WETLANDS REGULATIONS

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A wetland is an area of land that is either covered by water or saturated with water for at least part of the year. The depth and duration of this seasonal flooding varies. There are various types of wetlands, generally categorized as either freshwater wetlands or tidal wetlands. The water is typically groundwater seeping up from an aquifer or spring. A wetland's water can also come from a nearby river, lake, or sea, especially in coastal areas that experience strong tides. Wetlands are transition zones; they are neither totally dry land nor totally underwater but have characteristics of both.

The saturation of wetland soil determines the vegetation that surrounds it. Plants that live in wetlands, which are called hydrophytes, are uniquely adapted to their watery (hydric) soil. Seasonally dry wetlands or wetlands with slow-moving water can often support trees and other sturdy vegetation. More frequently flooded wetlands have mosses or grasses as their dominant hydrophytes.[1]

Wetlands may be regulated by the federal government under the Clean Water Act[2] (CWA), which prohibits the discharge of pollutants, including rocks and sands, into "navigable waters," or by a state. In New York, for instance, the Department of Environmental Conservation regulates freshwater wetlands and tidal wetlands and requires that a proposed activity be approved and a permit issued.

On October 3, 2022, the Supreme Court heard argument in *Sackett v US Environmental Protection Agency* to determine the proper test for determining whether wetlands are "waters of the United States" under the CWA.[3] The Sacketts bought their land in 2004 in a subdivision near Priest Lake, Idaho and obtained the necessary permits to build a modest three-bedroom family home. Shortly after they began construction in 2007, EPA officials demanded they stop, alleging that their land was a protected wetland under federal jurisdiction. The EPA's compliance order claimed the construction violated the CWA because their property was a federally regulated "navigable water."

In earlier litigation, the Sacketts won the right to challenge the EPA's order in a court of law. When their litigation simply languished in lower courts, the Sacketts' counsel, Pacific Legal Foundation, returned to the Supreme Court asking the Court to clarify the scope of the EPA's regulatory powers under the CWA. At stake is whether the EPA can expand the definition of "navigable waters" which limits the EPA's authority to include any semi-soggy parcel of land.

The term "navigable waters" was defined by a plurality of the Supreme Court in *Rapanos v United States*[4] as traditional navigable water capable of use in interstate commerce and non-navigable but relatively permanent rivers, lakes, and streams as well as

abutting wetlands with a continuous surface water connecting to traditional navigable waters.

The logic of the designation of the Sacketts' property as "navigable waters" is difficult to follow. The property is across the street from Priest Lake, which is navigable water. There is no water path from the lake to the Sacketts' parcel. A 30-foot-wide paved road separates the land and lake from the Sacketts' property. The EPA acknowledges that there is no stream, river, lake, or similar water body on the parcel. It also acknowledges that there is no surface-water connection between the Sacketts' lot and the wetlands complex on the other side of the road. Yet, the EPA and the Ninth Circuit nevertheless concluded that the Sacketts' lot was similarly situated to those across-the-street wetlands.

The Sacketts argue that the Court should adopt a test, proposed by a four-justice plurality in *Rapanos*, that would only allow the EPA to regulate wetlands that have a continuous surface water connection to regulated waters. The EPA contends that the Court should apply the "significant nexus" test suggested by Justice Kennedy in a concurring opinion in *Rapanos*: (i) whether there is a "significant nexus" between the wetland and the navigable waters that are covered by the CWA; and (ii) whether the wetlands "significantly affect" the quality of those waters.

The decision in *Sackett* is expected by June 2023.

New York wetlands

In New York, wetlands are delimited and marked first by examining available maps, aerial photos, and soil sample survey maps. Then an inspection is performed, during which the vegetation, water, and soils on the site are examined and soil borings are taken. The boundary is flagged by placing sequentially numbered flags at various points on the boundary line. The flagged boundary is transferred to a survey map. The law then provides a 100-foot protective buffer which is a "wetlands adjacent" area.[5]

New York's definition of adjacent fresh water wetlands is much more specific than the EPA's proposed "significant nexus" test, defining an "adjacent area" as:

> [A]ny land immediately adjacent to a tidal wetland within whichever of the following limits is closest to the most landward tidal wetland boundary…:
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> (i) 300 feet landward of said most landward boundary of a tidal wetland, provided, however, that within the boundaries of the City of New York this distance shall be 150 feet (see figure 1); or
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> (ii) to the seaward edge of the closest lawfully and presently existing (i.e., as of August 20, 1977), functional and substantial fabricated structure (including, but not limited to, paved streets and highways, railroads, bulkheads and sea walls, and rip-rap walls) which lies generally parallel to said most tidal wetland landward boundary and which is a minimum of 100 feet in length as measured generally parallel to such most landward boundary, but not including individual buildings (see figure 2); or
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> (iii) to the elevation contour of 10 feet above mean sea level, except when such contour crosses the seaward face of a bluff or cliff, or crosses a hill on which the slope equals or exceeds the natural angle of repose of the soil, then to the topographic crest of such bluff, cliff, or hill (see figures 3 and 4). Pending the determination by the commissioner in a particular case, the most recent, as of the effective date of this Part, topographical maps published by the United States geological survey, Department of the Interior, having a scale of 1:24,000, shall be rebuttable presumptive evidence of such 10 foot elevation.[6]

Valuing wetlands when they are condemned

An owner whose property has been taken in condemnation is entitled to just compensation.[7] Just compensation for property taken in condemnation is generally determined by the property's market value at the time of the taking, that is "the price a

willing buyer would have paid a willing seller for the property."[8] The property valuation must be "based on its highest and best use on that date, whether or not the owner was then using the property to its fullest potential, as legally restricted by all applicable governmental regulations then in effect."[9] However, pursuant to the "'reasonable probability-incremental increase rule,' if the owner proves a reasonable probability that the regulations on the property could be invalidated in court as an unconstitutional taking, he or she is entitled to an increment above the value of the property as regulated, 'representing the premium a knowledgeable buyer would be willing to pay for a potential change to a more valuable use.'"[10]

In *Paolella v. N.Y.C. (In re New Creek Bluebelt)*, a New York appellate court affirmed the findings of the lower court which ruled that there was a reasonable probability that the imposition of wetlands regulations on the subject property constituted a regulatory taking and applied a 75 percent increment in calculating the final condemnation award of $810,000.[11] For the claimant, the award represented a 338 percent increase over the city's valuation of $185,000.

