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Major Land-Use Regulation Case

On June 24, 1994, the U.S. Supreme Court decided *Dolan v. Tigard*, No. 93-518, 1994 WL 276693, a potentially landmark decision involving land-use restrictions and the "takings" clause of the Fifth Amendment. The decision is important to property owners for at least three reasons. First the Court established that the relationship between land-use regulations and legitimate state interests is to be evaluated under a higher level of scrutiny than had previously been employed in takings cases. Second, this new higher level of scrutiny arguably takes into consideration the noneconomic significance of property ownership which prior takings cases had ignored. Third, the Court put property rights on a par with the individual rights protected by the First and Fourth Amendments.

With *Dolan*, the Supreme Court has now rendered three significant takings decision in the past seven years. The first of these decisions, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), involved property owners that owned a small, dilapidated beach house that they wished to tear down and replace with a larger home. The Court assumed that under the prevailing construction of the police power, the state could have prevented the construction of the new house absolutely, in order to preserve the public's viewing access from the public highways to the waterfront. 483 U.S. at 835-36. The Commission announced that it was prepared to grant the Nollans the right to build on their land, and consequently the right to obstruct the view, if the Nollans would surrender a lateral beachfront easement over their land for the public benefit. If the Nollans had agreed, the the state would have reeeived the easement without having to pay for it. However, it was also settled that this easement would have to be paid for if the government had taken it in a separate transaction. 4843 U.S. at 835-36. Similarly, it seems clear that the Coastal Commission, having only the limited powers derived from the state, could not have simply declared itself the owner of the development rights over the Nollans' land solely to sell it back to them for cash.

Within these contours, the question raised in *Nollan* was whether the state could force the Nollans to choose between their construction permit and their lateral easement. Under existing California law, the exaction in question had been upheld even though there was at best an "indirect relationship" between the new construction and any local need for access. See *Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985). The Supreme Court held that this particular bargain between the state and two of its citizens was impermissible because the condition imposed — surrender of the easement — lacked a "nexus" with, or was "unrelated" to the legitimate interest used by the state to justify preserving the view. 483 U.S. at 841. The absence

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FmHA Conservation Easements

The Fifth Circuit has upheld the FmHA's authority to impose wetland conservation easements on lands purchased from the FmHA by their former owner. The court also upheld the affected tracts' designation as wetlands and the inclusion of "wetland buffer areas" within the easements. *Harris v. United States*, 19 F.3d 1090 (5th Cir. 1994).

The wetland conservation easements at issue were imposed on approximately 1,005 acres in the Mississippi Delta acquired by the plaintiff under the FmHA's "lease-back" and "buy-back" programs at a price that reflected the easements' existence. *See* 7 C.F.R. § 1951.911(a)(8)(ii). The FmHA, as a junior lienholder, had acquired the lands at a foreclosure sale initiated by a commercial bank. It imposed the easements under authority of Executive Order 11990. Issued by President Carter pursuant to the National Environmental Policy Act of 1969, Executive Order 11990 generally requires federal agencies to "take action to minimize the destruction, loss or degradation of wetlands. . . ." 42 Fed. Reg. 26,961 (1977).

Although he conceded the FmHA was bound by the Executive Order in the absence of statutory authority to the contrary, the plaintiff argued that the easements were "prohibited by law" because they were not expressly authorized by either the Food Security Act of 1985 or the Agricultural Credit Act of 1987. "Thus, the issue presented [was] whether Congress sub-silentio rendered Executive Order 11990 void as it pertains to the buyback program by not specifically codifying the FmHA's authority to impose wetland easements." *Harris*, 19 F.3d at 1093. In answering that question in the negative, the court essentially concluded "that Congress felt no need to codify the FmHA's powers to impose wetland easements because Executive Order 11990 already obliged the FmHA to do so." *Id.*, at 1094.

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of the nexus was fatal to the case. The Court stated that "unless the permit conditions serves the same governmental interest as the development ban, the building restriciton is not a valid regulation of land-use but an 'an out-and-out plan of extortion.'" *Id.* at 837.

While *Nollan* imposed a nexus requirement between land-use regulations and a legitimate state interest, the fact that the court found that no nexus existed prevented it from ruling on the issue of what level of scrutiny would be applied to determine the constitutionality of land-use regulations that were related to a legitimate state interest.

The next major Supreme Court case in the takings area was *Lucas v. South Carolina Coastal Council*, 112 U.S. 2886 (1992), a case that focused directly on the conflict between the private right to use property and the state's ability to control land-use to further environmental objectives. In *Lucas*, two years after the landowner purchased two residential lots with the intent to build single-family homes, the state passed a law prohibiting the erection of any permanent habitable structures on the Lucas property. The purpose of the law was to protect the property as a storm barrier, a plant and wildlife habitat, a tourist attraction, and a "natural health environment" which aided the physical and mental well-being of South Carolina citizens. *Id.* at 2886. The effect of the law was to render the Lucas property valueless.

