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Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Eminent Domain, Imminent Decision

The U.S. Supreme Court has agreed to revisit the issue of eminent domain, granting cert. in *Kelo v. City of New London*, No. 04-108. A ruling against New London could dramatically curtail the ability of local governments to revitalize distressed cities.

The Fifth Amendment allows a government to compel a reluctant landowner to sell private property, but only for "public use." Common public uses include roads, parks, schools, and blight clearance. Some governments have used the power more broadly, however, and the Supreme Court has previously allowed non-blighted property to be condemned and transferred to another private owner if a state or local legislature reasonably deems that transfer to be for public use.

The *Kelo* case arose out of the dire economic condition of New London, Connecticut in the late 1990s. The city's unemployment rate was almost double that of the state, it had been losing residents for three decades, a major employer had left the town in 1996, and the local tax base was anemic. When the Pfizer corporation decided to locate a major facility in New London, local officials planned to turn an adjacent waterfront neighborhood into a site for a hotel, health club, condominiums, office towers, parking facilities, and a public river walk that it hoped would create jobs, generate more tax revenues, energize the city economically, and encourage New Londoners to enjoy the river as a public amenity.

The city sought to condemn homes in the Fort Trumbull neighborhood to clear the way for this new project. A handful of the affected homeowners objected, saying that a greatly increased tax base and more than a thousand new jobs were insufficient to clear the Constitution's public use hurdle. The Connecticut Supreme Court sided with New London, 843 A.2d 500 (Conn. 2004), and the homeowners petitioned the U.S. Supreme Court for review.

Eminent domain has played a crucial role in major waterfront redevelopments, ballpark construction plans, and neighborhood revitalization. If the Court backtracks on the scope of eminent domain, state and local officials will lose a key economic development tool. Worse, residents of many distressed cities will be less likely to enjoy the benefits—like new jobs, better services, and more amenities—that arise out of the careful, intelligent use of eminent domain. Expect a decision next spring.

EYE ON WASHINGTON

U.S. Supreme Court to Hear *Chevron* "Substantially Advance" Case

On October 12, the U.S. Supreme Court agreed to review *Lingle v. Chevron U.S.A., Inc.*, No. 04-163, which presents the question of whether a regulatory taking occurs where government action does not substantially advance a legitimate state interest.

The *Chevron* case—styled below as *Chevron v. Bronster*, 363 F.3d 846 (9th Cir. 2004)—involves a takings challenge to a Hawaii law designed to promote competition in the retail gasoline market. To ensure continued price competition at the pump, Hawaii lawmakers passed Act 257, which prohibits oil companies from converting independent lessee gas stations into company-operated gas stations. The law also places a ceiling on rents charged by oil companies to prevent them from driving independent lessees out of business. Chevron challenged Act 257 as an uncompensated taking of property because, in its view, the rent cap fails to advance a legitimate government purpose.

The trial court gave no deference to the State's legislative judgment and held that Act 257 works an unconstitutional taking of property because it does not substantially advance a legitimate public interest. The Ninth Circuit affirmed, applying heightened scrutiny, rejecting the familiar rational basis test typically applied under the Due Process Clause, and giving no deference to the views of the State legislature regarding the wisdom of the law. In essence, the Ninth Circuit and trial court invalidated Act 257 because they disagreed with the State's elected lawmakers that the measure would advance the interests of Hawaii consumers. The courts articulated a naked preference for Chevron's economic views and rejected the State's legislative judgment as to the efficacy of Act 257, much as the Court in *Lochner v. New York*, 198 U.S. 45 (1905), concluded that New York's worker protection laws were unnecessary and unwise.

Community Rights Counsel filed an amicus brief in support of Hawaii's petition for certiorari on behalf of state and local organizations, and will do so on the merits as well.

OUTRAGE OF THE MONTH

Louisiana Court Nixes $1.8 Billion Takings Award to Oyster Fishers
Avenal v. The State of Louisiana, No. 2003-C-3521 (La. Oct. 19, 2004)

It's not often we write about positive takings developments in our Outrage of the Month column, but the $1.8 billion judgment in the case of *Avenal v. State of Louisiana* was so outrageous, we can't help ourselves—especially now that Louisiana's high court has agreed. The court's decision overturns the earlier verdict and reestablishes the importance of the public trust doctrine.

The stunning award to a group of oyster fishers was the result of class-action lawsuits alleging that the value of their state-issued oyster bed leases was wiped out by a successful coastal restoration plan. The restoration plan, which ironically was supported by the oyster industry generally, involved diverting freshwater to reduce artificial salinity in Breton Sound caused by Mississippi River levee systems. The change in water salinity has improved oyster conditions in some areas, but reduced oyster viability in the areas of the claimants' leases. Combined with another multi-million dollar verdict, state courts had awarded some 200 claimants more than $2 billion, an amount equal to one eighth of the state's budget. The takings awards, the largest in U.S. history, were worth more than the total value of all oysters harvested in Louisiana since the state created its leasing program in 1902.

The Louisiana Supreme Court reversed because the coastal restoration project fell "precisely within the public trust doctrine." The court recognized that the "public resource at issue is our very coastline, the loss of which is occurring at an alarming rate." Coastal restoration, the court noted, is not merely an environmental goal but a critical protection against hurricanes and storms that threaten lives and property.

Notwithstanding the government's ultimate victory, the outrage here is that such a massive, meritless takings claim could be allowed to chill desperately needed coastal restoration for so long.

QUOTE OF THE MONTH

"[T]he implementation of the Caernarvon coastal diversion project fits precisely within the public trust doctrine. * * * The State simply cannot allow coastal erosion to continue; the redistribution of existing productive oyster beds to other areas must be tolerated under the public trust doctrine in furtherance of this goal."

Avenal v. Louisiana (La. Oct. 19, 2004).

ON THE HORIZON

Nevada High Court Ruling Will Assist Future Airport Expansions

Because many major airports were designed decades ago and did not adequately anticipate future growth, they must expand to keep up with increased demand. A recent Nevada ruling will assist local officials who face regulatory takings challenges to these expansion efforts.

In *County of Clark v. Tien Fu Hsu*, No. 38853 (Nev. Sept. 30, 2004), the Nevada Supreme Court overturned a $22 million takings judgment in a challenge to height restrictions around McCarran International Airport, rejecting the claimants' per se, physical invasion theory of liability and ruling that their regulatory takings claim under *Penn Central* is unripe.

The height restrictions at issue covered the "transition zone," a federally mandated buffer zone along the approach path that provides an extra margin of safety. These restrictions did not authorize any physical invasion of the transition zone, but rather prohibited structures above a certain height in case a plane accidentally left the approach path. A group of landowners challenged the restrictions, alleging that the rules worked a physical taking. The trial court agreed.

On appeal, the Nevada Supreme Court held that "a rule supporting the notion that airport height-restriction ordinances, of necessity, effect per se physical takings, is overbroad in its reach" and embraced what it called "the modern trend" that such ordinances "as a valid exercise of police power, are not the definitional equivalent of a per se physical taking." The court noted that the property could still be further developed and that the landowners had not availed themselves of variance procedures that might yet permit taller structures.

Takings challenges involving airports are being brought across the country, and this case will be helpful precedent for municipalities. Community Rights Counsel filed an amicus brief in the case on behalf of the American Planning Association and the Tahoe Regional Planning Agency.