

STATE OF MICHIGAN
COURT OF APPEALS

RICHFIELD LANDFILL, INC.,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and DEPARTMENT OF
NATURAL RESOURCES,

Defendants-Appellants.

UNPUBLISHED

October 27, 2005

No. 260850

Court of Claims

LC No. 93-015002-MZ

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendants appeal by leave granted an order of the Court of Claims granting partial summary disposition of plaintiff’s regulatory taking claim based on the denial of an operating license for plaintiff’s sanitary landfill. We vacate the order and remand this case for reconsideration of plaintiff’s regulatory taking claim in light of *Lingle v Chevron USA, Inc*, 544 US ___; 161 L Ed 2d 876; 125 S Ct 2074 (2005).

I

This is the second time in its fourteen-year history that this case has been before this Court. In a previous appeal,¹ this Court reversed the grant of summary disposition for defendants with regard to plaintiff’s regulatory taking claim and remanded for further evidentiary development necessary to determine the taking claim. On remand, the court decided as a matter of law that the denial of the operating license constituted a regulatory taking because it was an invalid exercise of the state’s police power, and, therefore, the only remaining issue was the amount of damages.

This Court granted defendants’ application for leave to appeal the decision on remand. After defendants submitted their brief on appeal, the United States Supreme Court decided *Lingle, supra*, which repudiates the regulatory taking theory relied on by the Court of Claims in granting plaintiff’s motion for partial summary disposition. The parties now dispute whether

¹ *Richfield Landfill, Inc v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued January 26, 2001 (Docket Nos. 202774, 202777). [“*Richfield I*”]

Lingle applies retroactively to this case. Because *Lingle* clarifies the legal principles for analyzing a regulatory taking claim, over which there has been substantial confusion in this case, we vacate the order granting partial summary disposition and remand this case for consideration of plaintiff's regulatory taking claim in light of these clarifications. We therefore decline to address the issue of retroactive application of *Lingle's* specific holding.

II

This case commenced in 1991, after defendant Department of Natural Resources (DNR) denied an operating license for an additional sanitary landfill cell that plaintiff constructed pursuant to plans approved by the DNR. The underlying facts and procedural history were summarized in this Court's earlier opinion:

For many years, plaintiff operated a sanitary landfill in Genesee County. As plaintiff's original landfill (cell 1) was approaching the end of its useful life, plaintiff applied for a permit to construct a second landfill (cell 2) adjacent to the first. The DNR expressed concern about contaminants thought to be leaking from the first landfill, and after lengthy negotiations, plaintiff and the DNR entered into a consent order in 1989. The consent order set forth the steps required to close cell 1 and announced the DNR's approval of a specific engineering plan for the construction of cell 2. Further, the consent order provided that an operating license for cell 2 would be granted when plaintiff, among other things, redesigned cell 2 in order to satisfy certain requirements for monitoring groundwater.

In April 1991, a DNR official informed plaintiff by letter that it was not in compliance with the 1989 consent order and that an operating license would not be granted until plaintiff complied with DNR requirements. The DNR demanded that plaintiff substantially reconstruct cell 2 with a "double liner/double leachate collection system" which would make it possible to differentiate any leakage from the new facility from any cell 1 leakage ("differential monitoring").

Thereafter, plaintiff filed suit requesting an order of mandamus, or, alternatively, appeal of the administrative decision. Plaintiff asserted that the DNR's denial of the license was arbitrary and capricious, and requested declaratory and injunctive relief. The trial court ruled that mandamus was not an appropriate remedy in this situation, and treated the case as an appeal under § 631 of the Revised Judicature Act, MCL 600.631; MSA 27A.631. In a November 1991 order, the court ruled that defendants could not compel plaintiff to implement differential monitoring in the form of a double-liner system, but that the DNR could require some other system of differential monitoring. The court further ruled that the DNR was arbitrary and capricious in denying an operating license for cell 2: "At Plaintiffs' facility it is technically inappropriate to place wells between Cell 2 and Cell 1 and, as such, any monitoring wells required by Defendant may only be placed outside the boundaries of the combined Cell 1 and Cell 2 considered as a single landfill." *Richfield Landfill, Inc v Dep't of Natural Resources*, unpublished order of the Ingham Circuit Court, entered Nov. 8, 1991 (Docket No. 91-69153-AZ).

