

2013 MUNICIPAL INLAND WETLANDS AGENCY *CONTINUING EDUCATION* TRAINING:

LEGAL AND ADMINISTRATIVE UPDATES

By the Connecticut Attorney General's Office

RECENT COURT CASES

A. Supreme Court Cases

None.

B. Appellate Court Case

- i. *Estate of Casimir Machowski v. Ansonia Inland Wetlands Comm'n*, 137 Conn. App. 830 (2012)

In March 2008, the applicant, TUG, LLC, with the approval of the landowner, the Estate of Casimir Machowski, applied for a permit to construct an age-restricted residential development on 7.5 acres of a 16.4-acre parcel. The applicant originally proposed twenty units within ten buildings, but subsequently revised the proposal for eighteen units within nine buildings. The site contains two wetlands areas, four watercourses, including three intermittent watercourses, and a constructed drainage swale.

The property slopes down to the west, with a difference of 200 feet of elevation from the northeast to the southwest. During construction, 30,000 cubic yards of fill would be required, of which 20,500 cubic yards would be trucked to the property. All activity would occur in the upland review area. To manage stormwater at the site, the applicant proposed to construct a detention basin upslope of a wetlands area.

The Commission held a public hearing across four nights in July, August, September, and October 2009. In November 2009, the Commission voted to deny the application, based on its finding that “[t]here is a feasible and prudent alternative to placing the detention basin in fill on the extreme slope. . . . The proposed location is inconsistent with DEP 2002 Soil and Erosion and Sediment Guidelines Control and good engineering practice. The extensive amount of fill creates an extreme erosion hazard, immediately upstream of a wetlands area.”

The applicant and landowner appealed. The Superior Court noted that the record demonstrated that the proposal would entail removal of trees and brush, placement of significant amounts of fill, and construction of a detention basin on a steep slope. In addition, the record contained expert testimony that a failure of the detention basin would impact wetlands and exacerbate flooding. Though the Commission’s expert and the applicant’s expert disagreed about the chance of failure of the detention basin, the Commission was permitted to choose which opinion it found most credible.

The court held that the record contained sufficient substantial evidence to support the Commission's denial, and dismissed the appeal. "This assertion [that the detention basin may not fail], even if supported by expert testimony, is not sufficient to prevent a finding by the commission that an impact upon wetlands is likely." The court found that "any failure" of the detention basin would "clearly impact" the wetlands and exacerbate flooding.

The plaintiffs appealed to the Appellate Court, arguing that the Superior Court misapplied the substantial evidence test by assuming that the detention basin would fail, and that the failure would adversely affect the wetlands.

The Appellate Court agreed, noting the similarity of this case to *River Bend Assocs., Inc. v. Conservation and Inland Wetlands Comm'n*, 269 Conn. 57 (2004), in that the Commission failed to adduce evidence of the likelihood of failure of the detention basin, and of the effect a failure would have. The Commission's expert said only that there was a "potential impact" if the detention basin failed, but provided no opinion that an adverse impact was likely if the detention basin failed, or that a failure was likely.

While the court acknowledged concerns that the detention basin did not comply with DEP guidelines because the basin would be sited on a steeper slope than recommended, the court observed that the guidelines contain beneficial recommendations, and do not have the force of law. Non-adherence with the guidelines does not in itself imply a likelihood of adverse impact to wetlands.

The court reversed the Superior Court and remanded the case with direction to render judgment directing the Commission to grant the plaintiff's application.

Major Points

- A commission must analyze and make a finding regarding an activity and whether a likely adverse impact to wetlands will result, even if that requires consideration of an intervening event. Just as the *River Bend* commission could not conclude that an adverse impact would result simply because pesticides would enter wetlands, a commission cannot conclude that an adverse impact would result from the failure of a detention.
- A commission must base each finding on substantial evidence in the record.
- DEEP guidance documents are informative; they do not have the force of law. A commission cannot assume that noncompliance with cause and adverse impact to wetlands.

