SHAKY GROUNDS: RECENT LEGAL DECISIONS AND WETLANDS REGULATION IN NEW YORK STATE

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ABSTRACT The U.S. Supreme Court rendered three decisions in 1987 which alarmed land-use planners. The Court had eschewed hearing zoning and other land-use regulation cases for over fifty years after the 1926 *Euclid vs. Ambler* decision upholding zoning. Changes in the composition of the Supreme Court through the 1980's were reflected by 1987 by a new standard for examining the "takings" clause of the Fifth Amendment. The Court's narrow decision on the 1992 *Lucas v. South Carolina Coastal Commission* made the standard for takings more complex. Wetlands regulation may be construed as covered by the takings clause. Wetlands are regulated by federal, state and local laws, with different criteria of acreage, hydrologic, vegetative and soil conditions. The recent confusion in the judicial climate is reflected in cases involving wetlands regulation in New York State.

INTRODUCTION

Wetlands provide fish and wildlife habitat, prevent flooding, purify water and maintain ground water supplies. The EPA and other researchers estimate that over half of the original 221 million acres of wetlands in the lower 48 states have been destroyed and between 300,000 and 458,000 additional acres are lost each year[1]. The U.S. Fish and Wildlife Service determined 2.6 million acres were lost between the mid 1970s and mid 1980s.[2] Concern over the loss of the wetlands resource led the National Wetlands Policy Forum, comprised of government, industry and environmental leaders, to recommend no net loss of wetlands as national policy in 1988. President Bush and the EPA moved quickly to endorse the policy. The no net loss policy was reiterated in a February 1990 Memoradum of Understanding between the EPA and the Department of the Army.

Wetlands designation and regulation have become increasingly complicated, as a result of increasingly complex federal, state and local laws and regulatory procedures developed from implementation of section 404 of the Federal Water Pollution Act Amendments of 1972. Under this law, the U.S. Army Corps of Engineers is responsible for issuing permits, for dredging and/or filling the "waters of the United States", although no specific reference is made to wetlands. The Environmental Protection Agency provides guidelines, and may even veto a decision made by the Corps. Other federal level regulations which affect wetlands are overseen by the U.S. Fish and Wildlife Service and the Soil Conservation Service. Over 20 states have their own wetlands regulations and local jurisdictions also promolgate wetlands laws. In 1989, in an attempt to provide consistency, a new, more stringent "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" was issued, superceding the previous 1987 manual. The more recent 1991 manual, which again changed guidelines, created such controversy that wetlands specialists have reverted to the 1987 manual.

SUPREME COURT DECISIONS

Judicial findings interpreting these regulations have further complicated the status of wetlands. The Fifth Amendment of the Constitution prevents the "taking" of property without due compensation. Regulations which limit the use of land, such as zoning ordinances or wetlands protection measures are challenged in court based on the Fifth Amendment. Thus court rulings establish precedents in interpreting the scope of land use regulation, including those governing wetlands.

After the 1926 *Euclid v. Ambler* decision upholding zoning, the U. S. Supreme Court refused to hear zoning and other land use regulation cases for more than fifty years, until the *Penn Central Transportation v. New York* case in 1978. Cases heard in the late 1970's and early 1980's tended to support the regulation of environmentally sensitive areas. Changes in the composition of the Supreme Court through the 1980's were reflected by 1987 in a new standard for examining the "takings" clause of the Fifth Amendment, which states that no private property can be taken for public use without just compensation. In 1987, the Court rendered three decisions which chilled land-use planners because of threats to future land regulation. This "trilogy" was *First English Evangelican Lutheran Church v. County of Los Angeles* (482 US 304) , *Nollan v. California Coastal Commission* (483 US 825) and *Keystone Bituminous Coal Association v. DeBenedictis* (480 US 470). In *First English*, the Supreme Court supported a compensation payment for "takings" although the taking was temporary, a moratorium while a new comprehensive plan was completed. In *Nollan*, the Court applied a "heightened scrunity... to determine if a government regulation substantially advances a legitimate governmental

interest" rather than targeting landowners to rectify a land use problem they had not caused. The *Keystone* decision was more in keeping with earlier standard: that all economic use must be prohibited before a taking has occurred. The trilogy appeared to narrow the legal scope of regulation and its rationale.

