

New York Supreme Court
Appellate Division—Third Department

ROBERT GABRIELLI, DAVID ROEHRS, SHAWANGUNK RESERVE, INC.,
GEORGE SIFRE and KEVIN ZRALY,

Petitioners-Plaintiffs/Respondents,

-against-

TOWN OF NEW PALTZ, TOWN BOARD OF THE TOWN OF NEW PALTZ,
SUSAN ZIMET, as Supervisor of the Town of New Paltz, TOWN OF NEW
PALTZ PLANNING BOARD, TOM WIACEK, as the Town of New Paltz
Building Inspector, RODNEY WATROUS, as the Town of New Paltz
Code Enforcement Officer, and JAMES BARBOUR, as the Town of
New Paltz Wetlands Inspector,

Respondents-Defendants/Appellants.

**BRIEF OF RIVERKEEPER, INC. AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENTS-DEFENDANTS/APPELLANTS**

Daniel E. Estrin, *counsel of record*
Lauren Bachtel, Legal Intern
Pace Environmental Litigation Clinic, Inc.
78 North Broadway
White Plains, New York 10601
(914) 422-4343

Of counsel:

Michael P. Dulong
Krista Yacovone
Riverkeeper, Inc.
20 Secor Road
Ossining, New York
(914) 478-4501

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INTRODUCTION

At issue in this appeal is whether the Town of New Paltz (“the Town”) will be able to provide its residents with the economic, public health, environmental, and other benefits that would be provided by the Town’s Wetland and Watercourse Protection Law, Local Law No. 5 of 2011 (“Wetlands Law” or “the Law”). The Town enacted the Wetlands Law in order to:

protect the health, safety and well-being of the citizens of the Town of New Paltz and of property therein by preventing the despoliation and destruction of wetlands, waterbodies and watercourses, and associated buffer areas, collectively referred to . . . as "regulated areas," recognizing their varying ecological, water quality, and recreational values. The Town of New Paltz hereby regulates activities that may cause a substantial adverse effect on the function served by regulated areas or the benefits derived therefrom.

Wetlands Law, § 139-1. Notably, the Wetlands Law does not flatly prohibit destruction of, or development on or near, these important resources, but instead establishes a legal framework through which such “regulated areas” may be identified, and property owners may apply for permits to develop such areas that may exist on their property. *See* Wetlands Law §§ 139-12, 139-14, 139-15.

This *amicus curiae* brief is intended to make two primary points. First, Riverkeeper wishes to ensure that the Court fully understands the vital public purposes that wetlands serve, and the important governmental interest that municipalities have in protecting them. The issue will be addressed in Point I, *infra*.

Second, Riverkeeper wishes to apprise the Court that, having carefully reviewed the Town's Wetlands Law, along with several dozen other local wetlands laws enacted by municipalities around the State,¹ there is nothing novel, unconstitutionally vague or uniquely onerous about the legislative approach that the Town of New Paltz has taken in its Wetlands Law. Indeed, it follows in the footsteps of virtually all of the other municipalities across the State that have also enacted local wetlands laws. In fact, the Town's Wetlands Law is less vague and/or onerous than many of these other laws. Riverkeeper will address this issue in Point II, *infra*. Riverkeeper also respectfully refers this Court to Appendix A to this brief, which is a survey of local wetlands laws enacted by New York State municipalities that have been identified by Riverkeeper as of July 2013.

For these reasons, as more fully discussed below, Riverkeeper respectfully requests that the Court reverse the order and judgment of Supreme Court, Ulster County challenged in this appeal.

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus curiae, Riverkeeper, Inc. ("Riverkeeper") is a member-supported watchdog organization dedicated to defending the Hudson River and its tributaries and protecting the drinking water supply of nine million New York City and Hudson

¹ See Appendix A hereto, a survey listing all of the local wetlands laws identified by Riverkeeper throughout the State of New York. The table, and several of the laws listed therein, are discussed *infra*, in Section II of this brief.

