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~~FST~~ CV 03 05 23880 S : SUPERIOR COURT

TOLL BROTHERS, INC. : JUDICIAL DISTRICT OF STAMFORD/NORWALK

V. : AT STAMFORD

BETHEL INLAND WETLANDS COMMISSION : JANUARY 18, 2006

MEMORANDUM OF DECISION

The plaintiff appeals from the decision of the defendant Bethel Inland Wetlands Commission (hereinafter the "Commission") denying its application for approval of regulated activities both within wetlands areas and within an upland review area.[1] The property consists of 22 acres of undeveloped land just east of the Danbury city line. The plaintiff proposes to build an affordable housing development of 129 townhouse units in 24 separate buildings pursuant to § 8-30g of the General Statutes. The land contains four inland wetland areas totaling approximately 2.5 acres, designated A through D. Only wetlands D is involved in the Commission's decision and therefore, this appeal is limited to the Commission's action with respect to wetland D.[2] The wetlands and watercourses within area D consists of the Terre Haute Brook, a watercourse, and its repairian flood

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[1] Section 115-4 of the Bethel Inland Wetlands and Watercourses Code defines upland review area as the area of land within 100 feet measured horizontally from the boundary of any wetland or watercourse. The definition of regulated activity basically follows the statutory definition found in § 22a-38(13).

[2] Notwithstanding the agreement on this point by the plaintiff and the Commission, the Commissioner of Environmental Protection (hereinafter the "Commissioner") contends, nevertheless, that the filling of wetlands A and the proposed modification of wetlands B are also involved in this appeal. The Court rejects that claim for the reasons that more fully appear, infra. In addition, because such activities are not even mentioned in the Commission's written decision, the court cannot go behind its decision and search the record for additional reasons or reasons created by the ingenuity of counsel.

plain. Outside area D but within the upland review area, the plaintiff proposes to construct a masonry type wall approximately 1,300 feet long and ranging from four to twenty feet in height with a chain link fence on top of the wall. The purpose of the wall is to obviate the need for grading and sloping of the earth in close proximity to area D. No construction activities are proposed within area D. The wall will be located as close as three feet to area D and an average of five feet distant from area D.

The plaintiff filed its application on December 16, 2002. The Commission held public hearings on April 21, June 2, and July 14, 2003. At its July 28, 2003 meeting the Commission denied the application.

Aggrievement

In order for this court to have jurisdiction of the appeal the plaintiff must be aggrieved. The test for aggrievement in a wetlands agency appeal is the same as for a zoning appeal, namely, a plaintiff must demonstrate a specific, personal and legal interest in the subject matter of the decision, as distinguished from a general interest. Second, the plaintiff must successfully establish that this interest has been specially and injuriously affected by the decision. *Huck* v. *Inland Wetlands and Watercourses Agency*, 203 Conn. 525, 530 (1987).

On September 20, 2005 the Court took evidence on this issue. On the basis of the testimony of Gregory Kamedulski, a Vice President of the plaintiff, and the documentary evidence presented, the court finds that the plaintiff was at the time of the application and at all times during this proceeding to the present time, a contract purchaser of the property involved in this appeal and is thereby aggrieved. *Goldfeld* v. *Planning and Zoning Commission*, 3 Conn. App. 172, 177 (1985).

The Commission's Decision

The Commission was statutorily required to give reasons for its decision. Section 22a-42a(d)(1) of the Gen. Statutes. When it does, a reviewing Court may not go behind the formally stated reasons and attempt to search out and speculate on other reasons which might have influenced some or all of the members of the Commission to reach the Commission's final collective decision. *RYA Corp.* v. *Planning and Zoning Commission*, 87 Conn. App. 658, 675 (2005). *Cf Gagnon* v. *Inland Wetlands and Watercourses Commission,* 213 Conn. 604, 611 (1990). In *Avalon Bay Communities Inc.* v. *Inland Wetlands Commission*, 266 Conn. 150 (2003), our Supreme Court announced a new limitation on the jurisdiction of a wetlands commission to regulate activities which occur in areas outside wetlands, watercourses and upland review areas. In *River Bend Associates Inc.* v. *Conservation and Inland Wetlands Commission*, 269 Conn. 57 (2004) the Court extended that limitation to the wetlands and upland review areas themselves. Nevertheless, as previously stated the parties (although not the Commissioner) agree that the present case involves only activities occurring outside of the wetlands and watercourse in so far as those activities may have an effect on the wetlands/watercourse.

