approved state compensation for unconstitutional legislative omission. Japanese case law on the state compensation for unconstitutional legislative action (or omission) is said to have established the extremely high hurdle to be cleared for compensation: one may be compensated for damages caused by the legislature in the exceptional case where legislature would act against unambiguous constitutional mandates, intentionally or negligently (*see* Sato v. Japan 35[7] MINSHU 1512 [1985]). Taking the general and abstract nature of constitutional wording into account, such a case must be impossible rather than exceptional. For that reason, almost all of the scholars of constitutional scholarship have criticized the doctrine. It is true that the Opinion of the Court took the trouble to note that their holding would not be contrary to the established doctrine of compensation, but on making a careful examination of their newly asserted requisites for compensation, that "where it is obvious that the contents of legislation or legislative omission illegally violate citizens' constitutional rights or where it is absolutely necessary to take legislative measures to assure the opportunity for citizens to exercise constitutional rights and such necessity is obvious but the Diet has failed to take such measures for a long time without justifiable reasons," it seems evident that the hurdle is lower than the conventional doctrine, and thus one might conclude that the Court has jettisoned the existing doctrine implicitly. Anyway, after this, citizens can expect a more flexible judicial remedy for legislative omission than ever.

2. Administrative Law

X v. Minister of Construction
Supreme Court G.B., December 7, 2005
Case No. (*gyo-hi*) 114 of 2004
1886 HANREI JIHO 52

Summary:

Concerning the Action to quash the approval disposition about the railroad continuative two-level crossover enterprise as a city planning

enterprise, the people who reside in the related area specified in Art. 2(5) of the Tokyo Environmental Impact Assessment Ordinance possess "legal interests" and have "standings." However, concerning the Action to quash the approval dispositions about the attached streets enterprises, those possessing "standings" are restricted to those who have an estate on the enterprise-site of an attached street, and mere local residents do not have "standings."

Reference:

Town Planning and Zoning Act, Articles 1–2 and 59; Tokyo Environmental Impact Assessment Ordinance, Articles 2 and 13; Administrative Litigation Act, Article 9.

Facts:

In June 19, 1994, Defendant Y (the then Minister of Construction), based on Article 59(2) of the Town Planning and Zoning Act, made approval dispositions for city planning enterprises to Tokyo. These approval dispositions were about following two enterprises; that is, (1) about the railroad continuative two-level crossover enterprise of the section from near Kitami Station to near Umegaoka Station on the Odakyu Odawara Line, (2) about the attached streets enterprise and in July 3, 1994, the then Minister of Construction gave noticed of these approval dispositions.

Appellants X1 to X33 and X38 to X40 were all those who did not have estates on the enterprise-sites of the city planning enterprises stated above. On the other hand, Appellants X34 to X37 had estates on the site of the attached streets enterprises.

Furthermore, X1 to X33 resided in the area specified in Art. 2(5), Art. 13(1) of the Tokyo Environmental Impact Assessment Ordinance (that is, the area specified as an area with a possibility that the enforcement of the enterprise may have a remarkable influence on environment in the area and its circumference, where an developer is going to undertake the enterprise).

Appellants Xs brought the case before the court, asking for the quashing of the Minister's approval dispositions for the city planning enterprises by making the Minister of Construction into a defendant.

But Tokyo High Court denied the "standings" of X1 to X37, who merely resided around the enterprise area, and that of X38 to X40, who resided outside of the enterprise area, and dismissed their appeal. On the other hand, Tokyo High Court acknowledged the "standings" of X34 to X37 concerning only the attached streets enterprise to which their estates belong, but, annulled the judgment of Tokyo District Court which approved a part of their claims.

Opinion:

Concerning the Action to quash the approval disposition about the railroad continuative two-level crossover enterprise, Appellants X1 to X37 possess "standings," Appellants X38 to X40 do not possess "standings."

Concerning the Action to quash the approval dispositions about the attached streets enterprises, Appellants X1 to X33 and X38 to X40 do not possess "standings," Appellants X34 to X37 possess "standings" only about the attached street enterprise to which their estates belong.

Those who possess "legal interest" according to the Administrative Litigation Act, Article 9(1) which prescribes the "standing" of an Action to quash is a person whose right or "legally protected interest" (in the Case Law) has been infringed or may be infringed inevitably, and provides administrative legal provisions which prescribe a particular disposition with the intention that besides the general public interest, individual interest should also be protected, such individual interest also belonging to "legally protected interest," so those whose such interest was infringed or may be infringed inevitably possess "standings" in an Action to quash.

