

Takings: Exigent Circumstances Justify Bypassing Notice and Hearing

On June 1, 2011 a devastating tornado ripped through Springfield, Massachusetts, heavily damaging many parts of the City. Both the Governor of Massachusetts and the Springfield Mayor declared a state of emergency. Although the South Commons Condominiums (South Commons) were not fully destroyed by the storm, the City rapidly concluded--without having undertaken an engineering study--that they were in imminent danger of collapse. The next day, pursuant to City order, South Commons was leveled by Charlie Arment Trucking (Arment).

Neither South Commons' owners nor residents were notified in advance that the City considered the buildings to pose an immediate threat. They were not given an opportunity for a hearing prior to the City's actions to destroy the condominiums. The South Commons owners sued Arment and the City under 42 U.S.C. §1983 alleging violation of its substantive and procedural due process rights. The District Court for the Western District of Massachusetts dismissed the suit.

HELD: On appeal, the First Circuit affirmed, finding that, although defendants bypassed some of the traditional elements of Fifth Circuit due process protections, the exigent circumstances and availability of a post-taking remedy under Massachusetts law made the City's action constitutional.

DISCUSSION: The Court of Appeals asked two questions: (1) Did these facts present a case where traditional pre-destruction notice and hearing could justifiably be bypassed by defendants? And if so, (2) did Massachusetts law afford a sufficient remedy after the fact?

Both questions were answered in the affirmative.

No Hearing or Notice: Plaintiffs had relied on *Zinernon v. Burch*, 49 U.S. 113 (1990) for the proposition that the Massachusetts laws allowing demolition without a hearing was constitutionally deficient. But the Florida law at issue in *Zinernon* involved decision-making powers delegated to state mental hospital employees, who had virtually autonomous authority to avoid notice and hearing processes when committing patients involuntarily. *Zinernon* had no relevance to the limited scope afforded by Massachusetts law to officials confronting an imminent threat to public safety.

Here, the probability of a looming building collapse provided ample justification for expedited action by City officials. "If a building is so badly damaged it must be demolished immediately to protect life and limb, then it surely poses a serious danger to the public safety that must be addressed with dispatch." (*citation omitted*).

The Massachusetts statutes in question did in fact call for pre-demolition notice and hearing in the ordinary course. But they provided a specific exception where public safety was involved: "If the public safety so requires and if the aldermen or selectmen so order, the inspector of buildings may immediately enter upon the premises . . . and cause such unsafe structure to be made safe or taken down without delay . . . ." Mass. Gen. Laws ch. 143, § 7.

The First Circuit was fully aware that the rapidity allowed under Massachusetts law might result in mistakes, but that did not invalidate the process: "Such a practicably workable standard is sure to be imprecise enough to require the official to make judgment calls about the urgency of the need to act. That some such calls may be mistaken does not show that the process for making them was constitutionally improper."

The Court of Appeals also found an additional level of protection in the fact that the decision to demolish came from elected officials (aldermen or selectmen) rather than inspectors themselves.

Post-taking Remedy: Massachusetts law clearly provided for a post-taking remedy.

A person aggrieved by such order may appeal to the superior court for the county where such building or other structure is situated, if, within three days after the service of such attested copy upon him, he commences a civil action in such court. Trial by jury shall be had as in other civil causes. The jury may affirm, annul or alter such order . . . . [I]f it is annulled, he shall recover from the town his damages, if any, and costs . . . . Mass. Gen. Laws ch.139, § 2

Discussion of the post-taking remedy was made more interesting because the City had issued formal orders authorizing the demolition *after* the buildings had been destroyed. Plaintiffs had therefore not availed themselves of the statute, and argued that it did not apply. But the court found that the remedial language above was not invalidated by such timing. (And unfortunately for plaintiffs, they had not brought their action until one year following the demolition, far after the three-day period cited in the remedial statute. While the court found this timeframe to be brief, it had no authority to modify the statute).

Substantive Due Process: Plaintiffs' substantive due process claim was dispatched rapidly. The First Circuit did not find a fact pattern that objectively "shocks the conscience."

Plaintiffs were therefore directed to pursue their post-demolition remedies in state court:

> [W]hen a city decides buildings are sufficiently damaged that they must immediately be demolished to protect

life and limb, and when the city does so pursuant to a state law that anticipates such an emergency and authorizes the use of summary procedure to respond to it, the remedy for any wrong, absent conscience shocking behavior, must come from the remedies the state itself supplies rather than from a federal suit premised on the federal Constitution's Due Process Clause.

