Journey to the Legal Horizon

by

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Lack of wildlife information valid basis for wetlands agency denial

In my last column we took a five-year retrospective look at the change in wetlands law regarding consideration of wildlife. Since that newsletter was published, the Connecticut Supreme Court has issued a decision in Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93 (2009). The Supreme Court upheld the agency's action. The decision is helpful in instructing agencies how to go forward in the consideration of wildlife.

In Unistar Properties, LLC the Supreme Court uses the term "wildlife" to encompass only animal life. In numerous dictionaries and among the scientific community "wildlife" is deemed to encompass plant and animal life, the flora and fauna. Among lay people it is somewhat more common to limit "wildlife" to animals. I use the term "wildlife" to include both plants and animals. However, to avoid confusion in this article I will specify animals or plants and animals. Where I am quoting directly from the court decision I will use the court's wording, i.e, wildlife, meaning only animal life.

Unistar Properties, LLC, the applicant, appealed the decision of the Putnam inland wetlands agency for denying its application for a 34-lot subdivision. The agency denied the application as incomplete based on the applicant's failure to provide both a sufficiently detailed wildlife[i] inventory and an analysis of alternatives. The applicant claimed that it had provided expert testimony that there would be no adverse impacts to wetlands or watercourses. Hence, *according to the applicant*, the agency had no authority to seek information about plants and animals or to require the applicant to consider alternatives. The trial court dismissed the appeal, affirming the agency action. The trial court found there was substantial evidence to support the agency's denial based on the application being incomplete.

On appeal to the Supreme Court, the applicant argued that because no one established that there would be an adverse impact to wetlands or watercourses, the agency wasn't authorized to deny an application as incomplete for the lack of information about animals. Secondly the applicant claimed that because no one had established that an impact on plants and animals would have a physical effect on the wetlands or watercourses on the property, no plant or animal inventory could be required of the applicant.

Refer back to this column in that last issue (or pull out *your* town's wetlands regulations). After the Supreme Court's decision in Avalon Bay in 2003, the legislature responded in 2004 by amending § 22a-41. Subsection (d) was added. It limits the authority of an agency to *deny* or *place conditions on a permit* when the proposed activity occurs outside of a wetlands or watercourse "unless such activity will likely impact or affect the physical characteristics of such wetlands or watercourses."

The agency countered that it did not deny the application because there was evidence that animal life would be adversely impacted, but because *the agency lacked sufficient information to*

determine whether the proposed subdivision would adversely impact the wetlands. An environmental intervenor supported the agency's position arguing that the applicant cannot refuse to supply information to the agency simply because the *applicant* has determined there will not be an adverse impact.

The Supreme Court agreed with the agency and the intervenor. The court interpreted the new provisions of the General Statutes § 22a-41. The first amendment in § 22a-41 (c) "contains a more expansive definition of wetlands and watercourses for purposes of the commission's considerations of the factors set forth in that statute for permit approval."[ii] The definition of wetlands or watercourses is enlarged to include "aquatic, plant or animal life and habitats in wetlands or watercourses." General Statutes § 22a-41 (c). The Supreme Court holds that § 22a-41 (c) "make[s] clear . . . the wetlands resources that a commission is charged with preserving and protecting . . . are not limited simply to the wetlands and watercourses as containers of soil and water but encompass the aquatic, plant or animal life and habitats that exist therein."[iii]

Thus, the Supreme Court rules it is proper for an agency to deliberate on the factors for consideration with respect to not only the physical characteristics of the wetlands resources but also with respect to "the aquatic, plant and animal life and habitats that are part of those wetlands and watercourses."[iv] Most important: "[A] commission necessarily must be able to request, and is entitled to, information on the aquatic, plant or animal life and habitats that are part of the wetlands and watercourses, pursuant to § 22a-41 (c), as well as an assessment of impacts to those resources, along with information on any impact to plant or animal life outside the wetlands that might, in turn, impact the wetlands."[v]

