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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

SUPREME COURT IOLTA VICTORY PROTECTS LEGAL FUNDING FOR THE POOR

It's official: There is a public side winning streak in takings cases. Okay, so it is only two wins, but after 15 years of losing, the win this week before the Supreme Court in *Brown v. Legal Foundation of Washington*, 2003 WL 1523550 (U.S. March 26, 2003), coming on the heels of last year's *Tahoe* victory, sure feels good. More importantly, the *Brown* victory preserves programs in virtually every state that provide approximately $160 million annually for legal services for the indigent.

Brown involved IOLTA ("Interest on Lawyers' Trust Account") programs, which pool small amounts of money held by lawyers for clients for short periods of time and use the interest generated to fund legal services for the poor. Funds go in IOLTA programs only if they are so small and held for so short a time that they cannot generate net interest outside the program. In other words, if IOLTA programs didn't exist, the clients whose funds are placed in IOLTA accounts would not earn a penny of net interest.

In *Phillips v. Washington Legal Foundation* (1998), the Court held that interest generated in IOLTA programs was the "property" of the clients depositing funds in IOLTA accounts. In *Brown,* the Court assumed that IOLTA programs worked a *per se* taking of that property. Victory in *Brown* was snatched from the hands of defeat in the final "just compensation" phase of the takings inquiry. By a 5-4 ruling, the Court held that because the clients could not otherwise earn net interest, no compensation was due and, therefore, there was no constitutional violation. Community Rights Counsel's brief in *Brown*, filed on behalf of the National League of Cities, International Municipal Lawyers Association, and Trial Lawyers for Public Justice, focused exclusively on this dispositive issue. Kudos to all who defended IOLTA programs in the case.

EYE ON WASHINGTON

"Obtain" vs. "Take"

In *Scheidler v. National Organization of Women, Inc.*, 123 S. Ct. 1057 (2003), the Court interpreted the word "obtain" as used in the federal Racketeer Influenced and Corrupt Organizations Act, concluding that the petitioners had not "obtained" the respondents' property even though they significantly interfered with its use:

> There is no dispute in these cases that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights. * * * But even when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property.

Id. at 1065-66 (citation omitted).

If one cannot "obtain" property by shutting down a business or otherwise interfering with the owner's use of the property, one wonders how local officials can be deemed to have "taken" property where community protections interfere with land use. Community Rights Counsel has long encouraged government counsel to emphasize the narrow plain meaning of the word "taken" in the Takings Clause. While it is unlikely that the Court will abandon the doctrine of regulatory takings anytime soon, the narrow meaning of "taken" should act as a forceful check against the inappropriate expansion of takings liability. Let's hope that the Court's recent cogitations on the meaning of "obtain" have a beneficial spillover effect on its takings jurisprudence.

EYE UPDATE

Last month, we reported on efforts by property rights groups to persuade the U.S. Supreme Court to review two cases involving legislative impact fees: *Rogers Machinery Co. v. City of Tigard* (Or. Ct. App. 2002), and *Agencia La Esperanza Corp. v. Orange County Bd. of Supervisors* (Cal. Ct. App. 2002). On March 10, the Court declined to review both cases.

OUTRAGE OF THE MONTH

A Bad Month For the CFC

Community Rights Counsel and a broad coalition of public interest groups adamantly opposed Larry Block when he was nominated to serve on the U.S. Court of Federal Claims (CFC) primarily because he was a leading promoter of extreme federal takings compensation and ripeness bills.

Our main concern, that Mr. Block (now Judge Block) would issue extreme takings rulings, has proven unfounded to date. A check of the CFC website suggests that Mr. Block has not yet issued a single ruling on any case in his five months as a CFC Judge. According to a statement by Senator Patrick Leahy, the real concern appears to be that Block is up to his old tricks:

> I understand that [Judge Block] has spent a great deal of time working on legislative matters from the bench in the past few months, which causes me some concern as well, given our Constitution's separation of powers and the need for confidence that judges are not engaging in the political process or continuing past political activities.

This adds support to our December 2002 *Takings Watch* report, which discussed the relative paucity of cases for CFC judges. We seem to have a *Takings Watch* reader at *The Washington Post*, because many of the issues raised in our December issue were echoed in a March 26 *Post* editorial calling for CFC to be abolished. Meanwhile, the Senate is rushing to confirm four new judges to the CFC, including Victor Wolski, an avowed libertarian and former attorney for the radical Pacific Legal Foundation who has bragged that "every single job I've taken since college has been ideologically oriented, trying to further my principles." What a mess.

ON THE HORIZON

New Takings Bills Threaten State and Local Planning Efforts

State property rights advocates are once again pushing legislation aimed at curtailing municipal planning efforts and other community protections. The reprieve Oregon planners won last year when the state supreme court struck down Measure 7 has proven short lived. Now lawmakers are pushing House Bill 2137, dubbed "Son of Measure 7," which would force the government to pay compensation whenever regulations reduced the fair market value of a property by more than 10 percent.

Meanwhile, in Idaho, a House committee approved a pair of property rights bills. House Bill 256 requires state and local governments to perform a takings impact analysis for all zoning changes, while House Bill 257 would prevent local governments from enacting emergency ordinances of more than a year in duration.

In Florida, municipalities are fighting an amendment to the Bert J. Harris Jr. Private Property Rights Protection Act, which would subject local governments to retroactive liability for takings claims to the date of the Act's passage in 1995. Since then, some 250 claims have been filed statewide, with $24.8 million in claims pending in Miami Beach alone.

QUOTE OF THE MONTH

The property rights movement has long insisted that landowners have a fundamental right to build, and that arbitrary government action is subject to a takings challenge under the *Agins* substantially advance test. But consider this surprising language from Justices Scalia and Thomas in a recent case:

> Freedom from delay in receiving a building permit is not among these "fundamental liberty interests." To the contrary, the Takings Clause allows government *confiscation* of private property so long as it is taken for a public use and just compensation is paid; mere *regulation* of land use need not be "narrowly tailored" to effectuate a "compelling state interest." Those who claim "arbitrary" deprivations of nonfundamental liberty interests must look to the Equal Protection Clause * * *.

City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 2003 WL 1477301 (U.S. March 25, 2003) (Scalia, J., with whom Thomas, J., joins, concurring) (citation omitted).