

April 2, 2008

Michel J. Danko
Marine Fisheries Agent
New Jersey Sea Grant Extension Program
Building 22
Fort Hancock, NJ 07732

Dear Mike,

Below is the summary of research regarding the questions you posed to the Sea Grant Law Center regarding New Jersey's new public access regulations and their impact on marinas. As we understand it, the marinas are primarily concerned about the new requirement that strips of land be dedicated for public access in exchange for permission to develop the land or expand existing facilities. The following information is intended as advisory research only and does not constitute legal representation of New Jersey Sea Grant by the Sea Grant Law Center. It represents our interpretations of the relevant laws and cases.

When a government requires a property owner to provide a benefit to the public in return for receiving permission to use land in a way that would otherwise be prohibited, it is known as an exaction.¹ An exaction may require the property owner to cede real property, grant easements, or pay impact fees.² In some situations, exactions can rise to the level of a constitutional taking.

Under the Fifth Amendment, the U.S. Constitution prohibits the government from taking private property without paying just compensation. This prohibition extends to state governments under the Due Process Clause of the Fourteenth Amendment. A taking may result from either a physical occupation of private property or a governmental action that damages or impairs the use of private property. The physical occupation of property is a per se taking for which the government must compensate the landowner.³ Additionally, when government regulation of property goes "too far" it will be recognized as a taking.⁴

In two cases involving exactions, the Supreme Court has developed a test to determine whether an exaction has gone "too far" and become a taking. In *Nollan v. California Coastal Commission*, property owners had applied to the Coastal Commission for a permit to build a larger home on their beachfront property. The Commission granted the permit, subject to a requirement that the owners dedicate a public right-of-way (easement) across their property.⁵ The property owners challenged the decision, claiming it resulted in a taking under the Fifth Amendment. The United States Supreme Court found that the right to exclude others from private property was an essential right to the ownership of property. The Court held that a government action resulting in permanent

¹ Steven A. Haskins, Closing the Dolan Deal: Bridging the Legislative/Adjudicative Divide, 38 Urban Lawyer 487, 490 (2006).

² *Id.*

³ *Loretto*, 458 U.S. 432-435.

⁴ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (U.S. 1922)

⁵ *Nollan v. Cal. Coastal Com.*, 483 U.S. 825 (U.S. 1987).

occupation of land would result in a taking unless it *substantially furthered legitimate state interests*, which would justify denial of the permit, and did not deny a property owner the economically viable use of his land.⁶

In *Nollan*, the Commission claimed the easement was necessary to protect the public's visual access to the beach. Although this may be a legitimate state interest, the court found that the easement did not substantially further this purpose. For instance, the Court noted that the Commission could have imposed height restrictions to preserve visual access, rather than requiring a physical easement.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the U.S. Supreme Court increased the level of scrutiny in *Nolan*, holding that there must be a "rough proportionality" between a legitimate state interest and the conditions imposed. In this instance, the City of Tigard granted Dolan a permit to expand a retail store and parking lot, but required Dolan to dedicate a portion of the property for a public greenway and bike path. The Supreme Court held that the required dedication did not have a sufficient relationship to the impact that Dolan's expansion would cause. Specifically, the city did not show a reasonable relationship between the public greenway and its interest in preventing floods through a floodplain easement. Additionally, the requirement for a dedication for a bike path was not reasonably related to the additional number of vehicle and bicycles that would be using Dolan's development.

New Jersey

The New Jersey Supreme Court has recognized that "[the] application of takings principles requires a fact-sensitive examination of the regulatory scheme, focusing on whether it substantially advances a legitimate public purpose and whether it excessively interferes with property rights and interests."⁷ The public access regulations promulgated by the New Jersey Department of Environmental Protection regulate coastal development for private property owners, municipalities, and counties. The standards specify the requirements for public access, including the width of walkways, restroom facilities and parking. Because the regulations place requirements on private property, the regulations could constitute a taking unless the government can show that the conditions relate to a legitimate government interest.

Following *Nollan*, the New Jersey Supreme Court has recognized that government regulation of private property must meet two requirements to survive a takings challenge: 1) the regulation must substantially advance legitimate state interests, and 2) it cannot deny an owner all economically viable use of the land. For instance, in *Gardner*, a landowner brought an inverse condemnation action against the state, alleging that the Comprehensive Management Plan enacted under the Pinelands Protection Act resulted in a regulatory taking of his land because it restricted residential development. The court found that protecting the Pinelands, which provides a unique habitat for several threatened and endangered animal and plant species, was a legitimate state interest. The court held that the Pinelands Protection Act substantially advanced the state interest of protecting the state's Pinelands by limiting development. Furthermore, the court found that the regulations limiting development did not deprive the landowner owner of all

⁶ *Id.* at 834.

⁷ *Gardner v. New Jersey Pinelands Commission*, 125 N.J. 193, 593 A.2d 251 (1991), *Bernardsville Quarry v. Borough of Bernardsville*, 129 N.J. 221, 235 (N.J. 1992).

economical use of his land because he retained several other economically-beneficial uses of his land.⁸

In another New Jersey case, a quarry owner brought suit when a borough enacted an ordinance limiting the depth to which property could be quarried. He alleged a taking, because he was prevented from quarrying below the allowed level. The New Jersey Supreme Court found that the ordinance protected a legitimate state interest, which was preventing harm to the public and environment caused by quarry operations. The court held that the regulation of quarry operations below the permissible level substantially advanced that interest. Additionally, the regulations did not deny the quarry owner of the substantial value of his property or prevent its use for other economically viable purposes.

