"Journey to the Legal Horizon"

As a follow-up to my column in Spring, 2007 the Editor has asked me to address the trial court decisions issued in 2008 on the exemptions to the Inland Wetlands & Watercourses Act.

The question whether wetlands agencies have correctly applied the exemption provisions of the wetland law came up in a number of trial court decisions in 2008. One wetlands agency has completed two separate court enforcement actions where the statutory exemption was implicated. One agency action was upheld by the court; the other was not. One applicant claimed its proposed golf course was exempt. Each of these cases will be discussed in this column.

To begin, trial court decisions are binding on the parties in the case. Trial court decisions are not like Appellate Court and Supreme Court decisions which establish a precedent to be followed by all wetlands agencies. The trial court decisions are generally not officially reported, which means it can be more difficult for you to locate a decision.[i] Trial court decisions can provide guidance. Taken as whole, they measure "the pulse" of hot topics in litigation. Lastly, they may not be final. Appeals may be underway which means a binding precedent may be forthcoming from a higher court.

The trial court decision in Lussier v. Pomfret Inland Wetlands and Watercourses Commission[ii] is succinct and a model of clarity. The decision, comprising five sentences, sets forth the facts, the applicable law and the legal conclusion. Mr. Lussier applied to the commission for a determination that his selective timber harvest was exempt from wetlands regulation. Instead of issuing a determination ("yes, it is exempt" or "no, it is not"), the commission issued a permit for the activity and attached fourteen (14) conditions. The judge disclosed that he reviewed the statutory exemption for agriculture, General Statutes § 22a-40 (a) (1), the statutory definition of agriculture found in § 1-1 (q), and the municipal wetlands regulation. The court concluded the selective timber harvest was exempt and remanded the matter to the commission with an instruction to issue a ruling that it is permitted by right and to attach no conditions.

A wetlands agency would be hard pressed to find a better outline of how to proceed in ruling on an exemption. Turn your attention first to the statutory section (and your equivalent municipal regulation). If the person is claiming an agricultural exemption, examine section 1-1 (q) of the General Statutes. Here, Lussier was claiming his selective timber harvest activities were exempt. Unclear whether forestry falls within farming? The answer lies in § 1-1 (q); forestry is explicitly included. What about selective timber harvest? Examine the second sentence of § 22a-40(a)(1): clear cutting of timber (except for the expansion of agricultural crop land) is not part of the exemption. Selective cutting is not excluded from the exemption. It is part of forestry and, hence, exempt.

Issued the same day in another courthouse was the decision in Watertown Fire District v. Woodbury Inland Wetlands and Watercourses Agency,[iii] which addressed the exemption provision for water companies, set forth in General Statutes § 22a-40(a)(5). Perhaps the water company exemption is even less familiar to you than the farming exemption. "Water company," just like "agriculture," has been defined in the state statutes. The wetlands exemption directs you to the definition in § 16-1 of the General Statutes. The definition, in relevant part, includes "every person owning, leasing, maintaining operating, managing or controlling any pond, lake, reservoir, stream, well or distributing plant or system employed for the purpose of supplying water to fifty or more consumers." § 16-1(a)(10). Developers who are constructing water systems for fifty or more consumers fall within the exemption. Do all of the developer's activities at the site fall within the exemption? No. Section 22a-40 sets out "construction and operation . . . of dams, reservoirs and other facilities necessary to the impounding, storage and withdrawal of water in connection with public water supplies . . ." § 22a-40(a)(5).

The Watertown Fire District, which the court determined is a water company by referring to the statutory definition in § 16-1, proposed to remove sediment from a river. This activity is undertaken every five years. The water company deems it necessary because the sediment backs up floodwaters behind a dam in the river after heavy rains which would result in contamination of the water company's wells and damage to the pumps. The water company had previously applied for and received permits from the wetlands agency to undertake this work. The water company deemed a previously granted permit and conditions so onerous as to render the permit unusable. This time the water company sought a ruling that its activity was exempt. The agency denied the ruling claiming the water company failed to establish the exemption. The trial judge examined the water company exemption in § 22a-40(a)(5), the municipal regulation and the definition of water company in § 16-1. The judge concluded that the statutory exemption specifically exempts specified activities of water companies from the jurisdiction of wetlands agencies. Here, the court found that the purpose of dredging is to repair a problem caused by a dam which causes sediment to disrupt the operation of the water company. The fact that the wetlands agency did not believe the Fire District had established its right to the exemption did not prevent the court from examining the facts in the record and applying the exemption law.

One trial court decision interpreted the portion of the exemption law that exempts certain specified activities, including golf courses, if they don't "disturb the natural and indigenous character of the wetlands or watercourse . . ." § 22a-40 (b)(2). Note this criterion (non-disturbance of the natural and indigenous character of the wetlands/watercourse) can not be imposed on the activities listed in the "a" section of the exemptions, such as, the farming and the water company exemptions. In River Sound Development, LLC v. Inland Wetland & Water Courses Commission,[iv] the applicant proposed to construct 221 houses, a golf course, roads and associated infrastructure in an area known as "The Preserve," located primarily in Old Saybrook. On appeal for the denial of the wetlands permit, the applicant argued that the golf course fell within the exemption. The trial court examined the language of § 22a-40(b)(2) and the record.

