

Torrromeo v. Fremont and MDR Corporation v. Fremont

More from the courts: [Torrromeo v. Fremont and MDR Corporation v. Fremont](#), two cases joined at the hip and in court.

This is a procedurally fascinating opinion that lays out some very important points, and answers at least one perennial question.

Torrromeo got approval for a 27-lot subdivision in 1997. By August 1999, only five lots remained unsold (the opinion is silent as to the status of actual buildings, but I assume there had been 22 building permits granted), and the town stopped issuing permits pursuant to its growth management ordinance. The opinion doesn't say when the ordinance was adopted, but it must have been sometime after the subdivision approval, because the trial court said that the approval was protected from zoning changes by RSA 674:39 (i.e., it was vested). The trial court told the town it couldn't refuse to issue the permit. OK so far?

MDR had a 14-lot subdivision approved (we don't know when), and had 5 building permits. At some time, the town told MDR that it would have to wait for more permits, because of the growth management ordinance. MDR sued, claiming that the growth control ordinance was invalid because the town had never legally adopted a capital improvement program, which is a legal prerequisite to the adoption of a growth control ordinance. If you want, read this at [RSA 674:22](#) ("... may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program... "). This goes back to the 1987 Town Meeting in Fremont, where there was apparently an amendment to a warrant article made from the floor of the meeting, authorizing the creation of the CIP. Because this subject matter had not been included in the original posted warrant, the trial court declared that the Town did not have proper authority to adopt a CIP (which REQUIRES town meeting vote, see [RSA 674:5](#) ("... the local legislative body may authorize the planning board to prepare and amend a recommended program of municipal capital improvement projects ...").

Therefore, the growth management ordinance was invalid. (This is old news, as the Supreme Court acted on this in an unpublished decision in June 2000).

Then followed another year of procedural stuff in superior court that I won't bother to recount here, except to say that the trial court concluded that Torrromeo and MDR were entitled to damages because the town had attempted to enforce an invalid ordinance, whether or not it had been shown that a "taking" had occurred. The town appealed.

The supreme court determined that there is a difference between the following:

(1) an ordinance that is 'substantively unconstitutional' ("... arbitrary or unreasonable [zoning ordinance] restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way ..." quoting *Burrows v. Keene*, 121 NH 590, 598 (1981)); and

(2) an ordinance that is invalid because of a procedural flaw.

The first results in a compensable taking; the second does not. According to the court, "this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy ... Accordingly, we hold that the plaintiffs are not entitled to damages, and that their only remedy is issuance of the erroneously-denied building permits."

This doesn't mean necessarily that the Fremont growth management ordinance is constitutional, as that question was never addressed. It only means that procedural flaws alone don't ordinarily result in compensable takings.

What's the perennial question that the court answered? (Imagine one planning board member talking to another) "Are we gonna get sued if we're wrong?" Well, you might get sued and have your decision reversed, but according to what the court said here, you shouldn't have to pay damages: "We have

also distinguished an erroneous planning board decision based upon an otherwise valid regulation from 'the application of an invalid regulation,' and held that the former does not constitute a compensable taking even though it may subject the property owner to a loss of value" and "'Judicial, quasi-judicial, legislative or quasi-legislative acts of a town ordinarily do not subject it to claims for damages.'"

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