

# IX. Legal Aspects of Floodplain Regulation in the 1970's

## INTRODUCTION

The management of coastal and riverine flood-prone areas through State and local regulation is a comparatively recent phenomenon in the United States. The widespread adoption of comprehensive land use zoning following the 1926 U.S. Supreme Court decision of *Ambler Realty Company v. Village of Euclid*<sup>1</sup> did not involve restraints on the private development of floodplains. As recently as 1953, an authoritative study of flood problems stated:

Flood zoning, like almost all that is virtuous, has great verbal support, but almost nothing has been done about it. A few local governments have restricted the use of low-lying lands, but not enough for us to point to any substantial amount of experience, or any great degree of progress.<sup>2</sup>

In 1959, a seminal law review article by Allison Dunham "Flood Control Via the Police Power"<sup>3</sup> was unable to cite a single major floodplain zoning decision as of that year.

The long delay in the emergence of floodplain regulation may be explained by three factors. First, Congress in the Flood Control Act of 1936 and its successors declared that the management of flooding would be the responsibility of the Federal Government to be discharged through construction of flood control works. To date, more than \$10 billion has been spent in the task of taming the rivers through flood control reservoirs, levees and dikes, channelization and other structural means. Most of this work was performed at Federal expense with little or no involvement by States and local governments. The impression naturally became widespread that flood problems were thus solved, and no further action of a regulatory nature was required. Even where the U.S. Army Corps of Engineers required State or local "assurances" that downstream floodplains would be regulated to prevent encroachment,<sup>4</sup> such as-

surances have not been widely enforced. A second factor in the slow acceptance of floodplain regulation was uncertainty concerning the constitutionality of such measures. It was widely believed that courts would only uphold restrictions based on precise and unassailable engineering studies. For example, two leading hydrologists Luna Leopold and Thomas Maddock, Jr., wrote in 1954:

Zoning to restrict the use of floodplain land is . . . complicated. The degree and frequency of hazard vary so greatly that the delineation of zones to which a given restriction will apply should be based on careful study of individual areas, using appropriate engineering information on flood frequency and flood heights.<sup>5</sup>

In the absence of such studies in most communities, it is scarcely surprising that, as the authors noted, "few such laws have been written and tested in the courts." While the importance of a reasonable basis for any kind of regulation is indisputable, it is perhaps ironic that judicial decisions in other areas of zoning were commonly sustained on the most speculative or questionable planning assumptions. Where loss of life and property were directly at stake, it was widely believed that a higher burden of proof lay with the community.

Reinforcing these two factors, the third reason for the long delay in the adoption of floodplain zoning has been the tendency for communities to avoid politically unpopular measures of this kind. Apart from their hazard potential, floodplains afford level building sites close to transportation systems that follow river valleys. Even where development has little relation to the river it adjoins, floodplains are popular locations for shopping centers, industrial parks, and even housing developments.

The inevitable price of this widespread encroachment of floodplains has been ever increasing flood losses. Despite the expenditure of more than \$10 billion in Federal flood control works, average annual flood damages have been rising

<sup>1</sup>272 U.S. 365 (1926).

<sup>2</sup>William G. Hoyt and Walter B. Langbein, *Floods* (Princeton, N.J.: Princeton University Press, 1955).

<sup>3</sup>107 *University of Pennsylvania Law Review* 1098-1132 (1959).

<sup>4</sup>President's Water Resources Policy Commission, *Report*, 1950.

<sup>5</sup>Luna B. Leopold and Thomas Maddock, Jr., *The Flood Control Controversy* (New York: The Ronald Press, 1954).

consistently since 1936 to a currently estimated total of \$2 billion per year. The loss of lives has decreased in major river valleys due to improved flood warning systems, but is considered to be a major concern in areas subject to flash floods or coastal hurricanes.<sup>6</sup>

Following a series of devastating floods in the mid-1950's and early 1960's, the Nation began to come to its senses. The influential report of the Task Force on Federal Flood Control Policy<sup>7</sup> recommended numerous changes in the national approach to floods. While admitting that structural measures were still needed in certain areas, the report stressed the need for improved use of non-structural measures including floodplain regulations, flood insurance, and relocation of occupants from flood hazard areas. This report was forwarded to Congress by President Lyndon B. Johnson concurrently with the issuance of Executive Order 11296, which ordered all Federal agencies to consider the flood impacts of their actions. Congress in 1968 established the National Flood Insurance Program (NFIP), which for the first time made floodplain regulation an integral component of Federal policy.

