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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Eighth Circuit Rejects Challenge to *Williamson County*

Kottschade v. City of Rochester, No. 02-1504MN (8th Cir. Feb. 13, 2003)

The Eighth Circuit rejected a challenge to established ripeness rules this month, applying *Williamson County*'s requirement that a landowner seek compensation in state court before filing a federal takings claim in federal court. Developer Franklin Kottschade sued the city of Rochester, Minnesota, in federal court, alleging that the city's development conditions took his property without compensation. A federal district judge dismissed the case under *Williamson County*, but despite this clear precedent, Kottschade appealed.

Kottschade argued on appeal that *City of Chicago v. International College of Surgeons* (U.S. 1997) modified *Williamson County*, even though that case does not even cite *Williamson County*. In affirming the district court's dismissal of the case, the Eighth Circuit held that *College of Surgeons* addresses "only the question of federal-question jurisdiction over a ripe takings claim" and did not "explicitly answer the question of what is necessary to render a takings claim ripe."

Kottschade's case has become a cause celebre in the homebuilding industry, which has tried for years to undermine the holding of *Williamson County*. The National Association of Home Builders, which is representing Kottschade, has vowed to take his case "all the way to the Supreme Court if necessary." Indeed, NAHB's litigation role comes on the heels of its failed efforts to lobby for a federal bill that purported to give landowners a direct path to the federal courts, effectively overturning *Williamson County*'s ripeness requirements. The *Kottschade* opinion is available at http://www.ca8.uscourts.gov.

EYE ON WASHINGTON

The Campaign to Eliminate Legislative Impact Fees

The U.S. Supreme Court is currently considering requests by property rights groups, amply supported by developer *amici*, to review two state court cases holding that *Dolan*'s rough proportionality test does not apply to legislatively imposed impact fees. The cases will be considered at the court's February 28th conference. If embraced by the court, the petitioners' contentions could severely limit, if not scuttle altogether, legislatively imposed impact fees across the country.

In *Rogers Machinery Co. v. City of Tigard*, 45 P.3d 966 (Or. Ct. App. 2002), the court refused to apply *Dolan* to a traffic impact fee imposed as a condition to a permit to build a new corporate headquarters. The court observed that "with near uniformity," other courts have declined to apply *Dolan* to legislatively imposed fees. *Id.* at 977. In *Agencia La Esperanza Corp. v. Orange County Bd. of Supervisors*, 2002 WL 681798 (Cal. Ct. App. 2002), the court declined to apply *Dolan* to a traffic impact fee imposed on all applicants for nonresidential building permits based on the square footage of the project. The court rejected arguments that the fee was unfair because the claimant's proposed self-storage facility would have less severe traffic impacts than other nonresidential facilities.

These rulings flow directly from *Dolan*, which expressly relied on the adjudicative nature of the permit condition at issue to justify imposition of its rough proportionality standard on government officials. Moreover, cases involving impact fees (as opposed to dedication requirements) make exceptionally poor vehicles for further illumination of takings jurisprudence. In *Eastern Enterprises,* five Justices (Kennedy, Breyer, Stevens, Souter and Ginsburg) concluded that the Takings Clause does not apply to a government-imposed monetary liability that does not affect an identified property interest.

The petitioners, represented respectively by Oregonians in Action Legal Center and Pacific Legal Foundation, argue that permit applicants should be able to use *Dolan*'s rough proportionality test to attack reasonable legislative judgments about the impact of new development. Under their theory, a developer could challenge a school-impact fee by showing that a small portion of its subdivision sales went to seniors or others without children in the home. In essence, they contend that permitting officials must adjust impact fees on an individual basis. If subject to second-guessing on a permit-by-permit basis, the entire notion of legislatively imposed fees could fall by the wayside, thereby significantly increasing the cost of reviewing plans for approval.

The U.S. Supreme Court has repeatedly declined to grant review on precisely this issue. Let's hope the Court continues to see this ruse for what it is.

OUTRAGE OF THE MONTH

Dream or Nightmare: You Make the Call

On February 23, property rights activists gathered in our nation's capital to attend a three-day conference on "Preserving the American Dream." Keith Schneider, a regular contributor to *The New York Times* and Deputy Director of the Michigan Land Use Institute, rightly denounces the conference as designed to promote the "right to build anything, anywhere."

According to Schneider, the proposed American dream is based "on cars, cheap fuel, and suburban sprawl" and will be advanced by "opposing public transit, ending zoning, paving over farmland, and taking other measures to ensure that sprawl survives." Agenda topics include "Selling the Idea of Autos and Highways" (newsflash: they're already pretty popular). Among those encouraged to attend are "opponents of traffic calming measures," presumably because their right to careen around our neighborhoods has been deeply eroded by speed bumps.

Conference cosponsors included unbiased, middle-of-the-road groups like the Tennessee Road Builders Association and the omni-present homebuilders. To read Keith Schneider's excellent critique, go to http://www.mlui.org/growthmanagement/fullarticle.asp?fileid=16423

UPDATES

Police Searches as Takings

In our August 2002 issue, we discussed a takings suit against the City of Philadelphia based on an unsuccessful police search for drugs at a store in a high crime neighborhood. A jury had found both a compensable taking and a 4th Amendment violation, and the trial court refused to grant the city judgment as a matter of law. On January 29, 2003, the U.S. Court of Appeals for the Third Circuit ruled for the City on both claims. (*Jones v. Philadelphia*, 2003 WL 193695). Congrats to Jane Istvan and her colleagues in Philadelphia for securing this important reversal.

Oral Argument in Nevada Airport Case

In last month's *TW*, we reported that the Nevada Supreme Court had scheduled oral argument in *County of Clark v. Tien Fu Hsu* -- a $22 million takings challenge to height restrictions around McCarran International Airport -- for February 10. The Court has now postponed argument. We'll keep you posted.

ON THE HORIZON

Six States Request Limits on Recent Federalism Jurisprudence

If anyone unequivocally supported the Supreme Court's recent "federalism" jurisprudence, you'd think it'd be the states. After all, the Supreme Court inevitably invokes the "dignity interest" of the states as justification for its rulings limiting federal constitutional authority.

That is what makes the brief filed by the State of New York and five other states in *Nevada Department of Human Resources v. Hibbs*, No. 01-1368, so interesting. These states argue that it is critical that state agencies be held liable under the Family and Medical Leave Act in order to advance important objectives served by federal law.

FMLA was passed by Congress in 1993. Under the law's "family medical care provision," all workers, regardless of gender, are entitled to twelve weeks per year of unpaid leave for a family emergency. Williams Hibbs, a Nevada state social worker, has sued Nevada for being denied the full twelve weeks to care for his ill wife, and then fired.

This case is significant because it brings to the fore the effort by some Justices to scale back the power of the federal government when the Justices view those powers as unduly intruding upon state and local authority. The central question raised at the Jan. 15 oral argument in *Hibbs* was whether Congress acted within its constitutional power when it authorized state employees to sue a state for damages when the state violates FMLA. What remains to be seen is whether the court will shift from its recent rulings holding that Congress does not have the power to protect state employees against age or disability discrimination.

QUOTE OF THE MONTH

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization.

Dolan v. City of Tigard, 512 U.S. 374, 396 (1994).