Valley residents. For more than 44 years, Riverkeeper has been New York’s clean water advocate. It has worked to establish globally recognized standards for waterway and watershed protection, and has been a leader in advocating for the preservation and restoration of critical habitat in the Hudson River estuary.²

ARGUMENT

POINT I

The Town’s Wetlands Law Would Protect Critical Water Resources that Provide Economic, Public Health and Safety, and Environmental Benefits to Town Residents.

As noted above, the stated purpose for the Wetlands Law is “to protect the health, safety and well-being of the citizens of the Town of New Paltz and of property therein by preventing the despoliation and destruction of wetlands, waterbodies and watercourses, and associated buffer areas . . . recognizing their varying ecological, water quality and recreational values.” Wetlands Law § 139-1. The Wetlands Law was supported by an extensive list of legislative findings, including, *inter alia*:

Federal, state, and local agencies and private researchers highlight numerous values and beneficial services of wetlands, which are important to the health and welfare of the people of the Town of New Paltz. These include, but are not limited to, the following:

² The most current information on Riverkeeper’s work can be found on its website at www.riverkeeper.org. A simple search of the word “wetlands” on the Riverkeeper website will reveal dozens of wetlands-related matters on which Riverkeeper has engaged in advocacy in recent years.

(1) The protection of water quantity and quality by preserving sources of surface water, recharging groundwater and aquifers, serving as chemical and biological oxidation basins, serving as nutrient traps for nitrogen and phosphorus, filtering pollutants, and/or functioning as settling basins for naturally occurring sedimentation.

(2) The protection of aquifers and waterbodies that are and may be used for water supply purposes.

(3) The protection of stream channel and stream bank stability, thereby controlling and reducing erosion, flooding, and related property damage.

(4) The control of floodwater and stormwater by slowing water runoff and absorbing and temporarily storing water, thus helping to protect downstream areas from flooding. Public health and private property in one part of a watershed may be harmed if wetlands are destroyed in a different part of that watershed.

(5) The provision of important breeding, nesting, feeding, migratory, cover, and wintering habitat for diverse fish and other wildlife species, including many listed as "special concern," "threatened," "endangered" and "rare" by New York State or other government entities, including the United States Fish and Wildlife Service. The perpetuation of scores of species depends upon them. Many of the species are migratory and must have nesting, migration, and wintering habitat. The destruction of one kind of wetland habitat in one place may reduce populations of wildlife elsewhere. Vernal pools in particular are unique and critical habitats for native species of amphibians and reptiles.

(6) Supplying food and organic detritus that support the fish and wildlife of adjacent waters.

(7) The support of distinctive and less common noninvasive vegetative associations specifically adapted for survival in low-oxygen environments.

(8) The provision of areas of unusually high productivity that support significant biological diversity and help to maintain ecological integrity.

(9) The provision of recreational uses throughout the Town directly and by supporting recreation provided by other areas. Such recreation includes hunting, fishing, boating, hiking, bird-watching, photography, camping and other uses, which are a social and economic value to the Town.

(10) The provision of outdoor laboratories and living classrooms for environmental studies.

(11) The provision of open space and visual relief from residential and commercial development and sense of connection with the natural world.

Wetlands Law § 139-2(C). The Town's legislative findings are fully supported by formal federal and state governmental policy. Wetlands do, in fact, provide many important public functions, including aiding in groundwater recharge and water retention and detention, as well as providing habitat and food for diverse species. Wetlands are like sponges, absorbing and retaining flood and stormwaters to reduce erosion and prevent downstream flooding, which reduces the risk of property damage and loss of life. U.S. ENVTL. PROT. AGENCY ("EPA"), 843-F-01-002C, FUNCTIONS AND VALUES OF WETLANDS (2001);³ wetlands then slowly release stored waters, allowing for the recharge of surface waters, ground waters, and aquifers that may feed local drinking water supplies. *Id.*

Wetlands also perform crucial water filtration functions, trapping pollutants and nutrients such as nitrogen and phosphorus and removing them from water supplies. *Id.* In addition, wetlands are biologically productive resources with

³ Available at <http://water.epa.gov/type/wetlands/outreach/upload/functions-values.pdf>.

abundant vegetation and shallow waters that provide diverse habitats for fish and wildlife species to flourish. *Id.* By fostering healthy drinking water and fish populations, improving recreational opportunities, and providing pollution control and flood protection benefits, wetlands positively contribute to local and national economies and reduce cost burdens on regulatory authorities.

