2014 MUNICIPAL INLAND WETLANDS AGENCY CONTINUING EDUCATION TRAINING

Connecticut's Inland Wetlands and Watercourses Act:
A Legal and Administrative Update

By the Connecticut Attorney General's Office

RECENT COURT CASES

A. U.S. Supreme Court Case

i. *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013)

In 1972, Mr. Koontz bought 14.9 undeveloped acres in Florida. The state subsequently enacted the 1972 Water Resources Act, which established five water management districts to regulate "construction that connects to, draws water from, drains into, or is placed in or across the waters in the state." The Water Resources Act requires a landowner to obtain a permit, which the respective district may condition to ensure development will not harm water resources. In addition, the 1984 Henderson Wetlands Protection Act made it illegal to "dredge or fill in, on, or over surface waters" without a wetlands permit, pursuant to which a district may require an applicant to offset environmental damage by creating, enhancing, or preserving wetlands elsewhere. The St. Johns River Water Management District has jurisdiction over Mr. Koontz's land under both acts.

In 1994, Mr. Koontz applied to develop the northern 3.7 acres of the parcel, which is classified by the state as wetlands. He proposed to raise a section of his land to make it suitable for building and to install a stormwater pond. To mitigate environmental impacts, he offered to foreclose development of the remaining 11 acres by granting to the District a conservation easement. The District rejected the proposal and stated that it would approve construction only if Mr. Koontz either (1) reduced the size of his development to one acre and granted a conservation easement on the remaining 13.9 acres, or (2) agreed to develop 3.7 acres, grant a conservation deed on the remaining 11.2 acres, and hire contractors to improve approximately 50 acres of District-owned wetlands several miles away. Mr. Koontz refused, and the District denied his application.

Mr. Koontz sued under a state law authorizing monetary damages for agency action that constitutes a taking without just compensation. The trial court found the District's actions unlawful under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, which provide that the government cannot condition a permit approval on the landowner's relinquishment of a portion of his property, unless an essential nexus and rough proportionality between the demand and the effects of the proposed development exist. The state appellate court affirmed, but the Florida Supreme Court reversed.

Mr. Koontz then appealed to the U.S. Supreme Court. In a 5-4 ruling, the Court reversed and remanded, holding that a governmental demand for property (the conservation easement) from a permit applicant must satisfy the *Nollan* and *Dolan* requirements for an essential nexus and rough proportionality, even if the agency denies the permit. The majority noted that the *Nollan* and *Dolan* requirements acknowledge the possibility of governmental coercion in the land use permitting context, while accommodating the legitimate need to offset public costs of development through land use exactions.

The majority held that there is no difference that the Koontz property was not physically "taken." Demands for property in the land use permitting context run afoul of the Takings Clause not because they actually take property, but because they impermissibly burden the right to not have property taken without just compensation. It is irrelevant that that the District might have denied Mr. Koontz's application outright without giving him the option of securing a permit by agreeing to spend money improving public lands. The Court also held that a demand for money (rather than property) must also satisfy the *Nollan* and *Dolan* requirements. The condition that the applicant pay for improvements is directly linked to a proposed development, which implicates the central concern of both *Nollan* and *Dolan*: the risk that an agency may use its power to pursue governmental ends that lack the essential nexus and rough proportionality to the effects of the proposed use.

Major Points

- In the permitting context, a government agency may legitimately offset the public costs of development through land use exactions, but those exactions cannot be extortionate.
- A demand by an agency for a property interest (such as title or an easement) or expenditure of money from a permit applicant must have an essential nexus and rough proportionality with the effects of the proposed development.

B. Connecticut Appellate Court Cases

i. *Three Levels Corp. v. Redding Conservation Comm'n*, 148 Conn. App. 91 (2014)

The plaintiff is a prospective purchaser of a 14.19-acre parcel which encompasses 1.75 acres of wetlands and a vernal pool. The parcel lies adjacent to floodplain wetlands and the Saugatuck River, which feeds a major public drinking water supply.

