11th Circuit asked to revive case against developer that filled in Georgia wetland

An appellate panel seemed likely to give conservation groups another chance to pursue their case, with one judge saying he was "very sympathetic" to arguments that the filling in of a wetland area caused aesthetic harm.

KAYLA GOGGIN / February 11, 2022

(Image by Dagmar Weingartz from Pixabay via Courthouse News)

ATLANTA (CN) — The 11th Circuit appeared poised on Friday to give two Georgia environmental conservation groups another chance to pursue allegations of Clean Water Act violations against a real estate developer they say landscaped over a wetland without proper permits.

Attorney John Brunini of Butler Snow found a highly receptive audience in the three-judge panel as he argued via Zoom conference that a Georgia federal judge made a mistake when he tossed out the groups' claims based on a lack of legal standing.

U.S. District Judge J. Randal Hall ruled last year that the Glynn Environmental Coalition and the Center for a Sustainable Coast failed to show they suffered any environmental injury based on recreational or aesthetic harm.

The groups sued real estate developer Sea Island Acquisition in 2019, claiming that the developer's move to fill nearly half an acre of wetland on St. Simons

Island was not compliant with a permit issued under the Clean Water Act by the U.S. Army Corps of Engineers.

The complaint alleged that the developer landscaped over the wetland rather than build the office building the permit allowed, harming the surrounding habitat and decreasing the water quality of a nearby creek.

Local resident Jane Fraser also joined the lawsuit, filing an affidavit which alleged that the developer's actions harmed her aesthetic and recreational uses of the land.

Brunini said Fraser has lived in the area near the wetland for more than 25 years and bought property there based on "aesthetic interests."

"She's alleged that as an 82-year-old person, her recreation includes enjoying the aesthetic beauty of the area… We think that alone is sufficient to establish standing," Brunini said.

U.S. Circuit Judge William Pryor, a George W. Bush, appointee said he was "very sympathetic" to Brunini's argument. Pryor pointed to the U.S. Supreme Court's 1999 ruling in *Friends of the Earth v. Laidlaw Environmental Services* as the final word on the issue.

"The Supreme Court has told us that an aesthetic injury is an injury for standing purposes so long as the individual uses the affected area and is a person for whom the aesthetic value of the area will be lessened by the challenged activity," Pryor explained. "You've got a client who says I use this area, I've seen this particular site where there's been a fill. I've derived aesthetic pleasure from it before… and it's not aesthetically pleasing anymore."

"It seems to me, that's enough," the judge added.

Bolstering the plaintiffs' arguments, Barack Obama-appointed U.S. Circuit Judge Adalberto Jordan said, is the fact that Fraser owns property near the wetland. According to Brunini, Fraser's property is less than a third of a mile away.

"So, it's not as if she's a person, at least from the pleadings, who's visiting the area once a year or every two or three years as a recreational tourist or something," Jordan said. "She's an inhabitant of the area."

U.S. District Judge Michael Brown, a Donald Trump appointee sitting by designation from the Northern District of Georgia, also chimed in, noting that the complaint and affidavit from Frasier "explained a good bit about the degrading of the water quality and the harm to wildlife in a way that's not hypothetical but that's actual and imminent."

Brunini said experts for the plaintiffs testified that the developer's activities decreased the wildlife and habitat in the area.

Arguing on behalf of Sea Island Acquisition, attorney James Durham of Hall Booth Smith told the panel that Fraser's claims do not meet the standards for showing a "concrete, particularized and actual or imminent – not conjectural or hypothetical" injury.

Durham argued that if the panel were to see the case through Fraser's eyes, "That basically means any time a wetland is removed, it's always going to be sufficient standing to bring such a lawsuit."

But the panel did not seem persuaded by his arguments.

Acknowledging that "aesthetic harm is sort of hard to wrap your head around," Jordan explained that the allegations made by Fraser in her affidavit include claims that she derived aesthetic pleasure from the wetland before the alleged Clean Water Act violation but that the wetland and local wildlife have since been diminished.

"I'm not sure that's speculative and conjectural," Jordan said.

Pryor agreed, saying, "She says it's less aesthetically pleasing, from which I would infer reasonably that she has seen it again after the fill and she has seen that it is less pleasing."

"What more do you need?" he added.

The case is likely to be remanded back to the district court, which will reevaluate the claims against the developer.

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