

**BURDEN OF PROOF IN THE STATE WETLANDS LAW
and
CASELAW UPDATE**

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A. BURDEN OF PROOF VS. SUBSTANTIAL EVIDENCE IN THE RECORD

1. Focus of municipal wetlands agency under the State Inland Wetlands and Watercourses Act:

- a) implementing a municipal permit program for regulated activities;
- b) enforcing deviations from the permit program for either (1) violations of a permit or (2) undertaking an activity without a permit.

2. BURDEN OF PROOF: obligation to "go first" and establish certain facts through introducing evidence falls on the party/entity that "wants something":

- a) permit proceeding: burden of proof on APPLICANT
- b) cease, desist and restore proceeding: burden of proof on AGENCY
- c) determination of exemption: burden of proof on PERSON CLAIMING EXEMPTION

3. APPLICANT'S burden of proof:

"The plaintiff [applicant/ Unistar Properties, LLC] **improperly** shifts the burden of providing information to support its application from the applicant to the commission itself and places the commission in the role of disproving the [applicant's] assertion, rather than evaluating information presented to it in accordance with the governing statutory and regulatory scheme." Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 112 (2009) (emphasis added). The agency requested a wildlife inventory; the applicant stated that it (the applicant) "established" that the proposal will have no effect on wildlife, so the agency couldn't require the applicant to provide such information. The court said the applicant provides the information; the agency establishes whether the facts support a conclusion of an impact.

4. How APPLICANT satisfies burden of proof:

- a) Alternatives: "The applicant has the burden to establish that its proposal is the only feasible and prudent alternative." Samperi v. Inland Wetlands Agency, 226 Conn. 579, 593 (1993) That will "ordinarily require an affirmative presentation to that effect . . . In practical terms, this will usually require that the applicant present evidence of more than one alternative to the local agency."

- b) Providing expert information when requested by agency: failure to do so can result in agency denial based on incomplete application. "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." Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 110 (2009).
- c) Providing appropriate expert: e.g., not engineer for biological impact to wetlands

5. AGENCY ACTION must be supported by "substantial evidence"

- a) River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission, 269 Conn. 57, 70 (2004)
- b) credibility of the witnesses and determination of facts within the agency's province
- c) there can be contradictory evidence, the possibility of drawing two different conclusions
- d) need for expert evidence: "[A] lay commission acts without substantial evidence, and arbitrarily, when it relies on its own knowledge and experience concerning technically complex issues such as pollution control, in disregard of contrary expert testimony, without affording a timely opportunity for rebuttal of its point of view. Feinson v. Conservation Commission, 180 Conn. 421, 429 (1980)
- e) adverse impact to the wetlands or watercourses at the site: "The sine qua non of review of inland wetlands applications is a determination whether the proposed activity will cause an adverse impact to a wetland or watercourse." River Bend Associates, Inc., supra, 269 Conn. 74.
- f) Not substantial evidence: "may increase risk," "may result in adverse impact," "could harm the wetlands," "can't swear that it won't increase the run off."

After significant expert evidence on both sides, the agency in River Bend found that the soil mixing plan *may* increase pesticide mobility and result in greater pesticide transport into wetlands and watercourses. "The defendant may have inferred from the expert testimony that the plaintiffs' proposed actions would adversely impact the wetlands and watercourses. Such an inference, however, would be improper in this case." page 78 n.27. An expert is required to establish the adverse impact on the wetland or watercourse.

B. UPDATE ON CASE LAW AND OTHER NEWS

- 1. River Sound Development, LLC v. Inland Wetlands & Watercourses Commission, 122 Conn. App. 644, cert. denied, 298 Conn. 920 (2010).
 - a. Do wetlands agencies have jurisdiction over activities outside of wetlands, watercourses and officially adopted upland review areas?
 - 1. YES. The Appellate Court reasoned, without citation or reference, that while there are proposed activities outside of the official adopted upland review area, because "the majority of the annotations identify specifically regulated activities that are within the upland review area . . . we conclude that the court properly found" the agency acted within its jurisdiction. *Id.*, 653.
 - 2. NO. See Prestige Builders, LLC v. Inland Wetlands Commission, 79 Conn. App. 710 (2003), cert. denied, 269 Conn. 909 (2004). The

Appellate Court focused on the language in C.G.S. § 22a-42a(f) which states: "*If* a municipal inland wetlands agency regulates activities within areas around wetlands or watercourses. . ." (emphasis added.) It construed the regulation of activities outside wetlands/watercourses as optional and required regulations to be adopted prior to having jurisdiction over such optional activities.

b. Can the impact on wildlife be a valid basis for denial?

1. YES. The Appellate Court relied on the *applicant's* expert, Dr. Michael Klemens, who characterized wood frogs as a "keystone species in terms of the wetlands cycles," and then concluded that there was substantial evidence in the record that the loss of wood frogs would have an adverse effect on the physical characteristics of the wetlands. The legal argument by the opponents of the project was that this fact pattern falls within the footnote to the *AvalonBay* case, i.e., "the extreme case" where a loss of or negative impact on a wildlife species might have a negative consequential effect on the physical characteristics of a wetland or watercourse.
2. The *AvalonBay* case was overruled in part and confirmed in part by the legislature within a year of the court decision:

CGS § 22a-41 (c): For purposes of this section, (1) "wetlands or watercourses" includes aquatic, plant or animal life and habitats in wetlands or watercourses, and (2) "habitats" means areas or environments in which an organism or biological population normally lives or occurs.

CGS § 22a-41 (d): A municipal inland wetlands agency shall not deny or condition an application for a regulated activity in an area outside wetlands or watercourses on the basis of an impact or effect on aquatic, plant, or animal life unless such activity will likely impact or affect the physical characteristics of such wetlands or watercourses.

2. Lorenz v. Inland Wetlands & Watercourses Commission, 124 Conn. App. 489 (2010)

a. No new permit application required. The abutter appealed the granting of a permit for a golf course. One of the conditions was for the golf course to establish a \$300,000 bond to serve as "security for the payment of any and all damages and/or claims for damages by an person or property adversely affected by the activities of [River Sound] with respect to the Integrated Pest Management Plan." *This was struck down by the Superior Court.* When the modification is allowed by the municipal regulations and the modification is to address a permit condition stricken by the court as illegal, the modification does **not** trigger the commencement of a new proceeding.

b. When the application was remanded by the court to the agency, a new commission member may participate, if s/he becomes acquainted with the original record. Since an absent member may acquaint him/herself with an application and vote on an application, so may a subsequently appointed member.

3. Changes in DEP / DEEP