

The Case of *Smyth v. Falmouth* on Regulatory Takings

Real Estate Bar Association
Environmental, Land Use & Zoning, and Litigation Sections

April 23, 2019

Michelle N. O'Brien

The End (*for now*)

Appeals Court decision

Janice Smyth v. Conservation Commission of Falmouth & Town of Falmouth, 94 Mass. App. Ct. 790 (2019)

- Plaintiff was not entitled to a jury trial on her claim of regulatory taking
 - Question of first impression
 - Trial judge erred in denying defendants' motion to bifurcate
- Evidence presented at trial did not, as a matter of law, support a claim for regulatory taking
 - Jury Verdict awarding plaintiff damages of \$640,000 reversed
 - Subject of plaintiff's application for further appellate review

How did we get there?

- Smyth filed Notice of Intent (NOI) with Falmouth Conservation Commission (ConCom) in 2012
- Sought approval under Massachusetts Wetlands Protection Act and Falmouth Wetlands Protection Bylaw to construct a residence on her property
- Falmouth Wetlands Protection Regulations (FWR) precluded development without variances
- ConCom denied variance requests





1995

Imagery Date: 5/23/2015 41°38'08.31" N 70°38'27.33" W elev 12 ft eye alt 475 ft

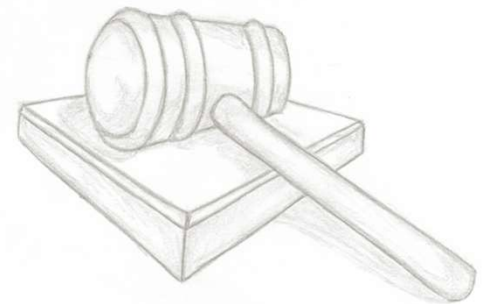
Google earth

How did we get there?, cont.

- Smyth appealed ConCom decision
 - Certiorari action
 - Regulatory taking claim
- Superior Court judge upheld ConCom decision
- Regulatory taking claim ripe

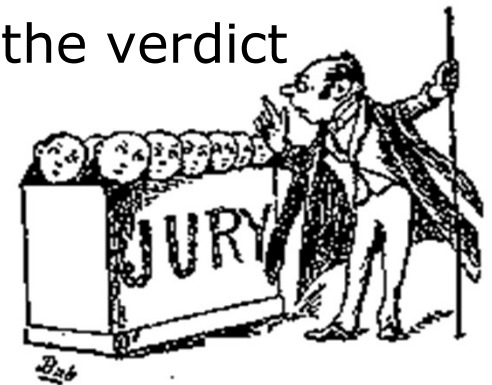
How did we get there?, cont.

- Superior court judge denied Falmouth's Motion for Summary Judgment
- Another superior court judge denied Falmouth's motion to bifurcate the trial
 - Question of whether a regulatory taking occurred to be tried without a jury
 - Question of damages (if taking occurred) to be tried before a jury



How did we get there?, cont.

- Five day jury trial in Barnstable Superior Court
- Jury found that application of FWR to Smyth's property effected a regulatory taking
- Awarded \$640,000 in damages (difference in value, according to Smyth's appraiser, if property unbuildable versus buildable)
- Falmouth sought judgment notwithstanding the verdict (denied)



Background

- Janice Smyth and the Property
- What is a Regulatory Taking

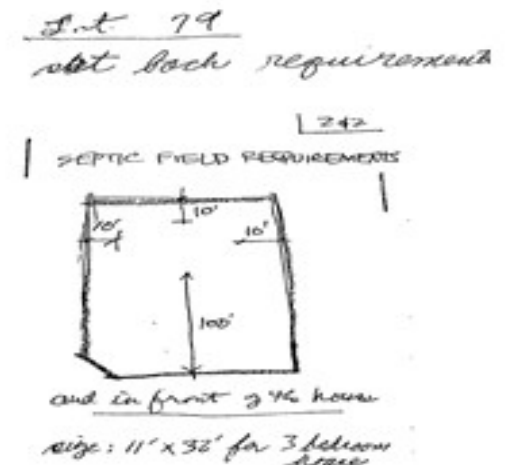
Janice Smyth

- Resident of Florida
- Sole owner of vacant lot at 250 Alder Lane, Falmouth (Property)
- Inherited Property from her parents
- Parents paid \$49,000 in 1975
- Smyth and her parents paid property taxes and homeowners' association dues from 1975 through 2005 but incurred no development costs



Janice Smyth, cont.

