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Takings Watch

CRC's Monthly Update on Regulatory Takings

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QUOTE OF THE MONTH

The original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used. * * * In fashioning modern takings jurisprudence, the Supreme Court has essentially ignored the original understanding of the Takings Clause.

William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 782, 803 (1995)

FEATURE CASE

***Rith Energy, Inc. v. United States* (Fed. Cir. Nov. 5, 2001)**

When government attorneys hunt for favorable regulatory takings precedent, they typically don't start with the U. S. Court of Appeals for the Federal Circuit, which has handed down several notable clunkers over the years. But in *Rith Energy, Inc. v. United States*, No. 99-5153, 2001 WL 1380899 (Fed. Cir. Nov. 5, 2001) (on petition for rehearing), the Federal Circuit favorably interpreted the Supreme Court's recent ruling in *Palazzolo v. Rhode Island* and provided helpful guidance on a broad range of issues, including the *per se* rule under *Lucas*, the parcel-as-a-whole rule, and the role of expectations in takings analysis.

Rith claimed that the United States effected a regulatory taking by revoking its mining permit after it had mined about 35,700 tons of coal, roughly nine percent of what it expected to mine from its coal lease area. The government revoked the permit to protect surrounding communities from harmful runoff. In May 2001, the Federal Circuit affirmed the trial court's grant of summary judgment to the government. (*See* 247 F.3d 1355.)

Rith then filed a petition for rehearing in light of the Supreme Court's June 2001 ruling in *Palazzolo*. The Federal Circuit's most recent opinion responds to that motion and provides one of the first comprehensive discussions of *Palazzolo*. The Federal Circuit stressed that "*Palazzolo* is distinctly unhelpful to Rith" on its *per se* claim under *Lucas*, stating: "The Supreme Court held that because Mr. Palazzolo retained some economic value in the regulated property, the denial of a building permit in Mr. Palazzolo's case did not constitute a categorical taking." Because Palazzolo's *Lucas* claim failed even though he alleged a 94% loss in value, Rith's *Lucas* claim failed as well notwithstanding an alleged 91% value loss.

Rith argued that the amount of coal it mined prior to the permit revocation should not be considered in evaluating its takings claim, but the Federal Circuit responded that it would be "artificial" to divide the interests in the coal lease in this way. This ruling reaffirmed the court's earlier conclusion that the parcel-as-a-whole requires analysis of Rith's entire bundle of property rights in the coal lease. The *Rith* Court also ruled that expectations remain relevant to takings analysis after *Palazzolo*, citing Justice O'Connor's concurrence for the proposition that the relevance of expectations is "well-settled." The Court concluded by noting that the exercise of the police power to address potential harm to a community "is the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations."

At the same time the panel issued its recent clarification, the full circuit denied en banc review, which means that absent review by the Supreme Court (which seems unlikely), this is the final word on *Rith Energy*. All in all, *Rith Energy* should prove to be quite useful to government attorneys called upon to explain the meaning of *Palazzolo* and defend community rights against takings challenges.

ON THE HORIZON — More on IOLTA

In our October "On the Horizon," we predicted that the U.S. Supreme Court would soon jump back into the dispute over "Interest on Lawyers Trust Accounts" (IOLTA) programs in view of the Fifth Circuit's recent ruling invalidating the Texas IOLTA program under the Takings Clause. Supreme Court review now is looking even more likely because on November 14, 2001, the Ninth Circuit issued an en banc ruling that squarely conflicts with the Fifth Circuit's decision, rejecting a takings challenge to Washington State's IOLTA program by a vote of 7-4. *Washington Legal Found. v. Legal Found. of Washington*, No. 98-35154, 2001 WL 1412787. Stay tuned!

EYE ON WASHINGTON

Are Conservatives Finally Starting to Listen?

Many conservatives are faced with a striking dilemma in the takings debate. They push for an aggressive application of the Takings Clause, but at the same time they denounce judicial activism and insist that the proper role of judges is to interpret the law, not make it up as they go along.

