

2011 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

None.

B. Appellate Court Cases

- i. *River Sound Dev., LLC v. Inland Wetlands & Watercourses Comm'n*, 122 Conn. App. 644 (2010)

River Sound owned a 934-acre parcel of land known as “the Preserve” spanning Old Saybrook, Essex, and Westbrook. The parcel encompassed a total of 114.5 acres of wetlands. River Sound filed an application proposing to develop in Old Saybrook 221 residential units, a golf course, roadways, and associated structures and infrastructure.

After a public hearing, the commission denied the application, citing eleven specific reasons, including likely adverse impacts to wetlands and watercourses from activities proposed within the 100-foot upland review area (“URA”). In addition, the commission found that the development of the golf course would fragment and isolate areas outside wetlands for wildlife, reducing the ability of the areas to support animal life, particularly amphibians. Based on expert testimony, the commission concluded that a smaller amphibian population would allow greater leaf and other detritus to collect in vernal pools, adversely impacting the water quality.

River Sound appealed to the Superior Court, which upheld the commission’s decision and dismissed the appeal, and then to the Appellate Court.

In the Appellate Court, River Sound argued that the commission: (1) lacked jurisdiction over regulated activities within the URA, despite the town’s URA regulation; (2) improperly based the denial on impacts to species located outside of wetlands and watercourses; (3) lacked substantial evidence to support the denial; and (4) conducted an improper analysis of feasible and prudent alternatives.

The court disagreed and held that the commission properly denied River Sound’s application.

Major Points

1) A commission may exercise jurisdiction over regulated activities in the URA pursuant to § 22a-42a(f), provided it adopts a regulation.

2) Consistent with § 22a-41(d), a commission may deny or condition a regulated activity that impacts aquatic, plant, or animal life outside a wetland or watercourse if it will likely impact or affect the physical characteristics of the wetland or watercourse.

ii. *Lorenz v. Inland Wetlands & Watercourses Comm'n*, 124 Conn. App. 489 (2010)

River Sound applied for a permit to develop a private country club and 18-hole golf course on a 239.4-acre parcel. The application proposed regulated activities on 7.19 acres of wetlands, including the removal of forest canopy for the construction of cart paths and fairways. In addition, River Sound proposed regulated activities on approximately 32 acres of the URA for construction of tees, greens, roadways, and buildings.

After a public hearing, the commission approved the application with several conditions, one of which required River Sound to file a \$300,000 bond before applying chemicals on the golf course. The purpose of the bond was to ensure River Sound's compliance with its Integrated Pest Management Plan and to serve as a source for the "payment of any and all damages and/or claims for damages by any person or property adversely affected by the activities" conducted pursuant to the Integrated Pest Management Plan.

The plaintiffs, abutting property owners and Connecticut Fund for the Environment, appealed to the Superior Court, which found the bond condition illegal because it was not a performance bond under town wetlands regulations, and it did not by its terms protect wetlands and watercourses. The court concluded that the bond condition was integral to the permit, in that the commission would not have granted the permit without the bond condition. Therefore, rather than just striking the condition from the permit, the court invalidated the entire permit.

Pursuant to town wetlands regulations, River Sound applied to modify its initial application to be consistent with the court's decision to avoid having to restart the entire permitting process. In regard to the bond, the application restated its purpose as "to ensure correction of any inadequacies or problems which may occur" in implementing the Integrated Pest Management Plan. The commission approved the modified application, concluding that the bond requirement was not an integral part of the approval.

The plaintiffs appealed. The Superior Court determined that the commission had not violated the court's prior decision by concluding that the bond condition was not integral to the overall application; that the commission did not err in allowing commissioners who had not voted on the original application to vote on the modified application; and that the commission did not err in approving the modified application without reconsidering the § 22a-41 factors.

The plaintiffs appealed to the Appellate Court, which affirmed the Superior Courts decision. The Appellate Court concluded that the first Superior Court's conclusion that the bond condition was integral determined only whether the court could excise the condition, and was

not binding on the commission's consideration of the modified application. In addition, River Sound's modified application did not seek permission to perform additional regulated activities, but only to remove the illegal bond condition; therefore, the commission did not need to reconsider the § 22a-41 factors. Finally, the commission properly allowed the commission's current seven members (only two of whom participated in the consideration of the original application) to approve the modified application because they sufficiently reviewed the record to make an informed decision on the modified application.

