

Banning Hydrofracking Is Not A “Taking” of Property

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As the public sentiment grows for a ban on High Volume Hydrofracking (HVHF), lawyers and others who speak for corporate profit-making opportunities in natural gas say that laws banning or limiting gas drilling is a “taking” of property. Even some who seem to be on our side make the same claim. This claim is groundless and misguided. It is a scare tactic to prevent public pressure on our elected officials against HVHF.

What is the Legal Status of These Claims?

- All property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community. There is no compensation for limiting that type of use of property, and
- A “taking” claim does not apply if the property can be used for other purposes even if those uses are not as profitable.

Consider the Source

The claim that the government (fed, state or local) will be sued to recover the value of lost property is made by attorneys and others supporting HVHF as a method of gas drilling. They say that we, the taxpayers, will have to pay for the lost profits due to the government’s taking of their property. Always bear in mind that lawyers are advocates for their clients. When a Landowners’ Coalition lawyer claims that a ban will be a taking, that lawyer is making an argument in support of his client’s position. Making a claim (I’m going to sue you) doesn’t mean that a lawsuit will really happen nor that a Court will agree with the argument if an actual lawsuit is filed.

What Is the Law on Taking Property by the Government

The Fifth Amendment to the U.S. Constitution provides certain protections to persons. Included in the protections is the phrase “nor shall private property be *taken* for public use without just compensation.” This is the “taking” referred to by the anti-ban people. This obligation to compensate for taking private property only applied to the federal government until the 14th Amendment to the Constitution expanded the application to state governments as well. Eminent domain is the term most frequently used when a government takes a piece of property: land for a public park, a public road, a public school, etc. The owner of the land is entitled to be paid for the value of the land taken from her. Historical evidence suggests that the original intent of the takings clause did not include mere restrictions on use.

But what if the government, say through a town zoning law or a state law, BANS gas drilling without taking over title to the property where gas companies and gas leaseholders expect to drill for gas? Are governmental laws that restrict the use of the land by restricting a profit making opportunity a “taking” when actual ownership does not change?

The notion that one can do anything he wants on his property is not the law of the land. The US Supreme Court has said “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.” Mugler v. Kansas, 123 U.S. 623, 665 (1887) This principle still remains the law of the land even as Court rulings on “takings” have muddied the waters.

A town government can use its police power and zoning/land use power to restrict and prohibit uses that it considers to be detrimental to the community. The exercise of these powers does not constitute a “taking.” For example, the Town of Hempstead passed a law prohibiting gravel pit from excavating below the town’s water table. This law was upheld in Goldblatt v. Hempstead, 369 U.S. 590 (1962) as a valid use of the town’s police power. The Supreme Court conceded that the law completely prohibited a prior use by Mr. Goldblatt who had operated a gravel pit for 30 years. But the Court held that depriving the property of its most profitable use does not make the law unconstitutional, nor a taking.

The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.” Goldblatt at p.593 quoting Mugler v. Kansas.

In 1992 the Supreme Court carved out an exception to this concept in Lucas v. S.C. Coastal Council, 505 U.S. 1003. The Supreme Court expanded the right to be compensated when new laws deprived land of *all* economically beneficial use. Although Lucas still owned the land, a lower court at trial had found that the property was rendered *of zero value* by the law which prohibited residential construction beyond a baseline on the beachfront. While the Supreme Court described these as “relatively rare situations”, it has encouraged litigation. At the same time as Lucas slightly expanded the takings doctrine it also reaffirmed the principle that government does not have to pay compensation when it limits “harmful or noxious uses” of property.

It is correct that many of our prior opinions have suggested that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation. . . .[G]overnment may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate – a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power”

The Court further acknowledged that Lucas would not be entitled to compensation even though he was deprived of all economically beneficial use *if* his “bundle of rights” did not include the prohibited use to begin with. Some uses of land are not a part of the land title to begin with. When someone owns property the owner does not have the property right to have a common law nuisance. Government actions that abate common law nuisances are per se not takings. The Court acknowledged there are inherent limits on landowner rights, imposed under background

principles of the State's law of property and nuisance. Thus government can still forbid deleterious uses even to the point of total takings.

Justice Scalia, who wrote the majority opinion in Lucas, says that a "total taking" of **personal** property would be subject to a lower standard "by reason of the State's traditionally high degree of control over commercial dealings" This means that there is no claim of a taking based on a gas lease, which is **personal** property rather than **real** property, i.e. land.

Those opposing a ban on hydrofracking base their claims of a "taking" on Lucas but subsequent cases have confirmed the narrowness of the ruling in Lucas.

- Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (Court said moratorium was not a regulatory taking);
- Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (part of parcel was worth \$200,00, so was not a total taking);
- Lingle v. Chevron U.S.A. 125 S. Ct. 2655 (2005) (recognized that Takings cases were inconsistent. Tried to clarify by saying the inquiry is whether the regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster" i.e. functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his property.);
- Gazza v. NYSDEC 89 NY 2d 603 (1999), cert. denied. (Mere diminution in value of property, however serious, is insufficient to demonstrate a taking.)

Conclusion

- To make a takings argument, the following conditions apply:
 - A taking claim cannot be based on an interest the owner never had, e.g. the right to create a nuisance.
 - A taking claim does not apply if the property can be used for other purposes. i.e. the economic value has not been totally extinguished. Just because the value of the property has been reduced does not mean the owner gets to claim his "expected" profits if he were allowed to fully exploit the property.
 - Personal property, such as a gas lease, has even less recognition as a taking, even if it is a total taking.
- Property rights, as well as other rights, are limited by the neighborhood of other public interests. The highest court in NYS said in Gernatt Asphalt Products v. Town of Sardinia, 87 N.Y.2d 668 (1996):

A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police power to prevent damage to the rights of others and to promote the interests of the community as a whole. (at page 684)
- The police power of the state is the power to regulate persons and property for the purpose of securing the public health, safety, welfare, comfort, peace and prosperity of the municipality and its inhabitants.