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Land Use Moratorium Upheld Against Takings Claim

In a case of national significance issued on April 23, 2002, the United States Supreme Court upheld a land use moratorium that froze land uses in the Lake Tahoe regional basin. The purpose of the moratorium was to prevent all removal of vegetation or establishment of impervious land cover, while a study was conducted that attempted to define the carrying capacity of the basin in relation to runoff eventually entering the Lake. *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency, et al.*, 535 U.S. ____ (2002).

The moratorium was total and it was expressly defined as temporary, 32 months in duration. An association of affected property owners calling itself the Tahoe-Sierra Preservation Council, Inc., sued the Tahoe Regional Planning Agency that had established the moratorium. The lawsuit claimed that the moratorium deprived the landowners of all economically viable use of their properties and was, therefore, a *per se* taking.

A 1992 decision of the United States Supreme Court, *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, involved a permanent prohibition of all economically viable uses of a property on the Atlantic Ocean. This regulation was declared to be an automatic or *per se* taking. The affected property owners in the *Lake Tahoe* case argued that the moratorium had same effect and it should not matter that the moratorium was temporary, except with respect to the amount of compensation would have to be paid if it were declared to be a taking.

A six justice majority opinion in the *Lake Tahoe* case rejected that argument. The majority opinion recognizes that a property has a life span far exceeding 32 months. A regulation that impacts the property for only 32 months is not a total taking of all economically viable use opportunities for the entire life span of the property. In this respect the situation is no different than a regulation that only restricts a geographical portion of property, leaving the remainder of the property with economically

viable uses. That situation does not create a *per se*, total taking of the property, because the property is looked at in its entirety.

The property owners argued that fairness and justice entitled them to compensation. The Supreme Court rejected this argument, saying that moratoria are necessary in order for planning bodies to conduct studies, and provide opportunities for public input, especially from landowners and interest groups less organized and less familiar with the planning process. Planning organizations should not be rushed through the preparation of plans because development is occurring or because of fear of being sued for damages if a moratorium is used to maintain the *status quo*.

The decision does not mean that moratoria cannot be challenged as takings. But, such challenges will be judged under a balancing test, in which the concerns of the public agency will be weighed against the economic impacts on the property owners.

A dissenting opinion by Chief Justice Rhenquist and Justices Scalia and Thomas regretted the fact that the Supreme Court had framed the issue on appeal as dealing only with the 32 month moratorium. The dissenting justices note that the 32 month freeze was one portion of a series of moratoria, judicial restraining orders and adopted plans that added up to a prohibition of development of several hundred undeveloped residential lots for almost six years.

Viewed in this context, the dissenting Justices argued that the *Lucas* ruling should apply to all total prohibitions of development, whether temporary or permanent.

The decision has been hailed by the planning community as an endorsement of a necessary tool in the planners toolkit and another signal that the Court is not expanding the *Lucas* doctrine. A press release issued the day after the *Lake Tahoe* decision by the National Association of Homebuilders expressed a fear that the decision will result in "moratoria mania."

— Richard A. Lehmann

Commission Approves TRANSLink Application

The Federal Energy Regulatory Commission ("FERC") has conditionally approved the formation of a new, for-profit, independent transmission company, the TRANSLink Co. ("TRANSLink"), by a group of investor-owned utilities, cooperatives, and municipal utilities. The group includes three members of the Midwest ISO (Alliant, MidAmerican Energy and Xcel), along with the Nebraska Public Power District, Omaha Public Power District, and Corn Belt Power Cooperative.

Like the American Transmission Company LLC, the new company will become part of the Midwest ISO, but share certain regional transmission functions. The new company would oversee 26,000 miles of transmission lines linking generators producing 35,000 MW of electricity. The company's footprint extends over 14 states and is expected to serve nearly 7 million customers.

Although the new company is being hailed as a potential model for public-private transmission partnerships, a number of public power interests had challenged certain aspects of the TRANSLink application, including the independence of the TRANSLink Board of Directors and the company's proposed tariff design.