- Had a soil evaluation ("perc") test done in 2006
- Husband (architect) prepared sketches for potential development
- Tired to sell Property in 2007-2008; no takers
- Hired attorney and other professionals in late 2007 and early 2008 to prepare plans and permit applications
- Submitted NOI in 2012

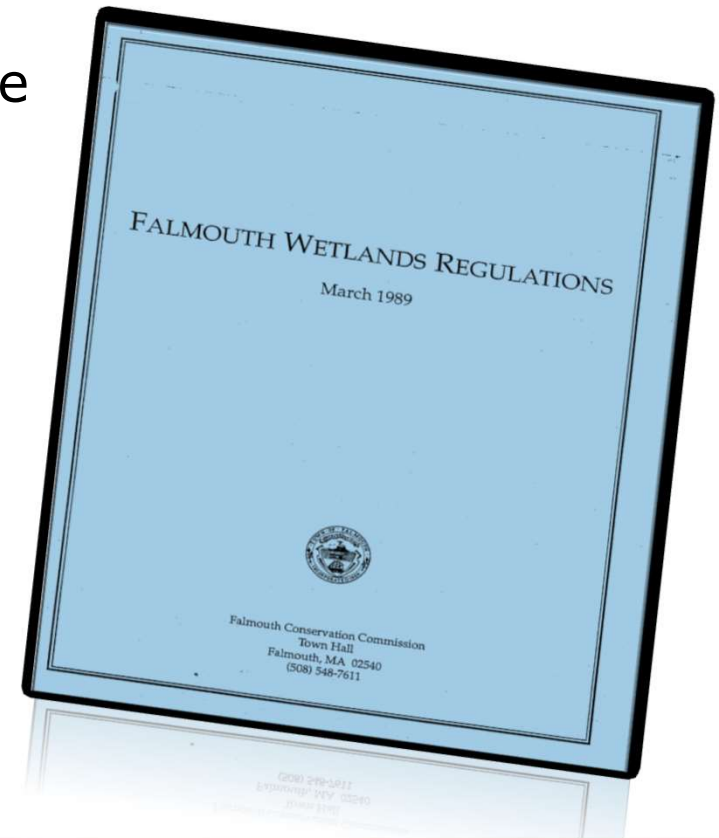


The Property

- Part of Wild Harbour Estates subdivision created in 1960s
- Most houses built in 1970s and 1980s
- Zoning allows single family homes, parks, playgrounds, agriculture and floriculture, among other uses
- Subject to restrictive covenants by homeowners' association
 - Only allows single family homes
 - Size of home
 - Setback from street

The Property, cont.

- Contains wetland resources protected under FWR
 - Salt marsh
 - Coastal bank
 - Land subject to coastal storm flowage
- FWR adopted in 1989 and amended periodically
- 2008 version precluded development of the Property without variances



What is an alleged regulatory taking?

How do you know if one occurred?

Constitutional Protections

- Article 10 of Massachusetts Declaration of Rights
- Fifth Amendment to U.S. Constitution
- No taking of private property for public use without just and reasonable compensation

Types of Takings

- Physical invasion or government appropriation
- Complete deprivation of all economically beneficial use
- Substantial restriction on use of property so that the regulation “goes too far”

Three-part framework for evaluating whether FWR effected a taking of Smyth's Property

- *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)
- *Blair v. Dep't of Conservation & Recreation*, 457 Mass. 634, 641 (2010)
- *Gove v. Zoning Bd. Of Appeals of Chatham*, 444 Mass. 754, 764-767 (2005)

Factors:

- Economic impact of the regulation on Smyth
- Extent to which the regulation interfered with Smyth's distinct investment – back expectations
- Character of the governmental action

A Jury or No Jury

- Right to jury trial established by Art. 15 of Massachusetts Declaration of Rights
- Preserves right to trial by jury in actions for which a right to jury trial was recognized at the time the Constitution of the Commonwealth was adopted in 1780
- No jury trial in a “wholly new cause of action,” but
- If a new cause of action is analogous to a common-law claim entitled to trial by jury in 1780, there might be a right to a jury trial

A Jury or No Jury?, cont.

