March 2004
Vol. IV, No. 3

Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel
1301 Connecticut Avenue, NW, Suite 502, Washington, DC 20036; www.communityrights.org

FEATURE CASE

Big Win in Texas Supreme Court: Clarity from the "Serbonian Bog"

The Texas Supreme Court once described the state of regulatory takings jurisprudence as "a sophistic Miltonian Serbonian Bog" that could swallow up even the most careful navigator. But earlier this month, in *Sheffield Devel. Co. v. City of Glenn Heights*, No. 02-0033 (Tex., March 5, 2004), the court identified some firm islands of clarity in the bog by unanimously rejecting takings challenges to municipal downzoning and a related twelve-month moratorium.

The case arose out of a 1998 decision by the City of Glenn Heights, a small suburb south of Dallas, to rezone a 194-acre tract from (roughly) 1/6-acre to 1/4-acre lots. Sheffield challenged the rezoning and related moratorium as takings under the Texas Constitution.

The trial court ruled that the downzoning worked a taking, and a jury awarded Sheffield $485,000 plus interest, a potentially devastating amount for Glenn Heights, whose population was just 8,050 as of 2000. The trial court rejected the takings challenge to the moratorium. An intermediate appeals court affirmed the takings award for the downzoning, and also concluded that the moratorium worked a taking and remanded for additional compensation on that claim. In one of the most expansive readings of a state Takings Clause ever rendered, the appeals court ruled that a 38 percent loss in value could work a taking, even though the land was still worth more than four times what Sheffield had paid for it.

The Texas Supreme Court reversed both takings rulings. The state high court concluded that the rezoning advanced the government's legitimate interest in curbing the ill effects of urbanization. The court then applied *Penn Central*'s multifactor test, assuming (based on the jury award) that the rezoning reduced the value of the land by 50 percent. While recognizing that this value loss is significant, the court stressed that it is "more important" to the takings analysis that the land was still worth four times what Sheffield paid for it just a few years ago. The court concluded that while certain aspects of the City's conduct were "troubling," the City's decisions "were not materially different from zoning decisions made by cities everyday." Turning to the moratorium, the court asserted that a municipality may not use delay merely to extract concessions, but concluded that the moratorium here facilitated an orderly process for resolving various disputes over zoning within the city.

Kudos to Robert F. Brown of Brown & Hofmeister, LLP for securing this victory for Glenn Heights. The court received numerous *amicus briefs* in the case, including briefs CRC prepared at the petition stage and on the merits on behalf of the Texas Municipal League, Texas City Attorney Association, and International Municipal Lawyers Association.

The opinion is available at: http://www.supreme.courts.state.tx.us/historical/2004/mar/020033.htm.

EYE ON WASHINGTON

Ethical Laxity at Interior

A rotting fish stinks from the head down. This adage is borne out by a recent Inspector General report describing ethical lapses by Deputy Interior Secretary J. Steven Griles that favored his industry allies at the expense of community welfare. The report not only criticizes Griles personally for a "lax understanding" of his ethical obligations, but also identifies a deficient "ethical culture" and deep-seated "institutional failure" at Interior to address conflicts of interest.

According to the report, while at Interior Griles repeatedly dealt with industry clients of his former lobbying firm while continuing to receive payments from that firm. The public will never receive a full accounting of the conflicts, however, because the investigation was thwarted by "an unanticipated lack of personal and institutional memory." Indeed, the report notes that when informed of the inquiry into his alleged conflicts of interest, Griles cavalierly responded to investigators: "Good luck."

More information on the report is available at: http://www.washingtonpost.com/wp-dyn/articles/A64647-2004Mar16.html.

