Facial Challenges -- Hardly a Relaxing Topic!

Interesting and frustrating new case out the 10th Circuit, *Alto Eldorado Partners v. County of Santa Fe,* which doesn’t appear to have gotten coverage from Takings lawyers and scholars and probably should. The case involved a challenge to Santa Fe County’s inclusionary zoning ordinance, and it carries potential important federalism issues; it also raises — although then runs away from — a question that federal courts have been skirting around the last few years: what does it mean to raise a facial challenge under the Takings Clause?

As we all know, Takings cases rely primarily on *Penn Central RR v. City of New York,* which stressed the essentially “ad hoc, fact-based” nature of a Takings inquiry. Facial claims, according to the Supreme Court, are those that allege that there are “no set of circumstances” under which a statute would be valid. So then how can a plaintiff raise a facial challenge to begin with?

The Court in *Alto Eldorado,* it seems to me, essentially punted the question by holding that under *Williamson County,* plaintiffs had to bring their claims to state court first — even for a supposedly “facial” challenge. And then it refused to give state courts guidance as to how to handle such claims. But even though this was a substantive punt, it was procedurally important: Takings plaintiffs are bringing “facial” claims in the hopes that they can go directly to federal court. *Alto Eldorado* says that they can’t do that.

Williamson County held that in order to bring a Takings challenge in federal court, there had to be 1) a final decision; and 2) the state had to refuse compensation, which — crucially — meant that a plaintiff had to pursue compensation in state court first. Why not then just go to federal court if the state courts don’t compensate? Well, aside from the expense and delay, federal courts would be both issue-precluded and claim-precluded from reopening the

matter. The Supreme Court has since upheld this understanding of *Williamson County* in *San Remo Hotel v. City of San Francisco*, with the deciding vote coming from (surprisingly) Justice Scalia. Nino apparently really doesn't want federal courts turning into zoning boards.

The plaintiffs in *Alto Eldorado* tried to get around *Williamson County* by bringing a facial challenge to Santa Fe Coutny's inclusionary zoning ordinance; since it was a facial claim, they argued, *Williamson County*'s requirement of a "final decision" for a permit obviously cannot apply. The 10th Circuit agreed as a matter of argument, but held that even though the *finality* prong of *Williamson County* was inapposite, its requirement of going through state courts still held.

But it didn't say anything about what the state court was supposed to do with the case once it got it! How can a court make a fact-based, ad hoc judgment on a facial challenge? *Alto Eldorado* didn't say.

The Ninth Circuit has faced the same issue, and has had little success. In *Guggenheim v. City of Goleta*, Judge Jay Bybee, writing for a panel, attempted to come up with a framework for a facial challenge (apparently Bybee, who as Assistant AG for OLC signed off on John Yoo's infamous torture memos, thinks that it's okay to torture people as long as you leave their property intact), but over a dissent from Andrew Kleinfeld; the case went en banc, and Kleinfeld wrote the opinion. (Importantly, the en banc court reached the merits because the parties had settled their state law claims and for some other technical reasons, but very clearly reaffirmed that as a general matter, even facial claims have to go to state court.)

The en banc decision held that a facial challenge requires that the very enactment of a statute causes the Taking, which sounds sensible until you realize that the only way to determine whether the statutory enactment injured the plaintiff is to *apply its effect to the plaintiff's property.* The en banc panel did this, and found that there was no taking because it didn't violate the plaintiff's Distinct Investment-Backed Expectations, but again: you can't determine that question until you determine the specific nature of the plaintiff's investment-backed expectations and why they might have been violated. And that, it seems to me, constitutes an as-applied challenge.

Even then, the Ninth Circuit decision came over a grouchy dissent from Judge Bea, joined by Chief Judge Kozinski and Judge Ikuta, and a cert petition has been filed. So we may know more about this sooner rather than later.

So where are we now? We have two appeals courts that have held very clearly that facial

Takings claims must go to state court first, with the standard preclusive effects. But we still are at sea as regards how a court is supposed to assess these claims. The 10th Circuit punted, and the 9th Circuit used a standard that for all the world looks like an as-applied challenge. Blecch.

This might be less critical than might be thought if plaintiffs still have to go through state court: as I noted above, one reason why plaintiffs are making ostensibly “facial” challenges was to get around *Williamson County* entirely, and if they still have to go through state court, they might not care. But they are still bringing the cases, and at some point or other, someone is going to have to answer coherently the question posed in the title: what is a facial Takings claim?