August 2001

Takings Watch

CRC's Monthly Update on Regulatory Takings

Community Rights Counsel

Community Rights Counsel
1726 M Street NW, Suite 703, Washington, DC 20036; www.communityrights.org

QUOTE OF THE MONTH

"The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eighty to one hundred feet. Safe pillars may be required in coal mines. Billboards in cities may be regulated. Watersheds in the country may be kept clear. These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation."

Justice Oliver Wendell Holmes, author of *Pennsylvania Coal Co. v. Mahon* (1922), in *Block v. Hirsh*, 256 U.S. 135, 155-56 (1921) (citations omitted).

FEATURE CASE — *Keshbro, Inc. v. City of Miami*: Sex, Drugs, and the Takings Clause

We typically associate takings claims with zoning and other routine land use planning techniques. But a recent case from Florida reminds us that local officials face takings challenges to a broad array of laws that protect our communities, including laws to curb prostitution and drug abuse.

On July 12, 2001, the Florida Supreme Court issued a single opinion in two consolidated cases that addresses the question of whether the temporary closure of buildings under a nuisance abatement statute designed to address prostitution and drug-related activity may constitute a per se taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Keshbro, Inc. v. City of Miami*, 2001 WL 776555 (Fla. 2001), the City of Miami ordered the Stardust Motel, a fifty-seven unit building, to be closed for six months in 1997. In the companion case of *City of St. Petersburg v. Kablinger*, the city ordered closure of an apartment complex based on at least two cocaine sales within a six-month period in violation of the city's nuisance ordinance. In both cases, the landowners sued for inverse condemnation.

The intermediate appeals courts split. In *Keshbro*, the appeals court found no taking because the prohibited uses ("a brothel and drug house") had no protection at common law and did not inhere in the landowner's bundle of property rights. In *Kablinger*, however, the appeals court found a compensable taking based on an earlier case, *City of St. Petersburg v. Bowen*, 675 So. 2d 626 (Fla. 2d DCA 1996), in which the same appeals court found a compensable taking where the city closed an apartment complex for one year as a nuisance.

The Florida Supreme Court affirmed both *Keshbro* and *Kablinger*, notwithstanding their disparate outcomes. The Court rejected the cities' argument that the temporary nature of the closures precludes a ruling that the landowners have been denied all economically viable use under *Lucas*. Relying on what we believe to be a misreading of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court held that a temporary closure may constitute a *Lucas* taking. The court expressed special concern over "the drastic economic impacts" inflicted by the closure of ongoing concerns. The Court expressly distinguished land-use planning moratoria, which raise "an entirely different set of considerations" that might warrant a different result. While troubling, the ruling does not provide support to claimants like those in the *Tahoe* moratorium case who argue that temporary restrictions on development always constitute a per se taking.

Finally, the Court considered whether background principles of nuisance law precluded takings liability. In the case of the Stardust Motel, the Court stressed that operation of the motel had become "inextricably intertwined" with drug and prostitution activity. Thus, this nuisance activity justified the closure and no taking occurred. The same was not true, however, with respect to the apartment in *Kablinger*. Because there was no record of persistent drug activity, the one-year closure was not necessary to abate a drug nuisance and thus constituted a compensable taking.

Keshbro illustrates that the Takings Clause is omnipresent, but with a proper record local officials have considerable leeway in protecting the quality of life in our communities.

OUTRAGE OF THE MONTH

All too often, lawyers for the so-called "property rights" movement play dirty pool, and it's especially gratifying when courts take them to task for doing so. Consider *Machipongo v. Commonwealth of Pennsylvania* (Pa. No. 113 MAP 2000), a takings challenge to a mining ban designed to protect a fragile watershed in central Pennsylvania. Washington Legal Foundation (WLF), a "property rights" law firm, filed an amicus brief in *Machipongo* on June 29, 2001, many weeks after it was due. Why did WLF wait until June 29? It candidly conceded that it delayed its filing so it could discuss the U.S. Supreme Court's ruling in *Palazzolo*, handed down on June 28. As a result of its strategic delay, WLF could have gained a clear advantage over amici supporting the Commonwealth. In response to oppositions filed by CRC and others, the Pennsylvania Supreme Court didn't let WLF get away with this chicanery and bounced its brief, a small but satisfying victory for those of us who play by the rules.

