Recent Developments in Property Rights Law…
…with a Focus on the *Rapanos* Decision

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Kelo keeps coming…
Settled!
Kelo settled with New London.

- $319,155 over the $123,000 first received.
- City forgave $85,000 in use and occupancy fees.
- She can move her cottage before June 15, 2007.
Kelo total

$442,155
Pasquale Cristofaro and family settled.

- $475,000 for the house last appraised in 2000 for $150,000
- City forgave $105,000 in use and occupancy
- Family can salvage fixtures
- Shrubs to be moved at no cost
- NLDC will install a plaque in memory of Margherita Cristofaro
Cristofaro total

$580,000
Dery and family settled.

- $980,000 for four properties
- City forgave $370,975 in use and occupancy
Dery total

$1,350,975
Others settled

- Patayla Construction and owner Richard Beyer received $515,000 and occupancy fees of $101,250 were forgiven.
- Thelma Brelesky received $189,652 and forgiveness of $40,537.
Van Winkle

- Apartment houses appraised at $638,000 – he will receive $1.5 million
- $300,000 for a garage outside the project limits
- City forgave $482,000 in use and occupancy
Van Winkle total

$2,282,000
Election Day 2006

10 states adopted new laws
“We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the police power.”
Why do we care?

- Learn from their mistakes
- Watch for the after shocks

San Andreas fault zone, Carrizo Plains, central California. Photo by R.E. Wallace, USGS
Arizona

- citizen initiative prohibiting the use of eminent domain for private economic development and enhancing compensation including that for regulatory takings

- **passed** 65% to 35%
California

- Proposition 90, a citizen initiative restricting eminent domain and providing compensation for public regulation reducing the value of real estate

- **failed** 52% to 47%
Florida

- constitutional amendment passed by the legislature prohibiting transfers of private property taken by eminent domain to a person or private entity except when the legislature allows exceptions by three-fifths vote; blight not a basis

- passed 69% to 31%
Georgia

- constitutional amendment passed by the legislature requiring approval of any eminent domain by the elected governing authority of the county or city and limiting the use of eminent domain to the elimination of harm

- passed 82% to 18%
Idaho

- citizen initiative prohibiting eminent domain for private economic development and providing compensation for regulatory takings

- **failed** 25% to 75%
Louisiana

- constitutional amendment passed by the legislature prohibiting the use of eminent domain for economic development, enhancement of tax revenue, or a benefit only incidental to the public

- **passed** by the general electorate on September 30, 2006
Michigan

- constitutional amendment passed by the legislature prohibiting the use of eminent domain for the purpose of economic development or enhancement of tax revenues

- passed 80% to 20%
Nevada

- constitutional amendment proposed by citizen initiative prohibiting the use of eminent domain for private economic development and enhancing compensation

- **passed** 63% to 37% and if it passes again in the 2008 general election, it becomes law
New Hampshire

- constitutional amendment passed by the legislature prohibiting the use of eminent domain for private development or other private use

- **passed** 86% to 14%
North Dakota

- constitutional amendment proposed by citizen initiative to prohibit the use of eminent domain for economic development, including an increase in tax base, tax revenues, employment, or general economic health

- **passed** 68% to 32%
Oregon

- citizen initiative to amend the state statutes to prohibit the use of eminent domain for private economic development

- **passed** 67% to 33%

The wagon train migration of 1843 (Oregon State Capitol mural).
South Carolina

- constitutional amendment passed by the legislature prohibiting the use of eminent domain for the purpose or benefit of private economic development

- passed 86% to 14%
Washington

- modeled after Oregon’s Measure 37, would limit land use rules that reduce the value of property

- **failed** 58% to 42%
And in my home state?

- Everyone seems not to have noticed...
Ombudsman law

Sec. 3. (NEW) *(Effective July 1, 2006)* (a) There is established an Office of Ombudsman for Property Rights which shall be within the Office of Policy and Management for administrative purposes only. The Office of Ombudsman for Property Rights shall be under the direction of an Ombudsman for Property Rights who shall be appointed in accordance with section 4 of this act.
Property rights are also defined by what the government regulates…
Federal Wetlands Jurisdiction -- *Rapanos*
It all starts with…
The Clean Water Act (1972)

- “...to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
- prohibits “the discharge of any pollutant” into navigable waters without USACOE approval under Sec. 404
“Navigable waters”

- USACOE defines them as “the waters of the United States”
- ...meaning all traditionally navigable waters, tributaries of these waters, and wetlands adjacent to traditional navigable waters (or their tributaries)
EPA then USACOE took position that waters need not be navigable in fact...
An enormous line drawing problem!
Modern history starts with *Riverside Bayview Homes* (1985)
Number of Known At-Risk Species Tied to Isolated Wetlands in U.S. Counties

- 0
- 1 - 2
- 3 - 6
- 7 - 11
- 12 - 20
Riverside Bayview (6th Cir.)

“The transition from water to solid ground is not necessarily or even typically an abrupt one. Rather between open waters and dry land may lie shallows, marshes, mud flats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic, but nevertheless fall short of being dry land. Where on this continuum to find the limit of ‘waters’ is far from obvious.”
In *Riverside Bayview Homes* U.S. Supreme Court held unanimously that...

USACOE has jurisdiction over:

“wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as ‘waters.’”
And a year later...
The Reasonable Duck Rule…

…also known as…
The Migratory Bird Rule
So, now tell me what “adjacent to” means?

…and 16 years later…along came “Swank”…
Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers (1991)
Howdy Kids!