The new rule, simply stated, is that a wetlands commission may regulate activities outside of wetlands/watercourses and upland review areas only if those activities are likely to affect the land which comprises the wetland/watercourse. *Avalon Bay Communities Inc.* v. *Inland Wetlands Commission*, 266 Conn. at 163. This rule corresponds with § 22a-42a(2)(f)(2) of the General Statutes. The term "likely" both as used in *Avalon Bay* and in the statute has been construed by the Court as "more than a mere possibility" *River Bend Associates Inc.* v. *Conservation Inland and Wetlands Commission*, 269 Conn. At 70. While the Court did not define the term "likely," it has

done so elsewhere. In *Boland* v. *Vanderbilt*, 140 Conn. 520, 525 (1953) the Court adopted Webster's New International Dictionary (2d. ed.) definition namely, "probable, appearing like truth, seeming to justify belief." The Court notes that a more modern definition may be found in Webster's New World Dictionary, Second College Edition at 819, namely, "probable, reasonably to be expected, seeming as if it would happen." In fact, in the wetlands field, the Court has said that the term "significant activity" as used in wetlands statutes implies that the activity must have a "substantial potential effect." *Rockville Fish and Game Club Inc.* v. *Inland Wetlands Commission*, 231 Conn. 451, 457 (1994). Finally, in the context of affordable housing land use cases, the court has held that the sufficient evidence standard applicable to such appeals requires the record to show that the identified harm to public interests is more than a mere possibility but rather a probability. *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 156 (1985).

The Commission attempts to distinguish the River Bend case on the grounds that unlike Bethel, the Simsbury wetlands regulations go further than the general statutory requirements applicable in Bethel and establish "additional factors" that the wetlands commission was required to consider. Specifically, it points to the requirement contained in the Simsbury regulation, that the commission consider a physical event, i.e., siltation and leaching into the wetland and any adverse effects which they might cause. The Court disagrees that this difference in the regulations constitutes a meaningful distinction, such that without it the Court would have reached a different result. That regulation did nothing to alter the fact that the general statutes require that the activity adversely impact the wetlands. See G.S. § 22a-42a(f)(a)

With these guidelines the Court must now scrutinize each of the seven reasons given by the Commission to determine (1) whether each reflects a finding by the Commission that the particular

activity identified in the uplands is likely to cause harm to the wetlands, and (2) whether the record supports such a finding by substantial evidence.[3] The substantial evidence rule which generally applies to administrative appeals was first stated in 1987 in the seminal case of *Huck* v. *Inland Wetlands and Watercourses Agency*, 203 Conn. at 540-542. "This so called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred."

Reason A

The discussion centers on the Commission's concerns that (1) the disturbance of the upland during a non-phased construction plan will "create [s] the potential for damage to the wetlands"; (2) the introduction of impervious surfaces such as pavements and roofs will "greatly increase the potential for runoff pollutants into the wetlands; (3) there is a "likely potential" for damage to the wetlands by construction of the retaining wall within five feet of the wetlands;[4] (4) 40 of the 129 units will have partial footprints within the flood hazard limits established by the Federal Emergency Management Agency (FEMA) thereby requiring them to purchase flood insurance, thereby "indicating a potential danger from flooding." (Emphasis added throughout.)

