N.D.A.G. Letter to Nicholas (Nov. 15, 1989)

November 15, 1989

Representative Eugene J. Nicholas
Rural Route 1
Cando, ND 58324

Representative Robert E. Nowatzki
HCR 3, Box 68A
Langdon, ND 58249

Dear Representatives Nicholas and Nowatzki:

Thank you for your April 6, 1989, letter requesting a Attorney General's Opinion concerning the constitutionality of N.D.C.C. ch. 61-32. I apologize for the delay; however, I wanted to provide you with as much guidance as possible on this complex and controversial issue. Staffing changes in my office also inhibited a prompt reply.

You ask whether the wetland replacement provisions of chapter 61-32 are an improper taking of private property for public use in violation of the just compensation clause of either the fifth amendment to the United States Constitution, or article I, § 16, of the North Dakota Constitution. The real issue here is whether the statute constitutes a taking. Neither the federal Constitution nor the state constitution prohibit takings for public purposes; rather, they require just compensation when a taking occurs.[1] Thus, the mere fact a statute works a taking does not make the statute unconstitutional. You ask also whether this law violates any other constitutional provisions.

I began my review of these issues in the hope that a clear-cut decision could be rendered to resolve the controversy surrounding this enactment. I discovered there are strong barriers to a successful constitutional challenge of this nature. These barriers limit my ability to provide a definitive answer to any of your questions. However, I will discuss the more significant barriers and several cases relating to the issues of regulation, property rights, and exactions.

In North Dakota, statutes are presumed to be constitutional unless they clearly contravene a constitutional provision. Verry v. Trenbeath, 148 N.W.2d 567, 571 (N.D. 1967). Even the legislature has declared that a statute's intent is presumed to be in "[c]ompliance with the

[1] Not all takings are proper. A taking for a private use is not authorized. A statute authorizing a taking solely for a private use or benefit would be unconstitutional. J. Nowack, R. Rotunda & J. Young, Constitutional Law 447 (1978). I do not believe chapter 61-32 implements a private use or benefit because it concerns flood control, wildlife, water pollution, and other public interests which are protected by drainage regulation.

constitutions of the state and United States." N.D.C.C. § 1-02-38(1). The North Dakota Supreme Court resolves constitutional doubts in "favor of validity of the statute." Snortland v. Crawford, 306 N.W.2d 614, 626 (N.D. 1981). Furthermore, North Dakota's Constitution requires four of the five Supreme Court justices to agree before the court may declare a statute unconstitutional. N.D. Const. Art VI, § 4. Thus, to have a statute declared unconstitutional by the North Dakota Supreme Court, a challenger must remove all doubt to the statute's validity, must demonstrate the statute clearly contravenes a constitutional provision, and must convince at least four of the Supreme Court justices these standards have been met.

Another barrier to a "takings claim" is the deciding court's perception of the result of its decision. Because the nature of a regulatory "taking" claim may result in a finding which requires the government to pay compensation, courts are reluctant to hold a regulation to be a taking when that conclusion would force the government to pay "just compensation" for unintended takings. Laitos, Regulation of Natural Resources Use and Development in Light of the "New" Takings Clause, 34 Rocky Mtn. Min. L. Inst. 1-l, 1-46 (1988).

In a "takings" challenge, a challenger must also prove a property right has been taken. In some situations, whether or not a property right is involved depends upon whether use of the property has occurred.

A North Dakota case applying this principle is Baeth v. Hoisveen, 157 N.W.2d 728 (N.D. 1968). In the Baeth case, landowners sought to have the North Dakota Supreme court declare N.D.C.C. § 61-01-01 unconstitutional because it allegedly took their ground water. In that case, the Baeths had not put the ground water at issue to a beneficial use before the statute was enacted. The court held a landowner did not have a "'vested right' to unused ground water underlying his land." Id. at 732.

Chapter 61-32 only applies prospectively. It requires replacement acreage only from those persons whose permit applications are not complete as of July 1, 1989. Thus, if the ability to drain property only becomes a property right when exercised, then under the Baeth case, chapter 61-32 does not take property.

While the person seeking to have a statute declared unconstitutional has a heavy burden, perhaps the greatest barrier is the extreme difficulty of sustaining a facial constitutional challenge to a statute. A facial challenge is a challenge to the constitutionality of a statute as enacted, that is, "on its face," not as it is applied.