Fortunately, by this time a firm legal basis for the regulation of floodplains was finally in the process of development. No decision by the U.S. Supreme Court has directly addressed the question of floodplain zoning. However, in a 1962 decision involving the regulation of gravel quarries within a residential area, the Court enunciated a general test for the imposition of public authority to abate hazardous situations:

To justify the state in . . . interposing its authority in behalf of the public, it must appear—first, that the interest of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.<sup>8</sup>

The court went on to reaffirm its traditional view that the legislative determination will be upheld unless clearly arbitrary and capricious.

In the absence of further guidance from the Supreme Court, the evolution of legal doctrine with respect to flood hazards has occurred largely in the State courts with a scattering of Federal

decisions. The case law in this area maybe roughly divided into two categories. First, those cases that directly deal with flood hazards per se, either riverine or coastal; and second, those cases that address State and local wetlands regulations in which flooding is an incidental consideration. Both groups of cases involve common questions -- with respect to the "taking issue" as well as matters of technical delimitation and administration. Each group is reviewed below.

## THE JUDICIAL RECOGNITION OF FLOOD HAZARDS

In the surprisingly few cases that directly raise the issue, courts have been almost unanimously willing to give explicit recognition to the threat of flood hazards as a proper object of public regulation. In a 1930 case arising in New Hampshire, a Federal court of appeals stated the issue in terms of consumer protection. Where the purchaser of a flood-prone site from the City of Keene object to the subsequent imposition of floodplain restrictions on his use of the land, the court upheld the restraints as a "proper exercise of the City's police power in order to protect possible purchasers being victimized by the City itself." Protection of the unwary buyer or tenant was cited by Dunham as a proper ground for public intervention along with the avoidance of public rescue costs and the protection of downstream interests from the risk of greater flooding due to individual encroachments.<sup>10</sup>

Restrictions imposed following a flood disaster to mitigate future losses were viewed favorably by the Connecticut Supreme Court in 1958.<sup>11</sup> The case involved an "encroachment line" establishment by the State that prohibited all reconstruction within a specified distance of the Naugatuck River upon challenge by a property owner who retained only 60 ft<sup>2</sup> outside of the encroachment line, the court declared:

Reasonable regulation of the size and area of buildings and the type of material used in them and the method of construction has long been recognized as legal proper . . . The loss of human life and the destruction of property wrought by the floods in August 1955, justified the legislature in conferring upon the commission broad powers to

<sup>6</sup>Gilbert F. White and Eugene Haas, *Assessment of Research on Natural Hazards* (Cambridge, Mass.: M.I.T. Press, 1975).

<sup>7</sup>*A Unified Program for Managing Flood Losses* (House Document 465), 89th Cong., 2d sess. (1966).

<sup>8</sup>*Hempstead v. Goldblatt*, 369 U.S. 590 (1962).

<sup>9</sup>*American Land Co. v. City of Keene*, 41 Fed.2d 484 (1930).

<sup>10</sup>Dunham, op. cit., footnote 3.

<sup>11</sup>*Vartelas v. Water Resources Commission*, 153 A.2d 822 (1958).

adopt preventive measures against their repetition. The trial court found that the encroachment lines as established by the commission extend for several miles along the Naugatuck River, in accord with sound engineering principles and statutory requirements, and were designed to reduce hazard to life and property in the event of recurring floods.