Wetlands in New York State are currently threatened by human activities, which can lead to wetland loss or degradation. N.Y. ENVTL. CONSERV. LAW (“ECL”) § 24-0105 (McKinney 2013) (characterizing wetlands as “invaluable” and describing activities that have resulted in wetland loss or spoilage as well as future threats to these resources). Human activities, particularly development projects, often alter water quality, quantity, and flow rates, increase pollutant inputs, and affect species composition in wetlands as a result of resource disturbance and the introduction of non-native species. EPA, 843-F-01-002D, THREATS TO WETLANDS (2001).⁴ These changes prevent wetlands from effectively providing beneficial functions to human and natural communities.

The destruction and degradation of wetlands is compounded by the fact that many of these vital, nonrenewable resources remain unregulated. Federal and state agencies often do not have jurisdiction over smaller wetlands and are limited in their ability to take effective enforcement and compliance actions by resource

⁴ Available at http://www.epa.gov/owow/wetlands/pdf/threats_pr.pdf.

constraints. ECL § 24-0105; *see* Wetlands Law §§139-2(H)-(J). Municipalities thus attempt to “fill the gap” in federal and state wetland protection laws by enacting local laws. *See* Appendix A.

As previously noted, the importance of wetlands resources, coupled with ongoing wetland loss and degradation and the deficiency of federal and state oversight, has led several dozen municipalities across New York State to adopt wetland protection laws that restrict property owners from encroaching on wetlands, their buffers, and other watercourses unless they obtain a permit. As discussed below, the requirements found in virtually all municipal wetlands laws in effect in New York State were crafted in response to the ecological and recreational benefits that wetlands provide and in recognition of the practical impossibility for municipalities to survey, delineate and map every single regulated area before requiring property owners to seek a permit. The obligations of residents under the Town’s Wetlands Law are not vague, and the law is far less onerous than many other local wetlands laws enacted by municipalities across the state. *See* Appendix A.

POINT II

The Town of New Paltz's Wetland and Watercourse Protection Law Is No Different from, and Requires Less of Permit Applicants than, Many Other Wetland and Watercourse Protection Laws in Effect in New York State.

A. The Wetlands Law Is Not Unconstitutionally Vague.

Supreme Court ruled that the Wetlands Law is unconstitutionally vague because the Town did not identify in advance the precise location of each regulated wetland within the Town subject to the Law. The Court's analysis of the vagueness issue was as follows:

Wetlands Law 139-6(B) places the burden on the property owner to determine if his or her property lies in a wetland designation area or is affected by adjoining wetland property. . . . This provision of the Wetlands Law fails to identify the wetland areas and properties in the Town that are subject to its restrictions. . . . A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary and discretionary enforcement. . . . In this instance, this Court finds the Wetlands Law vague as it invites arbitrary or discriminatory enforcement and application.

Gabrielli at 9-10.