***South Commons Condominium Association v. Charlie Arment Trucking Inc.,* Nos. 13-2244, 13-2248 (1st Cir. Dec. 23, 2014)**

Native Americans: Tribes "Recognized" by the Federal Government as Recently as 2002 Qualify to Receive Casino Lands

In a classic battle (featuring 9 plaintiffs and 14 defendants) by gaming businesses against a potential new entrant, a Washington D.C. federal court has applied *Chevron* analysis to uphold an Interior Department decision to take Washington State land into trust for an Indian tribe which intends to develop a casino complex.

The Cowlitz Indian Tribe (Cowlitz) of southwestern Washington has been without land since President Lincoln signed a proclamation in 1863 that opened Cowlitz lands to non-Indian settlement. In 2002, the Interior Department acknowledged the Cowlitz, finding that the tribe had existed as an Indian entity on a "substantially continuous basis" since at least 1878. The Cowlitz, numbering some 3,000 members, immediately requested that the Interior Secretary take into trust 152 acres of land in Clark County, Washington (Parcel) and declare it the Tribe's "initial reservation" under the Indian Reorganization Act of 1934 (IRA). The Secretary complied.

The Cowlitz claimed their purpose was to "create a federally-protected land base on which the Cowlitz Indian Tribe can establish and operate a tribal government headquarters to provide housing, health care, education and other governmental services to its members, and conduct the economic development necessary to fund these tribal government programs, provide employment opportunities for its members, and allow the Tribe to become economically self-sufficient." To further that goal, the tribe produced a plan to develop the Parcel with 20,000 square feet of tribal offices, sixteen elder housing units, a 12,000 square foot cultural center and a 600,000 square foot casino-resort-convention center complex with a 250-room hotel.

Plaintiffs, including tribes with existing casinos in the area, other gaming-related businesses and community groups, came together to challenge the Secretary. Their action arose under a matrix of federal laws: the IRA, the Administrative Procedure Act (APA), the Indian Gaming Regulatory Act (IGRA), and the National Environmental Policy Act (NEPA). Their key argument was that, under applicable law, the Cowlitz had to have been formally "recognized" by the federal government since 1934. The Secretary argued that the statutory language was ambiguous and that recognition was only necessary as of the date the land was taken into trust.

HELD: The Secretary's interpretation of the applicable statutes is reasonable, and under *Chevron* must be given deference.

DISCUSSION: The IRA authorizes the Secretary to acquire land in trust for "Indians," which include, *inter alia,* "members of any recognized Indian tribe now under Federal jurisdiction." While the Supreme Court had determined that the word "now" was used by Congress to mean 1934, when the IRA was enacted (*Carcieri v. Salazar,* 555 U.S. 379 (2009)), it was not clear that "now" applied to "recognized" as well as "under Federal jurisdiction."

It was this ambiguity that the Secretary construed. The Secretary reasoned that the term "recognized" had historically been used in two distinct senses: (1) the "cognitive" or "quasi-anthropological" sense, under which an official "simply knew or realized that an Indian tribe existed," and (2) "the more formal or `jurisdictional' sense to connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique relationship with the United States." The formal or jurisdictional sense of recognition, the Secretary explained, evolved into the modern notion of "federal recognition" or "federal acknowledgment" in the 1970s, and eventually regulations established procedures pursuant to which an entity could demonstrate its status as an Indian tribe.

The Secretary reasoned that "whatever the precise meaning of the term recognized tribe,' the date of federal recognition does not affect the Secretary's authority under the IRA" because "the IRA imposes no time limit upon recognition," and "the tribe need only be `recognized' as of the time the Department acquires the land into trust."

The Secretary concluded that the Cowlitz tribe had been "recognized" since at least 2002, when it received federal acknowledgment, and therefore it satisfied the recognition requirement.

Although plaintiffs countered that the only plausible interpretation of the IRA was that the Cowlitz had to be "recognized" and "under Federal jurisdiction" in 1934, the court disagreed. It found significant ambiguity in the IRA and its legislative history regarding the issue.

This opened the door to the *Chevron* standard of review for evaluating an agency's interpretation of a law it administers. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Where, as in the Cowlitz case, the statute is "silent or ambiguous with respect to the specific issue,"the court must determine whether the agency's response to the question at issue is reasonable and based on a permissible construction of the statute." If the agency's interpretation is reasonable, the court must defer. The agency's interpretation need not be "the only possible interpretation, nor even the interpretation deemed most reasonable by the courts."

The court is "principally concerned with ensuring that [the Agency] has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational

Continued on page 34