In the *Lucas* opinion, the Court cited *Nollan* for the proposition that a land-use regulation does not constitute a taking if it is related to a legitimate state interest. However, the court determined that the state's interest in the regulation in *Lucas* was irrelevant since Lucas was deprived of *all* economical use of the land. *Id.* at 2899. Thus, the court did not expound further upon the nexus requirement of *Nollan*, nor did the court address what level of scrutiny would be applied to evaluate the constitutionality of the relationship between the regulation and the legitimate state interest. Similarly, *Lucas* focused solely on the economic viability of land, did not take into consideration any potential noneconomic uses, and did not address how a reduction of value would be measured when only a portion of the regulated property was burdened; as, for example, occurs with much of the present environmental regulation affecting agriculture.

With *Dolan*, the Court has gone further than in any previous case in answering these questions. Dolan owned a plumbing and electric supply store on a 1.67 acre parcel in the central business district of Tigard, Oregon. The premises also contained a gravel parking lot. A creek flowed through the southwestern corner of the lot and along the lot's western boundary, rendering the area within the ereek's 100-year floodplaint virtually unusable for commercial development.

The city developed a comprehensive land-use plan and codified it in the city's eommunity development code (CDC). The CDC required property owners in the area zoned central business district to comply with a fifteen percent open and landscaping requirement, whieh limited the site coverage, including all struetures and paved parking to eighty-five pereent of the pareel. After completion of a transportation study that identified congestion in the central business district as a particular problem, the city adopted a plan for a pedestrian/bicyele pathway intended to encourage alternatives to automobile transportation for short trips. The CDC required that new developments facilitate this plan by dedieating land for pedestrian pathways where provided for in the pedestrian/bicycle plan.

The city also adopted a master drainage plan. The drainage plan noted that flooding occurred in several areas along the creek, including areas near Dolan's property. The drainage plan also established that the increase in impenetrable surfaces associated with continued urbanization would exacerbate these flooding problems.

To combat these risks, the drainage plan suggested a series of improvements to the creek basin including channel exeavation in the area next to Dolan's property. The drainage plan coneluded that the cost of these improvements should be shared based on both direct and indirect benefits, with property owners along the waterways paying more because of the direct benefit that they would receive. The city's comprehensive plan included the creek floodplain as part of the city's greenway system.

Dolan applied to the city for a permit to redevelop the site, doubling the size of the stor- and paving a 39-space parking lot. In the seco. phase of the project, Dolan proposed to build an additional struelure on the northeast side of the site for supplementary businesses, and to provide additional parking. The proposed expansion and intensified use were consistent with the city's zoning scheme in the central husiness district.

The eity planning commission granted Dolan's permit application subject to conditions imposed by the CDC which required Dolan to dedicate sufficient open land area for a greenway adjoining and within the floodplain to improve the storm drainage system and to be used for the pedestrian/bicycle pathway. The dedication required by the permit condition encompassed approximately ten percent of Dolan's entire property.

The commission denied Dolan's request for variances from the CDC's standards. The commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts of Dolan's project. The commission noted that it was reasonable to assume that customers and employees of the future uses of the site could utilize a pedestrian-bicycle pathway adjacent to the development for transportation and recreational needs. In addition, the commission found that the pedestrian-bicycle pathway could off- some of the traffic demand on nearby streets a lessen the increased traffic congestion. Likewise, the commission noted that the required floodplain dedication was reasonably related to Dolan's request to intensify the use of the site given the increase in the impervious surface.

Dolan appealed the denial of the variance request to the Land Use Board of Appeals (LUBA) on the ground that the city's dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of property under the Fifth Amendment. The LUBA *assumed* that the city's findings about the impacts of the proposed development were supported by substantial evidence, and the LUBA concluded that there was a reasonable relationship between the proposed development and the requirement to dedicate land along the creek for a greenway. In addition, the LUBA found a reasonable relationship between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation. The case was eventually appealed to the United States Supreme Court.

Chief Justice Rehnquist delivered the opinion of the Court and began the Court's analysis of the case by noting that in evaluating Dolan's claim, the Court had to determine whether, in accordanee with *Nollan*, an "essential nexu- " existed between a legitimate state interest a the permit condition. The Court found that the prevention of flooding and the reduction of

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AALA Editor.....Linda Grim McCormick
Rt. 2, Box 292A
2816 C.R. 163
Alvin, TX 77511
(713) 388-0155

Contributing Editors: Susan Schneider, Hastings, MN; Roger McEowen, Kansas State University; Drew L. Kershen, University of Oklahoma College of Law; Juliana Pickrell, Bellevue, WA; Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN; Linda Grim McCormick, Alvin, TX.