The plaintiff applied for a permit to develop a ten-unit housing development, which entailed the installation of a septic system, construction of a stormwater drainage system, earth moving, and the laying of driveways. The Commission held a public hearing across four nights, and ultimately denied the application. The Commission concluded that, although the proposed activities would not adversely impact the wetlands on site, they would impact the Saugatuck River and its associated wetlands. Specifically, the Commission concluded that:

(1) the plaintiff proposed insufficient pretreatment of stormwater before discharge;
(2) the soil would insufficiently renovate stormwater and septic effluent before discharge;
(3) the application was incomplete because the plaintiff failed to present sufficient information to enable the Commission to determine possible impacts to the Saugatuck River, the impact of pathogens and septic effluent, and the relationship between the 100- and 500-year flood lines and the elevations of the proposed septic systems; and
(4) feasible and prudent alternatives to the proposal may exist.

The plaintiff appealed to the Superior Court, which sustained the appeal, finding that none of the four reasons was sufficient to deny the application. The Commission then appealed to the Appellate Court.

Substantial Evidence of Adverse Impacts

The Appellate Court first considered whether the record contained substantial evidence supporting the Commission's conclusion that the proposed regulated activities would likely have an adverse impact. During the course of its consideration of the application, the Commission heard testimony from two expert witnesses: its own expert, MacBroom, and the plaintiff's expert. In accordance with legal authority and its prerogative, the Commission found MacBroom's testimony most credible. MacBroom testified at one night of the public hearing and submitted four letters addressing various aspects of the application. In regard to erosion and soil control measures, he testified that they were "minimal," "not sufficient to avoid having some type of adverse impact on wetlands," and that the likelihood of an adverse impact "is very strong." In addition, the underground filtration system will be difficult to maintain and "[i]f it's not maintained, and this is a hypothetical, then you would have adverse impact on the wetland system." He noted that temporary sediment basins were proposed "at the base of the top of a hill . . . so the sediment is not likely to reach the basins and is more than likely to discharge into the wetlands area." The stormwater drainage system was "a particular concern" in part because it lacked "surface water treatment measures . . . to treat runoff prior to infiltration" and biological treatment or nutrient removal," meaning "these materials will go into the soil and probably the wetland."

The court reviewed recent precedent concerning the substantial evidence standard: *River Bend Associates, Inc. v. Conservation and Inland Wetlands Commission* (in review of redevelopment of former agricultural land, the commission "made no specific finding" that "any specific harm to the wetlands or watercourses will occur" from pesticide residue in soil), *Avalon Bay Communities v. Inland Wetlands and Watercourses Commission* (commission's finding that some sediment will enter wetlands during construction is not substantial evidence because "there is no specific finding of any actual adverse impact"), and *Estate of Casimir Machowski v. Inland Wetlands Commission* (potential failure of detention basin, with "no evidence specifically indicating what effect, if any, a failure . . . would have on the downslope wetlands" insufficient to support denial).

The court acknowledged that MacBroom's testimony was detailed, but "he did not identify any specific, actual harm that was likely to occur to the wetlands or the Saugatuck River." Testimony of "some type" of impact does not satisfy the substantial evidence test. "Absent evidence that identifies and specifies the actual harm resulting therefrom, a commission cannot find that the proposed activities will, or are likely to, adversely impact wetlands or watercourses."

Completeness of the Application

The court next considered the Commission's finding that the plaintiff's application was incomplete. In its review, the lower court had applied a weight-of-the-evidence standard, and concluded that the record failed to support the Commission's finding of incompleteness.

The Appellate Court confirmed that the proper standard of review is substantial evidence, which is less demanding than the weight-of-the-evidence standard. The court exhaustively reviewed the record for MacBroom's testimony at the public hearing and in three separate letters he submitted identifying potential impacts to the off-site wetlands and the Saugatuck River for which the Commission lacked sufficient information. These included for example, the potential impact of the use of household chemicals at the proposed development. The court concluded that, based on the record evidence of MacBroom's concerns, and the plaintiff's response, that the Commission required additional information to make a determination. Accordingly, the Commission's denial of the application for incompleteness was justified.

The Commission's Jurisdiction to Regulate Stormwater Discharges

In its decision sustaining the plaintiff's appeal, the Superior Court acknowledged an issue raised by the plaintiff that the Commission lacked jurisdiction to regulate discharges of stormwater because the Commission did not have regulations to do so. The court was unconvinced by the plaintiff's arguments, but noted that the wetlands regulations are vague and do not specifically reference stormwater and do not provide standards or guidelines for compliance.

Although the court did not decide the issue, the Appellate Court addressed it because it raised the question of the Commission's jurisdiction. The court considered the stated purpose in § 22a-36 to protect wetlands, and the specific criteria in § 22a-41(a), specifically the "impacts of the proposed regulated activity on wetlands and watercourses outside the area for which the activity is proposed." In addition, § 22a-42a(f) provides that if an agency will regulate activities outside of wetlands and watercourses, the regulation must be consistent with regulations governing activities within wetlands and watercourses and apply to only activities that may impact them.