It is noted that the Commission did not find that the impacts which it described were likely to harm the wetlands or that the wetlands would probably be damaged by these conditions. Instead,

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[3] Each of the seven reasons assigned by the Commission is clearly pertinent to the considerations for which the Commission was required to apply pursuant to § 22a-41 since they are a verbatim recitation of the seven "standards and criteria" set forth in § 115-22 of its Code. *West Hartford Interfaith Coalition Inc.* v. *Town Council*, 228 Conn. 498, 513 (1994).

[4] The Commission seems to use the terms wetlands and watercourse interchangeably. Hereinafter, the Court's use of the term wetlands will include watercourse.

it found that these activities had the potential to cause damage to the wetlands. "Potential" is a synonym for possible. Webster's New World Dictionary 2nd College Edition at 1114. It is further noted that the Commission takes a different position in its trial brief. The Court recognizes that the Commission's brief is dated April 28, 2004 and the River Bend case came down May 18, 2004. At page 1 of the brief the Commission states that "the intensity of the development was likely to impact the wetlands." Curiously, the Commission does not make that finding in its written decision nor does it identify where in the record one may find any evidence of the likelihood of injury to the wetlands, unlike in *Bain* v. *Inland Wetlands Commission*, 78 Conn. App. 808, 815, n. 5, (2003) wherein the Commission stated in its written decision that "there would be a direct environmental impact on the wetlands." (Emphasis added.) This reason fails to satisfy the first prong of the two part test.

Notwithstanding that this reason fails to satisfy the first prong of the test the Court has reviewed the record carefully, searching for evidence to support the claim which the Commission makes in its brief. At oral argument, the Commissioner invited the Court's attention, to Exhibits 43 and 50 as a source of such evidence. Neither document supports that position.[5] The Court will now consider the two exhibits identified by the Commissioner.

Exhibit 43

Sean Hayden, a certified soil scientist speaking for an organization known as Northwest

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[5] In its trial brief the Commission argues that "common sense indicates that the intensity of the development of the site and shifting of over 60,000 cubic yards of material and depositing some of it in close proximity to wetlands and the watercourse may have a significant impact on them." (Emphasis added.) The Court observes that common sense is a virtue with which the members of the Commission may have been generously endowed. They are not however, permitted to substitute that virtue for expert testimony on the highly technical subject of how upland construction activity would impact a wetland. *United Jewish Center* v. *Brookfield*, 78 Conn. App. 49, 57 (2003).

Conservation District, based in Torrington, Connecticut stated the following:

(1) "Activities, such as developments that change hydrology in head water areas of a water shed tend to amplify negative environmental impacts to lower areas in the water shed.:

(2) "Research has shown that water quality, aquatic habitat and stream bank stability become impaired when more than 10% of the water shed has been developed .... The intensity of the proposed project will only increase the issues."

"Although in considering an application for a permit to engage in any regulated activity a local inland wetlands agency must, under [General Statutes] § 22a-41, take into account the environmental impact of the proposed project, it is the impact on the regulated area that is pertinent, not the environmental impact in general." *River Bend Associates* v. *Conservation Inlands and Wetlands Commission*, 269 Conn. at 72. The character of the evidence cannot be speculative but must be specific to the particular site. Id. at 79, n. 28. The impact on the wetlands must be precise and not generalized. Id. at 74. It is not enough to say that intensive development of an upland area will "impair" the characteristics of a wetland without saying how. The expert must specify with particularity the precise harm that will result. Id. at 81. In the absence of such testimony from an expert and in the face of contrary evidence, an administrative agency may not draw an inference which undermines the contrary evidence or the contrary expert's conclusions. *United Jewish Center* v. *Brookfield*, 178 Conn. App. 49, 60 (2003).

Exhibit 50

Michael W. Klemess, an expert on wetlands and wildlife retained by the Commission opined that:

(1) "The project as proposed will result in the loss of box turtle habitat and sever the links between upland and wetland areas made by box

turtles during their yearly activity cycle."

(2) "The intensity of use is not appropriate for such an environmentally constrained site."

