

1-1-2007

Neifert v. Dep't of the Env't, 910 A.2d 1100 (Md. 2006)

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the year that Idaho joined the Union. The court held that the district court should have determined the OHWM through historical facts.

The court explained that in 1907 the Washington Water Power Company completed dams on the Lake's outlet river. Every year since their completion, the dams kept the OHWM at 2128 feet, the same OHWM level as 1890. The court rejected the district court's finding of 2130 feet because, based on historical facts, the OHWM could not have been higher than 2128 feet.

The court next addressed whether the lakeshore property owners had any right to exclude the public from the exposed lake bed between the OHWM and OLWM. Like the district court, the state supreme court rejected the property owners' contention that English common law applied to the case. English common law cannot apply to Idaho state court decisions when it is inconsistent with state law. The English case at issue recognized a private land owner's title to land down to the lake's OLWM. Conversely, Idaho common law recognized a littoral owner's rights only down to the OHWM. The title to the lake's bed below the OHWM belonged to Idaho and was held in a trust for the public. Even more damaging to the lakeshore owners' claim was an Idaho statute that specifically stated that lakeshore between the Lake's OHWM and OLWM is devoted to public use. Due to inconsistencies between English and Idaho law, the court held that lakeshore property owners could not exclude the public from exposed lake bed between the OHWM and OLWM.

The court vacated the district court's judgment and remanded for further proceedings.

Kurt Kropp

MARYLAND

Neifert v. Dep't of the Env't, 910 A.2d 1100 (Md. 2006) (holding that denial of application for sewer service and wetland fill permits did not violate equal protection or amount to an unconstitutional taking).

On April 3, 2003 Euginia Neifert, Melvin Krolczyk, and Teresa Krolczyk ("Neifert & Krolczyk") filed suit against the Maryland Department of the Environment ("Department") seeking damages and attorneys fees resulting from the Department's denial of sewer service and wetland fill permits. Neifert & Krolczyk claimed that the Department's denial of the permits deprived Neifert & Krolczyk of equal protection and constituted a taking under both the United States Constitution and Maryland Declaration of Rights. The Circuit Court of Worcester County granted summary judgment in favor of the Department. Neifert & Krolczyk appealed to the Maryland Court of Special Appeals. The Maryland Court of Appeals granted certiorari on its own initiative to hear the case, and affirmed the circuit court's decision.

Neifert & Krolczyk owned four parcels of land in the Cape Isle of Wight subdivision in Worcester County. The deed to each lot contained a restriction requiring that any septic tanks or sewage disposal systems conform to all requirements established by the Maryland Department of Health and the Worcester County Maryland Health Authorities. Worcester County, as a result of sewage disposal problems in the mid 1970s, required that lots pass a seasonal percolation test when the water table was at its highest. This requirement virtually eliminated the possibility of any property in the Cape Isle of Wight subdivision obtaining a septic tank permit as such lots were unable to pass the seasonal percolation testing. Neifert & Krolczyk applied for a septic tank permit in 1979, but Worcester County denied the application. Neifert & Krolczyk did not appeal this decision.

In 1983, Worcester County proposed a central sewage collection system in order to allow for the development of new homes and businesses in the area. Worcester County sought additional funding from the United States Environmental Protection Agency ("EPA"). The EPA agreed to fund 75% of the total sewer system cost, but, pursuant to an Environmental Impact Statement ("1983 EIS"), required that the sewer system not provide service to any parcel of land within wetlands, as defined by the United States Fish and Wildlife Service.

The EPA also required Worcester County to submit maps that clearly delineated all non-service areas. Worcester County submitted maps in 1984 ("1984 Maps") and later expanded the map in 1986 ("1986 Maps"); however, Worcester County increasingly used the maps only as guidance, and denied service to any property not only mapped as a wetland but also any property defined as a wetland under the applicable Fish and Wildlife Service delineation.

In 1991, the Department realized that the EPA's interpretation of the restrictions imposed by the 1983 EIS was frustrating many lot owners who had relied upon the wetland guidance maps in purchasing their lots. In addition, the Department realized that as more lots became ineligible for sewer service, Worcester County would face increasing difficulties in retiring the debt it had assumed in order to finance its share of the project. The Department requested that the EPA review and revise the EPA's interpretation of the restrictions imposed by the 1983 EIS. In 1992, the EPA agreed to reinterpret the restrictions to the 1983 EIS to apply only to those wetland areas originally identified in the 1983 EIS. Under this 1992 Policy, the County could approve sewer service for parcels outside the 1986 Maps if the owners obtained all necessary wetland fill permits. Conversely, lots with mapped wetlands were ineligible for sewer service.

