

## THREE HOT CASES TO WATCH: “DECISIONS,” WETLANDS CRITTERS, AND VARIANCE CONDITIONS

Mark K. Branse

**When is a Zoning Enforcement Officer’s statement a “decision” that can be, and must be appealed to the Zoning Board of Appeals? *Piquet v. Town of Chester*, 124 Conn. App. 518 (2010), compared to *Holt v. Zoning Board of Appeals of the Town of Stonington*, 114 Conn. App. 13 (2009).**

In *Holt*, the Appellate Court considered whether a letter from the Zoning Enforcement Officer of Stonington (hereinafter, the “ZEO”), which stated that a lot qualified for construction of a single family home, constituted an appealable decision. *Id.* at 14. The letter in question was sent by the ZEO to a prior owner of the Holt property. *Id.* The letter states that the lot qualifies as an “undersized lot” for the construction of a single family home, lists several zoning requirements with which any proposed house would have to comply, and declares, in part, “[b]ased on the RH-10 [z]one [b]ulk [r]equirements, a single-family residence could be built on this lot if it does not exceed a total floor area of approximately 1750 [square feet].” *Id.* Upon learning of this letter several months later, Holt’s neighbor’s attorney contacted the ZEO with additional information, prompting the ZEO to seek advice from the municipal attorney. *Id.* In response, Holt published a copy of the ZEO’s letter in a local newspaper and, following publication, Holt’s neighbor appealed to the Stonington Zoning Board of Appeals. *Id.* at 17. The Stonington Zoning Board of Appeals agreed with Holt’s neighbor and sustained the appeal, “deciding that [the ZEO’s] conclusion in the letter that the lot qualified as an undersized lot . . . was incorrect.” *Id.* at 17.

Holt appealed the decision of the Zoning Board of Appeals to the Superior Court. *Id.* The Superior Court determined that the ZEO's letter *was not* an appealable decision and therefore the Zoning Board of Appeals and the Superior Court lacked subject matter jurisdiction over any appeal of the letter. *Id.* The Appellate Court agreed, stating,

[w]e conclude that [the ZEO's] letter that the plaintiff's lot qualified for construction of a single-family residence was an advisory letter informing [the previous owner of the Holt property] that a single-family residence could be built on it if the necessary permits were obtained . . . [w]e stress that we do not conclude that all letters issued by zoning enforcement officers interpreting zoning regulations, and applying the to specific situations, are not appealable pursuant to [Conn. Gen. Stat.] § 8-7.

*Id.* at 22. The clear conclusion in *Holt* is that some letters in which a zoning enforcement official interprets the zoning regulations are simply "preliminary, advisory opinions and not a decision subject to appeal under General Statutes § 8-7 . . ." (*Id.* at 29), while others are appealable "decisions."

By comparison in *Piquet*, the Plaintiff / Appellant was issued a Cease and Desist Order by the Chester Zoning Compliance Officer after burying her husband's remains in her backyard. Plaintiff appealed to the Zoning Board of Appeals but before the appeal could be heard, the Order was withdrawn in a September 16, 2005 letter to the Plaintiff. As a result, Plaintiff's appeal to the Zoning Board of Appeals was subsequently withdrawn.

In the September 16, 2005 letter withdrawing the Order, the Zoning Compliance Officer reiterated her interpretation of the regulations that burial of the remains of the Plaintiff's husband in the Plaintiff's backyard constituted a zoning violation. Plaintiff did not appeal that letter, but instead sought a declaratory ruling from the Superior Court on the issue. The Superior Court entered summary judgment for the Defendants and the Plaintiff appealed. The Connecticut Appellate Court held: that the September 16, 2005 letter constituted a decision of the Zoning Compliance Officer; that by failing to appeal the September 16, 2005 letter the Plaintiff had failed to exhaust her administrative remedies; and, that the Superior Court therefore lacked subject matter jurisdiction over the declaratory ruling action.

The decision in *Holt* appears to be in direct conflict with the decision in *Piquet*, where the Appellate Court concluded that the ZEO's letter "was a decision by the zoning compliance officer from which the plaintiff could have appealed to the zoning board of appeals." *Piquet*, supra 124 Conn. App. at 524 (2010). In each letter, the zoning enforcement official lays out their interpretation of the zoning regulations. Neither letter states on its face that it is, or is not, subject to appeal. Neither letter constitutes an order in response to an alleged violation. Neither letter states that it is, or is not, a decision pursuant to Conn. Gen. Stat. § 8-7. Neither letter was drafted in response to an application or serves to grant or deny a permit. Neither letter purports to be the final word on the subject in question. For example, the letter in *Holt* hints at the need to revisit the question of what is required of a proposed house in the future, stating, "[a] proposed structure on this lot *may need* Costal Area Management review depending on it (*sic*) proposed location." (emphasis added). The letter at question in *Piquet* contains the same kind of equivocal language, stating, "[i]f the violation is not remedied, *it may be* necessary for me to revisit the matter . . ." (emphasis added). Both letters contemplate possible future action or requirements depending on how the projects in question proceed.

