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Recent Developments: MacDonald v. Yolo County: The Supreme Court Reexamines the Concept of Inverse Condemnation in Determining Whether an Unconstitutional Taking without Compensation Has Occurred

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result of monopoly pricing based on the unique asset available to the ABE – its members who possess "highly favorable mortality and morbidity rates." 106 S.Ct. at 2429. In discussing the third factor – that the participants could collectively change the nature of the program – the Court looked at the agreement itself which *requires* assignment of the dividend as a condition to participation in the program. The Court rejected the argument that the assignment was voluntary because members could change the policy at any time, stating that the Claims Court had put too much weight on such an unsubstantiated argument. Finally, the Court held that the ABE's program was "an example of precisely the sort of unfair competition that Congress intended to prevent" by enacting the unrelated business income tax.

> If the ABE's members may deduct part of their premium payments as a charitable contribution, the effective cost of ABE's insurance will be lower than the cost of competing policies that do not offer tax benefits. Similarly, if ABE may escape taxes on its earnings, it need not be as profitable as its commercial counterparts in order to receive the same return on its investment. Should a commercial company attempt to displace ABE as the group policyholder, therefore, it would be at a decided disadvantage.

106 S.Ct. at 2432. The only factor in the ABE's favor was that the insurance plan was consistently presented as part of its fund-raising effort. However, the Court felt that this factor could not stand alone as a basis for overturning the assessment by the IRS.

II. The Court upheld the finding of the Claims Court regarding the individual participant's claim for a charitable deduction. The fact that the respondents received a benefit from their contribution did not automatically make the premium payments non-deductible. Had any of the claimants demonstrated that the contributions were purposely made "in excess of the value of any benefit" received in return, then some deduction may have been allowed under §170 of the Code. However, none of the respondents in the action offered any proof that similar policies could have been purchased for a lower cost. Such a lack of proof led the Court to assume "that the value of ABE's insurance to those taxpayers at least equals their premium payments." 106 S.Ct. at 2434. Thus, no charitable motivation could be found by the Court.

In his dissenting opinion, Justice Stevens' main argument concerned the viability of the Court's analysis regarding the ABE program and its effect on unfair competition. In focusing his argument on the Court's failure to justify its conclusion with any concrete evidence, Justice Stevens remarked,

> The trial judge scoured the record for evidence pointing to a harmful effect on competition and found none (footnote omitted). The absence of evidence in the record, rather than the Court's ruminations about possibilities and likelihoods, should control our analysis. 106 S.Ct. at 2436.

Justice Stevens went on to refute the Court's other findings regarding the participants involuntary assignment of the dividends, the taint of a monopoly by the ABE, and the lack of a factual basis behind the charitable participation of the members, concluding that the decisions of the court of appeals and the claims court were correct.

The decision in *United States, Petitioner v. American Endowment et al.*, represents yet another clarification of the Internal Revenue Code; this time affecting members of the legal community because of the Court's interpretation of what constitutes a trade or business for purposes of the unrelated business tax.

– Barbara E. Wixon

MacDonald v. Yolo County: THE SUPREME COURT REEXAMINES THE CONCEPT OF INVERSE CONDEMNATION IN DETERMINING WHETHER AN UNCONSTITUTIONAL TAKING WITHOUT COMPENSATION HAS OCCURRED.

In *MacDonald v. Yolo County*, 54 U.S.L.W. 4782 (U.S. June 25, 1986) (No. 84-2015), the Supreme Court of the United States in a 5-4 decision delivered by Justice Stevens reaffirmed *Agins v. City of Tiburon*, 447 U.S. 225 (1980), in holding that absent knowing the nature and extent of permitted development, the Court cannot adjudicate the constitutionality of a regulation that proports to limit it; in essence because limiting intense development does not prohibit all economic use of the land sought to be developed.