CRC and others long have argued that the so-called property rights movement is advocating blatant, improper judicial activism that contravenes the original understanding of the Fifth Amendment, as well as principles of federalism and separation of powers. In a 1998 report called "The Takings Project" (http://www.communityrights.org/takproj.html), CRC chronicled how Professor Richard Epstein and other conservative legal theorists have been using the courts to advance an activist reading of the Takings Clause, which, in Professor Epstein's words, renders "constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments [and] progressive taxation." More recently, in a 2001 report called "Hostile Environment" (http://www.communityrights.org/reportmain.html), CRC described how activist judges are misusing the Takings Clause and other constitutional provisions to undermine our nation's basic environmental protections.

It appears as though some conservatives are finally starting to listen, and even welcome debate on this issue. The Federalist Society, an influential group of conservative and libertarian legal scholars and practitioners, held a panel discussion on this very question at its November 17 National Lawyers Convention. The panel, which included CRC's Executive Director Doug Kendall, addressed the topic: "Property Rights Protection: Judicial Activism or a Return to First Principles?" (visit www.communityrights.org to read Doug's remarks). It is unlikely that any of the attendees experienced a Damascus-road conversion, but discussion of the issue provides hope that at least some of these conservative lawyers will see the hypocrisy behind their simultaneous call for judicial restraint and Takings Clause activism.

OUTRAGE OF THE MONTH — Will the Real Michael Berger Please Stand Up?

The property-rights movement is not known for its true-blue consistency. But Michael Berger -- counsel of record for the landowners in the *Tahoe* moratorium case pending before the U.S. Supreme Court (see July 2001 Takings Watch) -- is setting a new standard for 180-degree switcheroos.

Mr. Berger's cognitive dissonance arises out of the Supreme Court's ruling in *First English Evangelical Lutheran Church v. County of Los Angeles* (1987), which holds that where a court finds a regulatory taking, invalidation by itself is not a sufficient remedy. In other words, just compensation must be paid for the period of time the regulation was in effect. The ruling, however, is silent on the question of when a regulation constitutes a taking because the *First English* Court assumed *arguendo* that the regulation before it worked a taking. Indeed, the *First English* Court stated unequivocally that the lower court rulings had "isolat[ed] the remedial question for [its] consideration." On remand, the state court concluded that the challenged regulation did not constitute a compensable taking.

Not letting the truth stand in the way of a good story, Mr. Berger argues in his *Tahoe* brief that *First English* worked a sea change in liability standards for regulatory takings. He reads the case as holding that any temporary development delay, no matter how reasonable, can constitute a compensable taking. Never mind the fact that the *First English* Court defined temporary takings, not as temporary restrictions on land use, but rather as "those regulatory takings which are ultimately invalidated by the courts." The Tahoe Regional Planning Agency does a masterful job of rebutting Mr. Berger's nonsense, showing that *First English* has nothing to do with liability standards, but instead is a case about remedies.

So far, this sounds like nothing more than another distortion of the case law by lawyers for the property-rights movement. But here's the kicker. Mr. Berger was also counsel of record for the landowners in *First English*, and when that case was argued before the Court, he had a much narrower view of its significance. In his brief on the merits in *First English*, Mr. Berger insisted -- in a major heading of the brief, no less -- that "The Only Issue In The Case At Bench Is The Proper Remedy For A Regulatory Taking." He also emphasized in his *First English* brief that "this case contains no issue of whether a taking occurred." CRC highlighted this anomaly in its amicus brief in the *Tahoe* case filed on behalf of state and local officials across the country.

It is not entirely clear when Mr. Berger changed his mind and mistakenly concluded that *First English* goes beyond remedial issues and works a sea change in liability standards. When the Court rules in the *Tahoe* case, it should escort him back to his original, narrow, and correct reading of *First English*.