The problem of structures erected in violation of applicable encroachment line restrictions was confronted by the Iowa Supreme Court in 1968.<sup>13</sup> The court strongly endorsed the constitutionality per se of such restrictions declaring:

A river uncontrolled may at flood state become a devil, a destroyer of life and property, a disrupter of transportation and commerce vital to the state and its citizens.<sup>14</sup>

"But the court refused to order the removal of certain levees constructed by the defendant subsequent to the enactment of State floodplain restrictions. Instead, it merely required the filing of an application for a permit. A strong dissent argued that a mandatory injunction for removal should be issued on the ground that such unauthorized encroachment amounts to a "public nuisance." (A contrasting view is expressed in a Florida coastal wetlands case, where a U.S. District Court ordered immediate removal of fill illegally placed in a Florida bay.<sup>15</sup>

Regulation of flood-prone areas at the local level appeared with increasing frequency after 1960. Perhaps the strongest judicial decision upholding such municipal restrictions was the 1972 Massachusetts opinion in *Turnpike Realty Co. v. Town of Dedham*.<sup>16</sup> Dedham in 1963 had amended its zoning bylaws and zoning map to establish a "floodplain district" that included most of the plaintiff's land in a "low swampy area" bordering the Charles River. Within the floodplain, the use of land was limited to "woodland, grassland, wetland, agricultural, horticultural, or recreational" purposes. Citing the 1959 Dunham law review article and other authorities, the court stated:

The general necessity of floodplain zoning to reduce the damage to life and property caused by flooding is unquestionable.<sup>17</sup>

In response to the plaintiffs challenge that the ordinance deprived him of any reasonable use of his land, the court replied:

We are unable to conclude, even though the judge found that there was a substantial diminution in the value of petitioner's land, that the decrease was such as to render it an unconstitutional deprivation of its property.

At the municipal level, conflicting motives and objectives may confuse the floodplain management situation. In *Turnpike Realty*, the ordinance listed among its purposes in addition to the protection of public health and safety from floods, the conservation of "natural conditions, wildlife, and open spaces for education, recreation and general welfare of the public."<sup>19</sup> The court admitted that such objectives would not support the ordinance in their own right, but that they are merely incidental to the ordinance which is "fully supported by other valid considerations of public welfare." The court distinguished a 1963 New Jersey case<sup>20</sup> in which a municipal wetlands restriction was invalidated on the grounds that it served merely environmental or conservation goals not the alleviation of flood hazards.

Clearly an important factor in the willingness of the Massachusetts court to approve Dedham's ordinance was evidence of actual and frequent flooding of the site in question. Testimony of an "expert hydrologist" stated that:

Petitioner's lands "will have water on it ranging anywhere from practically nothing up to . . . three feet of water annually." He further testified that once the flow in the Charles River exceeds 1280 cubic feet a second which is equivalent to the approximate elevation of the petitioner's land . . . [the] latter will be flooded. The flow of the Charles River . . . exceeded that level in 1936, 1938, 1955, and 1968. Barrows stated that he personally went to the petitioner's land in March 1968, and observed that it was covered with "approximately four to five feet of water."<sup>21</sup>

Where flooding is recent and notorious, courts may take judicial notice as in the *Vartelas* case.<sup>22</sup> But where the hazard is less obvious, expert testimony of the kind used in *Turnpike Realty* is normally involved. Given such assistance, courts are

<sup>12</sup>153 A.2d, at 825.

<sup>13</sup>*Iowa Natural Resources Council v. Van Zee*, 158 N.W.2d 11 (1968).

<sup>14</sup>158 N.W.2d at 118.

<sup>15</sup>*U.S. v. Joseph G. Moretti, Inc.* 331 F. Supp. 151 (S.D. Fla., 1971).

<sup>16</sup>284 N.E.2d 891 (1972).

<sup>17</sup>*Id.*, at 899.

<sup>18</sup>*Id.*, at 890.

<sup>19</sup>*Ibid.*

<sup>20</sup>*Morris County Lund Co. v. Parsippany-Troy Hills Twp.* 193 A.2d 232 (1963).

<sup>21</sup>284 N.E.2d, at 899.

