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Responsible Citizens v. City of Asheville: A New Analysis of the Taking Issue or a Step Into Confusion?

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Responsible Citizens v. City of Asheville: A New Analysis of the Taking Issue or a Step Into Confusion?

The fifth amendment to the United States Constitution prohibits the taking of private property by the government without just compensation.[1] The "law of the land" provision of the North Carolina Constitution has been interpreted to impose a similar prohibition.[2] Not all interferences with property rights, however, constitute a taking; otherwise, any land use regulation would be subject to compensation, rendering government regulation impractical or impossible.[3] The standards for determining what constitutes a taking under the federal and North Carolina constitutions have developed independently. The United States Supreme Court has recognized that in considering the taking issue it has conducted a series of "ad hoc, factual inquiries."[4] In *Responsible Citizens v. City of Asheville*[5] the North Carolina Supreme Court attempted to develop a coherent approach analyzing what constitutes a taking under the State constitution. This attempt, however, has left suspect some of the court's earlier decisions and offers property owners less protection than they receive under the federal constitution.

In *Responsible Citizens* several property owners challenged a city flood zone ordinance that restricted the development of their property.[6] Plaintiffs contended that the cost of meeting the city's development standards was prohibitive and effectively denied them the right to develop their land.[7] They challenged the ordinance on two grounds. First, they argued that the restric-

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1. "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. This prohibition has been made applicable to the states by the fourteenth amendment. *See* Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 241 (1897).

2. "We recognize the fundamental right to just compensation so grounded in natural law and justice that it is part of the fundamental law of this State . . . . This principle is considered in North Carolina as an integral part of the 'law of the land' within the meaning of Article I, Section 19 of our State Constitution." Long v. City of Charlotte, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982). N.C. CONST. art. I, § 19 reads as follows:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

3. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

4. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Penn Cent. Transp. Corp. v. City of New York, 438 U.S. 104, 124 (1978).

5. 308 N.C. 255, 302 S.E.2d 204 (1983).

6. *Id.* at 256, 302 S.E.2d at 206. All new construction or substantial improvements in a flood hazard district were required to be anchored to prevent flotation, collapse, or lateral movement, and constructed with materials and utility equipment resistant to flood damage. Furthermore, all water and sewage systems had to be constructed to limit infiltration of flood waters. In floodway and flood fringe districts all residential uses were prohibited; other construction was permitted if it met the flood hazard district requirements and if its lowest habitable floor was at least two feet above the regulatory flood elevation. *Id.* at 257-60, 302 S.E.2d at 206-07.

7. *Id.* at 264, 302 S.E.2d at 210.

tions constituted a taking for which they were entitled to just compensation.[8] Second, they argued that the ordinance violated the equal protection provisions of both the State and federal constitutions "because it impose[d] a burden only on those citizens in the flood hazard area strictly for the benefit of those citizens with property outside the flood hazard area."[9]

The North Carolina Supreme Court stated that in ascertaining the validity of an equal protection challenge to a legislative classification, " '[t]he test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation.' "[10] Since the city had classified only lands that were prone to flooding, and the permissible object of the legislation was to prevent harm from flooding, the court concluded that the ordinance was constitutional.[11] Furthermore, the court concluded that the restriction did not amount to a taking under either the State or federal constitution.[12] The court found no taking under the fifth amendment,[13] stating that nothing distinguished *Responsible Citizens* from *Penn Central Transportation v. City of New York*,[14] in which the United States Supreme Court had upheld an historic district ordinance. The *Responsible Citizens* court found no violation of the North Carolina Constitution because plaintiffs had not been deprived of all practical uses of their property and the property had not been rendered valueless.[15]

The tenth amendment reserves the police power to the states,[16] permitting state regulation that promotes the public health, safety, morals, and welfare.[17] Not every exercise of the police power, however, constitutes a taking. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[18] If the government were required to compensate every governmentally induced

8. *Id.* at 256-57, 302 S.E.2d at 206.