The court reviewed the Commission's regulations and found that they provide for regulation of activities that will likely affect "wetlands and watercourses outside the area for which the activity is proposed." In addition, the regulations define the key terms "regulated activity" and "significant impact activity" to include wetlands and watercourses both on site and off site. Although the regulations do not set standards for stormwater discharges, the court acknowledged the long history under the IWWA of agencies establishing applicable site-specific standards through expert testimony in the context of the public hearing. In addition, the court noted that its conclusion was bolstered by the DEEP's model regulations, which do not contain guidelines for stormwater discharges.

The court reversed the Superior Court and remanded the case with direction to render judgment dismissing the plaintiff's appeal.

Major Points

- "Absent evidence that identifies and specifies the actual harm resulting therefrom, a commission cannot find that the proposed activities will, or are likely to, adversely impact wetlands or watercourses."
- A commission's conclusion that an application for a permit is incomplete must be supported by substantial evidence in the record.
- With proper regulatory authority, a commission may consider impacts to wetlands or watercourses located off the site of the proposed activities. In considering impacts to wetlands and watercourses presented by stormwater runoff, the commission need not establish standards by regulation, but may rely on expert testimony.

ii. *Frances Erica Lane, Inc. v. Stratford Board of Zoning Appeals*, 149 Conn. App. 115 (2014)

In Stratford, the plaintiff owns a parcel comprising twelve acres, of which 4.8 acres are wetlands. The plaintiff wishes to subdivide the parcel into four lots to build a single-family house on each lot. Three of the four proposed lots are located upland of the wetlands, and would require the construction of a road and two driveways over 1,300 square feet of wetlands for access.

Pursuant to § 22a-42(c) of the General Statutes and § 217-4(A) of the Town Charter, the Commission was established in 1988 as the "sole agent for the licensing of regulated activities." Accordingly, the plaintiff applied for and received a permit for the proposed road and driveways.

The plaintiff also applied for a variance from the Stratford zoning regulations. Section 3.14 of the regulations provides that "[n]o new building construction increasing building area including . . . driveways . . . shall be permitted within [fifty] feet of the mean high water line of any waterbody or watercourse or within [fifty] feet of any freshwater inland wetland." The plaintiff applied for the variance, requesting that the fifty-foot limitation be reduced to zero. The Board denied the variance, finding that the plaintiff would not bear a hardship by the application of the zoning limitation.

The plaintiff appealed to the Superior Court, which dismissed the appeal. The plaintiff then appealed to the Appellate Court.

The plaintiff argued that because the Commission is designated as the "sole agent for the licensing of regulated activities," the Commission had exclusive jurisdiction over all activities affecting wetlands. The plaintiff acknowledged the so-called "savings clause" in § 22a-42(g), which states that the Inland Wetlands and Watercourses Act does not "limit the existing authority of a municipality or any boards or commissions of the municipality." The plaintiff argued, however, that the current version of § 3.14 (establishing the 50-foot limit) was adopted in 1991, after the establishment of the Commission. Therefore, § 3.14 was not an "existing authority" when the Commission was established and was superseded.

The Appellate Court disagreed, noting that § 22a-42(c) provides that a municipal inland wetlands commission is the "sole agent for the *licensing* of regulated activities," and that the requirement to obtain a variance is a distinct requirement. In addition, the court observed that § 3.14 governs only the distance between roads or driveways from a wetland or watercourse, appears consistent with the Commission's jurisdiction, and may be implemented to protect wetlands and watercourses, but to address other valid municipal concerns, such as flooding.

The court observed that § 22a-42a(d)(1) reinforces this conclusion. That section provides that "[n]o person shall conduct any regulated activity within an inland wetland or watercourse which requires zoning or subdivision approval without first having obtained a valid . . . variance . . . establishing that the proposal complies with the zoning or subdivision requirements of the municipality."

The Appellate Court also agreed with the Superior Court's conclusion that the plaintiff had failed to demonstrate a hardship necessary to grant a variance, and affirmed the dismissal of the appeal.