C. Superior Court Cases

- i. *Taylor v. Fairfield Conservation Comm'n*, Docket No. FBT-CV-11-6017217-S (Aug. 30, 2012)

James Taylor is a farmer in the Town of Fairfield who owns six acres of land. James Taylor owns six acres of land in Fairfield historically used as a dairy farm and on which he intends to grow blueberries. A shallow ditch runs the length of the planting area. In September 2010, one of Mr. Taylor's neighbors sent the Commission videos and photographs purporting to show machinery digging in wetlands on Mr. Taylor's property. Two staff members inspected the property, and after the inspection, issued a Notice of Violation ("NOV") in October 2010. The NOV explained that the inspection "confirmed that a watercourse within mapped wetlands on the property had been deepened and extended utilizing a

backhoe and the excavated soils were removed from the wetland.” Mr. Taylor did not respond to the NOV, so in November the Commission issued a Cease and Correct Order (“Order”) and scheduled a show cause hearing for December 2, 2010.

During the hearing, staff presented evidence, including ground-level and aerial photographs of the site, the neighbor’s video footage, and their observations and conclusions from the inspection. Mr. Taylor reclaimed the wetland, they said, because “he deepened and is draining the wetland soil by deepening the existing watercourse.” They cited Barron’s Real Estate Dictionary to define “reclamation” as “[c]ausing a change in land from an unusable or undevelopable state to a usable or developable state.” Examples included such varied activities as irrigating desert to create grazing land, draining a swamp to create cropland, and “[g]rading severe topography” to build a house. They concluded that Mr. Taylor’s actions were “regulated activities,” constituted “reclamation,” were ineligible for the so-called “farming exemption,” and therefore required a permit.

Mr. Taylor argued that the activities were exempt as of right because the definition of “farming” allows someone to construct and maintain waterways, and that he simply maintained an existing waterway. Mr. Taylor presented the testimony of a layman and two expert witnesses to establish that farming had been conducted on the property for a long period of time, that the ditch existed before he bought the property, and that the ditch was previously deeper and wider. Mr. Taylor admitted that he had used a backhoe to remove material, estimated by his experts as five cubic yards, to maintain the ditch and to control the ponding of water. In his experts’ opinion, the work was not “reclamation” because the ditch was too shallow to intersect with the groundwater and would not drain the wetland.

The Inland Wetlands and Watercourses Act does not define “reclamation,” so the commission necessarily considered what “reclamation” is. Must the work be “substantial”? Must the amount of material removed be “significant”? Does it matter if the work is done with machinery rather than hand tools? Are the depth of the excavation, the making of the side slopes of the channel more definite, and the removal of wetland soils relevant? If a homeowner, rather than a “farmer,” maintains a ditch, would that be exempt? Is the ultimate question not whether what Mr. Taylor did was “reclamation,” but whether he altered a watercourse?

The commission upheld the order, but the bases are unclear from the transcript. The commissioner making the motion noted that “there is a watercourse . . . [and] he took fill out of it, which typically would . . . require a permit.” He continues that Mr. Taylor “also had the opportunity to come in here and ask for a permit before he did the work. I think maybe I would have said—give him the permit. But I also think that he didn’t ask for it—I think he should have asked for it—and that is why I would move to uphold the cease and desist.”

Another commissioner commented “I think there was maintenance; I think there was a line that was crossed—whether it is a farm or whether it is not a farm, there is . . . a judgment call to be made as to when the level of activity claimed as-of-right crosses the line into something that should have been . . . under a permit in the first place.”

The commissioner making the motion later adds: “the comment that concerned me the most was when I asked him what the farming purpose was, . . . as I understood what he said was the purpose was that he could drain the soils and be dry enough so he could grow blueberries. But I think when you drain the soil to make it dry enough to grow blueberries you are doing reclamation.”

Mr. Taylor appealed, and the court sustained the appeal and vacated the order.

The court turned to Section 22a-40(a), which allows certain uses in wetlands and watercourses as of right, including “[g]razing, farming, nurseries, gardening and harvesting of crops. . . . The provisions of this subdivision shall not be construed to include . . . filling or reclamation of wetlands or watercourses with continual flow.”

The court found that the General Statutes do not define “reclamation,” so it researched case law, and observed that a footnote in *Red 11, LLC v. Conservation Commission*, 117 Conn. App. 630, 643 (2009) presents a definition of the term. Although the *Red 11* court “was not called upon to offer a detailed definition of the term,” the court found the definition “instructive.” The *Red 11* court referred to Ballentine’s Law Dictionary (Third Edition, 1969) and to Webster’s Third International Dictionary, noting that they define “reclamation” as “making land for cultivation, as by draining swamps . . . or irrigating arid land” and “the act or process of restoring to cultivation,” respectively.

