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FEATURE CASE

Minnesota High Court Revives Takings Challenge To Comprehensive Plan Designation

Sometimes, perceived equities trump the law. That might be the best explanation for the ruling by the Minnesota Supreme Court in *Wensmann Realty, Inc. v. City of Eagan*, 2007 Minn. Lexis 389, A05-1074 (July 12, 2007), which remands a takings challenge to the city's refusal to amend its comprehensive plan to allow for residential development of land that has been zoned as a golf course for many years.

The landowner, Rahn Family LP, bought 120 acres in the City of Eagan in 1996 for $3.6 million. The prior owner had requested that the land be zoned for golf course use, and he had operated the golf course since the early 1960s. Consistent with this zoning, the city's comprehensive plan designation for the land prohibits residential development. Rahn bought the land with full knowledge of the zoning and plan restrictions. It also knew that shortly before the purchase, the city denied permission to rezone the land. Rahn readily acknowledges that it bought the land without any expectation of using it for any purpose other than a golf course.

Due to increased competition and other reasons, the golf course became less profitable, and in 2004 the owner applied for an amendment to the comprehensive plan to allow him to build 480 housing units. The city refused due to concerns about traffic, school overcrowding, and loss of open space. The owner filed a lawsuit claiming that the refusal was arbitrary and constituted a taking of the land. The trial court sustained the takings challenge but was reversed by the court of appeals, which rejected all of Rahn's claims.

The Minnesota Supreme Court affirmed the appeals court's ruling that the refusal to amend the plan was rational and properly supported by record evidence, but it revived the takings claim and remanded it for further analysis. Analyzing the claim under *Penn Central*, the court first looked at economic impact. It rejected the landowner's contention that the court should compare the value of the land as a golf course to its value with residential zoning. But it also rejected the city's position that the court should compare the land's value before and after the refusal to amend the plan (which caused virtually no change in value). Instead, the court ruled that in a takings challenge to a refusal to change a comprehensive plan, the best way to judge economic impact is to ask whether the owner retains "any reasonable, economically viable use of the property." The court concluded that the record was inadequate to make this determination because it is unclear whether a golf course is still a reasonable use and whether other reasonable uses exist. The court also left open the possibility that holding the property as an investment might well constitute a reasonable use.

The court further ruled that the expectations factor favored the city since the owner had no investment-backed expectation of using the land for anything except a golf course. But the court concluded that the character-of-government-action factor favored the owner because, in its view, the burden of maintaining the comprehensive plan fell disproportionately on the owner.

The court remanded the case for further findings on whether the owner retains reasonable use of the property. But it is not clear from the opinion what constitutes a reasonable use. The landowner might argue on remand that it must be able to recoup the original investment of $3.6 million plus additional expenses and a reasonable return on the investment to constitute a reasonable use. The city undoubtedly will push for a more flexible standard.

Whatever happens on remand, we hope we aren't left with a legal framework that gives every Minnesota farmer a constitutional right to insist on a change from rural to residential zoning if market conditions render the farm unprofitable. The Takings Clause should not be invoked as a taxpayer-subsidized insurance policy against market risk, especially when those risks are undertaken with full awareness of longstanding land use restrictions. Settled land use measures in place at the time of purchase prevent a landowner from having a reasonable expectation to use the land in a manner inconsistent with those requirements and generally should insulate local officials from takings liability when they decide to retain them. We hope the Minnesota courts have not lost sight of this basic principle of takings law.

EYE ON WASHINGTON

Condemnation After *Kelo*

"Washington" is such a convenient shorthand for "the federal government" that it's easy to forget that Washington, D.C., has many challenges that bedevil older urban areas, including the threat of blight and the desperate need in some neighborhoods for economic development. Indeed, the Supreme Court's landmark ruling in *Berman v. Parker* derived from the District. A recent ruling by the D.C. Court of Appeals—the city's highest court—highlights the issues raised by the use of eminent domain for economic development in the wake of the *Kelo* decision.

In *Franco v. National Capital Revitalization Corp.* (D.C. Ct. App. No. 06-CV-645), the court reversed and remanded a lower court's ruling that a property owner could not allege as a defense that a condemnation was invalid because it was a pretext for granting a private benefit on a private party. While emphasizing repeatedly that the court's role in reviewing condemnation cases is tightly circumscribed, the court wrote, "… *Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of a public purpose is a pretext designed to mask a taking for private purposes, and we hold that Mr. Franco adequately pled such a defense."

This is, at best, a partial victory for the plaintiff, Mr. Franco, who owned a Discount Mart store in a down-at-heel shopping center in a neighborhood that is vastly underserved by national retailers. The city's National Capital Revitalization Corporation and many neighborhood residents hoped that the center, which the city council had found to be "a blighting factor" in the neighborhood, could be redeveloped to attract new businesses, shopping, and employment opportunities to the community. The NCRC entered into a joint development agreement with four private corporations to turn this vision into reality.

The court said that the NCRC's goal of promoting economic development is clearly a public purpose, and that private parties can be the vehicle for this development, and can even benefit from the project. It warned that "further proceedings, including discovery, should honor the 'longstanding policy of deference to legislative judgments' concerning the public purpose of a taking…. We simply hold that in this case the defense may not be rejected as a matter of pleading."

The opinion contains a valuable analysis of state court eminent domain rulings after *Kelo*. Judges across the country are carefully feeling their way between the poles of legislative deference and heightened sensitivity to claims of improper private use. We'll keep you posted on their conclusions.

OUTRAGE OF THE MONTH

Developers Explain Housing Bubble, Contradict NAHB Lobbyists

When lobbyists from the National Association of Home Builders testify before Congress on why NAHB supports federal regulatory takings legislation, their oft-repeated refrain is that local officials arbitrarily deny development permits, or impose conditions and fees that cause developers untold woe, thereby necessitating special relief.

But when actual homebuilders (as opposed to the lobbyists) are asked about the current housing market meltdown, they say just the opposite. When giving reactions to slumping sales, homebuilders don't mention difficulties in the permitting process, but instead bemoan the huge inventory of unsold homes.

For instance, Beazer Homes USA Inc. noted that most of its markets have a large excess supply of homes for sale, forcing it to lower prices. Beazer also pointed to higher interest rates and tighter lending standards as reasons for reduced demand. D.R. Horton Inc., one of the nation's largest homebuilders, recently posted an unexpected third-quarter loss due to large charges required to write down the value of unsold inventory. Industry economists warn the downward spiral will last until the huge overhang of unsold homes finally decreases.

This isn't the first time there's been a major disconnect between a trade association and its members. But in light of the current housing crisis (the worst in 16 years), it's astonishing that NAHB's top legislative priority in recent years has been to grease the litigation skids at the expense of local communities. It's too bad these high-priced schmoozers don't sit down with local officials to discuss how to make housing more affordable and other ways to provide genuine relief to the industry.