When a party makes a facial challenge, the United States Supreme Court rarely finds the statute in question constitutes an unconstitutional taking. Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S 470, 494-96 (1987); Laitos, Regulation of Natural Resources Use and Development in Light of the "New" Takings Clause, 34 Rocky Mtn. Min. L. Inst. 1-1, 1-48 (1988) (facial challenge likely will fail because the court need only "hypothesize a set of facts that would not be a taking").

Like the United States Supreme Court, the North Dakota Supreme Court is also unlikely to declare a statute an unconstitutional taking on its face. See Eck v. City of Bismarck, 283 N.W.2d 193 at 201 (N.D. 1979) (property owner had no cause of action based solely on enactment of zoning ordinance). Instead, the court cites to the fact that statutes are presumed valid. See State v. Taylor, 156 N.W. 561 (N.D. 1916). Barring a showing of the impact a statute has in a particular situation, the court most likely will refuse to find the statute per se unconstitutional. See State v. Baker, 21 N.W.2d 355 (N.D. 1946). Assuming a challenger presents a factual controversy, he or she must present facts which meet the test for a taking.

The United States Supreme Court has recently articulated two tests for determining whether a statute effects a taking. The "three factor" test and the "two-part disjunctive" test. Laitos, supra. The three factor test requires the Court to review the type of government action, the interference with investment backed expectations, and the economic impact on the property in question. Under the two-part disjunctive test, the Court considers whether the regulation advances legitimate state interests or the landowner is denied all economically viable use of the land.

The Court has provided no discernible reason for applying one test and not the other. The reason the Supreme Court has failed to provide clear guidance on this issue pivots on the difficulty of ascertaining one test that will provide a fair result in each case. For this reason the United States Supreme Court and other courts rely upon "'ad hoc factual inquiries'" to reach a decision about a particular case. The Court has stated this inquiry is a common denominator of both the three factor test and the two-part disjunctive test. Hodel v. Irving, 481 U.S. 704, 714 (1987) (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

The inquiry includes consideration of several factors. "'[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action'" are among a few of them. De Benedictis, 480 U.S. at 495 (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)). The Court also considers if it is "commercially impracticable for them to continue" the activity which the statute seeks to control. Id. at 495-96.

The North Dakota Supreme Court also recently addressed "taking" challenges to regulatory statutes. Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344 (N.D. 1987); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983). In these cases, the court applied the disjunctive test.

In Grand Forks-Traill Water Users, the North Dakota court stated article I, § 16, of the North Dakota Constitution is broader than the same provision under the fifth amendment to the United States Constitution because it secures "'not only the possession of property, but also those rights which render possession valuable.'" Grand Forks-Traill Water Users, 413 N.W.2d at 346 (quoting Donaldson v. City of Bismarck, 3 N.W.2d 808 (N.D. 1942)). Nonetheless, the North Dakota court applied the criteria set out in De Benedictis, holding "courts look to the effect of the restriction on the parcel of land as a whole, rather than to

the effect on individual interests in land." Id. (citing De Benedictis, 480 U.S. at 497.) Thus, in North Dakota, statutes which "do not prohibit all or substantially all reasonable uses of the regulatory property as a whole" are not deemed to result in a taking of property. See id. at 347.

In Grand Forks-Traill Water Users, the court determined the statute in question did not prohibit all or substantially all uses of the regulated property. 413 N.W.2d at 347. Instead, the court concluded that prohibiting a landowner from constructing electrical communication, gas, oil, water or other pipelines within 100 feet of the center line of a highway only regulated one future use of the property. Id. Applying the second part of the disjunctive test, the court held the 100 foot restriction was reasonably related to a matter of general public welfare and promoted "sound and efficient highway planning, safety, and the public welfare." Id.

In the Rippley case, the court found for the landowner holding that while the state has broad regulatory authority to enact land use regulations, it may not do so if that regulation "destroys all reasonable use of the property." Rippley, 330 N.W.2d at 509.

In Rippley, the court found the zoning ordinance to be a taking for which just compensation was required. The ordinance limited the Rippley's property essentially to a public use. Id. The court did not need to apply the other prong of the disjunctive test since under that test if one prong is met a taking is found.

Various courts have articulated a special test for environmental regulations. Krahl v. Nine Mile Creek Watershed Dist., 283 N.W.2d 538 (Minn. 1979); Potomac Sand and Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241, cert. denied, 409 U.S. 1040 (1972); Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972). Those courts state if the regulation is to enhance a public benefit, it is more likely a taking will be found, but a regulation protecting existing public interests and preserving the status quo, will not likely be a taking. Thus, statutes regulating a use so an adverse environmental impact does not occur are generally upheld. Id.

