Journey to the Legal Horizon

Results of 2013 Statewide Survey
of Municipal Wetlands Regulations, Part II:
Discovery of oases and mirages in town regulations –
preview of workshop at CACIWC 2014 annual meeting

In this article I will continue to report on my town-by-town review in the fall of 2013 Between online posting of regulations by individual towns and the helpful assistance of town staff I was able to review 95% of all regulations, ably assisted by Wesleyan student Vanessa Castello. Originally, the questions I was investigating included: How many towns have adopted upland review areas? Are there towns regulating vegetated buffers? What about vernal pools? And, is it true that 100 feet is the most common size of an upland review area? That article, Part I, covering those results is found in Winter 2014, Volume 26, Number One. While developing color-coded spreadsheets of the regulations verbatim, I wanted to note other topics of interest. I was running out of colors for highlighting and ended up with the gray color-coded topics. Not an apt description it turns out. Most of the gray entries involved regulations that were clearly legal – or not. I've recast those topics in this Journey to the Legal Horizon as oases, positive discoveries, and mirages, regulations that upon close examination for statutory support, just seem to disappear. At the annual meeting the actual wording of the regulations will be examined. For this article the concepts will suffice. At the workshop I will discuss ways to discuss proposed regulation changes to keep your agency's actions from turning into a disappearing mirage. In this article I will pose one question to help you focus on the mirage's problem.

Accentuating the positive: oases in municipal regulations

I designate portions of municipal regulations "oases" when they are helpful to applicants, the public or commission members in understanding the process or the reasoning behind a policy. What an upland review area is may be a topic covered in many legal update workshops, but may not be a familiar term to applicants, the public and new commission members. In East Haven, Milford, Wallingford and Washington, agencies have employed a variety of helpful expressions to clarify and define the regulatory limits of the agency in an upland review area. In one example the regulation states it is not sufficient for the agency merely to assert that the activity "may" impact wetlands. In another the regulation boldly declares it is not intended as an exclusionary setback. One approach underscores upland areas are regulated only to protect wetlands and watercourses.

Regulating activities conducted outside a wetland, watercourse or established upland review area

This was the most pleasant surprise in my review. I discovered that four municipalities have created a process for determining when proposed activities outside an established upland review area will be deemed a regulated activity, requiring a wetlands permit. Let's back up and review when this comes into play. In 2003 the Appellate Court issued its ruling in *Prestige Builders, LLC v. Inland Wetlands Commission*[i], that a wetlands agency was not authorized to exert jurisdiction over activities unless the agency had adopted a regulation to regulate where the

activity occurred. DEEP (then DEP) had already recommended, in its 1997 Upland Review Area Guidance Document, that agencies promulgate a regulation to regulate those activities outside of established upland review areas that are likely to impact wetlands or watercourses. Here is DEP's suggested language: : "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." DEP wetlands training presenters and materials urged that towns adopt protective language, such as the sentence quoted above. Seventy per cent of Connecticut towns (118) did so.

Left unanswered by that sentence is exactly *how* the agency would make that determination. Agency conduct must be undertaken with due regard to fundamental fairness to those who come before it. Four towns flesh out how fundamental fairness will occur in this context. Three of the towns (Avon, Bridgewater and Ridgefield) require that a hearing be provided with varying amounts of notice to the landowner that a proposed activity is likely to cause an impact to wetlands/watercourses. Another town (Simsbury) sets out the factors for the agency's consideration. By adopting a regularized method of making these determinations, agencies fulfill their duty to conduct themselves in a fundamentally fair manner and lessen the chance that their conduct can be successfully claimed on appeal to be arbitrary and capricious.

These examples of regulations should inspire other towns to adopt regulations which flesh out the process the agency will engage in.

Mirage #1: Who is the regulating authority?

Too many towns to list delegate the authority to their agent or town staff to determine whether activities outside established upland review areas require a permit. Agencies are, in the words of the courts, "creatures of statutes." Take a look at the statute or the DEP model regulation or the DEP Upland Review Area Guidance Document. In none of those documents is there any articulation that the staff/agent is authorized to undertake such a determination. The agency makes the determination. The agent or staff can gather information and present it at a meeting, in a memo, etc. Who raises their hands and votes at a meeting? That is the regulating authority -- unless the statute specifically states otherwise.

Mirage #2: Is the resource within the agency's jurisdiction?

I was most shocked to find that towns claimed jurisdiction over a variety of resources nowhere mentioned in the Inland Wetlands and Watercourses Act, such as: "flood hazard area," "streamward of established local encroachment lines," areas listed on a FEMA map, flood plains, open space in the town, land with conservation easements recorded on the land records, "any geographical area where activity thereon may . . . impact the purity of groundwater supplies," "one hundred feet from all tidal wetlands." Case law issued in the 1980s has made it clear that wetlands agencies are not mini-EPAs. The amendments to the wetlands statutes have honed in on the impact to wetlands and watercourse. Agencies should, too.

This reason alone is sufficient to justify DEEP resuming its supervisory role and actively advising agencies when they are adopting regulations. The statute requires agencies to send their proposed changes to DEEP. It did not take me much time to site these erroneous resources in the regulations. It would not take much time for a DEEP staff person to send out a letter advising that the resource is not in the agency's jurisdiction.

Mirage #3: Is this activity exempted by statute?

A number of towns establish that certain specified activities are regulated activities requiring a permit. None of the regulations overtly states the agency is exerting jurisdiction over exempt activities, but commission members may be confused. They read their own regulation that states certain activities are exempt, but here is a specific regulation which seems to trump the exemption (such as, no pesticide use, no use of logging skidders, no establishment of a new lawn without a permit). These examples involve the farming exemption, forestry exemption (part of agriculture), and the "uses incidental to enjoyment and maintenance of residential property" exemption. If these regulations are fine-tuned (i.e., amended) they can be crafted to mesh with the statutory exemptions. Perhaps a simple fix would suffice, such as, "if the activity is not exempt as set out in Section __ of these regulations or pursuant to Connecticut General Statutes § 22a-40." As these broader regulations now stand, commission members run the risk of acting outside their jurisdiction.

Glimpses of further mirages

It doesn't end there. There are beavers and superstorms, "assumption" of jurisdiction until otherwise determined, emergency authorizations, artificial illumination, "intentional setting of fire" (pyromaniacs beware), time limits to complete a regulated activity, occupancy of a structure for greater than 180 days. Can these regulations be saved? Come to my workshop on November 15th as we try to transform the mirages into oases and pay our last respects to those regulations we cannot.

Janet P. Brooks practices law in East Berlin. You can read her blog at: www.ctwetlandslaw.com and access prior training materials and articles at: www.attorneyjanetbrooks.com.

---

[i] *Prestige Builders, LLC v. Inland Wetlands Commission*, 79 Conn. App. 710 (2003), cert. denied, 269 Conn. 909 (2004).