<sup>22</sup>See footnote 11.

willing to sustain measures of an unusual kind or severity. The California Supreme Court in 1953 upheld a municipal ordinance creating a "beach recreation district" with the benefit of testimony that plaintiffs land on the Pacific shoreline was subject to inundation during heavy storms.<sup>23</sup> A California Appellate Court in 1972 upheld an absolute prohibition of residential or commercial structures in a floodplain upon proof that the site had been flooded four times since 1927.<sup>24</sup> (The zoning in question was adopted in 1965 as a prerequisite to the approval of a flood control project to be constructed by the U.S. Army Corps of Engineers.) The New Jersey Supreme Court in 1966 sustained a total ban on construction of homes seaward of a municipally established "building line."<sup>25</sup> The court rested its judgment on:

Unrebutted proof that it would be unsafe to construct houses oceanward of the building line . . . because of the possibility that they would be destroyed during a severe storm—the result which occurred during the storm of March 1962. Additionally, defendants admitted proof that there was great peril to life and health arising through the likely destruction of streets, sewer, water and gas mains, and electric power lines in the proscribed area in an ordinary storm.<sup>26</sup>

In what must be regarded as one of the most quotable examples of explicit judicial recognition of flood hazards, the New Jersey Court concluded:

Such recognition prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on the use of their own lands.<sup>27</sup>

Where proof to the contrary is offered, namely that no flooding has been known to occur on the site in question, judicial tolerance of floodplain regulations is more problematic. A Michigan Court of Appeals ruling in 1971 invalidated the application of an ordinance to property where:

It is uncontested that the plaintiffs land has never flooded and is separated from the flood area by a shallow ditch which plaintiff has prepared to repair, clean, and line with concrete.<sup>28</sup>

The court however upheld the constitutionality of the ordinance as it applied to actual flood hazard areas.

<sup>23</sup> *McCarthy v. City of Manhattan Beach*, 264 P.2d 932 (1953).

<sup>24</sup> *Turner v. County of De Norte*, App., 101 Cal Rptr. 93 (1972).

<sup>25</sup> *Speigle v. Borough of Beach Haven*, 218 A.2d 129 (1966).

<sup>26</sup> *Id.*, at 137.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Sturdy Homes, Inc. v. Township of Redford*, 186 N.W.2d 43 (1971).

The obvious question arises as to how courts will deal with floodplain zoning where it applies to land that has not been flooded within record but which lies within reach of a flood of estimated probability, e.g., "the 100-year flood." The Federal Insurance Administration (HA) requires communities to regulate such areas as a condition to participation in the regular phase of NFIP. As of September 1978, no known decision has directly addressed this question. However, a 1974 Maryland decision<sup>29</sup> suggests that where a public authority bases its floodplain regulations on computer simulation, that such estimates must be updated in light of actual subsequent flooding experience. The case involved water pollution regulations adopted by the State of Maryland in 1970 that restricted the operation of gravel quarries within a designated "50-year floodplain." After Hurricane Agnes in 1972, the operator of a gravel quarry brought suit to challenge the constitutionality of the restriction *per se* and its application to his property. The court sustained the overall validity of the measure but agreed that the Department's estimate of the 50-year floodplain should be revised in light of recent experience:

The Court is aware that "the date from which the Department's computations were made was derived from storms occurring over the past 40 years, but not Agnes. It is felt that the immediate data resulting from the retention of the Agnes waters forms a more enlightened basis for the determination of the floodplain of Indian Creek."<sup>30</sup>

Plaintiff introduced testimony that Agnes was 1.4 times greater than a 50-year floodplain, even though plaintiffs land was apparently inundated by Agnes. The court rejected an argument by the State that a broader area should be regulated in the expectation of future development in the watershed upstream from plaintiffs land.

A common practice of municipalities that experience frequent flooding is to impose a temporary moratorium on the issuance of building permits pending completion of a master plan or structural flood control project. As in cases involving overloaded sewer systems, courts are inclined to be tolerant of moratoria that are reasonable in purpose and duration. A New Jersey court for example, sustained a moratorium on development in the floodplain of the Passaic River that had been in effect for 2 years pending completion of flood

<sup>29</sup> *A.H. Smith Sand and Gravel Co. v. Department of Water Resources*, 313 A.2d 820 (1974).

<sup>30</sup> *Id.*, at 827.

control plans and adoption of permanent floodplain zoning.<sup>31</sup> In 1975, an appeals court upheld the same ban but warned that:

The line between the exercise of the police and zoning powers on the one hand, and a taking on the other, although not precise may be found in the not too distant future to have been transgressed as to plaintiff's property, unless (the municipality) acts with some degree of expedition to complete the proposed project or to terminate the moratorium.<sup>32</sup>

## INLAND AND COASTAL WETLANDS RESTRICTIONS: INDIRECT FLOODPLAIN MANAGEMENT

The proliferation of State and local wetland restrictions in coastal and inland areas has generated a number of judicial decisions beginning in the early 1960's. The cases discussed below differ from those in the previous section in that little or no judicial recognition of flood hazards is expressed. This apparently reflects the absence of any mention of flood hazards as a stated purpose in many wetland statutes. Furthermore, the issue is seldom raised by counsel in the course of wetland litigation.

The nonrecognition of flood implications of wetlands laws is ironic since wetlands are crucial to the mitigation of flooding. Inland wetlands associated with riverine drainage systems serve as natural retention basins retarding flood runoff and reducing flood peaks. The natural valley storage program of the Corps of Engineers in the Charles River of Massachusetts is attempting to protect upstream wetlands in lieu of construction of flood control reservoirs. Coastal wetlands, depending on their location, serve to dampen heavy ocean waves and to provide a buffer between open water and landward development, while tidal marshes do not, of course, include all areas subject to coastal flooding by definition. They are directly subject to periodic inundation by high tides. The filling of coastal wetlands not only destroys the marsh ecology but poses the threat of storm damage to structures located thereon.

Wetland cases arising before 1970 struggled with issues of public purpose and the "taking issue." The leading case holding an inland wetland regulation to be invalid was the 1963 New Jersey decision in *Morris County Land Improvement Company v. Parsippany-Troy Hills Township*.<sup>33</sup> Like many subsequent wetlands cases, the activity in question involved excavation of swampland to be followed by filling and development. By municipal ordinance, this activity was prohibited within a 1,500 acre wetland known as Troy Meadows. The court took note that 75 percent of this swamp was owned by a private conservation organization that had been "energetic and apparently quite influential in urging the local authorities to restrict use of all of the land accordingly."<sup>34</sup> The court held the ordinance to be invalid on the ground that its "prime object . . . is to retain the land substantially in its natural state."<sup>35</sup>

Flood considerations are specifically rejected in a footnote by the court stating:

There is no substantial evidence in this case that the matter of intramunicipal flood control had any bearing on the adoption of the Meadows zone regulations. It does not appear that the rise in the water level in the Meadows in time of heavy rainfall affected any other area in the township. The emphasis was on permitting that rise in that areas as a detention basin for the benefit of lower valley sections rather than on any effort to prevent or channel it. This case, therefore, does not involve the matter of police power regulation of the use of land in a floodplain on the lower reaches of a river by zoning, building restrictions, channel encroachment lines or otherwise and nothing said in this opinion is intended to pass upon the validity of any such regulations.<sup>36</sup>

This qualification was carefully cited by the Massachusetts court in its *Turnpike Realty* decision<sup>37</sup> as ground for viewing the *Morris County* case as inapplicable where flooding is in fact a stated public concern. *Morris County* is even criticized in a lower New Jersey court in the 1973 *Capture Realty* case:

Increased urbanization and changing circumstances warrant a more sophisticated approach to flooding problems.<sup>38</sup>

<sup>31</sup>*Capture Realty Corp. v. Board of Adjustment of the Borough of Elmwood Park*, 313 A.2d 624 (1973).

<sup>32</sup>*Capture Realty Corp. v. Board of Adjustment of the Borough of Elmwood Park*, 336 A.2d 30 (1975), at 33. See also: *New Jersey Budders Association v. Town of Ocean*, 319 A. 2d 255 (1974).

<sup>33</sup>193 A.2d 232 (1%3).

<sup>34</sup>193 A.2d, at 234.

<sup>35</sup>*Id.*, at 239.

<sup>36</sup>*Id.*, at 242.

<sup>37</sup>See footnote 16.

<sup>38</sup>313 A. 2d, at 633.

Nevertheless, *Morris* County continues to be cited by parties objecting to both wetland and floodplain regulations throughout the country but with little effect.