Major Points

- For any project subject to municipal jurisdiction, the municipal inland wetlands agency has exclusive jurisdiction over the licensing of regulated activities that may impact wetlands and watercourses.
- An applicant must satisfy any other applicable zoning or subdivision requirements as implemented by the planning and zoning agency or the zoning board of appeals.
- A municipality may implement zoning requirements that govern activity proximate to wetlands without infringing upon the jurisdiction of the municipal inland wetlands agency.

iii. *Herasimovich v. Wallingford*, 148 Conn. App. 91 (2014)

(The Town of Wallingford is one of the communities within the state that has aquifer resources subject to regulation under the Aquifer Protection Act ("APA"). Conn. Gen. Stat. § 22a-354g *et seq.* The APA, which has numerous similarities to the structure and function of the state's Inland Wetlands and Watercourses Act, including general oversight by the Commissioner of Energy and Environmental Protection ("Commissioner"), allows a duly designated and empowered (by ordinance) administrative body—the municipal aquifer protection agency—to promulgate regulations to discharge its obligations under the APA. The regulatory regime is largely determined by the DEEP, which has promulgated aquifer protection regulations and which has created a model aquifer protection ordinance that municipalities may formally adopt. Among those obligations that municipal aquifer protection agencies must meet is the adoption of regulations that require businesses within the designated "aquifer protection area" to register. The registration process is designed to bring operations into compliance with pollution prevention measures in order to protect the underlying aquifer protection area from spills and discharges that could compromise the aquifer as an actual or potential drinking water supply.)

After having adopted its aquifer protection regulations, Wallingford's agency notified the landowner Herasimovich, who operates a lawn mower sales and service business and whose property lay within the mapped aquifer protection area, that he was required to register. He refused, contending that no "regulated activity" was being performed on his property, because the regulation did not include under its definition of "vehicle" lawn mowers. The agency then proposed amendments ("text amendments") to the definitions of "regulated activity" and "vehicle" that would have more obviously swept Herasimovich's and others' small internal combustion engine repair operations within the reach of the aquifer protection regulations. The agency adopted the amendments after a public hearing. Mr. Herasimovich appealed.

The trial court ruled that there was insufficient substantial evidence on the record of the regulation adoption public hearing to support the text amendments, and, furthermore, that the public notice of the hearing for the consideration of the adoption of the text amendments was deficient. The Wallingford aquifer protection agency and the Commissioner, who had the statutory authority to intervene in the proceedings, appealed. They argued that the trial court had applied the wrong standard of review and the wrong law respecting the legal adequacy of public notice provisions when municipal administrative agencies are required to publish notice.

The Appellate Court agreed with the agency and the Commissioner. First, it found that when an administrative body is acting in its legislative capacity, as when it promulgates or amends its regulations, a lower and more generous standard of judicial review of those actions applies to guide the court. Basically, so long as the agency's action is *reasonably supported by the record* and is *authorized by the enabling statute*, it is entitled to deference by the reviewing court. The APA is designed to prevent contamination to drinking water supplies. Wallingford's text amendments clarified existing registration regulations designed to address the handling of potentially polluting activities within the aquifer protection area. Moreover, under the APA, the Commissioner must approve municipal aquifer protection regulations before they become effective, and here he had done so and that approval was a matter of record. Therefore, the adoption of the text amendments was legally correct and the trial court decision was reversed.

Second, the Appellate Court agreed with the town and the Commissioner that there had been no error in the publication of the legal notice. (Because this was the Wallingford agency's second attempt to adopt these text amendments, the trial court had ruled that the notice should have addressed what the agency

already knew to be Herasimovich's particular objections.) The notice is only required "to fairly and sufficiently apprise those who may be affected of the nature and character *of the action proposed,* in order to make possible intelligent preparation for participation in the hearing." The notice needed to provide the time, date, location and list of issue(s), which had been done. The notice in this case had published the text of the proposed amendments verbatim; nothing more was required, even though because of prior proceedings the Wallingford agency knew of a variety of different arguments that Mr. Herasimovich wished to bring to its attention by way of opposing the application of the regulations to his business. Therefore, the public notice was deemed legally correct and the trial court was reversed on this issue, too.

The Appellate Court ordered the trial court to dismiss Mr. Herasimovich's appeal of the Wallingford agency's decision adopting the text amendments.