Public Access and Marinas

In December 2007, New Jersey adopted rules to require those with oceanfront properties, including marinas, to provide public access in conformity with specific guidelines. It may be easier to understand how a court might evaluate a takings challenge to these regulations if we explore a hypothetical situation in which an oceanfront property owner applied for a permit to expand his marina.

When examining whether an exaction “goes too far” and thereby becomes an unconstitutional taking under the *Nollan/Dolan* test, a court will typically consider four elements: the government goal being furthered, the condition being imposed on developer, the impact on government services and infrastructure caused by development proposal, and the underlying property right the owner attempted to utilize that lead to the demand.⁹

First, what is the goal being furthered by the New Jersey public access regulations? Here, the state’s interest appears to be to preserve the public trust doctrine’s public access rights. Under the Public Trust Doctrine, the public has a right to access and use tidal waterways and shores. Courts in New Jersey have affirmed that the public trust doctrine provides the public with the right to use tidal waterways and their shores for activities such as fishing, swimming, boating, walking and sunbathing.¹⁰ The courts have recognized that “[t]he public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.”¹¹ The rule proposal stated that “... the proposed repeal and new rules and amendments will ensure that the public’s rights continue to be protected and that improvements are accomplished, such as assuring that parking and restroom facilities are available, to provide families and others a realistic and meaningful opportunity to enjoy the public’s resources.”¹² The protection of public trust rights is a legitimate state interest.

What are the conditions being imposed by the state? A marina owner looking to develop his property would have to provide public access to the shore, including perpendicular access and a linear area along the tidal waterway and its entire shore.¹³

⁸ *Id.*

⁹ Haskins, 38 Urban Lawyer 487.

¹⁰ *Matthews v. Bay Head Improv. Assn.*, 95 N.J. 306, 326 (N.J. 1984), *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (N.J. 2005).

¹¹ *Matthews*, 95 N.J. 306, 326.

¹² <http://www.state.nj.us/dep/rules/proposals/110606b.pdf> (p. 6)

¹³ § 7:7E-8.11(d)(1)

Additionally, if the marina is located in a natural area, it must be designed to minimize the impacts to the natural habitat.¹⁴

For marinas located in particular areas, the owner must meet additional requirements. For instance, a marina in Newark Bay would have to provide a linear area with a walkway, which must be a minimum width of 16 feet.¹⁵ An area a minimum of 30 feet wide, including the walkway area, must be permanently protected by a conservation restriction.¹⁶ The perpendicular access must include a walkway with a minimum width of 16 feet and a 20-foot wide area must be permanently protected by a conservation restriction.¹⁷ The distance between the perpendicular accessways must not exceed .5 mile.¹⁸ These requirements may be altered in certain circumstances, such as to protect natural areas or existing infrastructure.¹⁹ The department may modify the public access requirements in certain instances, for instance the access may be limited at night or if there are safety concerns.²⁰

Additionally, public access must be marked by Department-approved public access sign at each accessway, access area, and/or public parking area and maintained by the property owner.²¹ Parking must be provided in areas in which public access is required.²² In addition, areas set aside for public access to tidal waterways and their shores must be permanently dedicated for public use through a conservation restriction.²³ These conditions could be quite onerous depending on the size and shape of the property and location of existing facilities.

A court would look at the impact on government services and infrastructure caused by the development proposal. For instance, would a larger marina cause more traffic on the city roads? Or would it necessitate more security from law enforcement? The exaction should seek to redress the impact placed on government infrastructure and services by the new development.

Finally, the court would examine the underlying property right the owner attempted to utilize. In this case, it could be the property owner's right to exclude the public from his land. Although, as discussed above, the public has a right of public access, a property's owners right to exclude others is one of the most fundamental sticks in the owner's "bundle of rights." Additionally, a property owner has the right to receive just compensation when his property is taken for public use.

Whether the regulations would result in a taking would need to be established on a case-by-case basis. A court would recognize that protecting public access is a legitimate state interest. But do the exactions -- the walkways, signage, and parking -- have an essential nexus to protecting public access? It would appear as though walkways, signage and parking would have an essential nexus to protecting public access. All of these improvements would better allow the public to access the shore. However, the exactions

¹⁴ *Id.* at (d)(2).

¹⁵ *Id.* at (e)(1).

¹⁶ *Id.*

¹⁷ *Id.* at (e)(2).

¹⁸ *Id.*

¹⁹ *Id.* at (e)(3).

²⁰ *Id.* at (f).

²¹ *Id.* at (h).

²² *Id.* at (j).

²³ *Id.* at (n).

imposed must be roughly proportional to the development's impact. For example, if a marina owner wanted to expand his pier to include more boat slips, would the parking requirements help ease congestion on the roads? Or, if the marina owner wanted to build a restaurant near the shore, would the wide walkways help offset the development and better define the public's right of access? The conditions do seem to be greater than necessary to redress the development impacts, given that many marinas already provide some public access; however, this would be decided after a fact-specific inquiry.

I hope you find this letter helpful. Please let us know if you have further questions. Thank you for bringing you questions to the National Sea Grant Law Center.

Sincerely,

Terra Bowling
Research Counsel

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