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Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Is Preservation of Open Space a "Public Use"?
Mount Laurel Township v. Mipro Homes, L.L.C.,
878 A.2d 38 (N.J. Super. Ct. App. Div., August 2, 2005)

The New Jersey Supreme Court recently heard oral argument in this challenge to a municipality's use of eminent domain to preserve open space, slow down development, and curb sprawl.

One would have thought that the taking of land for a park or open space would be deemed a quintessential "public use" under even the most restrictive reading of that term. But the temptation to ride the *Kelo* backlash is difficult to resist, and Mipro Homes contends in this case that condemnation to stop development is unlawful. It has vowed to take the case all the way to the U.S. Supreme Court.

Mount Laurel Township (yes, that Mount Laurel) is a rapidly developing community, and its growth is straining local schools, roadways, police and fire departments, and other services. In the wake of the famous "exclusionary zoning" case that bears its name, Mount Laurel now provides adequate affordable housing, and a "repose order" issued in that case now allows it to address the pressing issues arising from its dramatic growth. To preserve open space and limit growth, in 2002 the township authorized acquisition of a 16.3-acre parcel owned by Mipro zoned for residential development. Mipro refused to sell, and Mount Laurel brought a condemnation action. Astonishingly, the trial court ruled that the township could not use eminent domain to preserve open space.

Last August, an intermediate appeals court reversed and upheld the condemnation. It ruled that the municipality has statutory authority to condemn land for open space even though it does not have an existing plan to devote the land to active recreational use. The court also ruled it is lawful to target land slated for residential development for open space acquisition.

The matter now rests with the New Jersey Supreme Court. We'll keep you apprised of developments.

EYE ON WASHINGTON

The "Good News" Is Here:
CRC's Latest Publication

Community Rights Counsel is delighted to announce that our latest publication, *The Good News About Takings* (APA 2006, 68 pp.), is now available from the American Planning Association. This short book, accessible to lawyers and lay readers alike, is intended to give planners, planning commissioners, municipal attorneys, and others a guide to the remarkable and heartening developments in takings law over the past several years.

Just a few years ago, it seemed that the U.S. Supreme Court had raised takings law into a powerful obstacle to sound land use planning and environmental protection. But after a string of decisions, from 2002's *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* to 2005's *Lingle v. Chevron*, that is not the case. According to the Court, government action must be the "functional equivalent" of a physical expropriation of property to be deemed a regulatory taking. Regulations rarely reach this threshold.

The book's chapters address the building blocks of good land use planning—zoning, protections for ecologically sensitive areas, temporary moratoria, dedications, permit conditions and impact fees—and explain current Supreme Court case law on each subject using concrete examples. U.S. Representative Earl Blumenauer, the most outspoken advocate of smart growth at the federal level, contributed the introduction to the book, which is a thoughtful essay on fairness in land use planning. The foreword is by Paul Farmer, the Executive Director of the American Planning Association.

The book is for sale ($15.95, volume discounts available) on the American Planning Association's website at http://www.planning.org/bookservice/. We think *The Good News* links Court decisions and the nuts and bolts of land use planning in a clear and concise way. We hope readers find it interesting and useful.

ON THE HORIZON

The EPA and Greenhouse Gases, Take Two

On April 26, New York and California led a group of ten states and two cities in the latest legal charge to get the U.S. Environmental Protection Agency to take action on climate change. The states have asked the U.S. Court of Appeals for the D.C. Circuit to review EPA's decision in February that it did cannot, under the Clean Air Act, regulate power plants' emissions of carbon dioxide, the main culprit in global warming.

When the EPA (forced by a previous lawsuit) issued new regulations to reduce harmful emissions like nitrous oxide, sulfur dioxide, and particulate matter from power plants, it repeated its assertion that it had no authority under the Clean Air Act to regulate carbon dioxide as an air pollutant contributing to climate change. This, despite the fact that the Act defines "air pollutant" very broadly, and in fact explicitly refers to carbon dioxide as an air pollutant in section 103(g). Two EPA General Counsels had classified carbon dioxide as an air pollutant, but this position was changed during the current administration.

Does this argument sound troublingly familiar? It's almost identical to the one used by the EPA when many of the same plaintiffs sued the agency for declining to regulate carbon dioxide emissions from automobile tailpipes. EPA prevailed in the D.C. Circuit in that case, and the plaintiffs have petitioned the Supreme Court for review (see CRC's April newsletter for details). Although the D.C. Circuit ducked the central interpretative issue in the car case as to whether carbon dioxide is an "air pollutant" under the Clean Air Act, the new power plant case will give the court a second chance to settle the matter.

But the stakes are even higher in this case than in the automobile emissions case: while cars and trucks emit about one-fifth of the greenhouse gases produced in the U.S., power plants account for more than one-third of the greenhouse gases. Furthermore, power plants last—and pollute—for forty or fifty years. As the New York Attorney General's press release notes, "the plants built in the near future will determine the level of our carbon emissions for generations."

OUTRAGE OF THE MONTH

Kelo vs. the Environment: A Skewed View from the Libertarian Fringe

When the fox offers advice on how to protect the chickens, watch out. Two staunch libertarian academics have written an article arguing that the use of eminent domain for economic development poses a severe threat to environmental protection.

In a piece entitled *The Green Costs of Kelo*, Ilya Somin and Jonathan Adler assert that *Kelo* poses a special threat to privately owned, ecologically sensitive land. To their credit, the authors highlight the importance of land trusts, nature preserves, and other privately owned property that is environmentally sensitive. But they fail to cite a single case in which state or local officials have condemned land in trusts or nature preserves for economic development. The reason, of course, is that state and local officials appreciate the importance of preserving ecologically sensitive land.

The authors casually gloss over the real threat to the environment related to eminent domain: Without the ability to use eminent domain to revitalize our central cities, growth will sprawl outward. The resulting voluntary sale of rural lands for development poses a far greater threat to environmental quality than eminent domain.

Adler and Somin also engage in the useless exercise of knocking down straw men. They assert, for example, that restrictions on eminent domain for economic development, like those imposed by the Michigan Supreme Court in *County of Wayne v. Hathcock* or in pending legislation, are "unlikely to impede environmental regulation." No one has ever argued to the contrary.

The authors' bottom line seems to be that the use of eminent domain for redevelopment doesn't work because local officials are too corrupt (they "benefit parochial private interests, such as commercial developers, at the expense of the general public") or because such redevelopment is less efficient than the marketplace. They need to get out more. There are countless situations in which eminent domain was used to overcome market failures that have resulted in tremendous success stories, transforming lives and communities with new jobs, new energy, and new hope. Result-oriented papers masquerading as objective academic analysis do not enhance the public debate on eminent domain.
