## Takings: No Private Right of Action Against Condemnation of Real Property Under Uniform Relocation Assistance and Real Property Acquisition Policies Act

## *Clear Sky Car Wash Inc. v. City of Chesapeake*, No. 13-1492 (4th Cir. Feb. 21, 2014).

The Fourth Circuit has upheld the actions of a Virginia city in appropriating a car wash adjacent to a road widening project, finding that the plaintiff had no private right of action under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

In November 2008 the Chesapeake City Council approved a project wherein the Virginia Department of Transportation, with funding from the federal government, would widen a major road in Chesapeake. In order to accomplish the project, the city had to acquire and destroy Clear Sky Car Wash along the road at issue. Negotiations were unsuccessful, as Clear Sky ultimately rejected the city's $2.15 million offer, and the City resorted to using a "quick take" procedure under Virginia Code §§ 33.1-119 and 33.1-120. Under this procedure the City filed a "certificate to take" with the Circuit Court and deposited $2.15 million (the appraised value) for the car wash owners, completing the taking such that the only issue for contention was the appropriate level of compensation.

Clear Sky filed suit alleging that the City (and Virginia Department of Transportation and U.S. DOT) violated its rights under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA"). Specifically, it alleged both appraisals the City had done undervalued the property and that City then used those appraisals to negotiate in bad faith with Clear Sky by replying late to its requests for information and/or responding with faulty information. It also alleged the City inappropriately declined to discuss the settlement and prematurely effected a quick take. Altogether six claims were at issue: that the defendants 1) failed "to act in compliance with and subject to the mandates of the URA, 2) violated Clear Sky's rights under the Due Process Clauses of the Fifth and Fourteenth Amendments, 3) violated Clear Sky's rights under the Equal Protection Clause of the Fourteenth Amendment, 4) violated 42 U.S.C. §§ 1983 and 1985 in denying Clear Sky its interests in "the proper application of the [URA], 5) breached a contract in violation of Virginia law, and 6) violated Virginia law as to equitable estoppel.

The district court granted defendants' motion to dismiss. The court lacked subject matter jurisdiction over count 1 because no cause of action was created by the URA. As a result, it also dismissed counts 2-4 for failure to state a claim for which relief could be granted. Last, it declined to exercise supplemental jurisdiction over the remaining two state law claims. Clear Sky appealed the narrow ruling that the URA failed to create a private right of action and that neither Section 1983 nor the Administrative Procedure Acts (APA) provided avenues for relief despite the URA.

**HELD**: The Fourth Circuit affirmed, holding the URA does not create private rights of action.

**DISCUSSION**: Section 4651 of the URA requires federal agencies "to assure consistent treatment for owners . . . and to promote public confidence in Federal land acquisition practices," and directs the "heads of Federal agencies . . . to the greatest extent practicable, be

guided by" ten specific policies. These policies include making reasonable efforts to ensure land is acquired by negotiation and to offer the amount the head of the agency believes to be just compensation. Moreover, the URA provides "[t]he head of a Federal agency shall not approve any . . . grant to . . . an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property . . . unless he receives satisfactory assurances from such acquiring agency that (1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies [of the URA] . . . . As a result, state agencies must comply with the URA. Despite this language, § 4602(a) of the URA states "[t]he provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation." (emphasis added). It is this last sentence the court relied on to deny Clear Sky's appeal.

To create private rights of action Congress must "speak with a clear voice" and "unambiguously" intend to create the right. Clear Sky argued that while the words of §4602(a) appear clearly to state on their face that no private rights of action are created, that section only applies to the URA section enumerating the ten policies (§ 4651) and thus is inapplicable to state agencies since the statute is made applicable to states through a different section (§4655). The Court did not buy this argument, instead holding Clear Sky misconceived of the relationship between the sections: §4655 does not create any policies of its own, rather it extends those of § 4651 to state agencies that receive federal funds.

Clear Sky, conceding the URA created no private right of action, alternatively argued that either Section 1983 or the APA allowed it to claim relief under the URA. The court also denied these arguments, pointing out that Section 1983 is a not a source of rights itself, but a vehicle through which a right created elsewhere by Congress may be enforced. This made the inquiry "no different" from the Court's initial inquiry as to an implied right of action.

As for the APA, the Court rejected Clear Sky's assertion that the U.S. DOT's failure to comply with the URA was "per se arbitrary, capricious, and not in accordance with the law" because it was not final agency action, and thus not reviewable under the APA. To be final, agency action must "mark the consummation of the agency's decisionmaking process," and to be agency action, it has to be an "agency's determination of the rights and obligations" involved in the issue. Here the issue was, at most, whether the U.S. DOT monitored the state agency's use of federal funds properly--which fit neither definition. Moreover, even if the court were inclined to find differently on these two issues, Clear Sky had never raised the APA argument below, thereby waiving it.

http://www.ca4.uscourts.gov/Opinions/Published/131492.P.pdf (last accessed Mar. 6, 2014)