

legal

Regulatory Takings Law Strikes Again

BY MARK A. KABLACK

The Massachusetts Supreme Judicial Court recently issued a decision that will have significant impacts on land-use regulation and the ability of a

portion of the property, now referred to as Lot 2.

Approximately 9 months after Giovanella's purchase of the property, Ashland

conditions for the proposed work. Giovanella requested reconsideration before the Commission, which was denied, and then proceeded to file both administrative appeals



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landowner to argue that such regulation constitutes a taking. The case, decided in late November 2006, is *Giovanella v. Town of Ashland Conservation Commission*. *Giovanella* represents a further interpretation of how federal takings jurisprudence will be applied in Massachusetts.

The case involves an individual, Giovanella, who purchased residential property in the town of Ashland in 1999, consisting of 34,589 square feet for \$130,000. The property contained a single-family residence in the southern portion and a small wetland in the northwest portion. Shortly after purchase, Giovanella realized that a prior owner had divided the property into two relatively equal parcels, both of which were separately taxed and had separate addresses according to town records. Sometime after this recognition, he decided to build a new house on the portion of the property now referred to as Lot 1 (which contained the small wetland) and would retain the existing house on the remaining

adopted a wetlands protection bylaw, which imposed a 25-foot no-build buffer around identified wetlands. According to the bylaw, an applicant could provide evidence that the proposed work “sufficiently protects or enhances wetland interests,” but if such evidence was absent, work within the no-build buffer would be denied. In 2001, Giovanella filed a Notice of Intent with the Ashland Conservation Commission for construction of a new home on Lot 1. According to his proposal, there would be a temporary encroachment into the no-build buffer during construction, but no permanent encroachment. As a result of the hearing process, and in response to Conservation Commission concerns, alternative plan proposals were made, providing for additional mitigation during and after construction. However, due to the size and shape of Lot 1, Giovanella was unable to avoid the temporary encroachment. By the decision of May 2001, the Conservation Commission issued a denial Order of Con-

(under the Wetlands Protection Act) to the Department of Environmental Protection and a complaint in District Court (under the wetland bylaw), which was removed to Superior Court. Subsequent to the appeal, Giovanella sold Lot 2 for \$319,900 (this sale value will become crucial to the case as discussed below).

In the Superior Court proceeding, there were two issues presented on appeal. First, Giovanella argued that the denial Order of Conditions failed the substantial evidence test. Second, he argued that if the denial was valid and properly issued, then the denial constituted an improper taking without just compensation. Both issues were decided in favor of the Conservation Commission. Judge Edward Haggerty found the wetland bylaw to be reasonable and ruled that Giovanella failed to meet his burden of establishing how he would sufficiently protect the wetlands. This particular point, including the growing trend toward establishing no-build buffer zones throughout

Massachusetts, is a special concern for landowners, developers and builders and has been the subject of recent articles in this publication.

More importantly, Haggerty also found that the actions of the Conservation Commission did not meet the test of a regulatory taking under the Fifth Amendment of the U.S. Constitution (Giovanella did not pursue similar takings claims that could have been made under the Massachusetts Constitution). In interpreting federal takings law, Haggerty applied each of the standards of review and ruled that the regulations imposed, even though they ultimately prohibited construction of a single-family home on Lot 1, did not constitute a regulatory taking of Giovanella's property. Giovanella and his counsel appealed Haggerty's decision as to the takings issue only and the Supreme Judicial Court granted direct appellate review.

In a decision authored by Justice Francis Spina, reflecting the unanimous decision by all justices sitting on the case, the Supreme Judicial Court applied its own regulatory takings analysis to the facts of the case and upheld the lower court decision. In a concise and well-written decision, Spina outlines the proper standards for review of takings cases. Recognizing that each decision is to be based upon a fact-sensitive inquiry, he applies two main tests or analyses of takings law. The first test, sometimes referred to as the Lucas test (citing the 1992 Supreme Court case, *Lucas v. South Carolina Coastal Council*), is based upon the determination of whether a regulation causes an owner to lose all economically beneficial use of a property. If such a test is met, the courts will find a *per se* taking – meaning that an owner has been deprived all use of property and should be compensated. The courts liken such regulation to have the same impact on ownership rights as if the taking authority (in this case the town of Ashland) physically assumed occupancy of Giovanella's property.

