7-2016

California Building Industry Association v. City of San Jose: The Constitutional Price for Affordable Housing

Kristoffer James S. Jacob

California Law Review Circuit

Vol. 7 July 2016

California Building Industry Association v. City of San Jose: The Constitutional Price for Affordable Housing

Kristoffer James S. Jacob*

INTRODUCTION

The California Supreme Court determined, in the landmark case *California Building Industry Association (CBIA) v. City of San Jose*, that the City of San Jose's inclusionary housing ordinance does not constitute an unjust taking of property.[1] This momentous decision will likely transform how cities and municipalities approach their responsibility for providing affordable housing for their region. But this decision comes at a price—a constitutional price. The standard of review applied by the court weakens constitutional protections of private property. Specifically, the standard potentially allows a state to unconstitutionally take private property by masking exactions as legislative decisions.

This Comment argues that the court decided the case correctly within the context of legal precedent, but the holding is nonetheless problematic under the Fifth Amendment's guarantee that no "private property be taken for public use, without just compensation."[2] Part I of this Comment provides background for

DOI: :http://dx.doi.org/10.15779/Z386C4X

* J.D., University of California, Berkeley, School of Law, 2017; B.S., University of California, Berkeley, 2010.

1. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 1006 (Cal. 2015).

2. U.S. CONST. amend. V. In this Comment, I will refer to the Takings Clause in the Fifth Amendment provision for clarity, considering that both the State and federal Takings Clause are governed by similar fundamental precedent and protect similar interests. *See* CAL. CONST. art. I, § 19, subdiv. (a) ("Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid.").

the case and existing laws. Part II analyzes the court's decision. Finally, this Comment concludes by stressing that the court should discontinue the practice of distinguishing between legislatively enacted land use regulations and administrative decisions—a distinction that the *CBIA* standard of review hinges upon—because either method incubates the evils that merit a searching analysis to safeguard the constitutional protection of private property.

I.
A CASE STUDY: *CALIFORNIA BUILDING INDUSTRY ASSOCIATION V. CITY OF SAN JOSE*

A. Background

California is in a severe housing crisis. An estimated 1.7 million Californians do not have easy access to housing, spending more than half their income on this "most basic of human needs."[3] This is about 14 percent of all of the state's households—a considerably higher proportion than the national rate of about 8 percent.[4] This lack of access to affordable housing impacts the public welfare by "threaten[ing] the health and welfare of thousands of Californians, as well as the state's long-term prosperity."[5]

For nearly half-a-century now, the California State Legislature has enacted measures to prompt cities and municipalities to address the housing shortage gripping the state.[6] Cities and municipalities have a legal obligation to set forth and accommodate its fair share[7] of housing needs for all income levels.[8] The legislation also set the obligation to develop and adopt a long-term schedule to meet these needs.[9] To meet these responsibilities, cities in turn have enacted measures that have challenged the limits of the constitutional protections of private property.[10]

---

3. LEGISLATIVE ANALYST'S OFFICE, PERSPECTIVES ON HELPING LOW-INCOME CALIFORNIANS AFFORD HOUSING 4 (2016), http://www.lao.ca.gov/Reports/2016/3345/Low-Income-Housing-020816.pdf; LITTLE HOOVER COMM'N, REBUILDING THE DREAM: SOLVING CALIFORNIA'S AFFORDABLE HOUSING CRISIS i (2002), http://www.lhc.ca.gov/lhcdir/165/report165.pdf.

4. PERSPECTIVES ON HELPING LOW-INCOME CALIFORNIANS AFFORD HOUSING, *supra* note 3, at 4.

5. REBUILDING THE DREAM, *supra* note 3, at i.

6. *See* CAL. GOV. CODE § 65300 et seq. (1967) ("Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan.").

7. The "fair share" housing goals of the California Legislature reflect the "fair share" doctrine fashioned in the seminal affordable housing case, *Southern Burlington County, NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975). There, the court found that a city "must affirmatively afford [housing] opportunity, at least to the extent of the municipality's *fair share* of the present and prospective regional need therefor." *Id.* at 724–25 (emphasis added).

8. § 65580.

9. §§ 65583–65588.

10. For example, a City of Napa ordinance that required 10 percent of all newly constructed units to be affordable was challenged as an unconstitutional taking. Home Builders Ass'n of N. Cal. v. City of Napa, 90 Cal. App. 4th 188, 192 (2001).