Major Points

- When an administrative body adopts regulations or amends them, it acts in a "legislative capacity," to which reviewing courts afford greater deference than when it reviews the decision of an administrative body that has conducted a hearing on a license or permit.
- Even so, deference to an administrative body's legislative actions cannot excuse a failure to: (a) make a sufficient record demonstrating the reasonable relationship of the facts placed in the record to the proposed noticed action; and (b) reasonably relate the facts placed in the record to the purpose and substance of the enabling legislation from which the administrative body derives its authority.
- A proper public notice of a hearing, whether the administrative body is going to be acting legislatively (regulation adoption or amendment) or making a decision on a license or permit, requires the specifics of date, time and location; and also a summary of the nature and character of the proposed action (or, for example, the text of a proposed regulation or amendment), so that someone potentially affected by the administrative body's action can intelligently prepare to participate in the hearing. Individuated "public notice" of a hearing such as this to adopt or amend regulations, however, is not necessary.

C. Superior Court Cases

i. *Indian Spring Land Co. v. Greenwich Inland Wetlands & Watercourses Agency*, Docket No. LND-CV-12-6037682-S (July 19, 2013)

The Indian Spring Land Co. ("Indian Spring") owns a tract of land in the Town of Greenwich that has been duly classified by the State Forester as forest land. In 2012, Indian Spring applied to the inland wetlands and watercourses agency ("wetlands agency") for approval of a forest management plan as an exempt activity under Conn. Gen. Stat. § 22a-40 and also for construction of a gravel access road and associated bridge spanning wetlands under the same exemption. The wetlands agency issued a "letter of permission" acknowledging the proposed forest management plan on the tract as falling within the exemption for silvicultural activities, but separately it issued a permit for the access road and bridge. The permit had several conditions, among which was that the bridge was to be temporary only and had to be removed after each successive yearly slate of proposed activities in the forest had been completed. Indian Spring appealed.

Indian Spring claimed, among other legal positions taken, that the proposed road construction was altogether exempt under the Inland Wetlands and Watercourses Act ("I.W.W.A.") Abutter intervenors (who had standing under CEPA—the Connecticut Environmental Protection Act, Conn. Gen. Stat. § 22a-19) also appealed the decision of the wetlands agency, contesting both acknowledgement by the wetlands agency of the exemption and the permit issued for the road and bridge construction. The Commissioner of Energy and Environmental Protection was joined to the administrative appeal.
The trial court sorted through numerous issues in the appeal. First, the abutter intervenors attacked the notice provided by the company, but the trial court found it adequate. The court determined that the wetlands agency was not required to provide notice in compliance with § 8-7d, because the agency had made none of the prerequisite findings required by § 22a-42a(c)(1) (significant impact; public interest; receipt of a petition). The abutter intervenors had actual notice of the application of Indian Spring as ordered by the wetlands agency, which the trial court deemed legally sufficient under the circumstances.

Second, the trial court disagreed with Indian Spring's claim that the road construction fell within the agricultural exemption and that it ought not to have been culled out by the wetlands agency for separate permitting. The trial court ruled that *any* road construction is unable to lay claim to the exemption set forth in § 22a-40(a)(1), based upon its reading of the phrase "the provisions of this subdivision shall not be construed to include road construction *or* the erection of buildings not directly related to the farming operation" (emphasis added). The trial court read the phrase "disjunctively" and "narrowly" consistent with the language deriving from an exemption provision of the enabling act. A more rigorous interpretation of the exemption was, it said, more compatible with the goal of environmental protection and the purposes of the I.W.W.A. than reading the phrase "conjunctively" as modified by the phrase "not directly related to the farming operation." (In other words, that road construction and the erection of buildings are exempt so long as either is "directly related to the farming operation.")

Third, the trial court disagreed with Indian Spring's claim that its forest land was exempt from regulation by the wetlands agency under a provision of the state's forestry statutes. Conn. Gen. Stat. § 23-65j; § 23-65k. (These statutes allow certain designated towns to regulate forest practices by regulation through their inland wetlands and watercourses agencies, displacing state regulation; Greenwich, however, was not an enumerated municipality.) The trial court concluded that *these forestry practices provisions were not relevant to the wetlands agency's inland wetlands impact consideration of the proposed road*, and the Indian Spring could not claim complete exemption from regulation just because Greenwich had *not* been among the listed towns allowed to regulate forest practices. The issue was *wetlands impacts, not forestry practices.* Thus, consideration of any likely regulated activities under the I.W.W.A. by the wetlands agency was jurisdictionally proper.