Join SWANCC's Recycling Rangers today!

www.swancc.org
SWANCC held...

- no USACOE jurisdiction over nonnavigable, isolated waters
- why? no “significant nexus”
SWANCC reaction…

By 6-1 circuit courts of appeal, only Migratory Bird Rule invalidated and isolated wetlands with no adjacency or other connection to navigable waters excluded
And along came *Rapanos*...

- 20 miles from nearest navigable waterway
- direct surface connection
- Rapanos hired, fired wetlands scientist
John Rapanos looks at land in Midland he hoped to develop. After filling in wetlands, he got 18 months of probation and was fined $185,000. The Supreme Court sent his case back to be reconsidered by a lower court. (TOM PIDGEON/2004 New York Times photo)
Pine River Site

This slide shows the location of the Pine River site (circled in red). The Pine River is a major river approximately 100-120 feet wide where it flows adjacent to the north end of the property.
Hines Road Site

This slide shows the location of the Hines Road Site. The Rose drain is a designated County Drainage which is 15-20 feet wide and is the blue line running through the property and connecting with the Tittabawasee River approximately 1.3 miles downstream south of the property. The Tittabawasee River is approximately 200 feet wide where Rose drain connects with the river.
Hines Road Site

This slide shows aerials photos of the Hines Road site before and after Rapanos impacted the wetlands on the site. The 1998 aerial photo shows the extensive road network Rapanos constructed on the property. The blue line on the aerial photograph on the right is the Rose drainage way.
Hines Road Site

This is a photograph of one of an extensive series of unauthorized drainage ditches excavated to drain wetlands on the Hines Road site. Excavated spoils were used to illegally fill wetlands adjacent to the ditches. These photographs were taken in April 1992.
This is a photograph of one of an extensive series of unauthorized drainage ditches excavated to drain wetlands on the Hines Road site. Excavated spoils were used to illegally fill wetlands adjacent to the ditches. These photographs were taken in April 1982.
Salzburg Road Site

The slide above shows the location of the Salzberg Road site approximately 13-14 miles from Lake Huron and shows the 18 mile path water takes to reach Saginaw Bay. The slide on the right shows the streams on and adjacent to the property.
Salzburg Road Site

This slide shows aerial photographs of the Salzburg Road site in 1982 and 1998. On the 1982 aerial photograph, the extensive forested wetlands system on the site can be observed by the dark (black) coloration throughout the site. The 1998 aerial photograph shows the extent of alteration that occurred on the property since 1982. The alteration includes removal of the wetland forest and construction of drains on the property.
Salzburg Road Site

This slide depicts the Salzberg Road site after clearing.
Salzburg Road
Off-Site Remaining Wetland

This slide depicts the remaining forested wetland on the property adjacent to the Salzberg site. This photograph indicates what the Salzberg site probably looked like prior to clearing, draining, and filling activities. The darker bark at the base of the trees is created by standing water on site during other parts of the year.
The Associated Press
Developer John Rapanos stands at the edge of a field, where he is accused of illegally filling wetlands in Williams Township.
Rapanos

- criminal conviction
  - $185,000 fine
  - 200 hours community service

- civil complaint
  - all three sites wetlands
  - trial and appeal courts find for USACOE
Carabell case

- 130 (reduced to 112) condos on 20 acres
- 16 of 20 acres wetlands

Keith Carabell has fought nearly two decades to develop his wooded acres that regulators say contains wetlands in Chesterfield Township, Mich.

By Carlos Osorio, AP
Carabell…

- 12.2 sought to be filed
- 3.74 to be restored as mitigation
This slide depicts the vicinity of the Carabell site to Lake St. Clair and the Riverside Bayview site. The Riverside Bayview Homes Supreme Court case was argued on October 18, 1985 and decided on December 4, 1985. United States v. Riverside Bayview Homes, Inc. 474 U.S. 121, 133 (1985). The blue line is a designated county drainageway. The Carabell site is located approximately one mile from Lake St. Clair.
Carabell…

- ditch with 4-foot berm
- ditch connected to Sutherland-Oeming Drain, connected to Auvase Creek, connected to Lake St. Clair…
- USACOE denied permit
  - Isolated forested wetlands
A picture taken at the property under dispute in Carabell v. United States Army Corps of Engineer, located in Macomb County, Mich.
Carabell…

- permit denied:
  - seasonal habitat for aquatic organisms
  - year round habitat for terrestrial organisms
Keith Carabell said:

He felt that the federal government taking jurisdiction over this forested wetlands was the equivalent of … “Cuba or Russia or some other despotic government deciding what’s going to happen with private property.”
So, what’s the problem?

...what is a jurisdictional wetland?
A very split decision

4-1-4
“Scalia Four” plurality

- “navigable waters” are “relatively permanent, standing or flowing bodies of water”
“Scalia Four” two-part test

1. The adjacent channel contains a relatively permanent body of water connected to a traditional interstate navigational waters, and
2. The wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins
“Stevens Four” dissent

- “adjacent to” does NOT require a “continuous surface flow”
“Kennedy One” swing vote

- “significant nexus”
- neither Scalia nor Stevens agreed so he went with Scalia for remand
- his opinion reads like a majority opinion…
  - while Scalia’s reads like a dissent…
Bad, bottom line?

- both tests - Scalia Four and Kennedy Swing - are in play

- regulators have not promulgated guidance
Summary

- *Kelo* keeps kicking
- new laws will have problems with implementation
- expect copycat initiatives elsewhere
- our ombudsman could be quite good
- federal wetlands jurisdiction is a mess