The City of San Jose (City) is especially affected by the housing crisis, with an estimated 40 percent of households without easy access to affordable housing.[11] In addition, the City Council determined that an estimated 46 percent of San Jose households pay more than 30 percent of their income on their mortgage,[12] a rate suggesting that these households are overpaying for housing.[13] In an effort to comply with the City's fair share of the obligation to provide affordable housing, the City Council enacted Ordinance No. 28689 (the Inclusionary Housing Ordinance).[14] The ordinance requires developers of residential projects with twenty or more units to designate 15 percent of the total dwelling units as affordable housing.[15]

B. California Building Industry Association v. City of San Jose

The City adopted the Inclusionary Housing Ordinance on January 2010.[16] Shortly thereafter, the California Building Industry Association (CBIA) challenged the ordinance as an unconstitutional taking.[17] The CBIA alleged that the ordinance violates the Fifth Amendment's protection against "private property...taken for public use, without just compensation"[18] because the City failed to show that there was a "reasonable relationship" between the development of new residential projects and the "[need] for additional subsidized housing units in the City."[19]

The lower courts issued split decisions. The Superior Court agreed with CBIA and accordingly granted CBIA injunctive relief.[20] The City appealed to the Sixth District Court of Appeals, which reversed and remanded the decision after finding that the Superior Court erroneously applied a heightened level of scrutiny.[21] The Sixth District Court of Appeals held that the appropriate standard of review was whether the ordinance "bears a substantial and reasonable relationship to the public welfare," not whether the ordinance demonstrates a reasonable relationship between the new residential

11. Richard Scheinin, *Report: Silicon Valley's Housing Affordability Crisis Worsens*, SAN JOSE MERCURY NEWS (July 21, 2015, 2:45 PM), http://www.mercurynews.com/business/ci_28512250/report-silicon-valleys-housing-affordability-crisis-worsens.

12. SAN JOSE, CAL., ORDINANCE no. 28689 § 5.08.010(A)(3).

13. *Id.*

14. *See* § 5.08.020.

15. § 5.08.400. The ordinance defines affordable housing cost according to the California legislature, which defines affordable housing cost as "30 percent of the area median income of the relevant income group (i.e. extremely low, very low, lower and moderate income)." Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 983 (Cal. 2015).

16. Citywide Inclusionary Housing Ordinance, SANJOSECA.GOV, https://www.sanjoseca.gov/index.aspx?NID=1307 (last visited Apr. 1, 2016).

17. *Id.*

18. U.S. CONST. amend. V.

19. *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 978.

20. *Id.*

21. Cal. Bldg. Indus. Ass'n v. City of San Jose, 157 Cal. Rptr. 3d 813, 815 (Ct. App. 2013).

developments and the need for more affordable housing, because the ordinance was a legislative act.[22] Under this standard of review the City Council is given "substantial deference," and it is therefore a more "lenient" standard of review.[23]

The CBIA appealed to the California Supreme Court, which affirmed the appellate court's decision.[24] The court emphasized California courts' two standards of review in the context of land use regulations. If a regulation is generally applicable through administrative actions[25] and acts as an exaction,[26] courts apply the searching *Nollan/Dolan* test (commonly known as the "unconstitutional conditions doctrine"), which is effectively a heightened scrutiny test.[27] If a regulation, however, is generally applicable through legislative actions—such as here—courts apply a more deferential standard of review, determining only whether the regulation has a "reasonable relation" to a "legitimate public interest."[28] The court also noted that their holding does not foreclose the *Penn Central* test to determine whether a regulation goes "too far" and constitutes a "regulatory taking."[29] The *Penn Central* test lists three factors for consideration: (1) the economic impact on the claimant, (2) the extent to which the regulation interfered with investment-backed expectations, and (3) the character or extent of the government action.[30]

C. The Ordinance Does not Implicate the Unconstitutional Conditions Doctrine

The *CBIA* Court applied the appropriate standard of review in its determination. The ordinance is a legislative action under California precedent and thus heightened scrutiny is not appropriate.[31] The court also determined that the heightened scrutiny required for certain legislative actions is not implicated because the ordinance "goes beyond mitigating the impacts attributable to the proposed developments that are subject to the ordinance."[32]

---

22. *Id.* at 824.

23. *Id.* at 818, 824.

24. *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 979.

