Journey to the Legal Horizon

by

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Farming Exemption considered by the Appellate Court:
Red 11, LLC v. Conservation Commission, 117 Conn. App. 630 (2009)
Canterbury v. Deojay, 114 Conn. App. 695 (2009)

The Appellate Court has recently issued two decisions[i] involving the farming exemption to the Inland Wetlands and Watercourses Act. These cases affirm the general principles the courts have developed when applying the exemption provisions. The Appellate Court is the second highest court in the state. The decisions of both the Supreme Court (the highest court) and the Appellate Court are binding precedent throughout the state. In contrast, the decisions of the Superior Court (trial court) are binding on the parties to the lawsuit. The Red 11 case involves facts that will commonly arise in exemption matters. On the other hand as a cautionary note, in the Deojay case, the landowner is in a peculiar procedural posture which may limit the holding to its facts.

In these decisions the Appellate Court sets forth principles in applying the exemption provisions. They provide a good review of how to proceed on any kind of exemption.

Anyone claiming the benefit of an exemption has the burden of proving s/he falls within the exemption. The exemption provision cannot be interpreted so that it is rendered meaningless (i.e., that nothing falls within the exemption.) While "farming" is exempt, the legislature, by amending the statute in 1987, has established limitations on the farming exemption. You may need to pull out your agency's regulations, typically found in § 4.1 or refer to the state statute at § 22a-40(a)(1). In previous articles I've referred to this as the 1st sentence/2nd sentence analysis. You begin by determining if the activities fall within the 1st sentence: is it farming? (use the definition in General Statutes § 1-1(q)). If so, then determine if it falls within the 2nd sentence that removes certain farming activities from the exemption. Affirming 1991 precedent, the Appellate Court stated in *Deojay* and reaffirmed in *Red 11, LLC* that the agency must be given the first opportunity to determine its jurisdiction, not the courts. An agency can deny a request for determination of exemption if the person fails to provide all the necessary information requested by the agency.

The Red 11 case provides additional useful holdings. This case involves the appeals of three cease and desist orders. The trial court and thereafter the Appellate Court upheld all of the orders. In resolving a cease and desist order for conducting activities without a permit, Red 11, LLC, doing business as Twin Oaks Farm, asked for and received a determination that certain specified farming activities were exempt. Later Red 11 argued that because it received the earlier determination the wetlands agency had no jurisdiction over the "property." The Appellate Court said no. The agency earlier considered only the activities brought to its attention. The future violations, activities outside the exemption, hadn't been presented to the agency.

Your job is to focus on the activities, not the status of the person or the status of the person. To be absolutely clear, the following statements are <u>not</u> proper considerations for the

agency: (1) "He's not a farmer, he's a *fill in the blank*, so it's not farming." (2) "You can't regulate this property, it's a farm." Stay focused on the specified activity and determine after the 1st sentence/2nd sentence analysis, if the activity falls within the exemption.

In the 2nd sentence of the exemption, the statute excludes from the exemption "filling or reclamation of wetlands." The Red 11 case provided a definition of "reclamation." Relying on two dictionary definitions, the court stated "reclamation" means "making land fit for cultivation, as by draining swamps . . . or irrigating arid land" and also "the act or restoring to cultivation."

The statute also provides that "the filling or reclamation of wetlands or watercourses with continual flow" is not exempt. In defending itself in subsequent cease and desist order proceedings Red 11 claimed the farming area was both a wetlands and a watercourse. It further claimed there was no evidence of continual flow in the wetlands, hence its activity fell within the exemption. The Appellate Court said no. It determined that it was a question of law that the courts determine. The court held, for legal reasons, that continual flow is only relevant to watercourses, not wetlands.

The best explanation I've heard is a technical one and comes from Steve Tessitore, the DEP's liaison to municipal wetlands agencies: "Watercourses flow, land does not." So, the phrase "with continual flow" modifies watercourses, *not* wetlands. Different reasoning (technical, not legal), same result.

The court also examined the exemption for a farm pond "essential to the farming operation." Please note that this phrase only occurs in conjunction with a farm pond. It does not apply to all farming activities. In defending itself in one of the cease and desist order proceedings, Red 11 offered evidence to the agency that the pond was "critical" to the farm. The court noted, however, that there was no evidence of the lack of other water sources nor why the vernal pool had to be converted to a farm pond. In addition, the court held that the agency did not have to believe Red 11's witness. This level of scrutiny by the agency is appropriate because of the legislature's use of the phrase "essential to the farming operation" when describing farm ponds as exempt. For all of the other farming activities which are not required to be "essential" in order to be exempt this level of inquiry is not warranted.