9. *Id.* at 267, 302 S.E.2d at 212. The trial court dismissed the equal protection challenge on the ground "that all persons, firms and corporations whose properties are located in said Flood Hazard Districts are treated alike within said classification and the passage of said ordinance was a valid exercise of the police power . . . ." Record at 22, *Responsible Citizens*.

10. *Responsible Citizens*, 308 N.C. at 268, 302 S.E.2d at 212 (quoting Guthrie v. Taylor, 279 N.C. 703, 714, 185 S.E.2d 193, 201 (1971), *cert. denied*, 406 U.S. 920 (1972)).

11. *Id.*

12. The trial court concluded as a matter of law that even though the ordinance "seriously depreciates the value of properties, . . . [the ordinance did] not substantially deprive the plaintiffs . . . of the right to reasonable use of their property." *Id.* at 260, 302 S.E.2d at 208; Record at 22, *Responsible Citizens*.

13. *Responsible Citizens*, 308 N.C. at 267, 302 S.E.2d at 211.

14. 438 U.S. 104 (1978).

15. *Responsible Citizens*, 308 N.C. at 264-65, 302 S.E.2d at 210.

16. U.S. CONST. amend. X. *See* State v. Joyner, 286 N.C. 366, 369, 211 S.E.2d 320, 322, *appeal dismissed*, 422 U.S. 1002 (1975); Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971); City of Raleigh v. Fisher, 232 N.C. 629, 61 S.E.2d 897 (1950). The cases refer to police power as being inherent in the states.

17. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Even though this power is reposed in the state legislature, it can be delegated to municipalities and counties. *See* State v. Joyner, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975); Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971); Marren v. Gamble, 237 N.C. 680, 75 S.E.2d 880 (1953).

18. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

reduction in an individual's net worth, the taxing power would be abrogated.[19] Since first permitting land use regulation as an exercise of the police power,[20] courts have struggled to determine when such regulation constitutes a taking and requires compensation.

The North Carolina courts have focused primarily on the extent that an ordinance interferes with the use of property. Land use regulation has been held not to be a taking when the interference is minor. In *Zopfi v. City of Wilmington*[21] property adjacent to plaintiffs' property was rezoned from residential to commercial use. The court held that this did not constitute a taking because it had not interfered with plaintiffs' use of their property; they still were free to use their property for residential purposes.[22] That the rezoning of the adjacent property reduced the value of plaintiffs' property was of no consequence.[23]

In *State v. Joyner*[24] defendant operated a building material salvage shop in an area that had been rezoned to prohibit such use. Because defendant held the property under an oral lease, the lease was valid for no more than three years.[25] Even though defendant's use was frustrated completely, the rezoning did not constitute a taking because defendant's expectation was only for a three-year period. The court considered interference with such an insignificant interest to be insubstantial.[26]

As these cases illustrate, insubstantial interference with the use of property does not constitute a taking. The North Carolina courts have found a taking only when property has been rendered valueless or the owner has been deprived of all reasonable use.[27] If the regulation prevents the owner from conducting all permitted uses of the property, the regulation constitutes a taking.[28] Simply because the landholder can comply with the regulation, however, does not relieve the government of a duty to pay just compensation. In *Helms v. City of Charlotte*[29] the trial court had found no taking since the property owner still could comply with the uses permitted by the challenged zoning ordinance.[30] The North Carolina Supreme Court reversed because the trial court had not found that the permitted uses were reasonable. The court concluded that if the permitted uses were unreasonable, the regulation deprived

19. *Penn Central*, 438 U.S. at 124.

20. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 375 (1926) (actions under police power do not require compensation because they are inherent in ownership).

21. 273 N.C. 430, 160 S.E.2d 325 (1968).

22. *Id.* at 433, 160 S.E.2d at 329.

23. *Id.* at 436, 160 S.E.2d at 332.

24. 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975).

25. N.C. GEN. STAT. § 22-2 (1965).

26. *Joyner*, 286 N.C. at 375-76, 211 S.E.2d at 326.

