Spotlight on NAHB Litigation

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DOCUMENT CONTENTS

Page*(s)*

CONSTRUCTION LIABILITY | NOR – Constitutional Challenge

Twenty-five states have passed some form of Notice and Opportunity to Repair Legislation (NOR), which requires a homeowner to give a builder notice of a problem and opportunity to correct the problem before the homeowner initiates a lawsuit against the builder. As anticipated, a state Notice and Opportunity to Repair law is being challenged on constitutional grounds.

NAHB will be participating as an *amicus curiae* in a case currently before the Florida Supreme Court. In *Gindel v. Centex Homes*, Florida's Fourth District Court of Appeal held that service of a pre-suit notice under the state's notice and opportunity to repair statute (NOR) operates to "commence an action" for purposes of the statute of repose, even though the actual complaint was not filed until after the statutory period expired. Specifically, the Court has accepted the following question:

"Does Compliance with the Notice Requirement Under Section 558.004(1), Florida Statutes (2014) Constitute the Commencement of a Civil Action or Proceeding Sufficient to Toll the Statute of Repose Set Forth in Section 95.11(3)(C), Florida Statutes (2014)?"

The Court has not yet issued a briefing schedule.

Briefs and pleadings:

https://law.justia.com/cases/florida/fourth-district-court-of-appeal/2019/17-2149.html

Articles and blog posts:

Legislation to Significantly Refurbish Florida's Construction Defect Law Moving Through the Legislature

https://www.bergersingerman.com/news-insights/legislation-to-significantly-refurbish-floridas-construction-defect-law-moving-through-the-legislature#page=1

Decision Further Erodes Fla.'s Statute of Repose for Latent Construction Defects

https://www.law.com/dailybusinessreview/2019/01/09/decision-further-erodes-fla-s-statute-of-repose-for-latent-construction-defects/

ENDANGERED SPECIES ACT

The Endangered Species Act ("ESA") "was enacted in 1973 to conserve endangered and threatened species and the ecosystems upon which they depend." The ultimate goal of the ESA is species recovery. Unfortunately, this goal often takes a backseat to another goal – land use regulation. Two sections of the ESA, Section 7 and Section 9, increasingly impact the land use activities of NAHB's members. ESA Section 9 makes it unlawful for landowners to "take" a listed species, and includes significantly modifying critical habitat. ESA section 7 "consultation' requirements apply not to private parties but to federal agencies, but it covers their issuing permits for private activities such as CWA permitting for construction work in U.S. waters or wetlands.

On June 12, 2012, the U.S. Fish and Wildlife Service ("FWS") designated 1,555 acres of private land in Louisiana as unoccupied critical habitat for the endangered Dusky Gopher Frog. FWS admits that the land is not presently occupied and may never become suitable habitat for the Frog. In fact, FWS designated the forested land as critical habitat based on pure speculation; hoping that the land may some day be managed by private landowners for the species' conservation. The only way to make the land suitable for Frog habitat is through controlled burns and revegetation which FWS admits it cannot mandate on privately held land.

The landowners, both NAHB member, filed suit in the U.S. District Court in New Orleans, Eastern District in 2013. An appeal was filed in 2014, and affirmed the district court and upheld the critical habitat designation.

Lastly, in an 8-0 opinion, the Supreme Court disagreed. First, it explained that whether the 1,500 acres could be "critical habitat" depended on whether the area was also "habitat" for the frog. Since the Fifth Circuit had specifically ruled that "critical habitat" did not have to be habitable, the Court remanded that question back to the lower court.

Briefs and pleadings:

http://www.scotusblog.com/case-files/cases/weyerhaeuser-company-v-united-statesfish-wildlife-service/

Opinion and analysis:

https://www.scotusblog.com/2018/10/argument-analysis-justices-jostle-over-endangered-frogs-critical-habitat/

Articles and blog posts:

https://www.scotusblog.com/2018/11/opinion-analysis-frogs-and-humans-live-to-fight-another-day/

The Clean Water Act provides the federal government with two main avenues to regulate builders – when builders discharge dredge or fill material into waterbodies (including wetlands) and/or when builders discharge other pollutants (including stormwater) into waterbodies. Home builders and developers are impacted whenever the government expands its jurisdiction over waterbodies, or makes it more difficult to legally discharge into them.

Recently, there have been a number of federal Circuit Court decisions concerning the "conduit theory" under the Clean Water Act.

Imagine a pipe discharging pollutants into waterbody covered by the Clean Water Act. The discharge would be illegal unless the person in charge had the appropriate permit(s). Now imagine instead that the pipe is directed into the ground and the pollutants enter the groundwater and then flow from the groundwater into the waterbody covered by the Clean Water Act. Is that still illegal? Under the "conduit theory" the answer is "yes." The groundwater, though not a waterbody covered by the Clean Water Act, is a conduit and since the pollutants still reach a waterbody covered by the Act it is an unlawful discharge – unless the necessary permits are obtained. Under the theory, pollutant discharge that is directed into groundwater and then enters a water covered by the Clean Water Act is illegal.

Recent decisions by both the Fourth and Ninth Circuit Courts of Appeals have accepted the conduit theory and found companies liable for adding pollutants to groundwater that reached covered waterbodies. The Sixth Circuit, however, disagrees. It recently decided that such pollution is not covered by the Clean Water Act.

