

2009 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

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## RECENT COURT CASES

### A. Superior Court Cases

i. *Lussier v. Pomfret Inland Wetlands & Watercourses Commission*

The plaintiff applied for a jurisdictional ruling whether his proposed forestry operation fell within the agriculture exemption of § 22a-40(a)(1) of the General Statutes. The only activity proposed to occur in wetlands was the transport of timber over an existing road that crosses an intermittent stream by use of a concrete culvert. The commission issued a license with fourteen conditions, two of which addressed potential impacts to wetlands and watercourses.

The plaintiff appealed to the superior court, arguing that the commission's licensing of the activity was improper. The superior court agreed, finding that the activity was exempt, and the commission's regulation of the activity exceeded its jurisdiction.

### B. Appellate Court Cases

i. *Fanotto v. Inland Wetlands Commission of the Town of Seymour*  
108 Conn. App. 235 (June 3, 2008)

The case addresses whether the commission had adequate support to deny the Fanottos' application for wetlands permit when uncontroverted expert testimony and reports showed that there would be minimal impact to the wetlands associated with the proposed subdivision. The trial court upheld the commission's denial of the permit application.

The Appellate Court reversed the trial court's decision, remanding the case with direction to render judgment sustaining the plaintiffs' appeal and ordering the commission to approve the application with reasonable conditions. The court emphasized that "a lay commission acts without substantial evidence, and arbitrarily, when it relies on its own knowledge and experience concerning technically complex issues . . . , in disregard of expert testimony, without affording a timely opportunity for rebuttal of its point of view."

The decision has been appealed, and the matter is pending before the Connecticut Supreme Court. Briefs have been filed, but oral argument is not yet scheduled.

ii. *Barry v. Historic District Commission of the Borough of Litchfield*  
108 Conn. App. 682 (July 1, 2008)

The plaintiff owned a house in the historic district, and applied for a certificate of appropriateness for proposed revisions. A commissioner recused himself and reserved the right to testify as an expert in opposition. Over the plaintiff's objection, he testified at the public hearing, inspected the property, offered photographs, questioned the plaintiff's expert, cited statutes, and gave legal advice to the commission. The commission voted to deny the application. The applicant appealed, and the trial court sustained the appeal. The commission appealed to the Appellate Court.

The Appellate Court acknowledged the right to fundamental fairness, particularly in proceedings affecting the use of real property. Above all, "[p]ublic policy requires that a member of a public board or commission refrain from placing himself or herself in a position in which a personal interest may conflict with public duty." A personal interest is an interest in either the subject matter or a relationship with the parties that impairs the member's expected impartiality. The test is not whether the personal interest conflicts but whether it reasonably might conflict. A commissioner with a personal interest need not act wrongfully; the wrong is the creation of a situation that tends to weaken public confidence and undermine the sense of security of individual rights.

The Appellate Court found that the commissioner had a personal interest. His conduct undermined public confidence in the integrity of public commissions, and deprived the applicant of her right to a fair and impartial hearing. The commission's reliance on his testimony was not dispositive.

iii. *Cornacchia v. Environmental Protection Commission of the Town of Darien*  
109 Conn. App. 346 (July 29, 2008)

The plaintiffs applied for a license to construct an in-ground pool, spa, pool house, and surrounding terrace within the fifty-foot-wide upland review area, outside an adjacent wetlands area and watercourse. In addition, the plaintiffs proposed to develop a riparian buffer within the wetland area. The commission denied a license for the pool and related improvements, but granted a license to construct the riparian buffer, based on impacts to the upland review area.

The superior court dismissed the plaintiffs' appeal, and the plaintiffs appealed. The Appellate Court held that the commission improperly rejected the opinions of the plaintiffs' expert (relying instead on "unsubstantiated concerns about possible impacts" from lay witnesses), and improperly focused on impacts to the upland review area rather than the wetlands and watercourse. The Appellate Court sustained the appeal, and directed the commission to issue the license.

## C. Supreme Court Cases

- i. *Finley v. Inland Wetlands Commission of the Town of Orange*  
289 Conn. 12 (October 14, 2008)

This case overturned the decision of the Orange Inland Wetlands Commission for lack of substantial evidence to support its conditional approval of Stew Leonard's application for a regulated activities permit. The court stated that when a court reviews local wetlands decisions, a decision approving a permit cannot be upheld on appeal unless the commission has made a determination, supported by substantial evidence, that the applicant's proposal complies with applicable statutes and regulations. In particular, the court explained that by imposing the condition requiring the applicant to submit a revised and updated erosion control plan that implements all state regulations, the commission had not made a determination that the existing erosion control plan met state regulations when it rendered its decision.

For a wetlands commission, this means that, although the conditions imposed on a permit may require the applicant to take *specific actions* that will bring the proposed activity into compliance with applicable law, a commission cannot impose conditions on an approval which leave open the question of whether or not the permit should have been approved in the first place.

- ii. *Lord Family of Windsor, LLC v. Inland Wetlands & Watercourses Commission of the Town of Windsor*  
288 Conn. 669 (September 9, 2008)

The case addresses whether the concerns and apprehensions of a commission constitute substantial evidence to support the denial of an application to modify a previously approved subdivision plan. The approved subdivision plan identified three access roads; the applicant later proposed to eliminate one, and to use the existing, partially paved "neck road" to transport equipment during only the construction phase. The neck road crossed a brook, employing a culvert, raising concerns of increased vehicle pollution of the brook and the strength of the culvert to withstand the weight of construction equipment.

The trial court upheld the commission's denial. The Appellate Court determined in August 2007 that the record lacked substantial evidence to conclude that increased pollution of the brook was likely and that the culvert lacked the strength to support the construction equipment, and reversed the trial court.

The commission appealed, arguing that substantial evidence supported the denial, and that the denial was justified on the alternative ground that the prior approved plan presented no potential to contaminate the brook. The Supreme Court agreed with the Appellate Court that the record lacked substantial evidence, and that the alternative ground was insufficient because it was based on factual assumptions unsupported by substantial evidence.