The *Deojay* case involved landowners who purchased an abandoned rundown farm and undertook activities to remove a residence, trailer and garage with an intent, as disclosed on a zoning application to prepare the property for residential use. Initially the landowners did not disclose an agricultural use. The wetlands agent observed regulated activities occurring on the property without a permit: a drainage ditch was dug. The wetlands agent wrote a letter asking the owners to stop and to appear at the next agency meeting. The owners did not appear, but they filed an application for a permit to clear the lot, correct drainage problems created by the previous owner and by the run-off from the town road. The agency asked for the wetlands to be mapped. The owners did not provide soil mapping. The application was denied; no appeal was taken.

Thereafter the agency issued a cease and desist order. The owners appeared and claimed that the activities were agricultural and thus exempt. The agency upheld the order, with a

condition that the owners write to the Board of Selectmen regarding the road run-off onto the property. The court decision does not indicate whether and how the agency responded to the claim that the activities fall within the exemption. This is a critical fact missing from the decision. Recall that agencies have jurisdiction over *regulated* activities. Refer to the definition of "regulated activity" and note that it excludes exempt activities. If the claim of exemption is valid, the agency does not have jurisdiction over those activities. The order was not appealed. The owners did write to the Board of Selectmen, raising many of the issues that are raised in a court appeal, such as claims of unfair process, violation of civil and constitutional rights.

The owners notified the agency that the proposed activities would be undertaken and told the agency to stay off the property. The agency filed a suit in court seeking the removal of the fill in wetlands and the restoration of the property.

While the court case was pending, the owners filed a second application with the agency. The activities listed in the court decision included constructing a farm pond, planting blueberries, constructing a house, well, septic system, shed and driveway. The court decision does not provide enough detail. Why did the owners apply for a permit for the planting of blueberries? On its face, the planting of blueberries would surely fall within the exemption. Did the proposal include change in grade and a filling of wetlands, such as changing the soil profile by the addition of 2 feet of fill to provide a drier growing medium? Why a permit for the farm pond? Was it larger than 3 acres? Did the agency determine it wasn't essential to the farming operation? Perhaps the agency made these determinations, but the court decision does not refer to them.

At a following agency meeting the agency voted to approve the application and the lifting of the cease and desist order upon the posting of an $8,000 bond to ensure that the farming activities occur. Note: it was to ensure farming activities occurred, not *regulated* activities. Again, no appeal was taken of this agency action. No bond was posted; thus, the order was never lifted and remained in effect. After trial the judge found that the owners continued working on the property, including digging the farm pond, although the bond was not posted. The trial judge imposed a penalty of $10,000 plus costs and fees.

The Appellate Court ruled that the owners could not claim in court that their activities were exempt without a determination from the agency on the exemption. The court pointed to the requirement in § 4.4 of the municipal regulations, also in the DEP model regulations, of notification to the agency and receipt of a written determination from the agency prior to commencing the activity. Absent that determination, the owners could not make the claim of exemption in court -- even if the activities fall within the farming exemption.

In their defense in the enforcement case in court, the owners claimed that the posting of the bond for farming activities was illegal. The Appellate Court initially entertained the argument, though eventually disagreeing, only to conclude that *the owners had not appealed the permit condition.* The Appellate Court was on firm ground in holding that permit conditions are authorized by the wetlands statute.

In a narrow sense, this decision means anyone who has not appealed a permit condition can be held liable for violations of the condition. Are you jumping to the conclusion that your agency can impose a condition of the posting of a bond on an *exempt* agricultural activity? Not so fast. How is it that your agency will be *requiring* a person to apply for a permit for exempt agricultural activities? Not pursuant to the wetlands statute. The *Wilkinson* case, the applicable case law since 1991, and relied on by the Appellate Court in both *Deojay* and *Red 11*, holds that activities determined to be exempt need no permit. No permit, thus no permit conditions. Maybe the farming activities proposed in *Deojay* didn't fall within the exemption. In that case, those seemingly agricultural activities are, in fact, regulated activities for which a condition, such as a bond, may be reasonably imposed. We just can't tell from the written decision of the court.

Confused by this? I certainly was when I read the case. I followed up with an e-mail to the DEP and the Connecticut Farm Bureau. I believe that the *Deojay* case has sufficiently muddied the case law on agricultural exemptions that we owe it to the lay, volunteer members of wetlands agencies and those trying to farm to amend the exemption provision in the wetlands statute. The amendment should reflect the procedure, rights and restrictions when the exemption provision applies. Until then, I foresee numerous cases going up on appeal to clarify what *Deojay* means -- and what it doesn't mean.

Stay tuned.

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I have recently started a blog on Connecticut wetlands law. I am eager to have you weigh in with your comments on this article or any postings you read. You can read my blog at: www.ctwetlandslaw.com.

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[i] You may read the cases at the Judicial Website under the Archives of the Appellate Court cases. Go to www.jud.ct.gov. Click on "Courts"; go to "Appellate Court"; go to "Advance Release Opinions"; go to "Appellate Court archive"; go to "2009." Scroll down to: Published in CT Law Journal - 10/20/09, click on AC29092 for the Red 11, LLC case. Scroll down to: Published in CT Law Journal - 6/2/09, click on AC29602 for the Deojay case.