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Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Town of Flower Mound v. Stafford Estates Ltd. P'ship,
2004 WL 1048331 (Tex., May 7, 2004)

The Texas Supreme Court dealt municipalities in the state a setback this month when it affirmed a lower court decision holding that a development condition worked a taking under the Texas Constitution. In so doing, the court ruled that the *Nollan/Dolan* essential nexus and rough proportionality tests extend to conditions outside the context of dedicatory exactions.

The Town of Flower Mound requires that subdivision developers improve abutting streets that fall below current road standards. Accordingly, the town required Stafford Estates to rebuild an abutting road as a condition of receiving approval to construct a new subdivision. Stafford reconstructed the road and sued for a taking.

Although *Del Monte Dunes* and most state court decisions appear to limit rough proportionality analysis to compelled dedications of land, the court rejected the Town's argument that the *Nollan/Dolan* test is inapposite to other kinds of exactions. "In neither *Dolan* nor *Del Monte Dunes* did the Supreme Court have reason to differentiate between dedicatory and non-dedicatory exactions," the court concluded. Relying heavily on the California case *Ehrlich v. City of Culver City*, the court reasoned that the development condition at issue was more like a dedication than a mere restriction on the use of property and that therefore the *Nollan/Dolan* test should apply.

The court also parted company with the majority of state courts, which have limited application of the *Dolan* standard to adjudicative determinations. While the court did "not decide what 'legislative' decisions are to be judged by the *Dolan* standard," it concluded that "the condition that the Town imposed on Stafford must be." Because the road was in good shape at the time and the Town failed to demonstrate a proportional relationship between the development and the required improvements, the court affirmed the ruling for the developer. Lastly, the court rejected Stafford's claim for attorneys' fees under 42 U.S.C. § 1988, holding pursuant to *Williamson County* that since adequate state remedies were available, the company could not maintain a federal claim that would entitle it to a fee award.

EYE ON WASHINGTON

***Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756 (2004)**

In another clear sign that the Supreme Court's commitment to federalism does not fully extend to cases alleging preemption of state and local laws, last month the Court dealt a blow to Southern California's efforts to improve its air quality by requiring fleet owners to phase out diesel and other high-emission cars and trucks.

The 8-1 ruling reversed a Ninth Circuit decision that previously upheld rules requiring the owners of buses, trash trucks, street sweepers, and other fleets to purchase clean fuel vehicles, such as those powered by natural gas. Since the rules were adopted, more than 5,000 vehicles have been replaced, reducing emissions of smog precursors and cancer-causing soot.

The Court held that the Air Quality District's rules are preempted by the federal Clean Air Act because they set "standards" within the meaning of the act's ban on state or local standards relating to the control of emissions from new motor vehicles. The Court ruled that this prohibition extends to purchase rules as well as manufacturing requirements. "If one state or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme," Justice Scalia wrote for the court. CRC filed an *amicus* brief on behalf of a broad coalition of state and local groups supporting the state's position, arguing that the term "standard" as used in the act's motor vehicle provisions applies only to regulations imposed on manufacturers, not on fleet owners and other vehicle purchasers.

Although the Court held that the Air Quality District cannot require private fleets to buy new clean fuel vehicles on its own, the court did not entirely foreclose the possibility that California can enact similar rules. For one, the state remains free to set its own requirements for government-owned fleets and contractors where such rules "can be characterized as internal state purchase decisions." Moreover, California could petition the EPA to approve more sweeping rules that would cover private fleets. The case is nonetheless a setback for environmental federalism.

OUTRAGE OF THE MONTH

Water Wars Heat Up, Marzullas Stir the Pot

A half-billion here, a billion there. Pretty soon, you're talking real money.

In another sign of how damaging extreme takings rules can be to the public fisc, the property rights law firm of Marzulla & Marzulla, the heads of which—Roger and Nancie Marzulla—also lead the Defenders of Property Rights, continues to gin up multi-million dollar litigation over Western water rights. Brought on behalf of Central Valley water districts in California, the firm's latest case is a $500 million claim alleging that the federal Bureau of Reclamation improperly failed to deliver water from New Melones Reservoir. The Bureau maintains they have provided some water and that the districts are obligated to pay only for water received.

"It's a lot of money," Nancie Marzulla told the *Sacramento Bee* on April 21, "but this is a high-stakes business we're in." Indeed. The Marzullas recently filed a $1 billion takings claim in the U. S. Court of Federal Claims alleging that the government impermissibly denied water to farmers in the Klamath Basin along the California and Oregon border in order to protect endangered fish. They also won a $14 million case (with interest and fees that could top $26 million) over water rights in the Tulare Lake Basin on the basis of a highly questionable physical occupation theory. That case could be appealed later this year.

We'll keep you posted as these cases progress, but as Rep. Cal Dooley said in response to this latest claim, "I think the only people likely to get compensation here are the lawyers."

QUOTE OF THE MONTH

The development of national institutions and global enterprises does not lessen the importance of state and local governments. If anything, it makes them all the more necessary. The very impersonality of global trends and national bureaucracy will leave state and local governments among the few places where a sense of civic connection with governing institutions can still be felt.

Judge J. Harvie Wilkinson, III, United States Court of Appeals for the Fourth Circuit, Speech to the American Enterprise Institute entitled "Is There a Distinctive Conservative Jurisprudence?" (March 5, 2001)

ON THE HORIZON

Unprecedented Test Applied in Eighth Circuit Commerce Clause Case

Klingler v. Missouri, 2004 WL 936687 (8th Cir. May 3, 2004)

As we noted in our January 2004 inaugural issue of *Community Rights Report*, we are now participating in challenges to federal protections that provide minimum safeguards for all communities. The Commerce Clause is the lynchpin of federal safety, environmental, and anti-discrimination legislation. In a troubling ruling involving the Americans with Disabilities Act, the Eighth Circuit recently called into question the scope of Congress's power under the clause.

At issue is a Missouri regulation requiring the disabled to pay $2 to obtain a placard denoting their right to park in spaces reserved for their use. Disability advocates challenged the regulation as a violation of Title II of the ADA and its implementing regulations, which prohibit imposition of fees based on disability status.

Over a strong dissent, the Eighth Circuit held that Congress lacked Commerce Clause authority to prohibit the state from imposing the fee because it is unclear that the fee would dissuade a substantial number of people from engaging in commerce. Given that the aggregated fees exceeded $400,000 annually, this kind of individualized economic effects test seems unprecedented. One wonders how the court would distinguish a case involving a nominal toll imposed to recoup the cost of a wheelchair ramp, or a restaurant that charges white males 10 cents less than other patrons for a meal. The plaintiffs have requested a rehearing. Stay tuned.

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