JOURNEY TO THE LEGAL HORIZON

CACIWC's editor, Tom O'Dell, has supplied me with a series of questions for my column. If you'd like to see your question in the next issue, e-mail your queries to Tom at _____.

Question: What recourse does the Commission have to do its best to protect wetlands and watercourses within an upland review area? If a property owner wants to place a manicured, fertilized lawn abutting the edge of a wetlands, can a commission stop that action? Is placing a non-disturbance buffer a legal option? Is there another legal method we should be using? (In our town P&Z rules, a deeded conservation easement removes that part of the property from the area used to calculate buildable sqft, hence our use of a buffer.)

Signed, What-to-do

Dear To-Do,

If the property use is residential and you have already issued the permit, there's probably not a lot you can do. "Uses incidental to the enjoyment and maintenance of residential property" are exempt from your jurisdiction. The statute, § 22a-40 (a) (4) specifically states: "Such incidental uses shall include . . . landscaping but shall not include removal or deposition of significant amounts of material from or onto a wetland or watercourse or diversion or alteration of a watercourse." If your commission lined up a number of experts, who could (1) state what amount of fertilizer is a significant amount and (2) could prove that the amounts pose an adverse effect on the specific wetland involved, your commission may be on firm ground. But those are mighty big "ifs." More court decisions from 2000 forward are holding commissions accountable for "connecting the dots," proving harm to wetlands on a specific site, by use of experts.

I know that a number of commissions routinely impose conservation easements on residential subdivisions prohibiting or restricting the use of fertilizers. As I expressed in a previous issue of The Habitat, I have my doubts about the legality of a commission imposing a conservation easement. I also wonder whether any of those commissions who do impose conservation easements have justified their actions with expert opinions in each and every record in which they do so. *If they haven't, those conditions won't likely withstand legal scrutiny on appeal.*

For non-residential property there is no exemption entitling the property owner to undertaking landscaping. But again, you have to be prepared with experts to justify your conditions or denial.

Question: A question has arisen about when it is appropriate to use declaratory rulings. I was always told that a declaratory ruling should only be used by an applicant when there is a "permitted use as of right" or a "non-regulated use". Our Commission now has residential applicants citing Section 4.1.d (Permitted Uses as of Right & Nonregulated Uses) and asserting that, because they are not removing or depositing significant amounts of material from the upland review area, they do not need a permit. It should be noted that Section 2 (Definitions) of our Town's regulations includes the following wording in its definition of a "regulated activity":

any clearing, grubbing, filling, grading, paving, excavating, constructing, depositing or removing or material and discharging of storm water on the land within one hundred (100) feet measured horizontally from the boundary of any wetland or watercourse is a regulated activity.

Further, Section 4.3 of our regulations reads as follows:

All activities in wetlands or watercourses involving filling, excavating, dredging, clear cutting, clearing, or grading or any other alteration or use of a wetland or watercourse not specifically permitted by this section and otherwise defined as a regulated activity by these regulations shall require a permit from the Commission in accordance with Section 6 of these regulations, or for certain regulated activities located outside of wetlands and watercourses from the duly authorized agent in accordance with Section 12 of these regulations.

It should be noted that our Commission has not delegated the authority to its agent to approve licenses for regulated activities as described in Section 12 (Action by Duly Authorized Agent).

So, Attorney Brooks, when we are dealing with activities in the upland review area which appear to meet the regulated activity definition, and our agent has not been authorized to issue licenses, does that mean that permit applications should be used instead of declaratory ruling applications? And, further, what is the legal significance of a declaratory ruling versus a permit, please?

Thanks very much for your assistance.

Signed, Declare or not declare, that is the question

Dear Declare,

Let's begin with your last question: permit vs. declaratory ruling. A permit is the authorization needed before undertaking a regulated act under the wetlands law. A declaratory ruling "declares" that certain facts presented (a farm pond of 4 acres, for instance) give rise to your commission's jurisdiction, meaning your commission regulates the activity and the interested party needs to obtain a permit. Or the ruling "declares" that certain facts qualify as exempt (grazing, farming, nurseries, gardening, and the like). In the latter case, it appears that the commission is authorizing the conduct, but it is not. The legislature in the past set forth a category of activities as outside the authority of the commission; the commission determines in the present if the proposed activities fall into those categories.

A declaratory ruling needn't be restricted to jurisdictional rulings regarding exempt activities, although that is the most common use of the ruling for wetlands agencies. State agencies are often asked for declaratory rulings. Here's how broad the declaratory ruling authority for state agencies is: "Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling *as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency*." General Statutes § 4-176 (a).

Now turning to your initial question, you wonder whether residential applicants can use the declaratory ruling process if their activities don't involve "significant" amounts of fill. My response is: yes, they can, but what would they gain? Your regulations set forth an upland

review area that includes a myriad of activities and does not exclude "insignificant" amounts of those activities. "Any" amount of those activities triggers the need for a permit. So, yes, those activities require a permit. Yes, your commission can issue a declaratory ruling that declares, basically, that every activity in the upland review area requires a permit – which by the language you provided – it does. What has anyone gained? A delay in handling insignificant matters. Your commission has to issue permits for activities that you have defined are regulated in the upland.

The question I have for you: *isn't it in your commission's interest and the public's interest to have an agent authorized to handle these small potato applications expeditiously?* How can your commission hope to focus on meaningful enforcement if you are tied up considering every small activity in the upland which by definition needs a permit but is not going to impact wetlands or watercourses? The reality is that those minor activities should receive a permit with probably nothing more than your standard permit conditions. An authorized agent is capable of making such determinations. I don't see any good use of the commission's time is holding on to all permit-making authority. Even one of your commission members can become the authorized agent. Make it a priority. You will get to focus on the bigger issues and satisfy your residential applicants, which will encourage more compliance with the law.

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