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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE:

Good News on Relevant Parcel and *Penn Central* From the Colorado Supreme Court

Two of the most important issues in takings jurisprudence concern the definition of the relevant parcel and the application of the *Penn Central* test for non-per se takings. The Colorado Supreme Court recently provided very useful guidance on both issues in *Animas Valley Sand & Gravel, Inc. v. Board of County Comm'rs*, 2001 WL 1598634 (Colo. Dec. 17, 2001), a takings challenge to restrictions imposed by the La Plata County land-use plan on a mining company.

Drawing on both Colorado and federal case law for guidance, the court ruled that to prevail under *Penn Central*, a claimant "must show that it falls into the rare category of a landowner whose land has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation." The court adopted this slightly-greater-than-de-minimis standard in part because after "[r]eading *Palazzolo* together with the [U.S. Supreme] Court's prior precedent, it is apparent that the level of interference must be very high" for land-use regulation to constitute a taking. The court viewed *Penn Central* as a "safety valve to protect the landowner in the truly unusual case."

The *Animas* court also rejected the claimant's contention that the relevant parcel for takings analysis should be limited to the claimant's mineral rights, or that it should look only to the geographic portion of the claimant's land affected by the challenged government action. Instead, the court held that the relevant parcel consists of the entire contiguous parcel of land owned by the mining company, citing *Penn Central*, *Keystone*, and *Dolan*.

Like *Palazzolo*, *Animas* states that claimants are not limited to the *Lucas* per se test in seeking relief under the Takings Clause. Yet *Animas* reaffirms that in pursuing a non-per se claim, a landowner must still show that regulation is extremely severe — the functional equivalent of an expropriation — to constitute a compensable taking.

OUTRAGE OF THE MONTH: PERC vs. Osama bin Laden?

In our September 2001 newsletter, we lamented that certain politicians and special interest groups were exploiting the tragic events of September 11th to promote their policy agendas. As galling as those early exploiters were, they were pikers when compared to PERC, the Political Economy Research Center in Bozeman, Montana, which bills itself as the "Center for Free Market Environmentalism."

PERC's radical brand of free market environmentalism goes far beyond emissions trading and other market-based proposals that merit thoughtful attention. For example, PERC supports passage of a federal takings bill that would gut federal environmental protections, and it advocates auctioning off much of the nation's public land to the highest bidder.

So, what does selling the Grand Canyon to Disney have to do with Osama bin Laden? We're given the answer in a November 29, 2001 fundraising letter by PERC Chairman John Tomlin, who has the temerity to make an explicit appeal for donations to PERC based on the September 11th attacks. Mr. Tomlin begins the letter by observing: "At PERC, we have asked ourselves what is the role of free market

environmentalism in a world rocked by terrorism and a sense of insecurity." As one wag put it, you might as well ask: "What is the role of broccoli in an MRI exam?" None, as far as we can see.

Undeterred, Mr. Tomlin continues: "When we thought about what is under attack, we realized that the terrorists are threatened by those core principles on which PERC was founded." Huh? The terrorists have proffered a number of bogus excuses to justify their evil actions, but so far free market environmentalism has not made the list.

Then comes the monetary appeal: "As we stand strong against this menace * * * we need your continued support, now more than ever." We hope that any recipient of the PERC fundraising letter will instead direct a donation to one of the charitable groups providing assistance to the September 11th victims and their families.

Our thanks goes to Dick Schneider, professor at Wake Forest Law School, for bringing PERC's letter to our attention.

ON THE HORIZON: U.S. Supreme Court Contemplates the *Tahoe* Moratorium Case

In reporting on the January 7 oral argument in the Lake Tahoe case, the New York Times headline proclaimed: "Property-Rights Claim Meets Resistance." In contrast, the headline in the Los Angeles Times announced: "High Court Gives Lake Tahoe Landowners a Sympathetic Ear." Both perspectives are accurate.

Several Justices, including swing Justices Kennedy and O'Connor, gave a chilly reception to the landowners' argument that every moratorium that prohibits all use of land works a compensable taking. They were highly skeptical of the landowners' contention that the combined rulings of *First English* and *Lucas* require compensation for every temporary denial of all use, no matter how reasonable in scope and duration. Justice Souter's questioning, in particular, set useful limits on these rulings that seemed to reflect common ground among most of the Justices.

On the other hand, certain Justices expressed concern when Michael Berger, attorney for the Tahoe landowners, asserted that only a handful of the claimants may build on their land

even today, twenty years later. John Roberts, counsel for the Tahoe Regional Planning Agency, did a masterful job of clarifying that legal challenges to permanent controls in the Tahoe Basin are not before the Court. He also explained that most of the claimants have sold their properties for more than their purchase price and most of the rest may now build. But it remains to be seen whether Mr. Berger's extra-record assertions will color the equities in a way that affects the final outcome.

Solicitor General Theodore Olson, arguing on behalf of the United States in support of the Agency, urged the Court to follow the admonition in Justice O'Connor's *Palazzolo* concurrence to resist the temptation to fashion sweeping per se rules in takings jurisprudence. (See [Quote of the Month](#), below).

Attempting to read the Court's tea leaves is always a precarious venture. Many observers left the argument predicting a government win. With this Court, we'll believe it when we see it.

EYE ON WASHINGTON: Remembering Peter Milius

Those who oppose outlandish reinterpretations of takings doctrine lost an ally on January 10 with the sudden death of Peter Milius at the age of 64. Peter was an editor and editorial writer at the Washington Post. Although Washington Post editorials are unsigned, many in the takings community know that it was Peter who crafted the Post's first critiques of federal takings bills.

As early as February 1995, Peter sounded the alarm on the compensation bills that flowed from the Contract with America. In a 1997 editorial entitled "Son of Takings," Peter took on the National Association of Home Builders' takings/ripeness bill, noting the hypocrisy among politicians who proclaimed themselves to be federalists and yet supported the bill's unprecedented shift of control over land-use issues from local officials to federal courts.

Takings was, of course, only a tiny sliver of Peter's bailiwick. He was perhaps best known for his editorials on welfare reform, for which he was nominated as one of three finalists for a Pulitzer Prize. But his approach to takings characterized the entirety of his work. He rendered complex policy debates into plain English arguments; he insisted on reading the actual bill language, not just the talking points; he brought a meticulous eye to the nooks and crannies of legislation to determine how it would affect the lives of

ordinary people; and he recognized the need to balance competing concerns.

Indeed, balance was the hallmark of his thinking and writing. He viewed takings jurisprudence as a balanced effort to consider all relevant factors -- an approach he described as "muddy" but "usefully so" -- and he therefore bristled at proposed compensation schemes that considered only lost profits at the expense of the public good.

His colleagues at the Post remember not only his tremendous talent, but also his unfailing generosity and self-deprecating sense of humor, all-too-rare characteristics for a person of influence in our nation's capital. Peter's voice will be greatly missed.

QUOTE OF THE MONTH

"The temptation to adopt what amount to per se rules in either direction must be resisted."

Justice O'Connor, concurring in
Palazzolo v. Rhode Island,
121 S. Ct. 2448, 2466 (2001)

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