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Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel
Community Rights Counsel
1301 Connecticut Avenue, NW, Suite 502, Washington, DC 20036; www.communityrights.org

FEATURE CASE

Huge Win for Comprehensive Planning

The New Mexico Court of Appeals handed Albuquerque a spectacular victory in the war against sprawl on December 9th, when it overturned an $8.3 million verdict in a major case that supports a city's ability to enforce its comprehensive plan.

At issue in *Albuquerque Commons Partnership v. City Council of the City of Albuquerque*, No. 24,026 (NM Ct. App., Dec. 9, 2005), were revisions to the city's Uptown Sector Plan (USP), first drafted in 1981, which called for the Uptown Sector to be among the densest in the city. In early 1994, the city began considering revisions to the USP. Late that year, a developer proposed a big-box, suburban-style development for an empty parcel in Uptown.

The city eventually decided to create a very dense core zone in the Uptown Sector, with specific floor area ratio regulations that would require tall buildings and very little surface parking—in other words, no big-box stores. The city believed these quantifiable standards were necessary to fulfill the city's long-held goal of creating a genuinely urban area in the Uptown Sector.

The Albuquerque Commons Partnership (ACP), which held the lease on the proposed big-box site, sued. In early 2003, a jury awarded ACP $8.3 million in damages for due process violations.

The Court of Appeals, in a long, carefully reasoned opinion that reads like a primer in the nitty-gritty details of zoning law, overturned the decision. A city, the court held, can strengthen its zoning requirements to implement its comprehensive plan without going through a formal re-zoning process. One paragraph of the opinion is sure to warm the hearts of planners and local officials across New Mexico and beyond: "Zoning as 'governmental regulation of the uses of land and buildings' always affects a property owner's ability to use his property as he sees fit * * *. The fact that he cannot use it as he wants is simply the price of living in a modern community."

ACP has not yet decided whether to appeal.

OUTRAGE OF THE MONTH

Takings and the Federal Endangered Species Act

Back in September, the House of Representatives undermined both the Endangered Species Act and fundamental principles of takings law in a single bill, the Threatened and Endangered Species Recovery Act of 2005 (TESRA).

TESRA was introduced by California Rep. Richard Pombo, an ardent property rights advocate. The bill contains a new and extreme version of so-called "regulatory takings" provisions that would pay citizens for simply complying with federal law. The bill would require taxpayers to pay financial "aid" to landowners who forgo a proposed use of the land that would harm threatened or endangered species. The amount of the "aid" would be fair market value of the forgone use of the affected portion of the land, including business losses. The bill would compel windfall compensation to landowners who had no reasonable expectation of using the land in a manner that would harm species, including those who bought the land with full knowledge of the presence of protected species.

The Senate might produce a more moderate bill. Sen. Mike Crapo of Idaho introduced the Collaboration for the Recovery of Endangered Species Act in December. Crapo's bill proposes a plan of conservation banking and tax credits for species conservation measures. It's likely that an Endangered Species Act revision will include some form of financial incentives for landowners to do the right, law-abiding thing.

While we appreciate the challenges that landowners face when it comes to species protection, we hope that Congress does not start paying people to adhere to the law.

ON THE HORIZON

Good News About Takings

In early 2006, the American Planning Association will publish Community Rights Counsel's new book, *The Good News About Takings*. This short book 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 few years. The Supreme Court's decisions under the Fifth Amendment's Takings Clause were as recently as five years ago widely deemed a significant obstacle to innovative environmental and land use planning efforts at the federal, state and local levels. Happily, that is no longer true.

Starting in 2002 with *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, and culminating in the 2005 ruling in *Lingle v. Chevron*, the Supreme Court has made it clear that the state of takings law is this: There must be a wipeout of substantially all property value of the entire parcel for a government to be held liable for a regulatory taking. Most regulations do not meet this threshold, so local officials have wide latitude in protecting the environment and designing land use plans. Even cases like *Nollan v. California Coastal Commission*, *Dolan v. City of Tigard*, and *Lucas v. South Carolina Coastal Council*, which seemed like significant threats to land use planning when they were handed down, have since been interpreted narrowly, giving local officials even more scope for deciding how communities grow and change.

The book's nine chapters take up common planning issues, such as downzoning, protections for ecologically sensitive areas, temporary building moratoria, dedications, impact fees, permit conditions, and eminent domain, and explain the current Supreme Court case law on these issues.

We hope that this exciting new publication will counter the aggressive efforts of some developers to use the threat of lawsuits to block reasonable regulations that protect property values and communities. The National Association of Home Builders has called the threat of litigation a "hammer to the head" of state and local officials. Surveys and scholars alike have shown that fear of big litigation bills alters the behavior of local officials. But the law is fundamentally on the side of local officials. That's the *Good News*, and we hope that it spreads widely.

EYE ON WASHINGTON

Update on *Rapanos/Carabell* Wetlands Cases

As we reported in our October 2005 newsletter, the U.S. Supreme Court has agreed to review two wetland cases challenging federal authority to regulate wetlands and other intrastate, non-navigable waters under the federal Clean Water Act.

John Rapanos was convicted in a criminal proceeding for destroying wetlands to build a shopping mall. Rapanos' own consultant testified that Rapanos fired him after he told Rapanos the extent of wetlands at the site. Rapanos continued to fill the property even after receiving numerous cease and desist orders from Michigan environmental officials. His appeal to the Supreme Court arises out of a parallel civil enforcement action for millions of dollars in fines and mitigation fees. Carabell challenges the denial of a permit to destroy one of the last large forested wetlands in Macomb County, Michigan, 16 acres of wetlands about one mile from Lake St. Claire.

The issue before the Court concerns the phrase "waters of the United States," a key jurisdictional term in the federal Clean Water Act. Rapanos, supported by more than 20 *amici*, argues that the phrase is limited to traditionally navigable waters and their adjacent wetlands, a reading that would permit the discharge of fill material and pollutants in countless small streams and wetlands across the nation. Alternatively, they argue that any broader reading would exceed Congress's power under the Commerce Clause. If this position were to prevail, federal officials would lose authority to protect about 99 percent of the waters covered by existing regulations.

In January 2006, Community Rights Counsel will file a brief on behalf of an association representing state pollution control officials from all 50 states showing that longstanding federal protections are essential to the State-federal partnership created by the Act to protect our nation's waters, including the harm to downstream States that would result from a narrowing of federal authority.

The Court will hear oral argument on February 21.