The trial court concluded that the agency found that the construction of the golf course would disturb the natural and indigenous character of the wetlands and thus the exemption was not applicable. This case is being further appealed.

On the enforcement front, two trial court decisions were issued in August assessing the validity of the Fairfield wetlands agency's interpretation of the agricultural exemption provision in two different situations. Note: both of these trial court decisions have been appealed. In Conservation Commission v. Red Eleven, LLC d/b/a Twin Oak Farms,[v] the trial court had ruled in 2007 that not all farming activities of the defendant fell within the statutory exemption. This included filling in of a vernal pool, the draining and piping of wetlands, and the installation of a culvert and a weir. The trial court then conducted a hearing on the remediation of the property and issued its decision in July, 2008.[vi] The trial court ruled that restoration, i.e. back to pre-violation conditions, was possible on much of the site and ordered the removal of piping and non-wetlands soils. The court imposed a cash bond in the amount of $300,000 to be filed with the clerk of the court. A third party independent monitor is required to monitor the restoration efforts and report to the court and parties weekly. In deciding to impose a penalty, the court acknowledged the significant costs for remediation, but found the violations were egregious, the defendant refused to comply with municipal cease and desist orders and that several wetlands were permanently destroyed. The court imposed a penalty of $25,000. What will prove far more costly to the defendant is the court's award of a reasonable attorney's fee to the wetlands agency and the environmental intervenor.[vii]

The Fairfield wetlands agency's enforcement action against a homeowner taking steps to prepare her property for a horse barn, paddock and training area was in large part unsuccessful. The trial court in Conservation Commission v. DiMaria,[viii] found that the defendant's activities and contemplated uses of her property exempt. The trial court found that the agency lacked courtesy and understanding in not allowing the homeowner an extension of time to respond to a cease and desist order. The agency's implication, at trial, that Mrs. DiMaria claimed the exemption as a pretext, the court deemed absurd. The court found no clear cutting occurred. The court held that she should have sought a declaratory ruling that her activities were exempt. However, her failure did not alter the exempt status of the work. In preparing the upland for the horse farm, the court found that the defendant inadvertently pushed fill into the wetlands. While the court ordered the fill removed, which the defendant had already agreed to do, the rest of the agency's order went beyond restoration of the property. The planting of 100 native trees and 100 native bushes, as well as the construction of a stonewall (which hadn't previously existed) were deemed by the court overreaching. No civil penalty was imposed; nor were attorney's fees awarded.

What can be discerned from these cases? Without exception, the trial court proceeds headfirst into the language of the statutory exemption. Each court lined up the facts of the administrative record (in the case of appeals) or the exhibits and testimony of the witnesses (in the case of the enforcement actions). A determination was made: do the facts fall within the

scope of the exemption? The judges don't do this work without the statutes and regulations in front of them and neither can you. Your discourtesy will not be rewarded. When you do the work of matching up the facts of the proposed activity or the actions to the statutory exemption, your hard work will be rewarded.

Janet P. Brooks practices law with D'Aquila & Brooks, LLC, in Middletown.

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[i] Many lawyers subscribe to legal research tools, such as Westlaw or Lexis, through which unofficially reported cases can be downloaded. For those of you eager to read the trial court decisions addressed in this article, I recommend that you seek the aid of the very competent, enthusiastic and helpful law librarians at either the Connecticut State Library (http://www.cslib.org/) or the Connecticut Judicial Branch law libraries (http://www.jud.ct.gov/lawlib/aboutus.htm) which are located in most of the state courthouses. In endnotes, the official citation to each case will be provided.

[ii] Lussier v. Pomfret Inland Wetlands and Watercourses Commission, Superior Court, judicial district of Windham at Willimantic, Docket No. CV 07 4006358 S (August 5, 2008).

[iii] Watertown Fire District v. Woodbury Inland Wetlands and Watercourses Agency, Superior Court, judicial district of Waterbury at Waterbury, Docket No. CV 07 4013054 S (August 5, 2008).

[iv] River Sound Development, LLC v. Inland Wetland & Water Courses Commission, Superior Court, judicial district of Middlesex at Middletown, Docket No. CV 06 4005349 S (February 19, 2008).

[v] Conservation Commission v. Red Eleven, LLC, Superior Court, judicial district of Fairfield, Docket No. CV 04 4001044 S (April 4, 2007).

[vi] Conservation Commission v. Red Eleven, LLC, Superior Court, judicial district of Fairfield, Docket No. CV 04 4001044 S (July 25, 2008).

[vii] The trial court requested affidavits from the town's law firm and the intervenor's to determine the amount of the attorney's fees to be awarded.

[viii] Conservation Commission v. DiMaria, judicial district of Fairfield, Docket No. CV 05 4009431 S (July 21, 2008).