

May 2001

## Takings Watch

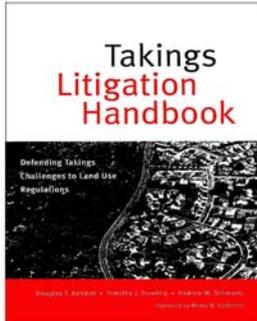
CRC's Monthly Update on Regulatory Takings

Community Rights Counsel

1726 M Street NW, Suite 703, Washington, DC 20036; [www.communityrights.org](http://www.communityrights.org)



Community  
Rights  
Counsel



To order CRC's *Takings Litigation Handbook*, a soup-to-nuts guide to defeating takings challenges, call American Legal Publishing at 1-800-445-5588.

### QUOTE OF THE MONTH

"We must not forget that the community also has rights, and that the happiness and well-being of every citizen depends on their faithful preservation."

*Charles River Bridge*  
v.  
*Warren Bridge*  
United States Supreme Court, 1837

2001), the U.S. Court of Federal Claims found a taking where federal protections for endangered salmon and delta smelt resulted in less water for farm irrigation from two water projects in California. The water reductions were relatively small and did not approach the denial of all economically viable use typically required for a finding of a taking. Moreover, unlike other cases in which federal actions have been deemed takings of water rights, the government did not consumptively use the water at is-

## WELCOME!

Community Rights Counsel proudly presents this inaugural issue of *Takings Watch*, a monthly newsletter on regulatory takings for local government attorneys.

Regulatory takings continues to be one of the hottest of the hot-button issues facing municipal lawyers. Smart-growth initiatives, historic preservation laws, restrictions on adult bookstores, protections for environmentally sensitive properties, and many other land-use controls all raise the possibility of a takings challenge. Keeping current on regulatory takings is essential for every city and county attorney who works in the land-use area. We hope *Takings Watch* helps you do just that.

The newsletter will include:

- regular updates on regulatory takings rulings of special significance to local government attorneys;
- an [Eye on Washington](#) column covering federal takings legislation, executive branch developments concerning property rights, and critical decisions from the Federal Circuit and the U.S. Court of Federal Claims;
- an [Outrage of the Month](#) feature (nominations are welcome); and
- a look at what's coming [On the Horizon](#), a recap of key pending cases so readers can anticipate future rulings affecting regulatory takings jurisprudence.

Our goal is to produce a quick read that combines useful information, interesting tidbits, and an occasional chuckle. If you have thoughts on how to make *Takings Watch* better, please let us know ([leah@communityrights.org](mailto:leah@communityrights.org)).

## FEATURE CASE

### [Crazy Ruling from the CFC](#)

*In Tulare Lake Basin Water Storage District v. United States*, 2001 WL 474295 (Fed. Cl. April 30,

2001), the U.S. Court of Federal Claims found a taking where federal protections for endangered salmon and delta smelt resulted in less water for farm irrigation from two water projects in California. The water reductions were relatively small and did not approach the denial of all economically viable use typically required for a finding of a taking. Moreover, unlike other cases in which federal actions have been deemed takings of water rights, the government did not consumptively use the water at is-

sue, but instead only restricted the use made by others. Nonetheless, the court ruled that the government had effectively "seized" the water, a conclusion that allowed the court to disregard the claimants' ability to use most of the water available to them under their water contracts. The court also ignored several background principles of state law, including the public trust doctrine and the reasonable use doctrine, that deprived the claimants of any property right to use the public's water in a way that injures wildlife. The court's "seizure" theory has potentially troublesome implications for municipal land use if it were expanded beyond the context of water rights.

## EYE ON WASHINGTON

### Senate Shift Is Death Knell for Takings Legislation

Local control over land-use law should not be a partisan issue. The reality, however, is that Republicans such as Orrin Hatch (R-UT) have been the lead backers of legislation drafted by the National Association of Home Builders that would make it far easier for developers and others to sue municipalities in federal court. For that reason, James M. Jeffords's (R-VT) departure from the Republican Party, and the shift in control of the U.S. Senate to the Democrats, virtually kills any chance of passage of the NAHB takings bill. The bill, passed by the House but killed in the Senate in each of the last two Congresses, was described by the NAHB as a "hammer to the head" of local officials. Virtually every national group that represents cities and counties opposes the bill. "This shift in control should be the death knell for the NAHB takings bill, at least for the time being," said Tim Dowling, CRC's Chief Counsel.

## OUTRAGE OF THE MONTH

### National Paper Reprints Lie About New London Redevelopment Project

The so-called "property rights" movement propels itself by spreading outrageous and mostly untrue stories of government abuse of landowners. Too often the media publicizes these horror stories without checking their facts. A perfect example is a recent article and editorial by USA TODAY, accusing New London, Connecticut of throwing people out of their homes "to make room for a health club." This outrageous claim, lifted from the web site of the DC-based Institute for Justice, was simply untrue. The paper recognized this fact in a correction, but buried the correction in the fine print at the bottom of page 3. Redeveloping the impoverished New London has taken courage, vision, and commitment by local officials. Spurious reporting on these efforts does not make this work any easier.

For briefs, cases, and updates to the *Takings Litigation Handbook*, sign on to CRC's *Filing Cabinet* at [www.communityrights.org/FCregister.html](http://www.communityrights.org/FCregister.html).

## ON THE HORIZON

Before its Term ends in late June, the U.S. Supreme Court will issue a ruling in *Palazzolo v. Rhode Island*, No. 99-2047, a takings challenge to state protections for 18 acres of pristine coastal wetlands in Westerly, Rhode Island. The case raises issues concerning ripeness, the nature of a per se takings under *Lucas*, the scope of the background-principles defense, and the role of expectations in takings analysis. Soon the Court will also decide whether to review: (1) *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 216 F.3d 764 (9th Cir. 2000), which rejected a takings chal-



lenge to moratoria that curbed development while government officials designed a plan to protect Lake Tahoe from harm caused by uncontrolled development; and (2) *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000), which rejected a takings challenge to wetlands protections.

Left Photo: Aerial view of Palazzolo's parcel. For more color photos of the site, go to [www.communityrights.org/Palazzolo.html](http://www.communityrights.org/Palazzolo.html)

### [Takings Watch Disclaimer](#)

This newsletter is provided for general information only and is not offered or intended as legal advice. This newsletter is best viewed in PDF format. To receive it in PDF format via e-mail, please contact Leah Doney at [leah@communityrights.org](mailto:leah@communityrights.org) or at 202-296-6889 extension 1.