The taking issue rather than the public purpose has proved to be an obstacle in several other wetlands cases arising in the 1960's. Where the Connecticut town of Fairfield had levied an \$11,000 sewer assessment against a wetland parcel, the subsequent inclusion of the property in a "floodplain zone" was held to be "practical confiscation of the land."<sup>39</sup> The court took a patronizing stance on the question of flooding:

Although the objective of the Fairfield Flood and Erosion Control Board is a laudable one and although we have no reason to doubt the high purpose of their action, these factors cannot overcome constitutional principles.<sup>40</sup>

The same court took a similar position in a subsequent case involving a wetlands restriction by the Town of Old Lyme that allegedly reduced the plaintiffs property value from \$32,000 to \$1,000.<sup>41</sup> Again, lip-service is paid to the public purpose: "Undeniably, the defendant's objective to observe marshland from encroachment or destruction is a laudable one. The preservation of our natural environment is of critical concern."<sup>42</sup>

The high courts of Massachusetts and Maine were meanwhile experiencing similar ambivalence. In a 1965 decision concerning the Massachusetts Coastal Wetlands Restriction Act (M.G.L.A. Ch. 130, sec. 27A), the court declared "the protection of marine fisheries is undoubtedly a public purpose . . . . The Legislature clearly has power to protect and preserve the fish and game of the Commonwealth."<sup>43</sup> It was further held that "Broad Marsh is a 'saltmarsh' necessary to preserve and protect marine fisheries."<sup>44</sup> Nevertheless the court expressed concern about the economic effect of restricting dredging and filling in the marsh. The Maine Supreme Court in 1970 similarly granted a property owner's request for relief from the coastal wetland restrictions of that State.<sup>45</sup> The court stated:

<sup>39</sup>*Dooley v. Town Planning and Zoning commission of the Town of Fairfield*, 197 A.2d 770 (1964), at 773.  
40197 A.2d, at 774.

<sup>41</sup>*Bartlett v. Zoning Commission of the Town of Old Lyme*, 282 A.2d 907 (1971).

<sup>42</sup>282 A.2d, at 911.

<sup>43</sup>*Commissioner of Natural Resources v. S. Volpe and CO.*, 206 N.E.2d 666 (1965).

<sup>44</sup>*Id.*, at 671.

<sup>45</sup>*State v. Johnson*, 265 A.2d 711 (1970).

The benefits from its preservation extend beyond town limits and are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose.<sup>46</sup>

The court declined, however, to hold the statute to be unconstitutionally vague, and sustained restrictions on the draining of sanitary sewage into coastal wetlands. Neither this case nor the preceding Massachusetts decision discuss possible flood hazards, although both note that the site in question is within reach of mean high tide before filling.

The year 1970, which began with the signing of the National Environmental Policy Act, proved to be a turning point in judicial handling of wetlands cases. Decisions in many jurisdictions since 1970 have displayed a new willingness to condone severe and even total reduction of economic value as the necessary price of preserving the Nation's dwindling coastal wetlands. In contrast to the ambivalent decisions cited above the courts have, on occasion, been enthusiastic about the virtues and values of wetlands. While the question of flooding remains obscure, there is no question that the national interest in managing coastal floodplains benefits, albeit tacitly, from this new judicial style.

The new era was perhaps most eloquently proclaimed by a Federal court of appeals in the 1970 decision *Zabel v. Tabb*.<sup>47</sup>

It is the destiny of the Fifth Circuit to be in the middle of great, often times explosive, issues of spectacular public importance. So it is here as we enter in-depth the contemporary interest in the preservation of our environment . . . .

We hold that nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment is entitled, if not required to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely 5, 10, or 15 years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water, and the immeasurable loss from a silent-spring-like disturbance of nature's economy.<sup>48</sup>

<sup>46</sup>*Id.*, at 713.

<sup>47</sup>430 F.2d 199 (1970).

<sup>48</sup>*Id.*, at 200-201.

The following year a Federal District Court in Florida ordered a developer to remove fill that had been placed in Florida Bay without obtaining approval of the Corps of Engineers.<sup>49</sup> The opinion discussed in detail the ecological impacts of dredging and filling on mangrove and shallow and estuarine waters. State courts confronted by wetlands issues during the 1970's have generally followed the Federal lead. The Massachusetts court in 1970 upheld the denial of a permit for a property owner to dredge a boat channel through his wetlands. The court sustained both a local by-law and the State Coastal Wetlands Act, holding them to properly operate concurrently.<sup>50</sup> To be sure, a boat channel may be regarded as an incidental restraint on the use of the owner's upland property.

