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**BACKGROUND PRINCIPLES OF WETLANDS LAW:
THE EARLY HISTORY**

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BACKGROUND PRINCIPLES OF WETLANDS LAW:

THE EARLY HISTORY

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A. The Relevance of Background Principles.

The Supreme Court has recently indicated that limitations inherent in the title to land may play a role in the extent to which that land may be validly regulated. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). It said that "regulations that prohibit all economically beneficial use of land... cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." (p. 2900).

A very recent opinion of the Massachusetts Supreme Judicial Court illustrates the difficulty of applying the *Lucas* holding to wetlands. In *Lopes v. City of Peabody*, 417 Mass. 299, 629 NE2d 1312 (1994) the court addressed the question of whether the City of Peabody's "wetlands conservancy zoning district" could validly prohibit the filling of Mr. Lopes' quarter-acre lot adjoining Devil's Dishfull Pond. The state supreme court remanded the case back to the trial court with instructions, including the following:

If the judge concludes that the zoning regulation deprives the parcel of all economically beneficial use, the

Lucas opinion advises us that there is a categorical regulatory taking, unless under the land use law of the Commonwealth [of Massachusetts] the proposed use would be a nuisance or otherwise impermissible. Lucas, supra at 2900. In that instance, a zoning regulation could validly prohibit in advance any use of the land that State law would bar in any event. Id. It is not for us now to be specific on the subject of restrictions that, for example, the law of nuisance and the law of riparian rights impose on the use of land subject to periodic flooding. See von Henneberg v. Generazio, 403 Mass. 519... [and five other earlier Massachusetts cases]

Although the court leaves it up to the trial court to make an initial interpretation of the earlier Massachusetts cases on Mr. Lopes land, the court's opinion certainly illustrates that an understanding of the state common law relating to the permissible use of wetlands will be a crucial issue in determining the permissible extent of wetland regulation in many cases. And the state common law has developed out of the common law of England.

B. Wetlands under English Common Law.

In prehistoric times, the evidence indicates that substantial tracts of England were subject to periodic flooding and were covered with marshland vegetation. From early historical times these areas were known by a host of different names, most commonly fen, bog, marsh, or moor.

1. The Fen People.

An appreciation of wetlands as having natural beauty or ecological significance is primarily a twentieth century phenomenon. Vast fen and marsh areas were ugly in the minds of

medieval and middle ages people; it was only the fen people, for whom the wetlands provided a living, that seem to have found any beauty or value in large tracts of wetland. For the fen people, the wetlands provided grazing, fishing, fowling, gathering, and the cultivation of certain characteristic crops. For their peculiar lifestyle and attitude the upland majority viewed these people with hardly less disdain than their watery environment itself.

For quite obvious reasons, it was also these same fen people who from the earliest times developed and applied extensive regulations for the use and protection of the fens and marshes. The economic activity of wetland communities set them apart from the lifestyle of the upland majority, and often dictated a different pattern of land use. Villages typically occupied the high ground surrounding a wetland, and within the wetland the villages shared commons of pasture, fishing, and other economic activity.

Eventually these villages divided up the common fen they had shared into parishes, consisting frequently of a long and narrow strip of land with one end at the sea, then extending across the higher siltland and well inland into the peat marsh. Each village usually had reclaimed some land on which crops were planted, and sometimes salt was evaporated from sea water. Each also enjoyed a much larger tract of property extending into the peatland, which was used for pasture and other wetland

activities.

From the earliest times, those who settled the wetlands built and maintained banks and drains to protect the land from the floods of both the sea and upland rivers. Archaeologists and historians have found evidence that the Romans settled many wetland areas of England and some of the banks that the held the tides from seaside marshes were traditionally thought of as Roman in origin. For practical purposes, however, the legal history of wetlands begins with the arrival of the Anglo-Saxons in about the fifth century.

The Anglo-Saxon "mark" (the precursor of the feudal manor) consisted of four main categories of land: village, arable fields, meadowland and waste land. Wetlands were particularly noted for their bountiful supply of winter hay, a commodity often scarce in the upland. In addition, upland pasture tended to become overgrazed in the summer. This made wetland pasture valuable in summer. It was apparently a common practice to drive livestock to the wetlands for the summer.