27. Helms v. City of Charlotte, 255 N.C. 647, 653, 122 S.E.2d 817, 822 (1961).

28. Roberson's Beverages, Inc. v. City of New Bern, 6 N.C. App. 632, 637, 171 S.E.2d 4, 7 (1969), *cert. denied*, 276 N.C. 183 (1970).

29. 255 N.C. 647, 122 S.E.2d 817 (1961).

30. *Id.* at 656, 122 S.E.2d at 824.

the owner of all reasonable use and constituted a taking.[31]

The measure of what is a reasonable use is not a rigid standard. If the public interest is of lesser importance, the courts will find a lesser intrusion to have denied the owner reasonable use. In *State v. Jones*[32] the supreme court imposed a lower threshold for finding an aesthetic zoning ordinance invalid because such ordinances are of lesser public importance.[33]

The United States Supreme Court has not adopted such a reasonableness standard. In addressing taking questions, the Court conducts " 'essentially ad hoc, factual inquiries.' "[34] The Court focuses on the character of the government's action[35] and the economic impact of the regulation, considering particularly the extent to which the regulation has interfered with distinct investment-backed expectations.[36]

The Supreme Court is less likely to find a taking if the government's action is a regulation instead of a physical invasion.[37] When the government's action rises to the level of a permanent physical occupation, the Court will find a per se taking.[38] To evaluate the substantiality of a regulation's economic impact, however, the Court has adopted a broad view of an owner's bundle of property rights and a narrow view of the property interest affected.[39] Thus, the Court has focused on whether the owner could make a reasonable use of his property after the government's action.[40] The Court has been most willing to protect investment-backed expectations when the government's action would have had the effect of denying the owner the fruits of some positive investment.[41]

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31. The court stated that the permitted uses would have to be "practical, desirable and of reasonable value." *Id.* at 657, 122 S.E.2d at 825.

32. 305 N.C. 520, 290 S.E.2d 675 (1982).

33. *See id.* at 526, 290 S.E.2d at 678-79. *See also* A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979) (applying same standard to historic preservation ordinances). *See generally* Note, State v. Jones: *Aesthetic Regulation—From Junkyards to Residences?*, 61 N.C.L. REV. 942 (1983).

34. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (quoting *Penn Central*, 438 U.S. at 124).

35. *Id.*

36. *Penn Central*, 438 U.S. at 124.

37. *Compare Penn Central* (upholding regulation of owner's use of air space over Grand Central Station) *with* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (denying government navigational servitude over waters that had been made navigable through private investment; Court characterized government's action as "physical invasion").

38. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). For a discussion of Supreme Court taking jurisprudence and an analysis of *Loretto*, see Note, *Eminent Domain*—Teleprompter Manhattan CATV Corp.: *Permanent Physical Occupation As A Taking*, 62 N.C.L. REV. 153 (1983).

39. *See* Andrus v. Allard, 444 U.S. 51, 65-66 (1979); *Penn Central*, 438 U.S. at 130. In *Penn Central* the Court stated:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [The] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .

Id.

40. *See Penn Central*, 438 U.S. at 136.

41. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979) (expectation that privately developed marina would remain private).

In *Responsible Citizens* the North Carolina Supreme Court applied a three-part test for analyzing the taking question under the North Carolina Constitution.[42] First, the court examined whether the object of the legislation is within the scope of the police power. Second, it determined whether the means employed are reasonably necessary to promote the accomplishment of that goal. Third, it examined whether the interference with the owner's right to use his property as he deems appropriate is reasonable.[43] To determine whether the object of the regulation in *Responsible Citizens* was within the police power, the court looked exclusively at the findings of fact enumerated in the ordinance. Since the purpose of the ordinance was to further the "public health, safety, morals, and welfare,"[44] the court concluded that the ordinance fulfilled the first element. Similarly, the court held that the since the enacting body had found the means to be necessary, the second element was fulfilled.[45]