The court concluded that the Commission improperly expanded “reclamation” to include activities that simply make land fit for cultivation. The court noted that the § 22a-40(a) exemption protects farming, and the exclusions from the exemption make truly damaging activities, such as the draining of swamps, marshland or meadows, subject to review. The court noted that the Commission’s concept of “reclamation” would encompass such legitimate agricultural activities as draining water after a storm or removing stones from a field.

Even applying the Commission’s expansive concept of “reclamation,” the court found that Mr. Taylor’s activities were exempt because the removal of sediment and material from an existing ditch is conducive to prudent farming and the impact was de minimis. The use of machinery to accomplish the work was irrelevant.

Major Points

- Although § 22a-40(a) establishes an exemption for as-of-right activities, that exemption is limited. The as-of-right activity of farming loses its exemption if it involves filling or reclamation of wetlands.
- The definition of “reclamation” adopted by the court is not controlling, as this is a Superior Court decision. Nevertheless, consideration of whether “farming” constitutes “reclamation” must allow for reasonable farming practices, consistent with legislative intent. In other words, don’t allow the exclusion swallow the exemption.
- The motion process is the culmination of the commission’s receipt, discussion, and consideration of evidence. A commission should use a disciplined process, allowing the commissioner making the motion to state his motion and the reasons completely before discussion of the motion.

ii. *A.J.K., LLC v. Torrington Inland Wetland Comm’n*, Docket No. LLI-CV-12-6006804-S (April 17, 2013)

The plaintiffs, A.J. K., LLC and Daniel Stoughton d/b/a Mountain Top Trucking own a parcel of land in Torrington. In 2009, the commission issued plaintiffs an inland wetlands permit, with conditions, for their property, permitting the plaintiffs to process gravel and other earth products trucked to their property from off-site construction projects. In January 2012, the commission determined that the plaintiffs had violated one or more of the conditions of their wetlands permit, notified them by letter to cease all activity at the site, and scheduled a permit revocation hearing. Specifically, the commission determined that the plaintiffs “cleared wetlands buffer plantings, stored materials and expanded the approved work area within the upland regulated area without a permit.”

A multi-day hearing was held and members of the commission made a site visit in May 2012. At the conclusion of the hearing, the commission unanimously voted to allow the continuation of the plaintiffs' permit, but subject to certain stated conditions:

- (1) the plaintiffs were not allowed to store, park, drive, set or use anything in any manner on the piece of land between the "haul road" on the site and the on-site watercourse, and
- (2) the plaintiffs were required to allow the area between the haul road and the pond to go fallow.

On appeal, the plaintiffs challenged the commission's decision. In its defense, the Town argued that the two conditions that emerged from the permit revocation hearing were merely clarifications of the conditions already imposed in the original permit.

When a commission engages in a permit revocation administrative proceeding, its conduct and powers are governed by the applicable statutory (§ 22a-42a(d)(1)) and regulatory (here, Torrington inland wetlands regulation § 14.5) authority. Section 22a-42a(d)(1) provides that "[t]he agency may suspend or revoke a permit if it finds after giving notice to the permittee of the facts or conduct which warrant the intended action and after a hearing at which the permittee is given an opportunity to show compliance with the requirements for retention of the permit, that the applicant has not complied with the conditions or limitations set forth in the permit or has exceeded the scope of the work as set forth in the application." There is no question that a local commission may suspend or revoke a permit if it finds that the permittee has violated the terms or conditions of its permit. The court observed, however, that "[n]either section permits the defendant to find that there has been a violation, and then maintain the permit subject to new conditions."

After analyzing the two conditions, the court found that they did indeed constitute new conditions, and were not merely clarifications of the original conditions. The court noted that, although the commission has several enforcement tools available to regulate land owners who conduct regulated activities without a permit, it does not have the power to add new conditions to an existing permit. The court sustained the plaintiffs' appeal and remanded the matter to the commission with instructions to suspend, revoke, or maintain the plaintiff's permit.

