

# What is the Highest and Best Use of Wetlands? Think Mitigation

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At first glance, wetlands areas may be considered as having little or no value in a condemnation case due to the federal and state limitations on development and use. The Army Corps of Engineers and the United States Environmental Protection Agency jointly define wetlands as: “[t]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”<sup>1</sup> Under the Watershed Protection and Flood Prevention Act, Congress determined that it is in the public interest to preserve, restore and improve wetlands in order to conserve water and protect certain wildlife.<sup>2</sup> If a property owner disturbs or destroys a wetlands area, the damage must be mitigated by creating or restoring an equivalent amount of wetlands either on-site or on adjacent or nearby land.<sup>3</sup> As a result, any area designated as a wetland may not be used or developed without approval permits from the Army Corps of Engineers and without significant development costs to the property owner.

In the condemnation context, this impacts the determination of fair market value and an appraiser’s opinion of the highest and best use of land. Under Georgia law, fair market value is defined as the price that a willing seller and a willing buyer agree is a fair price after due consideration of all the elements reasonably affecting value.<sup>4</sup> One of those elements affecting fair market value is the highest and best use of the property.<sup>5</sup> The highest and best use must be a legally permissible use, and the jury may consider all purposes to which the property might be legitimately put even at a future date.<sup>6</sup> “Legally permissible” use often refers to a change in zoning or future use, i.e., valuing raw land for its commercial or residential development potential.<sup>7</sup> To be considered for fair market value, the land must be reasonably capable of such different or future use on the date of taking.<sup>8</sup>

If a property owner cannot legally or reasonably develop the land being condemned due to wetlands requirements, how can wetlands be counted in the valuation? Mitigation. Wetlands mitigation banks are areas where large amounts of wetlands can be restored and preserved, creating a reserve of mitigation credits to be sold to builders needing

wetlands permits for construction and development projects.<sup>9</sup> There are several scenarios in which mitigation can play a significant part in an appraisal, and provide a basis for valuing the property as more than undeveloped swamplands. A condemning body, such as the Georgia Department of Transportation, has the authority to condemn property for use as wetlands mitigation associated with their construction projects.<sup>10</sup> The most valuable portion of a tract of land could be condemned in fee simple or be encumbered by easements, leaving a remainder that is comprised in whole or in part of wetlands. Or, a condemnor may condemn that portion of land that the owner had intended to use for on-site mitigation or for sale as a mitigation bank. In any case, land that is appropriate for mitigation banks should be considered in determining the property’s highest and best use, and valued as bankable credits that potentially hold substantial value.

The value of wetlands mitigation was addressed in *Department of Transportation v. Southeast Timberlands, Inc.*, in which DOT condemned approximately 378 acres of land in order to mitigate damages to wetlands caused by a nearby road construction project.<sup>11</sup> A jury awarded the property owner \$886,999 for the fair market value of the land taken and consequential damages to the remainder. On appeal, DOT argued that the trial court erred in admitting the testimony of the owner’s expert regarding the condemned land’s potential use as a wetlands mitigation bank, because the land was not being used for wetlands mitigation on the date of taking.<sup>12</sup> However, the Court of Appeals upheld the trial court’s ruling that allowed both the property owner and his expert to testify that the highest and best use of the property was for wetlands mitigation because such use was legally and reasonably probable as of the date of taking.<sup>13</sup> At trial, the property owner testified that he had planned on using the condemned portion of the property for onsite mitigation of a golf course community project. The property owner’s expert testified that the land could have been restored to wetlands at a cost of \$350,000, thereby producing between 1,286 and 1,701 mitigation credits that could have been sold to other developers. This made the subject property particularly more valuable than it would have been otherwise. The Court of Appeals found no abuse of discretion in allowing the testi-

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mony, noting that DOT had plans for the same use, even obtaining a permit to use the condemned property prior to the date of taking.<sup>14</sup>

While the opinion in *Department of Transportation v. Southeast Timberlands, Inc.*, is specific to the facts of that case, it is useful in demonstrating that wetlands mitigation can be a legally permissible use and thus can be considered by a jury in determining value and a property's highest and best use. Land that otherwise would have been useless from a development or a fair market value standpoint can be restored and either preserved for on-site mitigation or marketed as wetlands mitigation credits. Both condemners and condemnees alike should be aware that a wetlands area involved in a condemnation might be more valuable than initially thought—as a wetlands mitigation bank.

### Endnotes

1. Corps of Engineers Wetlands Delineation Manual by Environmental Laboratory, U.S. Army Corps of Engineers Waterways Experiment Station, 3909 Halls Ferry Road Vicksburg, MS 39180-6199.
2. See 16 U.S.C.A. § 1001; see also Memorandum of Agreement between The Department of the Army and the Environmental Protection Agency Concerning The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, effective February 8, 1990.
3. See *Dep't of Transp. v. Southeast Timberlands, Inc.*, 263 Ga. App. 805, 589 S.E. 2d 575, 579 (2003).
4. *Central Georgia Power Co. v. Stone*, 139 Ga. 416, 77 S.E.2d 565 (1912).

5. *Dep't of Transp. v. A.R.C. Security*, 189 Ga. App. 34, 375 S.E.2d 42 (1988).
6. *Dep't of Transp. v. Kanavage*, 183 Ga. App. 143, 358 S.E.2d 464 (1987).
7. See *Moore v. State Hwy. Dep't*, 221 Ga. 392, 144 S.E.2d 747 (1965); *State Hwy. Dep't v. Howard*, 119 Ga. App. 298, 167 S.E.2d 277 (1969).
8. *Moore*, 221 Ga. 392, 144 S.E.2d 747.
9. See *Dep't of Transp. v. Southeast Timberlands, Inc.*, 263 Ga. App. 805, 589 S.E. 2d 575, 579 (2003).
10. O.C.G.A. § 32-2-2.
11. *Id.* at 577.
12. *Id.* at 579.
13. *Id.* at 579-80.
14. *Id.* at 580.

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