

May 2002

Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

The Plane View On Takings:

City of Austin v. Travis County Landfill Company (Tex. 2002)

On March 28, 2002, the Texas Supreme Court issued a ruling that emphatically reaffirms the right of local communities to adopt reasonable airport zoning designed to protect public safety. In *City of Austin v. Travis County Landfill Co.*, 2001 WL 1826849, the Texas high court reversed the lower courts' \$2.95 million judgment in favor of the landowner, holding that to win an overflight takings claim, the "landowner must show that the overflight effects impacted the land directly, immediately, and substantially so that the property was unusable for its intended purpose."

QUOTE OF THE MONTH

The true friend of property, the true conservative, is he who insists that property shall be the servant and not the master of the commonwealth; who insists that the creature of man's making shall be the servant and not the master of the man who made it.
* * * [E]very man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it.

Theodore Roosevelt, *The New Nationalism*, Speech at Osawatomie, Kansas (August 31, 1910)

Travis County Landfill owns a 133-acre tract about one-half mile south of the main runway at Bergstrom Air Force Base. After the military base closed in 1942, the property reverted to the City of Austin, which then converted it into a municipal airport and began civilian flights in 1997. Although the claimant's predecessor had granted the federal government an aviation easement for military overflights, it argued that the easement does not include the civilian overflights, which precluded vertical expansion of the landfill.

The Texas Supreme Court observed that the air is a public highway and airspace is generally part of the public domain, and thus inconveniences caused by overflights generally are not compensable. Under binding precedent, compensable overflight takings typically are limited to situations where aircraft cause severe noise, vibrations, or fumes, and thereby render the land unusable for its intended purpose. Invasions of airspace accompanied by a mere loss in value are insufficient to support an overflight claim, the court ruled.

In the February 2002 issue of *Takings Watch*, our "On the Horizon" column discussed *County of Clark v. Tien Fu Hsu*, a disturbing airport zoning ruling by a Nevada district court now on appeal to the state supreme court. In a radical extension of *United States v. Causby* (U.S. 1946) and other overflight precedents -- which hold that an overflight taking occurs where overflights are "so low and so frequent as to be a direct and

immediate interference with the enjoyment and use of the land" -- the district court awarded the claimants more than \$22 million for an overflight taking even though the challenged ordinance imposes only height restrictions and there is no evidence that a plane ever will fly over the claimants' land.

We hope the well-reasoned ruling by the Texas Supreme Court in *Travis County Landfill* will encourage the Nevada Supreme Court to follow suit.

ON THE HORIZON: Verizon is Now Off the Horizon

In our September 2001 "On the Horizon" column, we noted that the U.S. Supreme Court had agreed to hear *Verizon Communication, Inc. v. FCC*, 122 S. Ct. 1646, a challenge to provisions in the Telecommunications Act of 1996 that are designed to make local phone service more competitive. The challengers contended that the case raised the interesting issue of whether takings concerns may be used to justify a narrow interpretation of a statute under the doctrine of constitutional avoidance.

Here's the follow-up we promised in last year's column. On May 13, 2002, the Court rejected the challenge, holding that the case did not present "a serious question" of constitutional avoidance. Given the technical nature of the ruling (it's a snoozer), it won't have much impact on regulatory takings cases in the land-use context. Unless you're in the throes of utility ratemaking, scratch *Verizon* from your must-read list.

OUTRAGE OF THE MONTH

"Takings Retreat Report" Rears Its Ugly Head

Readers may recall that a few years ago, the International Municipal Lawyers Association, the U.S. Department of Justice, and many others persuaded the ABA Section of State and Local Government Law not to ratify something called the "Takings Retreat Report." The report proposed changes to takings law that would have greatly benefited claimants at the expense of state and local governments. Of particular concern were recommendations that tracked arguments made by the National Association of Home Builders in support of NAHB's federal takings bill, which purported to rewrite the ripeness requirements articulated in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank* (U.S. 1985).

The report's bias was no surprise given the developer lobby's disproportionate influence at the retreat. Due to the robust opposition to the retreat report voiced by IMLA and others, the ABA Section declined to approve it. Some might have concluded that we could move on to other things.

Not so fast. Like the hockey-masked killer Jason in the "Friday the 13th" movie series, the retreat report has returned from the dead. In a brief recently filed with the U.S. Court of Appeals for the Eighth Circuit, Michael Berger, Gideon

Kanner, and NAHB cite the retreat report in an effort to get the Court to ignore *Williamson County's* clear mandate that takings claims against state and local governments be filed in state court.

Because Berger and Kanner were part of the retreat organizing committee, surely they know that the report states that "the Retreat did not advocate change in the essentials of the *Williamson County* ripeness requirements [because] there was no consensus on such changes." They also must know that when the ABA recently published the report (along with IMLA's comprehensive opposition) as part of a larger collection of essays on takings, the ABA included a disclaimer that "the retreat report should not be cited as reflecting the position of the ABA or the ABA Section of State and Local Government."

CRC plans to file an amicus brief to apprise the Eighth Circuit of these details. If readers encounter citations to the retreat report in other contexts, CRC asks that you let us know immediately so that we may make an appropriate response. Together, hopefully we can usher Jason to his final resting place.

EYE ON WASHINGTON:

A Week to Forget for Joe Biden

A dozen years ago, Senator Joe Biden (D-Del) was ahead of the curve in understanding the threat of expansive takings theories, questioning Clarence Thomas and other judicial nominees vigorously on their views of the extreme takings theories posed by Professor Richard Epstein, and spearheading the opposition to federal takings bills.

Two votes this past week suggest that Biden has badly lost his way on takings issues. First, there was his inexplicable decision to vote, initially at least, to oppose the Kerry Amendment to the trade promotion bill in the Senate (see March 2002 *Takings Watch*). The Kerry Amendment would have ensured that foreign corporations have no greater legal right to sue than the U.S. Constitution's Takings Clause grants domestic corporations. Senator Biden had to get unanimous consent of the Senate after the voting had ended to change his vote to support the Kerry Amendment. The Kerry Amendment failed by a final vote of 55-41.

Even more disturbing was Biden's unfathomable decision to break ranks with other Democrats and support the nomination of Judge Brooks Smith to a position on the Third Circuit. As the New York Times noted in an editorial opposing Smith's confirmation, "other courts have roundly rejected" Smith's "expansive reading of the Fifth Amendment's Takings Clause." The Washington Post opposed Smith for ethical lapses including his "unacceptable defense of his attendance at privately funded judicial junkets" that tout radical property rights theories.

At Smith's confirmation hearing, Biden seemed poised to lead the charge against the Smith nomination, threatening a filibuster on the Senate floor. When the nomination came up for a Committee vote, however, Biden gave a rambling and contradictory statement, concluding in a not particularly statesman-like fashion that, despite the numerous problems with the nomination: "I'm going to vote for this guy." Two Democrats followed Biden's lead, sending the Smith nomination to the floor on a 12-7 vote.

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