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Community Rights Report

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

FEATURE CASE

Another Big Win for Comprehensive Plans

Last month, we reported on a spectacular victory by the City of Albuquerque, after the New Mexico Court of Appeals overturned a large takings verdict and reaffirmed the primacy of comprehensive plans. This month, the City of Mendota Heights secured a similar win from the Minnesota Supreme Court in *Mendota Golf, LLP. v. City of Mendota Heights*, No. A04-206 (Minn. Jan. 10, 2006).

Mendota Golf's 17.5-acre tract has been used as a nine-hole golf course since the early 1960s. The surrounding neighborhood is residential. When Mendota Golf acquired the land in 1995, it was zoned residential, but the city's comprehensive plan designated it for golf course use. Mendota Golf asserts that the golf course is no longer profitable, and in 2003 it decided to sell the land to a developer to build single-family homes. When the city rejected a proposed amendment to the comprehensive plan to allow for development, Mendota Golf sued. The trial court ruled for the golf course, holding that the city's failure to amend was arbitrary, and it issued a writ of mandamus ordering the city to amend. An intermediate appeals court affirmed.

The Minnesota Supreme Court reversed, ruling that the city had a rational basis to deny the plan amendment because "the city has a legitimate interest in reaffirming a historical comprehensive plan designation and in protecting open and recreational space." The high court stressed that the legislature "has delegated to municipalities the power to determine and plan the use of land within their boundaries." The court also recognized that state law, specifically the Metropolitan Land Planning Act (MLPA), requires the city to reconcile its plan with any conflicting zoning, but it is the city's decision whether to change the plan or the zoning.

The court concluded that the district court "exceeded the scope of its authority * * * by interfering with the exercise of legislative discretion" and ordering the city to reconcile its plan with the zoning by amending the plan, particularly since 1995 amendments to the MLPA give a comprehensive plan priority over a conflicting zoning ordinance: "Since 1995, the MLPA has provided that the comprehensive plan constitutes the primary land use control for cities and supersedes all other municipal regulations when these regulations are in conflict with the plan."

A three-Justice dissent observes that requiring the owner to continue to operate an unprofitable golf course would have regulatory takings "implications," but the majority responds that its ruling does not "prescribe a permanent comprehensive plan designation for the property" or foreclose continued negotiations over other options for the land.

In short, the decision is another clear reaffirmation of comprehensive planning for the promotion of the health, safety, and quality of life of our communities. Kudos to the City for its victory.

ON THE HORIZON

City of Eagan Lawsuit Back On: City Cites *Mendota Golf* in Rejecting Settlement

The *Mendota Golf* ruling discussed above already is bearing fruit outside of Mendota Heights. Another Minnesota community, the City of Eagan, invoked the decision as one reason for its rejection of a settlement that would have allowed an Eagan golf course owner to proceed with residential development. This surprising 180-degree turnaround means that the landowners' lawsuit against the city will proceed to the Minnesota Court of Appeals, where the city will attempt to overturn an adverse trial court ruling.

As we reported in our September 2005 newsletter, the owner wants to build 480 homes on about 120 acres that have been used as a golf course since 1965. Eagan refused to amend its comprehensive plan to allow for development due to traffic risks, inadequate school capacity, and other potential harm. The owner sued, and the trial court ruled that the failure to amend lacked a rational basis and worked a compensable taking.

In November 2005, the city negotiated a tentative settlement with the owner. But bolstered by the *Mendota Golf* ruling, the city now has decided to press on with its appeal, much to the delight of the many neighboring homeowners who opposed the settlement. According to the *St. Paul Pioneer Press*, "Residents applauded and neighbors — many wearing the same shocked expressions — hugged each other after the council's 5-0 vote. * * * 'After the last meeting, I had given up hope,' said JoAnne Geister as she wiped away tears. 'It took a lot of guts for them to do this.'"

Community Rights Counsel filed an amicus brief in support of the city on behalf of the League of Minnesota Cities, arguing that the owners had no reasonable expectation of using the land for a subdivision. Stay tuned for further developments.

