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FEATURE CASE

No Takings Liability for Temporary Logging Restrictions

Late last year, the whole parcel rule resulted in victory for the State of Oregon in a regulatory takings challenge to endangered species protections, providing yet another example of how important parcel definition is to takings analysis.

In *Seiber v. State of Oregon*, 210 Ore. App. 215 (Dec. 27, 2006), the Oregon Court of Appeals held that the whole parcel rule compelled rejection of a takings challenge to a seven-year restriction on the claimants' ability to harvest timber from 40 acres of land situated within the claimants' 200 acre parcel.

Seiber arose out of state law protections for spotted owls. In 1986, the claimants acquire 200 acres of commercial timberland near Sweet Home, Oregon. In 1993, state officials identified a spotted owl nesting site on an adjacent parcel, and in 1994 the claimants were barred from harvesting timber on 40 acres of their property. They filed a takings suit challenging the restrictions. In August 2001, while the claimants' lawsuit was pending, the nesting site was deemed abandoned, the restrictions lifted, and the claim amended to allege a temporary taking for the seven years the restrictions were in effect.

The jury returned a verdict for the claimants for nearly $360,000 in takings compensation and attorney fees. But in a 2005 case called *Coast Range Conifers v. Board of Forestry*, the Oregon Supreme Court clarified that in analyzing a takings claim under state constitutional law, a court must consider the impact of the challenged government action on the claimant's entire parcel. Based on *Coast Range*, the appeals court in *Seiber* ruled that the trial court should have granted the state's motions for directed verdicts.

The appeals court first held that the ultimate issue of liability under *Penn Central* is a question of law, and that therefore the jury special verdict findings, while relevant to the historical facts, were not dispositive of legal liability. In particular, the manner in which the jurors weighed the *Penn Central* factors did not prevent the court from ruling differently as a matter of law.

The court further observed that the temporary restrictions applied to only one "stick" in the bundle of rights that constitute property (the ability to log), and that the claimants remained free to log other portions of the 200-acre parcel and to sell future contingent logging interests in the regulated area. Moreover, the character of the government action did not weigh heavily in favor of the claimants because the restrictions were necessary to ensure sound management of wildlife and scenic resources. Finally, with respect to economic impact, the appeals court concluded that the takings claim in *Seiber* was "even less compelling" than the claim rejected in *Coast Range*, which involved a permanent ban on logging 22.5 percent of the parcel at issue.

Seiber shows how the whole parcel rule plays a vital role in takings jurisprudence by properly limiting liability to land use restrictions that constitute the "functional equivalent" of an actual appropriation of property (see also the *Lingle* and *Tahoe* rulings by the U.S. Supreme Court). Where a claimant's theory of liability focuses exclusively on a small portion of the parcel affected by the challenged regulation, without regard to how the balance of the parcel may be used, the claim shouldn't even make it to the jury.

ON THE HORIZON

"The $1 Million Right to Sell Liquor:"
City of San Antonio v. El Dorado Amusement Co. (Tex. S. Ct., pending)

More than a century ago, in *Mugler v. Kansas*, the U.S. Supreme Court rejected a takings challenge to a state law banning the sale of intoxicating liquors. So it seems strange that a Texas district court would award almost $1 million in a takings challenge to rezoning by San Antonio that eliminated a nightclub's ability to sell alcoholic beverages, especially since the rezoning followed a long history of criminal activity at the site and numerous city code violations. The Texas appeals court reduced the award but affirmed the takings ruling.

Thankfully, the state supreme court responded favorably to the city's petition for review, asking the parties to submit merits briefs. CRC is preparing an amicus filing. We'll keep you apprised of developments.

OUTRAGES OF THE MONTH

Here We Go Again: New Regulatory "Takings" Measures in the States

Like horror movie zombies that just won't stay dead, regulatory "takings" measures are lumbering back to life after resounding defeats in 2006.

In the 2006 election, property rights groups used the widespread unpopularity of the Supreme Court's recent ruling in *Kelo v. New London* as the basis of a bait-and-switch tactic to get regulatory takings initiatives on the ballot in four states, California, Idaho, Washington, and Arizona. These initiatives would have limited the uses of eminent domain, but would also have allowed landowners to seek compensation when zoning codes or environmental regulations diminished the value of their property.

Fortunately, voters saw through the anti-*Kelo* veneer and rejected the ballot initiatives in California, Idaho, and Washington. The Arizona measure, which passed, was uniquely ambiguous and so poorly written that it might not have the far-ranging effects its sponsors sought.

But the activists are at it again. On January 22, the California Secretary of State cleared a new property rights initiative for circulation. Like last year's Proposition 90, the proposed "California Property Owners Protection Act" limits the use of eminent domain and requires compensation for economic "damage" to private property. There is an exception for health and safety and agriculture preservation laws, but fundamentally the measure, in the words of the ballot summary, "Requires government to compensate private property owners for certain land use, housing, consumer, environmental and workplace regulations." In fact, the new measure goes further than Prop. 90 did, in that it expressly bans rent control and would apply to laws passed decades ago.

And – something only land use law junkies can appreciate – the measure would resuscitate the *Agins* test, requiring that a land use law "advance a legitimate government interest" in order for a government to avoid a takings claim. The Supreme Court repudiated the *Agins* test in 2005 in *Lingle v. Chevron*.

South Carolina doesn't have an initiative process, but a special legislative study committee is mulling over a similar taxpayer trap measure. Last year, the state legislature considered putting a constitutional amendment before the voters, which would have required compensation for any new land use laws that reduced the value of the property after the owner had purchased it. That effort, happily, never came to fruition. But, as in California, the bad idea of paying people not to harm the environment or their neighbors by flouting land use laws just won't go away. The special committee will report its findings on March 15.

EYE ON WASHINGTON

Moving Past Myers

Speaking of zombies, nearly two years ago (see Outrage, February 2005), we noted that Ninth Circuit Court of Appeals nominee William Myers, a grazing and mining lobbyist and former Solicitor at the Department of the Interior, "was like a bad movie villain who keeps popping up to fight another day." We are happy to report that, with President Bush's decision this month not to renominate him, Mr. Myers' day is finally done.

In two reports on Myers' record (available at www.communityrights.org), CRC documented his antipathy for environmental safeguards. Myers has a long history of making legally erroneous and intemperate remarks. He asserted that property rights have the same constitutional status as freedom of speech, compared federal land management to the tyrannical rule of King George over the American colonies, and accused environmentalists of being "bent on stopping human activity wherever it might promote health, safety and welfare."

Even more disturbingly, Myers' record at the Interior Department displayed a predisposition to ignore the requirements of the law to advance his own agenda. Myers' disturbing record and lackluster qualifications generated bipartisan Senate opposition. This broad opposition would have almost certainly prevented Myers from ever being confirmed to the Ninth Circuit. But we are delighted that President Bush has canned Myers and replaced him with Norman Randy Smith, an Idaho State Court judge who appears far better qualified for the position.