Wednesday May 2, 2006 1:00 p.m.

Instructions

This part of the examination consists of one essay problem that you have 1 hour to complete. Your score on this part of the examination will account for roughly 1/3 of your final grade in the class.

You are permitted to have with you and to use during the examination the textbook, any class handouts (including printouts from the class web site), your class notes and outlines, and any other materials made by you personally or by your study group (not photocopied from printed materials). The materials we have studied constitute the legal authorities to which you are authorized to refer in answering the essay question. Do not rely on or cite as authorities cases, statutes, or other materials that we have not studied in class.

Please write legibly, double space, and on one side of a bluebook page only.

In answering this problem, do not begin with an elaborate discussion of the facts. Indeed, mere repetition of the facts without relevant legal doctrine will not get you any points at all. Neither, for that matter, will abstract discussion of legal doctrine that is not tied to the facts of the problem. Your analysis should weave relevant legal doctrine together with the facts to create a response that is directly relevant to what has been asked.

GOOD LUCK!
Problem

Town is a small New England municipality that was founded over 200 years ago. Town’s current population is about 30,000. While Town was originally a farming community, tourism has become a major feature of Town’s economic livelihood. In particular, Town’s central square block (“central square”) contains a number of old buildings – banks, small stores, restaurants, and hotels, several single-family residences, and one stone church – all of which have maintained their original architectural features. This central square is a major tourist draw, and the tourists who come spend money both inside and outside the square. Indeed, many larger hotels and tourist facilities have grown up in recent years on what used to be Town’s outskirts.

The stone church is owned by Church, Inc., a nonprofit corporation. Externally, the church is a rare remaining example of American church architectural style from the late 18th century. Internally, the church has widely admired wooden pews, beams, and altars, as well as a number of important American religious paintings and murals from the early 19th century. Over the years, Church, Inc. has seen membership and attendance at church services dwindle, because parking has become a big problem and because the tourist crowds make attendance at the church less palatable. Because Church, Inc. depends on member contributions to maintain the church building and pay for operations, the corporation began to see a financial collapse on the horizon. Reasoning that the church property would be more valuable for commercial operations than religious activities, Church, Inc. (through its board of directors) entered into negotiations with Buyer to sell the property. Buyer’s intent was to raze the church and build a commercial building more or less conforming in architectural style to the remaining structures in the central square. Church, Inc. would use the proceeds of the sale to buy property and build elsewhere in Town where it could induce more active participation in church activities than is any longer possible at the central square location.

Upon learning of the sale negotiations, the City Council of Town adopted an ordinance that prohibits all owners of property in Town’s central square from changing any external architectural feature of any building without permission of a Landmarks Commission. The ordinance further prohibits any interior architectural changes that would, in the opinion of the Landmarks Commission, “change the essential character of the building’s historic value.”

As a result of the adoption of the ordinance, Buyer broke off negotiations to buy the church property. Church, Inc. has since tried to sell the property to other commercial buyers, but all have conditioned purchase on being able to renovate the interior of the church, because pews and altars simply take up too much space to make operation as, say, a store, viable. Church, Inc. petitioned the Landmarks Commission for permission to remove the pews and altars, but the Commission concluded, based on the uncontradicted evidence of several experts, that such removal would change the essential character of the church. This decision of the Council was affirmed on appeal to the City Council itself, which also decided that no compensation to Church, Inc. was required because the ongoing costs of maintaining the church property in its
current form could be raised by converting the church to a museum and charging tourists an entrance fee. Substantial evidence supported the Commission’s and the City Council’s conclusion that entrance fees would be sufficient to cover all ongoing maintenance costs for the foreseeable future, and would even leave a small amount of income for Church, Inc. that it could use to further its nonprofit religious activities.

Church, Inc. now brings an inverse condemnation action against Town in the superior court, alleging that the ordinance and its implementation by the Commission have effected a taking of the church property located in Town’s central square. You are a clerk to the judge who is to decide the case (without a jury). Because the state’s eminent domain law is identical to federal eminent domain law, only the federal authorities need to be considered. The judge asks you to write a preliminary opinion deciding the case under the current federal authorities. Based on the facts presented, please write such an opinion. Do not raise or discuss any issues involving the First Amendment. Rather, deal with this as a takings problem involving a property owner engaged in the “business” of supplying church services to its congregation. If you need to make further factual assumptions, please be clear about what you are doing.