The applicant held the position that § 22a-41 (d) prohibited the agency from requesting information on plants and animals when there is no evidence of a change in the physical characteristics of a wetland. Not so, said the Supreme Court. "Nothing in § 22a-41 (d) prohibits a commission from requesting information on wildlife in order to determine *whether* the proposed activity either will 'affect the physical characteristics of such wetlands' or will impact wildlife outside the wetlands that in turn will 'affect the physical characteristics of such wetlands.' "[vi] The decision of whether a project will impact wetlands resources is a factual determination "that only the commission is empowered to make and what cannot be reached in the absence of such [wildlife] information."[vii]

This court holding is tremendous support for agencies in carrying out their duties. An agency doesn't need to make a preliminary finding of impact to request a inventory of plant and animal life. It is the inventory itself that is needed to make the determination of impact to wetlands resources. The court also authorized the submission of information on plant and animal life *in the upland review area* to determine if such an impact in the upland review area might impact wetlands.

Are there limits to how far from wetlands an agency may properly seek information about plant and animal life? Of course. The court warns that if the area for which an inventory of animal life is sought "is so remote and makes it so unlikely that the activity could have any effect on the wetlands that it would be arbitrary and capricious for the commission to impose such a demand on the applicant."[viii]

Finally, the Supreme Court settles the score on who has the burden of proof regarding a permit application. It is the applicant. The applicant argued that no inventory of plant and animal life could be required until someone had first offered evidence that an impact on plant and animal life could cause a change to the physical characteristics of wetlands. The court said no. The applicant impermissibly shifted the burden from the applicant to the commission and placed "the commission in the role of disproving the [applicant's] assertion rather than evaluating information presented to [the commission] . . ."[ix]

The Supreme Court went painstakingly through the transcripts of four nights of public hearings and what evidence was offered by the applicant, intervenor and the agency. During the hearings an agency member specifically asked for alternatives to the proposal which would limit water flowing to a vernal pool. The applicant rejected the request for alternatives stating since there was no impact to the wetlands, the applicant was not required to submit alternatives. The agency's expert identified deficiencies in the application, namely lack of identification of animal species in the wetlands and drainage information. When the applicant responded the inventory was general and not keyed to specific wetlands on the property.

The Supreme Court found it significant that the agency's regulations authorized the agency to require a wildlife inventory. Moreover, the regulations do not require the agency to find an adverse impact to the wetlands, before requesting an inventory.

The applicant's last hope was to argue that it was entitled to be remanded, sent back, to the agency to allow the applicant another opportunity in this application proceeding to offer the requested information on animal life. The applicant clung to the argument that it wasn't on notice what the agency wanted. The court made short shrift of that claim, referring to the numerous opportunities that it was given to respond to agency concerns during the public hearing process.

Why does this case support the agency when in the recent past the Supreme and Appellate Courts have thrown out numerous wetlands agency denials? The big distinction: this denial was based on lack of information from the applicant. Previous denials have involved the agency making findings of adverse impact or voting down applications without making a finding of adverse impact. The similarity in all of these cases is that the Supreme Court is continuing to look for "substantial evidence" to support the agency denial. The court hasn't found substantial evidence where an agency relied on vague, general or speculative evidence of an adverse impact. The court in Unistar found substantial evidence for the agency to require more information that in turn allows the agency to make the factual determination of adverse impact.

The Supreme Court has ruled that the 2004 revisions to the wetlands act are a source of authority for agencies to rely on in gathering information on plant and animal life. The court has thwarted any attempt by the applicant to shift the burden of proof away from the applicant and onto the agency. The next challenge is for agencies who receive the information they have sought to base denials on substantial evidence. The Supreme Court has solidly affirmed the right to gather the information, which is a valuable tool in protecting Connecticut's wetlands and watercourses.

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[i] Sorry, we don't know from the court decision whether the agency was referring to "animals" or "plants and animals," so I am using the word the Supreme Court used in its decision. It is clear from reading the decision that the applicant understood the word "wildlife" to encompass plants and animals. From the information given in the court ruling, it is not clear what the agency was referring to.

[ii] Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 109 (2009).

[iii] Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 109 (2009).

[iv] Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 110 (2009).

[v] Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 110 (2009).

[vi] Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 111 (2009).

[vii] Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 111 (2009).

[viii] Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 111 n. 15 (2009).

[ix] Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 112 (2009).