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## East Cape May Assoc. v. N.J. Dept. of Env'tl. Prot., 777 A.2d 1015 (N.J. 2001)

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**NEW HAMPSHIRE**

**KSC Realty Trust v. Town of Freedom, 772 A.2d 321 (N.H. 2001)**  
(holding spring water transport and sale are accessory to permitted Rural Residential water storage use).

William and Carol Foord appealed the superior court's order affirming the Town of Freedom Zoning Board of Adjustment's ("ZBA") decision to prohibit them from using their land to sell water. The Foord's land contained spring canals releasing underground water, which they first used residentially, but in 1987, when Mr. Foord entered into a contract to sell water, they collected it in tanker trucks and transported it from the property. The Town of Freedom zoned the property as Rural Residential ("RR"), and thus, permitted its use for "Water Recreation and Storage Facilities" under Zoning Ordinance § 304. In 1996, the town's Board of Selectmen ("Board") informed the Foords that selling water was not a permitted use in RR districts. The Foords appealed the decision to the ZBA, which held water sales were not permitted within the Foords' zoning district, and the use was neither nonconforming commercial, nor residential accessory. On appeal, the superior court held water storage was a permitted use, but its sale and removal were not.

The supreme court treated the ZBA's factual findings and ordinance interpretation on these questions of law as *prima facie* reasonable, noting its decision would be upheld unless evidentially or legally unsupported. Zoning Ordinance § 304 is "permissive" in structure, prohibiting land uses unless expressly permitted, or accessory to a permitted principal use, and "subordinate to it." As such, the town claimed sale and transportation were not accessory to the statutorily permitted storage use, and therefore not allowed. However, Zoning Ordinance § 901 permits some commercial uses for water "storage facilities," within its definition as a place for "commodities" and "merchandise." This definition contemplates the water's later transport off the property and sale, evidencing the storage facility's commercial purpose. Therefore, the court reasoned the Foord's transportation and sale were incidental and subordinate to water storage, and, thus, accessory to the permitted use.

*Robert Lykos*

**NEW JERSEY**

**East Cape May Assoc. v. N.J. Dept. of Env'tl. Prot., 777 A.2d 1015 (N.J. 2001)** (holding there is no taking claim when a state agency deems private property a protected wetland).

East Cape May Associates ("ECM") filed suit seeking damages after

the New Jersey Department of Environmental Protection (“NJDEP”) declared ECM land was a designated protected wetland. The trial court found that ECM’s taking claim was moot. As a result, ECM and NJDEP appealed.

ECM owned a 100-acre undeveloped plot of land in the City of Cape May. In accordance with the Coastal Area Facility Review Act (“CAFRA”), ECM applied for a permit in order to develop the tract. NJDEP denied the permit based on the protected status of the land as a wetland and as having an “exceptional resource value.” ECM subsequently filed suit against the State, claiming a taking had occurred. The court sided with ECM, but remanded with direction to address the State’s denominator argument.

The court noted that the denominator is a tool “to determine whether a taking has occurred. The court is charged with comparing the ratio of the land subject to the regulation with the property owner’s entire property of ‘the parcel as a whole’.” After an extensive fact investigation, this court found the property in question was not one whole, but rather separate development of resources, therefore the tract did not qualify as a “parcel as a whole” to be calculated in the denominator equation.

The court also addressed whether the NJDEP had any authority to make pre-permit deals without duly promulgated regulations. It found that while an agency has broad discretion in its actions, the NJDEP should act in accordance with the Administrative Procedure Act.

The court also found the provisions of CAFRA should not in any way “be regarded as to be in derogation of any powers now existing and shall be regarded as supplemental.” Therefore, because the primary issue in this case was freshwater, the NJDEP had state regulatory power to “bargain” with ECM concerning allowed development.

The court remanded the case to allow NJDEP to promulgate regulations concerning amelioration issues, and to decide whether a regulation will excessively burden private property interests. It found there had been no taking in this case, temporary or otherwise, mainly because the NJDEP was still optioning the owners to develop the site. Though there was a delay in the application process, the court did not find this “extraordinary,” warranting a finding of taking.

ECM also brought a claim of breach of contract and damages, arising out of a predecessor-in-title argument. The state originally had title to the property. It transferred title to private parties in 1903 and 1907. The court found the Legislature, in enacting such programs as CAFRA and the FWPA, made clear its intentions to solve generalized environmental problems. As such, the court found the riparian rights sold, “did not forever grant the landowners the right to fill the wetlands on the eastern tract, free of all government regulation.”

*Anne Francis*