The Burger Court Opinion Writing Database

Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma

426 U.S. 776 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1976

Re: (75-510 - Flint Ridge Dev. Corp. v. Scenic Rivers Assn.
(75-545 - Hills v. Scenic Rivers

Dear Thurgood:

I can join your circulation of June 1 if you find Bill Rehnquist's suggestion acceptable.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 2, 1976

RE: Nos. 75-510 & 75-545 Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 2, 1976

Re: Nos. 75-510 & 75-545, Flint Ridge Development Co. v. The Scenic Rivers Association

Dear Thurgood,

I think all of Bill Rehnquist's suggestions are good ones. If you see fit to accept them, I shall be glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 18, 1976

Nos. 75-510 and 75-545
Flint Ridge Dev. Co. v. Scenic Rivers Assn.

Dear Thurgood,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 2, 1976

Re: Nos. 75-510 & 75-545 - Flint Ridge Development Co. v. Scenic Rivers Assn

Dear Thurgood:

Please join me.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 21, 1976

Re: Nos. 75-510 & 75-545 - Flint Ridge Development Co. v. Scenic Rivers Assn

Dear Thurgood:

I am still with you.

Sincerely,

Mr. Justice Marshall

Copies to Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: JUN 1 1976

Recirculated: _____

Nos. 75-510 & 75-545, Flint Ridge Development Co. v. The Scenic Rivers Ass'n of Oklahoma

Mr. Justice Marshall delivered the opinion of the Court.

Today we must decide whether the National Environmental Policy Act of 1969 requires the Department of Housing and Urban Development (HUD) to prepare an environmental impact statement before it may allow a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act to become effective.

I

The Interstate Land Sales Full Disclosure Act (the Disclosure Act), 82 Stat. 590, as amended, 15 U.S.C. § 1701 et seq., is designed to prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose information needed by potential buyers. The Act is based on the full disclosure provisions and philosophy of the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. § 77a et seq., which it resembles in many respects. Section 1404(a)(1)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 3, 1976

Re: Nos. 75-510 & 75-545 -- Flint Ridge Development Co. v. The Scenic Rivers Association

Dear Bill:

Thank you for your suggestions. I shall respond to them one by one.

(1) Of course, you are quite right that upon our holding that no impact statement is required the public hearing question in this case -- although obviously not in general -- washes out. I shall be glad to add the following sentence to footnote 6:

> "However, because we find that no environmental impact statement was necessary before the Secretary could permit Flint Ridge's statement of record to become effective, a fortiori no hearing on an environmental impact statement was required in this case."

(2) In my view, the quotation from Calvert Cliffs does no more than accurately restate the statement of the House and Senate conferees. The conferees do more than admonish against a narrow reading of existing statutory authorization. They explain that "[t]he purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in [§ 102(a)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible." Op. at 9 (emphasis added). Together with the language to which you refer, this seems to me to be substantially the equivalent of the conclusion of the Court of Appeals in Calvert Cliffs that § 102 duties "must be complied with to the fullest extent unless there is a clear conflict of statutory authority." Thus, I prefer to retain the quotation.

(3) I had assumed that by expressly proceeding on the supposition that the Secretary's action would have otherwise required an impact statement, without deciding the question, it would be clear that the ultimate holding was on the same supposition and no more. If that is not clear, however, I have no objection to altering the last sentence in the second paragraph on page 10 to read:

> "And so the question we must resolve is whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with her duties under the Disclosure Act."

I shall also change the first sentence on page 12 to read:

> "In sum, even if the Secretary's action in this case constituted major federal action significantly affecting the quality of the human environment within the meaning of NEPA so that an environmental impact statement would ordinarily be required, there would be a clear and fundamental conflict of statutory duty."

(4) I agree that, in the first sentence you quote, Secretarial action depends upon a finding that disclosure is for the protection of purchasers or in the public interest, and I had thought the context made that clear. Nonetheless, I do not object to saying so directly.

The second part of that sentence states no more than black letter law, 5 U.S.C. § 553(e), and indeed is all but suggested by petitioner Flint Ridge as the proper means for providing environmental disclosure in this case. See Brief for Flint Ridge, at 39 & n. 15. I shall, however, delete the reference to NRDC v. SEC.

