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FEATURE CASES

Three Favorable Rulings from the High Courts of New Jersey, Maryland, and Massachusetts

Good news comes in threes, and in recent weeks local officials received helpful rulings from three state high courts. The Supreme Court of New Jersey upheld the use of eminent domain to acquire land for open space, and the high courts of Maryland and Massachusetts clarified regulatory takings analysis in a way that properly limits government liability.

In *Mount Laurel Township v. MiPro Homes*, 910 A.2d 617 (N.J., Dec. 7, 2006), the Supreme Court of New Jersey held that local officials have statutory authority to use eminent domain to protect land from development. As part of its open space acquisition program, Mount Laurel Township (yes, that Mount Laurel) condemned land that the owner planned to develop into an upscale, 23-house subdivision. The land was zoned residential, and MiPro already had dug a storm water basin and begun other work on the site.

By a 6-1 vote, the court held that state statutes authorize New Jersey municipalities to take land to promote recreation and conservation, a public interest reaffirmed by NJ voters' repeated approval of bonds, loans, and grants to fund acquisitions for open space. The court's short *per curium* opinion stresses that it makes no difference that local officials desired to prevent development that would worsen traffic congestion, overcrowded schools, and pollution. The court emphasized, however, that just compensation for such land should reflect development approvals and other factors relevant to the optimum use of the site.

On November 28, the Supreme Judicial Court of Massachusetts issued a comprehensive opinion on two key issues in regulatory takings analysis: how to define the relevant parcel and how to apply *Penn Central*. In *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451 (Mass., Nov. 28, 2006), the court rejected a takings claim filed by the owner of two contiguous lots. One lot contained a house, and the other contained wetlands. The owner purchased them together in 1999 for $130,000. The lots were assessed separately for taxes and had different addresses. Nine months after the purchase, the town adopted a wetland protection ordinance. The town's conservation commission refused to allow construction of a house on the lot with wetlands, prompting the owner to file a regulatory takings claim.

After a comprehensive review of applicable precedent, the court established a rebuttable presumption that contiguous, commonly owned lots constitute a single parcel in considering the economic impact of the challenged government action. Either side may overcome this presumption by showing that the owner's treatment of the property or other factors warrant a different result. The court also concluded that separate addresses or tax treatment generally carries "little weight" in the analysis. The absence of a common development plan for the two lots was not enough to overcome the presumption that they constitute a single relevant parcel.

Turning to the *Penn Central* inquiry, the court observed that the total reduction in value resulting from the challenged denial for the entire relevant parcel was 29 percent, a loss insufficient to support takings liability. Furthermore, although the wetlands ordinance was adopted after the owner's purchase, he could not show interference with reasonable, investment-backed expectations because he did not invest any funds that relied on the separate development of the unbuildable lot.

Finally, in *Neifert v. Department of the Environment*, 910 A.2d 1100 (Md., Nov. 14, 2006), the Maryland Court of Appeals, the state's highest court, denied takings claims brought by landowners seeking to develop wetlands west of Ocean City. Appellants' properties were part of the Cape Isle of Wight development, where much of the land was created out of sidecasting excavated canal material. In the mid-1970s, untreated sewage from about half of the 128 existing septic systems in Cape Isle leaked into drinking supplies. Thereafter, the State required each parcel to pass a seasonal percolation test before developing. Almost every property, including Appellants', failed this test. Appellants did not appeal this decision. Nearly twenty years later, Appellants filed an application to fill the wetlands on their property and to be connected to the County sewer system, and both requests were denied. The landowners challenged these actions as a taking.

The court held that no taking had occurred for several reasons, including: (1) the denial of fill and sewer service permit applications could not be takings because the lots were deemed undevelopable in the 1970s, (2) prohibition of the nuisance of untreated sewage leaking into drinking water does not constitute a taking, and (3) access to sewer services is not a constitutionally protected property interest. The court also rejected a related equal protection challenge.