In its order, FERC addressed some of these concerns. First, the order requires TRANSLink to use the Midwest ISO Tariff (although it can develop and file its own rate schedule). In addition, the order requires TRANSLink to revise its board selection process in order to minimize the influence of the investor-owned transmission owners on transmission policy. The order also requires TRANSLink to use the Midwest ISO OASIS Web site rather than develop its own and clarifies the regional transmission functions for which the company will be responsible (e.g., calculating available transmission capacity and congestion management).

According to the Commission press release, TRANSLink's approval is intended to encourage the establishment of independent transmission companies as transmission operators, not transmission providers, and to clarify the Commission's interest in so-called "one-stop shopping" through an RTO.

TRANSLink expects to begin operations in January, 2003. Copies of the TRANSLink Order and other information may be obtained on-line at www.translinktc.com.

—Richard A. Heinemann

Court of Appeals Upholds Department of Commerce Comm. 83 Rules for Private Wastewater Treatment Systems

The Wisconsin Court of Appeals upheld the Department of Commerce's new administrative rules for private wastewater treatment systems, in a Decision issued on May 9, 2002. The controversial rules, known as Comm. 83, authorize the use of new technologies, which potentially may allow the siting of private wastewater treatment systems in areas of the State that previously could not be developed. The new rules were challenged on appeal by 1000 Friends of Wisconsin, the Municipal Environmental Group, Citizens for a Better Environment, The River Alliance of Wisconsin, and the Town of Caledonia.

The Court of Appeals approved the Comm. 83 rules over several objections. First, the Court held that the Comm. 83 rules are sufficiently definite in requiring compliance with the Department of Natural Resources' Numerical Groundwater Standards, defined in Chapter NR 140 of the Wisconsin Administrative Code. Comm. 83 does not expressly include the NR 140 requirements as design criteria for approving new private wastewater treatment systems, but the Court of Appeals concluded that the groundwater standards are binding on the Department of Commerce due to incorporation by reference.

The Court of Appeals also held that the Department of Commerce has broad authority to grant variances from the Comm. 83 rules when approving private wastewater treatment systems. According to the Court, the Department has broad authority to approve variances from any Comm. 83 provision that is "unjust or unreasonable," upon petition by an interested person.

Finally, the Court of Appeals upheld the exemption of the Comm. 83 rules from compliance with the DNR's groundwater standard for nitrate discharges. The Court held that the Wisconsin Legislature properly excused the Department of Commerce from mandatory regulation of nitrate discharges from private wastewater treatment systems. The objectors to the nitrate exclusion argued that the legislature failed to provide a definite standard for the Department of Commerce to apply in determining whether or not to regulate nitrates. The Court concluded that the Department of Commerce can properly decide whether to regulate nitrates based upon the duty to ensure that all plumbing installations are "safe, sanitary and such as to safeguard the public health and the waters of the state."

The Department of Commerce adopted Comm. 83 in order to provide greater flexibility in approving new technologies for wastewater treatment systems. The Comm. 83 rules are intended to allow approval of wastewater treatment technologies that satisfy performance criteria, rather than defining approvals solely in terms of specified technologies. Although the final rules do not include numerical criteria, the Court of Appeals Decision makes clear that the Department of Natural Resources' numerical groundwater discharge standards, except for nitrates, must be incorporated into the approval of wastewater treatment systems.

—Richard L. Bolton

U.S. Supreme Court: Non-Union Seniority System Generally Trumps Disability Accommodation Request

On April 29, 2002, the United States Supreme Court issued the latest in a string of decisions that have weakened the effect of the Americans With Disabilities Act. The question in *U.S. Airways, Inc. v. Barnett* was whether a disabled employee has a right to be transferred to another position as an accommodation if the requested transfer would violate the employer's bona fide seniority system. The Court ruled that the Americans with Disabilities Act (the "ADA") ordinarily does not require the employer to transfer the disabled employee to the requested position if another employee is entitled to that position under the employer's established seniority system.

