DON'T ROCK THE BOAT: COURT DECLINES TO OVERTURN NO WAKE ORDINANCE

The United States District Court for Eastern District of Michigan has decided to abstain from ruling on whether a Michigan township properly adopted a "no wake" ordinance under the Watercraft and Marine Safety provisions of the Natural Resources and Environmental Protection Act (NREPA).

In 1993, Michael and Brenda Andrews purchased property on Marl Lake in Holly Township. At the time, there were no restrictions on use of the lake. In 1998, citing concerns over shoreline erosion that was possibly caused by the wakes from jet skis and other watercraft on Marl Lake, a group of Marl Lake homeowners (not including the Andrews) petitioned the Holly Township Board of Trustees to declare the lake a "no wake" lake, which would restrict all watercraft on the lake to a very slow speed.

M.C.L. §324.80110, 324.80111, and 324.80112 together provide that, in order for a local unit of government to pass an ordinance regulating watercraft speeds, the following procedure must be followed: (1) the local unit of government passes a resolution requesting MDNR assistance; (2) MDNR holds a public hearing; (3) MDNR prepares an ordinance and submits it to the local unit of government; and (4) if the local unit of government approves the MDNR-submitted ordinance, it enacts an ordinance that is identical to the one proposed by MDNR.

After receiving the residents' petition, the Board of Trustees held a hearing at which no one opposed the petition. The Board then adopted a resolution authorizing the Michigan Department of Natural Resources (MDNR) to conduct a public hearing and investigation concerning the propriety of making Marl Lake a "no wake" lake. A few weeks after the resolution was passed, the Andrews appeared at a Board meeting and voiced their opposition to restricting watercraft speeds on the lake.

In April 1999, the MDNR published a newspaper notice announcing a public hearing for the purpose of "gather[ing] information...concerning possible problems on the waters of Marl Lake." The Andrews purportedly never saw the notice. The hearing was attended by ten residents, all of whom favored the "no wake" restriction. After the hearing, the MDNR prepared an investigative report recommending that Holly Township adopt a "no wake" ordinance for Marl Lake. In August 1999, the township attorney drafted, and the Board of Trustees passed, such a "no wake" ordinance.

After several local residents, including the Andrews, objected, the Board of Trustees reconsidered and requested MDNR to hold another public hearing on the issue and review some corrected information that may have been inaccurately reported. The MDNR declined, however, stating that conditions at the lake had not changed so as to warrant a reconsideration, and a public hearing would be held only if the township requested that the "no wake" ordinance be rescinded. The Township decided not to take any further action, and the ordinance remained in effect. The Andrews then filed suit in federal court to enjoin enforcement of the ordinance.

In their suit, the Andrews alleged that: (1) the ordinance was invalid because the township and MDNR did not follow the procedures required in M.C.L. §324.80110, 324.80111, and 324.80112; (2) MDNR's notice of its public hearing was deficient under the due process clauses of the Michigan and United States Constitutions; (3) Holly Township exceeded its police powers in enacting the ordinance; (4) the ordinance constituted a "regulatory taking" under the Michigan and United States Constitutions; (5) the ordinance was an unconstitutional delegation of power under NREPA; (6) Holly Township's "deliberate indifference" to the Andrews' constitutional rights gave rise to a claim under federal civil rights laws; and (7) the ordinance was an "outright ban" on the use of watercraft that are necessary to engage in certain aquatic

sports, in violation of the Federal Aid in Sport Fish Restoration Act, 16 U.S.C. §777 *et seq.* In response, Holly Township argued that the federal court should abstain from deciding the case, and therefore, should dismiss the Andrews' claims.

The court observed that the abstention issue "goes to the heart of the appropriateness of the exercise of federal jurisdiction in this case," and, therefore, was of paramount importance. The court first outlined the Burford abstention doctrine, which mandates that federal courts should not rule on state law issues if: (1) the ruling would interfere with the operation of state administrative agencies; (2) "a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,'" or (3) the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

The court also explained the Pullman abstention doctrine, which applies "only when a state law is challenged and resolution by the state of certain questions of state law may obviate the federal claims, or when the challenged law is susceptible of a construction by state courts that would eliminate the need to reach the federal question."

The court held that both doctrines applied to the present case. Burford abstention was appropriate, in the court's view, because the NREPA provisions at issue required the cooperation and involvement of MDNR and local government, so a ruling on the law would affect state agencies and local interests. Such issues, the court observed, were "best left to the Michigan courts to resolve." In addition, the Pullman doctrine applied because if a Michigan court determined that the ordinance was not properly adopted under NREPA, then examination of the Andrews' federal constitutional and statutory claims would be unnecessary. As the court

explained, “this case is really about whether or not Holly Township has adopted a valid ordinance, regardless of the Andrews’ creative constitutional claims, which is best left to the Michigan courts.” Having decided to abstain, the court dismissed the Andrews’ claims without prejudice so that they could be brought in state court.

Andrews v Holly Township, No. 01-74433 (E.D. Mich. Aug. 21, 2002).

H. Kirk Meadows