March 2005
Vol. V, No. 3

Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Smith v. Town of Mendon, 822 N.E.2d 1214 (Dec. 21, 2004)

New York High Court Rejects Application of *Dolan* to Conservation Easement Requirement

On December 21, 2004, New York's highest court issued a 4-3 ruling rejecting a takings challenge to a permit condition requiring landowners to record a conservation easement. Pacific Legal Foundation has vowed to take the case to the U.S. Supreme Court.

The claimants own a ten-acre parcel in the Town of Mendon. The property is situated in a floodplain along a protected waterway. It includes several environmentally sensitive parcels, contains steep slopes susceptible to erosion, and is close to a protected agricultural district. Four separate environmental overlay districts restrict development of the land.

In 2001, the claimants applied for approval to build a single-family house on the non-restricted portion of the land. The town planning board approved the application but conditioned approval on the claimants' grant of a conservation easement consistent with the pre-existing overlay districts. The purpose of this requirement is to put subsequent buyers on notice of the restrictions. The trial division concluded that the requirement is an exaction subject to *Dolan v. City of Tigard* (U.S. 1994), but ruled that it met *Dolan*'s rough proportionality test. An intermediate appellate court held that the condition is not an exaction subject to *Dolan.*

The New York Court of Appeals likewise determined that the requirement is not subject to *Dolan.* Relying on an amicus brief filed by the New York Attorney General's office, the court concluded that *Dolan* applies only to permit conditions that require a dedication of property that impairs the owner's right to exclude others from the land, or that impose a fee in lieu of such a dedication. The court declined to extend *Dolan* to cover conditions that merely restrict land use, even where the claimant is required to record a conservation easement.

Evaluating the condition under the *Penn Central* and *Agins* multifactor tests, the court concluded that it did not constitute a taking because it did not appreciably reduce the value of the claimants' land, and it substantially advances a legitimate government interest in environmental preservation.

Community Rights Counsel filed an amicus brief in support of the town on behalf of New York municipal groups and the American Planning Association. Like the New York amicus brief, CRC's brief emphasized that *Dolan* is limited to permit conditions that impair the owner's right to exclude others. It also explained the benefits of permit conditions like those at issue to planning and environmental protection.

EYE ON WASHINGTON

Oysterers Seek High Court Review

It comes as no surprise when the loser in a high-dollar takings suit adds a big-name attorney to its legal team in preparing a petition for certiorari, hoping that "star quality" might spur the U.S. Supreme Court to grant review. It *is* surprising, however, when the resulting petition runs only twelve pages (the page limit is thirty) and presents a lead argument that is utterly incoherent.

In *Avenal v. State of Louisiana*, 886 So.2d 1085 (La. 2004), oyster fishers allege that Louisiana's coastal restoration efforts — designed in part to keep the next hurricane from swallowing New Orleans — worked a taking of their leasehold interests in underwater oyster beds by adversely changing the salinity of the water. Ironies abound in the case, not the least of which is that the oyster industry encouraged the restoration efforts. As noted in the October 2004 issue of *Community Rights Report*, the state Supreme Court rejected the challenge on several grounds, including the public trust doctrine.

The oysterers now have brought in Harvard Law School Professor Alan M. Dershowitz, who argues that the restoration efforts worked a physical-invasion taking of the oyster bed. It's unclear whether the underwater beds were allegedly "invaded" by new water, or by the dissolved salt in the new water. In either case, it seems absurd (not to mention unprecedented) to suggest that underwater property can be deemed physically invaded and thus "taken" under the Fifth Amendment by a change in the coastal currents. The high court should make short work of this one, notwithstanding counsel's celebrity status.

OUTRAGE OF THE MONTH

Billion-dollar Takings Claim Threatens Pacific Fishing Industry

All too often, regulatory takings cases are characterized as pitting environmental values against economic interests. Lost in this false dichotomy is the fundamental but overlooked truth that environmental protection itself is vital to a sound economy.

Nowhere is this more evident than in the billion-dollar takings lawsuit filed by Klamath Basin irrigators against the federal government in the U.S. Court of Federal Claims. The suit challenges the federal Bureau of Reclamation's decision, during a severe 2001 drought, to reduce water allocations to farmers from the Klamath River to protect threatened coho salmon downstream. The farmers contend that the reductions caused economic harm.

Commercial fishermen moved to intervene in the case. The Court permitted the fishers to join the action, the first time it has allowed a group to intervene to vindicate economic interests based on wildlife protection. Their presence in the case will assist in understanding that in protecting the environment, the government often acts as a referee among competing economic interests.

The case is one of several lawsuits that follow a recent $16.7 million takings award arising out of water diversions in the Tulare Lake water district. Arguments in *Klamath* were held on March 30. The court should give careful consideration to the economic interests of the fishers in evaluating the viability of the farmers' claim.

ON THE HORIZON

Oral Argument in San Remo

On March 28, the U.S. Supreme Court entertained oral arguments in the third takings case heard this term, *San Remo Hotel v. San Francisco*, No. 04-340. The case raises issues concerning the intersection of (1) the federal Full Faith and Credit Act, 28 U.S.C. § 1738, which requires federal courts to respect state court rulings by giving them preclusive effect, and (2) *Williamson County v. Hamilton Bank* (U.S. 1985), which requires takings claimants to seek compensation in state court under state law before filing a federal takings claim in federal court. The question presented in *San Remo* is whether a federal court should apply issue preclusion to a state court's findings and conclusions rendered in a takings suit that was filed to comply with *Williamson*'s state-court requirement.

The case involves a regulatory takings challenge to San Francisco's 1981 Hotel Conversion Ordinance. This affordable housing measure prevents owners of residential hotels from converting units historically used for tenants into lodging for tourists unless they take steps to mitigate the housing lost to permanent residents. The ordinance allows the hotels either to replace the converted units through construction of an equal number of units for residents, or to rehabilitate an equal number of residential hotel units, or to make an "in lieu payment" to cover part of the construction costs for the number of units being converted. According to the city, the measure is a vital source of funding to offset the loss of housing stock caused by conversion to tourist use.

The procedural history of the case is complex, but the bottom line is that Sam Remo lost in the California courts. It now seeks to relitigate the same issues in federal court.

At oral argument, the Justices seemed highly skeptical of the argument made by San Remo's counsel that takings claimants should be allowed to re-litigate, in federal court, issues already litigated and decided by a state court. Various members of the Court obliquely raised the possibility of revisiting *Williamson County*, but they seemed to recognize that its viability was not properly raised in this case. The Court will rule in the case before the Term ends in late June.

CRC filed an amicus brief in support of San Francisco on behalf of California municipalities and the American Planning Association, available at http://www.communityrights.org/PDFs/Briefs/SanRemo2005.pdf For a CRC op-ed on the case that appeared in the San Francisco Daily Journal, go to http://www.communityrights.org/PDFs/LADJ3-28-05.pdf

QUOTE OF THE MONTH

"So we have to eat crow no matter what we do, right?"

Justice Antonin Scalia during the oral argument in *Lingle v. Chevron*, evidently recognizing the need for the Court to confess error in articulating the "substantially advance" test in *Agins v. City of Tiburon* (1980).