July-September 2004

Connecticut Planning

Newsletter of the Connecticut Chapter of the American Planning Association

The Key Word is "In": A Summary of the Legislature's Amendment to the Inland Wetlands Act

by Timothy S. Hollister, Esq. and Matthew Ranelli, Esq.

After a lengthy debate and comments from numerous groups, the legislature passed and the governor signed Public Act 04-209, "An Act Concerning Jurisdiction of Municipal Inland Wetlands Commissions." This bill, of course, is a response to the Connecticut Supreme Court's October 2003 decision in *AvalonBay v. Wilton Wetlands Commission*. (See our article in the January-March 2004 issue of *Connecticut Planning*; this article picks up where that one left off.)

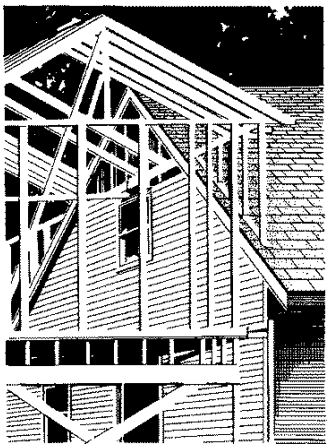
By way of disclosure, we represented AvalonBay, and it has been our belief that the court decision did not change wetlands law or require a clarification or amendment. (Shows how much influence we have.) When a coalition of groups proposed what became known as Senate Bill 445, we worked with the regulated community to support a more limited response to the *AvalonBay* decision. However, we also represent several municipal inland wetlands commissions, and our overall objective was to preserve rules that everyone can

(*continued on page 4*)

The New "Poirier" Legislation: Don't Throw Out Those Old Regulations!

by Christopher J. Smith, Esq.

In February of 2003, the Connecticut Appellate Court decided a zoning appeal that some thought created significant new land use law in Connecticut. The case was *Poirier v. Zoning Board of Appeals of the Town of Wilton*, 75 Conn. App. 289 (2003), *cert. denied*, 263 Conn. 912 (2003). *Poirier* involved the interpretation and application of what is known as Connecticut's Vested Rights Statute, Section 8-26a, entitled "Effect of change in subdivision or zoning regulations after approval of plan."



In response to the decision, the Legislature adopted Public Act No. 04-210, entitled "An Act Requiring Subdivisions to Comply with Subsequently Enacted Zoning Regulations." The Act modifies the effect of changes in a municipality's zoning and subdivision regulations upon existing residential subdivisions and certain lots.

(*continued on page 6*)

Make plans now to attend the 2004 New England Planning Expo in Springfield, MA, Sept. 30-Oct. 1. See page 3 for more information.

SCHOLARSHIP WINNER

Dixon Wins the 2004 Diana Donald Scholarship

CCAPA recently awarded Bonnie Dixon of New Haven with the $1,000 Diana Donald Scholarship. Ms. Dixon, a first-year graduate student at the University of Rhode Island, was selected due to her outstanding academic and personal achievements. She is a student liaison for the Rhode Island Chapter of APA and is active with the Feinstein Center for a Hunger Free America, assisting a section on food systems and sustainability.

CCAPA awards this annual scholarship in memory of the late Diana Donald. Donald, who passed away in 1975, was a Connecticut-based planner who was recognized nationally for her contributions to the profession. At the time of her passing, at age 40, she was the First Vice President of the American Institute of Planners and was in line to become President. Her status in the association set an historical precedent for women in planning.

Many thanks to Craig Minor, Liz Stocker and Tom Kreykes, who served as the selection committee for this year's award.

The Key Word is "In" (cont'd from p. 1)

understand and apply. For the most part, Public Act 04-209 fulfills that objective.

As you will recall, in *AvalonBay*, the Supreme Court ruled that wetlands commissions may not, under the current law, regulate based on impacts to wildlife or biodiversity, but only to the "physical characteristics" of wetlands and watercourses. The issue there was whether an impact on the upland/non-wetland habitat of a common salamander species, without any physical effect on a wetland, triggered jurisdiction and required a wetlands permit. The limited import of the Supreme Court's decision, therefore, was that the jurisdiction of wetlands commissions does not expand and contract based on the migration patterns of wetland-dependent species or other wildlife.

However, some interpreted *AvalonBay* to mean that wetlands commissions are prohibited from considering the impacts of proposed construction on the biological functions of wetlands and watercourses. We argued that that was not the issue in *AvalonBay*. Put another way, it was (and is) our view that aquatic and plant life within wetlands or watercourses are the *beneficiaries* of wetlands *functions*, and anything that adversely impacts those functions is a regulated activity — before *AvalonBay* and after. It became apparent at the legislature, however, that some sort of consensus on the Court's ruling was necessary.