N.D.C.C. ch. 61-32 may involve more than a scheme regulating property rights for environmental purposes. It may involve an exaction.

An exaction is "a condition of carrying forward a project in the form of a contribution" which the government places upon the project proponent. Note, When Exactions Become Extortion: The Supreme Court Draws the Line in Nollan v. California Coastal Commission, 39 Mercer L. Rev. 1033, 1047 (1988).

In this case the payment of 10% of the replacement acreage for wetlands which are drained, or the actual replacement of the entire drained acreage may be an exaction. Although I have been unable to find a North Dakota case addressing the issue of exactions, the United States Supreme Court addressed the issue in Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

The Nollans sought permission to replace a beach bungalow. Id. at 828. The California Coastal Commission granted a permit conditioned that the Nollans provide an easement to the public allowing public passage across the Nollan's property. Id.

On appeal, the United States Supreme Court determined the condition was not related to the purpose the Commission sought to achieve, that being "visual access." Id. at 838-39. The Court held the proposed condition did not substantially advance the state interest, impacted by the Nollans' new construction. The Court then found the Nollans were entitled to payment for the easement. Id. at 842.

All exactions are not unconstitutional or prohibited. When they are related to the purpose which they seek to achieve, and that purpose advances a legitimate state interest, they are appropriate. Note, When Exactions Become Extortion: The Supreme Court Draws the Line in Nollan v. California Coastal Commission, 39 Mercer L. Rev. 1033, 1047 (1988).

Chapter 61-32, reviewed in light of the factors discussed above, is not easily stricken.

N.D.C.C. § 61-32-01 declares the legislative policy and intent of this enactment. This section is a thorough discussion of the benefits and detriments of preservation and drainage[2] of wetlands. Among the benefits provided by wetlands are wildlife and waterfowl. Perhaps more significant is the public value attributed to wetlands for maintenance of flood control, pure water, and ground water resources. This value, in a particular case, provides the justification necessary to support police power action because drainage of the wetlands damages these values. In essence, the regulation or exaction serves to decrease the harm which could be caused by drainage. A substantial relationship between those benefits and the restoration or creation of other wetlands areas to mitigate the results of drainage is set out by this statute.

The entire burden of replacing wetlands is not placed upon the person draining the wetland. N.D.C.C. § 61-32-04(4) requires the person proposing to drain the wetland to pay only 10% of the cost of replacement. Payment of more than 10% is within the drainer's discretion. Thus, the drainer only pays 10% of the cost of restoring the damage his drainage may cause, while others pay the remaining cost of the harm which may result.

This is not to say, however, that in a particular circumstance preservation of a wetland or the requirement for replacement of that wetland would not mitigate the damage to water quality, decrease flooding, or restore depleted ground water. Additionally, a landowner

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[2] The ability of the government to require a person to use his property in a manner which does not adversely impact others is well established. See Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470 (1987) (regulation reasonably likely to prevent harm to others is not a taking); Mugler v. Kansas, 123 U.S. 623, 665 (1887) (property "is held under the implied obligation that the owner's use of it shall not be injurious to the community").

might show the denial of a permit would prevent substantially all reasonable use of his or her property.

My research has revealed several cases addressing constitutional challenges to similar land use restrictions. In some cases the courts upheld the land use restrictions. In others, the courts declared them to be unconstitutional takings. The difference in result is only partially because different courts have made the decisions. Each case involves different facts, underscoring the reluctance of courts to make blanket declarations of unconstitutionality in cases involving a facial challenge.

Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344 (N.D. 1987), was discussed earlier. In that case, the court determined the restriction and requirement for a permit for use of land within 100 feet of the center line of a state highway was not a taking because it did not deny substantially all use of the property and the regulation was a proper exercise of the state's police power. Id. at 347.

In Maine Land Use Regulation Commission v. White, 521 A.2d 710, 713 (Me. 1987), the court determined a zoning scheme prohibiting the harvesting of timber without a permit was not an unconstitutional taking of property. The court noted the Whites had not lost any property since they obtained the property after the permit requirement was in place. Id. at 713. This is an example of a factual situation which precludes recovery to one plaintiff, but which might not exist for another plaintiff (i.e., White's predecessors in interest).

In Rippley v. City of Lincoln, 330 N.W.2d 505, 509 (N.D. 1983) (also discussed earlier), the North Dakota court found a zoning ordinance deprived the Rippleys of all reasonable use of their property because the property was limited to public use.

