Journey to the Legal Horizon

The Agricultural Exemption:
The Year in Review

The agricultural exemption continues to be a topic which yields lots of legal fruit. Since December 2011 there have been one Appellate Court decision and three Superior court (trial court) decisions. While only Supreme Court and Appellate Court decisions are binding precedent for everyone, we can get an idea of the troublesome portions of the exemption by examining what's going on at the Superior Court level.

Attorney's fees were awarded to a downstream property owner which intervened in support of a town's wetland enforcement in court. In *Conservation Commission v. Red 11, LLC,* the town and intervenor prevailed in having earlier wetlands appeals brought by the LLC conducting farming activities, some of which were determined not to fall within the ag exemption. Then the town and intervenor prevailed in their enforcement action that the LLC had filled some wetlands and drained other wetlands without a permit. In that decision the Appellate Court upheld the Superior Court order requiring substantial restoration efforts. In this cycle of the litigation, the Appellate Court upheld the Superior Court's award of an eye-popping $391,967.80 for attorney's fees.[i] The threat of attorney's fees usually serves as a deterrent and encourages parties to settle. Red 11, LLC is liable for the town's attorney's fee and costs of $69,569.80 (which Red 11, LLC did not contest), the intervenor's attorney's fee and costs, which totaled $426,437.79 (only the attorney's fee portion was contested) and its own legal fees.

This is not the usual course of litigation for cases involving the agricultural exemption. Most cases involve individuals, as the following Superior Court cases exemplify. Many exemption cases aren't pursued because of the cost of litigation. As a result there has been a slow development of the case law in this area which has hampered uniform application of the exemption. Often we are looking to Superior Court decisions because there is no applicable Appellate Court or Supreme Court decision. However, as one of the judges in the case below pointed out, Superior Court decisions do not bind other Superior Court judges in their work. That can result in a "variety" of Superior Court decisions which are inconsistent with each other, which await resolution by a higher court.

The farming exemption decisions in the past year do not involve whether or not there is truly an agricultural activity being undertaken, but rather whether that activity falls within the exemption or not. The exemption in Connecticut General Statutes § 22a-40(a)(1) is, shall we say, inelegantly written, utilizing a double negative:

"(a) The following operations and uses shall be permitted in wetlands and watercourses, as of right: (1) Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation, and activities conducted by, or under the authority of, the Department of Environmental Protection for the purposes of wetland or watercourse restoration or enhancement or mosquito control. The provisions of this subdivision shall not be construed to include road construction or the erection of buildings not directly related to the farming operation, relocation of watercourses with continual flow, filling or

reclamation of wetlands or watercourses with continual flow, clear cutting of timber except for the expansion of agricultural crop land, the mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale."

I remain convinced that if the statute would be amended to include a list of explicitly included and explicitly excluded activities within the exemption, we would have better compliance.

In *Yorgenson v. Chapdelaine*,[ii] the Eastford wetlands commission was granted a temporary injunction against Chapdelaine's digging, removing of soil or stumps and use of heavy equipment in wetlands and adjacent to a watercourse. A temporary injunction is granted to preserve the status quo (or sometimes to return to the status quo before the violation occurred) at the outset of a lawsuit. The agency has a heavy burden to satisfy the court. In this case a cease and desist order was issued; she did not appear to defend her activities of clearing and filling near a stream. Nor did she appeal the final order that the commission issued. Months later she asserted that she could undertake farming activities without local oversight, trying to establish that the activities were exempt. Appearing pro se before the commission, she tried to rely on case law, but did not respond to the agency's request for more information. The agency determined that some of her activities fell within the exemption, but not all. She ended up in court, the defendant in an enforcement action. Chapdelaine pointed to a 2006 Superior Court decision that concluded the preparatory activities (stumping and grading the land) were encompassed within the agricultural exemption. This Superior Court judge disagreed -- as he was entitled to, as Superior Court decisions are not binding on anyone, except the parties involved. Now, there is non-binding case law for each side of the controversy for future cases.

In *Inland Wetlands and Watercourses Commission v. Andrews*,[iii] the Superior Court followed established precedent in granting the Wallingford wetlands agency relief against a property owner engaged in agricultural activities that the agency determined did not fall within the farming exemption. When the agency issued its initial cease and desist order, Andrews filed a determination for exemption. The agency denied that the activities were exempt. Andrews did not appeal the final order. The agency subsequently issued another order. Andrews did not appear at the agency hearing, nor did he appeal the second order when it became final. The agency brought an enforcement action to the Superior Court. Following established Supreme Court precedent, the Superior Court ordered the land owner to refrain from conducting regulated activities without a permit and to engage in restoration with specified kinds of professional within a defined timeframe. In the Wallingford and Eastford cases the people subject to enforcement actions do not have latitude to contest the orders in court, if they did not pursue appeals of the underlying orders.

The final wetlands decision turns out differently for the Fairfield wetlands agency. In *Taylor v. Conservation Commission*,[iv] the Superior Court admonishes that Taylor should be permitted to engaging in his farming activities "unencumbered by the micromanagement of Fairfield officials, or 'gotcha' surveillance by residents of an upscale neighborhood." A neighbor took a video of Taylor removing material from a trench on his property in which he conducts farming, although the Superior Court points out that the area is more conducive to "McMansions." The agency issued a cease and desist order and required him to restore the

"watercourse." Taylor had removed 5 cubic yards of material from the ditch, such as debris, leaves, grass clippings and sediment. A soil scientist (it is not stated for whom he worked) believed the activity was not affecting drainage. In upholding the order, the agency did not require restoration, it gave Taylor 60 days to file for a permit to maintain the ditch. Taylor appealed. On appeal the Superior Court sought a definition of "reclamation" and found only a footnote mentioning the dictionary definition of reclamation in an Appellate Court decision. Applying the most restrictive definition of reclamation, the Superior Court found that it did not include Taylor's activity which maintained the ditch in its present location and its current dimensions. Maintaining the ditch was just part of "prudent farming."

There continues to be a broad spectrum in which the Superior Court cases appear. One unifying theme is that where the recipient of a cease and desist order does not appeal a final order, there is virtually no opportunity to contest that the activities complained of were actually exempt. On the other hand, if the person brings an appeal, the Superior Court can examine the basis of agency decision. In this Fairfield case, that worked to the advantage of the property owner. The lack of Appellate Court and Supreme Court precedents continue to thwart uniform application of the farming exemption statewide.

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[i] You can read the case on the Judicial Website at: http://www.jud.ct.gov/external/supapp/Cases/AROap/AP135/135AP344.pdf. Or go to: www.jud.ct.gov, click on Opinions, click on Appellate Court Archives, click on 2012, scroll down to "published in the Connecticut Law Journal of 5/29/12, click on the case.

[ii] Superior Court, judicial district of Windham, Docket No. WWM CV 11 6003791 S (December 12, 2011).

[iii] Superior Court, judicial district of New Haven, Docket No. CV 10 5033404 S (January 23, 2012).

[iv] Superior Court, judicial district of Fairfield, Docket No. CV 11 6017217 S (August 30, 2012).