Model Answer

That Town receives important economic benefits from maintaining the central square in pristine architectural condition is unchallenged. The evidence of these economic benefits shows that City Council had a rational basis for thinking that the ordinance in question would help assure the continuation of such economic benefits. It is not for this court to second guess the legislative decision on that score. While the ordinance does leave the question of whether interior changes would effect a change in the building’s essential character to the “opinion” of the commission, which is a vague and general standard that could be abused, here there was uncontradicted expert evidence that the proposed interior changes would adversely affect the building’s essential character. This court is in no position to say that removal of pews and altars from a church could not change the church’s essential character or historic value. Therefore, the ordinance is a valid application of City’s police power and comports with the requirements of due process. Moreover, the Supreme Court has made clear that “public use” is synonymous with “public benefit.” Because the ordinance brings about a public benefit, it cannot be challenged on “public use” grounds. The issue is whether this validly enacted ordinance nevertheless constitutes a “taking” of Church, Inc.’s property that requires compensation.

There has been no physical occupation of the church, permanent or otherwise, so the categorical rule of Loretto does not apply. (The restriction on interior changes is arguably nearly equivalent to a physical occupation, because there is very little even the property owner itself can do to convert the building to a different use. However, we must assume that “physical” in the Loretto test refers only to tangible intrusions by the government or others authorized by governmental action. Otherwise any regulation limiting what a property owner can do on his property would be a “physical” intrusion.) Moreover, the ordinance does not regulate in the
interest of health and safety, so the categorical “no taking” rule of Hadacheck also does not apply. This leaves the tests of Lucas and Penn Central.

Here the regulation was not traditional health and safety regulation (common-law nuisance), so Lucas says there is a taking if there has been a total economic wipeout. As we discussed in class, if we are to be honest about things, there will never be a total economic wipeout, and that is one of the reasons few courts since Lucas have relied on it to find there has been a taking. Here we have a piece of property that has long been used as a church, but it has very little value as a church because potential churchgoers do not want all the hassle of going to church in such a crowded downtown tourist area. If none of its internal features can be modified, it seems to have little economic value as a store or similar commercial enterprise, either. If we could stop there, it would be about as close to a complete economic wipeout as we could ever expect to find in real life. Unfortunately, it seems that the church is somewhat useable as a museum. Charging an entrance fee will allow the necessary upkeep and maintenance and, at the same time, provide a small stream of income to the property owner. While the stream is “small,” it is not zero, and that is likely to take it out of the Lucas categorical rule.

That leaves us with the Penn Central balancing test. Penn Central tells us to look at the economic impact of the regulation, particularly at its effect on distinct investment backed expectations (DIBEs). We also look to the nature of the governmental action and whether the regulation facilitates a uniquely public function. Finally, under Lingle v. Chevron and other cases, we should look at the extent to which the property owner has been “singled out” to bear much or all of the burden of providing a general public benefit.

On the one hand, the economic impact of the regulation seems severe. The property is no longer useful as a church, and its only viable use is as a fee-charging museum. If the property owner could sell the property to someone who could put it to its highest and best use, the owner could acquire enough money to build a new church in an area more conducive to church activities. Without that ability to sell, the property owner’s goal of providing a place of worship used by its members cannot be achieved. Indeed, all of the economic value to this property owner has been largely wiped out, in contrast with Penn Central, where the building was still profitable for its original purpose. Running the church as a museum will provide a small stream of income, but that is not something Church, Inc. was founded or operated to do. We should also note here an important distinction between this case and Penn Central. In Penn Central, the property owner received transferable development rights that the Court expressly recognized as reducing the economic impact of the regulation on the property owner, whether or not they amounted to full “just compensation” (p. 1164). Here, nothing like that has been given to Church, Inc., to reduce the economic impact of the ordinance.