The case involved the application of wetlands regulations to a 19,500 square foot piece of property located on Staten Island. Subsequent to the purchase, the property was designated as wetland by the New York State Department of Environmental Conservation (NYSDEC) and on June 11, 2007 the City of New York acquired the property.

Specifically, the lower court held that: (i) claimants had established to a reasonable probability that the wetlands regulations constituted a regulatory taking; (ii) the appropriate increment to be applied was the 75 percent increment sought by claimants, not the 41 percent increment sought by the city; (iii) the city's extraordinary development costs of $723,000 would be accepted, rather than claimant's $62,000; and (iv) the final award amounted to $810,000.

On appeal, the Appellate Division noted that under *Lingle v Chevron USA Inc.*, "if a regulation of property goes too far, it will be recognized as a taking."[12] The analysis of whether non-possessory government regulation of property has gone so far as to constitute a taking involves a factual inquiry into three factors: (i) the economic impact of the regulation on the claimant; (ii) the extent to which the regulation has interfered with distinct investment-backed expectations; and (iii) the character of the governmental action."[13]

At trial, the city's expert appraiser estimated the wetlands regulation reduced the value of the property by 82 percent, which standing alone, the Appellate Division noted, is within the range generally found insufficient to constitute a regulatory taking. However, as to the third factor, the parties agreed that as a result of the wetlands regulation, it was highly improbable that the NYSDEC would issue a permit to develop the property applicable to its R3-1 zoning; accordingly, the highest and best use of the property was to leave it undeveloped and vacant. The Appellate Division stated:

> Thus, although the purpose of the wetlands regulations benefits the public good by providing flood prevention and mitigation, the wetlands regulations effectively prevent economically beneficial use of the property (see id.).
>
> Considering the 82% property value diminution estimated by the City as a result of the wetlands regulations, together with the effective prohibition on development of any part of the property effectuated by the wetlands regulations, we agree with the Supreme Court that the claimants established that there was a reasonable probability that the imposition of the wetlands regulations constituted a regulatory taking of the subject property.[14]

The purpose of the increment added to the regulated value of the property is to reflect a percentage that represents the premium a reasonable buyer would pay for the probability of a successful judicial determination that the regulations were confiscatory.[15] When adding an increment to the value of a vacant land to reflect its development potential, the specific increment selected must be based on sufficient evidence and satisfactorily explained.[16]

Here, the Appellate Division found that the 75 percent increment selected by the New York Supreme Court was based on sufficient evidence and was appropriate under the circumstances of this case. The court declined to disturb the lower court's findings as to the extraordinary costs to develop the property. Note that the increment must be supported by evidence and must be satisfactorily explained.[17]

Notes

1 See Wetland, National Geographic, Encyclopedic Entry, available at https://education.nationalgeographic.org/resource/wetland.

2 Clean Water Act, 33 U.S.C. § 1362(7).

3 ___ U.S. ___ (No. 21-454); see https://www.supremecourt.gov/docket/docketfiles/html/public/21-454.html.

4 547 US 715 (2006).

5 See Matter of City of New York (South Beach Bluebelt, Ramfis Realty, Inc.), 37 Misc. 3d 1207(A), 961 N.Y.S.2d 357 (Table), 2012 WL 4824763, 2012 NY Slip Op 51920(U) (N.Y. Sup. Ct. Rich. Co. Sept. 26, 2012).

6 6 NYCRR § 661.4(b)(1).

7 U.S. Const., amend. V; N.Y. Const., art. I, § 7[a]; EDPL 101.

8 Matter of Town of Islip (Mascioli), 49 N.Y.2d 354 (N.Y. 1980).

9 Staten Island Land Corp. v. City of N.Y. (In re New Creek Bluebelt Phase 3), 168 A.D.3d 745, 746 (N.Y. App. Div. 2019); see also Matter of Town of Islip, 49 N.Y.2d at 360.

10 See In re New Creek Bluebelt Phase 3, 168 A.D.3d at 746 (quoting Chase Manhattan Bank v State of New York, 103 A.D.2d 211, 217 (N.Y. App. Div. 1984)); see also Matter of New Cr. Bluebelt, Phase 3 (Baycrest Manor, Inc.–City of New York), 156 A.D.3d 163, 166 (N.Y. App. Div. 2017); Berwick v State of New York, 107 A.D.2d 79, 84 (N.Y. App. Div. 1985).

11 122 A.D.3d 859, 997 N.Y.S.2d 447 (N.Y. App. Div. 2014).

12 544 U.S. 538 (2005).

13 Penn Central Transp. Co. v New York City, 438 US 104 (1978).

14 Paolella, 122 A.D.3d at 862 (citations omitted).

15 See Berwick v State of New York, 107 A.D.2d 79, 84 (N.Y. App. Div. 1985).

16 See Matter of County of Suffolk (Firester), 37 N.Y.2d 649 (N.Y. 1975).

17 Paolella, 122 A.D.3d at 861.