The Kentucky Court of Appeals also addressed the impact of floodplain zoning in Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619 (Ky. 1953). In Hager, the court found a zoning ordinance making Hager's property a ponding area for a flood protection project took Hager's private property. Id. at 620. The property in question had always been a natural ponding area. Nonetheless, the court determined the express designation as a ponding area prohibited other uses of the property without compensating the landowner and was therefore a taking. Id.

Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964), also involved floodplain zoning. The Connecticut Supreme Court of Errors held the zoning of Dooley's land as a floodplain district was a taking because the use was so restrictive the property values were substantially (75%) diminished. 197 A.2d at 773-74. Use of the land was "for all practical purposes, rendered impossible." Id. at 772-73. The ordinance amounted to "a practical confiscation of the land." Id. at 773. The Connecticut court stated "[w]here most of the value of a person's property has to be sacrificed so that community welfare may be served, and where the owner does not directly benefit from the evil

avoided the occasion is appropriate for the exercise of eminent domain."[3] Id. at 774 (citations omitted).

Krahl v. Nine Mile Creek Watershed Dist., 283 N.W.2d 538 (Minn. 1979), involved a floodplain regulation. Under the regulation in question, the watershed district denied Krahl a permit to fill his property to the extent he desired. Balancing the harm unregulated development would cause with the impact on the use of Krahl's property, the court found no taking. Id. at 543.

The court found "unrestricted filling of the floodplain pose[d] a substantial threat to the public." Id. at 543. As Krahl did not demonstrate he had no use for his property without fill, his claim failed. Id. The court also found Krahl would actually benefit from "effective flood control" because he was a riparian landowner. Id.

In Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987), the Federal Circuit Court of Appeals determined the Corps of Engineers' denial of a section 404 dredge and fill permit,4 although a valid exercise of the commerce power, could be a taking if substantially all economic value of the property was destroyed by the permit denial.

Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963), involved a township zoning ordinance prohibiting a landowner from altering the natural state of his property. The purpose of the ordinance was "retention of the land substantially in its natural state, essentially for public purposes." 193 A.2d at 234. The Supreme Court of New Jersey declared the ordinance unconstitutional because it was "enacted to prevent private productive use and to maintain the natural state of the land rather than to seek and adopt reasonable means and conditions under which the area could be safely and properly developed by those private owners desiring and entitled to do so." Id. at 243.

In Maine v. Johnson, 265 A.2d 711, 714 (Me. 1970), the Maine court declared appropriateness of a police power action is "determined by consideration of the extent to which [landowners are] deprived of their usual incidents of ownership." Although the court acknowledged the right to use property was subject to restraint which might enhance a public benefit, it held if the landowner were left with "commercially valueless land," the police power was not being exercised reasonably. Id. at 716. In dicta, however, the court

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[3] Many cases allow a regulation partially because the landowner will receive benefits, even if the benefits are indirect. This principle is based on the proposition we all benefit from a cleaner, healthier environment, including those who are regulated. Private Property and Environmental Regulatory Takings: A Forward Look into Rights and Remedies, as Illustrated by an Excursion into the Wild Rivers Act of Kentucky, 73 Ky. L.J., 999, 1008 (citing Penn Central Trans. Co. v. City of New York, 438 U.S. 104 (1978); Krahl v. Nine Mile Creek Watershed Dist., 283 N.W.2d 538, 543 (Minn. 1979)).

implied a less favorable[4] result for the landowner in a case of sanitary sewage drainage because "[a]dditional considerations of health and pollution which are 'separable from and independent of' the 'fill' restrictions may well support validity of the Act in those areas of concern." Id. at 717.

In Bartlett v. Zoning Commission, 161 Conn. 24, 282 A.2d 907, 909 (1971), Bartlett alleged the city's zoning charge deprived him "for all practical purposes, of the use of his land." The ordinance allowed only uses limited to natural conditions except construction of a channel, a boathouse and other similar improvements large enough only for the landowner's personal use. The court agreed that except for public uses, Bartlett was deprived of the use of his property and a compensable taking had occurred. 282 A.2d at 910.

In Deltona Corp. v. United States, 228 Ct. Cl. 476, 657 F.2d 1184, 1185, 1189, 1194 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982), the court dismissed a claim for compensation for a taking based on a section 404 permit denial. In reaching its conclusion, the court determined the benefit the landowner derived from the regulation would be considered as well as the detriment. The court acknowledged Deltona was unable to "capitalize upon a reasonable investment-backed expectation" because of an unforeseen change in the law, however, the "residual economic value" of the property was "enormous." 657 F.2d at 1191-92. The tract involved only 20% of "Deltona's original purchase [and only] 33% of the developable lots." The property at the time of the permit denial was worth twice what Deltona had paid in 1964. Deltona's remaining land uses were also determined to be plentiful. Id. at 1192.

