

DEVELOPERS COUNCIL

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The State of Inland Wetlands and Watercourses Law in Connecticut



Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

Joseph P. Williams

PHONE: (860) 251-5127

FAX: (860) 251-5318

E-MAIL: jwilliams@goodwin.com



SHIPMAN & GOODWIN LLP

COUNSELORS AT LAW

What's Happening in Inland Wetlands Caselaw in Connecticut?

In a nutshell:

- It's the River Bend era
- Little debate over wildlife habitat after AvalonBay/Wilton
- Increasing battle of experts as to wetlands impacts
- Beware the Pyrrhic victory



The River Bend Era

River Bend Associates Inc. v. Conservation and Inland Wetlands Commission of Simsbury, 269 Conn. 57 (2004)

- Has become the defining standard
- Focused courts' attention on evidence of actual, adverse impacts to wetlands
- Incorporated the AvalonBay/Wilton rule on upland wildlife habitat
- Postscripts

Current Rules of the Game Post-River Bend

To support a denial, there must be “substantial evidence” in the record of:

- An actual, specific impact to wetlands/wc
- Impact must be adverse
- Proof of the likelihood impact will occur

Current Rules of the Game Post-River Bend

No good:

- Mere “possibility” of adverse impact
- General environmental impacts
- Mere speculation/assumptions
- General concerns

Current Rules of the Game Post-River Bend

Got Experts?

- Adverse impact to wetlands is a technically complex question requiring expert testimony
- Agency can decide which experts to believe
- Agency cannot disregard uncontradicted expert testimony and rely on undisclosed personal knowledge



Current Rules of the Game Post-River Bend

Wildlife Habitat

- Agency can protect wildlife and habitat within wetlands/wc
- Agency can regulate upland activities only if they will impact wetlands/wc



Recent Trends in Caselaw

- All Quiet on the Wildlife Front (no connections to adverse wetlands impacts)
- Take River Bend seriously – no assumptions
- “Feasible and prudent alternatives” being scrutinized more closely
- No consistency in decisions on what happens next if you win

A Tale of Three Significant, Recent Decisions



1. Toll Brothers Inc. v. Bethel Inland Wetlands Commission (Conn. Appellate Court, June 5, 2007)

- Proposed 128 townhouses on 22 acres
- Wetlands A, B + C = 0.13 acre;
Wetland D = 2.28 acres
- Wetland A to be filled, B expanded
- Main IWC issues were retaining wall, Eastern Box Turtle, flooding and stormwater impacts – all to Wetland D



1. Toll Brothers Inc. v. Bethel Inland Wetlands Commission (Conn. Appellate Court, June 5, 2007)

Superior Court:

- “Potential” damage to wetlands does not satisfy River Bend
- No evidence of harm to Wetland D from runoff, retaining wall, flooding
- No link between turtle habitat and physical qualities of wetlands
- Wetlands agency cannot rely on density

1. Toll Brothers Inc. v. Bethel Inland Wetlands Commission (Conn. Appellate Court, June 5, 2007)

Superior Court:

- The commission is not permitted "to substitute [common sense] for expert testimony on the highly technical subject of" impact to a wetland.
- "There cannot possibly be any alternative that could cause less impact than none ..."
- "It is apparent to the Court that density, per se, was the overriding reason for denial, not the likelihood that density might damage wetlands."

1. Toll Brothers Inc. v. Bethel Inland Wetlands Commission (Conn. Appellate Court, June 5, 2007)

Appellate Court affirmed:

- Commission merely assumed that any proposed alterations to Wetlands A and B justified denial of application -- *“that assumption was improper.”*
- Record lacks substantial evidence of a likely impact on Wetland D -- Commission improperly relied on evidence of general environmental impacts and wildlife
- “Any connection between the project’s density and a likely impact on the wetlands is merely speculative.”

1. Toll Brothers Inc. v. Bethel Inland Wetlands Commission (Conn. Appellate Court, June 5, 2007)

WE WON! NOW WHAT?

