



## FEATURE CASE

### What Happens in Vegas Should Stay in Vegas: McCarran Airport Height Ordinances Deemed a *Per se* Taking

In a troubling 5-2 ruling -- *McCarran Int'l Airport v. Sisolak*, 2006 Nev. Lexis 80, 122 Nev. Adv. Op. No. 58 (Nev. July 13, 2006) -- the Supreme Court of Nevada affirmed a \$16.6M takings award and held that height restrictions designed to promote public safety at McCarran International Airport worked a *per se* physical taking under *Loretto*.

In the 1980s, Steve Sisolak purchased three parcels near the Las Vegas Strip, about a mile from McCarran. At the time of the purchase, airport zoning restricted the height of structures on the land to 80-90 feet, subject to variance. In 1990, McCarran expanded a runway in conformity with the 1979 county master plan, which necessitated additional height restrictions, again subject to variance.

In 2000, the county planning commission and the FAA approved a proposal to build a four-story resort hotel and casino on the site, up to a height of 66 feet. The approval lapsed, however, because the developer failed to commence construction.

Shortly thereafter, Sisolak filed a complaint alleging that the height restriction ordinances constitute a *per se* taking. He submitted evidence showing that aircraft flew over the land at altitudes less than 500 feet. The trial court ruled that this evidence established a *per se* taking under *Loretto*, which holds that every government-compelled permanent physical occupation of land is a taking.

On appeal, the Nevada Supreme Court agreed, rejecting the county's arguments that the ordinances are mere height restrictions and thus subject to takings analysis under *Penn Central*. The court stressed that, in its view, the challenged ordinances "allow aircraft to exclusively use the airspace as a critical departure area within an airport approach zone," and "facilitate flights through private property." Although the county never denied Sisolak a variance, the court concluded the matter is ripe because one need not seek a variance to ripen a *per se* physical claim.

The high court also rejected the county's contention that the overflights should be evaluated under *Causby*, which holds that overflights are a taking only if they are so low and frequent as to be a direct interference with the use of the land. The majority ruled that the ordinances worked a taking under both the Nevada and federal constitutions, but emphasized that the Nevada Constitution gives landowners greater protection.

The *Sisolak* ruling stands in contrast to a 2004 ruling by the same court in *County of Clark v. Tien Fu Hsu*, No. 38853 (discussed in our Oct. 2004 newsletter), in which the court overturned a \$22 million takings challenge to airport height restrictions as applied to land within a "transition zone." Unlike the "approach zone" at issue in *Sisolak*, a transition zone is a mere buffer zone that provides an extra margin of safety in case a plane deviates from the normal flight path. The *Tien Fu Hsu* court stated that "a rule supporting the notion that airport height-restriction ordinances, of necessity, effect *per se* takings, is overboard in its reach," and it ruled against the landowners on ripeness grounds because they had not pursued variance procedures. The *Sisolak* opinion nowhere mentions *Tien Fu Hsu*.

Due to the court's reliance on the state constitution, it is difficult to predict how much impact the ruling will have outside Nevada. The Nevada Supreme Court now joins a handful of other state courts that have declared that their state constitution provides developers with more protection than the federal constitution. CRC is monitoring developments on this front to determine if this is simply a matter of a few rulings by outlying states or a part of a larger trend.

CRC filed an amicus brief in *Sisolak* and *Tien Fu Hsu* in support of the county.

## QUOTE OF THE MONTH

"I dissent from the broad statement that our eminent domain provision was intended to give landowners greater protection than that given under the Fifth Amendment of the United States Constitution. . . . Such a broad, sweeping holding, without any reference to Nevada's constitutional debates or other significant supporting analysis, is unwise and unwarranted." Nevada Supreme Court Justice Nancy A. Becker, dissenting in part and concurring in part, *McCarran Int'l Airport v. Sisolak*.

## OUTRAGE OF THE MONTH

### Trojan Horse Alert

Our May newsletter Outrage of the Month reported on a disastrous ballot initiative circulating in California, the “Protect Our Homes Act” also known as the Anderson initiative. The bad news to report this month is that the signatures have been verified, and the initiative has qualified for the November ballot. But the good news is that more people are starting to get outraged.

*Sacramento Bee* columnist Peter Schrag wrote a column calling Proposition 90 a “Pandora’s box” riddled with “takings booby traps.” He also explained that this initiative is the pet project of a libertarian millionaire from New York, Howie Rich, whose hobby is funding anti-government ballot initiatives in states where he doesn’t live. Schrag suggests, quite rightly, that those who benefit from these initiatives are likely to be “lawyers, slumlords, speculators and polluters,” not ordinary California homeowners.

*High Country News’s* recently reported on the California initiatives and similar measures in Arizona, Idaho, Montana, Nevada, and Washington. *HCN* reports that organizations that Howie Rich controls or is deeply involved in are the major donors for all of these campaigns, contributing between 40 and 99 percent of the budget. The article warns, “If you live in any of the six states targeted this year and someday you might want a new regulation to put conditions on a Super Wal-Mart, or to protect streambanks from new construction, or to require developers to do anything for open space and affordable housing, you would be wise to vote ‘no’ in November.”

We’re also encouraged that the proposed one-paragraph ballot summary tells voters that the initiative “limits government’s authority to adopt certain land use, housing, consumer, environmental, workplace laws/regulations,” and that the costs of the measure are “unknown, but potentially significant.” It’s not the most stirring language, but it’s significantly better than the ballot summary for Measure 37, which started out with “Government must pay...” The longer ballot explanation puts the takings part of the measure right up front (unlike the initiative itself, which buries the takings provision, in the same way one might bury a landmine) and says forthrightly that the law could apply to consumer protection, employment, and rent control regulations, as well as environmental protection.

It is imperative that supporters of reasonable, community environmental and land use laws get the word out that these initiatives are not what they seem. They are not ways to address the *Kelo* decision as much as they are ways to break the longstanding system of zoning and environmental laws that protect the environment, health, and property values.

## ON THE HORIZON

### Petition for Review filed in Minnesota Golf Course Case

In our January 2006 newsletter, we reported that the City of Eagan, Minnesota, rejected a settlement offer and decided to press on in its defense against a takings challenge to its decision not to amend its comprehensive plan to allow the owner of land used as a golf course since 1965 to proceed with intense residential development. In May, the city prevailed when the court of appeals overturned an adverse trial court ruling and rejected the claim. The ruling protects one of the city’s last private green spaces and was applauded by neighbors and open-space advocates.

The landowner has now petitioned the Minnesota Supreme Court for review. Although the trial court ruling in favor of the landowner was deeply disturbing, the appeals court’s reversal involves a straightforward application of settled law, and we therefore expect the petition for review to be denied. We’ll keep you apprised of developments.

## Amicus Opportunity

As we reported last month, the Supreme Court has agreed to hear *Massachusetts v. EPA* (No. 05-1120), a major global warming case raising the issue of whether EPA has authority under the federal Clean Air Act to regulate greenhouse gas emissions from cars and trucks.

CRC wrote an amicus brief supporting the petition for certiorari in this case on behalf of the National Association of Counties, U.S. Conference of Mayors, American Planning Association, and the City of Seattle. We welcome additional clients wishing to join our merits amicus brief. Any state or local officials whose employers are interested in joining the brief should contact us immediately at [crc@communityrights.org](mailto:crc@communityrights.org).

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