Community Rights Counsel

June 14, 2006

The Honorable Steve Chabot, Chair
Subcommittee on the Constitution
House Judiciary Committee
129 Cannon House Office Building
Washington, D.C. 20515

The Honorable Jerrold Nadler, Ranking Member
Subcommittee on the Constitution
House Judiciary Committee
2334 Rayburn House Office Building
Washington, D.C. 20515

Re: Subcommittee Hearing on H.R. 4772:
The "Private Property Rights Implementation Act"

Dear Subcommittee Chair Chabot and Ranking Member Nadler:

The Community Rights Counsel (CRC) is a nonprofit public interest law firm that promotes constitutional principles to help state and local officials defend laws that make our communities better places to live. CRC has filed legal briefs in the U.S. Supreme Court and lower courts on behalf of numerous clients, including the National Governors Association, National Association of Counties, National League of Cities, U.S. Conference of Mayors, National Conference of State Legislatures, Council of State Governments, International City-County Management Association, International Municipal Lawyers Association, Tahoe Regional Planning Agency, the municipal leagues of states across the country, American Planning Association, and American Public Health Association.

CRC strongly opposes H.R. 4772, the "Private Property Rights Implementation Act," for the reasons articulated since 1997 by the broad-based opposition to similar predecessor bills. This opposition has included our nation's cities, counties, and towns; the U.S. Catholic Conference, Religious Action Center for Reform Judaism, National Council of Churches of Christ, and other church groups; hunters, fishers, and environmentalists; the Conference of Chief Justices; 40 state Attorneys General; labor unions, planners, and historic preservationists; and many others.

1301 Connecticut Avenue NW, Suite 502 □ Washington, DC 20036 □ Phone 202-296-6889
Fax 202-296-6895 crc@communityrights.org **□ www.communityrights.org**

The bill is a severe affront to federalism that will further tilt the playing field in many local communities in favor of large developers, adult bookstores, corporate hog farms, massive waste dumps, and other corporate landowners at the expense of neighboring property owners and the public.

In addition to this reiteration of CRC's opposition, I am writing to correct a significant factual error that was repeated several times during the June 8, 2006 Subcommittee hearing on H.R. 4772. During much of the questioning, Subcommittee members either stated or assumed that it takes, on average, 9.1 years to litigate a regulatory takings claim in state court. For example, one Subcommittee member asked why takings claimants should be required to litigate for more than nine years in state court before proceeding to federal court.

In fact, the 9.1-year statistic refers to *federal* courts, not state courts. The statistic comes from page 17 of the testimony of Franklin P. Kottschade on behalf of the National Association of Home Builders (NAHB). The figure is derived from an NAHB-written article that appeared at 31 *Urban Lawyer* 195 (1999), which was updated by counsel for NAHB in May 2006. The NAHB testimony makes clear that the 9.1-year statistic refers to the time it took for federal courts to resolve certain cases.

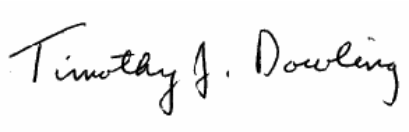
To be sure, the NAHB materials discuss certain state court cases, but nowhere does NAHB attribute any significant portion of this 9.1-year statistic to state court proceedings. Indeed, to my knowledge, the extensive hearing records on prior bills similar to H.R. 4772 do not contain any comprehensive statistical analysis showing that state courts are dilatory or unfair in resolving regulatory takings claims.

It is worth noting that even with respect to federal courts, the 9.1-year statistic is highly suspect. It is based on just 18 appellate cases over a 16-year period (1990-2006), hardly an adequate sampling given the thousands of cases decided by federal courts each year that involve private property. And by focusing only on appealed cases, the statistic does not account for the many federal court cases that were quickly settled or expeditiously resolved in federal district court.

In addition, NAHB asserts that federal courts dismissed 82% of regulatory takings cases (Kottschade testimony, p. 15). But in the vast bulk of these cases, the claimant failed to seek compensation in state court. As the U.S. Supreme Court repeatedly has held, the claimant "suffers no constitutional injury" until the state court denies compensation. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999), citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."). One wonders why the dismissal rate is not closer to 100%.

But putting aside these methodological flaws, it is uncontroverted that the 9.1-year statistic is derived from a review of federal court cases. It makes no sense for Congress to address alleged delay in federal courts through a bill that would add many more cases to the already overcrowded federal docket.

Sincerely,



Timothy J. Dowling
Chief Counsel

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