25. Administrative actions refer to permits that require approval by a local administrative agency or local government.

26. An exaction is a form of land use regulation whereby approval or denial of a development permit is conditioned on payment, either by property or money, by the property owner to mitigate the impact of the development. Jennifer Evans-Cowley, *Development Exactions: Process and Planning Issues* 1 (Lincoln Ins. of Land Pol'y, Working Paper WP06JEC1, 2006).

27. *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 988.

28. *Id.* at 987. A caveat, a legislatively enacted mitigation fee is reviewed under "heightened scrutiny" similar to administrative actions. San Remo Hotel L.P. v. City and Cnty. of San Francisco, 41 P.3d 87, 106–11 (Cal. 2002).

29. *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 991–92.

30. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978).

31. *See Cal. Bldg. Indus. Ass'n*, 351 P.3d at 987.

32. *Id.* at 1000. This holding overturned *Building Industry Association of Central California v. City of Patterson*, 171 Cal. App. 4th 886 (2009), where the Court of Appeal for the Fifth District

Further, the court noted that even if the ordinance was not a legislative policy but instead an administrative action, the ordinance is not unconstitutional because it is not an exaction.[33] The court explained that the ordinance's effect on the developers' expected revenue does not give rise to an exaction because "price controls [are] a constitutionally permissible means to achieve a municipality's legitimate public purposes."[34] Additionally, the court determined that the ordinance does not result in a conveyance or dedication of property to the City because the ordinance provides "economically beneficial incentives" to developers and places restrictions on future sales rather than on the developers.[35]

II.
ANALYSIS: A LEGALLY SOUND, BUT PROBLEMATIC PRECEDENT

A. The Court's Decision Weakens Fifth Amendment Protections

The *CBIA* Court's decision to continue differentiating between legislative and administrative actions chips away at Fifth Amendment protections and accordingly breeds constitutional concerns. As illustrated by the different holdings in this case's appeals process, a court's decision ultimately turns on the applied standard of review. Thus, the standard applied by the *CBIA* Court leaves open the possibility of allowing state governments to escape heightened scrutiny and achieve an unconstitutional taking by masking an exaction as a legislative decision.

The United States Supreme Court established the heightened scrutiny of the unconstitutional conditions doctrine in two landmark cases: *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. The *Nollan* Court held that the exaction must have an "essential nexus" to a legitimate government interest,[36] while the *Dolan* Court held that the exaction must be "rough[ly] [proportional]" to the burden imposed on the individual for the proposed land use.[37] The more searching analysis of the unconstitutional conditions doctrine for land use regulations is necessary because a unique set of fears arise from the "special context" of land use regulations where the government can demand more from an individual in exchange for a benefit.[38]

The legislative and administrative distinction arose from the *Dolan* decision. There, the Supreme Court determined that an administrative action was not valid because the government's demand that the claimant dedicate 10

determined that the *San Remo Hotel* standard of heightened scrutiny is applicable to legislatively enacted inclusionary housing policies. *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 1003–04.

33. *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 991.
34. *Id.* at 992.
35. *Id.* at 994, 995–96.
36. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).
37. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
38. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

percent of his property for a permit was not "rough[ly] [proportional]" to the benefit.[39] In its rationale, the Supreme Court distinguished "essentially legislative determinations classifying entire areas of the city" and "an adjudicative [administrative] decision to condition [an] application for a building permit on an individual parcel."[40] Yet at the same time, the *Dolan* Court left unanswered the question of whether the heightened scrutiny of the unconstitutional conditions doctrine applies to legislative actions. Lower courts have thus interpreted the *Dolan* decision differently. Some courts adopted a broad interpretation and apply the unconstitutional conditions doctrine to both legislative and adjudicatory decisions.[41] Other courts—such as in California—adopted a narrow interpretation and limited the unconstitutional conditions doctrine to adjudicatory decisions.[42]

The distinction between administrative and legislative decisions generally stems from due process precedent that find that adjudicative actions present more evils to an individual who will be impacted by the whims and demands of governmental officials.[43] In California, courts apply heightened scrutiny to administrative decisions because there is the "heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions."[44] Alternatively, courts reason that the unconstitutional conditions doctrine is not applicable in legislative decisions because the risk that the government can leverage greater concessions in adjudicatory exactions is absent "in widely applicable legislative enactments that do not require the exercise of meaningful discretion in applying the ordinance."[45]

However, the line of reasoning that adjudicative actions result in heightened risk compared to legislative actions is unpersuasive. Individuals in the adjudicatory context enjoy due process and the opportunity to present their case, whereas individuals affected by legislative decisions are not afforded the adjudicative elements that safeguard individuals from extortionate demands.[46] In addition, administrative actions are mandated by rules that focus on proper procedures to ensure that an individual's right is not violated, such as the

39. Dolan, 512 U.S. at 381–82, 391.

40. *Id.* at 385.

41. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 10.5 (3d ed. 2014).

42. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 979 (Cal. 2015).

43. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (finding that there are greater risks of governmental abuse when a "relatively small number of persons [are] concerned" to warrant a hearing).

44. Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 966 (Cal. 1999) (citing Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996)).

45. Dudek v. Umatilla Cnty., 69 P.3d 751, 756 (Or. Ct. App. 2003).

46. Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 271 (2000).

requirement that decisions must be substantiated by findings on the record.[47] Yet, certain institutions—for example, developers—cannot participate in the legislative process directly (e.g., voting to protect their interests). Thus, the reasoning that adjudicative actions breed heightened risk arguably leads to a paradoxical implementation of the unconstitutional conditions doctrine: "if legislative decisions are shielded from the 'rough proportionality' standard and adjudicative decisions are subjected to it, the result may be that extortionate behavior is granted deference, while fair processes are overly scrutinized."[48]

This reasoning that heightened risk is limited to administrative decisions is also weak in light of recent decisions by the Supreme Court and the Ninth Circuit. In the aftermath of *Dolan*, courts split on whether the unconstitutional conditions doctrine applies to nonphysical exactions.[49] In *Koontz v. St. Johns River Water Management District*, the United States Supreme Court determined that the unconstitutional conditions doctrine is not limited to physical exactions but also applies to other forms of land use regulations that warrant the same fears of governmental abuse as physical exactions.[50] There, the *Koontz* Court applied the unconstitutional conditions doctrine to mitigation fees because "[i]t makes no difference that no property was actually taken . . . Extortionate demands for property in the land use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[51]

The reasoning applied in *Koontz* broadens the scope of the unconstitutional conditions doctrine and suggests that it should not be limited in form, but rather applied generally to realize the spirit of the doctrine as a safeguard against the impermissible taking of property. Thus, it is difficult to argue that the unconstitutional conditions doctrine should only be applied to administrative decisions, as the fear of "[e]xtortionate demands" is also inherent in legislative decisions.[52] In fact, legislative actions arguably warrant greater fears of abuse, considering that the decisions will be applied to an umbrella of individuals and development projects rather than at an individual basis.[53] There is also the argument that legislative demands can be more oppressive "because unconstitutional conditions are imposed in every case, not

47. *See* Topanga Ass'n. for a Scenic Community v. Cnty. of Los Angeles, 11 Cal. 3d 506, 509–14 (1974) (holding that administrative agencies must render findings to support their decisions regardless of whether findings are statutorily required).

48. Reznik, *supra* note 46, at 271.

49. JUERGENSMEYER & ROBERTS, *supra* note 41.

50. Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 2599 (2013).

51. *Id.* at 2596.

52. *Id.*

53. *See* Reznik, *supra* note 46, at 270 n.136 (noting a number of ways legislators can abuse their authority to subvert Fifth Amendment protections).

just when the planning board is in an especially collectivist mood."[54] Thus, the *CBIA* Court's distinction of the present case from *Koontz*—merely that a "monetary exaction" is distinct from a housing ordinance[55]—is myopic and understates the rationale of the *Koontz* Court that the unconstitutional conditions doctrine serves to protect property rights in the land use context.

Like the Supreme Court, the Ninth Circuit has expanded the breadth of the unconstitutional conditions doctrine. In *Horne v. U.S. Department of Agriculture*, Horne alleged that the Agricultural Marketing Agreement Act of 1937 (AMAA) resulted in an impermissible taking of his property.[56] The AMAA was enacted to ensure orderly marketing conditions by setting an annual "reserve tonnage" requirement, which is diverted from the market to smooth the peaks of the raisin supply curve.[57] In *Horne*, the Ninth Circuit determined that the unconstitutional conditions doctrine applies to legislative decisions, reasoning that, "[a]t bottom, the reserve requirement is a use restriction."[58] The Ninth Circuit's holding suggests that the applicability of the unconstitutional conditions doctrine turns not on the form of the regulation, but on its purpose. Unlike the *CBIA* Court, the *Horne* Court appropriately recognized that the unconstitutional conditions doctrine must be applied generally because the heightened fears of governmental abuse in administrative decisions are equally present in legislative decisions.[59]

