



FEATURE CASE

High Court to Decide If Takings Claimants Can Get “Second Bite” in Federal Court *San Remo Hotel v. San Francisco* (U.S. No. 04-340)

On December 10, the U.S. Supreme Court turned an already significant takings term into a potential blockbuster by agreeing to hear *San Remo Hotel v. San Francisco*. The case raises the issue of whether takings claimants are entitled to a second bite at the apple in federal court on the same factual and legal issues they lost on in state court.

Now in its 11th year of litigation, *San Remo* is a takings challenge to a San Francisco ordinance designed to alleviate the city's severe affordable housing shortage by restricting the conversion of “residential hotels” to tourist use. Hotel operators converting rooms to tourist use are required to pay a mitigation fee to the city to help fund replacement units. *San Remo* first filed in federal court, but then asked the court to abstain from the case and voluntarily proceeded to state court. When it litigated its state law takings claim in state court, it expressly “reserved” its federal takings claim for future litigation. The state court case ended in 2001 when the California Supreme Court upheld the ordinance and broadly affirmed the right of governments to impose legislative impact fees.

San Remo then refiled in federal court to pursue a federal takings claim. The federal district court rejected the federal claim on grounds of issue preclusion. On appeal, the Ninth Circuit held that while a litigant may use a reservation to protect against claim preclusion, issue preclusion remains a bar to relitigating in federal court the specific issues already decided in state court. Because the California state courts already decided the factual and legal issues that governed *San Remo*'s federal takings claim, issue preclusion barred relitigation. The court's decision was a strong rebuttal to the notion that taking claimants deserve a second bite at the apple in federal court.

Under the Full Faith and Credit Act, one of the oldest provisions in the federal code, federal courts are required to give the same preclusive effect to a state court judgment as another state would give. As the Court held in *Allen v. McCurry*, 449 U.S. 90 (1980), federal claimants do not possess an unencumbered right to litigate their claims in federal court. If the Supreme Court follows past precedent, issue preclusion should prevent *San Remo* from challenging the state judgment in federal court.

The *San Remo* case harkens back to the federal legislation pushed by the developers' lobby that attempted to repeal the *Williamson County* requirement that claimants challenging state or local action first seek relief in state court before bringing a takings claim in federal court. Although these developer-supported bills failed to win passage in two successive Congresses in the wake of strong opposition from state and local governments, the developers' lobby is pushing cases like *San Remo* to advance a similar agenda in the courts.

ON THE HORIZON

Update on *Kelo v. City of New London* (U.S. No. 04-108)

On December 3, the Petitioners in *Kelo* filed their opening brief on the merits, arguing that New London's condemnation of land for an economic redevelopment project is not a “public use” and thus violates the Just Compensation Clause of the Fifth Amendment. The Petitioners ask the Supreme Court to rule that economic development alone is never a public use, or alternatively that governments condemning land for economic development must show to a “reasonable certainty” that the land will be used for development and the project will succeed.

The Petitioners are supported by more than twenty amicus briefs, a testament to the sympathetic facts of their case. CRC is weighing in on the side of New London, though, because of the importance of eminent domain for communities' ability to create jobs for their citizens and much-needed revenue for police departments, school districts, and other local services. CRC is preparing an amicus brief for a broad coalition of state and local officials.

New London's opening brief on the merits is due January 21, 2005. Oral argument is scheduled for February 22, the same day as the argument in another takings case, *Lingle v. Chevron*.

QUOTE OF THE MONTH

The [Fifth Amendment's] “public use” requirement is thus coterminous with the scope of a sovereign's police powers.

Hawaii Housing Authority v. Midkiff,
(467 U.S. 229 1984)

OUTRAGE OF THE MONTH

Ethics Panel Weakens Rule on Junkets

For the last six years, members of Congress, ethics experts, former judges, and non-profits such as Community Rights Council have worked to stop corporations and other interested parties from lobbying the federal judiciary through expense-paid trips to resort locations. Several prominent Senators, including Senator Patrick Leahy, the Ranking Member of the Senate Judiciary Committee, have introduced legislation that would ban certain gifts associated with education seminars while providing a fund that judges can use to pay their own way to needed educational opportunities. Senator Leahy was poised in May 2003 to add this legislation to a judicial pay raise bill, but he pulled the amendment based on assurances from judges that they would propose “self-regulation” on the topic.

In August, the judiciary’s Committee on Codes of Conduct indeed proposed “self-regulation,” but instead of tightening the guidelines for attending trips to luxury resorts, the Committee made the guidelines *weaker*, effectively blessing judicial participation in even the most problematic corporate-sponsored trips. The Committee also failed to inform Senator Leahy of its handiwork, so the Senator was first alerted to the change by a Dec. 16th letter that CRC sent to the Committee.

This was obviously not what Senator Leahy had in mind when he pulled his amendment, and the Senator immediately pledged to reintroduce his legislation. Senator Russ Feingold (D-WI), another strong proponent of ethics reform, also commented that the new guidelines “go in the wrong direction.” CRC’s letter to the Committee and the news stories chronicling these developments can be found at www.communityrights.org/Newsroom/newsroommain.asp.

EYE ON WASHINGTON

Claims Court Rejects Wetlands Taking Claims *Norman v. United States, No. 95-667L (Fed. Cl. Dec. 10, 2004)*

In an unusually detailed, 94-page opinion, the U.S. Court of Federal Claims this month rejected a developer’s multi-million dollar claim that wetlands protections affecting 220 acres of a 2,280-acre ranch in Reno, Nevada, constituted a taking.

During the 1980s and 90s, the Normans assembled a 2,280-acre tract of property. The U.S. Army Corps of Engineers determined that 230 acres of the property were wetlands. In 1999, the Normans sought and received a Section 404 permit to construct a multi-purpose residential, commercial, and industrial development on the property. The permit allowed the Normans to fill some 61 acres of wetlands in exchange for restoring roughly 220 wetland acres. The Normans filed a takings suit over these restrictions, asking for \$34.2 million in compensation.

The Normans argued that the restrictions constituted a physical taking of property under *Loretto*, an impermissible exaction under *Nollan*, a categorical regulatory taking under *Lucas*, and a regulatory taking under the multi-factor test of *Penn Central*. The Court rejected the physical taking claim, noting that although the Corps placed a permanent condition on the plaintiffs’ land

by requiring protection of the wetlands, “the government did not occupy or take physical possession of the lands.” Nor is the condition unconstitutional under *Nollan* because requiring the creation of new wetlands in exchange for the right to fill other wetlands “epitomizes the connection that was lacking in *Nollan*.”

REDEFINING FEDERALISM

Last month, *Community Rights Report* announced the publication of CRC’s new book, *Redefining Federalism: Listening to the States in Shaping “Our Federalism.”* Now, CRC has launched a new website, www.redefiningfederalism.org. Visitors to the site can buy a copy of *Redefining Federalism*; read excerpts from the book; read the briefs filed by state attorneys general in recent major federalism cases; and link to other organizations that encourage state and local governments to enact significant health and environmental protections, and make the idea of federalism’s laboratories of democracy come to life.

The court’s extensive discussion of precedent is also notable for its treatment of the parcel-as-a whole issue. The court declined the Normans’ invitation to consider only the 220 wetland acres as the relevant parcel after determining that “the 2280 acre Development was to be developed as part of an overall single scheme.” The court then rejected both the Normans’ categorical and *Penn Central* claims, finding that the 220 acres retained value as open space and as part of the development project’s flood control and flood detention facilities.

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