Finally, Indian Spring argued that the wetland agency's permit issued for the road and bridge was illegal, because the permit specified in its special conditions that the bridge be temporary only. The trial court's review of the record convinced it that the wetlands agency had not actually made findings on the environmental impacts sufficient to support the conditions that it had imposed, that, for example, the conditions were reasonable and needed for the purpose of mitigation of an adverse impact to either inland wetlands or watercourses. *Conditions have to be supported by substantial evidence*. Since the wetlands agency had not considered this aspect of the matter, the court refused to search the record, and remanded the case to the wetlands agency for further consideration on the existing administrative record.

Major Points

- The public hearing notice provisions of § 8-7d, which apply to proposed actions of an inland wetlands and watercourses agency, are put in play only where the agency engages the

preliminary findings mandated by the I.W.W.A., that is: (a) a finding of likely significant impact; (b) a finding of the matter before the agency as being of likely public interest; or (c) a finding that a petition has been received requesting a public hearing. *Considerations of requests for exempt activities are usually disposed of by way of a request for a declaratory ruling by the agency. Declaratory rulings do not necessitate the convening of a public hearing*.

- According to this court's interpretation, which is only a trial court level decision, *any road construction proposed in wetlands requires a permit and does not constitute an exempt activity under the agricultural exemption set forth in § 22a-40(a)(1) of the I.W.W.A.*
- The Forest Practices Act and any regulations formally adopted by the towns specified in the former regulating forest practices, has no bearing on the applicability of the I.W.W.A. to facts and circumstances within the jurisdiction of an inland wetlands agency. (That includes, by the way, the applicability or not of any exemption set forth in the I.W.W.A.).
- When an inland wetland agency issues a permit and desires to condition it, the agency had an obligation to anchor the imposed conditions in the factual record developed during the public hearing or in the public meeting in which the application to conduct regulated activities is considered. There must exist substantial evidence in the administrative record to support any and all conditions imposed upon the grant of a permit to conduct regulated activities.

ii. *Zappone v. Inland Wetlands and Watercourses Agency of the Town of Woodbury*, Docket No. CV-13-6017477S (April 14, 2014)

This case involved Mr. Zappone's third application (and the Town of Woodbury IWWA's third denial) to build a house, driveway and septic system on his half-acre lot, half of which consists of wetlands soils. The entire lot is located within the Town's 100-foot upland review area. The trial court found that the IWWA's denial was not based on substantial evidence in the record. The Court remanded the matter back to the local commission, directing it to approve Mr. Zappone's third application, subject to any reasonable conditions the commission may impose to ensure that the wetlands and watercourses on and adjacent to the site are protected.

The IWWA provided three reasons for denying Mr. Zappone's third application. The first two reasons for denial, namely that the plaintiff failed to submit feasible and prudent alternatives to his proposed activities, were rejected by the Court as having no basis in the record "in light of the uncontroverted expert opinions documented in the record indicating that any detrimental impact as a result of the proposed development would be mitigated in that the remaining wetlands and watercourses would be benefited by the development." Although the proposed development would result in the removal of 845 square feet of wetlands, in this case, the trial court was satisfied that the experts for both the Town and the applicant were in agreement that the activity would not adversely affect the wetlands. Absent an adverse effect, consideration of feasible and prudent alternatives was not necessary. Alternatively, the court also found that Mr. Zappone's submission of three applications in and of themselves constituted a showing that the last proposal was the feasible and prudent alternative, having the least impact on wetlands and providing an enlarged conservation easement to protect remaining wetlands.

The commission's third reason for denial – that the plaintiff "failed to show that construction and development of this lot will not cause irreversible and irretrievable loss of wetland or watercourse resources" – also failed to survive the substantial evidence test since the court found that "the experts for both the plaintiff and defendant both expressed approval of the plaintiff's proposed development of the site as modified." Significant to the court's conclusion was that "no expert expressed concerns with

regard to the third application as modified indicating that the development would cause irreversible and irretrievable loss of wetland or watercourses resources."

The deadline to file a petition for appellate review of the trial court's decision has been extended to May 25, 2014, and the Town has requested a further extension to June 2, 2014.

Major points

- The absence of supporting expert evidence in the record may prove fatal to a commission's denial, even where there is a loss of wetlands associated with the proposed project.
- The court in this particular case was ultimately persuaded by its observation that "the experts who provided their opinions during the pendency of the application were in agreement that the activity would not adversely affect the wetlands notwithstanding the loss of 845 square feet of wetlands."