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

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— Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Federal Register *In Brief*

The following is a selection of items that appeared in the June, 1994, *Federal Register*.

1. APHIS; NEPA implementing procedures; proposed rule. 59 Fed. Reg. 28814.

2. Agricultural Marketing Service; PSA; rules of practice; proposed rule. 59 Fed. Reg. 32138.

3. Farm Credit Administration; Referral of known or suspected criminal violations; proposed rule; comments due 8/19/94. 59 Fed. Reg. 31562.

4. PSA; Amendment to certification of central filing system; Oklahoma: goat embryos. 59 Fed. Reg. 31193.

—Linda Grim McCormick, Alvin, TX

Wetlands Regulation In Washington State©

By Juliana Holway Pickrell JD, PhD, LLM

In Washington state the primary state statutes that affect development activities in and near wetlands include the Growth Management Act of 1991 (GMA)[1], the Shoreline Management Act of 1972 (SMA)[2], the Hydraulic Project Approval (aquatic resources section)[3], the State Environmental Policy Act of 1971 (SEPA/NEPA section)[4], the Floodplain Management program (local section), and the Forest Practices Act. This article will describe three state environmental programs: the GMA, the SMA, and the SEPA.

The Growth Management Act

Responding to substantial population growth pressures, the legislature adopted a comprehensive Growth Management Act (GMA) in 1990, requiring fast-growing areas[5] to plan for orderly growth, restricting urban growth to urban areas.[6] Those not meeting the growth-rate or size criteria could choose to be included, but once in, are not allowed to withdraw.

After passage of the GMA, the Department of Ecology prepared the Model Wetlands Protection Ordinance.[7] The Model Ordinance has had significant influence on the development of local wetlands regulation under the GMA since the majority of Washington jurisdictions have based their wetlands ordinances on the Model Ordinance, at least in part.

In 1991, the legislature amended the GMA to require that all cities and counties in the State of Washington, including those required to or choosing to plan under the GMA, adopt development regulations that protect the "critical areas".[8] Critical areas, including wetlands, must be identified for special protective treatment.

The GMA does not establish a permit system, but requires counties and cities to develop a comprehensive growth management plan for each jurisdiction, with strong sanctions if local governments do not comply. As a sanction for failure to comply, the governor can direct the state treasurer to withhold the portion of revenues to which the county or city is entitled under one or more of several programs. Alternatively, the city or county cannot collect its share of real estate tax - a primary source of revenue.

"Critical areas" include both biological wetlands and the following areas and ecosystems: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. The term "wetlands" is defined in the statute.[9]

The law requires all counties to inventory agricultural and forest lands and critical areas, and to make zoning consistent with comprehensive plans.[10] The comprehensive plans must be coordinated with each other, and state agencies are required to comply with the comprehensive plans.

Each plan must address: (1) land use, including agriculture and timber production, (2) housing, (3) capital facilities, (4) utilities, (5) a rural element, and (6) transportation. The land use element must provide protection for the quality and quantity of ground water used for public water supplies. Where applicable, the land use element must review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.

The Department of Ecology, after consulting various interested parties, developed sample comprehensive plans which emphasize preservation of critical areas, saying,

> It is more costly to remedy the loss of natural resource lands or critical areas than to conserve and protect them from loss or degradation. The inherent economic, social, and cultural values of natural resource lands and critical areas should be considered in the development of strategies designed to conserve and protect lands.[11]

Classification and designation of natural resource lands and critical areas is intended to assure the long-term conservation of natural resource lands and to preclude land uses and developments which are incompatible with critical areas.

To review challenges to GMA-mandated plans and regulations, the Growth Management Act creates three Growth Planning Hearings Boards: one each for Eastern Washington, Western Washington, and Central Puget Sound, which includes the large population areas of King, Pierce, Snohomish, and Kitsap counties. The growth planning hearings boards may hear and determine only those petitions alleging that a state agency, county, or city, or its plans and regulations are not in compliance with the GMA requirements or with the State Environmental Policy Act ("SEPA") as it relates to GMA actions. Each board is authorized to make findings of fact and prepare a written decision in each case decided by it; however, the board is limited to a finding that the county or city does or does not comply with the requirements of the GMA. Any party aggrieved by a final decision of the hearings board may appeal the decision to Thurston County Superior Court [the site of the state capital] within thirty days of the final order of the board.

The Shoreline Management Act of '71

The Shoreline Management Act of 1971 (SMA) attempts a comprehensive approach to managing the coastal area, and requires local, state, and federal actions in its implementation.

Local governments are given the primary responsibility for initiating and administering the regulatory program, with the state Department of Ecology acting primarily in a supportive and review capacity. Local shoreline ma programs must be developed according to state policies and standards which are adopted by the Department of Ecology as state rules, and administered jointly by state and local government.

Essential to the SMA is the "order of preference" provision of Washington Revised Code section 90.58.020, which establishes a hierarchy of preferred uses in the shoreline.

