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Problems faced by Connecticut farmers: Farming, wetlands and "as of right" activities

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Over the course of the past thirty-five years, municipal land use regulations - particularly inland wetlands regulations - have been one of the most persistent problems faced by Connecticut farmers. Because the legislature has delegated the responsibility of all towns to adopt and enforce wetlands regulations, there should be a consistent statewide understanding as to what the statutes permit or require and which activities and areas are subject to regulation. Such consistency is not universal and, therefore, the cases and examples listed below may not be applicable to every situation. In addition, it is important to remember that this discussion of activities which are permitted "as of right" does not apply to zoning regulations, in which towns retain broad discretion to determine what uses may be permitted or prohibited and to define what constitutes "farming" or "agriculture".

Statutory Provisions

When the Connecticut legislature first adopted the inland wetlands and watercourses statutes in 1972, a number of prominent legislators from rural areas insisted that there be an exemption for agricultural uses because a strict application of the provisions of the law was incompatible with the day-to-day operations of many farming operations. That exemption is found today in Section 22a-40(a), subsection (1) of the Connecticut General Statutes, which provides as follows:

"(a) The following operations and uses shall be permitted in wetlands and watercourses, as of right:
(1) Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation, and activities conducted by, or under the authority of, the Department of Environmental Protection for the purposes of wetland or watercourse restoration or enhancement or mosquito control. The provisions of this subdivision shall not be construed to include road construction or the erection of buildings not directly related to the farming operation, relocation of watercourses with continual flow, filling or reclamation of wetlands or watercourses with continual flow, clear cutting of timber except for the expansion of agricultural crop land, the mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale."

In turn, the legislature has provided the following definition of "farming", which is found in Section 1-1(q) of the Connecticut General Statutes:

(q) Except as otherwise specifically defined, the words "agriculture" and "farming" shall include cultivation of the soil, dairying, forestry, raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, including horses, bees, poultry, fur-bearing animals and wildlife, and the raising or harvesting of oysters, clams, mussels, other molluscan shellfish or fish; the operation, management, conservation, improvement or maintenance of a farm and its buildings, tools and equipment, or salvaging timber or cleared land of brush or other debris left by a storm, as an incident to such

farming operations; the production or harvesting of maple syrup or maple sugar, or any agricultural commodity, including lumber, as an incident to ordinary farming operations or the harvesting of mushrooms, the hatching of poultry, or the construction, operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for farming purposes; handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market, or to a carrier for transportation to market, or for direct sale any agricultural or horticultural commodity as an incident to ordinary farming operations, or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market or for direct sale. The term "farm" includes farm buildings, and accessory buildings thereto, nurseries, orchards, ranges, greenhouses, hoopouses and other temporary structures or other structures used primarily for the raising and, as an incident to ordinary farming operations, the sale of agricultural or horticultural commodities. The term "aquaculture" means the farming of the waters of the state and tidal wetlands and the production of protein food, including fish, oysters, clams, mussels and other molluscan shellfish, on leased, franchised and public underwater farm lands. Nothing herein shall restrict the power of a local zoning authority under chapter 124.

Model Regulations

In addition to the statutory provisions, the Department of Environmental Protection has promulgated model regulations which have been widely adopted. Revised model regulations were adopted in 2006, but these have not been widely adopted yet. In Section 2.1 of the Model Regulations, as amended, "farming" is defined by reference to the broad statutory definition.

The Model Regulations also repeat the statutory "as of right" uses in Section 4.1(a), which reads as follows: "The following operations and uses shall be permitted in inland wetlands and watercourses, as of right: (a) grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation, and activities conducted by, or under the authority of, the Department of Environmental Protection for purposes of wetland or watercourse restoration or enhancement or mosquito control. The provisions of this subdivision shall not be construed to include road construction or the erection of buildings not directly related to the farming operation, relocation of watercourses with continual flow, filling or reclamation of wetlands or watercourses with continual flow, clear cutting of timber except for the expansion of agricultural crop land, or the mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale."

General Principles of Interpretation

The "as of right" agricultural uses identified in the statutes and Model Regulations are exempt from regulation by a town's inland wetlands and watercourses commission. It is within the authority of the wetlands commission itself to make jurisdictional rulings regarding the applicability of the exemption to a proposed activity. Because environmental statutes are deemed to serve a public purpose, exemptions from regulation are narrowly construed and the presumption is against the party claiming the exemption. The property owner should carefully examine the proposed activities and determine whether or not they fall within the available exemption.

