Stream and Wetland Buffers
Webinar Series
Part 3: Legal

September 15, 2017
Agenda

• Welcome and Introductions (5 min.)
• Buffers and Takings Lecture (40 min.)
• Q&A (15 min.)
• Wrap-Up
Webinar Moderator

Kimberly Roth
Environmental Analyst
Wetlands Program
NEIWPC
kroth@neiwpcc.org
John Echeverria is a Professor of Law at Vermont Law School where he teaches Property, Public Law and a wide range of environmental and natural resource law courses. Prior to joining the Vermont Law School faculty in 2009, he served for 12 years as Executive Director of the Georgetown Environmental Law & Policy Institute at Georgetown University Law Center. He also was General Counsel of the National Audubon Society and General Counsel and Conservation Director of American Rivers, Inc., and was an Associate for four years in the Washington, D.C. office of Hughes, Hubbard & Reed. He served for one year as law clerk to the Honorable Gerhard A. Gesell of the U.S. District Court for the District of Columbia immediately after graduating from law school.

Professor Echeverria has written several books and numerous scholarly articles on environmental and natural resource law topics. He has published pieces for more general audiences in The New York Times, The Washington Post, and The Christian Science Monitor. He has represented state and local governments, environmental organizations, and planning groups in a variety of legal matters at all levels of the federal and state court systems. In 2007, Professor Echeverria received the Jefferson Fordham Advocacy Award from the American Bar Association to recognize outstanding excellence within the area of state and local government law over a lifetime of achievement. In addition to teaching at Vermont Law School, he has served as a Visiting Professor at Harvard Law School and Georgetown University Law Center.
Stream and Wetland Buffers and the Takings Issue

John Echeverria
Vermont Law School

Stream & Wetland Buffers Workgroup

New England Interstate Water Pollution Control Commission
September 2017
The Takings Clause

“Nor Shall Private Property Be Taken for Public Use, Without Just Compensation.” U.S. Constitution, Fifth Amendment

And State Analogs . . . .
The Takings Issue

Does establishment of a stream or wetland buffer result in a taking?

Answer: Almost certainly not, at least most of the time, especially if the ordinance is well designed.
The question in a takings case is **NOT whether the government can lawfully proceed.**

Instead, the issue is whether the government has to pay $$$ as a condition of going forward.
Classic Takings

- Eminent Domain
- Appropriations
- Permanent Physical Occupations
But can a regulatory restriction on the use of private property also result in a compensable taking?

Yes, if the restriction goes “too far.”
The Lucas test: A regulation that completely deprives a landowner of all economically beneficial use of property is a “per se” taking.

If Lucas does not apply, a regulatory takings claim is evaluated using the so-called Penn Central test, focusing on: (1) the economic impact of the regulation on the claimant, (2) the degree of interference with investment-backed expectations; and (3) the character of the regulation.
Exception: There is no taking under either *Lucas* or *Penn Central* if “background principles” of nuisance or property law bar a takings claimant from asserting a vested “property” entitlement to begin with.

- E.g. South Carolina *McQueen* case
- E.g., Rhode Island *Palazzolo* case
“Exaction” takings claims

Arise when a permit condition (applied independently) would result in a taking, but the government has imposed the requirement as a condition to a permit the government could have denied without fear of takings liability.

E.g. Nollan case
“Nollan” test – is there is an “essential nexus” between the condition and the government’s legitimate regulatory purposes?

“Dolan” test – is there a “rough proportionality” between the burden imposed on the owner by the condition and the magnitude of the impact the government is seeking to mitigate?
In light of the foregoing, it is obvious assessment of economic impact is critical in regulatory takings analysis:

- **Lucas.** A regulation that completely deprives a landowner of all economically beneficial use of property is a “per se” taking – subject to various exceptions.

- **Penn Central** framework for other regulatory takings claims: (1) economic impact of the regulation on the claimant, (2) degree of interference with investment-backed expectations; and (3) the character of the regulation.

(Economic impact is irrelevant in determining liability in “physical takings” cases, which turn on the “character” of the government action, and in most exaction cases.)
To measure economic impact, the courts need some definition of the “relevant parcel” or, as it is sometimes called, “the denominator.”