Supreme Court thus essentially ruled that every regulated area, and every affected lot must be surveyed and mapped by the Town at its expense to satisfy constitutional due process, even when a clear statutory definition of the regulated areas is provided in the legislation and a free opportunity is provided to have the Town determine the presence or absence of a regulated area. A decision by this

Court to affirm Supreme Court's ruling on this issue would not only reverse decades of jurisprudence with respect to the constitutionality and enforceability of wetlands laws, it would also place in legal jeopardy several dozen other local wetlands laws that have been enacted by municipalities across New York State that take the same or a similar approach. *See Appendix A.*

Based upon Riverkeeper's research, there are at least 78 municipal wetland and watercourse laws currently in effect in New York State. *See Appendix A.* These laws, although obviously not perfectly identical to the Wetlands Law in all respects, all impose similar requirements on property owners seeking to develop on land that contains wetlands or wetland buffer areas. For example, many of these laws rely on existing state and federal maps as a starting point to identify regulated areas covered by local law. *See Wetlands Law § 139-6(B); see Appendix A.*

For permit applicants who are unsure whether a regulated area exists on their land (i.e., for those properties on which the federal or state governments have not already delineated wetland boundaries on their own maps), the Wetlands Law provides for a wetlands inspector to visit the property "at the sole cost of the municipality." Wetlands Law § 139-6(D)(1) (emphasis added). While numerous other municipal wetland laws across the State offer the services of a wetland inspector, the Town of New Paltz is the only municipality that Riverkeeper has identified that does not shift the cost of the inspector's initial delineation services

onto the permit applicant. This virtually eliminates any financial burden placed on Town property owners by the Wetlands Law in order to determine the applicability of the law to their property.

Many other municipal wetland protection laws in New York State require much more of the applicant. For example, the Town of New Castle requires permit applicants to hire their own wetlands inspector to delineate wetland boundaries at least one year before filing a permit application. *See* Town of New Castle Wetland & Watercourse Law § 137-5(B).⁵ The wetlands inspector's results subsequently may be reviewed by a land surveyor or other applicable professional (e.g., hydrologist, biologist, et cetera) at the approving authority's discretion. *Id.* The Town of New Castle can require permit applicants to pay for these other professionals as it deems "reasonably necessary to enable it to review [the permit] application as required by law." *Id.* § 137-5(L). Similarly, in the Town of Ossining, the applicant is responsible for retaining a specialist to determine the boundaries and buffers of regulated areas. Town of Ossining Wetland & Watercourse Law § 105-3(A).⁶ The Town of Ossining also may hire additional professionals to survey the land, paid for by the applicant. *Id.*

⁵ Available at <http://www.ecode360.com/11774386?highlight=wetlands,wetland#11774386>.

⁶ Available at <http://www.ecode360.com/OS0797>.

Other municipal wetland and watercourse laws currently in effect require even more of the applicant. In some instances, the municipal law does not reference any kind of map. *See* Appendix A. In other cases, the municipal law provides no guidance or assistance to a permit applicant trying to determine whether a regulated area exists on his or her property. In the Town of Woodbury, for example, there is no specified delineation process; the law only requires permit applications

to include a detailed description of the regulated activity, a map showing the area of freshwater wetland or adjacent area directly affected with the location of the proposed regulated activity thereon, a deed or other legal description describing the subject property and such additional information as the agency deems sufficient to enable it to make the findings and determinations required under this chapter.

Town of Woodbury Local Law §165-5(B)(1).⁷ Similarly, the Town of Sweden requires the permit application to “include a detailed description of the regulated activity and a map showing the area of freshwater wetland or adjacent land directly affected, with the location of the proposed activity thereon.” Town of Sweden Local Law § 117-5(B).⁸

The Wetlands Law is not an anomaly among New York State wetland protection laws. Rather, the Law follows the same general format as most of the dozens of other municipal wetlands laws in effect today. In subscribing to this format, the Wetlands Law imposes reasonable requirements on permit applicants

⁷ Available at <http://woodburyny.org/towcode2.html>.

⁸ Available at <http://www.ecode360.com/search/SW0122?query=wetlands>.

that are not overly onerous and are much clearer in terms of setting forth applicant obligations than numerous other wetlands laws around the State. To uphold the determination of the court below with respect to the purported vagueness of the Wetlands Law would be to call into question the legality of virtually all of these municipal wetland protection laws that currently provide crucial economic, public health and environmental benefits to local communities in New York.

B. It is Unnecessary, Impractical, and Unduly Burdensome for the Town to Delineate in Advance of Enacting its Wetlands Law Every Single Regulated Area Within its Borders.