As to the last sentence, I disagree with your suggestion that NEPA does not define the "public interest" so far as environmental disclosure is concerned or make mandatory upon HUD the duty to order such disclosure "to the fullest extent possible." See 42 U.S.C. § 4332(2)(F). In any case, however,

the sentence pointedly leaves the question open, and I think it appropriate to include it.

Thus, I propose to revise the sentences you quote as follows:

> "Therefore, if the Secretary finds it necessary for the protection of purchasers or in the public interest, she may adopt rules requiring developers to incorporate a wide range of environmental information into property reports to be furnished prospective purchasers; and respondents may request the Secretary to institute a rulemaking proceeding to consider the desirability of ordering such disclosure. 5 U.S.C. § 553(e). Of course, we express no view on the extent, if any, to which NEPA gives mandatory content to the Secretary's authority under the Disclosure Act to require disclosure of information 'in the public interest' or otherwise requires the Secretary to demand environmental disclosure."

Sincerely,

J.M.

Mr. Justice Rehnquist

cc: The Conference

PP 7, 10, 11, 14, 15, 16

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75–510 AND 75–545

Flint Ridge Development Company, Petitioner,
75–510 *v.*
The Scenic Rivers Association of Oklahoma et al.

Carla A. Hills, etc., et al., Petitioners,
75–545 *v.*
The Scenic Rivers Association of Oklahoma et al.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June —, 1976]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Today we must decide whether the National Environmental Policy Act of 1969 requires the Department of Housing and Urban Development (HUD) to prepare an environmental impact statement before it may allow a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act to become effective.

I

The Interstate Land Sales Full Disclosure Act (the Disclosure Act), 82 Stat. 590, as amended, 15 U. S. C. § 1701 *et seq.*, is designed to prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose information needed by potential buyers. The Act is based on the full disclosure

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1976

Re: No. 75-510 - Flint Ridge Development Co. v. Scenic Rivers Ass'n
No. 75-545 - Hills v. Scenic Rivers Ass'n

Dear Thurgood:

Please join me in your recirculation of June 17.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 1, 1976

No. 75-510 and 75-545 Flint Ridge Development Co. v. The Scenic Rivers Ass'n of Oklahoma

Dear Thurgood:

Please note at the end of your opinion that I took no part in the decision of the above cases.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 2, 1976

Re: Nos. 75-510 & 75-545 - Flint Ridge Development Co. v. The Scenic Rivers Association

Dear Thurgood:

While I agree with your result and with much of your opinion, several relatively minor points in it give me trouble. They are as follows:

(1) In your footnote 6, you observe that since respondents did not seek certiorari to review the holding of the Court of Appeals that no public hearing was required in connection with the preparation of the environmental impact statement which it did hold to be required, the correctness of that ruling is not before us. That is certainly technically true, but since your opinion ultimately concludes that no environmental impact statement at all was required, it would surely follow a fortiorari that no public hearing was required. Could you see your way clear to add a sentence to this effect in that footnote?

OK

(2) In your treatment of the language "fullest extent possible" contained in § 102 on pages 9-10 of the opinion, you cite at length to the statement of the Senate

and House conferees which seems to me to definitively support the position which you take. I think it both unnecessary and undesirable to go on and quote from the opinion of a Court of Appeals in Calvert Cliffs' Coordinating Committee v. AEC, 449 F. 2d 1109, 1115 (D.C. Cir.) to give added weight to this point. I think that the quote from the Committee report admonishing against narrow construction of existing statutory authorization to avoid compliance is one thing, but to go on and say categorically, as the Court of Appeals did in the Calvert Cliffs' case, that § 102 duties "must be complied with to the fullest extent unless there is a clear conflict of statutory authority" goes further than the Committee report did and goes further than is necessary for the decision in this case.

(3) In your basic statement of the two questions presented by petitioners at pages 7-8, you state the second question in the hypothetical -- "Even if HUD's action in allowing this disclosure statement to be effective constitutes federal action . . . HUD is nonetheless exempt from the duties of preparing an environmental impact statement . . .." You then proceed to sustain this contention of petitioners, but it seems to me that by the time you reach page 12 of your opinion, the question is no longer stated in the hypothetical form. The last sentence of the paragraph centering page 10, for example, states that "the question we must resolve" is whether an irreconcilable conflict would arise if the Secretary were required to prepare an impact statement in this case. And by the time you reach page 12, the hypothetical with which you resolve the case seems almost to have become the law. The first paragraph on page 12, indicating

that there exists "a clear and fundamental conflict of statutory duty," seems capable of being read to say that we have decided that HUD's action in allowing a disclosure statement to become effective constitutes major federal action, and that the requirement of an EIS is avoided only because of the thirty-day requirement contained in the Disclosure Act constitutes the sort of direct statutory conflict which may override a § 102 requirement. I think the question - answer on pages 10-12 ought to remain phrased in hypothetical form.

