November 2003
Vol. III, No. 11

Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Georgia High Court Rejects Takings Challenge, Limits *Nollan/Dolan* Review

Greater Atlanta Homebuilders Ass'n v. DeKalb County,
2003 WL 22532675 (Ga. Nov. 10, 2003)

Just as hard cases make bad law, straightforward cases can often produce some of the soundest, clearest analysis in the law. In somewhat predictably rejecting a takings challenge to a municipal tree ordinance, the Georgia Supreme Court issued an important decision that touches on the limits of *Nollan/Dolan* review and the importance of the parcel-as-a-whole rule. The decision is a welcome contrast to last month's Feature Case, *Coast Range Conifers*, in which an Oregon appellate court rejected the parcel-as-a-whole rule, potentially subjecting municipalities in the state to sweeping takings liability.

The challenged tree ordinance conditions new development permits on the submission of a tree survey and imposes various preservation and replacement requirements. The Georgia Supreme Court rejected the homebuilders' facial takings claim because they failed to prove that the ordinance "does not substantially advance legitimate state interests" or "denies an owner economically viable use of his land." The court concluded that the tree ordinance does not destroy the homebuilders' ability to develop their lands but merely imposes some additional management costs that are not sufficient to sustain a takings claim.

The homebuilders argued that each tree was a separate piece of real property, but the court flatly rejected their attempt to ignore the parcel-as-a-whole rule and divide the property into small parcels for takings purposes. Moreover, the court declined to extend *Dolan*'s rough proportionality test to the tree ordinance because *Dolan* involved an as-applied challenge to a land dedication requirement and was therefore "inapposite" to run-of-the-mill exactions.

With cases involving the parcel-as-a-whole rule and *Dolan* review still percolating through the courts, keep this Georgia case in mind for supplemental authority.

ON THE HORIZON

Battle Lines Drawn in Public Use Debate

City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. Sept. 8, 2003)

Municipalities have successfully used the eminent domain power to achieve community redevelopment goals since the U.S. Supreme Court approved the practice in the 1954 case of *Berman v. Parker*, but recently libertarian groups and property rights advocates have begun arguing in court that many redevelopment plans do not satisfy the Constitution's public use requirement.

The war on eminent domain is being waged primarily by the libertarian Institute for Justice, which earlier this year issued a report, *Public Power, Private Gain* (http://www.castlecoalition.org) that argues that many community redevelopment programs amount to an impermissible compelled transfer of property between private parties. The group is bringing cases around the country designed to test the limits of the public use doctrine by pitting sympathetic homeowners with well-kept properties against the efforts of municipalities to redevelop older and sometimes blighted neighborhoods.

In *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, the Nevada Supreme Court rejected the Institute's argument as *amicus curiae* that condemnation of the landowners' property to permit a partnership of casinos to build a parking garage was not an appropriate public use. The garage, which would serve both the casinos and a new pedestrian mall and tourist attraction, was part of a major development project intended to revitalize a long-blighted area of downtown Las Vegas. The court held that public ownership of the garage is not a prerequisite for public use and that "so long as a redevelopment plan, or any individual redevelopment project, bears a rational relationship to the eradication of physical, social or economic blight, it serves a public purpose within the power of eminent domain."

The property owners and interest group *amici* intend to seek review of the *Pappas* ruling by the U.S. Supreme Court and are reportedly hoping for a "landmark decision" on what constitutes a public use. We doubt very much that the court will even hear their case. But given the time and money the Institute is devoting to this topic, government attorneys would be well advised to keep an eye on this issue.

EYE ON WASHINGTON

Does the Takings Clause Guarantee a Reasonable Rate of Return?

Cienega Gardens v. United States, 331 F.3d 1319 (Fed Cir. June 12, 2003)

The Federal Circuit has issued clunkers before—cases such as *Florida Rock v. U.S.* and *Loveladies Harbor v. U.S.*—and, happily, few courts around the country have taken much notice. Let's hope a similar fate awaits the court's recent decision to award compensation to owners of property serving low-income tenants who argued that restrictions on their ability to prepay their mortgages—and thereby escape obligations to rent their properties to low-income tenants—constituted a taking.

In the late 1960s, the owners of the Cienega Gardens apartments obtained low-interest forty-year mortgages with the assistance of the Department of Housing and Urban Development. In return, the owners agreed to rent a percentage of their property to low-income tenants. Regulations in effect at the time allowed the owners to prepay their mortgages and be free of restrictions after twenty years, but they also allowed for changes to the regulations "at any time and from time to time." As the twenty-year mark approached, Congress passed legislation to preserve affordable housing that prohibited prepayment of mortgages under this program. The owners brought suit alleging contractual violations and a temporary taking of their property.

In 2001, the Federal Circuit rejected Cienega Gardens' *per se* taking claim but remanded for consideration of their claim under *Penn Central.* The Court of Federal Claims dismissed the case, but this summer the appellate court held that the claimants had a property interest in the contractual right to prepay and exit the housing program. Notwithstanding the explicit regulatory provision allowing for a change in the regulatory program, the Federal Circuit held that the plaintiffs had reasonable, investment-backed expectations in the terms of their mortgage contracts. Even more remarkably, the Court focused entirely on the owner's estimated loss in annual profits, rather than the diminution in their property value (estimated by the government to be only 35%), in finding that Cienega Gardens had suffered sufficient economic loss to maintain a *Penn Central* claim.

Interestingly, a different Federal Circuit panel on the same day decided a case on the similar facts, *Chancellor Manor v. United States*, 331 F.3d 891, but declined to find a taking and indicated, without prejudging the outcome, that the government might be able to defend itself against a *Penn Central* claim on remand.

QUOTE OF THE MONTH

A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

OUTRAGE OF THE MONTH

Property Rights "Scholar" Caught Plagiarizing PR Firm

Doesn't it seem like the property rights movement makes the same tired arguments over and over again? Now we have the explanation.

Samuel Staley is the president of a property rights "think tank" called the Buckeye Institute and a frequent apologist for sprawl. Recently, Staley and his colleague Joshua Hall submitted an op-ed to the *Columbus Dispatch* suggesting that Ohio privatize its workforce to save money. An alert reader noticed that the same basic text turned up two weeks earlier in a *Baltimore Sun* op-ed by Geoffrey Segal of the libertarian Reason Public Policy Institute.

Coincidence? No. In a meeting with the *Dispatch*'s editorial page editor, Staley admitted that the research and text of his op-ed came from an Alexandria, Virginia, PR firm that prepares such pieces for people who will submit them (or a version of them) to newspapers in their columns.

Staley has now been barred from publishing again on the opinion pages of the *Columbus Dispatch*. For the full story, go to http://libpub.dispatch.com/cgi-bin/documentv1?DBLIST=cd03&DOCNUM=43688&TERMV=41566:6:46754:6:51930:6:.