Senate Bill 1263's Hauled Water Ban: Property Rights Under Attack

By DAMIEN SCHIFF and JEREMY TALCOTT
Editorial

In his famous 1792 Essay on Property, James Madison affirmed that, because "Government is instituted to protect private property of every sort . . . that alone is a just government, which impartially secures to every man, whatever is his own." Perhaps nowhere else in the country is this basic principle of liberty more under threat than in California. From heavy-handed land-use regulation and eminent domain abuse, to anti-competitive vocational licensing and unbalanced environmental regulation, California state and local governments prefer to undercut, rather than to protect, private property rights.

This unfortunate trend has hit parts of Los Angeles County especially hard since last year's enactment of Senate Bill 1263. The law took effect in January, and mostly involves permitting requirements for new public water systems; but one of its provisions imposes a considerable hardship on owners of vacant residential parcels.

Specifically, Section 4 of the statute forbids any local government from issuing a building permit for new residential development if the proposed home would rely on hauled water. For many properties in the Acton and Agua Dulce communities, the only safe and feasible source for water is through hauling. Indeed, until SB 1263's passage, efforts were underway in Los Angeles County to enact a Hauled Water Ordinance that would have guaranteed the right of property owners in at least some circumstances to rely on hauled water for new residential development. Hence, for many L.A. County property owners, SB 1263 operates as a ban on the productive use of their land.

Such burdensome regulation cannot be squared with the Madisonian principle quoted above or, for that matter, with the protections for property rights that Madison himself placed in our Constitution. Most prominent among those is the final clause of the Bill of Rights' Fifth Amendment, which forbids the taking of private property for public use without just compensation.

The Takings Clause, as this protection is commonly called, has been interpreted by the U.S. Supreme Court to require compensation for a variety of government activities. Traditionally, the Takings Clause required compensation when the government, or a private party acting with governmental authorization, physically appropriated or occupied private

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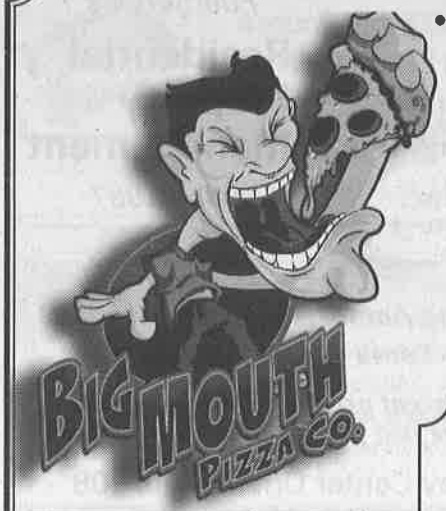

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property; but the Supreme Court has long recognized that burdensome regulation can constitute a taking, even when a property owner retains control over physical access.

For example, in the 1992 case of *Lucas v. South Carolina Coastal Council*, the high court held that the Takings Clause requires compensation to be paid when government regulation results in the loss of all economically viable use, even if the landowner still retains possession. David Lucas owned two oceanfront lots which he wanted to develop with residences, as had been done with many other parcels in the neighborhood; but under the coastal council's implementation of the state's Beachfront Management Act, no such development was allowed for Lucas' lots. In response to Lucas' subsequent takings suit, the government contended that Lucas was not entitled to compensation because he could still camp on the properties and exclude trespassers. It also argued that all private property was subject to an inherent limitation to prevent purportedly "noxious" uses, such as Lucas' planned homebuilding.

The Supreme Court, in an opinion written by the late Justice Antonin Scalia, rejected the government's defenses. The Court recognized the basic principle that when government physically occupies private property, it must pay compensation. The Court could see no meaningful difference between such physical occupation and a regulation that would preclude any economically viable use of the property. Burdensome rules of that latter kind were functionally like a physical ouster, and therefore, like physical occupations, categorically required the payment of just compensation to be constitutional. As the Court declared, "regulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation)."

This principle, as applied to many residential parcel owners in Acton and Agua Dulce, supports the conclusion that SB 1263 is unconstitutional. Before SB 1263's enactment, property owners had a reasonable expectation, especially in light of the County's hauled water initiative and contemplated ordinance, that proposed residences using hauled water could be permitted. With SB 1263's ban, residentially zoned property cannot be developed if water will be hauled. If supplies from a domestic well or public water system are not available, then SB 1263 operates to deny a property owner the right to build a home. Without that right, residentially zoned property loses all of its value.

Significantly, SB 1263 allows hauled water for existing homes. As the Supreme Court observed in *Lucas*, "that a particular use has long been engaged in by similarly situated owners," and "that other landowners, similarly situated, are permitted to continue the use," support the conclusion that a taking has occurred. With SB 1263, a property owner may continue to receive hauled water for an existing home, whereas the owner of a neighboring, undeveloped parcel is prevented from relying on the same water source to build a new home.

These and other points suggest that the state's water hauling ban may be unconstitutional. Just last month, remedial legislation (Assembly Bills 366 and 367) was introduced into the California Assembly to allow at least small residential projects (ten or fewer units) to proceed with hauled water; but naturally, there is no guarantee that such legislation will be enacted, especially given the strong anti-development forces that hold sway in our state government. Hence, Acton and Agua Dulce property owners may need to rely on the Takings Clause to vindicate their property rights.

Damien Schiff and Jeremy Talcott, attorneys with the Pacific Legal Foundation, recently presented on SB 1263 and other property rights issues at a public forum in Acton. They may be reached at dms@pacificlegal.org and jt@pacificlegal.org.

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