EYE ON WASHINGTON

On August 2, President Bush nominated Lawrence J. Block to be a judge on the U.S. Court of Federal Claims (CFC) for a term of 15 years. The CFC is critical for takings litigators because it has exclusive jurisdiction over all monetary claims against the United States for more than $10,000. It has produced some of the most troubling rulings in takings jurisprudence, including *Florida Rock, Inc. v. United States*, 45 Fed. Cl. 21 (1999). Mr. Block's nomination is deeply disturbing. Since 1994, he has worked on the Senate Judiciary Committee to promote extreme federal takings legislation, including the radical Contract-with-America compensation bills that effectively would have gutted vital protections. It is hard to imagine a nominee more likely to become an anti-environmental judicial activist. There's no word yet on when the Judiciary Committee will hold hearings on the nomination.

ON THE HORIZON — The Meaning of the "GVR" in *McQueen*

With all the hoopla over *Palazzolo* and the grant of certiorari in the *Tahoe* moratorium case, (see the June and July issues of *Takings Watch*) it's important not to overlook one other recent action by the U.S. Supreme Court. On June 29, 2001, it "GVR-ed" (Granted Cert., Vacated, and Remanded) *McQueen v. South Carolina Dept. of Health and Envt'l Control*, 530 S.E.2d 628 (S.C. 2000). The Court sent *McQueen* back to the Supreme Court of South Carolina "for further consideration in light of *Palazzolo*," issued the day before the GVR. 121 S. Ct. 2581 (2001).

McQueen involves unusual facts. In the early 1960s, Sam McQueen paid $4200 for two lots in Myrtle Beach created by fill next to manmade, saltwater canals. Over the next 30 years, neighboring lots were improved with bulkheads and homes, but McQueen's lots eroded and reverted to wetlands. In 1991, McQueen applied for permits to build bulkheads and fill his lots to prevent further erosion. The state denied the permits because the property is located in a critical tidal wetlands area. McQueen challenged the permit denials as a per se taking under *Lucas*. The state supreme court observed that it was "uncontested" that McQueen lost all economically viable use, but ruled that there was no taking because he did not have a reasonable expectation to develop the land in 1991 after failing to protect his lots from erosion for 30 years. In so ruling, the court relied heavily on *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), for the proposition that the lack of reasonable expectations may defeat a *Lucas* claim.

McQueen raises several interesting legal issues, including the role of expectations under *Lucas* and the continued viability of *Good* in light of *Palm Beach Isles, Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir.), *modified*, 231 F.3d 1354 (Fed. Cir. 2000), which creates an intra-circuit split with *Good* by holding that expectations are irrelevant to a *Lucas* claim.

The first order of business on remand, however, will be how to interpret the GVR order. Does it mean that the U.S. Supreme Court expects a new outcome in light of *Palazzolo*? Absolutely not. Lower courts have consistently ruled that GVR orders do "not create an implication that the lower court should change its prior determination." *Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1473 (Fed. Cir. 1998); *accord, United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992); *United States v. National Soc'y of Prof'l Eng'rs*, 555 F.2d 978, 982 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978). In one study of 90 GVR-ed cases in which there was at least a surface inconsistency between the vacated judgment and an intervening decision, the lower court adhered to its original ruling in more than 60 cases. Hellman, *Granted, Vacated, and Remanded* — 67 Judicature 389, 394-395 (1984).

Thus, the GVR order does not require the South Carolina Supreme Court to alter its holding. Nor does it preclude a ruling for the state on other grounds, such as whether the public trust doctrine entitles the state to restrict development on the land without incurring takings liability. Keep an eye on *McQueen* for an early indication of how lower courts will be applying *Palazzolo*.