Legal Cases Related to Wetlands in Michigan

Submitted as part of the Model Wetlands Ordinance Project
to the MDEQ Coastal Management Program
by the Huron River Watershed Council
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Overview

As part of it project to develop a model wetlands ordinance, the Huron River Watershed Council (HRWC) conducted a literature search for case histories involving legal challenges to wetland regulations. HRWC searched through the legal summaries section of the last 20 years of the *Planning and Zoning News* publication, contacted every community in Michigan on record with the MDEQ as having a wetlands ordinance, and conducted several internet-based searches through newspaper and legal databases.

Conclusions

The first conclusion to draw from this initial survey of legal cases regarding wetlands laws is that very little information is readily available describing local courts, where most of the wetlands-related cases occur. In order to obtain a more complete picture of the legal environment, much more time is needed to travel to each community to meet with its attorney and search through its legal files. Phone surveying was helpful, but often the government representative with whom we spoke (whether they were the clerk, planner, or building official) was not able (or willing) to conduct what they said would be an extensive file search. Indeed, even when we were able to obtain a written decision on a particular case, key information was often missing. Apparently, decisions made in the district and circuit courts are not organized or summarized in any particular way, as State Court records are.

The second conclusion to draw is that most lawsuits that we were able to find were settled in some way before a definitive decision needed to be made by a judge. Out of seven wetlands related cases about which we were able to find information, only two resulted in a decision regarding the wetlands ordinance. In the Superior Township case, the Judge decided for the developer, agreeing that the building of a farm road is a "permitted activity" not requiring a permit from the wetlands ordinance. The Judge did cite the provision of the ordinance that requires farm roads, even though they are exempt, to be "constructed and maintained in a manner to assure that any adverse effect on the wetlands will be otherwise minimized." So, the township can still prosecute the developer if he fails to minimize the road's effects on wetlands. In the Master Key Northern v. Ann Arbor case, the judge categorically sided with the City, saying that their wetlands ordinance is indeed constitutional.

Cases decided out of court (i.e. before a judge could make a final decision about an ordinance):

Cisne vs. City of Orchard Lake Village

The Cisne's owned 3.79 acres on Orchard Lake. They proposed to build a 22' wide, 140' long home on 7' stilts in a wetlands. They applied for and received a permit from MDEQ (after two years of negotiations), but were denied a local permit. They filed litigation. The MDEQ approval was appealed by Orchard Lake Shore Property Owners Association. That appeal was dismissed by the administrative law judge, but the Association is appealing that decision.

The City and the Cisne's agreed to a consent judgement that granted the wetlands permit with many conditions. Conditions include: installation of erosion controls during construction, removal of invasive species from the wetland, a restrictive covenant prohibiting removal of any native vegetation, acknowledgement that sewer and water may not be available (which would then void the permit altogether), planting of new shrubs in wetland, that the boardwalk be constructed by hand and not cause removal of any vegetation, and that vegetation must continue to grow under house and boardwalk. The house has never been built.

Final decision: The DEQ's approval of a permit pressured the local community into reaching a consent agreement, so the legal process never reached the point where a court really ruled anything regarding the legality of their wetlands. However, the consent judgement did give the community the power to condition a permit on a number of stringent conditions on building in the wetland.

Wixom Wetland Case

The Land and Water Management Division of the MDEQ is currently in a lawsuit regarding a parcel of land in Wixom, Oakland County. Part of the plaintiff's argument is that the local wetland law supercedes the States. The case is still pending.

Waterford Township v. Kurtz

In 1990, property owner Kurtz applied to the MDNR for permission to fill a wetland to install a seawall. The MDNR denied the permit. The Township also informed him he needed to apply for a Township permit. Kurtz began the work anyway in 1991. He refused to cease until the police were called and a cease and desist order was issued. Kurtz continued to work in the area, and the Township obtained a temporary restraining order. .

The Township cited Kurtz for violating their wetlands ordinance. In Oakland County Circuit Court, the Township tried to prove him negligent for damaging the wetland behind his house and sought a permanent injunction to keep him from landscaping the yard, and asked for several thousand dollars in attorney fees. In turn, the property owners filed a counter suit that charged that their constitutional rights had been violated.

All of those conditions were dropped in an out of court settlement, where the court dismissed both suits, saying it was no longer possible to determine the original wetland boundary and therefore whether a violation had occurred. The court also ordered that protection of the remaining wetlands occur.

Final decision: Dismissal of case and each party agrees to drop all legal actions. Wetland will be delineated, soil erosion fencing will be placed along wetland boundary, and landscaping will occur up to the wetland boundary.