OUTRAGE OF THE MONTH

Judge Votes to Invalidate Federal Law Against Foreign Sexploitation

Normally, we might let an off-the-wall dissent slide by without comment. And we have come to expect libertarian groups to advance outrageous theories that would dramatically curtail longstanding federal protections (see, for example, last month's discussion of *U.S. v. Rapanos*). But it is truly outrageous when a federal appeals court judge votes to free a convicted child molester on the theory that efforts to curb international sexual exploitation of children are beyond Congress's constitutional power.

In *United States v. Clark*, No. 04-30249 (9th Circuit, Jan. 25, 2006), the court reviewed the conviction of Michael Lewis Clark, an admitted pedophile who flew from the U.S. to Cambodia in 2003 and engaged in sex acts with two boys, ages 10 and 13. The boys accepted payments from Clark, ranging from two to five dollars, in exchange for sex so they could buy food for their siblings. Clark admitted he has engaged in sexual activity with 40-50 children overseas since 1996. Clark pled guilty under a federal law that makes it a felony for any U.S. citizen who travels to a foreign country to engage in an illegal commercial sex act with a minor. But Clark reserved his right to challenge the law's constitutionality on appeal.

The majority held that the law fits comfortably within Congress's Article I, § 8 authority "to regulate Commerce with foreign Nations." In the words of the court, travel in foreign commerce to a foreign country to engage in commercial sexual activity "falls under the broad umbrella of foreign commerce."

Despite the majority's powerful case for upholding the law, Judge Warren J. Ferguson dissented, arguing that because the law does not regulate commerce *with* foreign nations, it falls outside Congress's power. Incredibly, he concluded that the regulated activity is not economic even though the specific statutory subdivision at issue applies only to commercial sex acts.

Ferguson's analysis is akin to of the constrained interpretive method commonplace among those litigating Commerce Clause challenges to our drug control laws, environmental safeguards, and other community protections. Indeed, restrictive Commerce Clause theories are becoming an all-too-common plaything in the Ninth Circuit, with that court leading the pack in sustaining Commerce Clause challenges. Thankfully, Ferguson's colleagues refused to join him, but his cramped vision of the Constitution is genuinely shocking.

EYE ON WASHINGTON

Takings Test Two-Step

A January ruling from the Court of Federal Claims reaffirms the test for distinguishing between tort and takings claims. The opinion, in *Banks v. United States*, No. 99-4451-L (Jan. 9,2006), arose out of a dispute about the effects of Army Corps of Engineers projects in St. Joseph Harbor in Lake Michigan.

The plaintiffs alleged that Corps-built jetties have blocked sand that would have naturally replenished their lakefront property. As a result, they claimed, their property is rapidly eroding, and this is a taking. Further, they claimed that the seawalls they built with Corps permits to stop the erosion have in fact exacerbated it, and Corps is also liable for this additional erosion. The U.S. countered that this action is not even a takings case, but rather a tort claim.

In deciding the case, Judge Emily Hewitt of the Court of Federal Claims looked to two Federal Circuit precedents, *Ridge Line Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003), and *Moden v. United States*, 404 F.3d 1335 (Fed. Cir. 2005), which set out a two-part test for distinguishing between tort and takings cases. The test asks, first, whether the government invasion of property is intentional or a "direct, natural, or probable result of an authorized activity;" and second, whether the injury is more than a mere reduction in property value. The answer to both must be "yes" for there to be a potential taking.

Hewitt decided that erosion from protective structures like seawalls "is properly viewed as a 'direct, natural, or probable result' of the activities of the Corps in St. Joseph Harbor." Additionally, applying the reasoning in *United States v. Dickinson*, 331 U.S. 745 (1947), the judge concluded that "if the government has taken property by erosion, it can be found to have taken the land which it permanently erodes as well as the land that inevitably erodes as a result of that erosion." Furthermore, the injury the plaintiffs alleged would, if proved, be significant enough to meet the second prong of the test.

This ruling did not find a taking, but established that the case could proceed as a takings claim. Look for the resolution in a future Community Rights Report.
