



2007

# Recent Developments: Neifert v. Department of the Environment: The Denial of Wetland Fill Permits and Sewer Service Is Subject to Rational Basis Review under Equal Protection Analysis and Is Not Considered an Unconstitutional Taking

Jacqueline Callier

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>

 Part of the [Law Commons](#)

## Recommended Citation

Callier, Jacqueline (2007) "Recent Developments: Neifert v. Department of the Environment: The Denial of Wetland Fill Permits and Sewer Service Is Subject to Rational Basis Review under Equal Protection Analysis and Is Not Considered an Unconstitutional Taking," *University of Baltimore Law Forum*: Vol. 37 : No. 2 , Article 13.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol37/iss2/13>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

## RECENT DEVELOPMENT

---

### ***NEIFERT V. DEPARTMENT OF THE ENVIRONMENT: THE DENIAL OF WETLAND FILL PERMITS AND SEWER SERVICE IS SUBJECT TO RATIONAL BASIS REVIEW UNDER EQUAL PROTECTION ANALYSIS AND IS NOT CONSIDERED AN UNCONSTITUTIONAL TAKING.***

**By: Jacqueline Callier**

The Court of Appeals of Maryland held, under rational basis review, that a property owner's equal protection rights were not violated by the denial of sewer service and wetland fill permits by the Maryland Department of the Environment ("Department"). *Neifert v. Dep't of the Env't*, 395 Md. 486, 910 A.2d 1100 (2006). This denial does not qualify as an unconstitutional taking due to lack of proximate cause, absence of a defined property right, and the presence of Maryland's nuisance exception. *Id.*

Property owners Eugenia M. Neifert, Melvin D. Krolczyk and Teresa A. Krolczyk (the "Property Owners") own four contiguous lots within the Cape Isle of Wight subdivision in Worcester County, Maryland. Each deed required that any sewage system must meet the requirements established by the State. To encourage economic growth in West Ocean City, the County developed a sewage collection system and requested financing from the State of Maryland and the U.S. Environmental Protection Agency ("EPA"). The EPA required, however, that the County not provide sewer connection service to any land containing wetlands. Maps commissioned by the County in 1984 indicated the Property Owners' lots contained wetlands. Subsequently, the Property Owners were denied sewer permits by the County in 1985. The Property Owners requested review from the State's administrative agency, however, all appeals were denied. Even though the Property Owners sought judicial review in the Circuit Court for Worcester County, they deferred the sewer service appeal while they pursued wetland fill permits. In 1992, the EPA drafted a policy ("1992 Policy") that stated all lots considered wetlands after 1986 could receive sewer service if they obtained all necessary wetland fill permits. Subsequently, the Property Owners sought wetland fill permits from the State. Their applications were denied

upon a determination that the “economic benefits did not outweigh the ecological costs.” In 1998, the Property Owners renewed their application for sewer service, which was denied by the State.

On April 3, 2003, the Property Owners filed suit in the Circuit Court for Worcester County against the State and alleged that the denial of sewer service and wetland fill permits was a violation of their equal protection rights and were an unconstitutional taking under both the United States and Maryland Constitutions. The State filed a motion for summary judgment arguing that the Property Owners were precluded from filing suit in circuit court since they pursued appeals through the State’s administrative agencies. The circuit court agreed and granted summary judgment for the State, holding that the denial of wetland fill and sewer permits did not constitute a taking or violate the Property Owners’ equal protection rights. Although the Property Owners filed an appeal to the Court of Special Appeals of Maryland, prior to its decision, the Court of Appeals of Maryland granted certiorari on its own initiative.

While the Court noted the Property Owners’ contention that the 1992 Policy violated the Equal Protection Clause of the United States Constitution and Article 24 of the Maryland Declaration of Rights, the Court found that “rational basis” was the appropriate standard of review. *Neifert*, 395 Md. at 505, 910 A.2d at 1111. The Court reasoned that since the Property Owners’ classification was not based on race, alienage, or national origin they were not subject to a heightened standard of review. *Id.* Under rational basis review, the Property Owners had to demonstrate that the State granted sewer and wetland fill permits to lots “similarly situated” within the same County, and the disparate treatment did not serve a legitimate state purpose. *Id.* at 506, 910 A.2d at 1112.