Senate Bill 445, the DEP-sponsored bill, proposed to substitute for the statutory definitions of "wetland" and "watercourse" the phrase "wetland and watercourse resources," and defined this term as incorporating the entire "Purposes" section of the inland wetlands statute (§ 22a-36). Thus, the bill proposed to insert into the definition of what the wetlands act *actually regulates* (as opposed to its general policy objectives) such phrases as "related aquatic or wildlife habitats"; "hydrological stability"; "natural habitats for a diversity of fish, other organisms, wildlife and vegetation"; and "protection of potable fresh water supplies from the dangers of drought, overdraft, pollution, misuse and mismanagement." SB 445 then further proposed to incorporate this definition into each of the six criteria for granting, conditioning, or denying a wetlands permit (which are set forth in § 22a-41(a) of the statutes).

We and many others opposed this approach because it would have greatly expanded and confused the information required of a wetlands permit applicant, and the criteria that a commission should apply. It would have taken broadly-worded, undefined, and aspirational phrases from the Purposes section and made them jurisdictional and permitting criteria. In effect, it would have moved Connecticut from a system of wetlands regulation to one of ecosystem protection in one fell swoop, and without first defining the criteria.

These concerns of the regulated community generated counterproposals that sought to clarify *AvalonBay* while preserving the existing, objective definitions of wetlands or watercourses; jurisdictional boundaries that can be delineated without surveys of wildlife migration patterns; and permitting rules based on observable impacts.

Public Act 04-209 does *not* amend the jurisdiction of wetlands commissions, i.e., the up-front determination of whether a permit is required in the first place. It does, however, clarify that when a wetlands agency examines a permit application for compliance with the six criteria stated in § 22a-41(a), it may consider "aquatic, plant or animal life and habitats in wetlands or watercourses…" *The key word in this amendment is "in,"* meaning "within the physical or delineated boundaries of." The amendment clarifies that biological functions and habitats are relevant considerations in permitting, but only "in" the delineated limits of wetlands or watercourses.

Thus, the best way to understand the effect of Public Act 04-209 is to recognize that within the six criteria stated in § 22a-41(a), each reference to impacts on "wetlands and watercourses" now includes impacts on aquatic, animal, and plant life *within* the wetland or watercourse.

The final section of Public Act 04-209 states that a wetlands agency "shall not deny or condition" a permit for an activity outside wetlands or watercourses on the

basis of an impact to aquatic plant or animal life "unless such activity will likely impact or affect the physical characteristics of such a wetland or watercourse." Suppose a property owner proposes to clear vegetation in an upland review area or upland, and that vegetation provides habitat to certain species of wildlife. If the information submitted to the agency shows an impact to the vegetation or habitat but not the physical characteristics of the wetland, then the commission may not deny or condition the permit. If, however, the activity, notwithstanding its impacts on animal or plant life, will physically alter or pollute the wetland, then the activity may be (in addition to approved) conditioned or denied.

The bottom line is that when evaluating an activity proposed outside the physical limits of a wetland or watercourse, in order to condition or deny, the Commission must find some impact on the physical characteristics of the wetland or watercourse. An impact to animal, aquatic or plant life in a location beyond those boundaries does not provide a basis for conditional approval or denial.

It is important to note because this Public Act amends the six criteria for permit decisions, we assume that the DEP will amend its model wetlands regulations to reflect this change and will advise local commissions to revise local regulations to follow the model.

Another effect of this legislation may be closer scrutiny of the delineation of wetlands and watercourse boundaries. The stakes have been raised, slightly.

It also merits mention that neither the *AvalonBay* decision nor Public Act 04-209 altered agency powers to define and regulate within upland review areas and uplands, as stated in our Supreme Court's 2001 *Queach* decision. Wetlands commissions retain considerable discretion to establish upland review areas. In addition, if there is evidence that an upland activity is "likely" to impact a wetland, *Queach* confirms that the commission may assert jurisdiction. None of this has changed.

The case can be made that Public Act 04-209 was much ado about nothing, in the sense that *AvalonBay* only restrained an extreme and unsupportable exercise of jurisdiction by a local agency and that this amendment only codifies that result. But if there was something needing clarification, it was that the biological functions of wetlands and watercourses themselves have been, and remain, part of the criteria to be used in wetlands commissions' consideration of permit applications. We now have that.

Tim Hollister and Matt Ranelli are attorneys at Shipman & Goodwin LLP in Hartford, and members of its Environmental and Land Use Practice Group.