The "Taking Issue" Saga Continues

by Gideon Kanner

". . . that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."

Gideon Kanner is a Professor at Loyola Law School, located in Los Angeles, Ca.

Enlightenment is sometimes found in surprising places. This time, we find it in a court opinion, in a rather surprising context. The latest contribution to this controversial body of law comes from an air crash case: *In re Aircrash in Bali, etc.* (1982, 9th Cir.) 684 F. 2d 1301. In case you don't read the fine print on the back of your airplane tickets, there is a treaty called the Warsaw Convention, and one of its features is that as things stand today, the maximum that can be recovered for wrongful death of a passenger is $75,000. In this case, the survivors of crash victims sued, seeking to recover the full amount of their loss which the jury assessed at six-figure verdicts far above the Warsaw Convention limit. The trial court entered a judgment accordingly, and the airline appealed.

On appeal, the plaintiffs argued that if the Warsaw Convention is applicable to their case, then it works a taking of their property. They reasoned that under California law (which determines what is a property right of its residents) a cause of action is a property right, and therefore to the extent this right is vitiated by the Warsaw convention, the limitation on recovery is unconstitutional. The court, however, looked at the problem somewhat differently; it raised on its own motion the question of whether the recovery limitation constitutes a "taking" by the governmental act of applying the treaty provisions, thus entitling the plaintiffs to recovery of just compensation from the government whose action in entering into the treaty effected the destruction of the Californians' right to full recovery for the wrongful death of their decedents.

The court chose to follow the U.S. Supreme Court's reasoning in the Iranian hostage case *(Dames & Moore v. Regan* (1981) 453 U.S. 654), where the high court held that if the executive agreement between the United States and Iran ever effected a taking of the claimants' property, their remedy would be an action against the United States, under the Tucker Act, in the U.S. Court of Claims. The court quoted Justice Powell's words in *Dames & Moore:* "The Government must pay just compensation when it furthers the nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by relatively few persons and subject to jurisdiction of our courts". But that wasn't all; the court also went out of its way to address the question of compensability.

As readers of this column no doubt know, in 1979, the California Supreme Court decided *Agins v. Tiburon,* 598 P. 2d 25 (affirmed on other grounds by the U.S. Supreme Court), in which it held that in California the sole remedy for a regulatory taking of property is a judicial declaration that the regulation is invalid, and that no monetary "just compensation" can be recovered, no matter how egregious the governmental unconstitutional conduct. While the U.S. Supreme Court in reviewing *Agins* did not reach the issue of remedies, it did shed some oblique light on that problem in a later case, *San Diego Gas & Electric Co. v. City of San Diego* (1981) 450 U.S. 621. In the *San Diego* case (a 5 to 4 decision) the majority held that the appeal had to be dismissed because it was not taken from a final state court judgment. The four dissenters, however, not only disagreed with that, but also joined in a comprehensive opinion by Justice Brennan, showing that the correct remedy in regulatory taking cases, the same as in other takings, is just compensation, even if only for the interim period of time during which the unconstitutional regulation prevented the owner from using his land, while the matter was being litigated. But what made the *San Diego* case so special was that while Justice Rehnquist went along with the majority in concluding that the appeal was premature, he wrote a separate concurring opinion which he prefaced by a statement that if the appeal had been from a final judgment he would agree with much of what was said by the dissent. Thus, he created a sort of a shadow majority opinion (i.e., 4 dissenters +

Rehnquist's intimation of his view on the substantive merits). This effect of the *San Diego* case had already been noted by other courts, and some of them have followed it. Now, the Ninth Circuit did likewise. In the *Aircrash in Bali* case it noted the *Agins* theory that no just compensation can be paid for deprivations of property by the regulatory, police power process, and disagreed with it. "This, . . . does not appear to be the law", said the court. It then went on to rely on the *San Diego* case's substantive majority adumbration, and concluded: "Thus, we take it to be the view of the majority of the Supreme Court that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking'. . . Thus, not withstanding the view of the California Supreme Court, we assume that the excessive exercise of the government's law-making powers may constitute a 'taking' under the fifth amendment, for which just compensation must be paid". The court did not rule whether the Warsaw convention actually worked such a compensable "taking" on these facts; it left that to be decided by the U.S. Court of Claims in a later action, should the plaintiffs bring one.

While the taking/compensation issue saga is far from over, and won't be until the U.S. Supreme Court addresses it expressly, this case gives us another straw in the wind that should be carefully considered by governmental entities that are thinking of entering onto a regulatory path that may lead to a collision with the fifth amendment's guarantee against confiscation of private property. In other words, it may turn out that the free lunch isn't free--a caution to be kept in mind before digging in.

Missile base site of condemnation battle

After a four-day standoff last October with U.S. Army personnel, an 81-year old rancher left his property, located within the top secret White Sands Missile Range in New Mexico.

Armed with two rifles, a pistol, and provisions for a month, Dave MacDonald had set up camp with his niece on an old homestead that he claims the Army stole from him forty years ago. In 1942, the Army took MacDonald's land to use as a bombing range for a top-secret project, later known as the Manhattan Project. (The project that developed the atomic bomb.) For years, MacDonald was paid for the lease on the desolate grasslands.

But, in 1980 the lease extensions expired, and the US Army Corps of Engineers began eminent domain hearings. The land was condemned, and although MacDonald has not received lease payments or withdrawn any money from the $35,000 escrow account, $22,000 has been withdrawn by his relatives, according to Corps officials.

MacDonald has asked for $960,000 for 640 acres ($1500/acre). The dispute remains with federal court at press time.