According to the Court, the Property Owners were unable to prove the 1992 Policy was not rationally related to a legitimate state interest. First, the Court held that Property Owners’ lots were not similarly situated to those lots that received sewer service under the 1992 Policy, because the Property Owners conceded that their property contained wetlands. *Id.* at 508, 910 A.2d at 1113. Second, the Court found the 1992 Policy, which made a distinction between wetlands and non-wetland areas, served several legitimate state purposes including the protection of natural resources and the fiscal management of the sewer connection program partially financed by the EPA. *Id.* at 509-12, 910 A.2d at 1113-15. Therefore, according to

the Court, the 1992 Policy addressed all fairness issues by clarifying for all Property Owners the environmental prohibitions detailed in the EPA's grant and the alternative procedures available for pursuing a sewage connection permit. *Id.* at 511-12, 910 A.2d at 1115.

The Court addressed the preclusion argument raised by the State and found that the Property Owners were not precluded from filing an action in circuit court despite their exhaustion of appeals through the State's administrative agencies. *Neifert*, 395 Md. at 507-09, 910 A.2d at 1111-13. The Court cited three factors to determine preclusion including whether the agency acted in a judicial capacity, whether the issue was "actually" litigated, and whether the resolution of the issue was necessary to the agency's decision. *Neifert*, 395 Md. at 507, 910 A.2d at 1112. The Court held that the Property Owners were not collaterally estopped by the administrative decision because the Department primarily focused on whether the Property Owners' lots were eligible for sewer service under the EPA Consent Order and did not directly address the issue of whether their lots were "similarly situated" to other lots that received sewage connection service. *Id.* at 507, 910 A.2d at 1113.

The Court also addressed Appellant's assertion that denial of sewer and wetland fill permits by the 1992 Policy constituted a regulatory taking. *Id.* at 516-17, 910 A.2d at 1118-19. Property Owners claimed the 1992 Policy rendered their lots unable to be developed, despite their acknowledgment that their lots contained wetlands prior to the 1992 Policy. *Id.* at 518, 910 A.2d at 1119. The Court's analysis of the factors of a regulatory taking focused on the financial impact of the regulation, the degree to which the regulation conflicted with investment interests, and the nature of the regulatory action. *Id.* at 517, 910 A.2d at 1118-19. The Court found the Property Owners' lots, which were restricted to residential use, remained unable to be developed prior to the implementation of the sewer system and creation of the 1992 Policy. *Id.* at 518, 910 A.2d at 1119. Additionally, the Court asserted that the denial of sewer and wetland fill permits by the State was not the proximate cause of the Property Owners' lots remaining undeveloped. *Id.* at 518, 910 A.2d at 1119. The Court cited the implementation of the County's seasonal testing program, established in 1972, which determined the Property Owners' lots contained wetlands as well as Maryland's common law nuisance exception as the primary reasons for the lack of development. *Id.* at 519, 910 A.2d at 1119-20. The Court also determined that the Property Owners' takings claim could not be sustained because access

to sewer service was not a right guaranteed under the United States or Maryland Constitutions. *Id.* at 522, 910 A.2d at 1121. Therefore, the Court reasoned the provision or limitation of a government benefit, such as sewer connection or wetland fill permit, was entirely discretionary by the State. *Id.* at 523, 910 A.2d at 1122.

This case is relevant to the Maryland environmental and real estate practitioner for several reasons. First, this case demonstrates that exhaustion of all administrative remedies does not preclude the pursuit of further legal action through the courts. This case highlights the alternatives available to a litigant, including the filing of multiple actions with both the administrative agencies and circuit courts. Second, this case illustrates that the failure to provide an economic benefit, which may drastically restrict the way land is utilized or developed, does not necessarily constitute a taking under federal or common law. Furthermore, this case demonstrates that claimants have a particularly high standard to meet in order to establish an equal protection violation through the denial of an economic benefit such as sewer connection or wetland fill permits. While the Property Owners were aware that their land contained wetlands, this case leaves open the question of whether a party could maintain a takings claim if knowledge accrues subsequent to any state or federal regulation.