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Community Rights Report

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Community Rights Counsel

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FEATURE CASES

Three State Court Takings Victories: Mass., Mich., and Oregon Courts Uphold Wetland and Wildlife Protections

As our nation reaches out in sympathy to the victims of Katrina and its aftermath, it is reassuring to know that most judges will not allow the Takings Clause to be used to undercut protections against flooding and storm erosion. In *Gove v. Zoning Board of Appeals of Chatham*, 831 N.E.2d 865 (Mass. July 26, 2005), the Supreme Judicial Court of Massachusetts rejected a regulatory takings challenge to wetland protections designed to minimize what the court called "the ravages of nature." In 1975 Gove inherited a vacant 1.8-acre lot situated on coastal wetlands in southeastern Cape Cod. For decades the area has been susceptible to coastal flooding caused by hurricanes and other storms, and Gove's lot is bisected by a tidal creek also prone to flooding. In 1985 the Town of Chatham designated the wetlands area as a "coastal conservancy district" subject to a ban on residential construction to protect public health and safety. In recent years, a breach in the barrier island that protects Chatham from the ocean led to even more severe storm erosion that caused houses to fall into the sea.

The court invoked *Lingle v. Chevron* (U.S. 2005) to reject Gove's claim that the building restrictions fail to advance a legitimate public purpose. The court denied Gove's *Lucas* claim because her own expert testified that the land is worth at least $23,000. The court also rejected Gove's *Penn Central* claim because Gove failed to (1) introduce a thorough assessment of current value or show "a loss outside the range of normal fluctuation in the value of coastal property," or (2) show interference with any reasonable expectation to build in light of Gove's unsuccessful effort to sell the land prior to the development restrictions. The court rejected as irrelevant and "highly dubious at best" an offer to buy the land that was contingent upon gaining permission to build. Finally, in analyzing the character of the government action, the court noted that protection against harmful land use "routinely has withstood" takings challenges.

In a second wetlands case, *K&K Construction, Inc. v. Dep't of Environmental Quality*, No. 244455 (Mich. Ct. App. July 26, 2005), the court acknowledged a fundamental truth that should inform every regulatory takings challenge: "Land use regulations, such as zoning, are necessary to protect private property rights and values." This essential insight laid the predicate for the appeal court's reversal of a judgment for more than $16 million awarded by the trial court in favor of the landowner.

The case is a long-running takings challenge to Michigan's wetland protections as applied to an 82-acre parcel. About a third of the parcel consists of wetlands. In rejecting the claim under the multifactor *Penn Central* test, the court noted that the claimants retained the ability to develop a significant portion of their land. Although the appeals court rejected the trial court's finding that the wetland protections resulted in a 67% value loss (from $8.94 million to $3 million), the court ruled that even under this erroneous calculation plaintiffs failed to show a compensable taking. The court further held that the correct value loss of 24-33% "most certainly does not weigh in favor" of finding a taking.

The court also concluded the "plaintiffs are experienced commercial land developers who clearly had or were on notice of the wetland regulations . . . and therefore, plaintiffs' distinct, investment-backed expectations would reasonably have been tempered with the knowledge that their development of the property would be restricted due to the presence of wetlands." Finally, the court ruled that the character of the government action cut against a taking because "wetland regulations are, like zoning regulations, all but ubiquitous" and thus result in an "average reciprocity of advantage," providing benefits to all without targeting any single landowner for particularly adverse treatment. The court specifically noted the benefits that wetlands provide in protecting water quality, preventing floods, and curbing erosion.

Finally, in *Coast Range Conifers, LLC v. State of Oregon*, CC 011423 (Or. Aug. 11, 2005), the Oregon Supreme Court unanimously rejected a takings challenge to restrictions on logging designed to protect bald eagles. The restrictions prevented Coast Range Conifers from logging about nine acres of a 40-acre parcel. In 2003, the court of appeals ruled that the restrictions constituted a "taking" of property because the limits prevented all economically viable use of the nine restricted acres. The Oregon Supreme Court reversed, holding that the entire 40-acre parcel must be considered in analyzing whether a taking occurred. The court observed that the appeal court's erroneous approach would call into question height limitations, setback requirements, and other everyday land use controls. Because Coast Range Conifers retains substantial economic use of the whole parcel, the court concluded no taking occurred. Community Rights Counsel co-authored two amicus briefs supporting the State on behalf of a large coalition of local officials.