(4) At the bottom of page 12, following the sentence ending with a reference to footnote 15, you have three sentences which I think constitute dicta, and debatable dicta at that. You say:

> "The Secretary therefore has authority to adopt rules requiring developers to incorporate a wide range of environmental information into property reports to be furnished prospective purchasers; and respondents may request the Secretary to institute a rulemaking proceeding to consider the desirability of ordering such disclosure. Cf., Natural Resources Defenses Council, Inc. v. SEC, 389 F. Supp. 689 (D.D.C. 1974). Of course, we express no view on the extent, if any, to which NEPA gives mandatory content to the Secretary's authority under the Disclosure Act to require disclosure of information 'in the public interest' or otherwise requires the Secretary to demand environmental disclosure."

If §§ 1406(12) and 1408(A) are the governing standard as to whether the Secretary may adopt

the rules which you refer to in the first of these sentences, I would think that sentence should be changed to make the Secretary's authority conditional upon the finding that the adoption of such rules would be for the "protection of purchasers" or "in the public interest".

With respect to the second part of the sentence, I am simply unwilling to look as favorably as you do upon Judge Richey's opinion for the District Court in the case to which you cite; whether respondents may request the Secretary to institute a rulemaking proceeding is certainly not necessary for the decision of this case, and I would not want to follow Judge Richey's opinion without hearing argument on the point. I think your final suggestion, which intimates that NEPA may require the Secretary to adopt such rules, is quite unsupported in either statute; I see no reason to gratuitously insert it in this opinion.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 4, 1976

Re: No. 75-510 and No. 75-545 - Flint Ridge Development Co. v. Scenic Rivers

Dear Thurgood:

Thank you for responding so promptly to my suggestions. I appreciate your agreeing to change your draft opinion to meet my points (1) and (3), and I think your proposed changes fully meet and dissipate my original objections on these points.

With regard to my point (4), I am glad you are going to delete the reference to NRDC v. SEC and to note that the Secretary should find disclosure to be in the public interest before requiring it. As to your observations regarding rulemaking, I would still prefer to leave out what seems to me an invitation to persons to petition the Secretary; but if you feel strongly about this, I will go along.

I feel substantially more concern with regard to the two remaining points in my original memo. I do not read 42 U.S.C. § 4332(2)(F) to impose upon the Secretary any duty to require that environmental information be supplied by developers under the Interstate Land Sales Full Disclosure Act. But even if I might ultimately be proved wrong in

this, the issue is certainly not presented in this case, and I see no justification for adverting to it in an opinion of the Court. As we are all aware, our disavowals of such issues are frequently taken by the lower courts as an indication that such claims have content. Whichever of us proves correct as to that issue, if it is ever presented to us, I see no reason to mention it here.

I continue to have much the same objections to your use of the quotation from Calvert Cliffs. As I earlier indicated, your use of the House and Senate conferees' statements seems adequately to support your construction of "to the fullest extent possible." I see no reason to add to this citation of legislative history the views of a federal court of appeals panel which may or may not be the same as those of the drafters of the legislation and which in any event represent a judicial determination of the meaning of the Act that I think we should not approve unless the precise issue is before us. I am not sure that there must be a "clear conflict of statutory authority" or that "[c]onsiderations of administrative difficulty, delay or economic costs" have no part in determining what constitutes the "fullest extent possible." These issues are not presented and can be left for another day.

I do not doubt that eminently reasonable minds may differ on this point, as our exchange of correspondence testifies. But if you cannot see your way clear to deleting these two portions of your opinion, please show me as concurring in the result.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1976

Re: Nos. 75-510 & 75-545 - Flint Ridge Development Co. v. Scenic Rivers Association, et al.

Dear Thurgood:

Please join me in your draft opinion circulated yesterday.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

(3)

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 4, 1976

Re: 75-510 and 75-545 - Flint Ridge Dev. Co. v. The Scenic Rivers Ass'n of Olkahoma

Dear Thurgood:

Please join me.

Sincerely,

John

Mr. Justice Marshall

Copies to the Conference