

Even Absence of Endangered Species May Bar Development

The Case of the Missing Frog

By Janet S. Kole, Esq.

The heavily-regulated State of New Jersey has not made it easy for builders and developers. Our clients are confronted with a mind-boggling maze of statutes and regulations, which deal with everything from coastal area protection, anti-sprawl, and affordable housing requirements to protected habitat for endangered species. Navigating the maze with our clients is increasingly complicated. So our land use lawyers were briefly heartened in April when an administrative law judge expressed his displeasure with the state's policy to bar development in any area containing habitat that will support an endangered species, even in the absence of the species itself.

The judge's opinion concerned the Southern Grey Treefrog ("SGT"), which is listed on the state's endangered species list, meaning it is threatened with extinction in the state. One of New Jersey's last strongholds for the SGT is the area of West Cape May surrounding the so-called Rea Farm. Development in West Cape May has been all but eliminated because of the presence of the SGT, which usually lives in freshwater wetlands. The land mass of West Cape May, like many coastal municipalities, is made up of a high percentage of wetlands.

The New Jersey Department of Environmental Protection has issued protocols for barring development in so-called "exceptional resource value wetlands." Under those protocols, a wetland is deemed to be of exceptional value, and therefore undevelopable, if it is found to contain endangered or threatened species. Further, the DEP's protocols allow the DEP to forbid development of any property containing habitat that could support threatened or endangered species. With respect to the SGT, the DEP has decided that wetlands surrounded by forest containing several species of oak, sweet gum, willow, pine and holly trees; specific kinds of understory shrubs such as huckleberry and blueberry; tall grass-like plants such as cattail and phragmites; and ground cover of various mosses, pitcher plants and forbs and grasses are ideal habitat and must be protected from development even in the absence of the frogs themselves.

In April, Administrative Law Judge Edgar R. Holmes ruled that the DEP went too far in classifying the petitioner's property as exceptional resource value wetlands merely because of the property's ability to sustain the southern grey treefrog, in the absence of any actual frog population. In *Jones v. NJDEP*, OAL DKT. No. ESA 2008-03 (decided April 7, 2004), the DEP sought to bar the petitioner from building a house on her property, which recently had been reclassified by the DEP from intermediate value wetlands to exceptional resource value wetlands.

The DEP argued that it was entitled to reclassify Ms. Jones' property, based on the flora present, which are identical to the flora surrounding wetlands known to support the frog, and on



the fact that the property, in West Cape May, is near known breeding areas for the frog. All the parties conceded that frogs are present near Ms. Jones' property. In addition, the DEP presented evidence from a New Jersey Audubon Society member who claimed he heard one Southern Grey Treefrog on the property in 2001. The judge was not impressed with the evidence.

"To upgrade this particular site, based on its flora only after hearing the cry of one [Southern Grey Treefrog], is bootstrapping. It is placing a burden on a property upon which no [frogs] actually exist...It is a burden which cannot be tolerated under the conditions here." The fortuitous presence for a moment in time of the frog on Ms. Jones' property left the judge unmoved: "Apparently [Southern Grey Treefrogs] resemble chickens in this regard: they sometimes cross the road for reasons serendipitous... nothing explains why this lone, solitary [Southern Grey Treefrog] crossed the road in October of 2001. The fact that it did is not enough to foreclose Mrs. Jones from building a long anticipated home..."

The judge ordered the DEP to allow Ms. Jones to build on her property.

However, on appeal, DEP Commissioner Brad Campbell reversed the decision. He pointed out that a challenge to the regulation allowing the DEP to bar development on habitat conducive to the existence of an endangered species in the absence of the endangered species had been dismissed by the Appellate Division, in *In the Matter of Adopted Amendments to N.J.A.C. 7:7A-2.4*, 365 N.J. Super. 255 (App. Div. 2003). He gave short shrift to Judge Holmes' belief that the random presence of one member of an endangered species was not enough to invoke the protection of the state.

"That there may exist desirable, even superior, habitat nearby is not dispositive of the issue," said the Commissioner. "A freshwater wetlands is of exceptional resource value (and [the] DEP is required to classify it as such) if there is documentation of the presence of a threatened or endangered species within the environs

(continued on back)

CLIENT ALERT

Flaster/Greenberg Environmental Law Practice Group

Matthew Azoulay

(856) 382-2252

matt.azoulay@flastergreenberg.com

Carl S. Bisgaier

(856) 661-2269

carl.bisgaier@flastergreenberg.com

Jeffrey A. Cohen

(856) 382-2240

jeff.cohen@flastergreenberg.com

Mitchell H. Kizner

(856) 382-3338

mitchell.kizner@flastergreenberg.com

Janet S. Kole

(856) 382-2230

janet.kole@flastergreenberg.com

Franklin J. Riesenburger

(856) 382-3337

frank.riesenburger@flastergreenberg.com

Amy M. Trojecki

(856) 382-2259

amy.trojecki@flastergreenberg.com

Donna T. Urban

(856) 661-2285

donna.urban@flastergreenberg.com

Robert M. Washburn (Of Counsel)

(856) 382-2254

robert.washburn@flastergreenberg.com

Frank H. Wisniewski

(856) 661-2289

frank.wisniewski@flastergreenberg.com

Jamie P. Yadgaroff

(856) 382-2219

jamie.yadgaroff@flastergreenberg.com

Endangered Species...

(continued from front)

of a given property (as was shown to be the case in the within matter) and DEP finds that the habitat on the site in question remains suitable for the breeding, resting, or feeding by that species. In other words, it is not a requirement that DEP prove the actual presence of the endangered species on the subject site itself before it can reasonably conclude that the site is a documented habitat and warrants special protection from degradation.”

After the Commissioner issued his ruling, Ms. Jones decided not to spend money to appeal the decision to a court. Instead, she chose to file a lawsuit for compensation for a taking of her property.

Although the Jones case will not alleviate the difficulties in siting development, it may indicate that a crack is opening in the DEP monolith. The fact that an administrative law judge thought that in this case the DEP was overreaching shows that, in the proper case, DEP policies can be overturned.

This is a legal area that may now be in flux, and is definitely worth watching. ♦

This Client Alert, published by Flaster/Greenberg P.C., is intended to alert clients and interested readers to new developments in environmental law. It is for general use and information and should not be interpreted as rendering legal advice on any specific matter. For counsel regarding a specific matter or legal questions, you should contact your attorney.

Office Locations

Commerce Center
1810 Chapel Avenue West
Cherry Hill, NJ 08002-4609
(856) 661-1900

11 Penn Center
1835 Market Street, Suite 1215
Philadelphia, PA 19103
(215) 569-1022

190 S. Main Road
Vineland, NJ 08360
(856) 691-6200

216 North Avenue
Cranford, NJ 07016
(908) 245-8021

2900 Fire Road, Suite 102A
Egg Harbor Township, NJ
08234
(609) 645-1881

913 North Market Street, Suite 702
Wilmington, DE 19810
(302) 351-1910

Practice Areas

Bankruptcy • Business and Corporate Services • Closely-Held and Family Businesses • Commercial Litigation • Commercial Real Estate • Construction Law • Employee Benefits • Employment and Labor Law • Environmental Law • Estate Planning and Administration • Family Law and Adoption • Financial Work-Outs • Health Care • Land Use • Pension and Retirement Plans • Securities Regulation • Taxation • Technology and Emerging Businesses • Trademark and Copyright Licensing and Protection

Client Alerts and all other Flaster/Greenberg newsletters are on our Web site.

Visit us at www.flastergreenberg.com