In subsequent proceedings, plaintiff argued that the DNR's alternative proposals to the double-liner system were even more prohibitively burdensome than the double-liner system would have been, and advanced the theory that the DNR was retaliating against plaintiff because plaintiff asserted its rights in the matter.

¹The trial court acknowledged that "representatives of the parties did attempt, for a considerable period of time . . . to work out a mutually acceptable differential monitoring plan and ultimately they failed."

In 1993, plaintiff filed identical actions with the circuit court and the court of claims. In the new actions, count I alleged that the DNR was imposing the requirements of an unpromulgated rule, count II alleged breach of contract, count III alleged deprivation of property without due process, and count IV alleged a taking of property without just compensation. The two new actions were promptly consolidated with each other, and joined with the 1991 action, for resolution by the trial court. The DNR counterclaimed, alleging various statutory violations plus common-law public nuisance. Subsequently, the trial court dismissed from the case all the lower level officials and employees of the DNR on the ground that only the sovereign itself, not individuals acting on its behalf, could be sued for a regulatory taking. The court further ruled that plaintiff could not maintain an action for breach of contract but could seek specific performance of the consent order.

By way of its September 1996 order, the trial court granted defendants' motion for summary disposition on counts III and IV of plaintiff's 1993 cause of action, ruling that plaintiff had failed to state a valid claim under either 42 USC 1983 or under a regulatory-taking theory. . . .

* * *

Subsequently, the court dismissed count II of plaintiff's 1993 cause of action. The court dismissed this count on the ground that the court had rendered the contract claim moot by issuing its order that a license be granted, and rejecting plaintiff's claim for damages. For purposes of arriving at a final order that could be appealed, the parties and the court signed a final judgment and stipulated order, staying the order granting the operating license, dismissing count II of the 1991 suit without prejudice, and dismissing the DNR's counterclaim without prejudice. [*Richfield I, supra* at 2-4.]

Relevant to this appeal, in the earlier decision, this Court agreed with plaintiff that the Court of Claims erred in dismissing the taking claim on summary disposition:

The trial court ruled that the inquiry in this case under *Lucas [v South Carolina Coastal Council, 505 US 1003; 112 S Ct 2886; 120 L Ed 2d 798 (1992)]* was "did Plaintiff's ownership estate of the land in question include the unfettered right to build and operate a sanitary landfill without the State's permission?" Plaintiff conceded that it never possessed such an unfettered prerogative, and

therefore the court dismissed the taking claim. However, we agree with plaintiff that the trial court mischaracterized the issue. The question is not did plaintiff have an unfettered right to construct and operate a landfill without state regulation, but whether or not plaintiff had a piece of property of some value that became valueless as the result of arbitrary conduct that went beyond expressly prohibiting what was already illegal. [*Richfield I, supra* at 8.]

Accordingly, the earlier panel reversed the grant of summary disposition for defendants on the issue of a regulatory taking and remanded for further proceedings, stating:

Because the DNR withheld the license for cell 2 for reasons that went beyond already-existing legal requirements for use of the land, the DNR's actions clearly caused a decrease in the value of the property. Whether that value was reduced to zero, however, as plaintiff contends, is a question that must be decided on evidence presented upon remand. [*Id.* at 9.]

On remand, a dispute arose between the parties concerning the proofs necessary to establish plaintiff's regulatory taking claim in light of this Court's above statements concerning the question to be decided on remand. Defendants filed a motion to clarify the law of the case and the issues on remand, arguing that consistent with this Court's January 26, 2001 decision, plaintiff could prevail on its regulatory taking claim only if plaintiff established that the value of its property had been reduced to zero.

Plaintiff disagreed, arguing that it was entitled to establish a temporary taking by showing either (1) the property value had been reduced to zero, which constituted a categorical taking pursuant to *Lucas, supra*, or (2) there was a diminution in value and a taking under the balancing test of *Penn Central Transportation Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). Plaintiff's counsel further argued that pursuant to the step-by-step analysis set forth in *K & K Construction, Inc v DNR*, 456 Mich 570; 575 NW2d 531 (1998), the court must first determine if the regulation advanced a legitimate state interest; if not, there was an automatic taking and that ended the analysis. If the regulation advanced a legitimate state interest, then the next step examined whether the property was deprived of value.