Genoa Township:
Property owners were denied a building permit to build within the 25 foot setback from a wetlands. They appealed to the zoning board of appeals and were denied. They filed a suit claiming the denial of their appeal was improper, because a variance was necessary for reasonable use of the property, and since the property owners' consultant determined wetland boundaries that were different from those determined by the Township. They claimed that the zoning restrictions on their property rendered it unusable, and that is a takings. An official determination was never made, but it appears the Court sided with the property owners, who revised their original application for a land use permit and it was approved.

Charter Township of Independence

A property owner obtained a wetlands permit from the State, but the Township denied the project under the local ordinance. The property owner brought a lawsuit against the township in court. The DEQ's approval of a permit pressured the local community into agreeing to allow him to build a scaled back version of the original.

West Bloomfield:
They have had several cases. According to sources familiar with those cases, none of the challenges resulted in anything begin struck down in court that is in the model ordinance.

Cases where a court did make a final decision regarding a local ordinance:

Court of Appeals: Frericks v. Highland Township, March 13, 1998
Frericks purchased property zoned A1 (10 acre lots) and requested rezoning to R1B (1.5 acre lots). The Township Board approved rezoning to R1A (3 acre lots). Frericks sued, saying R1A was a taking. The trial court ruled this density was unreasonable and arbitrary, since this lot size is not necessary to protect legitimate interests about pollution, septic systems, increased traffic, threat of inadequate fire protection, or conformance to master plan.

Frericks then appealed to the Court of Appeals, charging that the way the ordinance calculated allowable buildable area (it didn't include wetlands and floodplains) was invalid since regulations of wetlands was under the perview of the State. The Court disagreed.

Conclusion: While this decision was not directly involving a wetland ordinance, it has important implications for local ordinances. Local communities can remove environmentally sensitive areas when calculating allowable buildable area on development parcels.

Superior Twp vs. Patrick Sieloff

Superior brought charges against property owner Sieloff in 1998. Sieloff was engaged in farming activities – constructing a farm road and planting trees. The court ruled that while the building of a farm road is an activity permitted without a wetlands permit, the ordinance does reference a standard the defendant has to meet in the building and maintenance of the road. He can put in the farm road as long as the road is constructed and maintained in a manner to assure that any adverse effect on the wetlands will be otherwise minimized.

Conclusion: The charges against the property owner by Superior Township are premature, because the building of a farm road is a permitted activity under the ordinance. But the township can prosecute if the road fails to minimize effects on wetlands.

Zealy v. City of Waukesha, 548 NW2d 528 (1996) *Note: this case occurred in Wisconsin, not Michigan, but the final decision is an important one regarding takings law.*

The property at issue was a 10.4 acre plot of land that had been zoned, at different times, for agricultural uses, for residential uses, and for business uses. By 1985, 8.2 acres of Zealy's property were zoned as a conservancy district, because of wetlands on that part of the property. Of the remaining portion of Zealy's property, 1.57 acres were zoned for residential use, and .57 acres were zoned for business. Under the rezoning, the property classified as a conservancy district could not be used for residential purposes. Zealy claimed that the reclassification of the 8.2 acres of his land from residential to a conservancy district decreased the value of that part of his property from $200,000 to $4,000. The trial court dismissed Zealy's claim, holding that the parcel should be considered as a whole.

The appeals court reversed, on the rationale that the property should be viewed with respect to its different segments, and not as a whole. The Wisconsin Supreme Court reversed the appeals court and affirmed the decision of the lower court. The facts of Zealy's case showed that the conservancy zoning only applied to part of his property, not all of it. The zoning only reduced (rather than destroyed) the value of Zealy's property, viewed as a whole. According to the Supreme Court of Wisconsin, there was no taking.

Master Key Northern v. City of Ann Arbor

In 1998, Master Key Northern applied for site plan approval and a wetland use permit for a development in the City of Ann Arbor. The planning commission denied the site plan and the permit. Master Key Northern filed a lawsuit alleging that the Wetland Protection and Natural Features chapters of the City Ordinance violated due process and were beyond the power of a local community. The Court disagreed, saying that the plaintiff

was not without legal remedy since he did not file an appeal. The Court also wrote that the City does have the discretion to approve or deny site plans, and it is done duty-bound to approve them, as the plaintiff claimed. The Court also wrote that the case is not "ripe" for a consideration of takings because all the appeals had not yet been exhausted. The Court also ruled that the wetlands ordinance is constitutionally valid in that it is not vague.

Final decision: the City of Ann Arbor Wetland Protection Section, which is part of its zoning ordinance, is constitutionally valid, and provides the proper process.