Furthermore, in case of judging the existence of a "legally protected interest" of a third party, without being based only on the terms of the provisions of the enabling act of the disposition, the aim and the purpose of the enabling act and the contents and the character of the interests which should be taken into consideration relating to making the disposition, should be taken into consideration.

Moreover, in case of judging the aim and the purpose of the enabling act, if there are some other related legal provisions, the aim and the purpose of those related legal provisions must be also taken into consideration, and in case of judging the contents and the character of the interests,

the following two points must be also taken into consideration. That is, (1) the contents, the character of the interests which will be infringed in the situation that the disposition in violation of the enabling act is carried out, and (2) the mode, the grade of the infringement (Administrative Litigation Act Art. 9(2), which was newly established by the revision of the Administrative Litigation Act in April. 2005).

From the aim and the purpose of the Town Planning and Zoning Act, it seems that the provisions of the Town Planning and Zoning Act relating to approval dispositions of the city planning enterprises are intended to protect the local residents' concrete interests in not suffering remarkable damage to health or the living environment by the noise, vibration, etc. resulting from an illegal enterprise. And in the light of the contents, the character, and the grade of the infringement, it is difficult to judge that such concrete interests are absorbed into general public benefit.

Judging from these provisions, it is the proper understanding that the Town Planning and Zoning Act intends not only to regulate the enterprises with regard to the maintenance of a city planning institution, but to protect the private interest of not suffering damage to health or the living environment from the enterprise.

Thus, in residents who reside around the site of the city planning enterprise, the person with a possibility of suffering directly remarkable damage to health or the living environment by the noise, vibration, etc. resulting from an illegal enterprise possesses a "legal interest" and possesses a "standing" in Action to quash.

Judgment of Supreme Court 1st P.B. November 25, 1999 Case No. (*gyo-shu*) 76 of 1996 (195 MINSHU 387, 1698 HANREI JIHO 66) should be changed as long as it conflicts with this judgment.

Next, concerning a "standing" in an Action to quash these approval dispositions of attached streets enterprises, since these attached streets enterprises are different, and independent from the railroad enterprise, so, the Appellants' "standings" in the approval dispositions of attached streets enterprises should be separated from the problem of the railroad enterprise, and should be judged severally.

Justice Fujita's concurring opinion (Justice Machida sides with his opinion)

He commented as follows: About the problem why we can say that the approval disposition of this enterprise itself infringes on the appellants' "legal interests," the traditional formula of this court that "legal interest" is acknowledged when the enabling act of the disposition includes the intention that the enabling act itself is going to take care of not only the subject party of the disposition but a third person does not provide a sufficient explanation.

I think, supposing that local residents are approved to possess "standings," it is in theory from the following reason. That is, statutes at large which regulate the exercise of the powers of administrative agencies impose on the agencies a legal duty by which a third person (local residents) is protected from the risk of local residents' suffering the fixed damage resulting from an institution being used in the future (in other words, local residents are given the right to such protection). That is, for the reason that an illegal approval disposition of the enterprise is made, and administrative agencies violate the duty of "protection from a risk," so local residents' "interest of being protected from a risk" are infringed, therefore, and the "standings" of local residents are acknowledged.

Justice Imai's concurring opinion

He commented as follows: The problem is whether the appellants who are local residents other than the appellant who has a right per estate in the enterprise site of an attached street enterprise, and who were acknowledged to have the "standings" in the Action to quash this approval disposition of the railroad enterprise, are acknowledged to have the "standings" in the Action to quash the approval dispositions of attached streets enterprises.

To deal with both of the enterprises as one will bring about the following inconvenient results. namely, if both are dealt with as one in a field of "standing," in judgment of illegality, both must also be dealt with as one, as the natural conclusion. If one does so, when an error is in either of both enterprises, it cannot but be tinged with an error about the whole, and cannot but result that all the enterprises become illegal as a whole, but this result cannot be admitted at all.

Therefore, these railroad enterprise and attached streets enterprises should be separate city planning enterprises from each other on the basis of respectively separate city planning, so each of the approval dispositions of these enterprises is respectively separated as an administrative disposition from each other. Consequently, about the "standing" of the Action to quash the approval disposition of the enterprise, we should also judge separately for each enterprise.