Major Points

- 1) A commission may accept and consider a modified application, without requiring a new application, provided the regulations provide for this.
- 2) Members of a commission may consider and approve a modified application even if they did not participate in the consideration of the original application, provided they are sufficiently informed of the issues (by reviewing the application, meeting minutes, hearing transcripts, etc.) to make "a wise and proper judgment."

C. Superior Court Cases

- i. *Rizzuto v. Environmental Protection Bd.*, 2010 Conn. Super. LEXIS 3360 (Dec. 10, 2010)

The plaintiff conducted earth-moving activities on his Stamford property, including grading, filling, and the construction of retaining walls in the URA. In response to a neighbor's complaint, a representative of the Board called to notify the plaintiff that he needed to stop and obtain any necessary permit. The plaintiff claimed the property had no wetlands, and that he was exempt under § 22a-40(a) because he was operating a Christmas tree farm. The Board notified the plaintiff of the violations by letter, stating the Board would inspect the property for compliance on a certain date. Shortly after that date, the Board issued a cease and desist order.

At the show-cause hearing, the plaintiff argued the Board lacked jurisdiction because he engaged in an as-of-right activity under § 22a-40. A Board representative submitted photographs of the property, concluding they demonstrated that no agricultural activities were being conducted. The plaintiff claimed that a 200-foot-long line of evergreen trees on the property demonstrated he operated a Christmas tree farm. A member of the Board (who was a forester, a member of the Christmas Tree Association, and who had experience planting and harvesting Christmas trees) disputed that, concluding that the line of trees was not agriculture, but simple landscaping.

The Board voted to maintain the order, require the plaintiff to submit a comprehensive survey plan, and place a notice of violation on the land records.

The plaintiff appealed to the Superior Court, arguing that the Board lacked jurisdiction over his agricultural activities, failed to provide him an opportunity to present evidence of his agricultural activities, improperly relied on photographs taken by the Board's employee after entering the property without permission, and improperly recorded the notice of violation on the land records.

The court disagreed with all the plaintiff's allegations and upheld the Board's maintaining of the cease and desist order and the recording of the notice of violation on the land records.

Major Points

- 1) A person claiming an exemption from the IWWA must come before the commission before conducting any activities alleged to be exempt. That person has the burden of demonstrating the exemption. A commission should strictly construe statutory exemptions.
- 2) In considering evidence relevant to a claimed exemption, the commission may draw on the expertise of its own members. Such expertise must be made known to the person claiming the exemption so he comprehends the range of information considered by the commission.
- 3) A commission representative must obtain the permission of the owner before entering private property. However, a commission may use evidence obtained if a commission representative trespassed while obtaining the evidence, and the use of this evidence will not invalidate a commission decision.
- 4) Section 22a-44(a) provides explicit authority to record a violation on the land records.

- ii. *Newberry Road Enters., LLC v. East Windsor Inland Wetland & Watercourse Agency*, 2011 Conn. Super. LEXIS 137 (Jan. 10, 2011)

The commission issued two orders to the plaintiff, the first addressing the construction of a farm road, and the second concerning filling in a wetland and the URA. Thirteen days later, the commission held a hearing on the orders, and upheld both, modifying the second order slightly.

The plaintiff appealed, alleging that the orders were void because the commission held a hearing three days later than required by § 22a-44(a). The court disagreed, finding that the orders were not void as of the hearing, and the commission's upholding of the orders was proper.

Major Point

- 1) Although § 22a-44(a) provides that a show-cause hearing "shall" be held within 10 days after issuance of an order, that time period is directory rather than mandatory. In other words, a commission *should* hold the hearing within 10 days, but if it does not, the order or any action taken pursuant to it will not be void.

- iii. *Wray v. New Canaan Inland Wetlands & Watercourses Comm'n*, 2011 Conn. Super. LEXIS 173 (Jan. 24, 2011)

The plaintiff applied for a wetlands permit to redevelop a former mill (currently used as a storage facility) into an office building, and expand an adjacent parking area. The application proposed improvements to the foundation of the mill, the northern and western walls of which are integral parts of the Jelliff Mill Pond Dam. The commission requested

input from the DEP, which confirmed that it has jurisdiction over the dam pursuant to § 22a-401.

After a public hearing, the commission approved the application and issued a license providing in part: “Construct new foundation walls inside and independent of existing foundation, with the exception of north wall. The existing building foundation will be reinforced.”

The plaintiff, adjacent property owners, appealed, claiming the commission had issued a license for certain activities exclusively with the DEP’s jurisdiction. The court agreed that portions of the license encroached on exclusive state jurisdiction over dam repairs, and sustained the appeal and invalidated the entire permit.

