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## Takings Watch

CRC's Monthly Update on Regulatory Takings

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### FEATURE CASE:

#### **K & K Construction and the Wayward Michigan Court of Claims**

The Michigan Court of Claims seems bound and determined to find a taking in the case of *K&K Construction, Inc. v. Department of Env'tl. Quality*, File No. 88-12120-CM (Mich. Cl. Ct. May 24, 2002). Despite a previous reversal in the Michigan Supreme Court, the Claims Court recently reaffirmed a multi-million dollar takings award against the state's top environmental agency. In a decision that will most likely be appealed, the court so ruled despite evidence that the land retained significant economic value.

In 1988, the landowners proposed a comprehensive development scheme that involved three of their four contiguous parcels. The state refused to allow the landowners to fill wetlands on one of the properties. In its first decision, the Claims Court ruled that "parcel one"—a 55-acre tract that contains some 25 acres of protected wetlands—was the only property relevant to the takings analysis, and that the state's wetland protections rendered the parcel commercially worthless and worked a taking. The trial court awarded the landowners \$3.5 million for a taking of the wetland portion and another \$500,000 for a temporary taking of the buildable land. On appeal, the Michigan Supreme Court rejected the trial court's analysis, ordering the court to expand the denominator to include at least three of the four parcels.

In its latest decision, the Claims Court fixed the overall value of the four parcels at \$9,339,181. It then excluded "parcel four" because the claimants acquired that land after the date of the alleged taking. Although the remaining land clearly retains substantial value, the court insisted that the "loss of parcel one far overshadows parcels two and three in area and value" and concluded that the wetland protections effected a taking because they deprived the landowners of nearly two-thirds of the value of the entire parcel. The ruling contains only a one-page *Penn Central* analysis that fails to cite a single case in support of the decision.

It clearly will take more litigation on appeal to set the trial court straight (once again).

### EYE ON WASHINGTON:

#### **Judge Loren Smith Strikes Again**

Earlier this month, Senior Judge Loren Smith of the U.S. Court of Federal Claims ignored an armload of binding precedent in upholding a takings challenge to federal mining protections in *The Stearns Co. v. United States*, No. 594-89 L (August 5, 2002). The case involves the application of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) to 47,000 acres of land in Daniel Boone National Forest in Kentucky. In 1986, the Interior Department determined that Stearns does not have "valid existing rights" under SMCRA (which would have allowed Stearns to mine without further ado), but Interior made clear that Stearns could mine if the mining is compatible with other uses. Instead of seeking such a compatibility determination, Stearns sued for a taking.

Judge Smith ruled the Interior Department worked "a physical taking" of Stearns's mineral rights when it concluded that Stearns lacked valid existing rights. This is quite a peculiar conclusion given that the government physically took nothing: it obtained no right to mine or use the coal. Peculiar also because two Supreme Court takings landmarks, *Mahon* and *Keystone*, involved similar restrictions on mining rights and

both were evaluated as regulatory, not physical, takings. *Tahoe-Sierra*, decided in April, emphasizes the clear and important distinction between physical and regulatory takings. Judge Smith cites none of these cases in his cursory discussion of the merits.

Equally bizarre is Judge Smith's ruling on ripeness. The government argued that the case is unripe because Stearns had not applied for a compatibility finding, a process one witness described as a "rubber stamp." Judge Smith concluded, however, that even if the finding were issued, it would "not change the fact that Stearns' right to mine has been fundamentally altered." This conclusion ignores the basic precept that simply subjecting land to a permitting scheme never works a taking.

Shortly before taking senior status, then-Chief Judge Smith rendered one of the most expansive regulatory takings rulings ever, in *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21 (1999). Let's hope that on appeal, the Federal Circuit applies the proper corrective to his recent innovation in the physical takings arena.

## **OUTRAGE OF THE MONTH: An Advocate's Spin on *Tahoe-Sierra***

Counsel of record for the claimants in *Tahoe-Sierra* recently gave new meaning to the term “zealous advocacy.” Offered space for his views in the June 2002 issue of the American Planning Association’s “Land Use Law and Zoning Digest,” Michael Berger used the opportunity to blast the APA for filing an amicus brief in support of the Tahoe Regional Planning Agency in *Tahoe-Sierra*, accusing the APA of “moral nonsense,” suggesting that it is “a hired gun for local government,” and exhorting it “to grow up.” Mr. Berger ends his rant by comparing professional planners to Senator Joseph McCarthy (!?!), asking the APA: “Have you no shame?”

It’s Mr. Berger who appears to have some growing up to do. Mr. Berger should at least acknowledge that his theory of the case — that any temporary ban on all use, no matter how reasonable, is a taking — was an extreme one. Mr. Berger argued that a ten-minute denial of all use is a taking, a theory so radical that even the dissent refused to embrace it. Plainly the APA, concerned with the efficacy of land-use moratoria, a commonplace and important planning tool, had reason to oppose this argument and side with TRPA.

Mr. Berger also needs to check his facts more carefully. His excoriation of the APA is strewn with the same misstatements that characterized his briefs. He asserts, for example, that TRPA permanently prohibited any use of “virtually all” of the lots at issue. Yet, as noted at oral argument, a pretrial order shows that many of the claimants may build under the 1987 Regional Plan now in effect. And at trial, an expert appraiser testified that even during the moratorium, restricted lots

retained reasonable economic value on the open market.

To these errors, Mr. Berger adds a remarkable new misstatement, asserting that landowners subject to the moratorium were “randomly selected individuals.” Every parcel of land at issue in the case was included in the moratorium based on extensive scientific evidence showing that uncontrolled development of the lot would contribute to the continued destruction of Lake Tahoe. The claimants never seriously questioned the science that supports the selection of their lots for land-use controls. Indeed, the trial court found “that further development on high hazard lands such as the plaintiffs’ would lead to significant additional damage to the lake. \* \* \* There is a direct connection between the potential development of plaintiffs’ lands and the harm the lake would suffer as a result thereof. \* \* \* Although unwilling to stipulate to the fact that TRPA’s actions substantially advanced a legitimate state interest, the plaintiffs did not seriously contest the matter at trial.”

In the face of this finding, uncontested on appeal, Mr. Berger now asserts that TRPA selected the restricted lots at random. We trust that planners and others who read the APA “Land Use Law Digest” will be able to discern the difference between truth and spin.

### **QUOTE OF THE MONTH**

It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

### **ON THE HORIZON: Police Searches as Takings?**

On appeal to the U.S. Court of Appeals for the Third Circuit is *Jones v. City of Philadelphia*, 2001 WL 1295648 (E.D. Pa. 2001), an unusual takings challenge to the execution of a search warrant. While recognizing that the issue was one of first impression, the federal district court concluded that a taking occurred based on a SWAT team’s unsuccessful search for drugs at a store in a high crime neighborhood.

Although the jury found that the police had conducted the search under the authority of a valid warrant, the district court held that police searches may work a temporary taking of the detained individuals and their personal property under the Fifth Amendment, even where the search is deemed reasonable under the Fourth Amendment.

Municipal officials, particularly those in Pennsylvania, New Jersey, and Delaware, should keep a close eye on this one.

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