JOURNEY TO THE LEGAL HORIZON

Greetings! The editor of The Habitat has invited me to resume the former tradition of providing an answer for a "Q & A" column. Most of you begin your focus with the protection of a natural resource in mind. I approach the same subject looking at the legal structure which supports protection of the resource. So, through this column, we will journey together, through a question-and-answer format. While you may know me from my background with the state wetlands law, coordinating the Attorney General's Office wetlands practice group for sixteen years, I will also draw on my years of experience litigating cases under the Connecticut Environmental Protection Act and other environmental laws to include topics of interest to members of Conservation Commissions as well as to citizen activists. I invite you to submit questions to: (supply e-mail address –not mine).

I open the column with a **question** from a new member of a wetlands commission: **"To what extent may we condition approval on a commitment by the applicant to impose a conservation restriction or easement on some of the property?"** The question follows logically upon reading the lead article in the last issue of The Habitat, "Some Legal Considerations Regarding the Use of Conservation Easements" by Richard P. Roberts and Kenneth R. Slater, Jr. The authors note that conservation easements are generally voluntarily placed on the land and are used to meet open space requirements in zoning or subdivision regulations and have been found as conditions for the issuance of wetlands permits. But what about the legal authority of a wetlands agency to extract an "offer" of a conservation easement in order to get a permit approval? And, if no easement is offered during the application give-and-take, what about a wetlands agency imposing a permit condition that requires the applicant to grant a conservation easement, in order to be undertake regulated activities?

My **answer** takes the form of a warning. **This practice of extracting a conservation easement as a condition of a wetlands permit, while not yet tested by court decisions, may very well not be supported by the wetlands law.** I am in full agreement with the statement by Attorneys Roberts and Slater in their article: "Furthermore, municipal land use agencies do not necessarily have any express authority to accept conservation

easements and *have limited or no rights to condition approvals upon the grant of a conservation easement."* The Habitat, Summer 2006, page 3 (emphasis added).

You may think there is something satisfying about requiring or receiving a conservation easement when someone applies for a wetlands permit. A "quid pro quo" because you don't get something for nothing. But that is not what the state wetlands law directs you to do. Your focus should be on the factors for consideration, set out in the Connecticut General Statutes § 22a-41 (a) and incorporated into your town regulations. Your duty is to determine whether the proposed regulated activity has an adverse impact on wetlands or watercourses. If the activity does not, you would have no authority to encourage or require a conservation easement. The permit should be issued. If the activity does have an adverse environmental impact, you need to look at alternatives and conditions to mitigate that adverse impact. Often the conservation easement addresses wetlands or uplands that were not even part of the proposed activities. Does a conservation easement on an untouched part of the property, which isn't involved in the proposed activities, actually mitigate, that is, diminish impact that occurs elsewhere? No. It is not a mitigation plan. It allows the conservation easement to be used as a "coupon" for the right to adversely affect some other wetlands or watercourse.

Our state Supreme Court has already found that $25,000 in cash plus a matching amount of in-kind services for an unspecified mitigation project, *even where voluntarily offered by the applicant*, is not a valid consideration by a wetlands agency. In Branhaven Plaza, LLC v. Inland Wetlands Commission, 251 Conn. 269 (1999), the court looked to the broad purposes of the state wetlands law and the broad discretion of town commissions, but focused its analysis on whether cash and in-kind services of an unspecified nature constitute mitigation. It concluded: NO. "The notion that money and its in-kind equivalent could present the sole obstacle to obtaining a permit

would severely undermine the rationale for enacting the legislation and the ultimate purpose of protecting wetlands and watercourses." Id., 284.

So, substitute your conservation easement for "money and its in-kind equivalent" in the *Branhaven* case. Is there a nexus between your conservation easement and mitigating the effects on wetlands or watercourses? Does the imposition of the easement truly diminish the adverse impact? Do you have substantial evidence in the record, i.e., expert evidence that supports that conclusion? Should a wetlands agency never impose a conservation easement? "Never" is a long time. Your agency may come across an application where a conservation easement can in fact provide protection from the adverse impact to wetlands or watercourses; in which case your condition can be authorized as a matter of law. I won't speculate whether I've ever seen a valid conservation easement. I do think there are many conservation easements offered or required which are vulnerable to attack on legal grounds. If you use a conservation easement as a "sweetener" to approving an application, you are not doing your job under the law.

If you keep your focus on mitigation, you may consider a panoply of measures as valid permit conditions. And if the evidence establishes that the imposition of a conservation easement is necessary, then your journey to the legal horizon may be protected.

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