In deciding defendants' motion, the Court of Claims essentially agreed with plaintiff, ruling that plaintiff could establish a taking either by showing zero value or a diminution in value. In the court's view, this Court's opinion merely reflected the stage of the proceedings, i.e., that if the property value was reduced to zero, there was a categorical taking and that was the end of the analysis; otherwise, the analysis proceeded to the balancing test.

On March 5, 2003, plaintiff filed a motion for partial summary disposition, arguing that defendants' arbitrary and capricious denial of an operating permit for the landfill failed to substantially advance a legitimate state interest and, therefore, constituted a regulatory taking, and plaintiff was entitled to partial summary disposition as a matter of law. The court initially denied plaintiff's motion, ruling that the DNR's arbitrary and capricious decision was not a per se taking. The court stated that plaintiff had provided no authority to establish that an arbitrary and capricious decision by a governmental agency is a regulation that does not substantially advance a legitimate state interest. Moreover, the DNR's insistence that plaintiff take measures to monitor groundwater for contamination does seem to advance a governmental interest.

Plaintiff moved for reconsideration, and the court granted the motion in an opinion and order filed October 5, 2004. The court stated that it had denied plaintiff's motion for partial summary disposition on the narrow basis that groundwater monitoring substantially advanced a legitimate government interest. However, plaintiffs admit that groundwater monitoring is a legitimate interest, but further argue that the denial of the operating permit was based on the inadequacy of groundwater monitoring.

After additional argument on rehearing, on February 1, 2005, the court issued an order and opinion granting plaintiff's motion for partial summary disposition on the issue of a regulatory taking. The court held that defendants' action constituted a regulatory taking pursuant to *Goldblatt v Town of Hempstead*, 369 US 590; 82 S Ct 987; 8 L Ed 2d 130 (1962), which recognized that the invalid exercise of the state's police power could be the basis of a regulatory taking claim.

The court noted that its holding was not in conflict with *Penn Central* in which "the Supreme Court stated a regulatory takings may occur if a use restriction is 'not reasonably necessary to the effectuation of a substantial public purpose ... or perhaps if it has an unduly harsh impact upon the owner's use of the property,'" *Penn Central, supra* at 127. Likewise, there was no conflict with *Agins v City of Tiburon*, 447 US 255; 100 S Ct 2138; 65 L Ed 2d 106 (1980), in which "the Supreme Court stated that land use regulations effect a taking if the regulation 'does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land,'" *id.* at 260.

III

Two weeks after defendants filed their brief on appeal in this case, on May 23, 2005, the Supreme Court decided *Lingle, supra*. The Supreme Court expressly rejected the principle that a regulatory taking could occur merely because a regulation failed to substantially advance a legitimate government interest. *Id.* at 2078.

In *Lingle*, the lower courts had applied the principle from *Agins* to strike down a Hawaii statute that limited the rent that oil companies may charge to dealers who leased service stations owned by the companies. The lower courts concluded that the statute effected an unconstitutional regulatory taking because it failed to substantially advance any legitimate government interest. *Lingle, supra* at 2078. The Supreme Court disagreed, stating that "[a]lthough a number of our takings precedents have recited the 'substantially advances' formula minted in *Agins*, ... [the] formula prescribes an inquiry in the nature of a due process, not a takings, test, and [] it has no proper place in our takings jurisprudence." *Lingle, supra* at 2082-2083.

The Supreme Court traced the history of the *Agins* principle, indicating that it was an example of a "would-be doctrinal rule" or test developing through simple repetition of a phrase. *Lingle, supra* at 2077, 2082-2084. The *Lingle* Court noted that in *Agins*, the Court addressed a facial takings challenge to certain municipal zoning ordinances, and

declared that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 72 L. Ed. 842, 48 S. Ct.

447 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).” [*Lingle, supra* at 2082 (citation omitted).]

