2012 MUNICIPAL INLAND WETLAND COMMISSIONERS TRAINING PROGRAM

SEGMENT 2

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

Presentation by
The Attorney General's Office

RECENT COURT CASES

A. Supreme Court Cases

i. *Bozrah v. Chmurynski*, 303 Conn. 676 (2012)

The first selectman asked the zoning enforcement officer (ZEO) to inspect the defendants' residential property "for unregistered motor vehicles and other junk," which, if confirmed, would violate town zoning regulations.

One of the defendants refused consent, instructing the ZEO to seek an inspection through the town attorney. The ZEO returned the following month, observing that a fence now prevented viewing of parts of the property from the street. The same defendant refused consent.

The town filed an action in the Superior Court for an injunction. After a hearing, the court issued an order authorizing the inspection and ordering the defendants to not hinder the inspection. The court observed that § 8-12 of the General Statutes authorizes a zoning official to inspect property to confirm whether zoning violations exist. The court also acknowledged that a town has an interest in enforcing zoning regulations to stabilize property values and promote the general welfare. The court applied the test from *Camara v. Municipal Court*, 387 U.S. 523 (1967), which held that the demonstration of "a valid public interest" was sufficient under the Fourth Amendment to permit an area inspection as part of a general administrative plan for the enforcement of a statutory scheme. The defendants appealed.

The Connecticut Supreme Court observed that the "relaxed showing" of *Camara* applied to routine and area-wide inspections and not to all administrative searches. This case differs because the intended search targets a single dwelling as the object of suspicion in response to a complaint, which more closely resembles a search for evidence of a crime in a criminal investigation. Although a town has an interest in zoning enforcement to promote health and the general welfare, the privacy interest protected by the Fourth Amendment outweighs that town interest when an inspection targets a specific property.

Accordingly, before a court may issue an order permitting an inspection of a specific property, the town must show facts known to the ZEO, based on reasonably trustworthy information, sufficient to cause a reasonable person to believe a violation is occurring.

The court found that a court order for an injunction authorizing the inspection, issued after a hearing, served as the functional equivalent of a criminal search warrant.

Major Points

- The Fourth Amendment's prohibition against unreasonable searches and seizures applies to inspections conducted pursuant to the Inland Wetlands and Watercourses Act.

- The privacy interest is at its peak when a search of a home or its immediately surrounding area is contemplated.

- A search occurs when a reasonable expectation of privacy is infringed. Viewing of private areas from public vantage points, or from adjacent private property entered with permission, is not a search.

- A search of a dwelling as the object of suspicion of a violation requires a demonstration of probable cause to a judge. Probable cause is established by demonstrating facts known by the inspector and based on reasonably trustworthy information sufficient to cause a reasonable person to believe that the conditions constituting the violation exist.

- In the civil context, the obtaining of an injunction after a hearing before a judge is functionally equivalent to obtaining a criminal search warrant.

ii. *Taylor v. Conservation Comm'n of the Town of Fairfield*, 302 Conn. 60 (2011)

James Taylor is a farmer in the Town of Fairfield who owns six acres of land. Mr. Taylor petitioned the town's conservation commission for a declaratory ruling that various activities, including the construction of three access roads on his property, constituted "as-of-right" activities under the Inland Wetlands and Watercourses Act for which no permit application was necessary. The commission denied Taylor's petition. Taylor appealed. The Superior Court sustained his appeal and remanded to the commission for consideration of each proposed roadway. Upon remand, the commission deemed Taylor's proposed activities exempt from regulation except for the proposed construction of two of the three roads, which two roads would require placing fill in wetlands. Mr. Taylor appealed a second time to the Superior Court.

Mr. Taylor's principle argument was that road construction directly related to a farming operation was permitted as of right. The commission argued that it had relied upon two provisions of law that prevented Taylor from filling wetlands for the purpose of road construction, even if the roads were related to the farming operations that he was proposing to undertake.