OUTRAGE OF THE MONTH

Justice Tainted by Seminars for Judges

On March 23, CRC issued a report called *Tainted Justice* that describes the ethical problems that arise from free judicial seminars at resort locations offered by the Foundation for Research on Economics and the Environment (FREE). Here are some of the unsavory details:

Ed Warren was invited to serve on FREE's Board of Directors alongside D.C. Circuit Chief Judge Douglas Ginsburg, and to lecture D.C. Circuit Judge David Sentelle at a FREE seminar. All the while, Mr. Warren was lead industry counsel in *ATA v. EPA*, a challenge to key Clean Air Act rules governing smog and toxic soot then pending in the D.C. Circuit. Mr. Warren's lecture tracked a law review article he wrote, which in turn sets forth arguments at the core of his *ATA* briefs, including an extreme view on the doctrine of unconstitutional delegation. Regardless of whether Mr. Warren discussed the *ATA* case by name, his position with FREE allowed him to give judges an ex parte preview of his oral argument. The D.C. Circuit accepted Mr. Warren's unconstitutional delegation argument, with Chief Judge Ginsburg serving on the 2-1 panel and Judge Sentelle casting a critical vote against rehearing. The Supreme Court unanimously reversed in an opinion by Justice Scalia that demonstrates the radical nature of the position advocated by Mr. Warren and accepted by the D.C. Circuit.

Environmental attorney Cristobal Bonifaz sued Texaco on behalf of 30,000 Ecuadoreans, seeking up to $1 billion for 30 years of environmental degradation from oil drilling. While the case was pending before him, federal Judge Jed Rakoff attended an all-expense-paid seminar from FREE, which is funded in part by Texaco. At the seminar, Alfred DeCrane -- former Texaco CEO and a key potential witness in the case -- delivered a lecture called "The Environment: Some Thoughts from the Corner Office." Notwithstanding this ex parte seminar on environmental law from a key potential witness, Judge Rakoff denied a motion for recusal and ultimately dismissed the action. Mr. Bonifaz states he "will forever feel that [the seminar] disadvantaged us in the litigation."

Several federal judges sit on FREE's board. CRC has filed petitions requesting a ruling that this board membership is improper under applicable ethical standards.

The report has received extensive media coverage, and is available at http://www.communityrights.org/TaintedJustice/main.asp.

QUOTE OF THE MONTH

"For the system to work as it should, the judges must *be perceived* to be honest, to be without bias, to have no tilt in the cause that is being heard."

Honorable Abner J. Mikva, Former Chief Judge, U.S. Court of Appeals for the D.C. Circuit (criticizing FREE Seminars).

ON THE HORIZON

Expect Another Cert. Petition (and Denial) Regarding Species Protections

On March 1, the U.S. Supreme Court denied certiorari in a Commerce Clause challenge to federal endangered species protections for the arroyo southwestern toad. *See Ranch Viejo, LLC v. Norton*, 124 S. Ct. 1506 (denying cert. in No. 03-761). But just days earlier, the Fifth Circuit teed up a similar case by denying rehearing en banc with a six-judge dissent that almost certainly will prompt another petition for certiorari. *See GDF Realty Investments, LTD v. Norton*, 2004 WL 396975 (5th Cir. Feb. 27, 2004) (denying rehearing and rehearing en banc).

In *GDF Realty*, the court rejected a Commerce Clause challenge to federal protections for various species of invertebrates that reside in underground caves in central Texas. The protections undermined plans for commercial development of a 216-acre tract. Rejecting the approach used by the D.C. Circuit in *Rancho Viejo*, the Fifth Circuit concluded it would be improper to focus on the commercial nature of the activity being regulated, but nonetheless ruled that the protections are valid under the Commerce Clause because they promote the interdependent web of all species, which as a whole has a sufficient connection to interstate commerce to justify regulation.

On February 27, the court denied rehearing en banc, but six judges dissented, arguing that the panel's rationale is unfaithful to recent Supreme Court teachings on the proper scope of the Commerce Clause. Because there is no genuine circuit split on the validity of these protections, the Supreme Court should, and probably will, deny cert. once again.