In 1975, appellants submitted a tentative subdivision map to the Yolo County Planning Commission and County Board of Supervisors proposing to construct a 159-home subdivision on land which was in part a corn field. Both the Yolo County Planning Commission and the County Board of Supervisors, appellees, rejected the subdivision plan. The Board based their rejection on what they considered numerous factors "inconsistent with the General Plan of the County of Yolo, (and) the specific plan the County of Yolo embodied in zoning regulations for the County." *MacDonald*, 54 U.S.L.W. at 4782. These included: 1) the lack of access to and from the subdivision to a public street; 2) no provision for public sewer service by any government entity; 3) inadequate police protection for the subdivision; and 4) no provision for water or maintainance of a water system by any governmental entity. *Id.*

As a result of the Board's decision, the appellants claimed inverse condemnation and sought a declaratory judgment and monetary relief.

Inverse condemnation exists when a governmental entity restricts land use through regulation, such as by prohibiting development, but does not condemn the land thereby removing the landowner's remedy of just compensation. *Agins*, 447 U.S. at 255. The appellants accused the Board of "restricting the property to an open-space agricultural use by denying all permit applications, subdivision maps, and other requests to implement any other use, and thereby of appropriating the 'entire economic use' of [their] property 'for the sole purpose of [providing] . . . a public, open-space buffer.'" *MacDonald*, 54 U.S.L.W. at 4782. Appellants concluded that the Board's ruling on the regulations denied any beneficial use of their property, thus it was an unconstitutional taking without just compensation, or inverse condemnation. *Id.* at 4783.

The California Superior Court sustained appellees demurrer citing the alternative uses appellants could make of their land under the Yolo County Code §§8-2.502, .503. *Id.* Quoting *Agins*, the Court concluded that "irrespective of the insufficiency of the appellant's factual allegations, monetary damages for inverse condemnation [based on land use regulations] are foreclosed. . . ." *MacDonald*, 54 U.S.L.W. at 4783.

The California Court of Appeals affirmed the superior court's application of *Agins* where monetary damages for inverse condemnation are not permitted in California. *MacDonald*, 54 U.S.L.W. at 4783. The court stated that a landowner cannot recover "in inverse condemnation based upon land use regulation." *Id.* In further tying the facts in this action to that in *Agins*, the court offered that the only remedy available to appellants would be to set

aside the regulations as unconstitutional. Nevertheless, as in *Agins*, the court of appeals did not find an unconstitutional taking because "the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action." *MacDonald*, 54 U.S.L.W. at 4783.

The Supreme Court granted the appellants petition to consider the constitutional issue involving a regulatory taking. But, in a decision that essentially mirrored the lower courts reasoning, the Supreme Court did not make a final decision on the merits because a final determination had not been made by the Board of Commissioners concerning the permitted use of the appellants property, thus making the issue not ripe for decision despite the prohibition on the housing development. *Id.* at 4784.

In refusing to decide on the merits, the Court followed *Agins* in permitting local governments the power of land use control through regulations that limit intensive development. The Court centered its reasoning behind two related components. First, that the appellant must establish that the regulation has "taken" his property or has "gone too far." Second, that any proffered compensation is simply not just. *MacDonald*, 54 U.S.L.W. at 4784.

The Court, in resolving the two components, examined the progeny of "taking" cases evolving from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), through *Penn Central v. New York City*, 438 U.S. 104 (1978); *Agins*, 447 U.S. 255 (1980), and *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981), to *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. ____ (1985). *MacDonald*, 54 U.S.L.W. at 4784.

In *Williamson*, the appellant-developer failed to exhaust available state avenues to permit development or receive just compensation. *MacDonald*, 54 U.S.L.W. at 4784. And in *Agins*, the Court failed to recognize a taking because development, albeit less intensive, was still permitted. In applying the facts in this action to their past examinations, Justice Stevens went on to conclude that as in *Agins*, *Williamson*, and *San Diego Gas*, the Court cannot decide whether the Constitution requires a monetary remedy to redress some regulatory takings because the appellant had left the Court uncertain as to whether a taking had occurred. *MacDonald*, 54 U.S.L.W. at 4785. The appellant had received the Board's determination on only the subdivision plan, thus leaving open the "final, definitive position regarding how [the board] will apply the regulations at issue to the particular land at issue." *Id.* Consequently, the appellant had not established that their property had been taken and the Board's decision was upheld.