> (T)he local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:
>
> (1) Recognize and protect the state-wide interest over local interest;
>
> (2) Preserve the natural character of the shoreline;
>
> (3) Result in long term over short term benefit;
>
> (4) Protect the resources and ecology of the shoreline;
>
> (5) Increase public access to publicly owned areas of the shorelines;
>
> (6) Increase recreational opportunities for the public in the shoreline;
>
> (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

The hierarchy is intended to guide the development of shoreline master programs so that they achieve a balance with respect to such diverse interests as environmental protection, public access, and economic development.

The statute designs a land use program that governs both state-owned and private lands that fall under its jurisdiction.[12] Permits are required to ensure that any proposed activity complies with the local shoreline master plan. The statute applies to all land within 200 feet of the high water mark of a state shoreline. Jurisdiction may be extended to include the entirety of an associated wetland and/or flood plains. Implementing agencies are the Washington Department of Ecology, and local jurisdictions.

The legislature declared that permitted uses in the shorelines of the state should minimize "any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

The SMA covers "shorelines of the state," which are the total of "shorelines" and "shorelines of state-wide significance." "Shorelines" means all of the water areas of the state including reservoirs, and their associated wetlands together with the lands underlying them. Shorelines of state-wide significance are excepted from the local plans, as are very small steams and lakes, and the wetlands associated with them. Shoreline means lakes, including reservoirs with twenty or more surface acres; streams where the mean annual flow is twenty cubic feet per second or greater; marine waters; plus an area landward for 200 feet measured on a hori-

Juliana H. Pickrell, JD, PhD, LLM, practices law in Bellevue, Washington.

zontal plane from the ordinary high water mark; and all associated marshes, bogs, swamps, and river deltas. Floodplains and floodways incorporated into local shoreline master programs are also included.

Wetlands are defined both by statute and in the regulations.[13] State regulations describe in some detail the wetlands areas associated with the streams, lakes, and tidal waters subject to the SMA. The SMA definition of wetlands includes all upland areas within SMA jurisdiction. Marshes, bogs and swamps that are associated with the shoreline are to be regulated as "associated wetlands."

The SMA encourages local comprehensive planning and land use control for all shorelines of the state. The local government may be any county, incorporated city, or town containing regulatory waters within its boundaries. The act requires each local government unit to complete an inventory and master program for its shorelines.

The SMA guidelines recommend that master plans restrict land use in their permit standards:

(a) Local governments should encourage the maintenance of a buffer of permanent vegetation between tilled areas and associated water bodies which will retard surface runoff and reduce siltation.

(b) Master programs should establish criteria for the location of confined animal feeding operations, retention and storage ponds for feed lot wastes, and stock piles of manure solids in shorelines of the state so that water areas will not be polluted. Control guidelines prepared by the U.S. Environmental Protection Agency should be followed.

(c) Local governments should encourage the use of erosion control measures, such as crop rotation, mulching, strip cropping and contour cultivation in conformance with guidelines and standards established by the Soil Conservation Service (SCS), U.S. Department of Agriculture.

Once accepted by the Department of Ecology,[14] each master program is adopted as land use regulations of the state shorelines. The master program contents are prescribed to include elements for economic development, conservation, and recreation, and specifically must provide for public access to publicly owned areas. The master plan is required to allow for variances to prevent unnecessary hardships, but only in extraordinary circumstances and on condition that the public interest suffers no substantial detrimental effect.

The local plans must provide for marshes, bogs, and swamps, which are areas having a water table very close to the surface of the ground. The Master Program guidelines advise with optimism that the potential of marshes, bogs and swamps to provide permanent open space in urbanizing regions is high because of the costs involved in making these areas suitable for use. Unlimited public access into them, however, may cause damage to the fragile plant and animal life residing there.

A shoreline permit is required for any substantial development or construction activity located on the water or shoreline, valued at $2,500.00 or more.[15] This requirement applies to any use or activity that materially interferes with the normal public use of the water or shorelines of the state, for any activity listed as a conditional use in the local master program, and for any activity that requires a variance from the provisions of the local master program.

An important exception to the permit requirement is the category of agriculture practices and construction.[16] Wetland areas in western Washington are often part of farms, and used either as grazing land for livestock, or as croplands between floods. This leaves a potential pollution source unregulated.[17] Nevertheless the exempt "normal or necessary" farming activities do not include alteration of the contour of the wetlands either by leveling or filling, other than normal cultivation.[18] The usual pollution problems of pesticide and fertilizer runoff, however, remain unresolved.[19]

The procedure for obtaining the permit varies, as does processing time. Generally a public hearing is required. The local official will require an affidavit of public notice, a location map, a topographic map, and a site map. If a shoreline variance or conditional permit is required, the Department of Ecology must give its approval.

