Journey to the Legal Horizon

*Wetlands Agencies and the Fourth Amendment*

The legal issues facing administrative agencies are often intricacies of the statute and how, primarily, the state Supreme Court interprets those provisions. It is rare when a constitutional right steals the show. That is what happened on February 14th when the Connecticut Supreme Court issued its unanimous decision in *Bozrah v. Chmurynski,* 303 Conn. 676 (2012).[i] In that case the Supreme Court *reversed* the trial court order requiring the private landowners (the defendants) to allow the zoning enforcement officer (the plaintiff) to inspect their residential property. The Supreme Court held that the trial court did not apply the standard of proof required by the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches by the government unless a search warrant is issued based upon probable cause. This case did not break new ground. The state Supreme Court relied on established precedent from the United State Supreme Court.

Why are you reading about a zoning enforcement case? Yes, there are differences between zoning *statutes* and wetlands *statutes*. But the *constitutional* principles apply equally to all of the land use administrative agencies. In *Chmurynski* the zoning case involved inspection of a residence and its curtilage. "Curtilage" was defined earlier in *United States v. Dunn*, 480 U.S. 294 (1987), as the area immediately surrounding a residence that "harbors the `intimate activity associated with the sanctity of a man's home and the privacies of life.' "

What happened in Bozrah: The first selectman directed the zoning enforcement officer (ZEO) by e-mail to inspect residential property at a specific address for unregistered motor vehicles and "other junk." Five adults reside at the address. The ZEO arrived and eventually spoke with the land owner who refused to consent to the ZEO's inspection of the residential property and curtilage. Without conducting a search the ZEO observed the following while at the address:

- six vehicles
- not in disrepair
- with license plates
- registration status unknown.

The ZEO then consulted with the town attorney. The ZEO returned to the property. In the interim a fence had been installed, blocking the view from the street. The town initiated a civil suit seeking an injunction to allow the ZEO to conduct the inspection authorized by CGS § 8-12. Here is where there is a difference between zoning and wetlands law. There is reference to inspections in the zoning law -- there is <u>no</u> reference to inspections in the wetlands statutes.

Eventually the trial court held a hearing on the request for injunction, an order requiring the land owner to allow the ZEO to inspect the property, and granted it. The trial court relied on the statute and municipal regulation authorizing inspections. It recognized that (1) the reasonableness requirement of the 4th Amendment applies to zoning inspections, (2) reasonableness can be satisfied with a valid governmental purpose and concluded (3) a court-

ordered injunction is a proper vehicle to satisfy the 4th Amendment's "search warrant" requirement.

The Connecticut Supreme Court's overturned the trial court's decision based on the following reasoning. The 4th Amendment protects against unreasonable searches. Did the land owner there a reasonable expectation of privacy? Yes. Residences and the curtilage area have been deemed areas of legitimate expectation of privacy. The fence, once installed, defined the area of curtilage. The 4th Amendment applies to all searches, not just criminal investigations.

The state Supreme Court considered the type of search, the nature of the premises and the governmental public policies. In routine inspections of an entire area a "relaxed probable cause standard" is acceptable. The Court distinguished a search motivated by a specific complaint with a general search of an area to implement regulatory enforcement. An example given was the routine annual inspection by a city housing inspector. In that case the motivation was neutral, general and not motivated by a complaint. But a specific search target, a specific address, stemming from a complaint does not fall into the relaxed standard.

Probable cause: *what it isn't*: it is not a "(c)ommon rumor or report, suspicion, or even 'strong reason to suspect' . . ." and "simple good faith on the part of the arresting officer is not enough . . ."[ii] Often all that a wetlands agency or staff has knowledge of, when motivated to inspect private property, is a rumor or suspicion. As you see, that does <u>not</u> constitute probable cause.

Probable cause: *what it is*: "there must be a preliminary showing of facts within the knowledge of the zoning officer and of which that officer has reasonably trustworthy information that are sufficient to cause a reasonable person to believe that conditions constituting a violation of the zoning ordinances are present on the subject property."[iii]

Finally, the state Supreme Court ruled that a judicial hearing before a judge that results in an order requiring the defendant to allow a search of private property is the functional equivalent of search warrant because the individual's right to be free from unreasonable searches is protected in court proceedings. The difference is that a search warrant is issued very quickly (within hours or a day) of an ex parte hearing before a judge. A court order occurs usually weeks, if not months, after the hearing before the court has been held.

Are you thinking that the wetlands agency can just try to apply to court for a search warrant to inspect property for wetlands violation, as long probable cause exists? The Connecticut Supreme Court said no to the zoning enforcement officer -- for reasons that apply to wetlands agencies as well. The Supreme Court noted that there is no statutory authority in the zoning law to apply for a civil search warrant. (If the state's attorney office had been pursuing criminal violations of the zoning law, that office could have relied on general criminal statutory provisions for a criminal search warrant.) The Supreme Court held that it is a matter for the legislature to address, not the courts.[iv]

For instance, the Commissioner of the Department of Energy and Environmental Protection, *does* have explicit statutory authority, CGS § 22a-6(a)(5), to seek a civil, administrative search warrant. Additionally, the Commissioner has explicit authority to delegate his right to municipal

authorities to enter onto property to conduct inspections to carry out specifically enumerated regulatory programs. That statutory right to delegate inspections, CGS § 22a-2a, includes the tidal wetlands act, but does not include the inland wetlands and watercourses act. The state inland wetlands statute provides no authority for municipal authorities to apply for administrative search warrants or to inspect property for violations of the wetlands laws.

Back to Bozrah case, the Supreme Court concluded: "We do not believe that the mere fact that six vehicles, none of which appeared to be in disrepair, were parked on the property of a home where five adults resided provides sufficient reason to suspect a violation of the Bozrah zoning regulations."[v] Without probable cause there is no basis to issue a search warrant, or in this case, a court order mandating inspection.

It is important to remember that, with consent, the agency may enter on private property. Your standard agency permit application should have the applicant granting consent to inspections necessary for the agency to make a determination on the application. Your standard agency permit should include a condition requiring the permittee to allow reasonable inspections of the property. But for land owners or those conducting activities without a permit, your agency should begin by asking for permission to enter onto the property. If that is denied, your agency should undertake inspections upon the advice of legal counsel.

This article, in the space of one column, cannot serve as a primer on 4th Amendment jurisprudence. This specific Supreme Court case deals with residential property and the curtilage associated with it. This may be one of the few areas that I do not believe training will solve most or all of the problems. Access to legal advice will be essential in determining when whether the 4th Amendment applies, whether any exceptions exist, and whether there is probable cause to seek a court order to inspect property. This case should give anyone reason to pause and seek legal advice before entering property without the owner's consent to conduct a wetlands inspection.

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[i] You can read the case on the Judicial Website at: http://www.jud.ct.gov/external/supapp/Cases/AROcr/CR303/303CR26.pdf. Or go to: www.jud.ct.gov, click on Opinions, click on Supreme Court Archives, click on 2012, click on February 14, click on the case.

[ii] *Bozrah v. Chmurynski*, 303 Conn. 676, 686 (2012).

[iii] *Bozrah v. Chmurynski*, 303 Conn. 676, 692-693 (2012).

[iv] *Bozrah v. Chmurynski*, 303 Conn. 676, 695 n. 11 (2012).

[v] *Bozrah v. Chmurynski*, 303 Conn. 676, 693 (2012).