ON THE HORIZON

Supreme Court to Address Personal Liability of Gov't Officials In Challenge to Alleged Takings Clause Violations

In a case with huge implications for the personal liability of government officials, on December 1 the U.S. Supreme Court agreed to review a 10th Circuit decision holding that federal employees may be subject to damages actions under *Bivens* and the federal racketeering laws based on activity within the employees' duties and undertaken without any purpose or intent of personal gain.

The case, *Wilkie v. Robbins* (S. Ct. No. 06-219), involves a damages action brought against officials of the federal Bureau of Land Management in their individual capacities. The litigation grew out of a longstanding controversy between land management officials and Harvey Frank Robbins, the owner of a dude ranch in Hot Springs County, Wyoming. The previous owner of the ranch granted BLM an access easement along a road on the ranch in exchange for grazing rights on adjacent federal lands, but BLM failed to record the easement. Thus, under state law Robbins took possession of the ranch unencumbered by the easement. The federal officials, in exercising their regulatory authority, attempted to secure a reciprocal right-of-way from Robbins in exchange for continued rights to graze and other easements, but Robbins refused to budge.

In his suit, Robbins alleges, among other things, that the officials unlawfully attempted to "extort" the right-of-way in violation of the Fifth Amendment, and then retaliated against him when he exercised his constitutional rights. The government argues that the defendant employees should not be held personally liable because they did nothing more than execute their duties under applicable federal land management regulations. It is uncontested that private landowners generally have a right to exclude, but this right has never been extended to embrace a right to insist on access to public lands without providing reasonable reciprocal access to private lands.

The high court will address several issues, including whether the Takings Clause of the Fifth Amendment protects against retaliation for exercising this alleged "right to exclude" the government from private property. Because the defendants rely on qualified immunity, which can be overcome only by demonstrating a "clearly established" right, resolution of this case will turn in part on whether the defendants violated clearly established rights under the Fifth Amendment.

EYE ON WASHINGTON

Global Warming in the Supreme Court: Oral Argument in *Mass v. EPA*

"To be sure, carbon dioxide is a pollutant, and it can be an air pollutant." It's not surprising that those words were uttered in the Supreme Court during oral argument in the case of Massachusetts v. EPA (No. 05-1120) late last November. But it *is* surprising to note that they came from Justice Antonin Scalia.

As Court watchers have come to expect, Justice Scalia fired off some of the best zingers during oral argument, including the memorable, "I'm not a scientist. That's why I don't want to have to deal with global warming, to tell you the truth." But the case will most likely turn on Justice Anthony Kennedy's reasoning, not Justice Scalia's wit.

The threshold issue in the case is whether any of the plaintiffs in the case (Massachusetts, 11 other states, three U.S. cities, and a host of environmental groups) have standing to sue. Justice Kennedy probed Massachusetts Assistant Attorney General James Milkey on whether or not Massachusetts "ha[s] some special standing as a state." Kennedy offered *Georgia v. Tennessee Copper* (206 U.S. 320) as "your best case."

Georgia v. Tennessee Copper was not cited in any of the briefs in the case, suggesting that Kennedy is casting the problem before the Court a little differently than the parties. In *Tennessee Copper*, Justice Oliver Wendell Holmes focused on the fact that states are special in the eyes of the law. The Constitution grants the Supreme Court original jurisdiction in cases in which a state is a party, for example. Holmes took this to mean that states "by entering the Union, did not sink to the position of private owners, subject to one system of private law," and that this applied with particular force when a state sought to protect "all the earth and air within its domain." This argument, firmly grounded in Constitution's recognition of states' special status in our federal system, might appeal to the Court's conservative justices, who appeared skeptical that the remedy sought -- EPA action on global warming pollution emitted from new cars and trucks -- would make a dent in global warming.

After oral argument, CRC was feeling optimistic about the outcome of the case. We even took heart that, on December 1, when the Justices conferred about the case after oral argument, the temperatures in Washington were in the 70s. We should know the outcome next spring.