- Regulatory takings claim did not exist when Massachusetts Constitution was adopted
- Is it analogous to a common-law claim entitled to trial by jury in 1780?
- Appeals Court says no
- Does not resemble an action in tort
- Is a “wholly new” cause of action
- Application of multifactored *Penn Central* test is similar to question whether acts are “unfair or deceptive” under G.L. c. 93A

The Inquiry Did Not End There

- Appeals Court’s “analysis [did] not end with [its] conclusion that it was error to submit the question of liability to the jury over the defendants’ objection”
- Remand for a new trial? Or
- Determine liability as a matter of law on the basis of the trial record

- Appeals Court evaluated whether evidence at trial supported a claim of regulatory taking
- Applied the *Penn Central* balancing test

Economic Impact

- Comparison of value of Property with and without the regulation
- Property valued at \$700,000 if buildable, \$60,000 if not buildable (91.4% reduction in value)
- Smyth's appraiser testified at trial the Property would be attractive to abutters for privacy or for expansion of their properties
- Under zoning Property had other uses
- Appeals Court noted the reduction in value was significant
- "[E]ven as unbuildable the property's value is still greater than the amount (\$49,000) the plaintiff's parents paid for the property when they purchased it"

Investment-backed Expectations

- Remarkably similar facts to *Gove*
- Smyth inherited Property
- Smyth and her parents took no action toward development for more than 30 years
- Payment of taxes is incidental to land ownership, not indicative of expectation of development

Investment-baked Expectations, cont.

- When Smyth submitted NOI in 2012, FWR (2008 amendments) precluded development without variances
- Variances only granted under FWR to “individual who suffers a hardship” and in rare and unusual cases
- When Smyth obtained perc test in 2006, plain language of FWR (1998 version) prohibited development as proposed
- Smyth’s trial evidence contained speculative, hypothetical analysis by her engineer on how the project would have been permissible under the 1998 FWR
- Smyth’s expectation of development based on surrounding lots was unreasonable

Investment-backed Expectations, cont.

- Appeals Court noted that Smyth's expenditures for professional services were after she knew she needed variances from applicable regulations
- Appeals Court simply concluded that "the record shows a distinct lack of any financial investment toward development of the property, whether by [Smyth] or her parents, at any time over more than thirty years, including a substantial period within which it could have been built upon"
- Court noted (again) that the Property "even as unbuildable is worth more than its purchase price" – any compensation "would constitute a 'windfall' for [Smyth]" citing *Gove*

Character of the Governmental Action

- Government regulations “may deprive an owner of a beneficial property use – even the most beneficial such use – without rendering the regulation an unconstitutional taking.” *Moskow v. Comm’r of Dep’t of Env’tl. Mgmt.*, 384 Mass. 530, 533 (1981)
- “What may be characterized as forbidden takings are those governmental actions which strip private property of all practical value to them or to anyone acquiring it, leaving them only with the burden of paying taxes on it.” *Lovequist v. Conservation Comm’n of Dennis*, 379 Mass. 7, 20 (1979)

Character of the Governmental Action, cont.

- Is the governmental action “like a physical invasion” of land?
Giovanella v. Conservation Comm. of Ashland, 447 Mass. 720, 735 (2006)
- Does the regulation “unfairly single[] out the owner”? *Id.*
- Is the regulation “of the type of limited protection against harmful private land use that routinely has withstood allegations of regulatory takings”? *Gove*, 444 Mass. at 767
- “Reasonable government action mitigating [harmful land uses], at the very least when it does not involve a ‘total’ regulatory taking or a physical invasion, typically does not require compensation.” *Id.*

Character of the Governmental Action, cont.