The court concluded because a denial of the highest and best use was not a taking, Deltona's property was not taken by the permit denial. Id. at 1193.

In Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388 (1988), the United States Claims Court questioned the Deltona decision. The Loveladies court, relying upon the Florida Rock Industries decision discussed above, concluded the test balancing the public interest in wetlands and the private development interest always "'reveal[ed] a private interest much more deserving of compensation for any loss actually incurred." Id. (citing Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 904 (Fed. Cir. 1986)). The court actually rendered the Loveladies decision by applying the same mechanism used in the Deltona case. The Loveladies court also examined the facts of the case and balanced the public versus the private interests rather than following its own suggestion that whenever the regulation involved a wetland the affected private interest should be compensated. Consequently, while the Loveladies court gave voice to an objection to the Deltona decision, it actually applied the balancing test used in both Deltona and Florida Rock Industries.

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[4] A section 404 permit is required under the Clean Water Act for all dredging and filling in navigable waters or wetlands which will impact those waters. 33 U.S.C. § 1344.

Potomac Sand and Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241, cert. denied, 409 U.S. 1040 (1972), involved a statute prohibiting riparian owners from dredging and carrying away sand and gravel from state tidelands or marshes. Potomac sought to remove sand and gravel from property adjacent to the tidelands and to exercise its riparian rights to use the tidelands for sand and gravel. The court found the legislation was enacted to prohibit dredging because the dredging would destroy marsh habitat, cause turbidity in the water and drive wildlife and waterfowl away. 293 A.2d at 249. Although prior law authorized Potomac to exercise a riparian right to dredge from the state's tidelands, the court held "unused riparian rights are not entitled to constitutional protections so long as they remain unexercised prior to the Legislature's revocation." Id. at 250.

In Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), the Wisconsin Supreme Court found a prohibition on the placement of fill within 1,000 feet of a navigable lake and 300 feet of a navigable river was not a taking of the Just's property.

In Just the court provided an interesting discussion on the limitations of a landowner's right to use his property. Language from the court's decision on pages 767 and 768 more clearly sets out the argument supporting regulation to prevent harm to the public's interests than other cases I reviewed. For that reason I have enclosed a copy of the case.

In conclusion, your questions raise issues which, for lack of factual setting and the unsettled state of the law, do not lend themselves to concise determination. Many factors are considered in determining whether a statute or regulation acts to take property for a public use and whether the taking requires reimbursement from the public fisc. Courts are imbued with the right to determine factual questions and apply the law to them but are unlikely to sustain a facial challenge. Even when presented with specific facts, they are reluctant to make broad declarations imposing an unintended cost upon the government. Instead, they have adopted tests based upon "ad hoc" factual analyses which are flexible enough to mold to the result sought.

The chances of a successful claim of a taking under the replacement provisions of chapter 61-32 increase if the challenger provides the court with the following:

1. Evidence the government will not have to pay large amounts of money it did not intend to expend;

2. Specific facts to which the court can apply the law:

3. Evidence a protectable property interest is involved;

4. In the case of an exaction, proof the exaction does not relate to and further the same legitimate state purpose, and

5. The regulation enhances a public benefit rather than protecting an existing public interest.

Because there is no mechanism for deciding which test a court will use, a claimant would have to address both the "three factor" and the "two-part disjunctive" tests. A claimant would have to be prepared to present facts and law demonstrating either: 1) the government action is inappropriate, the action interferes substantially with investment backed expectations, and the property is substantially damaged; or 2) the regulatory scheme does not further legitimate state interests, or the landowner is denied all economically viable use of the property.

If a challenger demonstrates all those factors, the challenger stands an increased chance of obtaining compensation from the government for the loss of his or her property. However, it is extremely unlikely the court would make a blanket declaration that the statute is unconstitutional and therefore invalid.

In closing I regret I cannot give you a definitive answer. However, I note other states, including Oregon, Minnesota, and Maryland have followed North Dakota's lead and either have enacted statutes similar to N.D.C.C. ch. 61-32 or are in the process of enacting such legislation. Consequently, case law more directly on point may soon result. Cases from these jurisdictions may provide further insight in this area.

Sincerely,

Nicholas J. Spaeth

Enclosure