In 1992, the Court agreed to hear three more land use regulation cases, although it ultimately rendered a decision on only one, *Lucas v. South Carolina Coastal Commission.* The outcome was awaited anxiously by both regulators and developers, in hopes the issues surround ing "takings" would be clarified. The case involved Lucas' two waterfront lots on the Isle of Palms, bought in 1986, but undevelopable after the passage of the South Carolina Beachfront Management Act in 1988, which sought to limit beach erosion. Ths South Carolina Supreme Court found Lucas was not entitled to compensation. The Court delivered a narrow opinion, discussing "takings" only in the context of a regulation the deprives an owner of all economic use of the land, and returning the case to the State court for further findings. Justice Scalia, writing the majority opinion, said that compensation was required only if the regulation cannot be justified under state laws and state decisions (author's emphasis) concerning land use. Thus the *Keystone* test was balanced with the *Nollan* requirement. The federal takings criteria therefore involve a two pronged test that the regulation must advance a legitimate state interest, and may not deprive a landowner of all economic use of the land. The *Nollan* decision also determined the government may not intrude on private property.

WETLANDS REGULATION: STATE OR FEDERAL DECISION?

The impact of federal decisions on state regulation is complex. For many decades most land use cases were decided in state courts. However, in 1978, the federal Supreme Court held that municipalities may be sued in federal court when land use decisions violate the federal constitition (*Monell v. Dept of Social Services* 436 US 658). Federal law also requires that state courts must abide by federal court judgements. But plaintiffs may not be able to ask a federal court to retry in federal court an issue which has been adjudicated by a state court. An issue which raises doubts about state law is decided by the federal court on a case by case basis. Thus while federal decisions establish legal guidelines, state interpretation provides for some latitude.[3] A further discrepancy between state and federal jurisdiction arises because state courts seldom know how to interpret or apply the federal "taking" criteria. A landmark case in federal wetlands regulation is that of "Sweeden's Swamp"--*Bersani v. United States Environmental Protection Agency* (674 F. Supp. 405 N.D.N.Y.,1987). The case illustrates what Fred Bosselman describes as the "morass" of wetland regulation caused by the overlapping systems of federal, state and local regulation. It ultimately involved a local agency, regional and central offices of a state agency, and two federal agencies, with court appeals through two state courts and four federal courts[4]. Sweeden's Swamp covers about 50-60 acres of an 80 acres parcel south of Attleboro, Massachusetts and in the late 1970s was one of a few sites in the region close to highway access and large enough to accomodate a regional mall. The first developer filed required notices in 1979 and received application approval from the Attleboro Conservation Commission. A group of residents appealed the decision to the Massachusetts Department of Environmental Quality Engineering (DEQE), which reversed the approval in 1982. The second developer, who had acquired the site, appealed to the DEQE central office and sold the property to a third developer, Pyramid Companies which submitted a revised application. Pyramid was granted approval in March 1985 by DEQE.

The residents appealed the decision in state superior court, challenging that the State should use the more stringent 1983 regulations, rather than the ones in force in 1979. The court reversed the approval. Pyramid appealed, and the Supreme Court, reinstated the approval, grandfathering the project under the earlier rules. Concurrently, Pyramid applied to the Corps of Engineers for the dredge and fill permit required under Section 404 of the Federal Water Pollution Act. The Corps local office recommended denial based on the destruction of wetlands, the availability of other sites and the fact the shopping center was not a water-dependent use. The Washington Corps headquarters reversed the local decision, and recommended granting a permit based on Pyramid's proposed mitigation measures. Then the EPA's regional administrator took a extraordinary move in having a hearing to decide whether to veto the Corps headquarters approval. The EPA decided to veto the permit, based on the fact that there were alternative sites without wetlands when Pyramid first entered the market. Pyramid challenged the separate stages of the EPA ruling in federal courts in New York, Massachusetts and the District of Columbia, with each court upholding the EPA ruling. The Second Circuit further upheld the EPA on appeal in June 1988 (*Bersani v. Robichaud*, 850 F. 2d 36 , 2d. 1988).

WETLANDS CASES: NEW YORK STATE

In New York State, the definition and regulation of wetlands fall under the aegis of both the U.S. Army Corps of Engineers and New York State Department of Environmental Conservation. The Corps administers the Section 404 regulations and permitting and uses hydrologic, vegetative and soil criteria to determine wetland extent, while the NYSDEC relies mostly on vegetative marker species. The minimum acreage for a Corps wetland is 1 acre, the DEC requires 12.4 acres, or that a smaller wetland has unique characteristics. Local municipalities can choose their own criteria and minimum acreage, but must be more stringent than the other

criteria to be upheld in the courts. New York State adopted state wetlands regulations in 1975 (Article 24), with subsequent later amendments.

The following three recent cases adjudicated since 1986, illustrate the complex nature of wetlands cases in New York State, and pose some questions about these "shaky grounds".