Neither statement rises to the level necessary to satisfy the substantial evidence test. First there is disagreement in the record as to whether the wetlands could support a viable colony of box turtles. In fact, the Commission admits this in paragraph 32 of its Answer. *Avalon Bay Communities, Inc.* v. *Inland Wetlands Commission of Wilton*, supra has clearly established that our inlands wetlands and watercourses statutes protect only the physical characteristics of a wetland and not the wildlife which inhabits the wetland. In Public Act 04-29 [now codified in the General Statutes as Section 22a-41(b)(2)(c)&(d)] the legislature added wildlife to the definition of wetlands (subsection c) and it codified the requirement first announced in *Avalon Bay* that any activity outside the wetland must likely impact (adversely) or affect the physical characteristics of the wetland (subsection d) (emphasis added.) Thus, even if this upland development were to cause the extermination of the box turtle, unless there was evidence that that event would adversely affect or change the physical characteristics of the wetland, that event could not constitute grounds for denial of the plaintiff's application.

Flooding

The Commission's concern with flooding seems to be misplaced. The Commission found that with respect to the planned location of forty of the units the homeowners will be required to purchase flood insurance in order to qualify for disaster relief from the Federal Emergency Management Agency. The plaintiff does not take issue with that finding. The Commission went on to infer that this indicated a "potential" danger from flooding. The plaintiff strongly disagrees

with that interpretation.

The Court is uncertain whether the Commission's concern for flooding is related to a perceived danger to the housing units proposed or to the wetlands. At P. 17-18 of its trial brief the Commission seems to include both. Nevertheless, at oral argument on November 8, 2005 the Commission agreed that regulating house locations in order to protect them from floods was outside of its jurisdiction. Wholly within its jurisdiction, however, is protecting the wetlands from damage by flood and "deterring and inhibiting the danger of flood" to structures outside the wetlands by safeguarding the flood controlling characteristics of the wetlands. See, G. S. § 22a-36. The record is totally devoid of evidence of likely flood damage to the wetlands, and, indeed, the Commission appropriately made no such finding. Likewise, the record is devoid of evidence of any likely change to the physical characteristics of the wetlands which tend to prevent flooding.

Runoff

The Commission's disapproval of the creation of numerous impervious surfaces for roads, sidewalks and rooftops serving 129 homes is in reality an expression of its disapproval of the density of the project in excess of that permitted by the zoning regulations. The Commission predicted that these surfaces would produce runoff which would contain pollutants. The Commission specifically identified those pollutants as garbage, fertilizers, sand and salt.

Recognizing the need to provide for such runoff the plaintiff designed a runoff renovation system that will remove 80% of the total pollutants from the runoff leaving 20% to enter the wetland. Nothing in the record contradicts this claim. Yet, the Commission maintains that even 20% will be potentially harmful to the wetlands. The Commission admits at page 15 of its trial brief that there is no expert testimony to support this claim but relies on the statement of one of its members

(Commissioner Ricci) that this quantity of pollutants will "obviously have negative and potentially destructive effects on the wetland"[6]. As noted above, our case law is clear that in determining what constitutes an adverse impact on a wetland, expert testimony is essential. *River Bend Associates* v. *Conservation and Inland Wetlands Commission*, 269 Conn. at 78. Absent such evidence there could be no finding of likelihood of harm.

Retaining Wall

The Commission found a "likely potential" of short and long term damage to the wetlands from construction of the retaining wall so close to the wetland. As our Supreme Court has said repeatedly, "determining what constitutes an adverse impact on a wetland is a technically complex issue." *River Bend Associates,* supra at 78. Consistent in its approach, the Commission once again inferred from the fact that this wall would be constructed within five feet of the wetlands, that construction activity and/or materials would necessarily, unavoidably intrude upon the wetlands and thereby cause them harm. The plaintiff has laid out a careful plan designed to avoid such a result. The Commission is empowered to hold the plaintiff to its plan. The record is barren of any evidence of either what types of construction materials or equipment might accidentally enter the wetland, or if they did, what harm they would cause.

