Community Rights Counsel

Oct. 2007
Vol. VII, No. 10

Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel
1301 Connecticut Avenue, NW, Suite 502, Washington, DC 20036; www.communityrights.org

FEATURE CASE

Ohio High Court Clarifies Whole Parcel Rule in *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, No. 2006-0165, 2007 Ohio LEXIS 2411 (Ohio, Oct. 3, 2007)

As readers of this newsletter know, the U.S. Supreme Court has established the parcel-as-a-whole rule as a critical limitation on regulatory takings liability. Despite some troubling dicta in earlier opinions, more recently the court repeatedly has reaffirmed the rule in cases such as *Tahoe Sierra Preservation Council v. Tahoe Reg'l Planning Agency* (2002). The overwhelming majority of lower federal courts and state courts also adhere to the whole parcel rule.

One glaring exception was Ohio's reading of its own state takings clause as applied to coal and other mineral interests. In *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998 (Ohio 2002), the Supreme Court of Ohio upheld a takings challenge to restrictions on mining on land owned by a coal company. The restrictions protected an aquifer used for drinking water by a nearby village. The court concluded that the restriction constituted a taking under the Ohio constitution because it refused to consider the uses the claimant could make of its surface interest, focusing instead exclusively on the impact of the restriction on the company's mineral interest. In other words, it defined the relevant parcel as including only the coal rights, not the surface rights, largely because Ohio law recognizes mineral rights as a separate property interest. The *R.T.G.* court also excluded portions of the company's land that fell outside the geographic scope of the mining restriction because it concluded that mining in this area was not economically viable.

The *R.T.G.* ruling expressly rejected the approach taken by the U.S. Supreme Court in *Keystone Bituminous Coal Ass'n v. Debenedictis*, 480 U.S. 470 (1987), relying instead on the dissent in *Keystone* written by Chief Justice William Rehnquist. *R.T.G.* stood as an outlier as most courts adhered to *Tahoe* and other precedents that reaffirmed the whole parcel rule.

But on October 3, 2007, the Ohio Supreme Court cut back dramatically on *R.T.G.* in a ruling that put the state's takings jurisprudence more in line with the rest of the nation. In *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, No. 2006-0165, 2007 Ohio LEXIS 2411 (Ohio, Oct. 3, 2007), the court rejected a takings challenge to a county zoning appeals board's denial of a conditional-use permit for mining. The land comprises about 306 acres and is zoned for agricultural use and residences on one-acre lots. It is surrounded by eight subdivisions with over 200 residential lots. Shelly bought the land in 1998 for $1,943,340 in order to mine sand and gravel deposits, but needed to obtain the conditional-use permit prior to mining. The county denied the permit because, among other reasons, Shelly failed to show that the mining would not be detrimental to surrounding property owners.

The Ohio Supreme Court concluded that no taking occurred because Shelly purchased the land with knowledge that it needed county approval to mine, and because the denial left the parcel with many potential uses and thus did not deprive Shelly of all economically viable use.

The court acknowledged that the *R.T.G.* ruling "departs from the established doctrine of considering a 'parcel as a whole,'" citing *Tahoe*, but no party had requested that *R.T.G.* be overruled. Accordingly, rather than overruling the case, the court basically limited the ruling to its facts, stressing that the holding "was largely dependent on unique circumstances," including the fact that most of the land at issue in that case had been leased for its coal rights, not purchased outright. Moreover, the mining company in R.T.G. had already received its conditional use permits to mine and had been mining in the area for ten years when the state imposed the challenged restrictions on mining. In contrast, Shelly bought its land in its entirety and held fee simple title. The court thus ruled that a mineral estate may be considered the relevant parcel only "if the mineral estate was purchased separately from the other interests in the real property."

Two justices dissented, arguing that *R.T.G.* controlled the case and should not be limited to its facts.

The larger lesson here is that the U.S. Supreme Court's 2002 ruling in T*ahoe* is still having beneficial influence on the development of takings jurisprudence. Government attorneys should continue to mine the *Tahoe* opinion for helpful nuggets on parcel issues, temporary takings, and other key questions that arise in takings cases.

OUTRAGE OF THE MONTH

Alaska Reg-Take Initiative Bites the Dust
70 Percent Oppose in a Landslide: "It wasn't even close."

On October 2, voters in Mat-Su Borough Alaska nixed a regulatory takings initiative that would have required taxpayers to pay landowners for simply following the law. More than 70 percent voted against the measure.

The "Private Property Protection Act", known as Prop. 1 and modeled after Oregon's Measure 37, drew strong opposition from several groups, including Taxpayers Against Prop. 1, which hailed the results as a victory for sensible land use planning. In a case of strange bedfellows, Prop. 1 was opposed not only by planners and environmentalists, but also the Mat-Su Home Builders Association and Mat-Su Valley Board of Realtors. Prop. 1 would have required compensation to landowners whenever Borough actions reduced the value of land by any amount. The opposition campaign explained that its basic strategy was to ask voters to read the actual language of the initiative before voting (what a concept!).

In a display of thoughtful moderation often associated with supporters of these measures, Prop. 1's lead sponsor denounced the vote as a "stunning victory for socialism."

ON THE HORIZON

Amending Measure 37: November Brings Oregonians a Chance for Relief

In November, Oregon voters will have a chance to amend its notorious Measure 37 by approving Measure 49, an initiative that would provide greater protection for farmland, forests, and other property against the harm caused by uncontrolled development, especially harm caused by massive residential subdivisions, big-box stores, mining, and other commercial development protected by Measure 37.

Corporate landowners and others have used Measure 37 to seek compensation by filing more than 7500 claims potentially affecting 750,000 acres in Oregon. Until recently, all successful claims resulted in a waiver of the challenged land use restriction because municipalities lack the funds to pay the required compensation. But last month, the city of Prineville became the first local government to pay cash to a claimant under Measure 37, doling out $180,000 to a couple who purchased their land in 1963 to build a home, but then decided to propose building a hotel after Measure 37 was enacted. The city originally agreed to pay them $47,000 due to development restrictions, but the owners more than tripled the payout by proposing the hotel, which might never have been built.

While we would prefer a complete repeal of Measure 37, the changes reflected in Measure 49 are a step in the rights direction. Recent polls show solid support for Measure 49 across the board. For more info on Measure 49, go to: http://www.friends.org/issues/measure37.html

EYE ON WASHINGTON

Rose Acre Farms Heads Back to the Federal Circuit

Last month, we reported that in *Cienega Gardens v. United States*, the U.S. Court of Appeals for the Federal Circuit helpfully clarified its use of lost profits in analyzing economic impact in reg-take cases under *Penn Central*. The court soon will have another opportunity to do so in *Rose Acre Farms v. United States*, a takings challenge to emergency health restrictions issued in response to several outbreaks of Salmonella traced back to Rose Acre's eggs. The outbreaks resulted in the food poisoning of hundreds of people. In February 2007, the U.S. Court of Federal Claims ruled that the temporary restrictions at issue -- which required that certain eggs be sold in the less profitable "breaker market" to ensure pasteurization -- constituted a taking that requires the government to pay Rose Acres $5.4 million in just compensation, plus interest and attorneys fees. Although the eggs produced by the three restricted farms lost only 10.6% of their value due to the restrictions, the court instead focused on the loss in profits, which it concluded was 219.2%, an approach that makes no sense legally or economically. The parties will be filing briefs with the Federal Circuit in coming months, and CRC plans to file an amicus brief explaining why the trial court's lost-profits analysis is deeply flawed and threatens consumer protections and other public health safeguards across the board.