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Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASE

Takings Claim Denied Under State Public Trust Doctrine

McQueen v. South Carolina Coastal Council, 2003 WL 1957496 (S.C. April 28, 2003)

In an important test of the reach of background principles of state property law, the South Carolina Supreme Court last month denied compensation to a landowner whose property had reverted to tidelands and was no longer suitable for building. The court reaffirmed that under *Lucas*, even a regulatory denial of all viable use does not warrant compensation if background principles of state law already prohibited that use.

Sam McQueen purchased two lots adjacent to saltwater canals in North Myrtle Beach in the early 1960s, but did not seek a development permit until 1991. By that time, continuous erosion had caused the lots to revert to saltwater wetlands regularly inundated by tidal flow. After the state rejected McQueen's proposal to backfill the lots and construct bulkheads in preparation for development, a master-in-equity awarded McQueen $100,000 for a total deprivation of economically beneficial use of the lots. The state's highest court reversed, but the U.S. Supreme Court granted certiorari and remanded the case in light of *Palazzolo*.

In rejecting the compensation award on remand, the state Supreme Court accepted as "uncontested" that McQueen suffered a total taking. Under South Carolina's public trust doctrine, however, the state holds "presumptive title to land below the high water mark," including tidelands, and "cannot permit activity" that significantly impairs marine life, water quality, or public access. Because tidelands are considered public trust lands, the court held that McQueen's ownership rights no longer include the right to develop the property. No compensation is due because, in the court's words, "[a]ny taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and McQueen's own lack of vigilance in protecting his property."

The *McQueen* decision joins the Ninth Circuit ruling in *Esplanade Properties, LLC v. City of Seattle* as the latest use of the public trust doctrine and background principles of property law to absolve the government of the need to pay compensation. The *Esplanade* case likewise considered the denial of a landowner's permit to build on tidelands and found that the state's public trust obligations precluded shoreline development. A petition for certiorari in *Esplanade* is currently pending in the U.S. Supreme Court.

Kudos to John Echeverria, Director of the Georgetown Environmental Law & Policy Institute, who briefed and argued the case for the South Carolina Coastal Council. Community Rights Counsel submitted an amicus brief in support of the state on behalf of a coalition of municipal groups.

OUTRAGE OF THE MONTH

NAHB Nixes APA Award

Mary Umberger of the *Chicago Tribune* reports that *Professional Builder*, a developers' trade magazine, has revoked an award it planned to give to the American Planning Association to honor the APA's "Growing Smart Legislative Handbook," a collection of model ordinances designed to promote smart growth.

The magazine had planned to present the award at the 2003 convention held by the National Association of Home Builders in Las Vegas, but it was pressured to quash the prize after howls from some of its readers and the NAHB. Umberger writes that the NAHB, which has no official connection to the magazine, has devoted an entire section of its website to criticism of the APA's Guidebook, and so it comes as no surprise that they would not tolerate developer praise for the APA's work. What does surprise and outrage is that the editors of *Professional Builder*, who obviously saw some merit in the APA's work, could be so easily bullied. Many developers embrace reasonable smart-growth initiatives like those advanced by the APA, and it's a shame that the developer press is not allowed to speak this simple truth.

QUOTE OF THE MONTH

"Both concern for property rights and concern for the environment play important roles in shaping political decisions. * * * An indiscriminate willingness to constitutionalize recurrent political controversies will weaken democratic authority and spell no end of trouble for the courts."

Gibbs v. Babbitt, 214 F.3d 483, 505 (4th Cir. 2000) (Wilkinson, C.J.)

ON THE HORIZON

Compensation for Every Procedural Glitch?

Who in their right mind would argue that taxpayers must compensate developers under the Takings Clause every time a municipal ordinance is invalidated due to a minor procedural error? The leading lights of the so-called property rights movement, that's who.

The National Association of Home Builders, supported by *amici* Defenders of Property Rights and Pacific Legal Foundation, has petitioned the U.S. Supreme Court for review of *Torromeo v. Town of Fremont*, 813 A.2d 389 (N.H. 2002), where the New Hampshire Supreme Court rejected takings claims brought due to a procedural flaw in Fremont's Growth Control Ordinance. In New Hampshire, a municipality may adopt a growth control ordinance only if it is supported by a Capital Improvement Program (CIP) that allows for the orderly construction of infrastructure projects. In March 1999, Fremont enacted a Growth Control Ordinance that restricted the number of permits to be issued for a one-year period, but state courts invalidated the Ordinance because the 1987 vote on the Town's CIP was procedurally flawed due to the failure to provide adequate public notice.

After the Ordinance and CIP were declared void, the Town issued the permits previously denied under the Ordinance, but two developers nonetheless sued Fremont for a temporary taking, arguing that the earlier denials did not substantially advance any public purpose because the Ordinance was invalid.

A serious question exists as to whether the "substantially advance" standard is a legitimate test of takings liability. Moreover, no court has ever adopted the developers' remarkable theory that a mere procedural defect in a municipal ordinance automatically gives rise to takings liability regarding every application denied under the ordinance. If embraced by the High Court, this theory could federalize procedural challenges to municipal land use ordinances across the country.

Incredibly, Defenders of Property Rights issued a press release asserting that the developers were denied all economically viable use of their land. Wrong. One developer already had built 22 homes in his 27-lot subdivision. The other had been issued permits for 5 lots in his 14-lot subdivision, and was told simply that other permits would not issue until the Ordinance's one-year window expired in April 2002. Neither situation even comes close to a denial of all viable use.

We suspect the Court will see through this flapdoodle. We'll keep readers apprised of the status of the cert. petition (No. 02-1507).

EYE ON WASHINGTON

Linking Judicial Junkets and Judicial Pay

For nearly five years, Community Rights Counsel has been fighting to ban "judicial junkets": lavish trips for federal judges, bankrolled by polluting corporations, which are designed to advance an anti-regulatory legal agenda. Our particular concern has been trips offered by a Montana-based outfit called Foundation for Research on Economics and the Environment (FREE), whose programs advance extreme views on subjects like the Takings Clause.

It has been a busy couple of months on this front. In April, Senator Patrick Leahy, the Ranking Democrat on the Senate Judiciary Committee, introduced S. 787, the *Fair and Independent Judiciary Act of 2003,* a bill that would link a ban on judicial junkets to a judicial pay raise. This past week, Senator Leahy indicated his intention to seek to amend a separate judicial pay raise bill, introduced by Senator Orrin Hatch, to include his ban on junkets. He was supported in this effort by Senator Russ Feingold, who had introduced a similar bill in July 2000. Two dozen national organizations, including the Leadership Conference on Civil Rights, the American Association of University Women, Natural Resources Defense Council, and Defenders of Wildlife, wrote letters supporting this proposed amendment.

To head this amendment off, representatives of the Judicial Conference (the judiciary's policy-making body) met with Senator Leahy and assured him that they would revisit and revise their internal ethical guidance to address his concerns. Given the prior adamant opposition by the Judicial Conference to any reform in this area, this represents significant movement on their part. Still, both Senators Leahy and Feingold expressly left open the possibility of future efforts to move legislation on these issues, with Senator Feingold, in particular, stating that he would evaluate the progress the Judicial Conference had made by the time the pay raise bill was scheduled for floor action and decide then whether to pursue an amendment on the floor. We will keep *Takings Watch* readers posted as this drama unfolds.

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