Furthermore, the Supreme Court has never explicitly blessed the legislative versus administrative distinction. In fact, in its most recent landmark land use decision, *Lingle v. Chevron U.S.A. Inc.*, the Supreme Court noted that "the government may not require a person to give up a constitutional right—here, the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[60] The Supreme Court did not limit its holding to administrative decisions, but rather described government actions in general: "[t]his is because the unconstitutional conditions doctrine does not distinguish, in theory or in practice, between conditions imposed by" either a local government or state legislature."[61] This reasoning invokes the very reasoning applied by both the *Koontz* and *Horne* Courts in finding that the proper application of the unconstitutional conditions

54. James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 424 (2009).

55. *See Koontz*, 133 S.Ct. at 2596.

56. Horne v. U.S. Dept. of Agric., 750 F.3d 1128, 1135 (9th Cir. 2014), *rev'd on other grounds*, 135 S.Ct. 2419 (2015).

57. Horne, 750 F.3d at 1133.

58. *Id.* at 1142.

59. *See id.*

60. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005) (citing Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).

61. Burling & Owen, *supra* note 54, at 400.

doctrine should be guided by the doctrine's purpose of protecting against governmental abuse rather than a formalist adherence to form.

B. Penn Central Does not Provide the Same Protections

The *CBIA* Court highlighted that their decision does not foreclose the *Penn Central* test in determining whether a regulation goes "too far" so as to constitute a "regulatory taking."[62] However, the court fails to recognize that *Penn Central* fails to protect against governmental abuse through land use regulations. Scholars often decry that the three factors of the test are so broad that the test provides no meaningful guidance for courts in takings cases.[63] Consequently, courts often struggle to determine the contours of a regulation that goes "too far," giving credence to the criticism that the test "mask[s] . . . the fundamental parameters of takings law"[64] so as to be too lenient towards regulators.[65] *Penn Central* is contrary to the *CBIA* Court's assertion that the test serves as a proper check in the context of land use regulations. Instead, it is clear that *Penn Central* fails as a bulwark against governmental abuse because it does not properly account for the heightened risk arising from the "special context" of land use regulations; specifically, the government demands too great a consideration for the benefit of a permit.[66]

CONCLUSION

California, especially the City of San Jose, is in the midst of a housing crisis. However, the solution to this crisis should not come at the expense of the Fifth Amendment's protections of private property. The *CBIA* Court's decision to maintain the distinction between administrative and legislative actions subverts the spirit of the unconstitutional conditions doctrine, which the Supreme Court fashioned to protect private property in the "special context" of land use regulations in Fifth Amendment jurisprudence. By keeping this distinction, the Court ignores recent Supreme Court and Ninth Circuit precedents that have recognized that the doctrine is more mindful of function over form.

Most telling, Justice Clarence Thomas in his concurrence to the Supreme Court's denial of certiorari noted: "I continue to doubt that the existence of a

---

62. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 991–92 (Cal. 2015).

63. *See, e.g.*, Lise Johnson, Note, *After* Tahoe Sierra, *One Thing Is Clearer: There Is Still a Fundamental Lack of Clarity*, 46 ARIZ. L. REV. 353 (2004) (discussing the lack of clarity in how to analyze and adjudicate regulatory takings cases); Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. B.J. 677 (2013) (highlighting the unworkable nature of the *Penn Central* test).

64. John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 174–75 (2005).

65. Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. EVNTL. L.J. 525, 546 (2009).

66. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

taking should turn on the type of governmental entity responsible for the taking."[67] Simply, there is no distinction. A taking of private property for public use without just compensation is unconstitutional, whether through administrative or legislative actions. The time is thus ripe to reconsider the court's strict adherence to form over function—a standard that allows governments to mask their actions under a more lenient standard of review. For this reason, courts must apply the unconstitutional conditions doctrine in both administrative and legislative decisions guarantee that "private property [shall not] be taken for public use, without just compensation."[68]

67. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (Cal. 2015), *cert. denied*, 577 U.S. ___ (U.S. Feb. 29, 2016).

68. *See* U.S. CONST. amend. V.