Neifert & Krolczyk's parcels contained mapped wetlands under the delineation methodology in place as of 1983, and Neifert & Krolczyk had been unable to obtain fill permits or sewer system permits. How-

ever, at least 26 other lots with unmapped wetlands obtained the necessary fill permits and sewer service permits under the 1992 Policy.

In affirming the circuit court's dismissal of Neifert & Krolczyk's equal protection claims, the Maryland Court of Appeals found that because Neifert & Krolczyk were not members of a suspect class and no fundamental right was at issue, that the standard of review applied to the circuit court's decision was the traditional and deferential rational basis analysis. Neifert & Krolczyk would only be able to recover if (1) the government treated Neifert & Krolczyk differently than it treated others similarly situated, and (2) the disparate treatment did not bear a rational relationship to a legitimate interest. The court held that as Neifert & Krolczyk could not meet either of the prongs of this test, the Department had not violated Neifert & Krolczyk's equal protection rights.

First, the court found that Neifert & Krolczyk's mapped lots were not similarly situated to the non-mapped wetland lots. Although the court held that Neifert & Krolczyk were not collaterally estopped from re-litigating that their lots were similarly situated (based on the court's finding that the issue was not necessary to the agency's prior decision), the court found that as Worcester County had applied the distinction between mapped and non-mapped wetlands consistently to determine sewer service eligibility under the 1992 Policy, the mapped lots were not similarly situated to the non-mapped wetland lots and the Department did not treat Neifert & Krolczyk differently than it treated others similarly situated.

Second, the court found that the disparate treatment afforded by the Department's implementation of the 1992 Policy was rationally related to the legitimate state interest of ensuring fairness, fiscal integrity, and the ecological protection of the sewage system service. The court found that the EPA and the Department rationally decided upon the 1992 Policy out of fairness to property owners that detrimentally relied on the 1983 Maps, fiscal concern to ensure that Worcester County could repay its portion of the debt, and concern for adherence to the environmental restrictions the EPA imposed on its grant conditions for the sewer system.

In holding that the denial of sewer service and fill permits did not constitute a taking, the court found that Neifert & Krolczyk were unable to prove that the denial of the permits under the 1992 policy was the proximate cause of rendering Neifert & Krolczyk's property undevelopable. In addition, the court found that there was no constitutional right of access to a sewer system.

First, the court found that the required seasonal septic testing caused Neifert & Krolczyk's inability to develop their property. As Neifert & Krolczyk had conceded that Worcester County's denial of an on-site septic system in 1979 rendered their lots undevelopable until the possibility of attaching to a sewage system arose, and Neifert &

Krolczyk had not appealed this decision, the court found that Neifert & Krolczyk were unable to demonstrate that the denial of their permits under the 1992 Policy was the proximate cause of their lots being undevelopable.

Second, although the denial of the septic permits rendered Neifert & Krolczyk's lots undevelopable, the denials did not constitute a taking as there was a "nuisance exception," recognized by the Supreme Court in *Lucas*, to taking when the government restricted development of a property to prevent public harm. The court found that the operation of an on-site septic system on Neifert & Krolczyk's lots most likely would have contributed to the contamination problem and constituted a nuisance; thus, there was no taking when the State denied Neifert & Krolczyk's permits for on-site septic systems in 1979.

Finally, the court found that Neifert & Krolczyk's takings claim also failed because Neifert & Krolczyk did not sufficiently allege that access to sewer service was an interest that qualified as a constitutionally protected property interest. Instead, the court found that there was no right to sewer service under either constitution, and that Neifert did not demonstrate a property interest established by other existing rules or state law.

The Maryland Court of Appeals affirmed the judgment of the Circuit Court for Worcester County.

Patrick Greenleaf

MONTANA

Mustang Holdings v. Zaveta, 143 P.3d 456 (Mont. 2006) (holding that the district court erred in granting a preliminary injunction to prevent an injury where the injury in question was already complete).

Mustang Holdings ("Mustang") and Marge Zaveta ("Zaveta") owned neighboring land in Montana. For more than a century, a creek on Mustang's property provided water via an irrigation ditch to Zaveta's property. Although Zaveta had valid claims for water rights associated with the ditch, the Water Court terminated those claims in 1999 for nonpayment of the claim processing fee. After Zaveta continued to divert water through the ditch, Mustang filed a complaint in the Fourth Judicial District Court, Missoula County, in July 2003 seeking a declaratory judgment that Zaveta had no right to use the ditch because the Water Court's 1999 decision had permanently terminated Zaveta's water rights. Zaveta offered an affirmative defense and claimed an easement for the ditch. She subsequently paid her claim fees and the Water Court reinstated her claims in November 2003. However, before the district court could rule on the declaratory judgment, Mustang bulldozed the ditch. Mustang's actions prompted Zaveta to move for a preliminary injunction in 2005, alleging that Mustang violated a statute prohibiting interference with a party's ditch easements. The district