Journey to the Legal Horizon

Substantial evidence sufficient to support wetlands agency denial: *proceed with caution*
AvalonBay Communities, Inc. v. Inland Wetlands & Watercourses Agency,
130 Conn. App. 69 (2011)[i]

In July the Appellate Court issued its decision affirming the Superior Court's overturning of the Stratford inland wetlands and watercourses agency denial of an affordable housing apartment project. This case was included at the CACIWC annual meeting workshop on 2011 legislation and case law update. The discussion was enhanced by comments from Steve Danzer, a Professional Wetland Scientist, Soil Scientist, and former staff to the Town of Stratford, who attended the workshop. Steve has agreed to continue our musings in writing for this column.

***Janet**:* The Connecticut Appellate Court's most recent *AvalonBay* decision continues the trend that began with the Connecticut Supreme Court's reasoning in *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission.*[ii] That ruling includes the following statements: "Evidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence."[iii] Also: "The sine qua non of review of inland wetlands applications is a determination whether the proposed activity will cause an *adverse impact* to a wetland or watercourse."[iv]

The application was for a proposed affordable housing apartment project with no activities proposed in wetlands, watercourses or the upland review area. The wetlands agency gave four reasons for denial. The Appellate Court, agreeing with the Superior Court, found no substantial evidence to support any of the reasons and thus reversed the agency denial.

Reason 1: The wetlands and watercourses will be negatively impact by sedimentation. While the courts agreed that there was evidence that some sediment would reach a brook and adjacent wetlands, there was no evidence that such would constitute an adverse impact. The courts ruled that there was nothing beyond speculation of adverse impact. Neither quantitative (amount of flow) nor qualitative (whether the impact would be adverse) evidence was in the record. The agency "could not simply assume that the entry of sediment and siltation would adversely affect the wetlands and watercourse without evidence that it would in fact do so."[v]

Reason 2: "The proposed intense development of the site will clearly alter the hydrologic regime of the wetlands."[vi] The courts concluded this was a generalized concern, which did not rise above speculation."[vii] The fact that "hydrologic changes would occur did not necessarily mean that those changes would adversely affect [wetlands.]"[viii]

Reason 3: The pocket wetland would be totally lost**.** The courts concluded that the wetland was 360 square feet, consisted of a man-made drainage ditch and earthen berm. The watershed serving the wetland would be reduced from 2.4 acres to .99 acre with sufficient flow to maintain the wetland. "(N)o evidence supports the [agency's] finding that any impact necessarily would be adverse."[ix]

Reason 4: "potential for acid generation from the rock exposed by blasting at the site."[x] The Appellate Court reviewed the record and concluded while the agency "was free to reject the plaintiff's [applicant's] expert evidence, which concluded that the potential for environmental impact due to acid rock drainage was minimal, it was not entitled to conclude that the opposite was true without any evidence to justify that conclusion."[xi]

Steve, what kind of consideration did the court decision in *River Bend* and specifically the statements about speculative evidence play in preparing your environmental review?

Steve: : "Speculation! Expert report dismissed!"

Obviously, no environmental professional wants to hear this message from the courts. But the reality is that every professional (and commission) should be prepared to understand why this may happen to them (frustrating as it is), and equally more important, perhaps every commission should understand how this could happen to their own cases as they make it up the ladder of appeal.

There were a few interesting background tidbits worth mentioning that may not be so obvious from the decision alone.

First, as much as *River Bend* has been drummed into our heads over the last few years (Prove! Don't Speculate!), the court case at issue here stemmed from a series of two applications that appeared before the Stratford Commission in 2000 and 2001. *River Bend*, the standard that all experts now attempt to emulate, stemmed from a court decision in 2004, three years later. In 2004, the *AvalonBay* case from Stratford was still (and is still) winding its way through the legal system, and the new River Bend standard (Prove! Don't Speculate!) was applied retroactively by the courts once the case made its way to the Superior and then Appellate Court. A carefully crafted, factually dense, pre-2004 record was now reevaluated based upon the application of a new set of standards. From the Commission's perspective, this was most unfortunate.