The Commission next disapproved of the wall because it would constitute "a permanent barrier to wildlife in an out of the wetlands." As a matter of law, such a ground for denial is not warranted. *Avalon Bay Communities Inc.* v. *Inland Wetlands Commission*, 266 Conn. at 150. Moreover, there is no credible evidence in the record to support the notion that any unwanted effect

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[6] Commissioner Ricci prepared a written statement for inclusion in the Commission's decision. The Commission duly incorporated that statement into its written decision.

on wildlife caused by the wall would have any effect on the physical characteristics of the wetland. Section 22a-41(b)(2)(c) & (d).

The next reason the Commission gave for not liking the wall, namely safety and maintenance concern, is obviously beyond the Commission's statutory purview and merits no attention from the Court.

Alternatives

The thrust of this reason is that the applicant failed to present any feasible and prudent alternative to the proposed regulated activity which would cause less or no environmental impact to the wetlands pursuant to Section 22a-41(a)(2). The Commission and the Commissioner misconstrue the statutory scheme which governs the need for a wetlands applicant to present to a wetlands commission an alternative to its proposed plan. In addition to subsection (a)(2), subsection (b)(1) and (2) of § 22a-41 also apply. Subsection (b)(1) applies to the planned issuance of a permit. Subsection (b)(2) applies to the planned denial of a permit. As this Court analyzes these provisions, the essential predicate to their invocation and application is that the activity proposed be a regulated activity as defined in § 22a-38 (13). A regulated activity may occur in one of two places, viz: (i.) in a wetland; or, (ii.) outside the wetland, provided that activity is likely to impact or affect the wetlands adversely. Section 22a-42a(f). *River Bend Associates Inc.* v. *Wetlands Commission,* supra.[7] In short, when a wetlands commission fails to find that an upland activity is likely to impact

[7] The cases which the Commission and Commissioner cite on this subject involve regulated activities which occurred directly in the wetlands or watercourses and therefore, met the statutory definition of "regulated activity," thereby qualifying as the essential predicate to consideration of a feasible and prudent alternative. *Sanpari* v. *Inland Wetlands Agency*, 226 Conn. 579 (1993); *Tarullo* v. *Inland Wetlands and Watercourses Commission*, 265 Conn. 572 (2003); *A.D.A.M. Land Development Corp.* v. *Conservation Commision*, 21 Conn. App. 122 (1990).

a wetland adversely, there cannot possibly be any alternative that could cause less impact than none and therefore, it would be highly improper for that commission to consider the issue.

Notwithstanding the above, the record is clear that any such alternatives, if implemented, would have a greater adverse impact than the plan that was disapproved. See, Record, App. A ex. 10.

Reason B.

The only new ground that can be culled from this reason is excessive density. Controlling density of population or density of housing units is fundamentally and statutorily a function of a planning or zoning commission. G. S. § 8-2. It is certainly not the function of a wetlands commission, *Tanner* v. *Conservation Commission*, 15 Conn. App. 336, 339 (1988). The proper function of a wetlands commission with respect to density is to assess, on the basis of expert testimony before it, whether the number of housing units proposed will have an adverse impact on the wetlands, and if so, to identify specifically that impact and the damage it is likely to cause. For a wetlands commission to rely on density of development in excess of that permitted by the zoning regulations, especially in the context of an affordable housing development, without the requisite proof of harm to the wetlands, is to invite a charge of pretextual denial. See, *Avalon Bay Communities, Inc.* v. *Sewer Commission*, 270 Conn. 409, 432, n. 26 (2004).

Reason C

The single ground offered in this reason is nothing more than a reiteration of prior reasons in different words and needs no further discussion.

