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FEATURE EVENT

Victory for Measure 49 in Oregon

Oregonians decided November 6 to restore some of the land use protections that they tossed away three years ago. On election day, Measure 49, a law designed to rein in some of the excesses from Oregon's last big land-use ballot measure, passed with 61 percent of the vote.

The legislature decided to offer Measure 49 to the voters as a correction to the chaos that erupted after Measure 37 passed in 2004. Measure 37 required compensation whenever specified government actions caused *any* loss in property value. Major land developers, mining corporations, forest companies, and others filed more than 7000 claims, covering more than 750,000 acres and seeking over $19 billion dollars in compensation. Because state and local officials lacked the funds to pay the claims, the challenged regulations were usually waived.

Measure 49 makes Measure 37 largely prospective, generally limiting the compensation requirement to new land use controls. It eliminates claims based on commercial and industrial uses, while preserving claims for residential development, farming, and forestry. It also allows for some small-scale residential development of one to ten homes on farmland, which would not have been allowed prior to Measure 37.

By the time they went back to the ballot box, Oregonians opposed Measure 37 by almost a 2-1 margin. One Oregon resident who voted for Measure 37 and filed a small claim for two additional homes on his land was flabbergasted to learn that his neighbor asked the government to allow more than 100 homes on adjacent property. He told reporters he has "not talked to one person who thought they were voting for this type of development." A former Oregon State University history professor noted, "The public now is alerted to the fact that it is not Dorothy English (the retired woman who was the face of the Measure 37 campaign) wanting to build a few houses on her acreage…. It's the big developers putting in huge projects right in the midst of small residential areas. I think people are alarmed about that."

Oregon's land use process will remain unsettled for the near future. A major issue to untangle is whether Measure 37 claims in progress have vested, meaning that they can continue, or not. According to the Oregonian newspaper, "No one has tracked how many property owners may contend that they've done enough work to be vested, said Cliff Voliva, Land Conservation and Development spokesman." Measure 49 didn't include a definition of "vested," and that term is sure to be contested in lawsuits. And new land use controls remain subject to Measure 37's pay-or-waive provision.

To help sort things out, Governor Ted Kulongoski has promised to reconvene the "Big Look" task force that was created after Measure 37 was passed. A slew of legislative land use reforms might be on the horizon.

The success of Measure 49 suggests that many people think they dislike government controls on land use until those controls are lifted – and then people want them back, at least in a modified form. The long, confusing, and expensive roller coaster that the people of Oregon have been on for the last several years should be a lesson to voters who might see Measure 37-style initiatives on ballots in their states: It's just not worth it.

UPDATE ON THE STAR WITNESS

For the Ripeness Bill

Those following the never-ending battle over *Williamson County* might recall that when the national developers lobby was last pushing their bill to repeal *Williamson*'s ripeness requirements, its star witness on Capitol Hill was Franklin Kottschade, a Minnesota developer with a penchant for lawsuits. In 2001 Kottschade filed a takings challenge to the conditions (all of them) set forth in a development permit issued by the City of Rochester, but unfortunately for him, he did exactly what *Williamson County* says you can't do: He filed his takings claim in federal court without first seeking compensation in state court. The federal district court dismissed the case on ripeness grounds, the Eighth Circuit affirmed, and the Supreme Court denied certiorari in 2003.

Kottschade then proceeded to do nothing with his takings claim for more than three years. He finally filed the claim in state court in 2006, but due to his senseless delay, his filing fell outside the statute of limitations. For this and other reasons, the state court granted Rochester summary judgment. Given Kottschade's litigious nature, we expect an appeal.

ON THE HORIZON

Federalism Tested in Preemption Cases

Federalism -- and in particular the ability of the States to act as laboratories of experimentation -- is getting quite a workout this term at the U.S. Supreme Court through a series of preemption cases. The court has agreed to hear several appeals raising the question of whether federal statutes preempt state law protections for human health and public welfare. The standards adopted by the court to resolve these cases could dramatically affect the ability of State and local officials to enact environmental safeguards, public health standards, and other community protections across the board.

On November 28, the court heard oral arguments in *Rowe v. New Hampshire Motor Transport Association*, No. 06-457, a challenge by shipping companies like Fed Ex and UPS to Maine laws designed to prevent the sale of cigarettes to kids. On December 4, the U.S. Supreme Court heard *Riegel v. Medtronic, Inc.*, No. 06-179, which raises the issue of whether the express preemption provision of the Medical Devices Amendments to the federal Food, Drug, and Cosmetic Act preempts state common law remedies as applied to medical devices that receive premarket approval from the FDA.

Community Rights Counsel filed an amicus brief in *Riegel* urging the court to reaffirm its clear-statement rule in preemption cases, and to hold that an express preemption provision in a federal statute does not preempt state law unless the text of the preemption provision makes clear that the challenged state law falls within its scope. This approach keeps the responsibility on the Congress to define the scope of preemption, with ambiguities resolved against preemption and ties going to the States. It respects the dignity of the States as independent sovereigns and helps preserve their role as laboratories of experimentation in our federal system.

The facts in *Riegel* are compelling. During Charles Riegel's angioplasty, the catheter used by his physician burst, causing Riegel to suffer a heart attack and sustain serious injuries. He and his wife sued the catheter's manufacturer, Medtronic, under state tort law, but the lower courts rejected his claims as preempted. While the case was pending, Riegel died, and his spouse was substituted as the lead plaintiff. The express preemption provision at issue makes no mention of common law remedies, and the relevant legislative history does not contain a shred of evidence that Congress intended to preempt these remedies. More than ten years went by before manufacturers started to argue for this preemption in litigation. The FDA originally took the position that state tort remedies remain effective against manufacturers, but in recent years it flip-flopped and now argues in favor of preemption, reflecting the aggressive preemption posture currently held by many federal agencies.

We'll keep you apprised of developments in these important cases.

OUTRAGE OF THE MONTH

Child Molester Law Deemed an "Illegal Taking"

On November 21, the Georgia Supreme Court declared unconstitutional a 2006 state law that prevented registered sex offenders from living within 1,000 feet of day care centers, schools, churches, and other places children congregate. In *Mann v. Georgia Dep't of Corrections*, 2007 WL 4142738 (Ga., Nov. 21, 2007), the state high court invalidated the restrictions as "an illegal taking" because "they force sex offenders who are homeowners to abandon their homes if a place where children congregate is suddenly built nearby." The law failed to contain an exception for situations in which a covered facility opens near the offender's home (a "move-to-the-offender" exception), and the court expressed concern that "sex offenders face the possibility of being repeatedly uprooted and forced to abandon homes in order to comply with the restrictions." The court rejected a challenge to similar workplace restrictions contained in the same law.

What makes the ruling disturbing from our perspective is the court's failure to assess the restrictions' overall economic impact on sex-offenders, which often might be minimal because they could continue to own the property, lease it, or sell it. To be sure, moving expenses could be substantial, but there is no reason to assume that the residency limits would deny sex offenders all or substantially all economically viable use of their property in every case. These residency requirements might be questionable for other reasons, but they don't "take" property in any meaningful sense of the word.

The court impermissibly stretched the Takings Clause to cover a perceived unfairness that does not come within the terms of that provision. Other states should be on the lookout for similar challenges to sex-offender laws.