July 2001

Takings Watch

CRC's Monthly Update on Regulatory Takings

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QUOTE OF THE MONTH

As a crass unrepentant capitalist real estate Republican type, I am certainly all for property rights. But who is talking about property responsibilities? This surreal concept that the right to own real estate somehow exempts one from having to balance rights with responsibilities, this Larry Flint attitude of "I can do what the hell I please and the rest of you be damned" is not only alien to 300 years of American political history, antithetical to how the west was developed, and the most blatant renunciation of fiscal responsibility today, but it is the ultimate gimmick to pass on bankrupt cities to our kids 20 years from now. * * * The so-called "property rights" movement is the singularly most misguided, historically inaccurate, fiscally irresponsible political movement of the last half century.

Donovan D. Rypkema, Economic Development Consultant, in a June 13, 2001 Speech on "Property Rights and Public Values" at the National Building Museum, Washington, D.C.

FEATURE CASE / ON THE HORIZON

U.S. Supreme Court to Hear Tahoe Moratorium Case

On June 29, 2001, the U.S. Supreme Court agreed to hear a very important case -- *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000), *cert. granted* 121 S. Ct. 2589 -- which raises the issue of whether a reasonable development moratorium constitutes a taking.

The case involves two moratoria imposed to protect Lake Tahoe, an exceptionally clear alpine lake in the Sierra Nevada Mountains. Lake Tahoe is a national treasure. Mark Twain once described it as "the fairest picture the whole earth affords." Unfortunately, the Lake is becoming a victim of its own beauty because rampant development in the Tahoe Basin is adding nutrients to the lake, which spurs the growth of algae. Lake Tahoe is losing a foot of clarity every year, and unless development is controlled, the Lake will become opaque and green forever.

In 1981, the Tahoe Regional Planning Agency imposed two successive development moratoria for a total of thirty-two months while it prepared a regional development plan. Some 450 landowners have brought a facial takings challenge to these moratoria. The trial court found that the moratoria did not interfere with the landowners' expectations because the average holding period between lot purchase and home construction in the Basin is 25 years. The court also found that the moratoria were reasonable in scope and duration. As a result of these and other findings, the trial court held that no taking occurred under *Penn Central*'s multifactor analysis. Nonetheless, the trial court concluded that a per se taking occurred under *Lucas* because the moratoria temporarily deprived the landowners of all economically viable use of their land.

On appeal, the Ninth Circuit reversed, holding that the moratoria do not constitute a per se taking under *Lucas*. The appeals court ruled that it must consider the landowners' entire bundle of property interests, including future uses available after the moratoria ended. In other words, the landowners could not engage in "temporal severance" by focusing exclusively on whether they could use the land during the moratoria. In rejecting the per se claim, the appeals court also relied heavily on *Agins v. City of Tiburon*, which held that "mere fluctuations in value during the process of government decisionmaking, absent extraordinary delay . . . cannot be considered as a 'taking' in the constitutional sense."

One key legal issue before the Supreme Court will be the meaning of the Court's 1987 ruling in *First English*, which holds that compensation must be paid for a temporary taking. The landowners argue that when read in conjunction with *Lucas*, *First English* requires compensation for virtually any development moratorium. The Agency argues that *First English* is far more limited in scope, holding only that a taking must be compensated where the government renders the taking temporary through government rescission of the offending regulation. The Agency supports its position with citations to numerous lower court rulings that reject takings challenges to reasonable moratoria.

The landowners have retained new counsel, Michael Berger, who argued *First English* (and other takings cases) before the Supreme Court. In their petition for certiorari, the landowners argue that the Agency effectively imposed a "twenty-year rolling moratorium" because their land remained restricted under the regional plans after the moratoria were lifted. Although the restrictions imposed by the regional plans are not part of the case before the Supreme Court, the landowners can be expected to continue to characterize the restrictions as, for all intents and purposes, permanent.

A photo of Lake Tahoe appears on page 2 of this newsletter. More information on the *Tahoe* case and CRC's Ninth Circuit Brief on behalf of IMLA are available at www.communityrights.org.

OUTRAGE OF THE MONTH

"The notice rule is dead, except in what remains of [Justice] Stevens' mind. * Stevens doesn't know what he thinks about this or anything else."**

Pacific Legal Foundation (PLF), counsel to Anthony Palazzolo, reacting to the ruling in *Palazzolo v. Rhode Island* in a listserve discussion hosted by the American Bar Association (June 29, 2001)

We're all in favor of robust debate, and we don't shy away from strong criticism of bad Supreme Court opinions, but this kind of gratuitous, personal insult of a Supreme Court Justice by PLF is beyond the pale. We don't recall the plaintiffs' bar hurling insults at Justice Stevens when he provided the critical fifth vote in favor of the landowner just two years ago in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* While we think Justice Ginsburg authored the stronger dissenting opinion in *Palazzolo*, Justice Stevens's opinion contains valuable insights that warrant a careful reading. PLF's boorish remarks easily qualify as our Outrage of the Month.

Picture of Lake Tahoe, our Feature Case on Page 1

EYE ON WASHINGTON

CRC and Others Urge Senators to Scrutinize Judicial Nominees on Takings and Other Activist Doctrines

On July 18, 2001, Community Rights Counsel and others released a report entitled "*Hostile Environment: How Activist Federal Judges Threaten Our Air, Water, and Land*." The report documents how a group of ideological judges are threatening core environmental protections through activist rulings.

These judges have used aggressive readings of the Takings Clause and other discredited legal theories to strike down a wide range of environmental protections. One judge effectively found a "constitutional right" under the Takings Clause to use motorboats in a wilderness area. Another blocked efforts to clean up toxic waste contamination because it concluded that the Superfund site was a local real estate matter not subject to federal control. A federal appeals court dusted off the "non-delegation" doctrine to strike down air pollution health standards designed to prevent 15,000 premature deaths annually.

On the day the "*Hostile Environment*" report was released, CRC and a dozen other groups sent letters to every U.S. Senator asking for close scrutiny of judicial nominees to ensure that they will properly respect the policy choices made by our elected representatives to protect the environment.

For briefs, cases, and updates to the *Takings Litigation Handbook*, sign on to CRC's *Filing Cabinet* at www.communityrights.org/FCregister.html.

The report is available at www.communityrights.org, and hard copies are available by e-mailing leah@communityrights.org.