Reason D

This reason breaks down into two separate grounds. The first covers the issue of pollutants flowing into the wetlands which has been discussed at length above and the second deals with the apparent failure of the commission to be satisfied with the plaintiff's assurance that it will protect the wetlands while building the retaining wall. As stated earlier, there is no evidence of what substance, harmful or otherwise, likely would enter the wetland from this activity. Moreover, the plaintiff's construction plans call for the careful use of hand labor, no use of construction machinery for excavation or otherwise and appropriate sedimentation and erosion controls. The commission characterized this plan as "simplistic" and therefore unacceptable without disclosing to the plaintiff the protective measures which it would accept as non simplistic. Since there was no evidence in the record that the wall would create any adverse impact on the wetlands, the Commission had to rely on its own knowledge of the effect which this part of the project would have on the wetlands. Concerning such a practice our Supreme Court has said: "the defendant may have inferred from the expert testimony that the plaintiff's proposed actions would adversely impact the wetlands and watercourses. Such an inference, however, would be improper in this case. In *Feinson* v. *Conservation Commission*, 180 Conn. 421 (429) (1980), this court held that 'a lay commission acts without substantial evidence, and arbitrarily, when it relies on its knowledge and expertise concerning technically complex issues . . .' In the present case, the record contains no evidence that the defendant had the requisite technical expertise to find facts sufficient to reasonably infer from the expert testimony that the plaintiff's proposed activities would adversely impact the wetlands or watercourses. Consequently, it would be inappropriate for the defendant to draw such inferences. Furthermore, even if we were to determine . . . that some of the members had the requisite technical expertise, the defendant would then be required to 'to reveal publically its special knowledge and

expertise,[and] to give notice of the material facts that are critical to its decision, so that a person adversely affected thereby has an opportunity for rebuttal at an appropriate stage in the administrative proceedings.' . . . the defendant, however, made no such disclosure." *River Bend Associates Inc.* v. *Conservation and Inlands Wetlands Commission*, 269 Conn. at 57, n. 27. In the present case the Commission could draw no such inference because there was no expert testimony from which to draw it. Moreover, the Commission here, as in *River Bend,* made no such disclosure.

Reason E

This reason also breaks down into two parts. The first part cites the lack of play yards for the children who will live in the development. As with its concern that the density of the development will create numerous impervious surfaces, a concern that high density will produce children who will have no play yards is so patently outside the statutory jurisdiction of the Commission as to once again create the impression that the Commission "grasped at straws to deny the application" or may even have acted pretextually.

The second part of the reason relates to loss of box turtle habitat which, because all activities are upland, must produce an adverse impact on the physical characteristics of the wetland. *Avalon Bay Communities Inc.* v. *Inland Wetlands Commission*, 266 Conn. 150, supra; G. S. § 22a-41(b)(2)(c &d). The Court notes that the Commission's decision was rendered three months before *Avalon Bay* was released. The issue is discussed earlier in this opinion.

Reasons F & G

These reasons offer excessive density of development as the ground. The issue has been discussed extensively above. The Court cannot help but note that F and G are the third and fourth

time the density issue has been mentioned in the Commission's decision. In fact, it is apparent to the Court that density, per se, was the overriding reason for denial, not the likelihood that density might cause damage to the wetlands. This reason presents the issue in no different a light than the prior reasons. The Commission has flagrantly exceeded its authority by positing these reasons.

Having subjected each of the proffered reasons to the two part test articulated at page 4 above, it is apparent that none of them is legally sufficient. Therefore, the plaintiff's appeal must be sustained.

Both the plaintiff and the Commission urge the Court to remand the case to the Commission in the event the appeal is sustained. When it appears as a matter of law that there was but a single conclusion which the administrative agency could reasonably reach, the Court may direct the agency to do or to refrain from doing what the conclusion legally requires. *Mobil Oil Corporation* v. *Zoning Commission*, 30 Conn. App. 816, 820 (1993). The present case meets this standard.

Therefore, the Court remands this case to the Commission with direction to issue the permit under such terms and conditions as the Commission might reasonably prescribe. Such action shall be completed within 90 days unless extended by the Court for good cause shown.

BY THE COURT

A. WILLIAM MOTTOLESE, J.T.R.