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PERSPECTIVE

'Finality' may be the next key issue in takings litigation

By Daniel Quinley

Just what makes a decision "final" enough to support a Fifth Amendment takings claim?

If the 9th U.S. Circuit Court of Appeals' latest decision is any indication, determining the "finality" of a local agency's decision may well be the next key issue in takings litigation. After denying en banc review of a property owner's taking claim in *Pakdel v. City and County of San Francisco*, 2020 DJDAR 11063 (Oct. 13, 2020), the issue of "finality" in local agency decisions may take center stage in takings litigation following the Supreme Court's landmark *Knick v. Township of Scott*, PA., 139 S. Ct. 2162 (2019), decision.

A Lifetime Lease Requirement

The en banc denial is the latest development in a lawsuit that sought federal relief for a purported local agency regulatory taking.

In 2009, Peyman Pakdel and Sima Chegini purchased a tenancy- in-common property in San Francisco and subsequently rented the unit. Plaintiffs contracted with the co-owners of the building to convert the building into condominium units with the intent to move-in upon their retirement. In 2013, the city and county of San Francisco enacted Ordinance 117-13, the Expedited Conversion Program. The program replaced a backlogged lottery system and expedited the rate of annual condominium conversions, but required any owner not occupying a converted unit to offer the existing tenant a life lease.

After the program went into effect, the plaintiffs and building co-owners applied for a conversion. The city approved the application and, pursuant to the city's approval, the plaintiffs offered their current tenant a lifetime lease. Six months later, the plaintiffs requested the lifetime lease requirement be waived or, alternatively, the city compensate them for transferring a lifetime lease interest in their property.

The city denied their request and the plaintiffs filed suit in the Northern District of California alleging an unconstitutional Fifth Amendment takings.

A Change in Law

In November 2017, the district court dismissed the case based on the plaintiffs' failure to seek compensation for the alleged taking in state court and thus exhaust state remedies in line with precedent established in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

The plaintiffs appealed and while the appeal was pending, the U.S. Supreme Court issued its decision in *Knick* and overturned *Williamson County*'s requirement that a plaintiff alleging a Fifth Amendment takings claim must first exhaust state remedies.

On appeal, the 9th Circuit panel upheld the district court's dismissal, recognizing that *Knick* left intact *Williamson County*'s "finality" requirement and finding that the plaintiffs' failure to seek an exemption from the lifetime lease requirement failed to meet that finality requirement.

"Finality" requires that a plaintiff obtain a final decision from a local agency before a Fifth Amendment takings claim is ripe for federal review. A final decision exists when (1) there is a decision regarding how land may be used and (2) the local authority has exercised its judgment regarding the particulars of use and parcel, thus eliminating the possibility of a variance from the relevant regulation.

In *Pakdel*, the majority interpreted "finality" as requiring plaintiffs to file a variance or exemption request "at the proper junctures" in order to "ripen their claim during the proper course." However, U.S. Circuit Judge Carlos Bea dissented, arguing that the plaintiffs had fulfilled the "finality" requirement because, here, they twice sought to be excused from the lifetime lease requirement, were denied by the city, and thus the city had arrived at a "final, definitive position" and the determination that plaintiffs' claims would be forever unripe was a "merits ruling, rather than one about ripeness."

The plaintiff's again appealed and requested en banc review. Last week, the 9th Circuit denied en banc review. The denial provoked a sharp dissent from Circuit Judge Daniel Collins and joined by eight other circuit judges. The dissent again reiterated that, under the facts of the case, the city "definitively imposed the Lifetime Lease Requirement on Plaintiffs' property, and there is no further avenue open to them under local law to avoid that."

The en banc dissent also argues that the majority's order uses "finality" as a masquerade for "exhaustion," and defies *Knick* by "converting *Williamson County*'s finality requirement into precisely the sort of exhaustion requirement disavowed" by the Supreme Court.

Defining "Finality"

While the Supreme Court's decision in *Knick* is unequivocal that *Williamson County*'s finality requirement remains intact, the 9th Circuit's latest decision distorts the contours of *exactly how* a plaintiff is required to obtain the definitive local agency decision necessary to satisfy "finality."

In *Pakdel* the 9th Circuit has made clear that "finality" requires a plaintiff to request a variance or exemption at the appropriate time in the administrative process and cannot rely on "token" exemption requests to ripen a federal takings claim.

Yet this approach does not necessarily square with other 9th Circuit decisions, which recognize that the finality requirement may be satisfied if submitting a request would be an "idle and futile act." *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454, amended 830 F.2d 698 (9th Cir. 1987). Nor does it necessarily square with at least one Central District of California decision, which found that the finality requirement had been satisfied based on a letter from the California Coastal Commission that indicated its intent to not permit any variance, despite the plaintiff's failure to request a variance. *O'Neil v. California Coastal Commission et al.*, 19-07748 (May 18, 2020).

Other courts also incorporate a degree of administrative exhaustion. For example, the District Court of Colorado recently held that "finality" requires a "conclusive determination of the property's status" and that a property owner was required to submit both a rezoning application and seek a zoning variance before a takings claim would be ripe. *North Mill Street LLC v. City of Aspen*, 19-00188 (March 10, 2020). The district court's decision is currently on appeal in the 10th Circuit and it remains to be seen whether that circuit will follow the 9th or chart a different path.

The 2nd Circuit appears to take a more flexible approach to "finality." In *Lebanon Valley Auto Racing Corp. v. Cuomo*, 20-0804 (Aug. 8, 2020), the Northern District of New York held that state agencies' enforcement actions — revocation and suspension of licenses — demonstrated a requisite level of finality and "finality" did not impose any additional "exhaustion" requirements.

These varying approaches to "finality," if nothing else, indicate there is no clear path forward regarding what constitutes a "final agency decision" sufficient to sustain a takings claim. "Finality" determinations may come in various guises: as a definitive agency statement (e.g., an indication that exemptions or variances will not be granted), as actual agency action (e.g.,, enforcement activity), or at the end of the agency's administrative process (e.g., requiring a property owner to request exemptions or variances at the appropriate times in the proceeding).

Not the Final Word on Finality

"Finality" remains alive and well following *Knick*. At the very least, one can rest assured that demonstrating that a local agency has made a definitive agency decision will remain critical in bringing successful takings claims. For now, that process will involve continued robust participation in the local agency's decision-making, timely requests for variances or exemptions, and efforts toward clearly capturing an agency's definitive intent regarding a specific property. Absent these factors, property owners risk developing a takings claim that is "forever unripe." ■

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