UPDATE ON INLAND WETLANDS CASELAW IN CONNECTICUT

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What's happening in inland wetlands caselaw in Connecticut? In a nutshell, it's the *River Bend* era. The Connecticut Supreme Court's 2004 decision in the case of *River Bend Associates, Inc. v. Conservation and Inland Wetlands Commission of Simsbury* has become the defining standard in appeals from decisions of local wetlands agencies. Three recent court decisions discussed below demonstrate this fact.

In *River Bend*, the Supreme Court held that to support the denial of a wetlands application, there must be "substantial evidence" in the record of a specific, adverse impact to wetlands or watercourses, along with proof of the *likelihood* that the impact will occur. The wetlands commission cannot support its decision by relying on the mere possibility of adverse impacts, speculation or assumptions. As for upland wildlife habitat, once a hotly debated topic in wetlands cases, the Supreme Court confirmed that a wetlands commission can protect wildlife and its habitat *within* wetlands, but can regulate activities in upland areas *only if those activities will impact the wetlands*.

The lower courts mostly have applied *River Bend* faithfully. Interestingly, since the *River Bend* decision in 2004 and the legislative amendment that year codifying the *AvalonBay/Wilton* salamander decision, there have been very few cases in which a wetlands application was denied based on upland impacts to wildlife habitat. We have seen no cases where impacts in an upland habitat area were shown to have a direct impact on the physical characteristics of a wetland or watercourse.

The key battleground now is in expert testimony over impacts to wetlands. Courts opinions over the last few years confirm that whether there will be an adverse impact to wetlands is a technically complex question requiring expert testimony. A wetlands commission cannot disregard uncontradicted expert testimony without a basis that is disclosed in the record. Three recent decisions from the Connecticut Appellate Court (our intermediate court) illustrate this trend.

In *Toll Brothers, Inc. v. Bethel Inland Wetlands Commission*,[1] the plaintiff proposed to build 128 townhouses on 22 acres. There were three, low-value wetland areas on the site comprising about one-tenth of an acre, and a wetland (known as Wetland D) that was 2.25 acres in size and extended along a brook. All agreed that Wetland D was of high quality and should be preserved, and the stormwater treatment system was designed accordingly. The site plan would result in filling one of the small wetlands and expanding another to act as a stormwater detention basin, but no direct impacts were proposed to Wetland D. The wetlands commission denied the application based on the proximity of a retaining wall to Wetland D, the migration route of the Eastern Box Turtle, potential flooding from the brook and indirect potential impacts to Wetland D from stormwater discharge.

On appeal, the Superior Court reversed the commission's decision. It held that the commission's findings of "potential" damage to the wetlands did not satisfy *River Bend*. There was no evidence of likely adverse impact to Wetland D and no link between upland turtle habitat and harm to the wetlands. The court held that the commission could not rely on density as a reason for denial and could not substitute "common sense" for expert testimony on the technical subject of impact to a wetland. It also found that the existence of feasible and prudent alternatives with less wetlands impacts was not a proper issue in the case, because "there cannot possibly be any alternative that could cause less impact than none."

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In a decision published June 5, 2007, the Appellate Court upheld the trial court decision on the merits. It agreed that the record lacked substantial evidence of a likely impact on Wetland D, finding that the commission improperly had relied on evidence of general environmental impacts. It further held that "any connection between the project's density and a likely impact on the wetlands is merely speculative." Finally, the Appellate Court held that the commission had merely assumed that any proposed alterations to the two small wetlands justified denial of the application, but "that assumption was improper." It ordered the case remanded to the commission for further proceedings.

In *Lord Family of Windsor, LLC v. Inland Wetlands and Watercourses Commission of Windsor*, the plaintiff applied to modify its subdivision plan to eliminate one of three access roads into its development. One of the existing "neck" roads crossed a brook over a culvert. The commission denied the application due to the greater discharge of pollutants into the brook it expected from increased traffic over the neck road, and because of the uncertain strength of the culvert. The Superior Court found in favor of the commission.

The Appellate Court reversed on August 21, 2007. It found that all stormwater runoff on the bridge was to be collected and treated and there was no evidence of harm to the wetlands from an increase in passing traffic. The Appellate Court held that the following statement by the vice chair of the wetlands commission fails to satisfy the substantial evidence test: "It doesn't take a rocket scientist to figure out that sometimes cars drop oil, and salts get into the wetlands and all kinds of things happen." In response to staff comments questioning the strength of the culvert, the court responded, "a mere worry is not substantial evidence." As in the *Toll Brothers* case, it remanded the matter to the commission for further proceedings consistent with its opinion.

The applicant in *Fanotto v. Inland Wetlands Commission of Seymour* proposed a 20 lot subdivision on a 20.37 acre parcel. The plan proposed direct impacts to .05 acre out of 5 acres of wetlands through two minor wetland crossings and a road upgrade. The commission denied the application and the Superior Court upheld its decision.

On June 3, 2008, the Appellate Court reversed the trial court. Without much discussion of the direct impacts, the court found that there was no substantial evidence in the record to support the commission's decision to deny the application. It noted that the plaintiff's expert had explained that any indirect impacts would be addressed by improving the existing stormwater system. While numerous lay people spoke at the hearing, the court found that there was "no credible evidence" presented to rebut the plaintiff's expert. The court also held that the commission improperly relied on its own knowledge without any expertise or opportunity for the plaintiff to rebut it. In this case, however, the Appellate Court found that "the only reasonable conclusion for the commission to reach would be to grant the application with reasonable conditions," and remanded the case to the commission with direction to do so.

In short, recent court decisions show that it is imperative for an applicant to present solid expert evidence demonstrating the avoidance or mitigation of adverse wetlands impacts, and to challenge and rebut any evidence that suggests the possibility of wetlands impacts.

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