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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Oregon Appeals Court Rejects Whole-Parcel Rule

Coast Range Conifers, LLC v. Oregon, 76 P.3d 1148 (Or. Ct. App. 2003)

On September 24, the Oregon Court of Appeals issued a stunning takings ruling that flatly rejects the parcel-as-a-whole rule, potentially opening up municipalities in the state to takings liability for ordinary zoning and planning activities.

Coast Range Conifers sought a permit to log a 40-acre tract of forestland that was later identified as a nesting site for bald eagles, a "threatened" species under the federal Endangered Species Act. The state forester permitted logging on 31 acres but denied the company a permit to log the nine acres closest to the nesting site. After losing an appeal to the Board of Forestry, the company filed an inverse condemnation action. The trial court dismissed the company's claims, but the appellate court reversed in a radical ruling that turns Oregon takings jurisprudence on its head.

The parcel-as-a-whole rule is a bedrock principle of takings law that protects government from liability for common land use regulation. The Supreme Court has repeatedly reaffirmed the proposition, first articulated in *Penn Central*, that "'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."

The Oregon appellate court, however, chose to focus only on the nine acres restricted by regulation, holding that "although the Oregon courts have not been exactly generous in their explanations * * * they have effectively rejected" the whole-parcel rule. In so holding, the court relied heavily on a questionable reading of *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411 (Or. 1997). The appellate court also ignored unambiguous federal constitutional precedent because it concluded that the parallel takings provisions of the federal and state constitutions do not have the same meaning.

The importance of the parcel-as-a-whole rule—and the potential impact of this case on municipal planning—cannot be overstated. If takings claimants can win compensation for infringement of individual sticks in the proverbial bundle of rights that characterize property, no zoning and planning law is immune from potential challenge. We'll keep you posted on the likely appeal.

QUOTE OF THE MONTH

"[U]nder petitioners' [segmentation] theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987).

EYE ON WASHINGTON

House Panel Reviews Takings Executive Order

Property rights advocates and environmentalists debated a new General Accounting Office study on the implementation of the much-criticized Reagan Takings Executive Order before a panel of the House Committee on the Judiciary October 16, possibly teeing up a renewed effort to revise the order and implementing guidelines.

UPDATE

In our July 2003 Eye on Washington, we reported on developer efforts to seek U.S. Supreme Court reconsideration of *Williamson County* through a petition for certiorari in *Kottschade v. City of Rochester*. On October 6, the Court denied the petition.

Roger Marzulla of Defenders of Property Rights testified that takings law's evolution since President Reagan issued the order in 1988 required new guidance and urged Congress to pass legislation making the executive order legally enforceable. By contrast, John Echeverria of the Georgetown Environmental Law and Policy Institute told the panel the order was "fundamentally flawed from its inception" and said the GAO, rather than focusing on the sufficiency of implementing guidance, "should be asking whether Executive Order 12630 should simply be scrapped." The GAO report and witness testimony are available on the panel's website — http://www.house.gov/judiciary/constitution.htm.

OUTRAGE OF THE MONTH

Let's Play Hardball

We thought we had seen it all. But the recent strong-arm tactic by the claimant's attorney in *McCarran International Airport v. Sisolak*, No. 41646 (Nev. S. Ct.) takes the cake.

Sisolak involves a takings challenge to county height restrictions around McCarran International Airport. The trial court awarded the landowner more than $16.6 million even though the County previously approved a development plan for the land that included a four-story resort hotel, a 33,050 square foot casino, and other structures. In light of the potential ramifications of an adverse ruling on appeal, several *amici* are supporting the defendants, including the American Planning Association (represented by Community Rights Counsel).

After the amicus briefs were filed, the claimants' counsel filed motions to conduct discovery on *amici*. That's right, discovery on *amici*, while the case is pending on appeal before the state supreme court. The defendants have filed hard-hitting oppositions representing to the court that *amici* forcefully object to this transparent effort to chill amicus participation. The court should summarily deny the motions.

ON THE HORIZON

Courts Consider Takings Challenges to California Hotel Ordinances

California cities in the San Francisco Bay area have tried to address blight, staggering home prices, and lack of affordable housing by imposing maintenance and other restrictions on hotels, particularly those that offer rooms for long-term rent. These provisions are under attack in the courts, but a recent Ninth Circuit decision rejecting a takings claim against the City of Oakland provides a welcome boost to these planning efforts.

In *Hotel & Motel Association of Oakland v. City of Oakland*, 344 F.3d 959 (9th Cir. Sept. 17, 2003), the Ninth Circuit held that Oakland's maintenance and habitability requirements substantially advance a legitimate government interest in preserving housing stock and reducing crime and safety concerns associated with run-down properties. The court rejected as unripe a facial takings claim because the association never pursued compensation through state courts or administrative procedures. The court also rejected the association's due process and equal protection challenges.

This support by the Ninth Circuit for Oakland's law will hopefully mean victory for another hotel ordinance case percolating through the courts. In *San Remo Hotel v. City & County of San Francisco*, 41 P.3d. 87 (Cal. 2002), the California Supreme Court gave local governments a major victory in 2001, when it upheld laws restricting the conversion of hotel-based affordable housing to other uses and broadly affirmed the right of governments to impose impact fees and other mitigation measures on new development. Now the Ninth Circuit must decide whether to permit San Remo to bring a takings claim in federal court despite having unsuccessfully pursued an identical claim in state court.

The *San Remo* appeal follows on the heels of a troubling Second Circuit ruling in *Santini v. Connecticut Hazardous Waste Management Service* (our Sept. 2003 Feature Case), which allows takings claimants to avoid claim and issue preclusion altogether by reserving their federal takings claims when first litigating in state court. The Ninth Circuit's decision thus could be critical to ensuring that takings claimants cannot get a second bite at the takings apple and burden municipalities by refiling identical claims in federal court. CRC will soon file a brief in *San Remo*, and we'll keep you apprised of developments.

UPDATE

Last month's Outrage reported on a paper by Professor Cass Sunstein and others that reached the counterintuitive conclusion that the party affiliation of judges makes no difference in the outcome of takings cases. In response to a letter expressing our concerns, we received a very generous reply from Professor Sunstein, thanking us for our views and indicating that he will take them into account as he prepares the final version of the paper.