Major Points

- 1) Considering whether a commission has jurisdiction over some or all of the activities proposed in an application is a critical threshold inquiry.
- 2) Pursuant to § 22a-401, the DEP has exclusive jurisdiction over “dams, dikes, reservoirs, and other similar structures . . . which, by breaking away or otherwise, might endanger life or property.” This jurisdiction is explicitly “to the exclusion of the local inland wetlands agencies.” RCSA § 22a-39-4.3.a. A commission that receives an application concerning a dam or other structure in the DEP’s jurisdiction must notify the applicant in writing to apply to the DEP. RCSA § 22a-39-4.3.d. A commission may either review the portion of the application within its jurisdiction, or deem the application incomplete until the DEP issues a final decision on elements of the application within its jurisdiction. *Id.*

iv. *DeSilver v. North Branford Conservation and Inland Wetlands & Watercourses Agency*, 2011 Conn. Super. LEXIS 617 (Mar. 14, 2011)

The appeal was brought by two CEPA intervenors, neighboring property owners, challenging the commission’s granting of a permit for a residential development. The trial court upheld the plaintiffs’ appeal, finding that the commission unlawfully approved the development with “conditions,” instead of denying the application on the basis that feasible and prudent alternatives exist.

Specifically, the commission approved the application subject to the applicant choosing and developing a plan consistent with one of three alternatives, set out as Conditions 17A, 17B, and 17C of the approval. The CEPA intervenors appealed, and the court upheld their appeal, remanding the matter back to the commission for further proceedings, finding that the type of conditions of approval imposed were improper and unlawful since they actually constituted “alternate plans” from which the applicant was to choose and, as such, required the applicant “to formulate an entirely new plan, rather than merely carry out a specific step to complete or perfect its original plan.”

The court explained that, “no matter how conscientious and/or diligent the agency was, it essentially stopped two-thirds of the way in this land-use marathon.” The court found that the agency, by virtue of providing a menu of options to the applicant, “found that there were viable, feasible and prudent alternatives which would have a less adverse impact on the Farm

River than the one [the applicant] submitted.” The court found it improper that the commission attempted to “shortcut the long and taxing process by approving the application with ‘conditions.’”

Major Points

- 1) A commission may not absolve itself of the obligation to fully analyze the impacts of, and any feasible and prudent alternatives to, a proposed development.
- 2) Alternate development options, which present varying impacts, cannot be imposed as “conditions” to be selected at the applicant’s discretion.

D. U. S. District Court Case

- i. *Watrous v. Town of Preston*, 2011 U.S. Dist. LEXIS 15208 (Feb. 16, 2011)

The plaintiff owned 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.

The plaintiff requested and received Zoning Board of Appeals approval to raze an existing dilapidated house on the property and build a new house. The plaintiff also applied to the commission on the basis of the representation by the commission’s enforcement officer that a permit was required. The ZBA approved the plaintiff’s proposal, with conditions including that the house be constructed in the same location as the old house, and that the commission approve his pending application. The commission approved the application, echoing the same location restriction.

The plaintiff 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 the construction of the house, the plaintiff constructed a set of steps to the Cove. The commission issued a cease and desist order. The plaintiff filed an application for a permit, which the commission denied. In the course of the consideration of the cease and desist order, the commission raised an issue whether the house was located as approved. The commission ultimately filed the cease and desist order on the land records. The DEP issued a notice of violation for the steps. The plaintiff removed the portion of the steps located within the tidal wetlands, and the DEP closed the notice of violation.

The plaintiff ultimately sued the commission in state court for exceeding its jurisdiction and for constitutional violations. The town removed the case to federal court. The plaintiff filed a motion for summary judgment to resolve whether the commission has jurisdiction over activities on his property. The town argued that because the Cove is a “watercourse” under the IWWA, and its regulations established an URA, it has jurisdiction over activities occurring within the URA.

The court concluded that the commission lacked jurisdiction over the plaintiff’s property. Under state law, the mean high water mark demarks the boundary between a municipality

and the state. A tidal waterbody is outside the territorial limits of a municipality, and belongs to the public (as represented by the state). In addition, section 22a-42a 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 Cove is a tidal waterbody outside Preston’s territorial limits and the commission therefore lacks jurisdiction over activities that may impact it.

Major Points

- 1) A commission lacks jurisdiction over regulated activities potentially affecting tidal waterbodies because such waterbodies lie outside the territorial limits of the municipality.