June 2003
Vol. III, No. 6

Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Right-to-Farm Laws as Takings

Farm bureaus may be rethinking their traditional support for expansive takings jurisprudence after an Idaho court struck down a portion of the state's Right-to-Farm law as an unconstitutional taking in *Moon v. North Idaho Farmers Association*, CV 2002 3890 (Idaho Dist. Ct. June 4, 2003). Idaho enacted a provision in April that immunized farmers who engage in crop residue burning from common law nuisance or trespass actions. Neighbors argued that burning grass seed stubble created noxious smoke and posed health risks. Because Idaho's new law prohibited these neighbors from suing the farmers for nuisance or trespass, they instead asserted a takings claim.

The court ruled that by abolishing nuisance and trespass claims, the Idaho legislature had imposed a "servitude" on the neighbors' property. Because field burning "impacts plaintiffs' right to exclusive possession" and the law eliminated their potential remedies of damages or injunctive relief, the court held the provision worked a taking. In so ruling, the Idaho court relied heavily on *Bormann v. Board of Supervisors*, a 1998 decision from Iowa that likewise struck down a Right-to-Farm law immunizing farmers from certain nuisance suits.

These cases show takings litigation can be a double-edged sword. Every developer's claim to a "right" to develop is counterbalanced by an equally or more valid claim by a neighbor of a "right" to be free of spillover costs. While we sympathize with the neighbors whose health was threatened by the farm operations at issue, expansive takings theories like those used in *Moon* and *Bormann* might come back to haunt those who promote environmental and other community protections.

No word yet on whether the Idaho farmers will appeal. But it's safe to say that we haven't heard the last word on this issue. A copy of the court's decision can be accessed at www.communityrights.org/PDFs/Moon.pdf.

OUTRAGE OF THE MONTH

The Blame Game

Prior to *Tahoe*, during the many years that state and local officials endured a takings victory drought of biblical proportions in the U.S. Supreme Court, they generally took their lumps with civility. Disagreements with outcomes and rationales were expressed with dignity and decorum.

Not so with many developer lawyers, whose losses provoke howls of protest that question not only judicial reasoning but judicial integrity. For example, on the American Bar Association's LANDUSE Listserve, one member of the claimants' bar recently blamed his losses on judicial deception: "This treatment cannot be attributed to ignorance. It is uniform judicial mendacity stemming, I guess, from the judges' membership in the elite group that enjoys sovereign immunity, and, therefore, total unaccountability. * * * I think reform is impossible. Demonstrating mendacity to those who want to believe in our system of justice is too difficult because of the number of half-truths that obscure every case."

This diatribe is by no means an isolated example. Michael Berger and Gideon Kanner have accused the Eleventh Circuit of a "morally scandalous performance" and denounced the entire judiciary for "callous insensitivity to constitutional rights" and "years of quite deliberate judicial obfuscation of takings law." 38 Santa Clara L. Rev. at 874 n.145, 881-82. And as we noted in our July 2001 Outrage column, Pacific Legal Foundation questioned Justice Stevens' opinion in *Palazzolo* by dismissing him as senile.

Civility toward judges enhances public confidence in the judicial system. We applaud state and local government counsel for taking the high road and encourage our brethren on the other side to do the same.

QUOTE OF THE MONTH

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

EYE ON WASHINGTON

High Court Denies Cert. in *Esplanade*, Review to Be Sought in *McQueen*

The Supreme Court denied certiorari June 16 in *Esplanade Properties, LLC v. City of Seattle*, a Ninth Circuit ruling that relied on the public trust doctrine as a background principle of property law to absolve the government of the need to pay compensation to a landowner who was denied a permit to build on tidelands. The Ninth Circuit held that the state's public trust obligations precluded shoreline development. Pacific Legal Foundation filed the cert. petition, which was supported by several *amici* from the developers' bar. The Supreme Court's denial of certiorari, while not unexpected, is still most welcome.

In other news involving the public trust doctrine, the Washington Legal Foundation recently pledged on its website to seek Supreme Court review of *McQueen v. South Carolina Coastal Council* (last month's Feature Case) "at the earliest possible opportunity." As in *Esplanade*, the *McQueen* court invoked the public trust doctrine to reject a takings claim by a landowner denied permission to fill tidal wetlands. We'll keep you posted on future developments.

ON THE HORIZON

Governor Approves Settlement of Takings Claim

Environmental Groups Criticize $2.7 Million Payoff for Spotted Owl Protections

Environmental groups are concerned that a recent, controversial settlement of a takings claim could undermine protections down the road. On June 26, Washington Gov. Gary Locke approved a settlement of a dispute between the state and a timber company over protections for the northern spotted owl. Included in this year's state budget was a request for $2.7 million to buy 232 acres from SDS Lumber Company, which sued the state for compensation for restrictions on timber harvesting on a portion of its lands. Only five percent of SDS Lumber's timberlands are affected by the spotted owl protections.

The money funds a settlement reached just two weeks after the Supreme Court's landmark decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, which strengthened the hand of state and local officials faced with takings challenges. In the wake of *Tahoe-Sierra*, many environmental groups hoped the state would pursue the appeal to the state supreme court and urged the governor to veto the appropriation.

A jury in Klickitat County ordered the government in May 2000 to pay SDS Lumber $2.25 million in compensation for restrictions imposed by the state Forest Practices Board when two nesting pairs of owls were found on company lands. The spotted owl is listed as threatened under the federal Endangered Species Act. On appeal, numerous environmental, timber, and building industry groups filed briefs that argued for and against the state's ability to regulate private lands without incurring takings liability, but the state—wary of mounting interest and litigation costs and hoping to avoid an adverse verdict that could limit future regulatory authority—agreed to settle.

The appropriations request originally required the state to seek reimbursement from the federal government, and short of that, to recoup the money from its forest practices budget or from asset management—i.e. timber sales on the property. Gov. Locke vetoed this provision and stressed that the settlement was a "one-time event limited to the facts of this specific case."

Gov. Locke's decision ends the court fight but sets an unfortunate benchmark for similar resource protection conflicts in the state. Our thanks goes to the Georgetown Environmental Law and Policy Institute, counsel for *amici* in the case, for keeping us up-to-date.

Update

In last month's On the Horizon, we reported on an effort by the property rights movement to obtain U.S. Supreme Court review of the New Hampshire Supreme Court's ruling in *Torromeo v. Town of Fremont*, which held that takings liability does not automatically arise whenever a municipality denies a permit under an ordinance that is subsequently declared to be void due to a procedural flaw. We are happy to report that on June 9, the U.S. Supreme Court denied review.