ON THE HORIZON

The California Coastal Comm'n Lives On

Last month, the California Supreme Court issued a ruling that is good news for supporters of environmental protection in California and elsewhere. In *Marine Forests Society v. California Coastal Commission* (Cal. 2005), the court upheld the constitutionality of the California Coastal Commission, the body that for three decades has protected California's treasured coastline.

The case arose in 1999, after the Marine Forests Society applied to the Commission for a permit to dump garbage in the ocean off Newport Harbor. The Society dreamed of mimicking natural reefs and creating aquatic havens out of discarded tires, plastic jugs, and other detritus. The Commission found that the science behind this optimistic plan was weak, and denied the permit.

So the Society sued, saying that the Commission was actually a legislative body, and that under the separation of powers clause of the state constitution the Commission was unable to issue or deny permits or institute enforcement proceedings at all, since those are executive and judicial functions. At the time the suit commenced, one-third of the Commission's voting members were appointed by the governor, one-third by the Senate Rules Committee, and one-third by the Speaker of the state Assembly. Each voting member had a two-year term, and was removable at will by his or her appointing authority. Both the trial court and intermediate appeals court agreed that this structure allowed for inappropriate legislative control over the Commission.

In 2003, while the case was pending before the California Supreme Court, the legislature changed the appointment and removal rules for the Commission. The voting members appointed by the legislative branches now have four-year terms and are not subject to at-will removal. (The old rules still apply to the Governor's appointees). The Supreme Court held that this new structure does not violate the California constitution's separation of powers clause. The legislature neither "improperly intrude[s] upon a core zone of executive authority" nor "retain[s] undue legislative control over a legislative appointee's executive actions." Just as crucially, the court upheld the validity of the Commission's acts prior to the 2003 tenure changes.

The Marine Fisheries Society was represented in the case by Richard Zumbrun, a long-time foe of the Commission. Although the Society plans to seek review by the U.S. Supreme Court, we hope that Zumbrun reconciles himself to the continued existence of the Commission. Maybe a long, meditative walk on one of the state's beaches will renew his appreciation for the Commission's good work.

EYE ON WASHINGTON

Victory Under NAFTA Expropriation Provision

In a significant but little-noticed victory for state and local environmental laws, an international trade tribunal ruled on August 9th that California's ban on MTBE, a gasoline additive that has contaminated drinking water in several states, does not violate the expropriation provision set forth in the North American Free Trade Agreement (NAFTA).

In 1999, California began phasing out the use of MTBE in gasoline because the substance had leaked from underground gasoline storage tanks into drinking water supplies, causing water to smell and taste like turpentine. The City of Santa Monica, for example, had to shut down most of its water wells during six months in 1996 because of MTBE contamination. More than a dozen other states have also banned MTBE.

Soon after California enacted its ban, Methanex, a Canadian producer of MTBE's key ingredient, filed a claim against the United States under NAFTA's Chapter 11, which prevents discrimination against investors from other nations. Methanex argued that California's law was designed to favor ethanol, which is mostly made from U.S. ingredients, at the expense of their product. The company asked for $970 million in compensation. The NAFTA panel found that it did not have jurisdiction over Methanex's claim, and that the claim would have failed on the merits. Had the company succeeded, the U.S. government would have had to force the states to reverse their MTBE bans, or pay almost a billion dollars to Methanex. Instead, Methanex has to pay the U.S. $4 million in legal costs.

The NAFTA ruling constitutes an encouraging victory under the widely criticized expropriation provision, which exists in varying forms in several international trade agreements. These provisions have drawn strong opposition due to concerns they will be used to require compensation for a broad range of public health, safety, and environmental safeguards.