The real issue in AvalonBay v. Stratford, in my opinion, was not whether the Commission's team of experts (disclosure – I was one of them) credibly proved harm to the wetland due to the applicants proposed activities, but whether a Commission's team of experts can credibly testify that the applicant ***has not*** successfully proven that there would be no impact to the wetlands.

Janet: From a legal perspective, the Supreme Court in *River Bend* relied on cases from the 1980s to establish that speculation cannot form the basis for substantial evidence. What ***was*** new in *River Bend* was applying that to denials issued by wetlands agencies. Previously, the case law about speculative evidence meant that applicants, who have the burden of proving they are entitled to a permit, were unsuccessful. Or, it meant that environmental intervenors or abutters to projects, who appealed the granting of a wetlands permit, failed to meet their burden because they offered only speculative evidence.

With *River Bend* we can document the shift to scrupulous examination of the agency's reasons for denial and the search for substantial evidence to support the reasons. The dissent in *River Bend* believed the majority opinion in *River Bend* shifted the burden of proof from the applicant

to prove its entitlement to the agency to disprove the applicant's entitlement. The majority opinion denied that it was shifting the burden of proof to the agency. What is clear now is that when an agency denies an application on the merits -- because of the impact of the project, that reason must be supported by substantial evidence. That means the following phrases are insufficient as a matter of law: "possible impact," "increased risk," "concern" and similar words. What the agency needs to have in the record are phrases like: "reasonably likely to cause an actual adverse impact to this specific pond/wetland."

In the *Unistar*[xii] case the Supreme Court ***has*** upheld an agency's permit denial where the applicant refused to provide information on the impact to wildlife. There, the agency didn't deny the permit because the impact was unacceptable, but because the applicant didn't come forward with evidence to prove it was entitled to a permit.

In the future I expect that agencies will focus on whether the applicant has provided sufficient evidence to prove it is entitled to a permit.

Steve*:* This legal "War on Speculation", in my opinion, involves the inability for the judicial system to understand the limitations of the scientific method as it is applied to wetland reviews.

In science, everything is speculation, until proven experimentally. Obviously, in the case of wetland review there is not time enough to perform a proper experiment, so what we are left with is scientific concepts and patterns that are agreed upon by the relevant co-professionals. For example, all professionals agree that sediment is bad for a wetland, without the need to design an experiment. Someone has to define these types of scientific concepts – ostensibly the experts. What tends to be frustrating is when a court discounts the experts (who are speculating to the best of their ability and training) and then enters the ring themselves. At what point does the court raise the bar too high as to what constitutes proof rather than speculation?

Does this mean that there is ***no role*** for experts in a review, especially when it may be difficult to quantify an impact (despite the fact that an impact, or a lack of impact, is "obvious" to all involved?). Absolutely not!

Experts serve many valuable functions to a Commission. They may offer constructive criticism to the project, help soften the impact of an activity, offer leverage to a Commission to suggest to an applicant a better alternative, and generally speaking, keep the applicant's experts on their toes.

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[i] As of the date the article was written, the Supreme Court had not yet ruled on the agency's petition for certification, i.e., the agency's request for the right to further appeal. (There is no absolute right to further appeal in land use decisions issued by the Superior Court (trial court)).
[ii] *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission* , 269 Conn. 57 (2004).
[iii] Id., 269 Conn. 57, 70-71 (2004).
[iv] (Emphasis in original.) Id., 269 Conn. 57, 74 (2004).
[v] *AvalonBay Communities, Inc. v. Inland Wetlands & Watercourses Agency,*
130 Conn. App. 69, 78 (2011).
[vi] Id., 130 Conn. App. 69, 78 (2011).
[vii] Id., 130 Conn. App. 69, 81 (2011).
[viii] Id., 130 Conn. App. 69, 80 (2011).
[ix] Id., 130 Conn. App. 69, 86 (2011).
[x] Id., 130 Conn. App. 69, 86 (2011).
[xi] Id., 130 Conn. App. 69, 87 (2011).
[xii] *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission*, 293 Conn. 93 (2009).