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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Expectations in Heavily Regulated Industries

In *Folden v. United States*, 56 Fed. Cl. 43 (2003), the U.S. Court of Federal Claims rejected a takings challenge to the Federal Communications Commission's denial of applications for cellular licenses. The claimants asserted that the FCC abrogated an express or implied contract by not holding a license lottery, and thereby took their property interests in the contract. The court rejected the claim in part because the claimants "failed to demonstrate that they could have had distinct investment-backed expectations of static, FCC application procedures * * *." The court stressed that the claimants operate in a heavily regulated field and thus can have no reasonable "expectations that include reliance upon a legislative and regulatory status quo."

The case serves as a useful reminder that *Penn Central*'s expectations analysis has unique, government-friendly application where a takings claimant is in a market sector subject to heavy regulation. The Supreme Court recognized this notion in *Ruckelshaus v. Monsanto* (U.S. 1984), where it rejected a takings challenge to the U.S. EPA's use of pesticide-related trade secrets, stating that the claimant had no reasonable expectation that its trade secrets would remain inviolate given that the pesticide industry "long has been the focus of great public concern and significant government regulation."

With respect to land use restrictions, the heavily-regulated-industry defense has been used more sparingly but with some success. For instance, in *Good v. United States* (Fed. Cl. 1997), the court rejected a takings challenge to a wetlands permit denial, expressly comparing land development in Florida to the highly regulated businesses at issue in *Monsanto* due to the pervasive network of federal and state land-use regulation. The Federal Circuit affirmed, observing that the claimant should have been aware that permitting standards might become more exacting. Given the extensive state of land-use regulation in most parts of the country we encourage government attorneys to invoke the defense wherever appropriate.

OUTRAGE OF THE MONTH

Property Rights Extremist Nominated to the D.C. Circuit

Our April 2002 Outrage was devoted to the latest in a series of wacky expositions on takings law written by California Supreme Court Justice Janice Rogers Brown. Justice Brown's dissent in *San Remo v. San Francisco* (2002) began with the assertion that "Private property * * * is now entirely extinct in San Francisco," (query: if this is true, why does a row house on Nob Hill cost $1 million?), and went downhill from there.

Responding then to rumors that Justice Brown had somehow found her way on to President Bush's short list of potential Supreme Court nominees, we expressed the hope that President Bush would think hard about this judge's radical views on property before nominating her to the U.S. Supreme Court. One might say we got our wish, but the net result is not much better. Last week, President Bush nominated Justice Brown to a lifetime position on the U.S. Court of Appeals for the D.C. Circuit.

While takings cases represent a miniscule part of the D.C. Circuit's caseload, the circuit has exclusive jurisdiction over many challenges to important health, safety, and environmental protections. Justice Brown's position that government regulation can only be sustained if property owners would agree in advance that the regulation is "appropriate and mutually beneficial" suggests that she could have a field day on the D.C. Circuit striking down such regulations. But as the majority declared in response to Brown's dissent, "nothing in the law of takings would justify an appointed judiciary in imposing that, or any other, personal theory of political economy on the people of a democratic state." The Constitution simply "does not enact the late Robert Nozick's 'Minimal State.'"

Justice Brown is not the only property rights extremist nominated by this President. Lawrence Block, a chief architect of the radical takings compensation legislation proposed as part of the Contract with America, is already a judge on the Court of Federal Claims. Victor Wolski, a former Pacific Legal Foundation lawyer and self-professed ideologue on property rights issues, was also confirmed to the CFC on July 9, 2003, by a contentious 54 - 43 vote. The nomination of Justice Brown, whose views often mirror those of extreme property rights theorist Richard Epstein, should be given the closest scrutiny by the U.S. Senate.

EYE ON WASHINGTON

Developers Press for High Court Review in *Kottschade v. City of Rochester*

Despite two swings and two big misses in the lower courts, development interests are back in the batter's box swinging for the fences in what could be their final strike at *Williamson County*'s ripeness requirement. Franklin Kottschade, backed by the National Association of Home Builders and a small armada of developer *amici*, has filed a petition for certiorari in the U.S. Supreme Court.

Kottschade maintains the development conditions imposed by the City of Rochester, Minnesota took his property without compensation. Despite *Williamson County*'s unambiguous ruling requiring aggrieved property owners to seek redress in state courts before filing a federal takings claim, Kottschade sued in federal district court without first having pursued his claim at the state level. Citing *Williamson County*, the district judge dismissed the claim, but Kottschade appealed to the Eighth Circuit where he pressed the novel argument that *City of Chicago v. International College of Surgeons* (U.S. 1997) modified *Williamson County*'s ripeness rule even though that case never cited *Williamson County*. In February, the Eighth Circuit rejected this contention and affirmed the dismissal.

Development interests are supporting Kottschade's petition with no fewer than six amicus briefs. Filing separate briefs thus far are Pacific Legal Foundation, American Forest and Paper Association, Wisconsin Builders Association, Santini Homes, Inc. (of Vernon, CT), Defenders of Property Rights, and land use professor Daniel Mandelker of Washington University in St. Louis.

Kottschade has shifted ground in the Supreme Court and is no longer arguing (ridiculously) that *Williamson County* already has been overruled. Instead, he is now urging the Supreme Court simply to abandon *Williamson County*. The city's opposition is due August 25. Given the absence of a circuit split, the Court's repeated reaffirmation of the unanimous *Williamson County* ruling, and the ruling's grounding in a century of precedent, the case is uncertworthy in the extreme. Here's hoping the High Court will strike out this most recent assault on *Williamson County*.

QUOTE OF THE MONTH

"The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards.'"

Dodd v. Hood River County, 136 F.3d 1219, 1230 (9th Cir. 1998) (quoting *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989).

ON THE HORIZON

Nevada Court Considers $22 Million Claim While Airline Safety Hangs in the Balance

The Nevada Supreme Court heard oral arguments June 25 in *County of Clark v. Tien Fu Hsu*, a multi-million dollar takings challenge to safety-related height restrictions imposed in 1990 to accommodate expansion of the McCarran International Airport in Las Vegas.

Tien Fu Hsu claimed the value of his property was diminished after the height restrictions precluded him from building a 40-story hotel and casino on the property. In 2001, a jury awarded Hsu $13 million for a per se, physical invasion taking, but with interest and attorney's fees the verdict is worth some $22 million. The land is currently used profitably to support a trailer park. Clark County appealed and argued before a five-member court last week that the decision be reversed. Fourteen amicus briefs were reportedly filed in the case, including one by Community Rights Counsel on behalf of the American Planning Association and others.

Our sources tell us that at the argument, Justice Nancy Becker asked the majority of questions and pointed out that a significant development project could still take place on the parcel even accounting for the height restrictions. Interestingly, few of the justices addressed the per se taking issue, which formed the basis of the district court's ruling. Even the claimant seemed more focused on a *Penn Central* analysis, which given the property's continuing economic value would seem to preclude a taking.

We'll not attempt to divine the court's thinking, but we will inform you of the decision, which should be released early next year.