February 2002

Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE:

Does the *Agins* "Substantially Advance" Test Still Exist?

In a startling concurrence in the 1998 case of *Eastern Enterprises v. Apfel*, Justice Kennedy explained that the Takings Clause was "the wrong legal lens" to view disputes about the extent to which regulatory means advance government ends. Four other Justices in dissent concurred. Thus, a majority of the U.S. Supreme Court seemed ready and willing to abandon the Court's cryptic assertion in *Agins v. City of Tiburon* (U.S. 1980) that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * *."

The Supreme Court of New Jersey recently acted on the U.S. Supreme Court's invitation to revisit the *Agins* test in *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001). The ordinance at issue in *Pheasant Bridge* increases the minimum lot size for residential development. The purpose of the ordinance is to protect wetlands, steep slopes, and other ecologically sensitive land. The trial court ruled that the ordinance, as applied to Pheasant Bridge's land, does not advance a legitimate government interest because the land does not implicate the environmental concerns underlying the ordinance. The state Supreme Court deferred to that ruling and invalidated the ordinance as applied.

QUOTE OF THE MONTH

"If I am correct in suggesting that the current Court intends to play a restrained role in the property area, how is Justice Scalia's aggressive opinion in *Lucas* to be understood? The case is not as far reaching as its rhetoric suggests. It does not protect all who suffer a complete loss in their property's value, for the categorical 100 percent diminution rule itself is sharply limited. Regulation that would be sustained under established common law "principles" of nuisance and property law is not affected. Presumably, states will have substantial latitude in determining the extent to which their existing legal principles limit property rights. "

Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433, 1437 (1993)

The landowner then requested compensation for a temporary taking during the time the ordinance was in effect. The New Jersey Supreme Court rejected the request, quoting the assertion in *First English* that the Takings Clause is designed "to secure compensation in the event of otherwise proper interference [with property rights] amounting to a taking." The Court further noted that in *Eastern Enterprises,* a majority of U.S. Supreme Court Justices disavowed the *Agins* means-end inquiry as a standard of takings liability. The *Pheasant Bridge* court saw no meaningful difference between the delay required to seek a variance and the delay occasioned by having a court declare an ordinance invalid as applied. Moreover, the Court observed that "[t]he overwhelming weight of authority * * * requires that a plaintiff demonstrate deprivation of all or substantially all economically beneficial uses of property to sustain a claim for a temporary taking." Because the claimant retained economically viable use of the land while the ordinance was in effect, its takings claim failed.

The landowner has requested review by the U.S. Supreme Court. If the ruling stands, it will serve as very helpful precedent that limits the application of the *Agins* "substantially advance" test.

EYE ON WASHINGTON:

Tahoe Oral Argument Transcript

A transcript of the Jan. 7 U.S. Supreme Court oral argument in the Tahoe moratorium case is available on CRC's web site at http://www.communityrights.org. This transcript identifies the name of the Justice asking each question, which makes it a more interesting and illuminating read than the transcript provided by most other sources.

OUTRAGE OF THE MONTH:
A Takings Claim for the Birds

The so-called property rights movement is famous for using the proverbial "widow in a wheelchair" to put a sympathetic face on their efforts to roll back health, safety, and environmental protections. Well, it may be that the community rights side has found a poster child of its own: his name is Tony Silva. Mr. Silva is a convicted criminal seeking compensation under the Takings Clause for the value of his ill-gotten booty in *Silva v. United States*, 2002 WL 62982 (Fed. Cl. Jan. 11, 2002).

Tony Silva's brazenness was extraordinary even before he filed his takings claim. According to the U.S. Department of Justice, Silva is one of the world's most ruthless wildlife smugglers, conspiring with his mother and others to run a nine-year, multimillion-dollar ring in which rare hyacinth macaws and other exotic birds were captured from the Brazilian rainforest and sold in the U.S. for as much as $10,000 apiece. The birds were transported in the false bottoms of suitcases and in other inhumane ways. All the while, Silva established himself as an internationally renowned author and advisor to bird owners, regularly denouncing wildlife smuggling in his writings.

Illegal wildlife trade like Silva's is a $5-billion-a-year business, the second most profitable black market in the world (behind drugs and ahead of arms smuggling). In 1996, Silva pleaded guilty to conspiracy and tax evasion. The trial court sentenced him to 82 months in prison.

During its investigation, the United States executed a search warrant and collected 103 of Silva's parrots. According to the trial court, Silva then abandoned the birds, and they were distributed to various persons and institutions for research. Silva filed a habeas corpus petition requesting return of the parrots, but the trial court denied relief.

Silva then filed a takings claim seeking compensation for the value of the 103 parrots and their potential progeny. On Jan. 11, 2002, the U.S. Court of Federal Claims ruled that it did not have jurisdiction under the Tucker Act to hear the claim because it was, in essence, a request that the court "intervene in the district court's enforcement of the criminal law in the guise of a takings claim." The court concluded that "it is unreasonable to hold that, in enacting the Tucker Act, the Congress intended [the Court of Federal Claims] to intervene in the conduct of criminal trials * * *."

If accepted, Silva's radical takings theory could generate claims by drug dealers, arms smugglers, and others who regularly deal in contraband. Because Silva is representing himself pro se, it would not be surprising to see an appeal before this claim finally flies away.

ON THE HORIZON:
Disturbing Airport Zoning Case

Do taxpayers have to pay to acquire every sliver of airspace that might be invaded by a plane deviating from its normal flight path? That is the issue in *County of Clark v. Tien Fu Hsu*, Case No. 38853, recently scheduled for review in the Supreme Court of Nevada. The district court awarded the landowners more than $22 million for a taking of air rights over 38 acres of land adjacent to McCarran International Airport in Las Vegas, concluding that county zoning designed to protect public safety works a per se physical-invasion taking.

The challenged rules impose mere height restrictions. They do not compel or authorize any invasion of the air space above the claimants' land. Rather, they restrict the height of structures on land adjacent to the normal flight path to provide a margin of safety in the event of an unplanned deviation from the flight path. The district court found a per se, physical-invasion taking even though there is no evidence that any plane ever will invade the claimants' airspace, much less that any overflights would be so low and so frequent as to rise to the level of a taking under the leading overflight precedents, *Causby* and *Griggs*.

It is undisputed that the challenged rules do not interfere with the existing, profitable use of the land as a trailer park. The landowners filed the suit because they wanted to sell the land to a developer to build a 40-story casino, a use that was prohibited by other height restrictions imposed before the claimants acquired the property.

Other landowners in the area have filed similar claims for compensation exceeding $500 million. Community Rights Counsel is preparing an amicus brief for the American Planning Association and others in support of the County.