

## **Journey to the Legal Horizon**

*Appellate Court decision "stays the course" on substantial evidence overturning wetlands agency grant of permit and addresses guidance documents*

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*Estate of Casimir Machowski v. Inland Wetlands Commission,  
137 Conn. App. 830, cert. denied 307 Conn. 921 (2012)*

At the end of my last column I mentioned in passing that the Appellate Court ruled on the legal effect of guidance documents. Although this topic was covered in both of the sessions I offered at the 2012 CACIWC annual meeting, the Estate of Casimir Machowski case is deserving of an entire column.

In Machowski the applicant proposed to construct, 18 units in 9 duplex buildings on a 16 acre parcel containing 1.8 acres of wetlands/watercourses. The project, on steep slopes in the upland review area, would require 30,000 cubic yards of fill, with 2/3 of the fill being trucked to the site. The trial court characterized the neighborhood opposition as "vehement."<sup>i</sup> Both the applicant and the commission presented experts. The agency denied the application citing the following reasons: 1) there was a feasible and prudent alternative to the placing the detention basin in fill on an extreme slope; 2) the proposed location of the basin is inconsistent with the DEP 2002 Soil and Erosion and Sedimentation Guidelines; 3) the extensive fill creates an erosion hazard upgradient of wetlands. The trial court acknowledged that no activity was proposed in the wetlands with substantial work proposed in the upland review area. The trial court dismissed the applicant's appeal, upholding the agency denial. The Appellate Court reversed and overturned the denial of the permit.

The Appellate Court found there wasn't substantial evidence to support the agency's denial. Specifically it found that the trial court failed to require "that there be specific evidence in the record showing that the [applicant's] activities would adversely impact wetlands or watercourses."<sup>ii</sup> The Appellate Court quoted extensively from the River Bend case in which the Supreme Court referred to "actual adverse impact" for the first time: "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."<sup>iii</sup>

The Appellate Court reviewed the expert reports. It concluded there was no evidence that the proposed activity would have an adverse effect on the wetlands or that the amount of fill would probably erode into the wetlands. The agency's expert referred to "potential damage to wetlands" if the detention basin fails. "Evidence regarding *potential* impacts to wetlands *in the event* of a failure of the detention basin does not in itself amount to substantial evidence."<sup>iv</sup> There was no expert opinion that 1) an adverse impact on the wetland was likely or 2) a failure of the detention basin was reasonably likely to occur.

Additionally the agency's expert stated that the location of the detention basin was not consistent with the 2002 Guidelines for Soil Erosion and Sediment Control due to the steep slope. He acknowledged that the detention basin could work but that he "would feel much more

comfortable" if the project kept away from the steep slopes.<sup>v</sup> The expert did not cite any statute, standard or regulation that the proposal violated. The Appellate Court: "although they [the guidelines] may contain a set of beneficial recommendations, non-adherence does not in itself imply a likelihood of adverse impact on wetlands. The requirements of *River Bend Associates, Inc.* still must be met to justify a denial in these circumstances."<sup>vi</sup> Guidance documents do not constitute standards that have the force and effect of law, nor do they constitute expert opinion requiring a specific outcome. Experts may refer to guidance documents, but better be prepared to substantiate their opinions based on conditions at the site.

The neighbors testified about their past experiences with flooding in the area. The Appellate Court concluded: None of that testimony addressed "what specific impact the proposed regulated activity would have on the wetlands."<sup>vii</sup>

The Appellate Court concluded that all of the evidence that the agency relied on was speculative in nature. Speculative evidence doesn't constitute substantial evidence. In the end, agencies and intervenors may wonder if the "deck is stacked against" them. Not all expert opinion is of equal value. If the expert does not believe that the data allow him/her to express an opinion that the outcome will likely occur, his/her opinion that it "might" occur is of limited value. It may assist the agency focus on what to seek from an applicant or another expert. An expert's "concern" is an appropriate place for departure. A "concern" is not a legitimate endpoint for an agency to rely on.

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<sup>i</sup> *Estate of Casimir Machowski v. Inland Wetlands Commission*, 137 Conn. App. 830, 833 (2012)

<sup>ii</sup> *Estate of Casimir Machowski v. Inland Wetlands Commission*, 137 Conn. App. 830, 835 (2012)

<sup>iii</sup> *Estate of Casimir Machowski v. Inland Wetlands Commission*, 137 Conn. App. 830, 838 (2012), citing *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 57, 74 (2004).

<sup>iv</sup>(Emphasis in original.) *Estate of Casimir Machowski v. Inland Wetlands Commission*, 137 Conn. App. 830, 840 (2012).

<sup>v</sup> *Estate of Casimir Machowski v. Inland Wetlands Commission*, 137 Conn. App. 830, 841 (2012)

<sup>vi</sup> *Estate of Casimir Machowski v. Inland Wetlands Commission*, 137 Conn. App. 830, 841 (2012)

<sup>vii</sup> *Estate of Casimir Machowski v. Inland Wetlands Commission*, 137 Conn. App. 830, 841 (2012)