Any person aggrieved by the granting, denying, or rescinding of a shoreline permit may appeal for review by the Shoreline Hearings Board or the Superior Court.[20]

The attorney general and attorney for the local government are authorized to enforce the provisions of the program by injunctive and declaratory relief, plus any other actions necessary.[21] In addition, a person found to wilfully violate the provisions "shall be guilty of a gross misdemeanor punished by a fine of between twenty five to one thousand dollars or imprisonment in the county jail for not more than ninety days," with increased penalties for repeated violations.[22] Violators are liable for damages resulting from the violation and the cost of restoring the area affected by a violation, plus award of attorney's fees and costs of suit to the prevailing party.[23] Suit for damages may be brought by the attorney general, local government attorney, or private persons.[24]

State Environmental Policy Act

The State Environmental Policy Act (SEPA)[25] is intended to ensure that environmental values are considered by state and local government officials when making decisions about projects. The act creates a state process which requires full disclosure of potential impacts associated with proposed actions.

The SEPA process starts when a party submits a permit application to an agency. Under SEPA, an environmental impact statement is required only if the lead agency makes a threshold determination that the proposed action poses the possibility of significant adverse environmental impact. In making this threshold determination, the administrative guidelines provide for review of an "environmental checklist."

Critical areas often receive protection under SEPA. If the project is not exempt,[26] the "lead" agency will ask the party to fill out an "environmental checklist". Included within the environmental checklist are questions concerning the following critical areas:

. Surface water, including wetlands;
. 100-year floodplains;
. Ground water;
. Threatened or endangered species; and
. Slope, subsidence and erosion.

This checklist, divided into different elements of the environment such as air, water, etc., asks questions about how the project will affect these elements.

In addition to general inclusion of critical areas in the environmental checklist, the EIS threshold determination guidelines also specifically note that a proposal might significantly "affect environmentally sensitive or special areas," such as wetlands, wild and scenic rivers, wilderness and endangered or threatened species or their habitat.

Based on answers to the checklist and the reviewer's knowledge about the project site, agency personnel will determine the types of impacts the project may have on the environment. If the project will have a "significant adverse environmental impact," an environmental impact statement (EIS) will be required.

Irrigation projects decisions are exempt if they do not rely on either state or federal government subsidy, and appropriate fifty cubic feet of water per second or less. Forest practices which have a potential for substantial impact on the environment (Class IV practices) require an EIS, to be reviewed by the Department of Natural Resources, and perhaps also the local government. Activities such as building logging roads in wetland areas are subject to regulation.

SEPA also enables local jurisdictions to designate "environmentally sensitive areas" within their boundaries. The regulations enumerate wetlands, floodplains, areas of unstable soils and areas of unusual or unique plant or animal life as examples of environmentally sensitive areas. If an area is deemed environmentally sensitive, certain SEPA exemptions to regulation will not apply to that area and it will receive full protection.

A recent supreme court case, *King County v. Washington State Boundary Review Bd. for King County*[27] confirmed interaction and application of the Growth Management Act and the State Environmental Policy Act. The court reviewed approval by the King County Boundary Review Board of two proposed annexations by the City of Black Diamond. Based in part on requirements of the Growth Management Act, the court held that an EIS should have been prepared for the proposed annexation of property to the City of Black Diamond, even though no immediate development is planned. With regard to SEPA requirements, the court held that a proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or be-

Continued on page 6

cause there are no immediate land-use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action.

The court reasoned that (1) the Growth Management Act requires the inclusion of all incorporated territory into urban growth areas. Therefore, if the specified properties are annexed, they will by force of law become part of the Black Diamond urban growth area. (2) It is clear that the land in question would be developed following annexation. (3) There is also no doubt the expected development will have a significant adverse impact on the environment. Such development would have a major impact on water drainage and quality, environmentally sensitive wetlands and wildlife habitat, open spaces, and the adjacent rural communities. (4) The annexation proposals thus will result in significant adverse effects on the environment arising from the probable development of the annexation properties, and an Environmental Impact Statement is required.

Conclusion

The effect of these programs on wetlands is unclear. No comprehensive studies have examined the results. At the very least, however, wetland preservation and regulation are often mentioned in the newspapers, indicating an increased level of public consciousness.

[1] 19990 Wash. Laws 1972, 1st Ex. Sess., ch. 17 (amended by 1991 Wash. Laws 2903, 1st Sp. Sess, ch. 32 and 1992 Wash. Laws 1050, ch. 227)(codified at Wash. Rev. Code Ann. ch. 36.70A (West 1991 and Supp. 1993), Wash. Code Ann. ch. 47-80 (West Supp. 1993), and Wash. Rev. Code Ann ch. 82.02 (West 1991 and Supp. 1993).

[2] 90 58, WAC 173 - 14 through 28.

