



# Regulatory Takings: The Ninth Circuit to Revisit its Guggenheim Opinion

03.16.2010 | By **Bradford B. Kuhn, Rick E. Rayl**

Last fall, we reported on the Ninth Circuit's decision in *Guggenheim v. City of Goleta*, a regulatory takings case that generated considerable interest. We noted that regulatory takings claims were typically fairly described as "all bark and no bite," but that *Guggenheim* demonstrates that regulatory takings litigation can have teeth (the Ninth Circuit Court of Appeals ordered the City of Goleta to pay just compensation to the owner of a mobile home park due to a rent control ordinance's constituting a regulatory taking).

Well, perhaps the three judge panel that decided *Guggenheim* "barked" too soon: the Ninth Circuit has now issued an order granting an en banc hearing of the *Guggenheim* case. This means that a large portion of the Ninth Circuit panel (11 judges) will re-hear the case, and potentially reach a different conclusion. In the meantime, the September 2009 *Guggenheim* opinion is no longer citable as legal precedent.

## ***Guggenheim v. City of Goleta*, Some Background**

In an opinion that filled two volumes and nearly 80 pages, the Ninth Circuit Court of Appeals ruled that the City of Goleta owes compensation to a mobile home park owner for the economic losses that resulted from the City's enactment of a mobile home rent control ordinance. The Court concluded that the ordinance crossed the line because it had the effect of transferring as much as 90 percent of the property's value from the owner to the mobile home park's tenants. The holding was significant not only because the Court found that the ordinance qualified as a compensable taking, but also because the Court actually reached the merits of the issue.

Regulatory takings cases are often decided on procedural grounds, with courts holding that the owner does not have standing to raise the takings claim or, even more commonly, that the claim is not timely. Typically, this occurs in one of two ways.

In some cases, courts hold that the takings claim is not "ripe." More specifically, regulatory takings claims generally turn on whether the government's regulations are so onerous as to eliminate the owner's ability to make an economically viable use of the property. Often, courts conclude that the owner has not sufficiently exhausted all reasonable avenues for generating an economically viable use of the property before filing the lawsuit. As a result, the claim has not matured, and the owner is thrown out of court.

In other cases, the opposite problem is true: the courts hold that the takings claim is "stale." In these cases, the owner may have worked tirelessly to ensure that all reasonable options are exhausted before suing, thwarting a ripeness challenge. In so doing, however, the owner lets the statute of limitations lapse, rendering the claim untimely.

Thus, when the Ninth Circuit Court of Appeals navigated its way through all of the procedural obstacles, reached the merits, and found that a taking had occurred, the *Guggenheim* opinion understandably generated some buzz.

### **Current Status**

On March 12, the *Guggenheim* case took a new turn. The Ninth Circuit issued an order granting an en banc hearing of the case. This means that 11 judges on the Ninth Circuit panel will hear the case. Whether the larger panel will reach a different conclusion than the three judges who initially heard the case remains to be seen.

### **Implications**

The September 2009 *Guggenheim* opinion is no longer citable as legal precedent. This could have a significant impact on currently pending regulatory takings cases. And, depending on whether the Court orders additional briefing and a new oral argument, the new opinion may not be issued for a year or more.

Regardless of the outcome of the *Guggenheim* case, government agencies still must be aware of the risks of exposure to regulatory takings claims. Cities and counties that have rent control ordinances should weigh carefully the degree to which the ordinances effect a transfer of value from the property's owner to the tenants. And, where that transfer is substantial, they should anticipate possible legal challenges.