

Wetlands Wisdom

LAW

HISTORICALLY, THERE WAS LITTLE APPRECIATION FOR THE value and importance of wetlands. Think about where the dump (a.k.a. “sanitary landfill”) was in your or your parent’s hometown—usually in a wetland or other low-lying area not amenable to development. The Hackensack Meadowlands, with its dozens of old landfills is an extreme example of that, as well as unrestrained filling in the face of development pressure. The Meadowlands region had 13,400 acres of wetlands in the 1950s, but by 1964, 21 percent had been destroyed, mostly through filling. In 1969 there were 1,900 acres of unregulated dumps.

Perhaps you have been to the Back Bay in Boston. It was, indeed, a back bay until it was filled in around 1890, creating 570 acres of new land.

The new wetlands ethic

Such filling could never happen today. The wetlands in the Meadowlands and Boston Harbor are “waters of the United States” and regulated under the Clean Water Act of 1977 and under the laws of the respective states. Wetlands can be coastal or inland. Usually they are characterized by poorly drained soils, periodic inundation, and plant species typical of wetlands. Wetlands include fens and bogs, as well as swamps, marshes, and prairie potholes. Coastal wetlands are subject to the ebb and flow of the tides and called “intertidal marshes.” Inland wetlands are often associated with brooks, streams, and rivers, but they can be isolated. One unique and highly valued inland wetland, which surprisingly may escape federal wetlands regulation because it is isolated, is the vernal pool.

They are “vernal” in that they are wet only in the spring and do not support predator fish, so amphibians like salamanders find them ideal habitats as part of their annual cycle. They are worth studying.

Why commissioners need to be knowledgeable

Planning and land-use commissioners need to know the law for three reasons. First, comprehensive plans and development decisions should consider federal wetlands—and state wetlands where the state regulates them. About half the states regulate wetlands in a significant way. There is little sense in planning for development where a federal or state permit is unlikely. Your plan, and the implementing zoning, may want to consider density transfer techniques—such as cluster and transferable development rights—to protect wetlands, to preserve density so important for smart growth, and to limit claims for takings. Importantly, federal regulation and some state regulation protects off-site wetlands, even wetlands far away where there can be a demonstrated physical impact. Therefore, commissioners need to inquire about whether there are such impacts.

Second, wetlands are important for sustainable development and for the welfare of future generations. They have great habitat value for all manner of flora and fauna, and are often critical stopping-off spots along flyways. Wetlands can cleanse water pollutants and bioremediate contamination in ways that we cannot do artificially. With global climate change and the evolving patterns of precipitation and flooding, wetlands have become more obviously important in flood control, as places where water can be detained or retained, as well as recharge groundwater.

Even if a wetland is isolated and beyond federal regulation, and your state does not regulate wetlands development, it may be possible for local government to regulate if state law does not preempt local regulation. In one case the New Hampshire state supreme court upheld the local denial of a development proposal because of a wetlands problem

after the state had already approved it. The same court later accepted designation of prime wetlands as a “land-use control.” Remember, though, that every state is different.

Third, your local government is often a developer and needs to be sure it complies with federal, state, and local law. And local officials need to be able to warn applicants of the possibility of liability. The lack of intent is not a defense to federal enforcement and if someone, even out of ignorance, illegally dredges or fills a regulated wetland,

the penalty may be to restore it and pay a fine. The Town of Ramapo, New York, recently entered into a consent agreement after being sued for violating federal wetlands law in filling 1.11 acres of wetlands in developing a ballpark. Under the decree the town will now have to construct 1.88 acres of new wetlands on the same land and pay \$125,000. In April 2014, a Fairhope, Alabama,

developer who illegally excavated and filled wetlands was sentenced to serve 15 months—nine months in prison and six months of home confinement—followed by one year of supervised release. His companies were ordered to pay more than \$1 million in fines and restitution, restore the wetlands destroyed, and donate another 272 acres to be preserved by a land trust. Why so harsh? The developer’s own consultant had told him that 80 percent of the land was federally regulated wetlands and excavating to drain them required a permit.

