

Court Keeps Takings Claim Afloat

In 1989 Bailey purchased for development some land on the shoreline of Lake of the Woods, Minnesota. Local authorities approved his subdivision plat but subsequently disapproved his state Clean Water Act Section 401 certification because his proposed septic systems were inadequate.

Then the U. S. Corps of Engineers determined that Bailey's land was 99% wetland, requiring him to apply for a Section 404 permit. The Corps denied that permit on the ground that Bailey's land was high-value wetland, that his development was not a water-dependent activity and the presumption that less environmentally damaging alternatives exist (e.g., upland sites) has not been rebutted.

Bailey sued for a regulatory taking. The Government moved for summary judgment, claiming that the denial of state certification proved that Bailey's land was undevelopable—and thus the Government had taken nothing. The CFC denied summary judgment, finding that an issue of fact exists as to whether Bailey's land is developable:

Determining the permissible uses of property requires a court to analyze “existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, [to] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking.” Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1212–13 (Fed.Cir.2005) (internal quotation marks omitted). For defendant to rely on state background principles of nuisance and property law it must do no more than replicate the limitations embedded in state law. Lucas, 505 U.S. at 1029; John R. Sand & Gravel Co. v. United States, 62 Fed. Cl. 556, 589 (2004), vacated on other grounds 457 F.3d 1345 (2006), aff'd 1522 U.S. 130 (2008); Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 115 (1999), aff'd on other grounds, 247 F.3d 1355 (Fed.Cir.2001). Defendant must show that it is undisputed that plaintiff had no right to use his property for residential development. See Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Should the evidence be inconclusive as to this material fact, defendant's motion for summary judgment must fail. Id.; see also RCFC 56(a), (c).

The opinion can be found [here](#).