To address this issue, the Supreme Court developed the so-called “parcel as a whole” rule.
The Relevant Parcel Issue
The Relevant Parcel Issue
The Murr case
Property Location
The Murr case
The *Murr* case
The disputed issue: Was the relevant parcel as a whole Lot E (as the plaintiffs argued) or was the relevant parcel as a whole Lots E and F combined (as the government defendants argued)?
The *Murr* Case

Basic Facts:

- **1960** – Murr parents purchased Lot F
  - built a cabin
  - transferred ownership to family plumbing co.
- **1963** – Murr parents purchased lot E individually
- **1970’s** - W & S R zoning enacted
- **1990’s** – Murr parents transferred ownership of both lots to children
- **2000’s** – Children's plan to sell lot E rejected
Basic Facts (II):

- Under the zoning regulations adopted in the 1970’s, Lots E and F were both “substandard” (undersized) lots.

- Under the regulation’s “lot merger” provision, Lots E and F were *merged* when the Murr parents voluntarily conveyed the lots to their children in the 1990’s, barring separate development of Lot E.
The *Murr* Case

Parties’ Positions:

- **Plaintiffs** argued that, once a building lot is created under state law, the building lot defines the relevant parcel, and therefore Lot E was the relevant parcel.

- **Defendant St. Croix County** contended that state-law lot subdivisions are a relevant factor but that the definition of the relevant parcel is ultimately a question of federal law and turns on the owner’s investment expectations, making Lots E and F combined the relevant parcel.
The Murr Case

The Decision, issued June 23, 2017

The Supreme Court basically adopted the County’s position.

The Justices split 5 to 3 on how to approach the parcel issue – the one lot or two lot question.
The *Murr* Case

- **Majority (per Justice Anthony Kennedy)**

Definition of the relevant parcel turns on “whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel.”
The *Murr* Case

**Majority (per Justice Anthony Kennedy)**

Relevant factors in applying the “reasonable expectations” approach include:

- How the land is bounded and divided under state and local law.
- The physical characteristics of the property in question.
- The potentially positive impact of the restriction on one of claimant's holdings on the value of an adjacent holding.
The *Murr* Case

Majority (per Justice Anthony Kennedy)

In the *Murr* case, the relevant parcel was self-evidently the two lots combined, not just lot E, because:

- The lots had been merged under the county’s lot merger provision.
- The lots had rugged terrain and were bordered by a wild and scenic river
- Lot E in an undeveloped state added very considerably to the value of Lot F

Hence, plaintiffs’ claim failed under both *Lucas* and *Penn Central*
Stream and Wetland Buffers
Stream and Wetland Buffers

Applying the takings tests:

Buffer restrictions will rarely if ever rise to the level of a denial of all economically viable use of private property, triggering the *Lucas* per se rule.

(If they might, the buffer line could be delineated with that risk in mind.)
Stream and Wetland Buffers

Applying the takings tests – *Penn Central*:

Economic impact

Reasonable investment-backed expectations
   (the better the science the better)

Character
   (the more general the better)
Stream and Wetland Buffers

Applying the takings tests – the parcel issue

Following *Murr*, the environmental sensitivity of buffer areas is likely to support a broad parcel definition.

Following *Murr*, the fact that a protected buffer is likely to add considerably to the value of the rest of the property is likely to support a broad parcel definition.
Stream and Wetland Buffers

Applying the takings tests

Background principles defense?

Not especially promising in this context
Takings challenges to buffer regulations have commonly been rejected:


Threat v. Fulton County, 266 Ga. 466 (1996)


See also Gorieb v Fox, 274 U.S. 603 (1927)
Recommendations

Design scope of buffer area with risk of takings liability in mind.

Support buffer with sound, specific science.

Adopt buffer regulation that is general rather than targeted.

Maximize the permitted uses in the buffer area (consistent with the purposes of the buffer).
Recommendations

Consider including a hardship variance – avoids risk of “facial” takings liability and minimizes the risk of “as applied” takings liability.

Consider a provision stating: “The restrictions on property use and development in the buffer area under this ordinance shall not apply if they would result in a compensable taking under the federal or state constitutions.”
Thank you!

Questions?
Thank you

Missed an episode?
Visit:
neiwpcc.org/wetlands/webinars

Questions and Comments?
Kimberly Roth
kroth@neiwpcc.org
978-349-2512