Journey to the legal horizon

by

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Will your wetlands permit conditions be upheld on appeal?

In October 2008 the Connecticut Supreme Court issued another case in a recent line of cases reversing wetlands agency action – this time for the *granting* of a permit. Depending on your current practices, your permit conditions may fail on appeal, as did the conditions of the Orange inland wetlands agency. Stew Leonard's Orange, LLC filed an application for a dairy store, outdoor garden center, restaurant, conference center and related parking, utilities and landscaping on 41 acres in Orange to conduct regulated activities in the wetlands and/or upland review area. The Orange wetlands agency granted the permit with twenty conditions. Individuals, who became environmental intervenors[i] at the wetlands agency, brought an appeal of the permit approval to the Superior Court. The court dismissed their appeal, affirming the agency's granting of permit, but sent the permit back to the agency to allow the environmental intervenors to respond to further information that would be supplied as required by five permit conditions. In Finley v. Inland Wetlands Commission, 289 Conn. 12 (2008) the Supreme Court reversed the trial court decision. The five-judge panel was unanimous in overturning the permit approval, but divided in its reasoning.[ii]

In Finley the environmental intervenors objected to the conditions requiring Stew Leonard's to submit: (a) a revised and updated erosion control plan that implements all state regulations; (b) additional detailed information for the silt fence and hay bales; (c) a phasing plan to minimize large disturbed areas subject to erosion; (d) additional info on paving stones, winter sanding and the drainage plan. The applicant's attorney welcomed the conditions because the statutory time for action was running out and there was evidently insufficient time to submit revised plans. He acknowledged that the installation of the erosion controls would be to the satisfaction of the wetlands enforcement officer. The intervenors argued that the application as submitted didn't satisfy all requirements for erosion control, otherwise there would have been no need for the condition. Many of us would have thought (and did, prior to this decision) that the condition cured the defect in the application. The Supreme Court said no. "It is implicit in the condition of approval requiring Stew Leonard's to submit a '[r]evised and updated erosion control plan that implements all [s]tate [r]egulations' that the commission had not determined that the existing erosion control plan met state regulations when it rendered its decision."[iii] The Supreme Court acknowledged that proper erosion control is critical to the protection of wetlands. It also acknowledged that permit conditions are permissible. The Court concluded there wasn't substantial evidence to support a determination that the application as filed complied with applicable statutes and regulations regarding erosion control.

While three judges on the panel held that the condition meant "implicitly" the application wasn't consistent with the wetlands law, a concurring opinion by two judges reached the same conclusion by examining the record. Justice Norcott, the author of the concurring decision, evidently spent time searching through the 350-page guidelines on erosion control trying to understand what the agency imposed. He found the conditions too "broad" and defective because they didn't identify specifically what was being remedied. "Reading the record, I am

convinced that the commission effectively 'punted' review of the erosion control plan in light of the looming statutory deadline."[iv] There was "no way" he could conclude that the agency decision rested on substantial evidence.

Both the majority and concurring opinions acknowledge there are lawful conditions that can be imposed, particularly relying on the Gardiner v. Conservation Commission decision.[v] So what is the bright line test? What conditions are clearly insufficient and what are permissible? Looking at the Gardiner decision, that's not so easy to discern. None of the permit conditions in the Gardiner case were overturned. The applicant proposed to construct an industrial park by constructing roads across wetlands and watercourses, establishing sediment basins adjacent to wetlands, installing sewer and water lines under watercourses, and discharging storm water in wetlands. The agency granted the permit with 29 conditions. An abutter appealed certain specific conditions claiming the further information which the conditions require should be available prior to the granting of the permit.

These conditions were:

a. A full subsurface investigation of the area where a detention basin would be located to determine whether the placement of the basin near an existing landfill would create pollution; *Comment: doesn't that sound like the agency couldn't have known at the time of its vote that the placement wouldn't cause pollution?*
b. Special design of the basin to prevent seepage between the basin and the landfill;
c. A water monitoring program of the leachate from the nearby landfill; and
d. Submission of engineering calculations for two of the basins (including the one near the landfill) "in order for the town engineer to review the structural integrity of these and other similar basins".[vi] *Comment: doesn't that sound like the agency couldn't have known at the time of its vote that the detention basins were sound and wouldn't allow pollution to the wetlands and watercourses?*

Without any regulation that so established, the Gardiner court believed it was possible the agency would provide the abutter a chance to comment on the information submitted as required by the permit. Why would the agency do that if it already issued the permit? How would it do that? Hold a public hearing after permit issuance? "To adopt [the abutter's] view would inhibit an inland wetlands agency in imposing such conditions as it deemed necessary to safeguard against the risk of pollution in the light of concerns raised during its deliberations. We conclude that [the abutter's] rights were not violated merely by the attachment to a permit of conditions that required the submission of further information after the agency's decision had been rendered."[vii] The Finley decision would be easier to understand if the Supreme Court abandoned its reliance on the Gardiner decision.

The Finley court holds that the environmental intervenor can prevail by proving that the proposed conduct likely would cause unreasonable pollution, impairment or destruction of the wetland or watercourse OR by establishing that the agency's decision (here, a permit with conditions) "was not based on a determination, supported by substantial evidence, that the development complied with governing statutes and regulations and would not cause such harm."[viii]

The effect of the Finley decision could have a number of different outcomes. One, there may be more permit denials because of the fear that permit conditions will be appealed and not upheld. Two, applicants may get revisions in sooner, eliminating the need for open-ended conditions. Three, your commission may be concerned that a permit denial will not be upheld (as has happened so often since 2000) and your case will be the next generation to go up to the Supreme Court for further refinement of what kinds of conditions are acceptable. Since there is no bright line test, it would be valuable for your commission to reexamine conditions you would ordinarily impose and consider eliminating or minimizing open-ended conditions requiring further submittals to the town.

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[i] Hazy on environmental intervenors before wetlands agencies? Check out this column in the *The Habitat*, Spring 2008, Volume 20, No. 2, pp. 4-5.

[ii] The official citation indicates where to find the decision in the official bound volumes. The decision is also available online. The majority decision can be found online at the Connecticut Judicial Department website at: http://www.jud.ct.gov/external/supapp/Cases/AROcr/CR289/289CR149.pdf. The concurring decision is found at: http://www.jud.ct.gov/external/supapp/Cases/AROcr/CR289/289CR149A.pdf.

[iii] Finley v. Inland Wetlands Commission, 289 Conn. 12, 41 (2008).

[iv] Finley v. Inland Wetlands Commission, 289 Conn. 12, 55 (2008).

[v] Gardiner v. Conservation Commission, 22 Conn. 98 (1992).

[vi] Gardiner v. Conservation Commission, 22 Conn. 98, 102 (1992).

[vii] Gardiner v. Conservation Commission, 22 Conn. 98, 106 (1992).

[viii] Finley v. Inland Wetlands Commission, 289 Conn. 12, 54 (2008).