The enabling legislation, section 22a-40(a) of the Act provides for certain "as-of-right" uses in the regulated resources (i.e., wetlands and watercourses):

> (1) Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation. . . .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, relocation of watercourses with continual flow, filling or reclamation of wetlands or watercourses with continual flow, clear cutting of timber except for the expansion of agricultural crop land, the mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale . . . ." (emphasis added)

As reported by the Supreme Court, the relevant municipal regulation, section 4.1(a), provides as follows:

> The following operations and uses shall be permitted in inlands wetlands and watercourses, as of right:
>
> (a) Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation. The provision of this subdivision shall not be construed to include road construction or the erection of buildings not directly related to the farming operation, relocation of watercourses with conditional flow, filling or reclamation of wetlands or watercourses with continual flow, clear cutting of timber except for the expansion of agricultural crop land, or the mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purpose of sale. . . ." (emphasis added)

In his appeal, Taylor asserted § 22a-40 grants him the right to fill wetlands, so long as the filling is related to the farming operation. (He also asserted that the commission did not explain why there is not a right to fill wetlands when the act is related to farming.) Taylor argued that the phrase "not directly related to the farming operation" modifies both "road construction" and "erection of buildings," and, therefore, that the legislative ban on the building of roads not directly related to farming operations as of right thereby creates a right to build roads directly related to farming operations. He also argued that filling wetlands in order to create a road suitable for the passage of heavy vehicles when directly related to the farming operation was also permitted as of right.

The Connecticut Farm Bureau Association filed a "friend of the court" (amicus curiae) brief that argued that the proper construction of the exemption in section 22a-40(a) should allow for the construction of farm roads if they are directly related to the farm operation. The Supreme Court did not specifically address the Association's argument which was, essentially, that "directly related to the farm operation" modifies "road construction" as much as "erection of buildings," and that the use of material (fill) was just as likely in the latter

instance as in the former. The Court, however, did state in its conclusion that the trial court correctly interpreted the Act as not allowing as of right the construction of farm roads "irrespective of whether the roads are directly related to the farming operation."

The Supreme Court approached the case as one of statutory construction. It agreed with the commission's interpretation of the Act and its regulation that no road construction as of right was allowed if it necessitated the filling of wetlands.

Major Points

- The definition of "regulated activity" includes "any operation involving removal or deposition of material, or any construction . . . [or] alteration but shall not include the specified activities in section 22a-40." Conn. Gen. Stat. § 22a-38(13) [definition of "regulated activity"]. Use of "any" in legislation is very broad and encompassing.

- The exemption provision in the Act, i.e., section 22a-40, is, because it is an exemption from regulation, restricted in scope. In addition, courts interpret exemption provisions in statutes narrowly ("strictly"), and one claiming the benefit of an exemption has the burden of demonstrating his entitlement to the exemption (i.e., his membership in the class of persons benefited by the exemption).

- The exemption provision in the Act is itself subject to further restrictions, one of which is that filling of wetlands is not sanctioned; therefore, an as of right activity pursuant to section 22a-40(a)(1) cannot involve the placement of fill in wetlands.

- The Court deemed its interpretation consistent with the Act's statement of legislative intent, § 22a-36. One of the activities associated with development at the expense of wetlands and watercourses resources is "deposition, filling or removal of material." The legislature has, therefore, made the conservation of these natural resources a high priority, a priority not to be defeated by the right to build a road even if directly related to an otherwise exempt activity.

- Finally, the legislature has made it a matter of public policy to require municipalities to regulate activities affecting these natural resources. Conn. Gen. Stat. § 22a-42(a).

B. Appellate Court Case

i. *AvalonBay Communities, Inc. v. Inland Wetlands & Watercourses Agency of the Town of Stratford*, 130 Conn. App. 39, cert. denied, 303 Conn. 908 (2011)

In 2000, the plaintiff, AvalonBay Communities, Inc., applied for a permit to conduct regulated activities associated with the construction of a residential housing complex. The proposal was also specially identified as an "affordable housing" application before the municipal zoning commission. A revised application was filed the following year after an initial rejection by the town's land use agencies. Both the Town of Stratford zoning

commission and the defendant, Inland Wetlands and Watercourses Agency of the Town of Stratford (Town), denied the revised permit application. The plaintiff appealed the denials to the Superior Court.

