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City Imposed Penalty of One-Year Building Moratorium Does Not Constitute a Taking: Nossaman

Local government agencies sometimes enact short-term building moratoriums for certain areas to further assess changes in land use patterns or slow growth. Those moratoriums imposed across a large area usually do not constitute a taking. But what if a moratorium is imposed solely and specifically as to a singled-out property? Does that moratorium give rise to a taking? According to a recent court of appeal opinion, the answer is no, at least when that moratorium is imposed as a penalty against the property owner for violating local building codes.

Background

In [*Lemons v. City of Los Angeles*, 2022 Cal. App. Unpub. LEXIS 6541](#), the plaintiffs owned a single family residence located in a Historic Preservation Overlay Zone (HPOZ), and their property was designated as a “contributing element”, meaning the residence contributed to the historic significance of the area. The owners sought and secured permits to undertake rehabilitation and repair of the property from the Historic Preservation Board and Cultural Heritage Commission, but they vastly exceeded what was allowed under their permit and mostly demolished the residence, leaving only a small portion of the first story wood flood and foundation. Under the City’s municipal code, one of the penalties for engaging in work without a permit is the imposition of a moratorium on the issuance of any permits for new development on the property. The City ordered a one-year moratorium on plaintiffs’ property.

Lawsuit for Violation of Eighth Amendment (Excessive Fine) and Inverse Condemnation

The property owners filed a lawsuit against the City, claiming that the moratorium was an excessive fine in violation of the Eighth Amendment, and also constituted a taking resulting in inverse condemnation liability. The trial court denied the excessive fine claim, concluding that a moratorium did not constitute a fine. The court also denied the takings claim, finding that the moratorium was not a taking, but instead a government action imposing a penalty under the municipal code. The owners appealed.

Appellate Decision - Moratorium is Not a Fine and Does Not Constitute a Taking

On appeal, the Court explained that the Eighth Amendment only limits the government’s power to “extract payments” as punishment for an offense; a one-year moratorium on new development permits did not require the owners to pay the City a fine. The Court likewise explained that the government “need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance.” The one-year moratorium on new development permits did not constitute a taking because it was a punitive measure imposed for violating the municipal code. Moreover, the concept of inverse condemnation is that the costs of a public improvement benefitting the community should be spread among those benefited rather than allocated to a single member of the community. In contrast, the purpose of a penalty such as the moratorium at issue here is to impose particular burdens on the violators — there is no benefit

transferred to the public at large. The court also rejected the owners' argument that they were constitutionally entitled to a jury trial on the inverse condemnation claim, explaining that there is no right to a jury trial on the issue of whether there has been a taking in the first instance; the right is limited to the question of damages.

Take-Aways

The case serves as an important reminder that a property owner's failure to comply with local municipal codes can result in significant penalties, including the potential forfeiture of the right to secure new permits for a significant period of time. The case also demonstrates that the imposition of penalties, even if they result in a diminution of value of the property, do not give rise to a claim for inverse condemnation, as there is no "taking" as a matter of law. Finally, the right to a jury trial in an inverse condemnation action only applies to the issue of just compensation or damages - it does not apply to the determination of whether there was a taking.

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