The third prong of the test is based on North Carolina reasonable use cases, but departs from the analysis in earlier supreme court cases. In *Helms* the court had concluded that an intrusion is a taking if it deprives the owner of all reasonable use of the property, *or* if it renders the property valueless.[46] In *Responsible Citizens*, however, the court stated that *both* elements must be satisfied.[47] The pronouncement that both elements are required may have been an inadvertent error, given that the court gleaned this rule from *Helms*.[48] More importantly, however, the passage is merely dictum since neither taking criterion was found in *Responsible Citizens*.[49]

Responsible Citizens identified a new factor to consider in ascertaining the reasonableness of the restriction—the form of the restriction. The court labeled the regulation in *Responsible Citizens* a "conditional affirmative duty."[50] Conditional affirmative duties require landowners to do something before changing the use of their land.[51] The ordinance in *Responsible Citizens* prohibited new construction or substantial improvements on the affected property unless specific requirements were satisfied.[52] If a regulation imposes only a conditional affirmative duty, it is not an unreasonable burden on the owner's use because "[t]he regulations do not affect in any way the current use of each

42. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208 (citing A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979)).

43. *Id.* at 261, 302 S.E.2d at 208.

44. *See supra* note 17 and accompanying text. The stated purpose of the ordinance was to prevent or reduce loss of life, property damage, and the like due to flood. *Responsible Citizens*, 308 N.C. at 262, 302 S.E.2d at 209.

45. "Indeed, it can be argued that an ordinance requiring, among other things, the flood proofing of new structures is the only feasible manner in which flood damage can be prevented or minimized in a flood hazard area." *Id.* at 263, 302 S.E.2d at 209.

46. *Helms*, 255 N.C. at 653, 122 S.E.2d. at 822.

47. *Responsible Citizens*, 308 N.C. at 264, 302 S.E.2d at 210.

48. *Id.* at 263-64, 302 S.E.2d at 209-210 (citing *Helms*).

49. *Id.* at 264-65, 302 S.E.2d at 210-11.

50. *Id.* at 264, 302 S.E.2d at 210.

51. *Id.*

52. *Id.* at 257-60, 265, 302 S.E.2d at 206-08, 210.

plaintiff's property."[53] Thus, it is of no consequence that other uses are prohibited.[54]

This conditional affirmative duty analysis departs from the court's prior holdings and conflicts with *Helms*. In *Helms* the land was not in use at the time of the zoning change. The court examined whether the available uses were reasonable;[55] the option of allowing the unused condition to continue was only a part of this inquiry. If a plaintiff in *Responsible Citizens* was not using his land when the ordinance was adopted, and all development effectively was prohibited by the "conditional affirmative duties" imposed by the ordinance, he was left with no available reasonable use. Under *Helms*, this deprivation would constitute a taking. *Responsible Citizens* held that it was not a taking.

The court's analysis fails to consider factors that constitute a taking under the federal constitution. The court applied the conditional affirmative duty rationale and relied on *Penn Central* in dismissing summarily the challenge under the federal constitution.[56]

> Both ordinances place conditional affirmative duties on the landowner to meet certain requirements if he or she wishes to engage in new construction or alterations. Indeed, we find no feature of the *Penn Central* case which substantially distinguishes it from the case at bar—at least to the extent that would render the exercise of police power invalid or justify a different conclusion on the "taking" issue.[57]

The court, however, incorrectly relied on *Penn Central* for its conditional affirmative duty analysis. *Penn Central* does not discuss the doctrine of conditional affirmative duty. Under the federal and State constitutions, the ends of the ordinance must be permissible, and the means must be reasonably necessary to effectuate those ends.[58] Even if an ordinance passes this test, however, its enactment constitutes a taking "if it has an unduly harsh impact upon the owner's use of the property."[59] Although the United States Supreme Court has not developed a framework for this analysis, the factors it has identified as pertinent to the taking issue do not include whether the regulation imposes a conditional affirmative duty on the owner.

The *Responsible Citizens* court's analytic framework does not account for an established federal factor—interference with investment-backed expectation in the use of property. If land presently is not in use or is held with an investment-backed expectation for the development of that land, a regulation

53. *Id.* at 264, 302 S.E.2d at 210.