The seclusion of wetland areas particularly suited the needs of monasteries. Ecclesiastical bodies became major landowners in wetland areas: the Lord of the Manor was frequently Bishop or Abbot. Whether the owner of the land was secular or religious, however, the actual work on the land was the job of the tenants

or villeins. The tenants and villeins of the mark (and later of the Norman manor), who lived and tilled their individual plots on the upland or on islands, normally shared rights of common in the fen or marsh for as much pasture, turf cutting, etc. as they required to meet the needs of themselves and their livestock. This mechanism allowed use of the wetland for its characteristic economic activities.

To use and protect their commons, the fen people developed complex systems of rules that governed the economic activities of the middle-ages fenland and stipulated by whom, when, and how much the fens could be exploited. For example, before being set out onto the commons, livestock had to be branded. Violators were often punished for allowing cattle belonging to persons outside the local villages to pasture on the wetland commons. Another function of the fen codes was to define and settle disputes over rights of fishing, which various fen people held in intricate patterns both exclusively and in common. The codes tried to protect the commons from overuse by limiting, for example, the amount of certain resources that individuals could remove, or the number of animals that could be grazed.

The legal validity of these wetland codes under the common law derived from custom exercised "from time immemorial." Such rules were valid among the tenants and villeins of a manor, and between them and their lord; the customary court of the manor

enforced such regulations. Digby noted as late as the nineteenth century that the governing body of some upland parishes still informally exercised regulation over commons in the waste of the parish. As a general rule longstanding local custom could have the effect of law. Proponents of the custom had the burden of showing the custom was exercised continuously without challenge since before 1189, and was sufficiently certain, compulsory, and consistent with other customs to permit enforcement. Fen codes originating in later times had more formal legislative sanction; a code of fen laws was officially enacted for the fens of Lincolnshire in 1573, and remained in force into the 19th century.

Rules for maintaining and repairing the embankments, drains, and channels that controlled the flow of water through the fens made it the duty of every landholder whose land was thus protected to maintain certain portions of the banks and drains. Disputes arose when one landholder neglected this duty, because one landholder's failure to meet his obligation imperiled the livelihood of many others. When an unusual event such as a storm caused major damage, all the benefiting landholders were obligated to share in the cost of repair.

Local authorities originally enforced the duty to repair banks and drains. The Crown, however, was sufficiently interested in protecting the wetland economy, and local control

was sufficiently unsatisfactory for major problems, that in the mid 1200s Henry III began to appoint his own commissioners to see that the wetlands were protected from flood. These Commissioners of Sewers were authorized by statute in 1531, and exercised considerable authority over the structures that protected the wetlands. (It should be noted that "sewer" referred to any body of flowing water.) Commissioners sat as judges of Courts of Sewers who had the power to adjudicate disputes over repair and maintenance costs, to seize the property of landholders who refused to pay, to authorize work on drainage facilities, and to enact ordinances for local regulation. The Commissions operated into the 20th century, when the drainage act of 1933 replaced them. Jaffe & Henderson noted that the Commissions of Sewers represent one of the earliest examples of a truly administrative body.

Wetland owners were also subject to limits on the embanking of wetlands in order to avoid injury to other landowners. In addition to overseeing repair and maintenance of banks and drains, the Commissions of Sewers and the common law courts heard disputes over changes in property use that affected other property owners. Landholders were in at least some cases obliged to ask the Crown for a writ of *ad quod damnum* before making significant changes in the wetland landscape. Writing in the seventeenth century, Dugdale records that in 1578 the Prior of Billygntone applied to the King for this writ to drain a marsh of

60 acres belonging to the Prior's Manor. The King's tribunal for the county inquired into "whether the same might be effected without prejudice to [the King] or others". The jury found no prejudice to others in the project, and found that the land so reclaimed would increase noticeably in value. In another case, however, a jury found in 1664 that the Prior of Christ Church in Canterbury had built a gutter on a wetland manor that was "so raised [that] the water, so descending from the upper parts . . . could not passe through it, whereby . . . the said fishing became totally lost . . ." and other traditional uses could not be made of the flowing water. The court required that the gutter be placed back in its original condition.

