 614, 679 N.E.2d at 1039, 657 N.Y.S.2d at 559.

[139] *Id.* at 618, 679 N.E.2d at 1042, 657 N.Y.S.2d at 562.

[140] *Id.*

[141] *Id.* at 619, 679 N.E.2d at 1043, 657 N.Y.S.2d at 563.

[142] 90 N.Y.2d 1, 681 N.E.2d 312, 659 N.Y.S.2d 145, *cert. denied*, 118 S. Ct. 50 (1997).

[143] *Id.* at 5, 681 N.E.2d at 314, 659 N.Y.S.2d at 147.

[144] N.Y. CITY CHARTER § 2904 [2] (1992) provides that:

> The owner of any property at his own cost, shall . . . fill any sunken lot or lots comprising part or all of such property or cut down any raised lot or lots comprising part or all of such property whenever the transportation department shall so order pursuant to standards and policies of the transportation department . . . . In the event that the owner fails to comply with the provisions of this section, the transportation