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Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Measure 37 Invalidated

MacPherson v. Dep't of Admin. Services, Case No. 05C10444 (Or. Cir. Ct., Oct. 14, 2005)

Judge Mary Mertens James of the Oregon Circuit Court for Marion County struck down Oregon's controversial "Measure 37," which requires state and local officials to either waive certain land use regulations or make payments to landowners when those regulations reduce their property value by any amount.

The suit was brought by property owners, commercial farms, five county farm bureaus, and 1000 Friends of Oregon. Judge James invalidated the law on several grounds, including impermissible impairment of the legislature's plenary police power, violation of equal privileges and immunities under the Oregon Constitution, and violation of due process.

No one is certain of the ruling's prospects on appeal. But whatever the outcome, the opinion is a *tour de force* in illustrating how land use controls protect landowners and land value. The opinion exposes the inherent fallacy of the so-called property rights movement, which promotes the rights of a select few at the expense of the vast majority of property owners.

For example, the opinion describes the plight of plaintiff David Adams, who owns property near a Measure 37 claimant who received a waiver of land use controls to allow for large-scale residential development. The claimant has begun clear-cutting and bulldozing the property, thereby impairing the surrounding watershed and destroying a wildlife corridor. New construction will require additional wells and septic systems, reducing the amount and quality of water available to Adams, who purchased his land in reliance on the development restrictions now waived under Measure 37. The surrounding roads, already at overcapacity, will suffer increased disruption, safety risk, and the potential for emergency vehicle delay. The school system will be further strained, leading to increased taxes.

Measure 37 threatens similar harm to many others, including farmers and ranchers, who bought their land in reliance on existing land use controls that are now subject to waiver.

Kudos to the *MacPherson* plaintiffs for demonstrating the importance of land use controls to landowners and property values.

QUOTE OF THE MONTH

"A government cannot be forced to choose between exercising its plenary power to regulate for public welfare, health or safety, or paying private parties to comply with the law."

Judge Mary Mertens James in *MacPherson v. Dep't of Admin. Services*

EYE ON WASHINGTON

High Court to Review Key Wetlands Cases

On October 11, the U.S. Supreme Court agreed to review two cases out of the Sixth Circuit raising statutory and Commerce Clause challenges to federal authority to regulate wetlands that have a surface hydrological connection to navigable waters: *United States v. Rapanos* and *Carabell v. U.S. Army Corps of Engineers*. *Rapanos* is a civil enforcement action for millions of dollars in fines and mitigation fees, alleging that the landowners illegally filled about 54 acres of wetlands at three sites near Midland, Michigan to build a shopping center and engage in other construction. *Carabell* involves a challenge to a permit denial to fill about 16 acres of forested wetlands near Detroit to build a condominium complex. The record shows that all of the wetlands at issue have a hydrological connection to navigable waters.

The landowners rely heavily on the Court's 2001 ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S.*, holding that the Clean Water Act does not extend to isolated wetlands that have no hydrological connection to navigable waters. SWANCC, however, did not cut back on the Court's ruling in *United States v. Riverside Bayview Homes* (1985), which upheld federal authority over wetlands adjacent to open waters due in part to Congress's concern for the protection of water quality in traditional navigable waters, a core federal interest that was not at issue in SWANCC. The pending cases reportedly implicate federal authority to protect roughly one hundred million acres of wetlands across the country.

CRC plans to file an amicus brief emphasizing that state and local officials embrace a vision of cooperative federalism that supports a vibrant federal role in protecting wetlands and other vital environmental resources.

OUTRAGE OF THE MONTH

Hyping Cert. Petitions

On August 31, the Wall Street Journal published an op-ed by former Attorney General Edwin Meese urging the U.S. Supreme Court to grant certiorari in *The Stearns Company v. United States*, a case in which the Federal Circuit rejected a regulatory takings challenge to federal regulations on mining in our national forests. In 1937, Stearns had sold the surface estate of its property to the federal government for use as part of the Daniel Boone National Forest, but retained its mineral interest. In the 1970s, Congress banned mining in national forests except when the owner has a "valid existing right" (which Sterns does not have) or when the government issues a "compatibility determination" that the mining is consistent with environmental, economic, and other public interests. Stearns challenged this requirement to seek federal permission to mine as a regulatory taking.

General Meese evidently agrees. His op-ed declared that "mineral rights command a market value, because of the unqualified right to access them freely, without the consent of the surface owner." Without this unfettered right of access, he wrote, "the mineral rights are worthless, and, as the law has long recognized, being able to petition a government agency for permission to access them is all but worthless." Hailing the case as "potentially as momentous" as *Kelo*, General Meese stressed that in rejecting the claim, the appeals court had "overturned centuries of precedent." If the ruling were allowed to stand, General Meese insisted, "for the first time in American history the courts will have created a giant detour around th[e] core constitutional requirement" to pay just compensation for a taking of property.

The op-ed is problematic on several levels, but two aspects are particularly striking. First, in *United States v. Riverside Bayview Homes* (1985), the Supreme Court squarely held that the assertion of regulatory jurisdiction does not constitute a taking: "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired."

Second, the requisite compatibility determination is essentially "a rubber stamp" because the federal government has granted an unbroken string of 18 straight compatibility requests within the Daniel Boone National Forest since 1982. It is silly to argue that requiring Stearns to seek a similar approval rendered his mineral interest valueless, or constitutes a taking of its property. Indeed, CRC began its Federal Circuit amicus brief in *Stearns* by stating: "Takings law can give rise to difficult cases, but this is not one of them."

On October 3, the Supreme Court denied cert. Perhaps General Meese should be more discriminating when making recommendations to the highest court in the land.

ON THE HORIZON

High Court Federalism Cases

In addition to the wetland cases discussed on page one, several other cases pending in the U.S. Supreme Court implicate federalism issues of concern to state and local officials. The case getting the most attention is *Gonzales v. Oregon*, No. 04-623, a challenge to a federal interpretive rule under the Controlled Substances Act that restricts the use of controlled drugs for physician assisted suicide, even in states like Oregon that have laws permitting such use.

In *U.S. v. Georgia*, No. 04-1203, and *Goodman v. Georgia*, No. 04-1236, the court will decide whether Congress may use Section 5 of the 14th Amendment to abrogate the states' sovereign immunity under Title II of the Americans With Disabilities Act as applied to discrimination against the disabled in state prisons. The case is a follow-up to *Tennessee v. Lane* (2004), which holds that Congress properly abrogated immunity under the ADA with respect to discrimination that undermines access to the courts.

Finally, in an important Dormant Commerce Clause case, *DaimlerChrysler Corp. v. Cuno*, No. 04-1704, the court will review a Sixth Circuit decision invalidating Ohio's local investment tax credit. It should be an interesting term. We'll keep you apprised of developments.