

CALIFORNIA SUPREME COURT RECOGNIZES A PARTIAL TAKING

The California Supreme Court offers landowners some good news and some bad news in its latest decision on “regulatory takings.” In *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal. 4th 761, the court recognized that a property owner alleging that a government agency has taken his or her property without just compensation need not be deprived of *all* economically viable use of the property in order to demonstrate that a taking has occurred.¹ This is a critical distinction, because until now most city attorneys and county counsel have taken the position that unless 100% of the value is lost, no taking has occurred.

In an earlier action challenging the Santa Monica Rent Control Board’s limitation of increases in rents to 12% per year regardless of a landlord’s expenses, Kavanau won a judgment declaring the limitation unconstitutional because it deprived him of “a just and reasonable return” and due process of law. Kavanau then sued the Board, seeking just compensation for the taking of his property. The trial court and the Court of Appeal denied his claim because he never “lost all use of his property.”

In a 5-2 decision, the Supreme Court rejected this reasoning but affirmed the judgment, holding that Kavanau’s remedy for the due process violation is to seek future rent adjustments from the Board in order to recoup his past losses. Admitting that its earlier reasoning in the 1979 case of *Agins v. City of Tiburon* (requiring that *all* reasonable use be taken) was a misinterpretation of the federal constitution, the *Kavanau* court opined that “a regulation...may affect a taking though...it does not involve a physical invasion [of property] *and leaves the property owner some economically beneficial use of his property.*” (Emphasis on original.)

According to the court, in order to determine whether a particular regulation that does not result in a physical invasion and does not deprive the property owner of all economic use of the property nonetheless constitutes a taking, a reviewing court must evaluate the regulation in light of a long list of factors. The three most important factors are (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has infringed on reasonable investment-backed expectations, and (3) the character of the government action.

Other relevant factors may include (1) whether the regulation interferes with interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute “property” for Fifth Amendment purposes, (2) whether the regulation affects the existing or traditional use of the property, (3) the nature of the state’s interest in the regulation, (4) whether the property owner’s holding is limited to the specific interest the regulation abrogates or is broader, (5) whether the government is requiring resources to permit or facilitate uniquely public functions, (6) whether the regulation permits the owner to profit and obtain a reasonable return on the investment, (7) whether the regulation provides the owner benefits or rights that mitigate the

¹ In analyzing the particulars of the case, however, the court found that Kavanau had fallen short of showing a taking.

burdens of the regulation, (8) whether the regulation prevents the best use of the land, (9) whether the regulation extinguishes a fundamental attribute of ownership, and (10) whether the government is demanding the property as a condition for the granting of a permit. The court emphasized that the list is not intended to be comprehensive, nor is it intended to provide a single analytical method for approaching all takings claims.

Reviewing the particulars of this case, the court found that the relevant factors did not indicate a taking. Kavanau further argued that regulation violating his right of due process by depriving him of a fair return necessarily constituted a taking. Rejecting this argument, the Court found that Kavanau would be adequately compensated by an invalidation of the limitation, coupled with the ability to adjust future rents in such a way as to account for the past confiscatory rents. The availability of this remedy, said the court, “precludes a finding of a taking.”

The proposition that a property owner can assert a taking claim based on less than total deprivation of economic use is a novel and desperately needed revised position for the California Supreme Court. Although this change of heart did not help Mr. Kavanau in his pursuit of damages against the Santa Monica Rent Board, it should assist other property owners in their pursuit of takings claims.