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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Oregon Supreme Court Invalidates Measure 7

League of Oregon Cities v. State of Oregon, 2002 WL 31235582 (Oct. 4, 2002)

The Oregon Supreme Court dealt property rights radicals a serious set back this month, overturning a referendum measure that required the government to pay property owners when state regulations affected their property values. The extreme proposal was a sleeper, one of 26 measures to appear on the ballot in 2000, and its unexpected passage stunned planners in Oregon and around the country.

Writing for a unanimous court, Chief Justice Wallace Carson held that the ballot measure impermissibly combined a property rights compensation proposal with another proposal that infringed First Amendment guarantees because the measure denied compensation to businesses restricted from selling sexually explicit materials.

This combination of property rights and First Amendment issues ran afoul of Oregon rules requiring that ballot measures be voted on separately unless they are closely related. "By incorporating both types of substantive changes that are not closely related, Measure 7 makes 'two or more amendments' to the Oregon Constitution that the voters were required to have voted on separately," the court held.

Had it taken effect, Measure 7 would have been the most sweeping compensation provision ever enacted by the voters of a state, requiring compensation for virtually all diminutions of value related to the state's regulatory efforts. State analysts estimated the measure could have cost Oregon governments as much as $5.4 billion. Moreover, it threatened to undermine regional planning efforts in Portland, whose urban growth boundary program is considered by many a model for the nation.

Thanks to the court's decision, Oregon planning is alive and well for now, but supporters of Measure 7 can be expected to push similar referenda in the future. Oregon's episode should serve as a reminder of the constant vigilance required to defeat radical property rights measures. Indeed, a similar referendum is on the ballot this year in Nevada County, California.

ON THE HORIZON

IOLTA Teed Up for the Supreme Court

It is unlikely that any case this Supreme Court term will match the legal firepower assembled on the opposing sides in *Washington Legal Foundation v. Legal Foundation of Washington* (On The Horizon, June 2002), the only takings case the Court has decided to review so far this year.

Leading Washington Legal Foundation's crusade against Interest on Lawyer Trust Account (IOLTA) programs is Reagan Administration Solicitor General Charles Fried. Weighing in on the other side are three former Solicitors General (Seth Waxman, Walter Dellenger, & Drew Days), preeminent Supreme Court advocate Carter Phillips, and many of the nation's most prestigious law firms. This star-studded lineup ensures a lively and interesting oral argument before the Supreme Court on December 9th.

The impressive assemblage of legal talent presented a quandary for Community Rights Counsel. What could we say on behalf of our clients -- the National League of Cities, International Municipal Lawyers Association, and Trial Lawyers for Public Justice -- that would do more than echo the arguments made by our more famous brethren? We responded by focusing our brief exclusively on a sometimes overlooked, but potentially dispositive, question: if a taking occurs, but causes no economic harm, is there a violation of the Just Compensation Clause. We argue "no" based on a straightforward reading of the Fifth Amendment (which bars only takings without just compensation) and precedent from numerous physical takings cases. Because IOLTA programs use only those funds that could not otherwise generate net interest, they cause no economic harm, and thus just compensation for any alleged taking would be zero. Hence, no violation.

The Legal Foundation of Washington's brief (pp. 34-35) directs the Supreme Court's attention to our brief's discussion of this critical issue and informs the Court that because this issue is so straightforward, "the Court may wish to consider only the just compensation question and affirm on that basis." Sound advice in our opinion.

(To read CRC's IOLTA brief, visit www.communityrights.org/legalresources/crcbriefs/indexofbriefs.asp)

OUTRAGE OF THE MONTH

An Argument for the Birds

At CRC, we are all for military readiness, and we believe that land use and environmental laws should be flexible enough to ensure a strong national defense. That said, in *Center for Biological Diversity v. Pirie*, 191 F.Supp.2d 161 (D.D.C. 2002), the Bush Administration went off the deep end in seeking to exempt certain Department of Defense activities from federal environmental protections.

At issue was the venerable Migratory Bird Act of 1918, one of the oldest and least controversial environmental statutes on the books. As Rep. Dingell has observed, "We have fought two World Wars, the Korean War, Vietnam and the Persian Gulf War with this law in place, and there is no demonstrated need to exempt the Department of Defense now."

When environmental groups and bird-watchers filed a lawsuit under the Act claiming that Navy bombing exercises in the Pacific were killing native bird populations, the U.S. Department of Justice responded by adopting some jaw-dropping arguments advanced in an amicus brief whose filing was rejected by the court. DOJ maintained that live-fire exercises protect wildlife by keeping people off the island. DOJ also contended that bird-watchers would actually benefit from decimated bird populations, asserting: "In some respects, bird-watchers get more enjoyment spotting a rare bird than they do spotting a common one."

Federal District Court Judge Emmet Sullivan pointedly instructed DOJ lawyers to "refrain from making or adopting such frivolous arguments in the future." We hope they get the message.

QUOTE OF THE MONTH

In this case, the restrictions that background principles of Washington law place upon such ownership are found in the public trust doctrine. * * * Relevant here, the jus publicum, or public trust doctrine, is the right of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. *Esplanade Properties, LLC v. City of Seattle*, 2002 WL 31190846 (9th Cir., Oct. 3, 2002) (denying a *per se* takings claim under *Lucas* because the public trust doctrine acted as a background principle) (citation and internal quotes omitted).

EYE ON WASHINGTON

More Takings Challenges to the War on Terrorism

In the wake of the tragic events of 9-11, we reported on a takings challenge to federal efforts to protect national security interests (Sept. 2001 Feature Case). It is no surprise that we continue to see such cases.

The federal district court for the District of Columbia recently rejected a takings claim and other challenges to the Treasury Department's designation of a nonprofit group as a terrorist organization and the freezing of its property under the International Emergency Economic Powers Act. See *Holy Land Foundation for Relief and Development*, 2002 WL 1818485 (Aug. 8, 2002). The designation was based on a determination that the foundation has acted on behalf of Hamas, a notorious terrorist organization. The record showed that the foundation had financial ties with Hamas since 1989; its leaders have actively met with Hamas leaders; it funds Hamas-controlled organizations; and it provides financial support to the families of captured or killed Hamas terrorists. The designation occurred just three months after the September 11 attacks, and shortly after the President had declared a national emergency to address potential attacks and curtail terrorist financing.

Although the court opined that it probably lacked jurisdiction to entertain the takings claim (since the Tucker Act funnels most monetary claims against the U.S. to the Court of Federal Claims), it nonetheless addressed the merits and ruled that the claim fails. Because the eight-month blocking order does not vest the blocked assets in the government, it is a mere temporary deprivation that does not work a taking. The Court concluded, however, that the plaintiff might "some day have a credible argument that the long-term blocking order has ripened into a vesting of property in the United States," at which point a more viable claim might arise. The court also rejected the plaintiff's claim under the Religious Freedom Restoration Act, holding that it had failed adequately to allege a substantial burden on the exercise of religion.

Expect similar takings cases to be brought as the War on Terrorism continues.