Because the statement in *Agins* was phrased in the disjunctive, the “‘substantially advances’ language has incorrectly been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test.” *Lingle, supra* at 2082. However, the “substantially advances” formula was derived from due process, not takings, precedents and has no proper place in takings jurisprudence. *Id.* at 2083-2084. “Instead of addressing a challenged regulation’s effect on private property, the ‘substantially advances’ inquiry probes the regulations underlying validity.” *Id.* at 2084. The test reveals nothing about the actual burden imposed on property rights and “is not a valid method of discerning whether private property has been ‘taken’ for purposes of the *Fifth Amendment*.” *Id.* Consequently, the “test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property” *Id.*

The majority opinion in *Lingle* observes that, in accordance with historical regulatory takings law, only three tests are applicable with respect to regulatory takings:

Our precedents stake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property -- however minor -- it must provide just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of “all economically beneficial use” of her property. *Lucas*, 505 U.S., at 1019, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (emphasis in original). We held in *Lucas* that the government must pay just compensation for such “total regulatory takings,” except to the extent that “background principles of nuisance and property law” independently restrict the owner’s intended use of the property. 505 U.S., at 1026-1032, 120 L. Ed. 2d 798, 112 S. Ct. 2886.

Outside these two relatively narrow categories (and the special context of land-use exactions discussed below, see *infra*, at 16-18), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). The Court in *Penn Central* acknowledged that it had hitherto been “unable to develop any ‘set formula’” for evaluating regulatory takings claims, but identified “several factors that have particular significance.” *Id.*, 438 U.S., at 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646. Primary among those factors are “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” *Ibid.* In addition, the “character of the governmental action” -- for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good” -- may be relevant in discerning whether a taking has occurred.

Ibid. The *Penn Central* factors -- though each has given rise to vexing subsidiary questions -- have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-618, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001); 533 U.S., at 632-634, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (O'CONNOR, J., concurring). [*Lingle, supra* at 2081-2082.]

It is undisputed that the Court of Claims decision in this case is undermined by *Lingle*, which repudiates the regulatory taking theory relied on by the Court of Claims in granting plaintiff's motion for partial summary disposition. Accordingly, the key dispute between the parties following *Lingle* is whether this Court should decide the applicability of *Lingle* on appeal or whether the case should be remanded to the Court of Claims to determine the applicability of *Lingle* in the first instance.

IV

Defendants argue that *Lingle* conclusively establishes that plaintiff's argument in support of partial summary disposition is without merit and *Lingle* should be applied retroactively to this case under the factors set forth in *Pohuski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). The only viable theories of taking available to plaintiff after *Lingle* are a categorical taking or a taking under the factors set forth in *Penn Central*. Accordingly, this Court should apply *Lingle* and remand the case with specific instructions to clarify the holding in this Court's earlier opinion with respect to whether plaintiff must prove the property in question was reduced to zero value to prevail on the taking claim.

Plaintiff argues that in the interests of fairness, this Court should remand the case to the Court of Claims for reconsideration in light of *Lingle*. The court can then determine, with the benefit of full briefing from both parties, whether and to what extent *Lingle* should be applied to this case. Despite *Lingle*, plaintiff is still entitled to summary disposition on the basis that (1) *Lingle* should be applied only prospectively, or (2) Michigan courts should either distinguish or decline to follow *Lingle* in cases such as this. If applied in the Court of Claims, *Lingle* would render all of defendants' arguments on appeal moot.

In the proceedings below, plaintiff argued both a categorical taking theory under *Lucas, supra*, and a taking under the *Penn Central* balancing test. However, in initially deciding the taking claim, the Court of Claims characterized the inquiry under *Lucas* as “‘did Plaintiff's ownership estate of the land in question include the unfettered right to build and operate a sanitary landfill without the State's permission.’” *Richfield I, supra* at 8. This Court concluded in the previous appeal that the Court of Claims analysis was improper. *Id.*

In addressing the lower court's incorrect characterization of the taking inquiry, this Court properly responded specifically in terms of the *Lucas* analysis, which was the focus on appeal. The Court reframed the inquiry under *Lucas*, which subsequently limited the Court's analysis. *Richfield I, supra* at 8-9. We find no basis in particular for the prior panel's omission of the *Penn Central* analysis, other than the fact that it was not at issue on appeal given the Court of Claims specific decision. Accordingly, contrary to defendants' argument, we find no error in the court's ruling on remand that this Court's opinion did not require that plaintiff show a zero property value to prevail on the taking claim.

It is undisputed that *Lingle*, if applicable, eliminates the theory of liability on which plaintiff sought, and the Court of Claims granted, partial summary disposition. *Lingle* also sets forth with greater clarity the legal underpinnings and tests for determining whether a regulatory taking has occurred. To a certain extent, this case has been plagued by the confusion over the theories and tests for a regulatory taking. This case should be decided anew based on the facts and law.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio