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Determining "Takings" Under Coastal Zone Management Programs in New York and Connecticut

I. Introduction

New York and Connecticut have adopted coastal management programs encouraged by the amended federal Coastal Zone Management Act (CZMA) of 1972.¹ In 1979, Connecticut passed the Coastal Management Act² and, in 1981, New York passed the Waterfront Revitalization and Coastal Resources Act³ as well as the Shoreowner's Protection Act.⁴ These new acts complement a number of previously enacted statutes,⁵ thereby giving both states comprehensive programs that fulfill the requirements of the federal CZMA.⁶

1. 16 U.S.C. §§ 1451-1464 (1976 & Supp. V 1981).

2. Conn. Gen. Stat. Ann. §§ 22a-90 to 22a-112 (West Supp. 1982).

3. N.Y. Exec. Law §§ 910-920 (McKinney 1982).

4. N.Y. Envtl. Conserv. Law §§ 34-0101 to 34-0113 (McKinney Supp. 1982-1983).

5. In Connecticut see, e.g., Conn. Gen. Stat. Ann. §§ 25-1 to 25-18 (West 1958 & Supp. 1982) and Conn. Gen. Stat. Ann. §§ 22a-28 to 22a-45 (West 1958 & Supp. 1982). In New York see, e.g., N.Y. Envtl. Conserv. Law §§ 13-0101 to 13-0371 (McKinney 1973 & Supp. 1982-1983) and Tidal Wetlands Act, N.Y. Envtl. Conserv. Law §§ 25-0101 to 25-0601 (McKinney Supp. 1982-1983).

6. Connecticut's program has already been approved by the Office of Coastal Zone Management (OCZM) of the National Oceanic and Atmospheric Administration (NOAA) within the U.S. Department of Commerce. New York's program should be approved some time in the near future.

The declared policy of the federal CZMA is "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone. . . ." 16 U.S.C. § 1452(1) (Supp. V 1981). This policy is realized by encouraging and assisting "states to exercise effectively their responsibilities in the coastal zone through the development and implementation of [state] management programs. . . ." 16 U.S.C. § 1452(2) (Supp. V 1981). Once a state program has been approved by the Secretary of Commerce, the state becomes eligible for federal grants for up to 80% of the costs of administering the program. Such approval is predicated upon the state program meeting various detailed requirements. 16 U.S.C. §§ 1454, 1455 (1976 & Supp. V 1981).

All federal actions within the coastal zone of the state must be consistent with the approved state program. 16 U.S.C. § 1456(c). The CZMA is an example of federal environmental legislation which puts the regulatory responsibility and burden on the states. Cf. Clean Air Act, 42 U.S.C. § 7410 (Supp. V 1981). Although state

The extensive coastlines of both states are covered by these programs. New York's coastline is over 3,200 miles long, and has been defined to include the shorelines of "lakes Erie and Ontario, the St. Lawrence and Niagara rivers, the Hudson river south of the federal dam at Troy, the East river, the Harlem river, the Kill Von Kull and Arthur Kill, Long Island sound and the Atlantic ocean, and their connecting water bodies, bays, harbors, shallows and marshes."⁷ Connecticut's coastline encompasses the shoreline of the state's thirty-six coastal municipalities fronting Long Island Sound.⁸

Along these coastlines "coastal areas" have been defined; and within the coastal areas "coastal boundaries" have been defined.⁹ It is within these coastal boundaries that the two state programs have the power to regulate and limit economic development of privately owned land. The scope of the land use constraints enacted in these programs depends in part upon whether the regulation is so onerous as to be a "taking" that requires compensation.¹⁰ For example, should the denial of a permit to develop or exploit coastal wetlands be considered a taking or merely a proper exercise of the state's police power? The highest courts in both New York and Connecticut have adopted different approaches to this problem.

II. Connecticut's Approach

The leading case on the taking issue in Connecticut is *Brecciaroli v. Connecticut Commissioner of Environmental Protection*.¹¹ Although this case was decided prior to the

participation is voluntary, once a state adopts and has approved a management program, that program regulates all activity within the state's coastal zone—including activity by the federal government. Both the federal grants and this consistency provision provide the main incentives for states to adopt a program.

7. N.Y. Exec. Law § 911(3); N.Y. Env'tl. Conserv. Law § 34-0103(4).

8. Coastal Management Act, Conn. Gen. Stat. Ann. § 22a-94(a).

9. N.Y. Exec. Law § 911(1), (2); Coastal Management Act, Conn. Gen. Stat. Ann. § 22a-94(a), (b).

10. The fifth amendment to the United States Constitution, art.I, § 7(a), of the New York Constitution, and art.I, § 11, of the Connecticut Constitution all state that private property shall not be taken for public use without just compensation.

11. 168 Conn. 349, 362 A.2d 948 (1975).

passage of Connecticut's Coastal Management Act, it is still applicable to taking issues arising under the state's Coastal Area Management (CAM) Program. The statute involved in the case was "An Act Concerning the Preservation of Wetlands and Tidal Marsh and Estuarine Systems,"¹² which is now part of the CAM Program.¹³

In *Brecciaroli*, the plaintiff was appealing the denial of an application to fill 5.3 of 17.5 acres of regulated tidal wetlands. The land in question had already received local approval.¹⁴ Holding that the denial under the Act was not a taking, the Connecticut Supreme Court formulated the following test: If a regulation results in a practical confiscation of property by restraining the use of the property for "any reasonable purpose," then it is a taking. Each case must be decided on its own facts, with consideration being given not simply to the diminution in value of the property but also to the public harm to be prevented by the regulation and to the alternative uses available to the property owner.¹⁵

In applying this balancing test, the Connecticut Supreme Court held that there had been no practical confiscation of Brecciaroli's property. Although he suffered a diminution in its value, that diminution was not sufficient to be a taking when balanced against the public interest in preserving the state's already threatened wetlands. The court not only stated that his proposed activity was "presumptively . . . not reason-

12. Conn. Gen. Stat. Ann. §§ 22a-28 to 22a-45.

13. Both this Act, as recently amended (Preservation of Wetlands Act (West Supp. 1982)), and the Coastal Management Act require coordination between the regulatory and permit programs. Conn. Gen. Stat. Ann. § 22a-30(c) and § 22a-98. Further, the Preservation of Wetlands Act was also amended to require that all regulations that might be adopted under it be consistent with the federal CZMA. Conn. Gen. Stat. Ann. § 22a-30(c).

14. If the new Coastal Management Act had been in effect at the time, this local approval might never have been given. Under the new Act, a coastal site plan for a proposed activity within the state's coastal zone must be filed with the municipal zoning commission. Approval of the plan is based not only on the local zoning ordinances, but also on the adverse impact, if any, of the activity on coastal resources. Further, the proposed activity must be consistent with the policies and goals of the Act. See Conn. Gen. Stat. Ann. §§ 22a-92, -105, -106, and -109.

15. 168 Conn. at 357, 362 A.2d at 952.

able when balanced against the public harm it would create,"¹⁶ but also stated that absent a clear abuse of discretion by the Connecticut Commissioner of Environmental Protection, "the welfare of the public, rather than private gain, is a paramount consideration. . . ." ¹⁷

The court felt that the denial of the application prohibited only one specific use of the property. Brecciaroli could still apply for a permit to fill a lesser area of the wetlands, conduct other regulated activities, or make other "reasonable unregulated use of his land."¹⁸ The court did not, however, consider whether these alternative uses would give any worthwhile economic return comparable to that which would have been generated had the permit been granted. In fact, the court upheld the denial of Brecciaroli's motion to introduce evidence as to this issue, and simply concluded that the denial of the application for the permit was "a proper exercise of the police power, not amounting to an unconstitutional taking. . . ." ¹⁹

III. New York's Approach

The New York Court of Appeals took a different approach to the taking issue in *Spears v. Berle*.²⁰ The plaintiff in this case sought an order directing the Commissioner of Environmental Conservation to either issue a permit for mining humus, sand, and stone from freshwater wetlands regulated by the Freshwater Wetlands Act²¹ or to initiate condemnation proceedings.²² Although this case involved the Freshwater Wetlands Act, its reasoning should be applicable to cases involving coastal zone regulation. The Court of Appeals, in

16. *Id.*

17. *Id.* (quoting *Corsino v. Grover*, 148 Conn. 299, 311, 170 A.2d 267, 273 (1961)).

18. 168 Conn. at 356, 362 A.2d at 952.

19. *Id.* at 358, 362 A.2d at 953.

20. 48 N.Y.2d 254, 397 N.E.2d 1304 (1979).

21. N.Y. Envtl. Conserv. Law §§ 24-0101 to 24-1305 (McKinney Supp. 1982-1983).

22. See N.Y. Envtl. Conserv. Law § 24-0705(7).

formulating its test for when a land use regulation constitutes a taking, stated that the test applies to any "land use regulation—be it a universally applicable local zoning ordinance or a more circumscribed measure governing only certain designated properties. . . ." ²³

The test itself states that a land use regulation is too onerous, and therefore constitutes a taking, when it " 'renders the property unsuitable for any reasonable income . . . and thus destroys its economic value, or all but a bare residue of its value.' " ²⁴

This test focuses on the economic destruction of property rather than on simple diminution of value. An evidentiary hearing, therefore, is required to examine the effect of the regulation on the market value of the property. At such a hearing the complaining property owner must show that a taking has occurred by producing "dollars and cents" evidence as to the reduced value of the property. In addition, he must show that "under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use." ²⁵ Since there had been no such hearing in *Spears*, the matter was remanded to the trial court.

IV. Conclusion

The approach adopted by the New York Court of Appeals contrasts with that of the Connecticut Supreme Court. Although both courts adopted tests that require more than a mere diminution in value, the New York test is far more concerned with the economic loss to the landowner.

In both cases, the statutes required a consideration of "the public health and welfare" before a permit could be issued. ²⁶ Each statute also allowed the reviewing court to hold

23. 48 N.Y.2d at 262, 397 N.E.2d at 1307.

24. *Id.* at 262, 397 N.E.2d at 1307 (1976). (quoting *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 596. (1976)).

25. *Id.* at 263, 397 N.E.2d at 1308; see also *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

26. N.Y. Env'tl. Conserv. Law § 24-0705(1) and Conn. Gen. Stat. Ann. § 22a-33 (West 1958).

a denial of an application for a permit to be an unconstitutional taking and to grant appropriate relief.²⁷ The two courts differed in that the New York Court of Appeals apparently left the balancing of the public welfare against the individual's economic harm to the administrative determination of whether to issue the permit. By contrast, the Connecticut Supreme Court included that balancing in its own consideration of the taking issue. Essentially, the Connecticut court appears to be more concerned with the potential harm to the public while the New York court seems to be more interested in the economic destruction of the property involved. Because of this difference in emphasis, the New York court requires an evidentiary hearing to measure the extent of the economic loss whereas the Connecticut court does not.

Despite these substantive and procedural differences, the two approaches might not, in practice, produce such different results. First, both approaches agree that a practical confiscation is a taking which requires compensation. Second, even though the New York approach gives the landowner a greater opportunity to present his case, the burden of proof is so high that as a practical matter it will be very difficult to prove a taking in most cases.

Absent an administrative abuse of discretion, the test in both states requires a showing of an almost complete interference in a landowner's property rights before a taking can be proven. If these cases, which involved regulation of freshwater and tidal wetlands, are any guide, it appears that the new coastal zone legislation will enable each state to effectively regulate land use without being overly burdened by the requirement of just compensation. Affected landowners, on the other hand, will have the heavy burden of proving a practical confiscation.

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27. N.Y. Evtl. Conserv. Law § 24-0705(7) and Conn. Gen. Stat. Ann. § 22a-34 (West Supp. 1982).