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A shift in favor of property development rights in municipal wetlands permitting

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After a long period of expanding discretion of municipal wetlands agencies to halt development based on conjecture that work taking place in uplands may harm nearby wetlands, a series of recent Connecticut cases, including several decided last year, are requiring more tangible evidence of wetlands impact to support denial of a wetlands permit.

Based on several Connecticut Supreme Court decisions issued more than a decade ago, proposed development in upland area constitutes a regulated activity requiring a permit if the activity would impact a nearby wetlands. Following that lead, more and more towns extended their defined regulated areas to include areas of uplands adjoining wetlands.

The expansive interpretation and application of wetlands regulations often made the wetlands permit the most difficult municipal land use approval to obtain and the most difficult to challenge on appeal if denied. For many years, mere speculation by an expert that a proposed development might cause adverse impacts to a wetland or watercourse could stop real estate development in its tracks. The pendulum began to swing in favor of developers after the Connecticut Supreme Court's decision in *River Bend Associates v. Conservation Inland Wetlands Comm'n*, 269 Conn. 57 (2004).

In *River Bend*, a developer proposed to construct 640 residential units on property formerly the location of a tobacco farm. The Department of Environmental Protection issued a permit allowing dispersal of contaminated soil across the site to reduce pollutant concentrations. The Simsbury wetlands agency denied a permit to allow the development of the site based on several well-known environmental consultant reports citing risks to the wetlands from the introduction of pesticides and heavy metals into the wetlands resulting from the remediation. The Supreme Court determined that the evidence was insufficient to support a denial because the experts did not determine that the wetlands would actually be impacted by the contaminants. The decision requiring proof that actual harm would likely occur to the wetlands signaled an important change in the way denials are reviewed on appeal. That change was reflected in a series of cases issued during the last year rebuffing denials of wetlands permits based on generalized attacks on development plans.

The Connecticut Appellate Court reversed the denial of a wetland permit associated with a plan to build 129 townhouse units on a 22 acre parcel in *Toll Brothers, Inc. v. Inland Wetlands Comm'n of Bethel*, 101 Conn. App. 597 (2007). The development plan proposed to fill one wetland and enlarge another. The court ruled that the evidence relied on for denial was speculative and did not constitute substantial evidence when the opposing environmental expert determined that "excessive" development harms wetlands.

The Appellate Court reversed a wetlands commission denial associated with a subdivision proposing two roads and use of an existing partially paved road that crosses a watercourse. *Lord Family of Windsor, LLC v. Inland Wetlands Commission of Windsor*, 103 Conn. App. 354 (2007).

The court ruled that the denial based on possible impacts to the brook and potential harm to the culvert caused by an increase in traffic was not supported by any specific, substantive evidence. Last year, several Superior Court decisions applied the River Bend test and rejected denials that were not supported by sufficient tangible evidence of adverse impacts to wetlands.

The Superior Court rejected the Fairfield wetland agency's refusal to authorize the division of a parcel into two building lots and its attempt to impose a conservation easement on the area proposed as the new building lot. *Heali v. Conservation Commission of Fairfield*, 207 Conn. Super LEXIS 1799 (Radcliffe, J., 7/6/07). The court determined that the agency lacked evidence that a proposed lawn adjoining a wetland would result in adverse impact to the wetland.

In *Diamond 67, LLC v. Vernon Inland Wetlands Comm'n*, 2007 Conn. Super LEXIS 1650 (Klaczak, J., 5/10/07), the Superior Court reviewed the report by the commission's expert, a professor of environmental science, outlining the strengths and weaknesses of a proposed residential development. The expert did not state that the wetlands would actually be harmed. Testimony by a wildlife biologist that increased velocity of storm water will introduce chemicals and sedimentation to the wetlands and increase the amount of heavy metals entering the stream was rejected as speculative.

The application of the River Bend test during the last year demonstrates a shift favoring developers who prepare careful plans and engage competent environmental experts to demonstrate that wetlands will not be harmed. With that kind of preparation, proposed development should not be blocked based on generalized statements of project opponents not backed up by substantive evidence that wetlands or watercourses will likely be harmed.

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