Major Points

- A commission may not impose new or additional conditions on an existing permit in the context of a permit revocation proceeding.
- The authorized outcomes of a permit revocation proceeding are limited to suspending, revoking or maintaining the permit in question.

D. U. S. District Court Case

- i. *Watrous v. Town of Preston*, Civil Action No. 3:10-cv-597 (JCH)

Kenneth Watrous owns property in Preston overlooking Poquetanuck Cove, a tidal estuary of the Thames River. The property encompasses no inland wetlands or watercourse, but borders, at the base of a cliff, an area of tidal wetlands and the Cove.

Mr. Watrous requested and received Zoning Board of Appeals approval to raze an existing dilapidated house on the property and build a new house, provided he construct the house in the same location as the old house, and that the inland wetlands commission approve his pending application. The commission approved the application, echoing the same location restriction.

Mr. Watrous razed the old house and constructed the new house. During the course of the construction, the town building department confirmed that the new house was constructed as approved, and ultimately issued a certificate of occupancy.

After constructing the house, Mr. Watrous constructed a stairway to the Cove. The Commission, asserting it had jurisdiction through its upland review area regulation, issued a cease and desist order. Mr. Watrous disputed the Commission's jurisdiction. Nevertheless, he filed an application for a permit, which the Commission denied. The commission ultimately filed the cease and desist order on the land records. According to the Mr. Watrous's attorney, several other houses bordering the Cove have stairways down to the Cove, but none of the owners to apply for a permit and none received an NOV. The DEP issued a notice of violation, finding that the lower landing of the stairway was located in tidal wetlands. Mr. Watrous relocated the lower landing, and the DEP closed the notice of violation.

Thereafter, in response to complaints from a neighbor, the first selectman visited the site and, based on his observation only, concluded that the house was built in the wrong location, contrary to the Commission's permit. The first selectman notified the Commission chairman, who directed that an NOV be issued.

In the ensuing years, the Commission issued another three cease and desist orders for the same violation. In an effort to resolve the issue, Mr. Watrous hired a surveyor, who confirmed that the house was built in compliance with the ZBA and Commission permits. The Commission itself hired a surveyor, who reached the same conclusion.

Mr. Watrous ultimately sued the commission, the town, the first selectman, the chairman, a commissioner, and the wetlands enforcement office under a federal statute, 42 U.S. Code § 1983, for violation of his 14th Amendment right to substantive due process. Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Mr. Watrous filed a motion for summary judgment to resolve whether the commission has jurisdiction over activities on his property. In 2010, the court concluded that the commission lacked jurisdiction over the property. The court found that, under state law, the mean high water mark is the boundary between a municipality and the state; a tidal waterbody is therefore outside the territorial limits of a municipality, and belongs to the public (as represented by the state). In addition, the court referred to § 22a-42a, which provides that it is "the public policy of the state to require municipal regulation of activities affecting the wetlands and watercourses *within the territorial limits of the various municipalities or districts.*" The court concluded that the Commission lacks jurisdiction over activities that may impact the Cove because it is outside the town's territorial limits.

In March 2013, the court conducted a jury trial concerning the constitutional violations. By this stage, the remaining defendants were the first selectman, the now-former chairman, the current chairman, and the wetlands enforcement officer. (The town and commission were dismissed from the case following successful motions for summary judgment.)

Evidence introduced by Mr. Watrous demonstrated that the Commission had no evidence of a violation when it issued the cease and desist orders regarding the location of the house, and had issued the orders as an investigatory tool. In addition, the evidence demonstrated that the Commission members discussed issuing the orders as a way to “taint” Mr. Watrous’s deed so that he could not sell the property, and trying to persuade the ZBA to join in enforcement against Mr. Watrous.

The jury found that the first selectman, the former chairman, and the current chairman had violated Mr. Watrous’s right to substantive due process. The jury did not find the wetlands enforcement officer liable. The jury awarded \$6,000 in compensatory damages, to be paid by any or all of the three liable defendants, and further awarded punitive damages of \$3,000 each.

Major Points

- Elected officials, volunteer commissioners, and staff members may be held liable for constitutional violations committed in the course of implementing or enforcing the Inland Wetlands and Watercourses Act.