Justice White, in his dissent, felt that a taking did occur when the Board denied the subdivision plan. *MacDonald*, 54 U.S.L.W. at 4785. He refuted the majorities application of *Agins*, finding that the appellant would be unable "to develop his property in some economically beneficial manner" because further application for development would be futile. *MacDonald*, 54 U.S.L.W. at 4786. The dissent went on to conclude that based on the facts, a taking had occurred and the Court should remand for an explanation by the court of appeals as to the precise basis for its judgment. *Id.* at 4788.

The impact of this decision will favor municipalities that seek to limit growth by denying high density housing developments and support state regulations such as Maryland's recently enacted Critical Areas Legislation. Conversely, developers will certainly feel as the dissent, that any limit to use is a taking deserving of compensation. Nevertheless, the Court seems to be assured of maintaining the view outlined in *MacDonald* as long as the 5-4 majority is maintained. And even with the recent change in the make-up of the Court, which essentially effects the dissent's side, it seems likely that similar land use controls will be sustained by the Court.

–Michael D. Mallinoff

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico: SUPREME COURT UPHOLDS CONSTITUTIONALITY OF REGULATIONS RESTRICTING ADVERTISING AIMED AT PUERTO RICO RESIDENTS

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 54 U.S.L.W. 4956 (U.S. June 24, 1986), the Supreme Court continued to explore the contours of first amendment protection for commercial speech which the court had initially recognized in 1976. The Court held that a Puerto Rico statute and regulations restricting the advertising of casino gambling aimed at the residents of Puerto Rico, but not at tourists, does not facially violate the first amendment or the due process or equal protection guarantees of the Constitution.

Beginning in 1948, the Puerto Rico Legislature has legalized various forms of casino gambling, adding additional games since the initial Games of Chance Act of 1948, Act No. 221 of May 15, 1948 (Act). P.R. Laws Ann. tit. 15, § 71 (1972). However, the Act states that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." P.R. Laws Ann. tit. 15, § 77 (1972). Furthermore, the Economic Development Administration of Puerto Rico issued regulations which specified and expanded the scope of the prohibition of advertising of casino gambling directed at the inhabitants of Puerto Rico and requiring prior approval by the Tourism Development Company of any casino advertising. P.R.R. & Regs. tit. 15, § 76-218 (1972).

In 1981, the Appellant Posadas de Puerto Rico Associates, doing business as Condado Holiday Inn Hotel and Sands Casino, filed a declaratory judgment action against the Tourism Company in the Superior Court of Puerto Rico, seeking a declaration that this regulatory scheme violated appellant's commercial speech rights under the United States Constitution. The court upheld the facial constitutionality of the Act, narrowly construing it as "the only advertisement prohibited by law originally is that which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo tables." 54 U.S.L.W. at 4958. The appellant's appeal was dismissed by the Supreme Court of Puerto Rico as "it [did] not present a substantial constitutional question." *Id.* at 4959. However, the United States Supreme Court granted the petition for *writ of certiorari* filed by Posadas de Puerto Rico Associates.

The Supreme Court, in a five to four decision, upheld the decision and narrowing construction issued by the lower court. Justice Rehnquist, writing for the majority, found two reasons for the Court's holding. First, he determined that by applying the first amendment analysis concerning commercial speech restrictions as dictated by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), the Puerto Rico regulatory scheme passed constitutional muster. Second, the Court, creating a new form of first amendment analysis parturient of greater enroads on the protection of speech, held that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 54 U.S.L.W. at 4961.

The Court reiterated that a limited form of first amendment protection for commercial speech was first recognized in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S.