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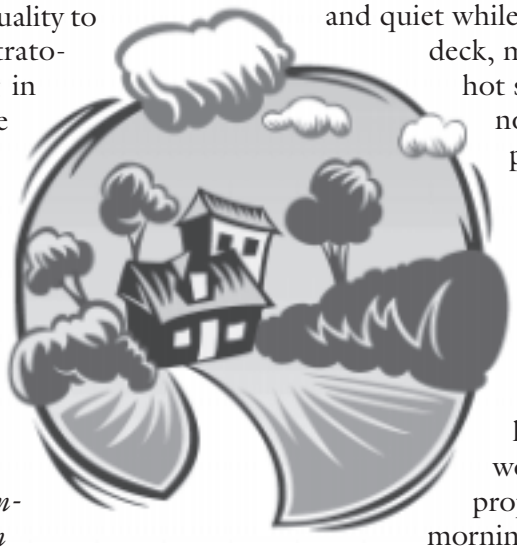
The AvalonBay-Wilton Salamander Case: Wildlife Migrate, But Jurisdiction Does Not

by Timothy S. Hollister, Esq. and Matthew Ranelli, Esq.

"Environmental regulation" is a very broad term. It potentially encompasses every aspect of our natural and physical world, from aquifers to indoor air quality to ozone levels in the stratosphere and everything in between. To be effective and coherent, environmental protection requires clear assignments of responsibility, and good definitions of who regulates what.



This is what the recent Connecticut Supreme Court decision in *AvalonBay Communities, Inc. v. Wilton Inland Wetlands Commission* — the so-called "spotted salamander" case — is all about: *which agencies are responsible for which part of regulating the environment.*

AvalonBay Communities has a contract to purchase 10 acres adjacent to Route 7 in Wilton. The site (despite what you may have heard) is developed; it contains a large building that was used until 2001 by an advertising

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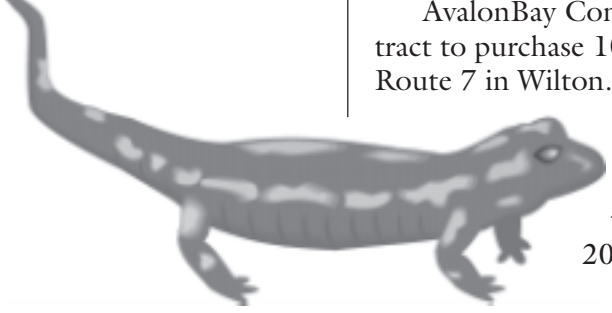

The Berlin Batting Cages Case: Peace and Quiet in the Woods – Who Regulates Noise Pollution?

by Christopher Smith, Esq.

You purchased your home and two-acre lot adjacent to undeveloped property owned by the local water company for a reason — you desire peace and quiet while lounging on your back deck, margarita in hand, during hot summer weekend afternoons. However, over the past two weekends, the water company property has been expropriated by what appears to be an elite military strike force of ATV riders and motorcycle dirt bikers. They buzz loudly through the woods within feet of your property from early in the morning until what seems like midnight. You feel under siege.

First, you call the water company. The company sends an employee to investigate. Not surprisingly, the employee is unwilling to hurl their body in front of the speeding bikers for the purpose of engaging in dialogue to explain the laws of trespass. The police arrive, but unlike television have no luck or real interest in chasing down these marauders who seem to disappear, Tolkien-like, every time someone of authority appears.

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CCAPA Goes (a little more) High-Tech!

CCAPA is getting onboard the email express. Since most of our members have email addresses, we will be emailing notices of Chapter meetings and other activities from now on. This will ensure that you receive your notices in a very timely manner, thus allowing you ample time to make your way through "the system" to register for events. **Please visit the CCAPA website (www.ccapa.org) and verify that your email address is current.** If you don't have email, we will continue to send your notices via regular mail.

The holding of the case is simply that *wildlife are not part of the resources regulated by the wetlands statute,* and as a consequence *a wetlands commission may not* require a permit for an activity that only impacts wildlife, such as an impact to the upland habitat of wetland-dependent species.

The Salamander Case (cont'd from p. 1)

agency. The land is bordered by condominiums, single-family homes, Route 7, and industrial and commercial uses.

AvalonBay proposed a 113-apartment complex with a 25 percent affordable housing component. In its northwest corner, the site contains one wetland of 0.3 acre which encompasses an intermittent watercourse, and a second wetland, part of an off-site pond, with 0.02 acre on-site. AvalonBay's site plan proposed *no construction* activities in a wetland, watercourse, or the adjacent upland review areas (50 feet from a wetland, 100 feet from a watercourse), and all potential impacts from construction beyond the upland review area were eliminated. The Town's consulting engineers confirmed that the plan would actually improve the quality of stormwater leaving the site.

But the Commission asserted that the plan required a wetlands permit and then denied the permit on this theory: the site contains a small population of spotted salamanders (which are common, not endangered) who breed in Wetland 2 during March-April and then spend the rest of the year in the upland/non-wetland area of the site. Construction in the upland would impact the upland habitat of the spotted salamander, thus reducing the "biodiversity" of Wetland 2. Although there was no impact to the salamanders' wetlands habitat, the Commission claimed that because these salamanders depend on the wetlands for part of their life cycle, they were *legally a part of the wetlands, and thus an impact on a salamander or its habitat, even in an upland, constitutes an impact to a wetland.*

AvalonBay sued to overturn the denial. AvalonBay argued that (1) the inland wetlands statutes, in defining "wetlands" and "watercourses," refer only to soil types, plant types, and hydrologic soils, but not wildlife; (2) therefore, neither wildlife nor wetland-dependent species are part of the "resources" regulated by wetlands commissions; and (3) if wildlife *were* legally part of the regulated resources, wetlands permitting would be limitless because "wildlife" is an undefined term, and wildlife and amphibian migration patterns are indeterminable.

The Commission and the DEP argued in reply that the "Purposes" section of the wetlands statute expressly refers to "wildlife" as a reason for wetlands protection, and wildlife, or at least wetland-dependent species, are inseparable from the wetlands on which they depend.

Our Supreme Court ruled that inland wetlands commissions do not, under the statute's definitions, regulate wildlife or "biodiversity" but only "the physical characteristics" of wetlands and watercourses. The Court agreed that interpreting wetlands to encompass wildlife would make wetlands permitting jurisdiction limitless.

The opinion does *not* say that wetlands commissions may not regulate or protect wetland and watercourse characteristics — shelter, dissolved oxygen, nutrients, etc. — that benefit wildlife or wetland-dependent species. The holding of the case is simply that *wildlife are not part of the resources regulated by the wetlands statute*, and as a consequence *a wetlands commission may not* require a permit for an activity that only impacts wildlife, such as an impact to the upland habitat of wetland-dependent species. In other words (as we argued), spotted salamanders and other species do not "carry the jurisdiction of wetlands commissions on their backs as they roam the landscape."

The Court opted to limit commissions' jurisdiction to impacts and areas that can be established by objective, determinable criteria as stated in the statutory definitions of "wetlands" and "watercourses." In doing so, the Court reiterated the principle that municipal wetlands commissions are not "mini-environmental protection agencies." These commissions have been assigned one, clearly-defined piece of the regulatory puzzle. In this way, the decision reaffirmed one of the critical requirements of effective environmental regulation.

Tim Hollister and Matt Ranelli are attorneys at Shipman & Goodwin LLP in Hartford, and members of its Environmental and Land Use Practice Group. They represented AvalonBay in this case.