- Smyth admitted Falmouth's action was not like a physical invasion (Appeals Court said action "clearly not like a physical invasion")
- FWR apply to all property in Falmouth that has wetland resources
- Regulations "are designed to protect coastal and wetland resources"
- Appeals Court simply quoted *Gove* – reasonable government action "typically does not require compensation"

Presenters

Michelle N. O'Brien
mobrien@pierceatwood.com

100 Summer Street
22nd Floor
Boston, MA 02110

PH / 617-488-8146

Smyth v. Falmouth:
Massachusetts Association of
Conservation Commissions
Amicus Curiae Filings

Rebekah Lacey
MIYARES AND HARRINGTON LLP

April
2019

MASSACHUSETTS ASSOCIATION OF CONSERVATION COMMISSIONS (MACC)



*MACC protects Massachusetts
natural resources by supporting
Conservation Commissions through
education and advocacy*

MUNICIPAL REGULATION OF WETLANDS AND FLOODPLAINS

- 196 of 351 Massachusetts municipalities (and counting) have adopted wetlands bylaws/ordinances
- Almost all Massachusetts municipalities have adopted floodplain restrictions required by the National Flood Insurance Program (usually via zoning)

MACC *AMICUS* BRIEF

- Conservation commissions concerned about implication for wetlands and floodplain regulation if *Smyth* facts constitute a taking
- “Character of the governmental action” prong of *Penn Central* test has been important in SJC wetlands/floodplain takings cases, but was deemphasized by trial court
- MACC requested leave to submit *amicus curiae* brief focusing on this issue

CHARACTER OF THE GOVERNMENTAL ACTION: SCOTUS

“[T]he ‘determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest’...this question ‘necessarily requires a weighing of private and public interests.’”

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 492 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260-261 (1980))

SCOTUS CASES RE: REGULATING NUISANCES

- *Beer Co. v. Massachusetts* (1877): Manufacture and sale of malt liquor
- *Mugler v. Kansas* (1887): Brewery
- *Hadacheck v. Sebastian* (1915): Manufacture of brick
- *Miller v. Schoene* (1928): Diseased cedar trees
- *Goldblatt v. Town of Hempstead, N.Y.* (1962): Mining below the water table
-and others

MURR V. WISCONSIN, 137 S.C.T. 1933 (2017)

- Purpose of Takings Clause is to ensure that government does not force “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” (quoting *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960)).
- “[R]easonable land-use regulations do not work a taking.”

CHARACTER OF THE GOVERNMENTAL ACTION: SJC

- *Turnpike Realty Co. v. Town of Dedham* (1972): Rights of property owners “must be balanced against potential harm to the community from overdevelopment of a flood plain area.”
- *Gove v. ZBA of Chatham* (2005): Harm-mitigating action “typically does not require compensation”
- *Giovanella v. Ashland Conservation Comm’n* (2006) (cites *Gove*)
- *Blair v. DCR* (2010) (cites *Gove*)

CHARACTER OF THE GOVERNMENTAL ACTION: APPEALS COURT IN *SMYTH V. FALMOUTH*

“Reasonable government action mitigating such harm, at the very least when it does not involve a ‘total’ regulatory taking or a physical invasion, typically does not require compensation.”
(quoting *Gove*)

SMYTH REQUESTS FURTHER APPELLATE REVIEW ...WITH NEW CO-COUNSEL



Pacific Legal Foundation filed *amicus curiae* briefs in *Gove* and *Giovanella*. It now represents Smyth in a petition for further appellate review.

SMYTH FAR PETITION

- Argument: Massachusetts courts have been wrong on regulatory takings law and Appeals Court is wrong here
 - 91% loss of value supports takings claim
 - Plaintiff had reasonable investment-backed expectations
 - “The Court should conform the ‘character’ test to modern takings precedent”
- Falmouth filed opposition
- MACC filed letter in opposition

MACC ARGUMENTS AND SMYTH RESPONSE

- MACC
 - SJC has followed SCOTUS precedent regarding character of governmental action prong of *Penn Central* test (see *Gove and Giovanella*)
 - Appeals Court decision followed SJC and SCOTUS precedent (see *Murr*)
- Smyth
 - “By applying the ‘character’ factor as a physical invasion test, Massachusetts’ courts (including the Appeals Court here) wrongly re-inject a physical invasion standard back into regulatory takings”

Rebekah Lacey
Miyares and Harrington LLP
40 Grove Street, Suite 190
Wellesley, MA 02482
(617) 489-1600

rlacey@miyares-harrington.com
www.miyares-harrington.com