The basics of wetlands law

THE LAW. The Clean Water Act of 1977 amended the Federal Water Pollution Control Act of 1972, which had established the basic structure for regulating discharges of pollutants to waters of the United States. Section 404 is central. It enables regulation of dredging and filling. Other laws often applicable with wetlands include the National

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The American Planning Association Vol. 20, No. 6. The Commissioner (ISSN 2330-4499) is published six times a year. Planning commissioner/official members of APA receive the newsletter as part of their membership package; others may subscribe. For information on subscriptions and membership visit www.planning.org. Carolyn Torma, Editor; Julie Von Bergen, Copy Editor; Lisa Barton, Design and Production; James M. Drinan, Jr., Executive Director. Editorial inquiries should be addressed to the editor. Copyright 2014 by the American Planning Association, 205 N. Michigan Ave., Ste. 1200, Chicago, IL 60601-5927; 312-431-9100. All rights reserved. No part of this publication may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the American Planning Association.

Environmental Policy Act of 1969, the Rivers & Harbors Appropriation Act of 1899, and the Endangered Species Act.

WHAT'S REGULATED. Federal wetlands are areas inundated by water or areas with water at or near the surface part or all of the year. The amount of water saturation (hydrology) dictates which plants and animals can live there. There may be both aquatic and terrestrial species. With long periods of wetness, specially adapted plants (hydrophytes) can inhabit the land and promote the development of wetland (hydric) soils. It is actually quite difficult in some instances, especially around the margins of a wetland, to classify land as a wetland or not. A qualified wetlands scientist is essential in making the determination. Understandably, with the expense in time and money of permitting, the impact on development, and federal and state enforcement, there is much litigation over wetlands classification. The facts in these cases can be fascinating and the court decisions seldom create bright-line rules. Regulators and those regulated often wonder where to draw the line.

WHAT'S PERMITTED? Regulated wetlands can be dredged and filled but only with a permit. The U.S. Army Corps of Engineers is responsible and they have a hierarchy of decision making. First, destruction of wetlands is to be avoided. Can the dredging or filling be prevented by reducing the size of the project or shifting development to upland areas? Second, destruction of wetlands must be minimized. Third, where avoidance and minimization simply will not work, such as an essential highway interchange that cannot be located elsewhere, compensatory mitigation through creating or restoring wetlands on- or off-site is required, usually in some amount in excess of that destroyed.

FOR FUTURE GENERATIONS. Commissioners have a special duty to protect natural resources not just for today, but for generations to come. Knowing about wetlands and managing the development process to preserve and enhance wetlands is critically important in meeting that obligation.

—Dwight H. Merriam, FAICP

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HISTORY

The Nation's First Comprehensive Zoning Code. At the turn of the 20th century, New York City's population was quickly swelling because of an influx of new immigrants fleeing oppression from overseas or just hoping for a better life in the city's prosperous economy. These population demands, as well as steel frame building methods and elevator improvements, gave rise to ever growing building heights. Tenement buildings and skyscrapers such as the Equitable Building were built tall and without setbacks, prompting residents to complain about loss of light and air in the city. In addition, industrial land uses were encroaching upon residential areas, which added to undesirable living conditions. The Zoning Resolution of 1916, the first of its kind, sought to address these issues by setting requirements for building setbacks, limiting height, and separating land uses. This zoning act would become a model for cities all over the U.S.

—Ben Leitschuh

Leitschuh is APA's education associate.

RESOURCE FINDER

HOW SHOULD ZONING BOARDS MAKE DECISIONS? Here are resources that can help answer the question.

APA PUBLICATIONS

APA Planners Press, 1983
The Citizen's Guide to Zoning
Herbert H. Smith

APA Planners Press, 1984
The Zoning Board Manual
Frederick H. Bair, Jr.

APA Planners Press, 1990
Zoning and the American Dream
Charles Haar and Jerold Kayden

Zoning Practice

This subscription publication monitors the latest trends in local land-use controls and brings you current news and excerpts.

APA STREAMING EDUCATION

www.planning.org/store/streaming

Administering the Zoning Code
2014

Introduction to the Zoning Board of
Adjustment
2007

Updating the Zoning Ordinance
2009

—Carolyn Torma

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