- Trial court should have followed the “ordinary rule.”
- Case remanded to the Commission “for further proceedings consistent with this opinion.”
- Postscript

2. Lord Family of Windsor, LLC v. IWWC of Windsor (Conn. Appellate Court, Aug. 21, 2007)

- Application to modify subdivision plan to eliminate one of three access roads
- Existing “neck” road crosses Phelps Brook by way of a culvert
- Application denied due to increase of pollutants into Phelps Brook and uncertain strength of culvert

2. Lord Family of Windsor, LLC v. IWWC of Windsor (Conn. Appellate Court, Aug. 21, 2007)

Superior Court:

- Found in favor of Commission
- Held - commissioners' concerns about structural integrity of culvert and pollution from increased traffic were valid reasons for denial

2. Lord Family of Windsor, LLC v. IWWC of Windsor (Conn. Appellate Court, Aug. 21, 2007)

Appellate Court:

- Commission can regulate driving of motor vehicles
- All runoff water on bridge was to be collected and treated
- No evidence of harm to wetlands from increase in passing traffic
- Only speculation as to whether existing culvert could sustain construction vehicles

2. Lord Family of Windsor, LLC v. IWWC of Windsor (Conn. Appellate Court, Aug. 21, 2007)

Wetlands Vice-Chair: “It doesn’t take a rocket scientist to figure out that sometimes cars drop oil, and salts get into the wetlands and all kinds of things happen.”

Appellate Court: **“The vice-chair’s conclusion that passing traffic might drop pollutants into the wetlands fails to satisfy the substantial evidence test.”**

2. Lord Family of Windsor, LLC v. IWWC of Windsor (Conn. Appellate Court, Aug. 21, 2007)

Wetlands Agent: “We don’t know how sound that thing [culvert] really is. I would hate to have one of your logging trucks end up in the middle of Phelps Brook.”

Appellate Court: “A mere worry is not **substantial evidence.**”

2. Lord Family of Windsor, LLC v. IWWC of Windsor (Conn. Appellate Court, Aug. 21, 2007)

Result

- Trial court judgment reversed
- Case remanded to the Commission “for proceedings consistent with this opinion.”

3. John Fanotto v. Inland Wetlands Commission of Seymour (Conn. Appellate Court, June 3, 2008)

- 20.37 acre parcel
- Proposed 20-lot subdivision
- 5.1 acres of wetlands, 3.6 dedicated as open space
- Two minor wetland crossings with culverts totaling .05 acre, road upgrade



3. John Fanotto v. Inland Wetlands Commission of Seymour (Conn. Appellate Court, June 3, 2008)

Superior Court:

- Commission could rely on knowledge gained by personal observation of the area in deciding that construction would adversely affect wetlands
- Commission was not required to believe plaintiff's uncontradicted expert
- Twelve of the twenty lots were affected by proximity to wetlands
- Dismissed plaintiff's appeal

3. John Fanotto v. Inland Wetlands Commission of Seymour (Conn. Appellate Court, June 3, 2008)

Appellate Court:

- Little discussion of direct impacts
- Plaintiff's expert explained how indirect impacts would be addressed by improving the existing stormwater system
- "No credible evidence" presented at the hearing to rebut the plaintiff's expert
- Commission relied on its own knowledge without any expertise or opportunity for plaintiff to rebut it
- No substantial evidence in the record to support Commission's decision to deny the application

3. John Fanotto v. Inland Wetlands Commission of Seymour (Conn. Appellate Court, June 3, 2008)

Result

- “The only reasonable conclusion for the Commission to reach would be to grant the application with reasonable conditions.”
- Case remanded, and commission was ***directed to approve the application*** with reasonable conditions

3. John Fanotto v. Inland Wetlands
Commission of Seymour (Conn.
Appellate Court, June 3, 2008)



Trends in Superior Court Decisions 2006-2008

- Healthy number of cases (about 17)
- Appeals dismissed: 9 (2 overturned)
- Appeals sustained: 8 (none overturned)
- Directions to grant permits: 4 (minus 1)
- Beware the Pyrrhic victory re-do (United Jewish Center, Diamond 67)
- Deference to agency findings not as absolute, but still formidable

Trends in Superior Court Decisions 2006-2008

Watch out for:

- Septic/A.T. systems (who decides?)
- Density, Traffic, Proximity
- Pesticides/ former agricultural use
- B.S. experts
- Vague/uncertain expert opinions
- Mitigation – overall functions & values
- Need for alternatives analysis

Thank you for coming!



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