Has there been a frustration of DIBEs here? In Penn Central, the building in question was built and operated as a train station and was still economically viable as a train station. As a result, the Court concluded that the owner’s DIBEs were not severely frustrated. Here, the
property owner’s expectations (whether investment backed or not) have been frustrated in that it cannot use its property as the church for which it has been designed, because the surrounding area has changed so much that people do not want to go to church there. But that change did not come from the regulation. Rather, it came from the changing times and attitudes. On the other hand, the property owner did have an expectation of continuing on in the church “business,” and the only way to do that is to use its only real asset as a means of building a church that people do want to attend. Did Church, Inc. have an expectation of being able to sell the property to a commercial developer so that it could continue in its role of supplying church services to a congregation in Town? The right to sell property is normally considered one of the most important in the bundle of rights that we call “property,” so we must assume that Church, Inc., had that expectation. But was it “investment backed”? It was investment backed in the sense that had Church, Inc. seen the problem earlier – before Town became so dependent on tourism for its economic vitality – it could have sold the property and likely avoided the imposition of the regulation that has now been put into place. As the land got increasingly valuable (for commercial purposes), Church, Inc., was in a sense “investing” in it by not selling it. It “knew” that if worst came to worst, it could sell the church property and build elsewhere. In that sense, perhaps Church, Inc.’s DIBEs were frustrated, but that is a bit of a stretch. We might say, on the other hand, that as a nonprofit corporation engaged in spiritual and not economic matters, Church, Inc. had no DIBEs at all, let alone any that were frustrated.

What about the nature of the governmental action? Here, as discussed above, there is no physical occupation. The regulation is of a type that is now common (according to Penn Central) throughout the country and serves an important public purpose of preserving some of our heritage. This factor does not help Church, Inc.’s argument that there has been a taking. Does the regulation facilitate accomplishing a uniquely public function? Here, Town wishes to preserve the central square, and the church in particular, because of its value as a tourist destination. That was not a sufficiently unique public function to lead to a taking in the Penn Central case. Is this case any different? Church, Inc., would like to argue that the regulation leaves it with only one choice that is at all economically viable, namely, turning the church into a museum. Museums are not always public, but it is likely that the vast majority are publicly run, in this country and elsewhere. Museums rarely make enough money to justify an investment in their creation on purely economic grounds, so they must be founded by wealthy donors who wish to contribute something to the public or by the government itself. In that sense, Church, Inc. can argue that the regulation forces it – a private property owner – into the position of performing a nearly unique public function, namely, that of running a museum, and this factor strongly suggests that a taking has occurred.

We should also consider the extent to which Church, Inc. has been singled out to bear an unjust portion of the burden of supplying a public benefit. Town will argue that all of the property owners in the central square have been equally burdened, so this is really little different from a zoning decision. Nobody is forced to do something by the ordinance that he was not already doing, nor has any current activity been prohibited. Church, Inc., remains free to run its
property as a church if it wishes. On the other hand, the part of the ordinance that prohibits changing the interior features, while nominally applicable to all, seems to apply only to the church property. Surely the residences in the neighborhood have upgraded their utilities, windows, etc., to take advantage of modern technological developments while maintaining their historic external appearance. By limiting what Church, Inc., can do inside its building, the burden of the ordinance seems to fall much more heavily on Church, Inc. than on the others. Moreover, the church is also unique in that it is the only church in the central square. As such, it is like the “anchor” store of a shopping center – something without which the whole notion of the central square as a historic district would lose much of its appeal. Town very much needs the church in its present form to achieve its goal of providing a popular tourist attraction. Why should Church, Inc. essentially have to go out of “business” (i.e., stop operating as a supplier of church services and go into the highly unprofitable business of museum services) without compensation in order to achieve the admittedly public good of maintaining the central square as a tourist destination? Church, Inc., will lose nearly everything it has, including the means of achieving its fundamental purpose, if this regulation is enforced without compensation. We can fairly conclude that Church, Inc. has been singled out to bear an unfair share of the burden without imputing any wrongful motives to Town based upon its precipitate action to adopt the ordinance only after hearing of the proposed sale of the church to Buyer.

I conclude that the economic impact of the ordinance on Church, Inc. is severe and that, while the ordinance may not directly impact the “investment” part of “DIBEs,” it wholly frustrates the property owner’s basic goal of supplying church services to a congregation from Town. In *Penn Central* the property owner could continue doing, at a profit, what it had always done. Here, the property owner must change its activity completely just to stay above water economically. And what the property owner must do under the ordinance (operate a museum) is usually if not uniquely a public function. Coupled with the degree to which Church, Inc., in particular, has been singled out to bear the brunt of the burden of achieving the desirable goal of having an attractive tourist destination, I would conclude there has been a taking under the balancing test of *Penn Central* and its progeny.