1. The case of *Ardizzone v. Elliott* (551 NYS 2d 457, NYS Court of Appeals December 21, 1989) illustrates the conflict between state or local jurisdiction in wetlands designation. The landowner had a 14.6 acre parcel, of which 11 acres were wetlands, part of a 19 acre NYS DEC designated wetland. He applied to the zoning board for a special use permit to build and operate a retail nursery on the wetland portion. The zoning board required an Environmental Impact Statement (EIS), and then granted the permit. The next month, the landowner requested a town wetlands permit. Meanwhile, DEC completed its review and granted a state wetlands permit. Then, the town zoning board denied the landowner a town wetlands permit. The landowner sued. The trial court supported town board's decision, but the State's highest court finally ruled in favor of the landowner.

This finding was justified on the basis that the New York State wetlands regulation provides exclusive jurisdiction for DEC over wetlands over 12.4 acres, and those of unusual importance. Thus the State preempts local wetlands regulation, unless the local program is state certified, and at least as protective as the DEC regulations. Wetlands of less than 12.4 acres are the responsibility of local municipalities.

Delays by the DEC in filing wetlands maps have generated much confusion and resulted in several law suits. The designation of wetlands was made first in preliminary maps, followed by a public hearing, before final designations were made. The next two cases are related to DEC's delays in filing final designated wetlands maps.

2. The case of *Jorling* (for the DEC) *v. Freshwater Wetlands Appeals Board,* (554 NYS 966, April 2, 1990) reveals the problems engendered by the uncertainty of which wetlands were state designated. New York State DEC filed a tentative wetlands map for Staten Island in 1981. In 1983 and 1984, a landowner bought several lots for building purposes. The DEC filed a second tentative map in 1986, almost doubling the size of designated wetland areas. The final wetland map was filed in 1987. Several suits were brought against the final maps. New York State's Trial court supported the DEC, but noted that the landowners' "burden" from the lengthy process could be lessened by legislation. The legislature, through the Environmental Conservation Law (ECL) found the mapping process had caused undue hardship for many Staten Islanders, and asked for relief for landowners not on the original tentative 1981 map. The intent of the ECL is "to protect critical freshwater wetlands while balancing the just and proper interests of landowners." The Freshwater Wetlands Appeals Board conducted a hearing which upheld the wetlands designation, but found landowners had experienced hardship. The NYS DEC objected, and asked the court for review. The State's highest court, the Appeals court held in favor of the landowner and the Freshwater Wetlands Appeals Board, against the DEC, ruling the board may use the standard of hardship from the statue, as well as other indications of harm. This case indicates that the DEC cannot delay the designation process for too long.

3. The case of *Wedinger v. Goldberger* (499 NYS 2d 600, Feb 1986) sets a precedent for the procedure of adding additional designated wetlands to the DEC wetlands maps. Wedinger was building a house on his own land in Staten Island. In 1985, DEC order a stop to construction. The landowner sued, claiming the property was not a Freshwater Wetland as defined, since it did not appear on the tentative 1981 wetland map. The Appeals Court found that additions to the state DEC freshwater wetlands maps can only be made after public notice and the required hearing. Until these actions have been completed the wetlands are not considered designated. Thus the landowner did not have the "due process" of the law, and the DEC did not have jurisdiction over the landowner's property to halt construction.

DISCUSSION

The definition of wetlands continues to be a major problem in their delineation and subsequent protection. The U.S. Supreme Court in upholding the Corps of Engineers in *United States v. Bayview Homes* 474 U.S.121 (1985) stated "Our common experience tells us that this [definition of wetlands] is often no easy task; the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs--in short a huge array of areas that are not wholly aquatic but nevertheless fall short of being dry land." The situation is exacerbated by different criteria used at the federal, state and, in some cases, the local level. The uncertainty, coupled with the recent heightened public awareness of the confused interpretation by different federal government departments has alerted landowners to possible lawsuits. If definitions are uncertain, so are delineations. A wetland is not "official" until it has been recognized through timely mapping, and the due process of public hearings. The U. S. Supreme Court appears to be using an increasingly stringent view in recent "takings"

cases. This trend may be reflected in more successful challenges to wetlands regulation at the state level, particularly if the loss of all economic benefit from the land can be substantiated.

SUMMARY

The impact that the recent change in judicial climate has had on wetlands regulation in New York State is complicated by several factors. First, federal judicial decisions may not be reflected at the state level, as the federal court continues to refer many decisions back to the states. Second, wetlands fall under federal, state, and possibly local regulation with varying criteria. Third, the confusion caused by changing wetlands definitions and legislative trends, combined with increasing environmental pressure to preserve wetlands means that regulators are pitted even more firmly against developers. The threat of the "takings" issue promises to continue to shape future land use regulation and its administration.

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