[3] RCW 75.20.100 (hydraulic project approval program), see also WAC 220.110.010 et seq. (hydraulic code rules).

[4] RCW 43.21C.010 et seq.

[5] RCW 36.70A.040.

[6] RCW 36.70A.110.

[7] Washington State Dep't of Ecology, Model Wetlands Protection Ordinance (Sept. 1990) [hereinafter Model Ordinance].

[8] RCW 36.70A.060(2) (West Supp. 1993).

[9] RCW 36.70A.030(17). [A]reas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including, but not limited to, irrigation and drainage ditches, grass-lines swales, canals, detention facilities, waste water treatment facilities, farm ponds, and landscape amenities. However, wetlands may include those artificial wetlands intentionally created from non-wetland areas created to mitigate conversion of wetlands, if permitted by the county or city.

[10] Washington Revised Code section 36.70A.170.

[11] WAC 365-190-020.

[12] RCW 90.58.029. This authority may be contrasted with that of other statutes that provide authority only over state-owned lands. See, e.g., RCW 79.90.010. (Aquatic Lands Act) in which the term "Aquatic lands" means all state-owned tidelands, shorelands, harbor areas and the beds of navigable waters.

[13] RCW 90.58.030(2)(f); WAC 173-22(10) wetlands" or "wetland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all marshes, bogs, swamps, and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter. . .

[14] The state retains power of approval over local master programs to insure consistency with the policies of the Act. RCW 90.58.090 (West Supp. 1991).]

[15] RCW 90.58.030(3)(E), WAC 173-14-040(1)(a). A Substantial development permit is not required for "Any development of which the total cost or fair market value, whichever is higher, does not exceed two thousand five hundred dollars, if such development does not materially interfere with the normal public use of the water or shorelines of the state."

[16] WAC 173-14-040(1)(e) The following developments shall not require substantial development permits:(e) Construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on wetlands, construction of a barn or similar agricultural structure, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels.

[17] WAC 173-16-060 ... It should be noted that there are several guidelines for certain activities which are not explicitly defined in the shoreline act as developments for which substantial development permits are not required (for example, the suggestion that a buffer of permanent vegetation be maintained along water bodies in agriculture areas.) While such activities generally cannot be regulated through the permit system, it is intended that they be dealt with in the comprehensive master program in a manner consistent with policy and intent of the Shoreline Act.

[18] WAC 173-14-040(1)(e).

[19] WAC 173-16-060(1): Agricultural practices are those methods used in vegetation and soil management, such as tilling of soil, control of weeds, control of plant diseases and insect pests, soil maintenance and fertilization. Many of these practices require the use of agricultural chemicals, most of which are water soluble and may wash into contiguous land or water areas causing significant alteration and damage to plant and animal habitats, especially those in the fragile shoreline areas. Also, large quantities of mineral and organic sediments enter water bodies through surface erosion when proper land management techniques are not utilized.

[20] RCW 90.58.180(1).

[21] RCW 90.58.210

[22] RCW 90.58.220.

[23] RCW 90.58.230.

[24] RCW 90 58.230.

[25] RCW 43.21C and its Implementing Regulations, WAC 197-11-010. Environmental Coordination Procedures Act RCW 90.62.

[26] RCW 43.21C.110.(1)(a).

[27] 122 Wash.2d 648, 860 P.2d 1024 (1993).

Deference Strikes Again

Courts continue to struggle with the appropriate fee for the standing trustee in Chapter 12 bankruptcy cases. The most recently addressed controversy concerns the interpretation of 28 U.S.C. section 586(e), the statutory provision that governs Chapter 12 trustee compensation. This subsection places an upper limit on trustee compensation based on the Executive Schedule for level 5 government employees and up to this maximum, provides for the trustee to receive a percentage fee based on the "payments made under the plan" of the debtor. 28 U.S.C. § 586(e)(1)(A) (1992). The percentage fee is not to exceed ten percent with regard to payments up to $450,000 and three percent of payments above $450,000. The statute authorizes the Attorney General, after consultation with the United States trustee, to fix the maximum compensation amount and the percentage fee amount for the standing trustees under the specific guidelines prescribed.

The controversy centers on the question: ten percent of what? The U.S. Trustee (UST) has taken the position that trustees are entitled not only to ten percent of the payments made to creditors, generally interpreted to mean "payments under the plan," but also ten percent of their own fee, i.e., ten percent of all payments made to them, including the percentage payment made for the trustee's fee. Two recent cases address this reasoning, with conflicting results.

The Tenth Circuit Court of Appeals adopted the UST position in *In re BDT Farms, Inc.*, 21 F.3d 1019 (10th Cir. 1994). Applying the rule that the court must defer to an agency's reasonable interpretation of an ambiguous statute (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844), the Tenth Circuit found the UST interpretation to be permissible and thus, deferred to it.

