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Constitutional Law—Zoning-Flood Plain Regulation

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RECENT NATURAL RESOURCE CASES

CONSTITUTIONAL LAW—ZONING-FLOOD PLAIN REGULATION*—Flood plain zoning—the regulation of land use development in areas reasonably susceptible to being flooded—has been rather widely enacted over the past fifteen years by municipal and county governments. However, unlike the closely related area of channel-encroachment legislation, the purpose of which is to maintain an adequate flood channel for a watercourse by preventing flow-constricting development, no reported case appears to have directly passed upon the validity of a flood plain zoning ordinance prior to *Dooley v. Town Plan & Zoning Comm'n.*[1]

In February, 1961, the defendant town amended its zoning regulations to create a new flood plain district in which the only permitted uses were those in the nature of parks, boat houses and docks, clubhouses, wildlife sanctuaries, farming, and motor vehicle parking. A subsequent amendment prohibited the excavation or filling of earth within the district other than by special exception. The court found that ninety-one per cent of the acreage of the district was tidal marshland and almost all of the remaining nine per cent was below the flood levels caused by the hurricanes of 1938, 1944, and 1954. Most of the land, both the tidal marshland and the higher ground, was publicly owned. The plaintiffs, who both owned and were under a contract to purchase certain of the land covered by the new zone, claimed that the application of the ordinance to their property constituted a taking without compensation and without due process of law.

The Connecticut Supreme Court agreed with the plaintiffs because "the use of the plaintiffs' land has been, for all practical purposes, rendered impossible."[2] Examining the list of permitted uses, the court found that parks and wildlife sanctuaries were essentially public uses, that the land was too far from water to be used for boat-

* Dooley v. Town Plan & Zoning Comm'n, 197 A.2d 770 (Conn. 1964).

1. 197 A.2d 770 (Conn. 1964).

2. 197 A.2d at 772.

houses and docks, that the right to build a clubhouse "would have little effect in preventing substantial diminution in the value of the land,"[3] that farming was not practical, and that as to parking, a special exception for filling or paving would be required which could be granted only for a limited time and under stringent conditions. The court accepted the testimony of the plaintiffs' expert that the zoning regulations caused a seventy-five per cent depreciation in the value of the property. The court then found that, at least with some filling in of the land of one of the plaintiffs, the property could be used for residential construction. Finally, the court rejected the argument that the plaintiffs had not exhausted their administrative remedies by applying for a variance because a variance cannot properly be granted where its effect would be to cause a substantial change in the uses permitted in the zone, as would be the case here.

The holding of the case can be accepted as correct if it is limited closely to the facts there presented. However, the danger is that, because the facts will probably be similar to the typical flood plain zoning case of the future, it may come to stand for the proposition that flood plain zoning as such is unconstitutional.

One basis for distinguishing the case in the future may rest on the fact that the Fairfield zoning regulations only permitted, by special exception, the filling in of land "under stringent conditions, and then only for a limited time." This, in effect, precluded the permanent raising of the level of the ground above the flood danger level. Such a restriction could be viewed as unreasonable if, as it appears, the zoning regulation was not directed against flood-channel encroachment but only against the loss of life and property that would be caused by tidal flooding if significant development were permitted on the flood plain. It may be noted that the defendant did not argue that the plaintiff failed to exhaust his remedies by not applying for this exception.

While the above distinction would, from the language of the opinion, clearly apply only to the land of one of the plaintiffs, the other plaintiff's situation can be distinguished by the fact that the town had levied an $11,000 sewer assessment against his property, a sewer that would have been worthless for the uses permitted by the zoning regulation; the act of the defendant in imposing this levy might be considered to have estopped it from asserting that the land was not fit for residential use.

3. 197 A.2d at 773.

More importantly, the case makes evident some of the pitfalls to be avoided in flood plain zoning regulation and litigation. First, the court found that there was no permitted private use to which the land could be put which would afford the owner a fair profit. The court may have been correct since, if the land had been frequently flooded, the salt from the ocean would have rendered the land unsuitable for farming. While a clubhouse might have rendered a profit, considering the acreage involved it is possible that a fair return could not be expected on the land as a whole. And it is hardly likely that motor vehicle parking would be in great demand in a relatively undeveloped area. The point to be made is that the drafters of the ordinance did not sufficiently enumerate permitted profitable uses. Possible additional uses for this area might have been golf courses, picnic grounds, skeet shooting ranges, transient amusement enterprises, storage yards for scrap metal, roadside stands for the sale of food or fishing bait, riding stables, etc. It is not enough for the municipality to say that a variance probably would be granted if application were made for such a use. As here, a court may strike the ordinance as a whole if the listed permitted uses are inadequate.[4] Furthermore, filling in the flood plain area should be permitted so as to permit the owner to raise the land above the flood-danger line, at least to the extent that such filling would not cause constriction of the flood channel of the watercourse. In the *Dooley* case channel-encroachment would not have been a consideration since only tidal flooding appears to have been involved.

Second, the opinion noted that some of the land was higher in elevation and not as subject to flooding. Yet the defendant set up only one zone with the same permitted uses for the entire area. This

4. See, *e.g.*, Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). In 1928, after an ordinance had been amended to classify the plaintiff's property as residential, the plaintiff was denied a variance for a gas station in a residential zone. Later, in 1936, the plaintiff brought suit to have the amended ordinance declared unconstitutional. The court found that the plaintiff's land could not profitably be used for residential purposes in the foreseeable future. The court then concluded that since the ordinance permanently restricted the use of the plaintiff's property so that it could not be used for any reasonable or profitable purpose, the ordinance resulted in an unconstitutional taking of the plaintiff's property without compensation. However, the court also concluded that the plaintiff's original application for a variance had properly been refused:

> the conditions which render the plaintiff's property unsuitable for residential use are general and not confined to the plaintiff's property. In such case . . . the general hardship should be remedied by revision of the general regulation, not by granting the special privilege of a variation to single owners.

15 N.E.2d at 592.

should serve as a warning that the flood plain zone should have several levels of restrictiveness, depending on the flood frequency of the area involved.[5] Severe restrictions may, and should, be imposed on frequently flooded areas, while in areas rarely flooded the only requirement might be the flood proofing of structures and a prohibition against the erection of prisons, schools, hospitals, and the like. It is evident that the entire flood plain is not subject to the same degree of flood danger and to impose only one set of permitted uses upon the area is a definite step toward unreasonableness.

Third, there is no evidence that the defendant either employed any experts or introduced any hydrologic data to establish the flood danger. Certainly it would have been appropriate to have expert testimony in opposition to the plaintiff's contention, apparently based on residential use of the land, that the zoning regulation caused depreciation in value of at least seventy-five per cent. For if the land had been flooded three times in twenty-five years and this accurately reflected the flood frequency of the area, the land is not appropriate for construction of homes. Furthermore, every flood plain zoning regulation should rest upon a scientific hydrologic basis. While the opinion gives some indication that the Fairfield ordinance was so grounded, there is no sign that the defendant attempted to introduce such evidence into the litigation to emphasize the reasonableness of the regulation and the flood danger.

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5. While this particular approach has not yet become common, it is not unusual for municipalities to regulate the flood channel in one way to avoid channel encroachments, and regulate the rest of the flood plain in a less restrictive manner. See Iowa City, Iowa, Zoning Ordinance, Art. VI.