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Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel

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FEATURE CASE

Takings and National Security

Air Pegasus of D.C., Inc. v. United States

We have previously reported on efforts by takings claimants to seek compensation based various national security measures imposed after 9-11. The trend continued in *Air Pegasus of D.C., Inc. v. United States*, No. 04-5108 (Fed. Cir., Sept. 21, 2005), in which owners of a heliport, supported by amicus Defenders of Property Rights, claimed that FAA air travel restrictions near the U.S. Capitol worked a compensable taking of the heliport.

Although some of the initial flight restrictions after 9-11 in the Washington, D.C. area were subsequently relaxed, much of the area's airspace remains off-limits to commercial aircraft, including the area leased by Air Pegasus to operate its heliport. In 2003, Air Pegasus filed suit against the United States. The U.S. Court of Federal Claims granted the government summary judgment. On appeal, the Federal Circuit affirmed in a 2-1 ruling.

The appeals court observed that the FAA restrictions were restrictions on the operation of aircraft, and thus Air Pegasus's economic injury was not the result of any regulation of Air Pegasus's property, but rather the more attenuated result of regulation of other people's property. The court concluded that under these circumstances, Air Pegasus did not have a viable takings claim because consequential damages resulting from lawful government action cannot form the basis of a compensable taking.

In so ruling, the court relied on *Omnia Commercial Co., v. United States*, 261 U.S. 502 (1923), in which the claimant had a contractual right to purchase steel from a steel company at a sub-market price that would have generated a substantial profit for the claimant. The federal government then requisitioned all of the steel plate produced by steel company and directed it not to perform its contract with the claimant. The Supreme Court rejected the clamant's takings challenge, even though the claimant had a property right in its contract, because an injury to one's property interest does not necessarily constitute a taking of the interest. Moreover, to the extent Air Pegasus claimed a taking of a right to access navigable airspace from its heliport, background principles of federal property law indicate there is no private property right in the navigable airspace.

EYE ON WASHINGTON

CRC's Reports on the Environment, Judicial Junkets Discussed at Roberts Hearings

Citing a major report and other materials co-authored by Community Rights Counsel, on September 15 former EPA Administrator Carol Browner testified before the Senate Judiciary Committee on the nomination of John Roberts to be Chief Justice of the United States. While she took no position on the nomination, she stressed the Supreme Court's critical role in determining the constitutionality of federal, state, and local environmental safeguards. And she urged the Senate to give careful attention to his views on a wide range of environmental issues, including Congress's authority to enact environmental protections under the Commerce Clause, and the standing of citizens to vindicate protections for public health and the environment in federal courts.

During his questioning of the nominee, Senator Russ Feingold asked whether Roberts, as Chief Justice and head of the Judicial Conference, would seek to ban anti-environmental junkets for judges, an issue CRC has been investigating and analyzing for many years. Roberts agreed to study the issue, stating that it was "clear" that "special interests should not be permitted to lobby federal judges."

After careful review of the record, including the nominee's demonstrated commitment to precedent and the rule of law, CRC issued a press release indicating that despite certain environmental concerns, the record contains nothing disqualifying and Roberts should be confirmed. We wish the new Chief Justice well.

QUOTE OF THE MONTH

"If you look at what I've done since I took the judicial oath, that should convince you that I am not an ideologue, and you and I agree that that's not the sort of person we want on the Supreme Court."

John G. Roberts, Jr., testifying before the Senate Judiciary Committee

OUTRAGE OF THE MONTH
Local Officials as "Grassroots Tyrants"

The libertarian Institute for Justice (IJ), a prominent player in the so-called property rights movement and counsel for the *Kelo* landowners, recently referred to Community Rights Counsel as "probably the most pro-government public interest organization in the country."

Although the context makes clear IJ intended the remark as a slur, we wear it as a badge of honor. We take great pride in the work we do to defend state and local officials and the laws they enact to improve the quality of life in our communities. While we have a healthy respect for the potential for abuse that comes with any government power, we don't view local officials as the enemy, but as our neighbors, friends, and fellow citizens.

Not so with IJ. In fact, IJ invented a completely new term to describe local government: "Grassroots tyranny." The phrase refers to what IJ calls the "ever-expanding beast" of local government, which in IJ's world is populated by local officials with a "propensity" (not just an occasional lapse, mind you, but a propensity) to violate constitutional liberties. These "nameless, faceless bureaucrats" are plagued by "widespread corruption," and we (normal people) are "at their mercy".

Nonsense. By and large, local officials are the leading lights of our communities, and the municipal attorneys who represent them are the best the legal profession has to offer. Referring to them as "enemies" or "tyrants" is an outrage beyond comprehension, and yet IJ and like-minded outfits use this scandalous, attack-dog rhetoric as part of their everyday propaganda.

When you use the same phrase to describe both Osama Bin Laden and your local leaders, maybe it's time to expand your vocabulary, or to visit your town hall to get to know your elected officials.

ON THE HORIZON
The Takings Clause as Insurance Against Business Risk:
***Wensmann Realty, Inc. v. City of Eagan* (Minn. Ct. App.)**

On August 29, CRC filed an amicus brief on behalf of the League of Minnesota Cities in support of the City of Eagan in this takings challenge to the city's refusal to amend its Comprehensive Plan to allow for residential development on about 120 acres of land that has been used as a golf course since 1965.

The claimants would like to build 480 homes on the property because the existing golf course allegedly can no longer be run profitably due to increased competition and other factors. The City decided against amending its plan (and the longstanding zoning law underlying the plan) due to serious concerns regarding traffic risks, inadequate school capacity, harm to water quality, drainage problems, and wildlife loss. The trial court ruled that the city's action worked a compensable taking.

The trial court's decision is extraordinary. In the typical regulatory takings case, a landowner challenges a new regulation that restricts previously permissible uses of the land. It is virtually unprecedented, however, for a court to find takings liability where local officials refuse to amend Comprehensive Plan requirements that prevented the claimant from ever having a reasonable expectation to use the land in a manner inconsistent with those requirements.

Investments sometimes go bad due to changes in market conditions. In effect, the claimants are asking the state courts to use the Takings Clause to require Minnesota taxpayers to provide landowners with insurance against the risk of new competition and other marketplace developments that can transform seemingly sound investments into unprofitable ventures, or alternatively to compel local officials to abandon longstanding community protections in their comprehensive land-use plans.

In its amicus filing, CRC argued that the claimants had no objectively reasonable expectation of using the land at issue for residential development given the longstanding zoning and Comprehensive Plan provisions that prohibit such use. Moreover, it is reasonable to presume that the change in value was de minimis because the land's market value already would have been discounted to reflect the longstanding restrictions on residential development. We're hopeful the appeals court quickly reverses the trial court's double bogey.