54. *Id.* at 265, 302 S.E.2d at 210.

55. *Helms*, 255 N.C. at 656-57, 122 S.E.2d at 824-25.

56. *Responsible Citizens*, 308 N.C. at 266-67, 302 S.E.2d at 211.

57. *Id.* at 267, 302 S.E.2d at 211.

58. *See Penn Central*, 438 U.S. at 127. *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Lochner v. New York, 198 U.S. 45 (1905); A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

59. *Penn Central*, 438 U.S. at 127.

that prohibits development may constitute a taking under the federal constitution.[60] Under *Responsible Citizens*, however, if this prohibition is merely a constructive prohibition in the form of a conditional affirmative duty, it is not a taking. Suppose a plaintiff in *Responsible Citizens* had purchased vacant commercial property and expended a considerable sum of money to prepare for construction of a shopping center. If the city council then imposed a conditional affirmative duty that effectively prohibited any development of the property, a taking would have occurred under the reasoning of *Penn Central*.[61] Under *Responsible Citizens*, however, this zoning would have been a permissible exercise of the police power.

The court's holding in *Responsible Citizens* was very broad. The court did not consider the different possible circumstances of the plaintiffs' property; it looked only to the form of the ordinance and held it not to constitute a taking. Furthermore, the trial court had failed to find that the ordinance did not deprive plaintiffs of all reasonable use of their property.[62] If the supreme court had applied its pre-*Responsible Citizens* reasonableness standard, it would have remanded for such a finding.[63] The court's failure to remand illustrates that the form of the ordinance as a conditional affirmative duty was crucial to the outcome.

In *Responsible Citizens* the North Carolina Supreme Court provided a simple framework for analyzing the taking issue. The decision, however, casts doubt on the court's previous taking decisions[64] since its conditional affirmative duty analysis has short-circuited the definition of reasonable use announced in *Helms*. Although the court attempted to clarify the answers to questions that have plagued this area of law, it raised more questions than it answered, leaving the present state of the law uncertain. Because the decision affords a landowner less protection under the North Carolina Constitution than under its federal counterpart, the primary question in North Carolina taking cases will be whether a violation of the fifth amendment has occurred. Thus, although the court provided a simple framework with which to analyze North Carolina taking law, it has rendered that framework of little value.

60. *See supra* notes 36-41 and accompanying text.

61. *See Penn Central*, 438 U.S. at 136.

62. Record at 20, *Responsible Citizens*.

63. *See Helms*, 255 N.C. at 657, 122 S.E.2d at 824-25; Jamison v. City of Charlotte, 239 N.C. 423, 79 S.E.2d 797 (1954). *See supra* notes 29-31 and accompanying text.

64. Even though the court analyzed the facts broadly, *Responsible Citizens* seems to be an example of result-oriented adjudication. The ordinance was enacted for the purpose of allowing Asheville residents to qualify for federal flood insurance under the National Flood Insurance Act. 42 U.S.C. §§ 4001-4128 (1976 & Supp. V 1981). The court apparently felt compelled to uphold any such ordinance. This predisposition of the court toward upholding the constitutionality of the ordinance may have affected its analysis in two ways. First, the court was willing to adopt an analysis broader than its prior decisions. Second, the court cited cases from other jurisdictions that do not support its analyis. Each of the cases cited, however, upheld similar flood zone ordinances. *See* Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1975); Cappture Realty Corp. v. Board of Adjustment of Elmwood Park, 126 N.J. Super. 200, 313 A.2d 624 (1973), *aff'd*, 133 N.J. Super. 216, 336 A.2d 30 (1975). In both of these cases, however, the courts did not consider whether the ordinance constituted a taking of the plaintiffs' property. *See, e.g.*, *Turnpike Realty*, 362 Mass. at 238, 284 N.E.2d at 901-02 (Tauro, C.J., concurring).

Once again, practitioners are left to interpret the "ad hoc factual inquiries"[65] of the United States Supreme Court.

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65. *See supra* notes 34-41 and accompanying text.