The Town claimed that its decision to deny the permit was based on a determination that the development would have a negative impact on the environment. The town council filed an intervention petition General Statutes § 22a-19, the citizen intervention provision of the Connecticut Environmental Protection Act. On the merits, the trial court ruled in favor of the plaintiff, finding that each of the wetland agency's reasons for denial was not legally sufficient, was speculative, and was not supported by substantial evidence. The court remanded the decision to the Town instructing the town that it determine only what reasonable conditions should be placed upon the permit, which, the court ordered, should issue. The Town appealed to the Appellate court.

The four reasons given by the agency were as follows: 1) the wetlands and watercourses would be negatively impacted by the sediment and siltation that would enter as a result of the plaintiff's activities; 2) the negative impact by changes to the hydrology of the site; 3) the total loss of the pocket wetland located in the area of the plaintiff's proposed emergency access due to changes in the surface and ground water flow at the site; 4) and the wetlands area adjacent to Pumpkin Ground Brook would be negatively impacted by acid generation from the rock exposed by blasting at the site. The Appellate Court did not find any of the defendant's reasons to be sufficiently compelling.

First, the court stated that the determination by the agency that the wetlands and watercourses would be negatively impacted by the sediment and siltation was too speculative. The court agreed with the town that the record suggested that some sediment and siltation could enter the brook from the activities of the plaintiff. The court stressed that the evidence, however, merely demonstrated the possibility. The court added that the record revealed neither quantitative data demonstrating the volume of the flow that would enter the wetlands and watercourse, nor qualitative evidence of adverse affects to the flow.

Second, the court also ruled there was not enough data in the record to support the Town's conclusion that the proposed intense development of the site would clearly alter the hydrologic regime of the wetlands. The Town based its reasons on the fact that the proposed development was large and there was, it claimed, a lack of evidence guaranteeing there would be no negative impact. The Town's expert claimed that there was a likelihood of changes to the hydrology of the wetland but did not proffer an opinion as to any adverse impact resulting from those changes. The expert's statement that the data offered by the plaintiff should have included more empirical data and the data over a longer term did not constitute substantial evidence of an adverse impact. The Town's determination was, therefore, speculative. (The Town also claimed that the information provided by the plaintiff was "incomplete," and that that was a ground for upholding the denial of the permit; the Court, however, refused to reach this argument, because the Town had not made an appropriate record for it to review.)

Thirdly, the Town's argument that there would be a total loss of a man-made pocket wetland was supported by no substantial evidence of an adverse impact. The Town argued that a net loss of watershed to this system would result from the plaintiff's activities; the evidence indicated that the reduction would drop from 2.4 acres to .99 acres. This would result in a loss but not enough to be considered a total loss of flow to the system, and, most importantly, the expert for the Town did not have any evidence to support his "concern" that the system would be dewatered. Finally, the necessity of placing an emergency exit to the proposed development at this location, as mandated by the Town's zoning commission, was credited by the Court as an "unavoidable impact."

Finally, the Town's determination that the plaintiff's actions would cause a negative impact from acid generation caused by rock exposed by blasting at the site was based on a "potentiality" and not a "probability." The potential for a negative impact was not viewed by the court to amount to substantial evidence. There was evidence that a small percentage (approximately one percent) of pyrite was found in the rock. The plaintiffs presented evidence that its blasting protocol would effectively remove exposed excavated rock from the site, thereby limiting its contact with stormwater, which would be retained in a closed system during construction. As to the Town's argument on appeal that the plaintiff's expert had not really offered hard evidence of no adverse impact, thus making the permit application indeterminate, the Court again ruled that the Town had not made an appropriate record for review.

Major Points

- A decision to deny a permit must be based on substantial evidence supported by a credible witness and determination of factual issues that support the conclusion that an adverse impact to regulated resources has been demonstrated.

- Evidence may not be speculative: "concerns" and "possibilities" cannot ground a determination of adverse impact.

- A wetlands commission may disbelieve an expert, but it cannot conclude that the opposite is true without any evidence to justify that conclusion.

- Where a land use commission fails to support its permit denial decision with substantial evidence, the reviewing court is legally entitled to sustain the appeal and remand to the commission with an order to issue the permit, subject to such reasonable conditions as the evidence on the administrative record supports.