Journey to the Legal Horizon:
The first takings case

In this column we'll wander through the halls of the Superior Court and look at a trial court decision. I don't usually focus on Superior Court decisions. While a Superior Court decision binds the specific parties in that case, i.e., Jane Doe and the ABC wetlands commission, only higher court decisions, from the Appellate Court and Supreme Court, are binding on all commissions. Superior Court decisions may measure the pulse of where the law is headed, from which we may glean some useful lessons.

The first takings case in a wetlands appeal: "untaken" by the Superior Court

In Turgeon v. East Lyme Conservation Commission, Superior Court, judicial district of New London, Docket No. CV 05-4002613S (March 9, 2007), the Superior Court held that the wetlands commission's denial of a permit constituted a taking without compensation. This is believed to be the first time a wetlands decision in Connecticut has been found to constitute a taking. (The previous time a Superior Court held a wetlands denial to be a taking, the Supreme Court reversed that finding. See Gil v. Inland Wetlands & Watercourses Agency, 219 Conn. 404 (1991).) The Town of East Lyme did not take an appeal from the Turgeon decision. Notice of the decision was discussed before a few hundred land use commissioners, zoning and wetlands, at the biennial Connecticut Bar Association training later in March. I waited for the fallout from the news to strike panic in the hearts of wetlands commissioners. I'm happy to say I haven't heard of any.

We've come a long way. In the late 1980s there was a sense of anxiety about the takings issue. Emanating from a number of United States Supreme Court decisions, it seemed the takings doctrine was gaining a foothold as a successful way to thwart regulatory action. After the Connecticut Supreme Court decision in Cioffoletti v. Planning & Zoning Commission, 209 Conn. 544 (1989), (where the zoning commission was acting in its capacity as a wetlands commission,) we knew that the claim of an unconstitutional taking could be bundled in a traditional wetlands appeal. Evidence could be admitted on the takings claim, even though no new evidence is permitted in a traditional appeal. Was the flood of takings claims going to overwhelm the wetlands regulatory system? That was the mood. It became commonplace to see takings claim included in traditional wetlands appeals.

The wetlands law since 1973 sets forth the consequences of a taking without compensation: "If upon appeal . . . the court finds that the action appealed from constitutes the equivalent of a taking without compensation, it shall set aside the action or it may modify the action so that it does not constitute a taking. In both instances the court shall remand the order to the inland wetland agency for action not inconsistent with its decision." Connecticut General Statutes § 22a-43a. So, the Connecticut law has long provided a mechanism for the court to "untake" the property. Yet the fear was deep-seated that the town, the commission, or worse, the commissioners could be exposed to paying for the taking. (Federal case law has created a claim for "temporary" taking. Thus, theoretically a Connecticut commission could be assessed for the temporary financial loss due to the amount of time between the "taking" and the "untaking." This has not happened to date.)

What occurred in East Lyme? The owner of the property was a developer who bought lots, built on property and sold them. The lot in question is 5000 square feet on public water and sewer. Eighty (80) % of the lot is wetlands. The first application for a 20' x 52' house with a deck was granted. However, a neighbor's appeal resulted in the reversal of the commission's decision because the commission hadn't complied with the proper factors for consideration under the wetlands law. Thereafter the applicant submitted an application for a 960 square foot house with no deck. This was further reduced to 665 square feet. The commission denied the application. On appeal, the Superior Court found substantial evidence to support the agency's action. Then, the applicant obtained a variance to allow him to reduce the setback from the street which allowed him to reduce the impact on the wetlands by five feet. Based on the variance, he filed a new application with the wetlands commission which refused to consider it. After an appeal in which the court required the commission to consider the new application, the commission did consider the application and in due course denied it. The commission made numerous findings: (1) the application will result in an irreversible and irretrievable loss of wetlands; (2) there is no feasible and prudent alternative, (3) the exercise of property rights and the public benefit from that use does not outweigh or justify the degradation of the wetland. The experts of both the applicant and the commission considered the wetlands in question to be of fair to poor quality, with their most important function being flood control. The commission concluded by noting other important functions, such as nutrient retention and sediment trapping that the wetlands provide. Finally, the commission noted there were 10 other lots in the wetland system and the cumulative impact if all lots were developed would be a major negative wetland impact.

The Superior Court examined the reasons given. It did not consider the finding of no feasible or prudent alternative, as a commission is not required to grant a permit based upon the lack of alternatives. The court went through the evidence and the reasoning and found that substantial evidence existed to support the commission's decision on all of the other reasons. Thus, the denial was proper under the factors for consideration within the state wetlands act. The commission properly carried out its duties.

The Superior Court did examine the commission's finding of no feasible and prudent alternative when analyzing the takings claim. The court determined there was substantial evidence to support the finding that no other revision would pose less impact to the wetlands. This was an important point in establishing that nothing remained for the applicant to propose or revise. Then the court proceeded to apply the legal factors for a takings claim. The court held that regardless of which of two tests were used to determine a taking, in each method a taking occurred.

The Superior Court examined the statutory language quoted above and determined it lacked the authority to grant a monetary award to the applicant. The court remanded the matter to the commission "to approve the application with such conditions it finds reasonably necessary to protect the wetlands on and adjacent to the site."

The commission did its job under the wetlands law. The Superior Court did its job in finding a constitutional violation. The commission is given a final opportunity to impose such

conditions it finds "reasonably necessary." Did the commission lose? Not under the wetlands act. The court affirmed the commission's denial. Should the commission have considered the takings claim when it reviewed the application and rendered its decision? No. An administrative agency can't determine a constitutional issue. The Connecticut and United States Constitutions are the backdrop against which all actions are judged, but by the courts, not by administrative agencies.

Should this decision make you anxious as a wetlands commissioner? Hardly. Do your job by relying on the substantial expert evidence in the record and make your decisions based on the factors for consideration in your regulations (and the state statute). If a court later in doing its job finds a constitutional taking, you will be given a chance to impose conditions that are reasonably necessary to protect the wetlands.

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