The lower court's ruling essentially prevents the Town from passing a law requiring permits for developing regulated areas before it maps every single regulated area within its borders. An attempt to delineate the exact boundaries of every wetland and all of their buffer areas, however, would be a significant burden and an unnecessary and infeasible exercise. It is practically difficult and virtually impossible—from the perspectives of both cost and the difficulty of obtaining legal access in the absence of a permit application—for the Town to send wetlands delineators to survey and map every wetland on every property within Town borders. Yet, this is exactly what would be required to meet muster under Supreme Court's analysis, *i.e.*, to create a complete wetland and watercourse map prior to enacting a law that requires property owners to obtain a permit in order to build on or near a regulated area.

First, such an endeavor would be a huge waste of resources. Unless a landowner seeks to develop a regulated area on her land, there is no reason for the Town to delineate wetland boundaries because the applicability of the Law will not be triggered. To send a delineator out to every parcel of land within Town borders would cost the municipality significant time and money—a cost that would necessarily be incurred by Town taxpayers—for little benefit.

Second, a delineator attempting to survey and map wetlands on every parcel of land within Town borders could face substantial restrictions on accessing private property. There is significant question as to whether citizens who have no interest in building on an undeveloped portion of their property would allow municipal employees or agents access to their land for delineation purposes. It is for this reason that federal and state agencies primarily use aerial photography to survey and map larger wetlands. However, as previously noted, the utility of these state and federal maps is limited in that they generally only include wetlands above a certain size threshold. For example, New York State freshwater wetlands maps typically only map wetlands that are 12.4 acres in size or larger. *See* ECL § 24-0301. Yet many smaller wetlands serve the vital functions discussed above and are in need of protection at the municipal level. *See* Wetlands Law § 139-2(J).

C. The Wetlands Law Is Clear That It Does Not Flatly Prohibit Property Owners from Encroaching upon Wetlands on Their Land.

Petitioners-Respondents argued below that the application requirements imposed by the Wetlands Law will impede their ability to develop their own land. Specifically, they alleged that they will be unable to discern whether their activities violate the Law, thereby preventing development for fear of incurring criminal penalties. This argument distorts the plain meaning of the Law. The Law clearly does not flatly prohibit development on lands with wetlands, but simply requires anyone proposing to carry out a regulated activity (as defined by section 139-8 of the Law) to apply for a permit. The Law further allows property owners who are unsure whether their intended activity is exempt from permit requirements, or whether certain procedural requirements apply, to schedule a pre-application conference with the Wetlands Inspector. Wetlands Law § 139-7(C). In this way, the Wetlands Law is no different from numerous other local code requirements such as the need to obtain a building permit before commencing a construction project. Furthermore, the Wetlands Law provides an appeal process for anyone whose permit application is denied by the Town Planning Board. *Id.* § 139-16. The Wetlands Law therefore accomplishes its stated goal of protecting wetlands, and by extension protecting the health and safety of Town citizens, without categorically prohibiting development and without imposing unreasonable obligations or restrictions on property owners.

CONCLUSION

Because wetlands and their buffers play a critical role in maintaining the health of communities and their environments, and because the Wetlands Law is typical of (but less onerous than) many local wetland protection laws enacted by New York State municipalities, Riverkeeper respectfully urges this Court to issue an order and judgment reversing the decision of Supreme Court, Ulster County in its entirety and dismissing the petition/complaint in its entirety.

Respectfully submitted,

Daniel E. Estrin
Lauren Bachtel, Legal Intern
Pace Environmental Litigation Clinic, Inc.
Attorneys for Amicus Curiae Riverkeeper, Inc.
78 North Broadway
White Plains, New York 10603
(914) 422-4343

Of counsel:

Michael P. Dulong
Krista Yacovone
Riverkeeper, Inc.
20 Secor Road
Ossining, New York 10562
(914) 478-4501

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White Plains, New York