The trustee compensation issue in *BDT Farms* arose in December of 1992 when the debtor moved to close the Chapter 12 case after completion of the plan payments. The trustee objected, raising a number of issues regarding his fees. The bankruptcy court ordered an accounting of the trustee's fees and sua sponte raised the issue of the percentage fee, challenging the trustee's practice of assessing his fee on the total amount transferred to him. The bankruptcy court held that this practice resulted in an effective fee of 11.11%, in violation of the ten percent maximum. *In re BDT Farms, Inc.*, 150 B.R. 795, 796-99 (Bankr. W.D. Okla. 1993), *aff'd on reh'g*, 152 B.R. 642, 644-46 (Bankr. W.D. Okla. 1993). With regard to the UST's arguments, the court stated that "[it] is difficult to adequately characterize the convoluted logic upon which this position is apparently grounded, or to find the reasoning that would find it not in violation of the governing statutory provision, 28 U.S.C. § 586(e)(1)." *BDT Farms*, 150 B.R. at 803. The court found the UST interpretation of the statute to be "aberrant." *Id.* On appeal, the district court affirmed.

On further appeal, however, the Tenth Circuit court disagreed with the lowers courts' reading of the relevant statutory language. In contrast to the clarity found by the lower courts, the Tenth Circuit found the statute to be ambiguous as to the definition of what payments are to be included in the ten percent assessment. The court considered both the language of section 586(e)(1), as referenced above, and the language in section 586(e)(2), which provides that the trustee "shall collect such percentage fee from all payments received by such individual under plans in the cases under chapter 12 or 13. . ." *BDT Farms*, 21 F.3d at 1022. The phrase "all payments received" in section 586(e)(2) led two bankruptcy courts to conclude that the percentage should be assessed against all payments made to the trustee, including the fee. *Id.*, citing *In re Weaver*, 118 B.R. 730 (Bankr. D. Neb. 1990); *In re Estes*, 1992 WL 512785. This contrasts with the lower courts in *BDT Farms* and the district court in *In re Edge*, 122 B.R. 219

traffic congestion in the central business district qualified as a legitimate public purpose that could be substantially advanced by the permit conditions. Consequently, the Court was then required to establish the proper level of scrutiny to be applied in determining whether the degree of the exactions of the city's permit conditions bore the required relationship to the projected impact of the Dolan's proposed development. The Court's opinion with respect to this issue makes *Dolan* a very significant case.

The Court reviewed representative state court decisions to determine how the state courts had dealt with this issue in the past. The Court cited *Simpson v. North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980), as representative of the scrutiny to be given the necessary connection between the required dedication and the proposed development. In *Simpson*, the Nebraska Supreme Court noted that the distinction between an appropriate exercise of the police power and an improper exercise of eminent domain is "whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license of permit." *Id.* at 301.

However, the Court refused to adopt a "reasonable relationship" test because of potential confusion with the "rational basis" test which describes the minimal level of scrutiny to be applied under the equal protection clause of the Fourteenth Amendment. Instead, the Court opined that a test such as "rough proportionality" best epitomized what they held to be the requirement of the Fifth Amendment. The Court did not believe a precise mathematical calculation was necessary, but held that the city must make some sort of individualized determination that the required dedication was related both in nature and extent to the impact of the proposed development. In essence, the city needed to make some effort to quantify its finding in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it *could* offset some of the traffic demand generated. In essence, the Court held that governmental agencies forcing property owners to give up their property as a condition to further development must prove that the benefits conferred by the government are "roughly proportional" to the property being taken.

The majority also rejected the contention that the city's conditional demand for part of the Dolan's property was "a species of business regulation" that was constitutional. The majority opinion stated "simply denominating a governmental measure as a business regulation does not immunize it from constitutional challenge." No. 93-518, 1994 WL 276693 at page 8. The Court also flatly rejected the notion that property rights are entitled to only second-class protection under the Constitution. The Court stated "we see no reason why the takings clause of the Fifth Amendment, as much a part of the Bill of Rights, as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Id.* at page 8. Thus, for the first time in more than fifty years, the Court has placed property rights on a par with individual rights protected by the First Amendment (speech, press, religion) and the Fourth Amendment (unlawful searches and seizures).

The *Dolan* case is significant to agricultural landowners for several reasons. First, the Court has shifted the burden of proof in takings cases in favor of landowners by placing the burden on governmental agencies to prove that the benefits conferred by the government are roughly proportional to the property being taken. Second, to the extent the Court has elevated property rights to the status of a "fundamental" constitutional right such as speech or voting, a strong argument can be made that the noneconomic significance of property ownership is to be accounted for in the "rough proportionality" test. Third, the *Dolan* case may signal that the Court is stepping back from its infamous 1938 *Carolene Products* decision, *304 U.S. 144 (1938)*, that began a two-tiered system of judicial review of laws. In *Carolene Products*, the Court indicated that government actions that affect economic rights would be less closely scrutinized than those affecting "fundamental" rights such as speech or voting. To the extent *Dolan* has elevated property rights to the status of a fundamental right, the scrutiny to be applied to the governmental action involved has been heightened. Thus, the government must employ means which bear some reasonable relationship to the legitimate end. It would then appear that under *Dolan*, if that reasonable relationship or "nexus" is shown, then the regulation will be upheld as constitutional only if the government can show that the value of the property (both economic and noneconomic) taken from the landowner and the benefits conferred by the government are "roughly proportional."

