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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE: A Victory for Affordable Housing

On March 4, 2002, the California Supreme Court issued a powerful ruling in favor of affordable housing advocates, rejecting a takings challenge to efforts by San Francisco to address its low-income housing crisis through reasonable restrictions on the conversion of residential hotels to tourist use. *See San Remo Hotel v. San Francisco*, 117 Cal. Rptr. 2d 269.

San Francisco enacted the challenged ordinance based on findings that the City suffers a severe shortage of affordable rental housing; many elderly, disabled, and low-income persons reside in residential hotels; and available residential hotel units have decreased dramatically in recent years due to conversion to tourist use. The affordable housing ordinance requires no changes to existing property use, but instead requires owners who seek greater profits by converting their properties to tourist use to build affordable replacement units, or pay a fee based on a portion of the replacement costs.

In upholding the ordinance, the Court ruled that the law bears a reasonable relationship to the legitimate public interest in providing affordable housing. The Court refused to apply the rough proportionality test established in *Dolan v. City of Tigard* (U.S. 1994) because it concluded that the fee is legislative, not imposed on an individualized basis. The ruling is good news not only for cities and counties that have affordable housing shortages, but for any municipality that seeks to protect community rights through the imposition of fees on a general class of landowners.

In responding to the claimants' argument that the affordable housing law unfairly singles out hotels to bear a disproportionate burden, the Court provided this insightful analysis of reciprocity of advantage: "[T]he necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good." In a bit of rhetorical flourish, the Court concluded: "If, as Justice Holmes warned, the Constitution 'does not enact Mr. Herbert Spencer's Social Statics' [citing *Lochner*], it just as surely does not enact the late Robert Nozick's Minimal State." CRC filed an amicus brief in support of San Francisco on behalf of 67 California Cities, the California State Association of Counties, and the International Municipal Lawyers Association.

ON THE HORIZON:

Does *Dolan* Apply to Impact Fees and Other Non-Land Exactions?

One of the cutting-edge issues in the post-*Dolan* era is whether *Dolan's* rough proportionality test applies to impact fees. The California Supreme Court has split the baby, recently reaffirming in *San Remo* (see Feature Case above) that *Dolan* applies to monetary exactions imposed on an individualized and discretionary basis, but not to legislatively imposed fees.

In *Eastern Enterprises v. Apfel* (U.S. 1998), however, five Justices of the U.S. Supreme Court concluded that the Takings Clause should not be applied to general monetary obligations. They observed that a requirement to pay money "does not operate upon or alter an identified property interest" and "is not applicable to or measured by a property interest." As a result, they concluded that the Takings Clause does not apply and that courts should evaluate general monetary obligations under the Due Process Clause. Although these five Justices expressed their views in a concurrence and a dissent, the Federal Circuit recently ruled that lower courts are "obligated to follow the views of that majority" and thus refused to apply the Takings Clause to an obligation to pay money. *Commonwealth Edison Co. v. United States* (Fed. Cir. 2001).

Eastern Enterprises naturally raises the question of whether the Takings Clause applies to impact fees. The Washington Supreme Court is considering a case that might well provide additional guidance: *Benchmark Land Co. v. City of Battle Ground* (2000). The lower court applied *Dolan* to strike down a permit condition requiring road improvements near the proposed development. CRC filed an amicus brief in support of the City arguing, among other things, that the Takings Clause does not apply to the exaction, citing *Eastern Enterprises*. The issue is also percolating through the Texas courts in *Town of Flower Mound v. Stafford Estates Ltd. Ptnrshp.* (2002), in which a state appeals court held that an impact fee worked a taking under *Dolan*. We'll keep you posted on how the Washington and Texas Supreme Courts resolve the issue.

EYE ON WASHINGTON: Trading Away Community Rights

Imagine a new Takings Clause that affords special protections to foreign corporations operating in the United States, allowing them to seek millions of dollars in takings challenges to laws that would pass muster under the U.S. Constitution. And suppose this new provision could be used to attack all kinds of state and local laws that protect human health, the environment, worker safety, and other vital public interests. And then imagine that foreign investors could bring these challenges in secret arbitration tribunals, whose rules limit public access to files and deny neighboring landowners and interested third parties the right to intervene.

This nightmare scenario is unfolding right now as the U.S. Congress considers trade promotion legislation. The bill -- the "Bi-partisan Trade Promotion Authority Act of 2001" (H.R. 3005) -- passed the House by one vote (215-214) on December 6, 2001, and will be taken up by the Senate this Spring. The bill would authorize U.S. negotiators of international trade agreements to establish "standards for expropriations," language that does not require the negotiators to adhere to U.S. Supreme Court precedent under the Takings Clause of the Fifth Amendment. And once a trade agreement has been negotiated, it becomes subject to an "up or down" vote in the Congress, without the opportunity to modify the agreement through amendment.

Would U.S. negotiators give away the store if handed this open-ended authority? Many think they already did so in NAFTA, which contains a broad expropriation provision that has produced several very disturbing claims. A NAFTA arbitration panel assessed a \$17,000,000 award for lost profits against Mexico based on a local government's denial of a permit for a hazardous waste facility, even though the

constitutional Takings Clause has never been read to guarantee a profit. A Canadian company is seeking nearly a billion dollars in compensation due to California's ban on a gasoline additive, MTBE, that harms groundwater. A Canadian developer has brought a NAFTA claim against a Boston redevelopment agency even though the state supreme court rejected the claim. Another Canadian firm seeks \$725,000,000 due to the award of punitive damages in a civil action. Indeed, in the eight years since NAFTA's ratification, roughly 20 expropriation claims have been filed for compensation in excess of two billion dollars.

Like the failed federal takings legislation that arose out of the Contract with America, expropriation provisions in trade agreements could require U.S. taxpayers to pay corporations and others for simply following the law. Tufts University researchers estimate that the pending trade promotion legislation could lead to \$32 billion in claims every year.

Sen. John Kerry (D-Mass.) plans to introduce an amendment on the Senate floor that ensures that foreign investors are not afforded greater legal rights to sue than the U.S. Constitution affords domestic investors. We'll keep Takings Watch readers posted on further developments.

QUOTE OF THE MONTH

"Private Property * * * is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing * * *."

Benjamin Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania* (1789), in *10 The Writing of Benjamin Franklin* 54, 59 (Albert H. Smyth ed., 1970).

OUTRAGE OF THE MONTH

According to the Newark, NJ Star-Ledger, James Burling of the Pacific Legal Foundation believes that in the wake of *Palazzolo v. Rhode Island* (U.S. 2001), smart growth is now "doomed." Burling also is quoted as saying that "the best characterization of smart growth is that smart growth is dumb takings" and that smart growth is "ultimately incompatible with the protection of property rights."

This hyperbolic assessment of the impact of *Palazzolo* is remarkable because Burling and PLF have yet even to win a victory for Mr. Palazzolo. The Supreme Court's remand of the case is yet another limited ruling from which both sides of

the debate may draw support.

Far from being incompatible with property rights, smart growth enhances the property rights and property values of most Americans by making our communities better places to live. Smart growth will easily survive *Palazzolo* and the overheated exaggerations of developers' lawyers.

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