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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

Oregon High Court Reinstates Measure 37

MacPherson v. Dep't of Administrative Services, 2006 Ore. LEXIS 104, No. SC S52875 (Ore., Feb. 21, 2006)

"If my fellow citizens want to go to Hell I will help them. It's my job." So wrote Justice Oliver Wendell Holmes in a famous 1920 letter to Harold Laski.

The Oregon Supreme Court evidently agrees. On February 21, the high court in *MacPherson* reversed a lower court ruling that had declared Oregon's Ballot Measure 37 unconstitutional. The state supreme court rejected arguments that Measure 37 violates various federal and state constitutional provisions, but it stressed that "whether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview."

Well, it's not beyond our purview, and it's clear the initiative is foolish indeed. Under Measure 37, state and local officials must either compensate landowners for *any* loss in value caused by land-use restrictions, or waive those restrictions as applied to the complaining landowners. Any owner who acquired land prior to enactment of the challenged regulation may seek compensation.

The ruling will trigger reconsideration of thousands of claims for compensation that were put on hold for the duration of the case. These claims cover more than 66,000 acres of land, and most are for residential subdivisions to be built on farm and forest land. Because there are no state or local compensation funds, most successful claims will result in waivers.

Measure 37, a ballot initiative that passed with 61 percent of the vote in 2004, exemplifies the dangers of governance by referendum, a process that can reduce complex issues to misleading bumper-sticker campaigns. It has spawned similar initiatives in other states, including Washington, California, Nevada, Oklahoma, and South Carolina (see Outrage, p.2).

Those challenging Measure 37 in *MacPherson* included farmers, ranchers, and other landowners who bought their land in reliance on land use laws that control residential development. Their land and livelihoods now are at risk as uncontrolled development harms watersheds, impairs water quality, increases safety risks on local roads, and further strains overburdened school systems. Their farm and ranching businesses also will be threatened by new residential subdivisions that increase the likelihood of expensive nuisance suits against them.

Environmental groups reportedly responded that the latest ruling would spur their efforts to repeal the law. We hope so. Otherwise, expect Oregon's highly successful land-use planning controls to go, as Holmes might have said, to Hell in a handbasket.

ON THE HORIZON

Oral Argument in *Rapanos/Carabell*

On February 21, the U.S. Supreme Court heard oral argument in *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, two monumental cases under the federal Clean Water Act that raise the issue of whether the Act protects non-navigable tributaries that feed into our nation's navigable waters, as well as wetlands adjacent to those tributaries. Further details can be found in our October and December 2005 newsletters.

Although developer *amici* cast the cases as an important test of state prerogatives, 33 state Attorneys General and CRC's client, the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), filed amicus briefs in support of continued federal protection. As the U.S. Solicitor General contended at argument, it is unreasonable to assume every upstream state will deny economic opportunities to its businesses when the harmful impacts of development will be felt in downstream states. As always, it is difficult to read the tea leaves, but we're hopeful the court will listen carefully to what the states are saying.

QUOTE OF THE MONTH

Does it make sense to say that wetlands adjacent to navigable waters are covered [as the court has previously held], and yet tributaries of those navigable waters are not covered?

A paraphrase of Justice Samuel Alito's only question during *Rapanos/Carabell*, expressing skepticism over Rapanos's position.

OUTRAGE OF THE MONTH

Two Valentines for Property Rights Extremists

It was a sweet February for property rights advocates in Washington state and South Carolina, as ballot initiatives and legislation that would gut responsible land use planning advanced.

On February 9, the Washington Farm Bureau filed a ballot initiative that, if passed by voters in November, would essentially roll back ten years' worth of state land use laws, by requiring governments to pay compensation for land use regulations passed after 1995 or waive the regulations altogether.

The measure is in some ways more extreme than Oregon's Measure 37, a property rights ballot initiative that passed in 2004. Measure 37 does not compensate owners for the effect of laws in place at the time they bought the property. By contrast, Washington's initiative would grant owners who bought property with full knowledge of its limitations—and presumably at a price that reflected those limits—an enormous windfall. But, like Oregon's measure, this initiative includes no source of funds for compensation, meaning that most challenged laws probably will be waived because local governments simply cannot afford to pay to regulate.

A South Carolina General Assembly committee dealt land use laws a double blow on February 15, when it approved two bills that require governments, or more accurately, taxpayers, to pay landowners to comply with new land use regulations. One bill, which proposes a constitutional amendment for voter approval, requires a government to pay landowners if changes in land use law reduce the value of their property after they purchased it. The proposed constitutional provision would have an extreme chilling effect on lawmakers, because landowners are explicitly exempt from applying for a variance or making other efforts to comply with the law before they ask for compensation. The other bill includes Measure 37 style pay-or-waive language.

Both the proposed amendment and the legislation include the pay-to-regulate scheme among provisions to change the state's eminent domain laws, presumably because the sponsor hopes to capitalize on the public outrage at the Supreme Court's *Kelo* decision.

But land use regulation is a far cry from outright condemnation, and there is no constitutional requirement that governments have to pay property owners for land use laws that benefit the community and enhance the quality of life for everyone. We hope that Washington voters and the South Carolina legislature reject these efforts to enrich a few disgruntled property owners at the expense of good land use planning and community wellbeing.

EYE ON WASHINGTON

Senators Move to Stop Judicial Junkets:
Fair and Independent Judiciary Act Preserves Judicial Independence, Bolsters Public Trust

On January 27, U.S. Senators Patrick Leahy, John Kerry, and Russ Feingold introduced a bill to stop the disturbing practice of special interests using lavish "educational" trips to fancy resort locations to lobby federal judges on hot-button legal topics such as regulatory takings law. The Fair and Independent Judiciary Act of 2006 would allow for judicial education but ban the unseemly gifts of privately funded vacations that accompany judicial junkets.

These trips, which Community Rights Counsel exposed in a series of investigative reports, have been condemned by the nation's leading experts in legal ethics, former judges, members of Congress, and dozens of newspaper editorial pages across the country. The bill establishes a $2 million fund for judicial education. Judges would be allowed to access money from this fund to pay for educational seminars, but their expenses would be paid by the courts, not by special interests. To promote transparency and address the problem of judicial stock conflicts, the bill also requires judges to maintain a public list of all potential financial conflicts of interest.

In his September confirmation hearings, Chief Justice John Roberts stated, "I don't think special interests should be allowed to lobby federal judges." We hope the Chief Justice will work with Congress to develop a solution that protects both judicial independence and public trust in the judicial branch.

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