The defendants in the Ninth Circuit case, *County of Maui, Hawaii v. Hawaii Wildlife Fund* asked the U.S. Supreme Court to hear their case. The Court granted defendant's request on Feb. 19, 2019. NAHB staff are now in the process of crafting arguments and securing the necessary approvals to file a brief in support of the county. Oral arguments are expected to occur in October.

Briefs and pleadings:

https://www.scotusblog.com/case-files/cases/county-of-maui-hawaii-v-hawaii-wildlife-fund/

Opinion and analysis:

https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/may-june-2019/county-of-maui/

https://reason.com/2019/04/29/might-maui-v-hawaii-wildlife-fund-disappear/

NAHBNow Articles and blog posts:

New EPA Guidance Says Groundwater Discharges Do Not Require Permits
http://nahbnow.com/2019/05/new-epa-guidance-says-groundwater-discharges-do-not-

require-permits/

Maui County Could Settle Clean Water Act Case
https://www.eenews.net/stories/1060241957

LAND USE | MISCELLANEOUS

On occasion, legal issues arise that fall outside of our traditional focus areas. These cases can be found here.

The U.S. Postal Service (USPS) has determined that centralized delivery is generally the most cost-effective primary mode of delivery and has therefore designated it as the preferred method of delivery. However, this guidance has not been communicated well or implemented uniformly across the country, so NAHB continues to receive many calls about the burdens this change is now imposing on builders and developers.

The Postal Operations Manual (POM) Section 631 was revised in April 2018 to explicitly state that curbside, sidewalk delivery, and door modes are generally not available for new delivery points, with very rare exceptions, as determined by the Postal Service in its sole discretion and on a case-by-case basis. NAHB staff has updated the online toolkit to explain the USPS's evolving guidance and provided case-by-case, project-by-project assistance to members (including leveraging congressional contacts) to navigate their centralized delivery issues.

The cluster mailbox policy was up for sunset review in 2018 and a new policy was adopted at the 2018 Midyear Meeting. Another policy was adopted at the 2019 IBS Meeting, which replaced the 2018 policy.

NAHB Government Affairs has been pushing Congress to hold hearings on the challenges associated with cluster mailboxes. NAHB took advantage of an April 30, 2019 House hearing on the fiscal state of the USPS to send a letter highlighting the issues surrounding cluster mailboxes and calling on Oversight and Government Reform Committee Chairman, Elijah Cummings (D-MD), to hold a hearing on the issue. Additionally, NAHB is monitoring a number of potential legislative vehicles to address the issue.

NAHB has also started the process of filing an administrative complaint with the Postal Regulatory Commission. The first step in this process is to request a "meet and confer" with the USPS Law Department. NAHB made this request on March 21, 2019. On April 1, 2019, the USPS accepted our request to meet and confer. The meeting with the USPS law department will occur on June 11, 2019.

NAHBNow articles and blog posts:

NAHB Expresses Concerns Over Cluster Mailboxes
http://nahbnow.com/2019/05/nahb-expresses-concerns-over-cluster-mailboxes/

Post Office Wants Cluster Mailboxes for New Homes: 5 Things to Know
https://www.knoxnews.com/story/money/business/2018/11/05/cluster-mailboxes-usps-new-houses/1891949002/

No Home Delivery Any More for New Developments; Centralized Boxes Required
https://www.northsidesun.com/front-page-slideshow-news-breaking-news/no-home-delivery-any-more-new-developments-centralized-boxes

MISCELLANEOUS | AMERICANS WITH DISABILITY ACT

The 1988 amendments to the Fair Housing Act (FHA) introduced provisions to ensure that homebuilders design and construct developments, model homes, apartments and multi-family housing so that they are accessible for persons with disabilities. For our NAHB members failure to do so may be considered discrimination on the basis of handicap, which may also be a violation of a legally binding code requirement.

In *Robles v. Domino's Pizza* plaintiff alleged that Domino's violated the Americans with Disabilities Act ("ADA") because its website and mobile app had not been designed and maintained in compliance with version 2.0 of the Web Content Accessibility Guidelines ("WCAG"), a third party international consortium that develops web standards. Plaintiff argued that the U.S. Department of Justice's ("DOJ's") repeated use of the WCAG standard means that all businesses subject to the ADA must comply with it.

The District Court granted Domino's Motion to Dismiss because DOJ has not promulgated any regulations with regard to website, which "are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III" of the ADA. Robles has appealed the decision to the Ninth Circuit.

The primary arguments advanced in our brief are (1) websites are not "places of public accommodation" under the statutory language of ADA Title III and (2) to the extent websites are covered under Title III, requiring businesses to comply with nonexistent "guidelines" violates basic principles of administrative law and due process.

On Jan. 15, 2019, the Ninth Circuit ruled that a "nexus" between Domino's website and mobile app and its physical restaurants is critical to determining whether its online offerings are covered by the ADA. Further, the court reinforced that the lack of specific regulations or guidelines does not eliminate the statutory obligation to comply with the ADA. In the end the court expressed no opinion on whether Domino's website and mobile app comply with the ADA, leaving that decision up to the district court following the completion of discovery.

Briefs and pleadings:
https://www.chamberlitigation.com/cases/robles-v-dominos-pizza-llc

NAHBNow articles and blog posts:
Workforce Housing Project Revitalizes Urban Neighborhood
http://nahbnow.com/2019/04/workforce-housing-project-revitalizes-urban-neighborhood/

Ninth Circuit Reaffirms Applicability of ADA to Websites
https://www.law.com/nationallawjournal/2019/04/30/ninth-circuit-reaffirms-applicability-of-ada-to-websites/