The Second Test

The second main test applies in the circumstance where a regulation does not affect all use of a property, but just a portion. Under this test, the courts will ask a series of threshold questions to determine if the regulation goes too far. These questions are: To what extent does the regulation in-

terfere with the owner's distinct investment-backed expectations? What is the economic impact of the regulation? What is the character of the government action? In the first question, the courts will look to an owner's intent and expectation regarding ownership and use of a property, and determine in both instances whether they are reasonable. In the second question, the courts will look to what impact a regulation has on the ownership and use of a property (e.g. whether the reduction in value is caused by a large or small regulation). The third question gets to the type of governmental action (e.g. whether the regulation results in a physical invasion, whether it unfairly singles out the owner and whether it is limited to mitigating harms or nuisances).

In either of the main regulatory takings tests, the ability to articulate and describe the affected property (sometimes referred to as the relevant parcel) is crucial. The relevant parcel will be important in both the Lucas test (to determine if all of the property is taken) or in the second test defined above (to determine the extent of reduction in value). According to *Giovanella*, "[t]he intuitive starting point for determining the boundary of the property under a takings clause analysis is to consider as one unit all contiguous property held by the same owner." When property is contiguous, it gives rise to a rebuttable presumption defining the relevant parcel. This is not a bright-line rule, however, and courts will look to other important factors to overcome the presumption, including: whether the property is divided by a road; whether the property is acquired at the same time; whether purchase and financing of the property is linked; the timing of development; whether the property is put to the same or different uses; whether the owner intended or actually did use the property as one economic unit; and treatment of the property under state law.

According to Spina, not all of the factors that may be used to rebut the presumption will be given equal weight. An owner's treatment of property as a distinct economic unit (i.e. separate purchasing and separate financing) and an owner's intentions of use for that property will be given greater weight than the property's treatment under state law (i.e. separate street address and separate tax identification). In the *Giovanella* case, the court found the contig-

uous nature of Lots 1 and 2 to be determinative. Giovanella purchased both lots at the same time for a lump sum, as part of one transaction. These facts were supportive of the Court's finding that Lots 1 and 2 should be considered together. The Court also found a lack of sufficient evidence that Giovanella intended to treat the two lots as separate economic units. According to Spina, this was Giovanella's burden of proof.

An Uphill Battle

Once the Court defined the relevant parcel as both Lots 1 and 2, the Court quickly dispensed with the remaining takings test factors. The Court ruled that Giovanella could not have had reasonable, investment-backed expectations as to Lot 1 because he never invested money in it as a separate lot.

Furthermore, the impact of the regulations on Giovanella did not give rise to a taking, because he sold Lot 2 for \$319,900 (a profit of \$189,900 over his initial purchase price). The value of separate Lots 1 and 2 would have been \$452,700, and \$319,900 represents a decrease of only 29 percent over a maximum return on investment. Such a diminution in value was not significant enough, according to the Court. Lastly, the Court did not need to review the character of government action at issue in the case. Once there was a failure to demonstrate investment-backed expectations, and substantial reduction in value, the takings claim fails, regardless of the type of government action.

The importance of *Giovanella* is that it provides insight as to how courts in Massachusetts will treat regulatory takings cases going forward. If regulated property consists of a large tract of land or land that is contiguous to other properties in common ownership, the owner will have an uphill battle to distinguish and define a discrete relevant parcel. This uphill battle may significantly erode any hope for a successful regulatory takings claim. Landowners, developers and builders will want to be aware of this case before seeking damages as a result of land-use regulation. ♦

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