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Town of Bellmont v. New York State Dep't of Env'tl. Conservation, 726 N.Y.S.2d 769 (N.Y. App. Div. 2001)

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Agency and the Fish and Wildlife Service. The Corps estimated this alternative project would cost approximately \$120 million while the Sierra Club predicted a cost of \$52.5 million.

The Commission chose the Big Sunflower project, stating, "(t)he Corps evaluated the purchase of flowage easements and determined that not only was this alternative cost prohibitive, but also the option would not accomplish the purpose of the project." The Commission did not provide any further reasoning to substantiate its decision between the chosen and the proposed alternative.

In *McGowan v. Mississippi State Oil and Gas Board*, the Mississippi Supreme Court held that if an agency does not disclose the reason upon which its decision is based, the courts would be usurped of their power of review over questions of law. The court also noted that among those questions of law were whether board action was arbitrary and capricious and whether it was supported by substantial evidence.

Since the court was unable to determine if the Commission's decision was arbitrary or capricious, it remanded the case to the Commission for reconsideration and further fact finding and analysis.

Michael Barry

NEW YORK

Town of Bellmont v. New York State Dep't of Env'tl. Conservation, 726 N.Y.S.2d 769 (N.Y. App. Div. 2001) (holding the town of Bellmont failed to prove administrative remedies futile or would have caused irreparable harm).

The Town of Bellmont ("Town") brought this action after the Department of Environmental Conservation ("Department") granted a permit, along with certain conditions, to operate a dam located at the northern end of Mountain View Lake. The Town took title to the dam in 1962, and conducted drawdowns every year to lower the water level of the lake. Recently, the dam fell into disrepair and the Town filed for a permit to repair it in 1998. The Department issued a permit for the repairs and renewed it several times until it expired on June 15, 1999. On August 24 of the same year, the Town applied for renewal of the permit. The Department treated the application as a new application and taking public concerns into consideration, issued a new permit containing certain conditions on its use.

The conditions on the permit caused the Town to file the action against the Department, asking the court to enjoin and prohibit any such enforcement and to remove the conditions from the permit. The Department filed a preanswer motion stating the Town had failed to exhaust its administrative remedies by failing to seek an adjudicatory hearing. The trial court granted the Department's motion and

dismissed the action.

The court determined a petitioner must exhaust all administrative remedies unless an agency's action is unconstitutional, wholly beyond the scope of the agency's power, when relying on an administrative remedy would prove futile, or when pursuing an administrative remedy would cause irreparable harm. The court determined the complaint raised no constitutional issue. The court further determined the permit and conditions were squarely within the agency's power. Relying on the agency's granted power, the court determined the agency may require conditions as necessary to protect the population and the environment. Finally, the court agreed with the trial court that administrative relief would not have been futile or resulted in irreparable harm. Thus, the court affirmed the trial court's decision.

Lynne Stadjuhar

People v. Grucci, 729 N.Y.S.2d 577 (N.Y. 2001) (holding that the state lacked jurisdiction to regulate shellfish within privately owned lands).

New York Environmental Conservation Law section 13-0311 allows the state to regulate public shellfish taking by requiring a permit to take shellfish. Joseph J. Grucci ("Grucci") was caught catching clams with a revoked clamming permit. Grucci sought to dismiss the taking charge, arguing a permit was not required.

The violation occurred within the Town of Brookhaven. Through private patents, Brookhaven had received underwater land rights. The court questioned whether the state or the underlying owner had the right to take shellfish on privately owned land. The court examined the state's right to regulate an activity related to both the tidal waters and the underlying land. Furthermore, the court examined the relationships between shellfish taking on both the navigable water and the underlying land. The court ruled a state could control and regulate an activity closely related to the use of public waters. However, the underlying land ownership determined the private or public character of the activity.

The court maintained that clams, by nature, live in the land, and thus the landowner has more than nominal control over them. As a result, the court found shellfish taking more closely related to the underlying land. Thus, the court held that since the state had invested Brookhaven with private ownership of the tidal lands, Grucci was exempted from state regulation and control. The state did not own the shellfish under section 13-0311 and the court dismissed the charges against Grucci.

Jon Hyman