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Floodplain and Wetland Regulatory "Takings"

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**FLOODPLAIN AND WETLAND
REGULATORY "TAKINGS"**

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**REGULATORY TAKINGS & RESOURCES:
WHAT ARE THE CONSTITUTIONAL LIMITS?**

Natural Resources Law Center
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FLOODPLAIN AND WETLAND REGULATORY "TAKINGS"

Jon Kusler

I. Why Wetland and Floodplain Regulations Often Raise the Takings Issue and Will Continue to Do So

- Many state and local regulations prohibit all structural uses in floodplain and wetland areas,
- "Improvements" to areas which are prerequisites for development such as fills are also often prohibited because of their impacts on flood flows, natural and beneficial values,
- Due to flooding and wetland conditions, there are often few economic uses for these areas in their natural state, particularly in urban areas where agriculture and forestry are not economic.

II. Overview of Case Law

- Most floodplain and wetland regulatory takings cases have been at state and local levels. There are an estimated 400 floodplain and wetland "reported" state cases at these levels in contrast with a limited number of federal district court, federal court of appeals, and federal court of claims cases.
- State courts have been overwhelmingly supportive of both floodplain and wetland regulations over the last twenty years with only a small number of cases (perhaps 30) holding regulations a taking. All of these have involved "prohibitory" regulations. Performance-oriented regulations have been widely upheld. Virtually all decisions since *Nolan* and *Lucas* have supported regulations.
- I have not encountered a case in which a state court has held that denial of due process (insufficient nexus between ends and means) alone is sufficient to constitute a taking as implied by Scalia in *Nolan*.
- Most state courts have, for many years, applied a "denial of all economic test" to regulations and have also focused on basic "property interests." These decisions are consistent with *Lucas*. State courts have also, with a few exceptions, applied a "whole property" test to regulations.

III. Why Courts Have Usually Upheld Floodplain and Wetland Regulations

- Courts at all levels have strongly endorsed the overall goals of floodplain and wetland regulations and the relationship of the regulatory standards to these goals. Courts have particularly endorsed protection of public safety and prevention of nuisances and nuisance-like activities.
- Courts have often found that agriculture or forestry are economic uses in urban settlements, or that floodplain or wetland portions of lots can be used in connection with other upland sections as parting areas, setbacks, recreation areas. Hence, no denial of all economic use occurs.
- Although the law of "nuisance" is often mentioned as the major limitation upon private property interests, a variety of other common law limitations exist upon private property rights where the actions of a floodplain or wetland property owner may damage adjacent property owners. These include: riparian rights (water law), appropriation rights (water law), the law of surface water (water law), trespass, and negligence. Other legal theories are also available to establish common law qualifications upon private property interests (e.g., prescriptive rights, implied warranty of sustainability or habitability).
- Courts have quite often found that the basic property interests of the wetland or floodplain property owners have also been qualified by "paramount" public interests such as public trust in waters (e.g., *Just v. Marionette County*) or public ownership of the beds of navigable waters including wetlands.

IV. Future Directions; Avoiding Problems

- Takings challenges to wetland and floodplain regulations will likely continue at all levels, particularly until the Supreme Court provides further guidance on issues such as:
 - whether a "whole property" is to be considered in all cases in deciding whether a taking has occurred,
 - how strong the "nexus" must be to avoid a taking and whether the lack of sufficient nexus is sufficient in itself to constitute a taking,
 - whether activities must be actual nuisances or simply nuisance-like to be prohibited where no other economic uses remain for land, and

- to what extent state legislative changes in common law (tort, contract) alter basic property interests to the extent that stringent regulations no longer take property.
- Governments have available to them a broad range of techniques to reduce the probability of a successful takings challenge such as:
 - adoption of regulatory performance standards which require compensatory mitigation measures,
 - establishment of wetland mitigation banks,
 - careful mapping and other data-gathering to document flood and other threats,
 - careful overall planning to ensure similar and even-handed treatment for similar properties,
 - reductions in real estate property taxes,
 - coordination of infrastructure policies with regulations, and
 - "positive planning" to ensure economic uses for floodplain and wetland properties as a whole.