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Community Rights Report

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FEATURE CASE

California High Court Nixes Billboard Co.'s Takings Challenge to City Tree-Planting Project

"I think that I shall never see, a billboard lovely as a tree." So wrote Ogden Nash in his *Song of the Open Road*.

The California Supreme Court evidently agrees. In *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, S132619 (Cal. August 7, 2006), the Court rejected a billboard company's takings challenge to a tree-planting project by the City of Los Angeles that allegedly made certain billboards less visible.

In June 2000, the City planted mature palm trees on city-owned property along Century Boulevard as part of a roadway beautification program in preparation for a national political convention. Regency Outdoor Advertising sued the city, arguing that the city took its property by impairing the view of some of its billboards and making them less valuable.

The trial court found that Regency failed to show that any loss in visibility devalued its property, and it concluded that no taking occurred. An intermediate appeals court ruled that loss of visibility could require compensation only when the government also infringes a separate property right, such as the right of access.

The California Supreme Court first considered whether the right to be seen from the road is a freestanding property right cognizable under the state or federal constitution. Courts have recognized several "abutter's rights" held by landowners along public roads, including the right of access and to receive light and air from the adjoining street. Moreover, some courts have provided relief under nuisance theories where a private party places an obstruction that impairs visibility of roadside land. But the California Supreme Court agreed with the lower appeals court that absent a physical invasion of private property, or some other infringement of a separate property right, "the virtually unanimous rule provides that there is no freestanding right to be seen, and that the government need not pay compensation for any lessened visibility."

In denying relief in these situations, some courts stress the foreseeability of additional construction or landscaping along public roads. Others rely on the government's inherent authority to maintain and improve the road system. In addition to these justifications, the California Supreme Court observed that Regency could not claim unfair surprise from the plantings because "local governments have long planted trees along roads for aesthetic reasons, to lessen the burdens of climate, and for other salubrious purposes," and "anyone who purchases or occupies property along a public road is presumed aware of this heretofore undisturbed—indeed, typically welcomed—custom."

Finally, as an independent ground for rejecting Regency's takings claim, the court emphasized Regency's failure to show a loss in value: "Even if one were to assume that the trees prevented abutting owners from displaying billboards on their property, this would represent, at worst, one manifestation of traditional land-use regulations that have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property" (citations and interior quotes omitted).

Nor did it help Regency's cause that it had acquired a special contractual interest in visibility through its lease agreements. The Takings Clause does not serve as an insurance policy against the risk that contract rights might be diminished: "Regency and the owners of the property upon which its billboards sat bargained in the shade of the government's well-established prerogative to plant trees on its own property. Regency now would have us foist onto the public what was appropriately a subject for negotiation between the firm and its lessors. We perceive no constitutional requirement that the public absorb these costs."

The court also rejected various state statutory arguments advanced by Regency, and it affirmed the trial court's decision to award the city fees and costs under California law.

Kudos to the City Attorney's office and amicus League of California Cities. Given the mitigating effect trees have on global warming, we hope the ruling encourages additional municipal tree projects in California and elsewhere.

EYE ON WASHINGTON

The Farmland Not Taken

On August 4, the Court of Federal Claims rejected a takings claim brought by a Pennsylvania farmer who argued that the federal government's enforcement of wetlands protections constituted a compensable taking of his land (*Brace v. United States*. Ct. Fed. Cl. No. 98-897). Judge Francis Allegra's opinion reads like a primer on takings law, lucidly walking through parcel-as-a-whole analysis, categorical takings, and a detailed analysis of the *Penn Central* factors as they apply to the facts of the case. Judge Allegra also squashes the notion that a consent decree could constitute a taking.

Some time between 1985 and 1987, Brace filled a 30-acre wetland on his property without a Clean Water Act permit. U.S. EPA issued three orders to stop filling and begin restoring the wetlands, and began an enforcement action in 1990. In 1995, after losing in the Third Circuit Court of Appeals, Brace entered into a consent decree with EPA that required him to restore the wetlands and undo much of the drainage work he had done previously. The consent decree also dramatically reduced Brace's civil penalty for Clean Water Act violations from the $125,000 originally sought by EPA to $10,000. But three years later, in 1998, Brace filed a takings claim, saying a vast portion of his land was unusable and that the consent decree was overreaching.

The court rejected his claim, noting first that he disregarded the parcel-as-whole doctrine by separating two parcels of land that had always been considered a single economic unit, just to bolster his takings case. The court called this "tantamount to betting heavy on a low pair in a game of high-stakes poker." Then Judge Allegra launched a blistering attack on Brace's "expert" analysis that the highest and best use of his property was a 125-unit subdivision (despite likely regulatory hurdles and paltry evidence of market demand), calling it "virtually devoid of factual moorings, depriving it of virtually any evidentiary value."

Brace's claim ultimately failed to clear the *Penn Central* hurdles. His true economic loss was about $55,000, or 14 percent, and the government action was legitimately in the public interest. While the wetlands rules at issue did upset his expectations, since wetlands regulations were in flux and wetlands were inconsistently defined by different branches of the U.S. government, this was not enough to overcome the other two *Penn Central* factors that weighed in favor of the United States.

We're of course pleased with the outcome of this case, but also pleased by the clarity of the analysis of the interlocking aspects of takings law. Opinions like this one, directly in line with the Supreme Court's 2005 *Lingle v. Chevron* opinion, go a long way towards making takings law clear to everyone involved.

ON THE HORIZON

Top-side Briefs Filed with U.S. Supreme Court in Global Warming Case

On August 31, CRC filed an amicus brief on behalf of the US Conference of Mayors, the National Association of Counties, the International Municipal Lawyers Association, the American Planning Association, and four major cities in *Mass. v. EPA*, No. 05-1120, a case designed to force the federal government to reconsider its refusal to control emissions of greenhouse gases from new cars and trucks. On the same day, Petitioners filed their opening brief on behalf of 12 states, three cities, and many others.

CRC's amicus brief provides the municipal perspective on global warming. First, we discuss how unfair the current federal position on global warming is to local officials. Not only has the federal government concluded, erroneously, that it has no authority to address global warming pollution from mobile sources, it has separately asserted that federal law also prohibits states and local governments from limiting this pollution.

Second, the brief explains the ongoing and projected impacts of global warming in the United States, with a particular focus on the costs borne by local officials, who are the first responders to the storm surges, heat waves, and other calamities global warming is likely to bring.

Third, the brief shows that the plaintiffs have standing because they have suffered and will continue to suffer serious injury, and because EPA has the authority to meaningfully redress these injuries by mandating reductions in global warming pollution from mobile sources.

CRC's amicus brief and other submissions in the case are available at http://www.communityrights.org/LegalResources/PendingSupremeCourtCases/Mass.asp. We'll keep you apprised of further developments.