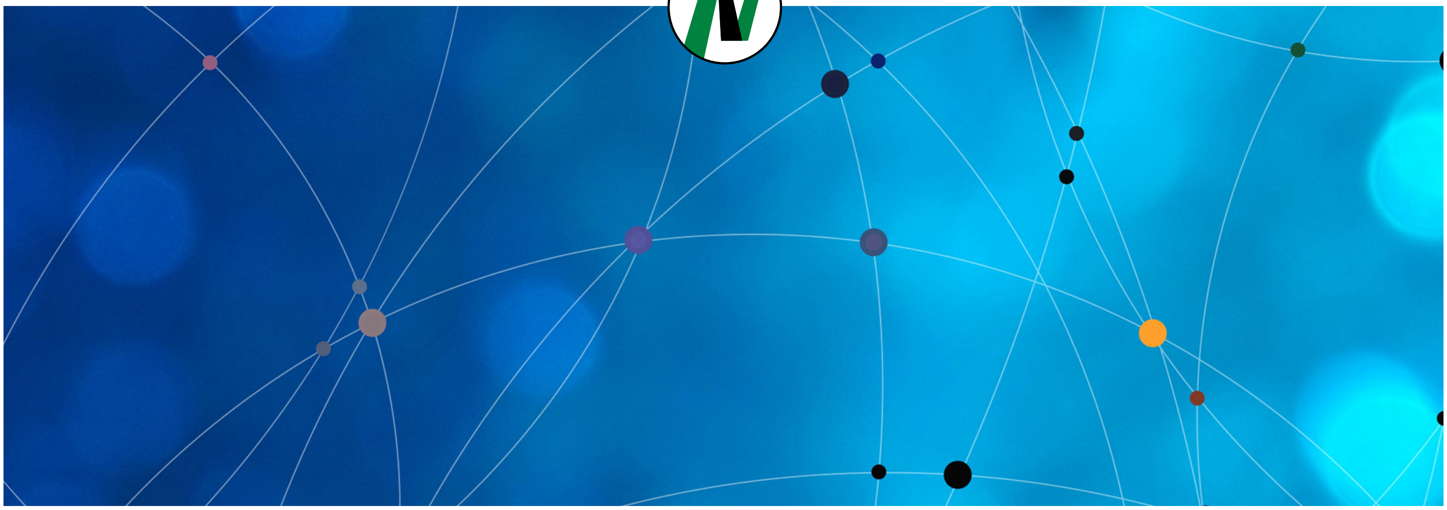

Temporary Regulatory Takings Do Exist in California!

05.16.2013 | By Bernadette Duran-Brown, Bradford B. Kuhn

Given the maze of procedural and substantive hurdles involved, property owners rarely succeed with regulatory takings claims. Even when owners do win, it is yet more uncommon for courts to award damages, instead allowing the public agency to repeal the regulation. But securing a victory on liability and a damages award for a <u>temporary</u> regulatory taking, well, that is nearly uncharted territory (going into the realm of unicorns, the Loch Ness Monster, and other mythical creatures); we've heard stories of such events, but it is rare to find reliable documentation.

That all changed last week when the California Court of Appeal issued its decision in *Lockaway Storage v. County of Alameda* (May 9, 2013), holding that the County's application of a voter-approved growth control initiative resulted in a compensable temporary regulatory taking entitling the owner to nearly one million in damages and over $725,000 in attorneys' fees.

Background

In May 2000, Lockaway purchased 8.45 acres of land in Alameda County for $800,000 with the intent to build a boat and RV self-storage facility. Prior to the close of escrow, Lockaway confirmed with the County that the property could be used for this purpose. The prior owner had secured a Conditional Use Permit (CUP) in 1999 which permitted the development of a storage facility that would expire in September 2002 if not implemented before its expiration. Escrow closed in August 2000 and Lockaway assumed the rights and obligations of the seller under the 1999 CUP.