As noted earlier, extensive wetlands in common law England were often shared among villagers as commons. Such rights of common in the wetlands could be held as part of an estate in land. Free tenants could assert this right against the manorial lord, or any other person, in the King's court. Villeins, whose later successors were copyholders, could assert similar rights against the lord in the customary court of the manor, but against others they had to assert the right in the name of the fee holder (i.e., the lord).

One way a tenant of a manor could show rights of common pasture was by demonstrating that he and his predecessors held a freehold estate originating by enfeoffment occurring before 1290

(when the Statute Quia Emptores banned further subinfeudation). These rights of "common appendant" in the lord's waste attached by law to freehold tenements.

A second form of holding a right of common attached to an estate in land was "common appurtenant." This form of commons was available to non-tenants of a manor, and had to be asserted by anyone claiming a profit, or the right to take some resource from the land of another. Common appurtenant could originate by grant, but most often was asserted by prescription: the commoner asserted he and his predecessors had used his commons for a period of time such that "the memory of man runneth not to the contrary." Interpretation and statute later defined more precisely what period time supported a prescriptive right in property. Early interpretation established that the time to which the memory man runneth was 1189; prescription had to show use of the right uninterrupted from then. The Prescription Act of 1833 established fixed periods of years for prescription.

Asserting rights of common, however, held potential pitfalls for the wetlands people. Many important wetlands rights were profits (e.g., fishing, peat cutting, fowling, and reed gathering) that the commoner had to assert as common appurtenant whether or not he asserted against his own lord. Prescription was the most usual way to acquire a right of common appurtenant. Under a peculiarity of the common law, Prescription under the

common law was based on the theory that long use of a right or property was evidence of a grant from the feeholder that was lost in antiquity. This was fiction; historians agree that most prescriptive rights never actually involved a grant, but rather truly represented longstanding uses, often predating the feudal legal system. Nevertheless, the result was that persons who could not have received a grant of the right in question could not acquire it by prescription, and since grants could be made to individuals or corporate bodies, but not to indefinite groups such as the inhabitants of a village, unless a village was incorporated, the commoners dwelling therein as a group could not assert a prescriptive right to the profits of the wetland, no matter how long they had enjoyed them.

Wetland rights of common no doubt endured as long-standing local custom partly because that argument alone had force of law between the lord of a manor and his tenants. Additionally, because the wetlands had little other economic use until they were drained, local customs may not have been frequently challenged.

Another possible difficulty for wetland commoners was the right of the lord of a manor, under the Statutes of Merton in 1236 and Westminster II in 1285, to approve, or grant areas of waste land to individuals to hold privately. However, the statutes required that enough commons remain to accommodate the

needs of the commoners. The overall impact of "improvement" in wetlands is not known, but it is known that some piecemeal reclamation and enclosure of wetlands took place throughout the middle ages.

In spite of potential obstacles, the lifestyle of the wetlands people survived relatively unimpeded into the seventeenth century, when new technology began to make it possible to increase wetland drainage dramatically. The Parliament passed one of the first statutes to encourage private undertakers to finance drainage efforts in the year 1600. The acts awarded a share of lands recovered to private undertakers who successfully reclaimed fenland. Drainage involved more than the banking out of the tidal and freshwater floods that had been done for centuries; it meant sufficient drainage of large tracts of land so as to change the character of the land. Drainage allowed previously waterlogged pasture land to produce crops, and previously inundated land to be used for pasture, on a scale never before realized.

The statutes that authorized drainage purported to protect the interests of the commoners on the fen, but the violent resistance that wetland commoners raised against drainage suggests that they found this protection inadequate. What one historian called the Battle for the Fens rose to the intensity of vandalism, mob action, and even murder. Drainage was never

successful in drying out all the marshes and fens, but its massive success shows that the fen people did not win the battle. After numerous false starts and a hiatus for civil war, the drainage effort in the Fens expanded gradually. Vast areas of the Fens were drained, and the effort at first appeared wildly successful. Nature, however, had surprises in store. Shrinkage of the dried peat often lowered the level of the peatland to sea level or below, causing the loss of the fenland back to the floods. The development of the steam engine finally provided the reliable energy needed to keep the peatlands consistently dry. Today, some of the former wetlands is regarded very productive agricultural land, but in other places the shrinkage of the peat has exposed the infertile clay beneath.

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