Dissenting opinion

Since these attached streets enterprises are carried out as a measure for the preservation of the environment concerning this railroad enterprise, so these attached streets enterprises are attached to this railroad enterprise, thus, the approval dispositions of both enterprises are, whatever the form is, in substance one administrative disposition. Moreover, through the approval dispositions of both enterprises, it is expected that the city planning enterprise suits lawful requirements for the approval disposition that the enterprise should not do remarkable damage to health or the living environment of the residents who reside around the enterprise site. Thus, the appellants who are in danger of suffering remarkable damage to their health or the living environment possess the interest of seeking for quash approval dispositions of the attached streets enterprises.

Editorial Note:

This judgment is the first judgment of the Japanese Supreme Court G.B. which applied the new Article 9(2) of the Administrative Litigation Act revised in April, 2005, and an important judgment which, regarding "standing" concerning the Action to quash, changed the judgment of the Supreme Court 1st P.B., November 25, 1999 (judgment on the Tokyo circular road No. 6 incident).

In the Tokyo circular road No. 6 incident, though the person who has an estate on the enterprise-sites was acknowledged to possess a "standing" concerning the Action to quash approval dispositions of the city planning enterprise, local residents were denied their "standings" for the reason that requirements for the approval disposition, and procedural

rules prescribed in the Town Planning and Zoning Act are not the provisions which are intended to protect the plaintiffs' individual interest.

To the contrary, in this judgment, applying the new Article 9(2) of the Administrative Litigation Act, the people who reside in the related area specified in Art. 2(5) of the Tokyo Environmental Impact Assessment Ordinance were acknowledged to possess "standings" concerning the Action to quash.

So, we may say that, due to new Article 9(2) of the Administrative Litigation Act, requirements for acknowledgment of the "standing" of a third party other than the subject party of the disposition are mitigated.

And yet, in this judgment, a gap in opinions was seen among the justices about the method of understanding the concept of "legal interest" in the Administrative Litigation Act, Art. 9(1), and the "unitariness" between the railroad enterprise and the attached streets enterprises.

In the Administrative Litigation Act, Art. 9(1), a "standing" is acknowledged in those possessing a "legal interest," and regarding the concept of "legal interest," it is the traditional view that in order to acknowledge a "standing" (in other words, in order to acknowledge the existence of a "legal interest"), the damaged interest must be a right or a "legally protected interest," and moreover the infringed interest must relate to a concrete and particular interest. And in order to acknowledge the existence of a "legally protected interest" of a third party other than the subject party of the disposition, the administrative legal provisions concerned should be interpreted, as besides the general public interest, they also intend to protect individual interest.

The majority opinion, following this traditional view that "legal interest" means "legally protected interest," acknowledged the existence of "legally protected interest" and "standings" of local residents by making use of Art. 9(2) of the Administrative Litigation Act.

On the other hand, the concurring opinion says that an administrative agency has imposed a legal duty in which a third person (local residents) is protected from risks, and this duty derives from statutes at large, so local residents have an "interest of being protected from a risk," and, for the reason that such interest is infringed, local residents are acknowledged as having "standings."

So that, following this concurring opinion, there is room for

acknowledging the "standings" of local residents without relying on Art. 9(2) of Administrative Litigation Act, since "a legal duty of an administrative agency to protect people from risks" is derived not only from the enabling act of the disposition, but from statutes at large, and in judging the existence of such a "legal duty," the proposition whether a "legally protected interest" exists or not does not need not to be taken into consideration much.

Supposing this concurring opinion turns to a common opinion in the future, the meaning of Article 9(2) of the Administrative Litigation Act should be reexamined.

Next, regarding to the "unitariness" between the railroad enterprise and the attached streets enterprises, while the majority opinion denied it, the dissenting opinion acknowledged it.

On administrative business, both plannings of those enterprises dealt with the investigation, instruction, and expenditure of a state subsidy as one. Moreover, in the assessment on the Tokyo Environmental Impact Assessment Ordinance, those enterprises were assessed as one too. So if these points are taken into account, both approval dispositions will also be one disposition substantially.

On the one hand, the majority opinion associates the problem of "standing" with the problem of the illegality of the administrative disposition, and takes the view that an error on one side affects the other side, so the result that both enterprises were in an error and are illegal as a whole is brought, On the other hand, the dissenting opinion thinks the actual condition is important and regards both enterprises as one.

Accordingly, the proposition whether when considering "standing," we should divide and consider the problem of "standing" and the problem of the "illegality" of dispositions, and the proposition that the right or wrong of the theory that an error of one side affects another side, and both dispositions are in an error and become illegal as a whole will draw various arguments from now on.