In November 2000, the Alameda County voters passed Measure D, a growth control initiative which generally prohibited the development of storage facilities in the area of Lockaway's property. Measure D included two exceptions: (i) the ordinance could not be applied in a way that would deprive anyone of their "constitutional or statutory rights or privileges;" and (ii) the ordinance would not affect "existing parcels, developments, structures, and uses," nor apply to development or proposed development which had received all discretionary permits and approvals.

Despite Measure D's adoption, Lockaway pursued its plan to develop the property and was assured by County staff that it had implemented the CUP, as required. However, one month before the CUP was set to expire, the County informed Lockaway that it would not renew the CUP and the project could not go forward without a new CUP. By then, Lockaway had spent approximately $400,000 on the project and only needed a building permit from the County to proceed with construction, which the County did not issue prior to the CUP's expiration. The County considered the new CUP Lockaway filed under protest and determined the project was prohibited under Measure D because Lockaway had not secured its building permit and commenced construction prior to Measure D taking effect. Lockaway subsequently filed a lawsuit against the County for inverse condemnation, along with a writ of mandate to force the County to allow Lockaway's project to proceed.

The Trial Court

The trial court determined that Measure D did not apply to Lockaway's project and commanded the County to issue permits so the project could proceed. Lockaway continued to pursue its inverse condemnation claim, seeking damages for a temporary regulatory taking for the 30 month delay during which the County applied Measure D and prohibited the property's development.

At trial, the court determined that the County's application of Measure D resulted in a temporary regulatory taking of Lockaway's property. Using the three-factor test provided in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 115-116 -- i.e., (1) the economic impact of the regulation on the owner, (2) the extent to which the regulation interfered with distinct investment-backed expectations, and (3) the character of the governmental action, the court held that the County's conduct had a "substantial, negative economic impact on Lockaway's use of the property, had materially interfered with [its] distinct, investment-backed expectations and that its conduct could not be justified as a normal regulatory mistake." The trial court awarded damages totaling $989,640.96, comprised of lost profits, increased construction costs and interest. Lockaway was also awarded attorneys' fees amounting to $728,015.50. The County appealed.

The Court of Appeal

The Court of Appeal confirmed that Lockaway's project was not subject to the growth control initiative but instead fell within one of the Measure D exceptions since the project had secured the discretionary CUP permit, and any remaining permits were ministerial actions.

The Court also agreed that the County's actions went "too far" when considering the three-pronged *Penn Central* test. While the County's actions did not render the property completely worthless, the County did "unreasonably impair the value or use of the property" during the time it was enforcing Measure D. Expecting Lockaway to develop another project consistent with Measure D would have caused a substantial decrease in the value of the property; moreover, the funds devoted towards the property's development would have been wasted, and Lockaway would have been deprived of a reasonably expected return on its investment since it had always intended to develop the property for storage facilities. As such, the County had affected a temporary taking of Lockaway's property and compensation for that time period was appropriate.

The County argued that under *Landgate Inc. v. California Coastal Comm.* (1998) 17 Cal.4th 1006, there could be no liability for a temporary regulatory taking where a legally erroneous decision of a government agency results in a delay in the permitting process. But given more recent, conflicting authority from the U.S. Supreme Court in *Lingle v. Chevron* (2005) 544 U.S. 528, the Court questioned *Landgate's* validity, and at a minimum narrowly interpreted its application, holding that at most it could factor into consideration of a "normal delay in the permit process." That was not the case with Lockaway, as the County's "doctrinal shift" in interpreting Measure D took "the case out of the 'normal-if-mistaken-regulatory-activity' paradigm and turns it into a taking."

Conclusion

While successful regulatory takings claims are still infrequent, there does appear to be a judicial shift towards reigning-in overreaching government regulations. The *Lockaway* decision is important not only because it documents the reality of liability and damages for temporary regulatory takings, but also because it highlights the court's focus on the government's conduct and whether a property owner was treated fairly during the regulatory process. *Lockaway* also signals the narrow applicability of the "normal delay in the permitting process" defense public agencies could turn to under the prior *Landgate* decision.