The second general rule is that the statutory definition of "farming" should be reviewed to make sure that the proposed activity falls within its scope. It is irrelevant whether a town's zoning regulations, wetlands regulations or general ordinances define "farming" or "agriculture" in a different manner. Note also that the statute doesn't require that a farming activity already exist in order to qualify for the exemption and there is no specific requirement that it be done for profit or have a state tax

registration.

Finally, bear in mind that the wetlands commission has jurisdiction over inland wetlands and watercourses, but that nearly all towns have also created an additional "review" or "buffer" area in which they exercise authority. Be aware of the differences between these regulated areas but keep in mind that the exemption applies with equal force in each.

Specific Activities

The statute lists the following activities (subject to the remainder of the section) as exempt from regulation: "Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation." Courts have spent somewhat less time examining these provisions than they have the "exceptions", but there are some legal precedents which may be useful. Activities which are "preparatory" to these listed uses, to the extent they do not fall within any of the exceptions discussed, should similarly be permitted as of right. For example, removal of stones or stumps in anticipation of use of land for farming should be permissible so long as it doesn't result in, for example, the filling of a wetland or the relocation of a watercourse with continual flow.

* Grazing. The term "grazing" is not defined in the statutes but has generally been interpreted to mean the feeding of animals by allowing them to eat grass and vegetation which occurs on the ground.

* Farming. The DEP model regulations currently defined "farming" by referring to the statutory provisions in CGS 1-1(q). The statutory definition of "farming" has generally been recognized to supersede any conflicting local regulatory definition, including ones which may require evidence of state or federal tax registrations as a "farm".

* Nurseries.

* Gardening.

* Harvesting of crops.

* Farm ponds of three acres or less essential to the farming operation. The model definitions promulgated by the DEP define the latter phrase to mean "that the activity proposed is necessary and indispensable to sustain farming activities on the farm." Prior to 2006, it had referred to "an existing farm" but it currently permits the creation of a pond for a proposed farm. The burden will be on the farmer to demonstrate to the commission that the pond is essential to the farming operation. In addition, while the construction of a farm pond is exempt, careful consideration should be given to where the soil from the excavation will be placed. It may very well constitute "filling" if it is placed within a regulated area.

"Exceptions to the Exemption"

There have been a number of cases which interpret and clarify the activities which are exceptions to the "as of right" exemption.

* Road construction or the erection of buildings not directly related to the farming operation. Commissions and courts have required farmers to clearly demonstrate the link between the proposed road or building and the farming operation. Unlike farm ponds which must be "essential to" the farm, the road construction and erection of buildings only must be "directly related to" the farming operation. This is a lower standard, but commissions sometimes view them as interchangeable.

* Relocation of watercourses with continual flow. Note that "continual flow" does not necessarily mean "continual". Under the model regulations, it is defined to include a watercourse that may dry up during periods of drought or seasonally between June and September.

* Filling or reclamation of wetlands or watercourses with continual flow. As with relocation, filling and reclamation of watercourses that dry up during periods of drought or during the summer may be a regulated activity. In addition, the phrase "continual flow" probably does not apply to wetlands, rather only to watercourses.

* Clear cutting of timber except for the expansion of agricultural crop land. There are two elements of this exception that should be examined. First, "clear cutting" has generally been defined to mean the removal of substantially all of the trees, bushes and woody vegetation within a particular area. Selective cutting, even of a majority of the timber, is an exempt activity. Second, "agricultural crop land" would include hay fields and land on which animals are to graze, in addition to land on which crops are cultivated for harvest.

* Mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale.

How to Proceed

Those activities which clearly are "as of right" under the statutes and regulations require no permit from the inland wetlands commission or its agent. That being said, it would be prudent to discuss your proposed activities with town staff in order to ensure that they agree with your position. There is a provision in the DEP's model regulations, as amended in 2006, which requires "any person proposing a permitted operation and use or a nonregulated operation and use" to notify the commission of the nature and extent of the proposed activity in order to determine that the activity is in fact exempt from regulation. The regulations further state that the commission shall rule whether the proposed activity or use is nonregulated, i.e., "as of right". The commission may delegate this authority to its agent. When you are doing the work, be certain that it is as closely identical to that which you described to the town as possible.

Farmers should carefully consider whether their proposed activities fall within the letter of the exemptions and should follow the applicable town wetlands regulations in order to avoid enforcement actions by the town and costly litigation.

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