

Court slaps DNR with wetlands payout order

BY TIM RICHARD
STAFF WRITER

A state Court of Appeals panel stunned the Department of Natural Resources by ruling it must pay \$6.3 million to an Oakland County builder for "taking" 28 acres of his property by declaring it a protected wetland.

Joseph Kosik, his J.F.K. Co. and his Resorts and Co. wanted to build a restaurant on 65 acres of land zoned commercial on M-69 just west of Pontiac in Waterford Township. DNR refused a permit in 1988. DNR also refused Kosik's later proposal to fill in 3.17 acres and convert 6.33 acres of upland to wetland.

"This is a very important decision," said Kevin Smith, assistant attorney general representing DNR. "There have been other cases where trial courts found there had been a taking, but the others were reversed by the Court of Appeals. This is the first case where the Court of Appeals found there had been a taking."

Smith was unsure whether the state solicitor general would recommend appealing to the state Supreme Court. "If the decision

is not reversed, it will have a significant impact for the wetlands program. The DNR will have to consider the impact of all permit denials."

If allowed to stand, the case could have far reaching implications for areas like West Bloomfield which has been a leader in preserving wetland areas through legislation.

No nuisance

"The crucial issue," said Michigan's second highest court, "is whether there is a taking within the meaning of the Fifth Amendment to require just compensation."

It said there was. "The decision to build a restaurant, or a request to fill in wetlands, do not constitute nuisances that a government may abate," wrote Judge Kathleen Janssen. She was joined by Judges Clifford Taylor and J.P. Noecker in upholding a Court of Claims ruling.

They said "the legislature's declarations in the Wetlands Protection Act and the Michigan Environmental Protection Act...

do not constitute background principles of nuisance and property law sufficient to prohibit the use of plaintiffs' land without just compensation."

The state court relied heavily on a 1992 decision of the U.S. Supreme court in Lucas v. South Carolina Coastal Council. "While property may be regulated to a certain extent, if the regulation goes too far, it will be recognized as a taking," Janssen wrote.

Court of Claims Judge William E. Collette awarded Kosik and his companies \$2 million for the property taken, \$1.6 million in interest and nearly \$460,000 for a temporary taking of part of the land.

Collette in 1991 ruled the DNR wetlands restrictions "rendered the property essentially worthless as commercial real estate, and that plaintiffs were therefore entitled to just compensation." The base award amount to about \$60,000 an acre.

The parties do not question that the state has a legitimate

interest in preserving and protecting wetlands," said Janssen's opinion. The question was money.

The trial and appellate courts found unconstitutional a section of the statute limiting the landowner's recovery to twice the state equalized value of the property (half the supposed market value).

National issue

Janssen's opinion noted "the 28 acres of wetlands is irregularly shaped within the 65-acre parcel. Thus, it is not possible to simply leave the wetlands area undeveloped and build on the remaining 27 acres. Here the plaintiffs could not develop the remaining 27 acres because of the configuration of the wetlands within the parcel."

She added, "Defendant (DNR) has not shown that the Court of Claims' computation of damages was erroneous or excessive."

The Michigan Association of Home Builders joined the case as an "amicus" on Kosik's side. The case is part of a nationwide battle between landowners, who say government is taking their property by regulating its use, and environmentalists, who insist wetlands are essential to the ecosystem. The 1992 Republican national platform came out squarely for the landowners' side.

Ingham circuit judges constitute the Court of Claims and hear all suits against state government. Ironically, Michigan Republicans contend Ingham jurists are politically too liberal.

Home garden tours coming

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tours Saturday and Sunday, July 20 and 21. Tickets are \$3. Call (810) 286-6150.



Joyce Bichler, Gilda's Club executive director and author

Gilda's Club taps a new director

Farmington Hills resident Joyce Bichler was appointed executive director of Gilda's Club/Metro Detroit, a non-profit social, emotional and educational support community for people with all types of cancer, their families and friends.

Bichler formerly served as program administrator at Jewish Federation Apartments, West Bloomfield and Oak Park. She has also served as program director for the Cleveland Area Alzheimer's Association.

Bichler is a founder of the National DES Cancer Network. She holds a masters of social work from The University of Michigan and a certificate in gerontology from the Institute of Gerontology, University of Michigan.

Bichler is the author of "DES Daughter: The Joyce Bichler Story" (Avon Books, New York, 1981) as well as articles about Alzheimer's care and caregiving.

Bichler is the author of 'DES Daughter.'

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