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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Second Circuit Gives Developer Second Bite at Takings Apple

Santini v. Connecticut Haz. Waste Mgt. Serv., 2003 WL 22020555 (2d Cir., Aug. 28, 2003)

In rejecting a developer's takings claim last month, the Second Circuit broke new procedural ground that is sure to heighten debate over when litigants can assert federal takings claims in the face of adverse state decisions.

Connecticut developer Evandro Santini sought compensation after the state's waste management agency announced that his property was under consideration for condemnation for location of a low-level nuclear waste disposal facility. Although the site was not chosen, Santini sued for $955,000 in compensation for the two-year period that construction and sales were hampered by the siting announcement.

Following the requirements of *Williamson County*, Santini filed a takings claim in state court, and the court rejected the suit on the merits. He then filed a federal claim in federal court. The Second Circuit held that where a landowner "reserves" the federal takings claim in state court, the reservation immunizes the claimant against not only claim preclusion, but also issue preclusion, effectively giving the claimant a second bite at the apple on issues already litigated and decided in state court. This ruling stands in stark contrast to *Dodd v. Hood River County*, where the Ninth Circuit held that a claimant can use a reservation to avoid claim preclusion but that issue preclusion still bars relitigation of specific issues already decided in state court. The *Santini* court failed altogether to address a point central to the *Dodd* ruling, the federal Full Faith and Credit Act, which requires federal courts to give state judgments the same preclusive effect that another court of that state would give the ruling.

Williamson County issues are central to a number of pending cases. For example, *Kottschade* is awaiting a Supreme Court ruling on the landowner's petition for certiorari (scheduled for conference later this month), and the *San Remo Hotel* case is now on appeal to the Ninth Circuit.

EYE ON WASHINGTON

Federal Circuit Rejects Oil Tanker Takings Claim

On September 9, in *Maritrans, Inc. v. United States*, 2003 WL 22076611, the Federal Circuit rejected the claims of tank barge owners who alleged that the double hull requirement of the Oil Pollution Act of 1990 worked a taking of their single hull barges. The law, enacted in the wake of the *Exxon Valdez* disaster, reduced the value of Maritrans' barges by 13.1 percent. Although the result is laudable, the court's reasoning is flawed in at least two respects.

First, the court rejected the government's position that the barge owners lacked a property interest in the use of the vessels in interstate navigation. That the owners had a property interest in the barges themselves was indisputable, but the Court muddled the more precise question of whether the barge owners had a cognizable interest in the use of the barges for the specific purpose at issue. Surprisingly, the appeals court upheld the trial court's finding that the law interfered with Maritrans' reasonable expectations notwithstanding the long history of heavy regulation in the industry.

What's more, the court failed to consider adequately the distinction between real and personal property under the Fifth Amendment. The government argued that the *Lucas* per se rule does not apply to personal property, relying on the *Lucas* court's holding that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." The Federal Circuit blithely responded that "tangible property may be the subject of a takings claim," without recognizing the important analytical distinctions that come into play when applying the *Lucas* per se rule.

The court will have a chance to address these important issues again in *Rose Acre Farms* (see Sept. 2002 *Takings Watch*) and other cases. They demand a more nuanced analysis.

QUOTE OF THE MONTH

"[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

OUTRAGE OF THE MONTH

Takings and Parties: A Skewed View from the Ivory Tower

Three academics, including Professor Cass Sunstein, have published a report concluding that while party affiliation correlates with how federal appellate judges rule on many issues, it plays no significant role in takings cases. The report (available at http://www.aei-brookings.org/publications/abstract.php?pid=374) concludes that "Republican and Democratic appointees vote essentially alike" in takings cases.

Our flabbers have never been so gasted. Consulting with other practictioners, we had a hard time thinking of a single, recent federal appeals court case finding a taking that did not involve a panel with a Republican majority. (We came up with one from 1992, *Nixon v. U.S.*, a D.C. Circuit ruling involving presidential papers.) Deep ideological division characterized *Tahoe-Sierra* in the Ninth Circuit, with the denial of rehearing en banc pitting Judge Alex Kozinski and three other Republican appointees against Judge Stephen Reinhardt and other Democratic appointees. The Fifth and Ninth Circuits produced party-line divisions in takings challenges to IOLTA programs. These and other rulings led us to question how the report could reach such a counterintuitive conclusion.

First, we believe the Paper's methodology underemphasizes the role of ideology by focusing on absolute numbers, disregarding the relative importance of individual cases. Suppose a balanced mix of judges were to reject takings challenges to 100 routine land-use decisions, but Republican-appointed judges sustained three takings challenges that gutted key protections for endangered species, wetlands, and public lands. The absolute numbers might suggest no significant ideological influence, but the results could constitute a radical revolution in the law.

Second, the results might well be skewed by the rules imposed on takings claimants under *Williamson County*. Developers frequently disregard these requirements, resulting in a large number of federal appellate rulings rejecting takings claims on procedural grounds. These procedural dismissals, however, are explained not by a lack of sympathy for takings claims on the merits, but by a desire to avoid premature adjudication.

Third, the Paper appears to disregard rulings from the Federal Circuit, the court with exclusive appellate jurisdiction over the vast bulk of takings challenges to federal protections. Those who litigate in the Federal Circuit know all too well that party affiliation plays a significant role in takings cases. The same ideological division holds true at the U.S. Court of Federal Claims. Consider the rulings by this court that federal wetland protections constitute a taking; all but one were rendered by a single Republican-appointee, Judge Loren Smith.

We have expressed these concerns in a letter to Professor Sunstein and eagerly await his response.

ON THE HORIZON

Court Rules for Landowner in "Unique" Precondemnation Case

In *Johnson v. City of Minneapolis*, 667 N.W.2d 109 (Minn. 2003**),** the Minnesota Supreme Court awarded landowners $4.3 million last month due to precondemnation activities by Minneapolis that left the claimants' properties in limbo for more than seven years.

In 1983, the city adopted a redevelopment plan for three blocks of downtown Minneapolis. In 1987, the city informed landowners in the district that their properties were likely to be condemned for the project. In part due to the mayor's vocal opposition, the project developer was unableto secure tenants or win approval of its designs. The project fell through in 1989. The city reportedly waited until 1993 to inform the property owners that their properties would not be condemned.

The Minnesota Supreme Court ruled that the state's takings clause required compensation. Noting the general rule that precondemnation activities do not work a taking, the court held that an abuse of the power of eminent domain may rise to a taking "when that abuse is specifically directed against a particular parcel." The decision is troubling to the extent it portends greater scrutiny of precondemnation conduct, but local officials can take some comfort from the court's repeated statements that its decision is limited to the "unique" facts of the case. It remains to be seen whether the limitation holds.