The Connecticut court, however, was to sweep away its own prior indecision in a case involving substantial economic issue.<sup>51</sup> It upheld a denial of a State coastal wetlands permit to a proposed industrial subdivision that had already received local zoning approval by the Town of Guilford, stating:

There can be no question that the plaintiffs wetland would have greater value to him if it were filled. It must be presumed however, that the defendant's denial of the application was based on the standards set forth in the (statute) which require the hearing officer to "consider the effect of the proposed work with reference to the public health and welfare, marine fisheries, shell-fisheries, wildlife, the protection of life and property from flood, hurricane and other natural disasters, . . ."<sup>52</sup>

The court distinguishes its prior decisions in *Bartlett* and *Dooley*, declaring that there has been no "practical confiscation" of the plaintiff's land in this case.

Outside New England, Maryland, in 1972, upheld a total prohibition on excavation of and gravel within "state wetlands"-areas defined as lying below the reach of mean high tide.<sup>53</sup> The court quoted Justice Oliver Wendell Holmes to the effect that "a river is more than an amenity, it is a treasure."<sup>54</sup> Rhetorical elegance has also been supplied

by the Supreme Courts of New Hampshire and Wisconsin. The former in upholding its State's coastal wetlands act declared:

The denial of the permit by the board did not depreciate the value of the marshland or cause it to become "of practically no pecuniary value." Its value was the same after the denial of the permit as before and it remains as it had been for milleniums.<sup>55</sup>

The Wisconsin court in a landmark decision concerning that State's Shoreland Zoning Act stated:

It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp.<sup>56</sup>

While the tide of State and Federal wetlands decisions clearly is running in favor of validity, this does not suggest that no further legal issues affect the regulation of floodplains. The necessity for clear standards and fair treatment of permit applicants is illustrated in the protracted Massachusetts case of *MacGibbon v. Duxbury*.<sup>57</sup> Despite its firm acceptance of coastal restrictions expressed in *Golden v. Falmouth*,<sup>58</sup> the Massachusetts court in three decisions refused to sustain the denial of a permit for the filling of 4 acres of coastal wetland on the grounds that the local board of appeals had indicated its intent to deny all such applications regardless of circumstances. The 1975 opinion in this case does in fact discuss the coastal flooding and erosion stating that: "We think the board (of appeals) was entitled to consider flooding and resulting erosion in passing on the permit." However, in response to testimony that flooding and erosion could be mitigated through protective measures, the court held that the board should have imposed suitable conditions rather than denying their permit completely. It appears that the issue of flooding and erosion could have been better presented. In particular, the court did not acknowledge the importance of wetlands in their natural state as a buffer against storm tides. The experience of Massachusetts in February 1978 when some 9,000 coastal dwellings were damaged or destroyed suggests that the mitigation measures discussed in *MacGibbons* would have been of no avail. The only prudent course is to deter new development at the water's edge.

<sup>49</sup>U.S. v. *Joseph G. Moretti, Inc.*, 331 F. Supp. 152 (1971).

<sup>50</sup>*Golden v. Board of Selectman of Falmouth*, 265 N.E.2d 573 (1970). But see: *Lauricella v. Planning and Zoning Board of Appeals*, 342 A.2d 374 (Conn., 1974).

<sup>51</sup>*Brecciaroli v. Connecticut Commissioner of Environmental protection*, 362 A.2d 948 (1975).

<sup>52</sup>*Id.*, at 952.

<sup>53</sup>*Potomac Sand and Gravel Co. v. Governor of Maryland*, 293 A.2d 241 (1972).

<sup>54</sup>*Id.*, at 248 citing *New Jersey v. New York*, 283 U.S. 336 (1931).

<sup>55</sup>*Sibson v. State*, 336 A.2d 239 (1975), at 243.

<sup>56</sup>*Just v. Marinette County*, 201 N.W.2d 761 (1972).

<sup>57</sup>*MacGibbon v. Board of Appeals of Duxbury*, 200 N.E.2d 254 (1964); 255 N.E.2d 347 (1970); 340 N.E.2d 487 (1975).

<sup>58</sup>See footnote 50.