JOURNEY TO THE LEGAL HORIZON

CACIWC's editor, Tom O'Dell, has supplied me with a series of questions for my column. For those of you who know that I have two appeals pending in court on the agricultural exemption, no, I didn't plant the first question. But if you'd like to plant your question in the next issue, e-mail your queries to Tom at _____.

Question:

I am a new member of my town's IWC, and am having a great deal of problem wrestling with the real meaning of Section 4.1a of the regs - the whole "as of right" concept. Is there anything that is NOT allowed? Is it OK to clearcut, to fill, to level, etc, without any regulation, or even a report? Some of our newer subdivisions have been divided so that nurseries can buy the "less desirable" pieces of land, as they know they can do whatever they want with them. They then water their stock daily with a high nitrogen fertilizer, which is going directly into the wetlands that are the beginnings of several watercourses. I am highly concerned about this, especially as there are rumors of more nurseries moving into the same area, and there's no telling where it will stop.

Are there some controls we might have over what happens with the property and what goes into the surrounding wetlands, or we totally beyond recourse? We have no experts available to us to help interpret this, and the developers are having a field day with our ignorance.

Thank you so much for your help.

"New Wrestler"

Dear "New Wrestler,"

Welcome to the team. As I stated in my initial column, I tend to approach any wetlands inquiry from a legal point of view, looking at your jurisdiction. I understand most commissioners approach it from the resource point of view. I'll start at the opposite end of the path from you and end up answering your questions.

Your job revolves around "regulated activities." Those are the activities that can not be conducted without a permit. You issue permits for regulated activities. You enforce the law against those undertaking regulated activities without a permit or in a way that violates a permit. But you don't regulate activities which are exempt from the act. The definition of "regulated activity" in the statute does **not** include the activities exempt by statute. See General Statute § 22a-38 (13) ("Regulated activity" means any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses, *but does not include the specified activities in section 22a-40"*) (emphasis added.)

It was the job of the legislature to decide what activities you are not going to regulate. They did that job by passing, and at times, amending § 22a-40. Your job does entail determining

whether a proposed activity does fall within the language of one of the exemptions. Usually that is contained in § 4.4 of municipal regulations (the actual number is not important; for those agencies that followed the DEP model regulations, it can be expected to track the same numbers.) Throughout the years of training I've conducted with my former colleagues in the Attorney General's Office, we applied the following principles: 1) The farming exemption is not "intuitive;" always have the statute in front of you or your regulation *as long as your regulation is consistent with § 22a-40 (a) (1).* The first long sentence of the statute provides a laundry list of activities that are exempt. The second sentence, as judge recently commented, "tightens" the exemption by deleting activities otherwise associated with farming. Do not try to remember what the statute says – it's not a memory test. Have the statute in front of you each time you are reviewing a request for exemption; 2) Use the definition of agriculture found in § 1-1 (q) of the General Statutes. Don't try to exclude the raising of animals or the raising of certain animals or impose conditions (income from the farm); 3) There is no statutory requirement that a farm already be in existence, notwithstanding what your municipal regulation may state; 4) If the proposed activities fall within the exemption, your duty is done. You may not attach conditions, as if you were issuing a permit. It's not your job to stop exempt activities from coming into your town. It's your job to regulate regulated activities.

You ask whether a number of activities are exempt. Let's look at them one-by-one and compare them to the statute. You ask if clear cutting is exempt. It is not exempt "except for the expansion of agricultural crop land." (Second sentence.) Filling? Again, look to the second sentence: "The provisions of this subdivision [the exemptions] shall not be construed to include . . . filling . . . of wetlands or watercourses with continual flow . . ." So, no, filling is not exempt; it is a regulated activity. Can nurseries move into town and "do whatever they want with [the land]?" Nurseries are exempt. See the first sentence of the statute. Is "whatever they want" included in the second sentence? If it is in the second sentence, it is not exempt. If it is not in the second sentence and it is part of operating a nursery, it is exempt. You get the idea. You examine the specific proposed conduct and you determine if it falls only within the first sentence or if it falls within the second. Those aspects that are in the first sentence are not subject to the permitting process; those activities in the second sentence are "regulated activities" for which a permit is required.

Question:

In "Officers and Their Duties" section [of our municipal regulations] there is a requirement that the Secretary retain records. It refers to "tapes of meetings." Is there some legal requirement that we tape our meetings?

"Rose Mary Woods"

Dear "Rose Mary,"

Since 1990 with the Connecticut Supreme Court's decision in Gagnon v. Inland Wetlands & Watercourses Commission, 213 Conn. 604 (1990), the Connecticut Attorney General's Office has recommended that commissions tape the entire meeting, not just the public hearing portions. Since judges are obligated to review the record of a decision to see if there is any evidence to support the agency's decision, an agency will be best served if there is a recording of the whole meeting. For planning commissions, zoning commissions, planning & zoning commissions and

zoning boards of appeal, there is a statutory requirement that tape recordings or use of a stenographer occur at public hearings and deliberations on any application which can be appealed. General Statutes § 8-7a. The Inland Wetlands & Watercourses Act doesn't contain an equivalent provision. There is an obligation for the wetlands agency to submit a transcript of the public hearing and the deliberations in a matter that is appealed to court. If the wetlands agency doesn't have a transcript, any party to the appeal may submit a transcript to court.

Question:

> In "Committees" section [of our municipal regulations]: if we set up committees, it says that we have to open them to the public. Does that also mean that we have to provide public notice of them? Can't we have ad hoc committees (like our group that has been working on the bylaws) without going through all that?
>
> "Close the door on the way out"

Dear "Close the door,"

YES, a committee of the agency has to comply with the Freedom of Information Act[1] for public notice and NO, you can't have ad hoc committees that subvert open government as set out by FOIA. When you're doing "the people's work," i.e., governmental duties, you have to do the work in accordance with FOIA. That includes not holding committee meetings at a non-public place, such as someone's residence. It doesn't matter that no member of the public shows up to follow what you're revising in your bylaws. They are owed the opportunity to observe your public meeting in a public location, whether they choose to or not.

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[1] To read the law, go to the Freedom of Information Commission's website at: http://www.state.ct.us/foi/.