Journey to the Legal Horizon

The Editor of the Habitat, Tom ODell, sat through the workshops that Attorneys David Wrinn, Mark Branse and I offered at the CACIWC annual meeting. He had a few questions for me after the sessions and asked if I would expand our discussion into an article.

What does it mean, in general, and then specifically for wetlands agencies, when there are two Appellate Court decisions that aren't consistent?

In our legal workshops I touched upon this very issue that came up in the context of agency jurisdiction. Is a wetlands agency authorized to regulate activities outside of wetlands/watercourse boundaries or an adopted upland review area? That question is answered with opposite outcomes in two Appellate Court decisions. I will address how the Appellate has resolved the jurisdictional issue after I lay out the foundation of how land use appeals go through our state court system.

The Court system: Superior - Appellate - Supreme

The initial court to which wetlands appeals are brought are the Superior Courts, which you probably recognize as trial courts. (As I mentioned at the workshops, do not get confused by the use of the term "Supreme Court" in the television series, *Law & Order*, which is set in New York where the New York Supreme Court is equivalent, in many aspects, to the Connecticut Superior Court.) One Superior Court judge is assigned to a wetlands appeal. That judge's focus is on whether there is any reason for the wetlands agency's action that is legally sufficient and for which there is substantial evidence in the record. Once the judge issues a written decision, that decision is binding on all of the parties to the appeal -- but on no other wetlands agency, person or entity. I like to be aware of Superior Court decisions if they address an area of the law for which there is little case law from our Supreme Court or a new argument is being raised. But I don't get overly exercised about every Superior Court decision, precisely because no other judge or party is bound by it. If the legal analysis is persuasive, I may want to use it in framing a similar issue in a future case. I don't take a Chicken Little approach to a Superior Court decision. The sky is not falling from one Superior Court case. It may affect one town or one applicant very strongly, but not the whole state.

Once the judge has issued a decision and one of the parties (agency, applicant, abutter, CEPA intervenor) is dissatisfied, such party may petition the next higher level of court, the Appellate Court, for further review. While anyone "aggrieved" may bring an appeal to the Superior Court, there exists no absolute right to further appeal in land use matters. These requests for further review are called petitions for certification. That is, the higher court has to certify the appeal, to allow the appeal to proceed at the next level. Lawyers refer to them as "cert." petitions. The petitioning party must persuade two judges on the Appellate Court that the lower decision was wrongly decided based on existing Supreme Court case law or that the issue hasn't been reached by the Supreme Court but is likely not how the Supreme Court would rule or the matter is of

great public importance. Once "cert." has been granted, the matter proceeds with the filing of papers. Oral argument is the first time that the parties are in open court. While the Appellate Court comprises ten judges, appeals are heard in panels of three. The focus of the Appellate Court panel is whether the Superior Court properly ruled. (When I began practicing law, the focus was on whether the Superior Court "erred"; now the expression is more genteel.) The written decision[i] of the Appellate Court is binding on all parties *and* is precedent on the law. There's the rub. Exactly what the legal holding is, may be crystal clear . . . or a matter of opinion.

To continue with the court overview, again, the right to further review from an Appellate Court decision is not absolute. A party must petition for "cert." to the Supreme Court. The same procedure is set in play, except that the would-be appellant must persuade three justices of the Supreme Court to grant certification. Beginning in September 2009, the Supreme Court voted to consider appeals en banc, that is, with all seven justices participating (where there are no disqualifications.) Previously, a panel of five justices was the custom, with seven justices participating in extraordinary appeals. The Supreme Court's focus is whether the Appellate Court properly decided the case.

What this means for wetlands agencies

In 2003 the Appellate Court ruled that prior to a wetlands agency regulating activities outside of wetlands and watercourse, it must first adopt a regulation establishing an upland review area. *Prestige Builders v. Inland Wetlands Commission*, 79 Conn. App. 710 (2003), cert. denied, 269 Conn. 909 (2004). The Supreme Court had not ruled on that specific issue and declined to grant certification in that case. Thus, the Appellate Court's decision is the highest court decision and is binding on all wetlands agencies.

In 2010 the Appellate Court ruled that the Old Saybrook wetlands agency properly exercised jurisdiction over activities outside of the established upland review area because the majority of the activities were proposed within the upland review area. *River Sound Development, LLC v. Inland Wetlands and Watercourses Commission*, 122 Conn. App. 644, cert. denied, 298 Conn. 920 (2010). Again, the Supreme Court declined to certify the appeal.

Thus, we are left with one case which requires an agency to have adopted an upland review area in order to exercise its jurisdiction and another case which concluded that an agency may regulate activities outside the upland review area. Until the Supreme Court grants certification in an appeal presenting this issue, wetlands agencies can't know with any certainty how their actions regarding activities outside the upland review area will be adjudicated by the courts.

What's an agency to do until the Supreme Court definitively resolves the issue? Shortly after the decision in the *Prestige Builders* case was released, the Attorney General's Office and the DEP included recommendations in their training of wetlands commission members. The advice: to protect the agency's maximum authority to regulate activities outside of wetlands and

watercourses, they recommend the adoption of the following sentence in addition to the definition of "regulated activity": "The Agency may rule that any other activity located within such upland review area or in any other non-wetland or non-watercourse area is likely to impact or affect wetlands or watercourses and is a regulated activity." This language had already been widely broadcast by DEP in its 1997 Guidance Document, Upland Review Area Regulations Connecticut's Inland Wetlands & Watercourses Act, page 3. If the holding in the *Prestige Builders* case is eventually reversed, the additional language in an officially adopted regulation may be unnecessary, but the regulation still serves two salutary purposes. The agency will be certain of the scope of its jurisdiction and can refer back to the language in its own definition. The public will also be able to find written support for the agency's assertion of jurisdiction. For both the regulating agency and the public, more information is a benefit.

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[i] The decisions of the Appellate Court are cited in the following way: 1 Conn. App. 1 (1983). Decoded: 1 [number of the volume in which the decision is printed] Conn. App. [Appellate Court decision] 1 [page number on which the decision begins] (1983)[year in which the decision is published]. The Appellate Court decisions are printed in separate volumes from the Supreme Court decisions. The Supreme Court decisions are cited: 196 Conn. 218 (1985). Decoded: 196 [volume in which the decision is published] Conn. [Supreme Court decision] 21[page number on which the decision begins] (1985) [year in which the decision is published].