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FEATURE CASE

Takings and National Security: Claims Court Rejects Challenge to Changes in Airport Screening

In response to the terrorist attacks of 9-11, Congress enacted legislation establishing the Transportation Security Administration (TSA) and requiring virtually all passenger and baggage screening to be conducted by federal employees. Prior to this legislation, most airlines met their security responsibilities by contracting with private companies to conduct screenings. One private contractor, Huntleigh USA Corporation, filed a takings challenge for more than $200 million alleging that when TSA federalized airport screening, it worked a taking of Huntleigh's screening contracts, goodwill, and the going-concern value of its business.

The U.S. Court of Federal Claims recently rejected Huntleigh's takings claim and other related claims in *Huntleigh USA Corp. v. United States*, 2007 U.S. Claims LEXIS 76 (March 15, 2007). In so ruling, the court stressed that when Huntleigh entered the screening business, it contracted with airlines pursuant to government security regulations, the federal government retained the right to change those regulations, and government officials publicly discussed the possibility of fundamental changes to aviation screening, including federalization of the workforce. The court explained that it did not matter whether Huntleigh anticipated the specific policy changes that occurred after 9-11 because the prior regulatory regime allowing for these changes was already in place.

Moreover, Huntleigh's contracts with the airlines gave either party the right to terminate upon appropriate notice, usually 30 days. Accordingly, Huntleigh could not claim interference with a right to engage in the screening business "because its contracts with the airlines were always subject to the security regulations the government imposed on the airlines." The government actions, the court concluded, "amount, at most, to frustration of purpose rather than a taking."

The *Huntleigh* court ultimately concluded that the claimant did not possess a compensable property interest, but the ruling also should be useful in cases involving issues surrounding a takings claimant's reasonable expectations in the face of a changing regulatory environment.

ON THE HORIZON

Dolan, Impact Fees, and Exactions in the Ninth Circuit

With amicus support from Pacific Legal Foundation and the developers' lobby, landowners from Sumner, Washington are making two remarkable arguments to the U.S. Court of Appeals for the Ninth Circuit: 1) every government action that requires a landowner to spend money is a *per se* taking of the money; and 2) every permit condition that requires the expenditure of money for infrastructure improvements must be analyzed under the nexus and rough proportionality tests set forth in *Nollan* and *Dolan*. The case is *Tapps Brewing Inc. v. City of Sumner*, No. 07-35231 (9th Cir.).

Here's the background. As a result of severe flooding in the early 1990s, the City of Sumner adopted a Stormwater Comprehensive Plan and began improving its drainage system. To finance the improvements, the City adopted a Stormwater General Facility Charge based on the total amount of impervious surface of the property.

The claimants in *Tapps Brewing* own four adjoining residential lots adjacent to an alley. The city had previously vacated the alley, but retained an easement for a stormwater pipe. The claimants applied for a permit to turn one of the houses into a sandwich shop and convert the alley into a parking lot. In issuing the permit, the claimant noted that under its stormwater regulations, the permit would be conditioned on an upgrade of the sewer beneath the alley from the existing six-inch pipe to a 12-inch pipe, but it requested a further upgrade to a 24-inch pipe to handle a 100-year flood. The claimants assumed that the request was a required condition, installed a 24-inch pipe at a net cost of around $42K, and then filed their lawsuit alleging violations of state law and the federal Takings Clause.

The district court ruled against the claimants in all respects. It held that the permit condition requiring a 12-inch pipe is not subject to *Nollan / Dolan* because, if unilaterally imposed outside the permit context, it would not constitute a taking; it neither required a physical invasion of private property by the government or a third party nor denied economically viable use. The Court also ruled that the further upgrade to a 24-inch pipe was not a requirement but an implied contract undertaken in exchange for a waiver of certain fees.

On appeal, the claimants and their supporting amici advance a theory that would federalize virtually every permit dispute. CRC will provide the City with amicus support.

OUTRAGE OF THE MONTH

First Circuit Undercuts *Williamson County's* State Court Compensation Requirement

In a bizarre and disturbing ruling, the U.S. Court of Appeals for the First Circuit recently held that a takings claimant need not file a takings claim under the state constitutional takings clause in state court prior to filing a federal takings claim in federal court. Instead, the court distinguished these state takings claims from what it called state "inverse condemnation" proceedings, and ruled that *Williamson County*'s state-compensation mandate applies only to the former and not the latter, and that it does not apply at all to facial takings challenges.

In *Asociación De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 479 F.3d 63, 2007 U.S. App. LEXIS 4660 (1st Cir. Mar. 1, 2007), the First Circuit addressed a federal takings claim filed in federal district court by an association of underwriters alleging that the Secretary of the Treasury of the Commonwealth of Puerto Rico took its property without just compensation when he allegedly failed to forward to the insurers $173 million in premiums paid by motor vehicle drivers under a compulsory insurance statute. The Secretary allegedly withheld the funds on a temporary basis to alleviate the Commonwealth's cash-flow problems.

The opinion analyzes several important issues, including standing, qualified immunity as applied to a takings claim, and "the sometimes uncertain boundary between official- and personal-capacity claims against a government official." But what makes the decision especially disturbing to us is its ruling that the takings claim could proceed in federal court even though the claimant had not sought compensation under the takings clause contained in Puerto Rico's Constitution. The court first ruled that neither of *Williamson County*'s ripeness requirements -- to secure a truly final administrative decision and to seek compensation in state court -- applies to facial takings challenges. While there is some support for this ruling as it applies to the final decision requirement, it is flat wrong as it pertains to the state compensation requirement.

The court further held that *Williamson County's* state compensation requirement compels a takings claimant to pursue only inverse condemnation actions in state court, but not actions under the takings clause of the state constitution. Although the court calls the distinction "subtle,' it is virtually non-existent. A taking challenge to regulation brought under a state takings clause is, by definition, an inverse condemnation action; it is "inverse" simply because it is filed by the landowner, rather than by the government (as is the case in a "direct" condemnation action). But it's all the same clause – the takings clause. As noted by the concurring opinion, which did not accept this analysis, "there is no support in Supreme Court precedent for the conclusion that claimants are relieved of the [state-court] litigation requirement unless the state had adopted specific processes (presumably by way of statute) through which compensation may be recovered."

Because the only available cause of action in Puerto Rico's courts to recover just compensation for the alleged taking is under Puerto Rico's constitutional takings clause, the First Circuit ruled that the insurers were not required to seek compensation in those courts before filing in federal court. Given the unique facts in the case, it is uncertain how much impact the ruling will have. But this development is definitely worth monitoring.

On a happier note, the Seventh Circuit recently gave *Williamson County* a full-throated reading, holding that its state compensation requirement applies even where state case law stands against the claimant, since the state courts remain free to adjust the case law and award compensation. *See Rockstead v. City of Crystal Lake*, 2006 U.S. App. LEXIS 32553 (7th Cir. Apr. 10, 2007).

QUOTE OF THE MONTH

"A reasonable land use restriction imposed by the government in the exercise of its police power characteristically diminishes the value of private property, but is not rendered unconstitutional merely because it causes the property's value to be 'substantially reduced' or because it "deprives the property of its most beneficial use."

Putnam County Nat'l Bank v. City of New York, 829 N.Y.S.2d 661, 37 A.D.3d 575 (N.Y. App. Div., Feb. 13, 2007) (citations omitted; rejecting a takings challenge to protections for municipal drinking water supplies that required downsizing of a proposed 36-lot subdivision to 17 lots).