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Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Wow!

Lingle v. Chevron U.S.A. Inc., 2005 WL 1200710 (U.S. May 23, 2005)

The law reviews overflow with articles bemoaning the lack of clarity in takings case law. These works routinely condemn takings jurisprudence as a "muddle," a "mess," or worse. It has become almost *de rigueur* to begin takings articles by cataloguing a dozen or so of the most scathing critiques by previous authors. A reader of the literature is left with the impression that takings law is in a pretty bad state of affairs.

We need to rethink this mindset. Clarity, thy name is *Lingle.*

On May 23, the U.S. Supreme Court handed down *Lingle v. Chevron*, a remarkable, unanimous ruling thoroughly repudiating the formulation from *Agins v. City of Tiburon* (1980) that takings liability could be found if a government action fails to "substantially advance" a legitimate state interest. The *Lingle* court acknowledged that the oft-repeated but seldom-applied "substantially advance" formulation had become "ensconced" in Fifth Amendment case law, but it forthrightly confessed error and clarified that the test "has no proper place in our takings jurisprudence." (Slip op. at pp. 1, 10)

In addition to concluding that the *Agins* test has neither textual foundation nor analytic coherence, the court emphasized the serious practical difficulties of applying heightened scrutiny to any regulation of private property, "a task for which the courts are not well suited." (p. 14) Requiring "courts to substitute their predictive judgments for those of elected legislatures and expert agencies" would improperly resurrect the "long eschewed" *Lochner* era, according to the court. (p. 15)

If *Lingle* accomplished only this, it would be a major victory for clarity, and for the primacy of our elected officials over economic policymaking. But *Lingle* does far more.

Building on the court's landmark ruling in *Tahoe-Sierra v. TRPA* (2002), *Lingle* provides a straightforward analytical framework for regulatory takings that will help to guide the development of the law for years to come. According to the court, the touchstone for deciding whether a regulation works a taking is "functional equivalency": each test of takings liability "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." (p. 9.) That's why the *Loretto per se* rule is limited to permanent occupations of land, and why the *Lucas* rule is limited to "the complete elimination of a property's value." (pp. 8-9) The court similarly stressed that the *Penn Central* multifactor test also should be driven by a functional equivalency standard, suggesting that it requires an extremely severe economic loss and interference with reasonable expectations. (*Id.*)

Lingle also observes that *Dolan* and *Nollan* both involved permit conditions that required dedications of land that would allow permanent physical invasions by the public, and that these physical invasions, if unilaterally imposed, would have constituted per se takings under *Loretto.* And the *Lingle* court emphasized that *Dolan* applied the doctrine of unconstitutional conditions. This discussion will be very helpful in arguing that *Dolan* is inapplicable to impact fees and other permit conditions that do not involve physical invasions of the land. The court's emphasis of the "adjudicative" nature of the exactions in *Dolan* and *Nollan* supports arguments that those cases do not apply to legislatively imposed conditions. (pp. 16-17)

Kudos to Governor Lingle's legal team, which includes Robert Dreher (counsel of record) and John Echeverria at the Georgetown Environmental Law and Policy Institute, as well as Seth Waxman, Paul Wolfson, and Hawaii Attorney General Mark Bennett (who argued the case). A special tip of the hat goes to John, who has been working this issue like a pit bull for years.

CRC wrote two amicus briefs in support of Hawaii's cert. petition and merits brief on behalf of a broad coalition of national organizations representing state and local officials. *Lingle* is the first case in which CRC has supported a petition for *certiorari*.

QUOTE OF THE MONTH

"On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase--however fortuitously coined. * * * This case requires us to decide whether the 'substantially advances' formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not."

Lingle v. Chevron (U.S. 2005)

OUTRAGE OF THE MONTH

NAHB Outdoes Itself

While CRC is absolutely delighted with the outcome in *Lingle* (see Feature Case), we were surprised to learn that the National Association of Home Builders (NAHB) also cheered the result. Maybe the NAHB should read the opinion, and its own amicus brief, a little more closely.

Shortly after the court handed down *Lingle*, the NAHB issued a press release calling the case "a victory for property rights." But its *amicus* brief called the preservation of the "substantially advance" test, which was thoroughly repudiated by a unanimous court, the key to protecting property rights: "If the first prong of *Agins* is eliminated, the rights protected by the Takings Clause will become poor relations, indeed."

The NAHB press release also asserts that *Lingle*'s "preservation of the essential-nexus and rough-proportionality tests [] is important to the home builders." But the idea that the "preservation" of the *Nollan* and *Dolan* tests constitutes a win for the NAHB is laughable, since *Nollan* and *Dolan* weren't challenged by anyone in *Lingle*. NAHB further suggests that *Lingle* calls for the application of *Nollan* and *Dolan* to impact fees, but just the opposite is true, as explained in our Feature Case column.

During the oral argument in *Lingle*, Justice Scalia said of the *Agins* test, "we have to eat crow no matter what we do, right?", meaning it was clear at that point that the *Agins* test was simply unworkable in the takings context. The court owned up to its error, calling the *Agins* language "regrettably imprecise" and announcing: "Today we correct course."

We don't want to sound like sore winners here, but it's really time for the NAHB to taste its own helping of crow.

ON THE HORIZON

Three Federal Judges Leave Junkets Board in Response to CRC Ethics Petitions / Will the Fourth Follow Suit?

On May 6, two federal appellate court judges -- Chief Judge Douglas Ginsburg of the D.C. Circuit and Judge Jane Roth of the 3rd Circuit -- resigned from the board of directors for the Foundation for Research on Economics and the Environment (FREE) in response to ethics petitions filed last year by CRC. These resignations came on the heels of an order reflecting the resignation of Judge Andre Davis of the federal district of Maryland, also in response to a CRC ethics petition.

FREE regularly provides federal judges with free trips to a dude ranch in Bozeman, Montana, where the judges attend lectures often deeply critical of environmental laws, and explore theories of how the courts might invalidate those laws. The ethics petitions, filed under 28 U.S.C. § 351, resulted from years of research and analysis by CRC on judicial junkets. The petitions allege that membership on FREE's board constitutes "conduct prejudicial to the effective and expeditious administration" of the courts due to severe appearance problems. The petitions may be viewed at http://www.communityrights.org/TaintedJustice/main.asp#Petition.

CRC's Executive Director, Doug Kendall, said the resignations establish "the simple point that a judge cannot sit on the board of an organization that takes money from corporations to influence the outcome of environmental cases."

One federal appellate jurist, Judge Danny J. Boggs of the Sixth Circuit, remains on FREE's board and is the subject of a fourth CRC ethics petition. We hope Judge Boggs soon follows the example of his colleagues.

EYE ON WASHINGTON

Cert. Denials for Two Key Takings Cases

In addition to the *Lingle* ruling, on May 23 the U.S. Supreme Court issued an order denying review in two very important takings cases.

In the first, *Avenal v. Louisiana*, 886 So.2d 1085 (La. 2004), the Supreme Court of Louisiana had nixed a $1.8 billion takings award to oyster fishers alleging that their state-issued oyster bed leases were devalued by a successful coastal restoration plan. The cert. denial leaves in place the Louisiana Supreme Court's very helpful discussion of the public trust doctrine as a defense to takings liability.

The second case, *Tien Fu Hsu v. Clark County*, No. 04-1282, involved a takings challenge to routine, federally mandated height restrictions around McCarran International Airport in Las Vegas. The cert. denial leaves undisturbed the Nevada Supreme Court ruling overturning a $22 million judgment.