Facts of Barnett: Robert Barnett, the plaintiff in the case, injured his back while working in a cargo-handling position at U.S. Airways. The company had a decades-old seniority system. Mr. Barnett invoked his seniority rights and transferred to a less physically-demanding mailroom position. However, under the seniority system, the mailroom position, like others, periodically became

open to seniority-based employee bidding. After Barnett held the mailroom position for a period of time, he learned that at least two employees senior to him intended to bid for the mailroom job. He requested that U.S. Airways accommodate his disability by making an exception to the seniority bidding procedure so that he could remain in the mailroom. U.S. Airways considered the matter for several months and eventually decided not to make an exception to the seniority bidding rules. Barnett subsequently lost the job. Barnett sued U.S. Airways under the ADA claiming that U.S. Airways failed to reasonably accommodate his disability when it refused to make an exception to its seniority system.

Reasonable Accommodation and the Court's Decision: The ADA requires employers to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. Reasonable accommodations under the ADA take many different forms, including changing the employee's work schedule, shifting non-essential job functions, and reassignment to a vacant position. Barnett specifically addressed whether a job transfer accommodation is "reasonable" if the transfer of the disabled employee would run contrary to the rules of an established seniority system. The U.S. Supreme Court held that ordinarily such an accommodation request will not be reasonable.

The Court's decision relied on analogous case law upholding seniority system rights over various accommodation requests. For example, courts have held that in Title VII religious discrimination cases, an employer need not adapt to an employee's special worship schedule as a reasonable accommodation where doing so would conflict with the seniority rights of other employees. Similarly, courts around the country have unanimously held that collectively bargained seniority rights trump the need for reasonable accommodation.

In effectively ruling that established seniority systems ordinarily "trump" the ADA, the court also stressed the fact that seniority systems play an important role in lending fairness to employment decisions, stating that they provide, "important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." Seniority systems include "an element of due process," limiting "unfairness in personnel decisions."

Seniority Systems Will Not Always Prevail!

Importantly, the Court held open the door for employees to prevail if they can show that "special circumstances" warrant a finding that, despite the presence of a seniority system, the requested accommodation is reasonable on the particular facts. For example, an employee may be able to show that an employer has fairly frequently not adhered to the seniority system, "reducing employee expectations that the system will be followed." If this is the case, the employee might successfully argue that one more departure from the system is warranted. Thus, while there is a presumption that an established seniority system will trump an ADA accommodation request, the rule is not absolute and employers must carefully examine the facts of each accommodation request.

—Jennifer S. Mirus

FERC Approves Midwest ISO ROE Hike

In an Order dated April 25, 2002, the Federal Energy Regulatory Commission ("FERC") approved an increase in Return on Equity ("ROE") for the Midwest Independent System Operator ("Midwest ISO"). The Midwest ISO Tariff has been in effect since February of this year. In accordance with the ALJ's Order, the Company is expected to file revised tariff sheets within 30 days. The new rate will not apply to the American Transmission Company zone, in which most Wisconsin municipal utilities are located.

The ROE had been provisionally set at 10.5% when the Midwest ISO received its approval from FERC last year. The Midwest ISO and some of its transmission owners subsequently filed to increase transmission rates, requesting both the ROE increase to 13% and an array of return incentives. In an order dated January 30, 2002, the Commission provisionally accepted the proposed ROE increase and set the matter for hearing, but denied the owners' request for incentives, directing instead that the proposals be submitted to a stakeholder process.

In his decision, the Administrative Law Judge ("ALJ") followed standard FERC methodology to find a zone of reasonableness for the ROE between 8.79% and 15.06%. The ALJ then set the ROE at the midpoint in that range, or 12.38%. This figure was somewhat lower than the 13% figure recommended by the Owners' expert witness, but considerably higher than the recommendations submitted by wholesale customer interveners and even that of the FERC staff. The 12.38% ROE is also higher than the 12.2% ROE in effect for the American Transmission Company LLC Tariff.

In supporting his finding, the ALJ cited "current Commission policy" of utilizing the midpoint of the range of reasonableness. However, the ALJ agreed with the interveners that establishing an incentive-based ROE and a number of other issues raised by the transmission owners were outside the scope of the proceeding. There is no word yet as to whether the ROE increase will be further challenged by the interveners.

—Richard A. Heinemann

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