—Roger A. McEowen, Esq., Kan. State Univ., Extension Specialist, Ag. Law and Pol'y

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(D. Vt. 1990) which held that the phrase "payments made under the plan" was the operative language. Examining the statutory language and the cases interpreting it, and noting the conflicting decisions, the Tenth Circuit concluded that the statute was ambiguous. *BDT Farms*, 21 F.3d at 1022.

Once the court found that the statute was ambiguous, applying *Chevron*, the court addressed the issue of whether the UST's interpretation of it was "arbitrary, capricious, or manifestly contrary to the statute." *BDT Farms*, 21 F.3d at 1023, citing *Chevron*, 467 U.S. at 844. The court held that it was not, that the UST interpretation was "permissible" and accordingly, deferred to the UST position. *Id.*

Subsequent to the *BDT Farms* decision, however, a bankruptcy court in Missouri also addressed this identical issue, reaching a contrary result. *In re Wallace*, No. 93-10224-399, 1994 WL 197992 (Bankr. May 5, 1994). Expressly rejecting the holding in *BDT Farms*, the court held that the statutory language is clear and "unequivocal." *Id.* at *2. The court read § 586(e)(1) as specifying the amount of the fees and capping those fees at ten percent of payments made under the plan. The court further read subsection (2) as simply specifying the source of funds from which the trustee is to be paid. *Id.* at *3. Under this reading, applying the *Chevron* test discussed in *BDT Farms*, the court held that there is no conflict or ambiguity. *Id.* at *3-4. Accordingly, the court found that the inquiry could end there.

The *Wallace* court continued on, however, and held that even if the statute were ambiguous, the UST's position would be impermissible. The court held that the fee that the UST argued that it should be assessed amounted to an 11.11% fee, a direct violation of the 10% "maximum allowable percentage" set forth in the statute. *Id.* at *4. The court held that "[b]ecause the UST's interpretation is not permissible under the statute, it fails to meet requirements for deference in the Chevron case." *Id.*

As additional support for its holding, the *Wallace* court noted that the trustee's duties were specified in § 1202(b) of the Bankruptcy Code. The court held that the UST position was also an impermissible construction of the statute in that it sought reimbursement for "nothing more than processing its own fee." *Id.* The court held that in "charging a 10% fee for merely receiving its paycheck, the trustee is performing a function which has no benefit to the estate." *Id.* As such, it "bears no relationship to the other compensable duties of the trustee." *Id.* As final authority, the court cited *In re Edge* as persuasive. *Id.* at 5.

—Susan A. Schneider, Hastings, MN

The court also rejected the plaintiff's contention that the lands subject to the easements were improperly designated as wetlands. The plaintiff contended the designations were improper because soil samples were not taken and vegetation was not measured on all of the tracts. The court, however, noted that the Soil Conservation Service and the Fish and Wildlife Service had previously "determined that, with very few exceptions, hydrophytic vegetation predominated on all land situated in the Mississippi delta area;" that the plaintiff's expert witness "testified that he sometimes identified wetlands without taking soil samples or precisely measuring whether the vegetation was predominately hydrophytic;" that all of the tracts either were partially inundated when inspected, were in a floodplain, bore indications of "flooding or ponding," or exhibited more than one of these factors; and that the plants found on the tracts indicated a 99% probability that the areas were wetlands. The court also found that it was reasonable to include "wetland buffer areas" within the easements to allow for measures to protect the wetlands and to facilitate the preparation of the easement's legal description, a task that would have been "impossible" if only "'each and every' acre of wetland" had been included.

—Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

American Agricultural Law Association Awards Program
Selection of Distinguished Service Award for 1994

The Awards Committee is accepting nominations for the Association's "Distinguished Service Award." The Distinguished Service Award may be conferred in recognition of distinguished contributions to agricultural law. Achievements may be in the field of practice, research, teaching, extension, administration, or business.

Any member of the Association may nominate another member for selection by submitting the name to the Chair of the Awards Committee. A nominee must be a current member of the Association. Any member making a nomination may be requested to submit biographical information in support of the nominee. Nominations must be received by September 1, 1994, to be considered. Submit nominations to:

Prof. John Davidson
University of South Dakota -- School of Law
414 East Clark Street
Vermillion, SD 57069-2390
PHone: (605) 677-5361