The issue is now before the Supreme Court (SC 18723), so stay tuned. But meanwhile, the Zoning Enforcement Officer should be careful in issuing letters or statements and ask: Is this a "decision" that is final enough that the ZBA can review it? If so, say, e.g., "This is a decision under Conn. Gen. Stats. §8-7 and is appealable to the Zoning Board of Appeals within thirty days of receipt." If not, say "This is not a decision under Conn. Gen. Stats. §8-7, but only a preliminary review based on the facts provided

to me.” The courts may not be *bound* by how the Zoning Enforcement Officer characterizes his/her decision, but at least they’ll know the intent.

### **When Can a Wetlands Commission Deny an Application to In Order to Protect Wildlife?**

The Supreme Court in its recent decision, *River Sound Development, LLC v. Inland Wetlands & Watercourses Commission of Old Saybrook*, 122 Conn. App. 644 (2010) opened with a quotation of the legislative findings in the Inland Wetlands Act, which nearly always signals that the Court is about to uphold the commission. In most of the recent wetlands cases (nearly all of which have concerned affordable housing applications), the statement of legislative findings has been conspicuously absent and the holdings have curtailed the power of wetlands commissions. Not so here. The Court also reviewed the history of wildlife protection in the context of wetlands applications:

In *AvalonBay Communities, Inc. v. Inland Wetlands Commission, supra*, 266 Conn. at 163, 832 A.2d 1, our Supreme Court stated that “it is apparent that the commission may regulate activities outside of wetlands, watercourses and upland review areas only if those activities are likely to affect the land which comprises a wetland, the body of water that comprises a watercourse or the channel and bank of an intermittent watercourse.” See *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 68, 848 A.2d 395 (2004). Our Supreme Court concluded in *AvalonBay Communities, Inc. v. Inland Wetlands Commission, supra*, at 163, 832 A.2d 1, that “the act protects the physical characteristics of wetlands and watercourses and not the wildlife...” The court, nevertheless, pointed out that “[t]here may be an 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....” *Id.*, at 163 n. 19, 832 A.2d 1. Later, in 2004, the act was amended by Public Acts 2004, No. 04-209, to include subsection (c), now codified in General Statutes § 22a-41(c), which provides that “[f]or 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.” Also included in the amended act was subsection (d), now codified in § 22a-41(d), which provides that “[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.*" (Emphasis added.) In the present case, substantial evidence was presented to show that the amphibian life contributed to the life cycle of the wetlands themselves.

*Id.*, pp. 653-654.

What the Supreme Court determined to be "an extreme case" arrived in the *River Sound* wetlands application, which included a proposal for a golf course, country club/banquet facility, and 227-unit residential development (a mix of single- and multi-family housing), along with substantial open space. As the Court wrote:

\_\_\_\_\_ The [wetlands] commission found that the development of the golf course would cause unacceptable fragmentation and isolation of the area, which would result in a substantial reduction in the capacity of the wetlands to maintain animal life, especially amphibians, and that it greatly would reduce the capacity for survivorship of amphibians and that the clearing of forests adversely would affect amphibian populations and *nutrient and energy recycling* within the wetlands. The plaintiff's expert, Michael Klemens, testified that "[t]he wood frogs remove a lot of the detritus in the pools. The leaves' energy is transported through the wood tadpoles. They're one of the few species which you can say there's direct nexus biologically. And also, the actual quality of the water, physical parameters of the water, are affected by wood frog tadpoles, which is an important thing to take note of." Klemens also testified regarding the effect of wood frogs on the physical quality of water within the vernal pools and concluded that he "would actually call [wood frogs] a keystone species in terms of the wetlands cycles."

*Id.*, 654-655.

Note that the testimony upon which this decision was relied was elicited from the *plaintiff's* expert, Dr. Klemens. The Court concluded:

We conclude that there was substantial evidence in the record that the loss of wood frogs would have a negative consequential effect on the physical characteristics of the wetlands, which falls squarely within the commission's jurisdiction.

*Id.*, p. 655.

The plaintiff also tried to argue that the record did not contain substantial evidence to

support the Commission's conclusion, but the Court found that there was "abundant" substantial evidence from experts for the Commission itself, the opponents, and even the plaintiff. The Court also noted:

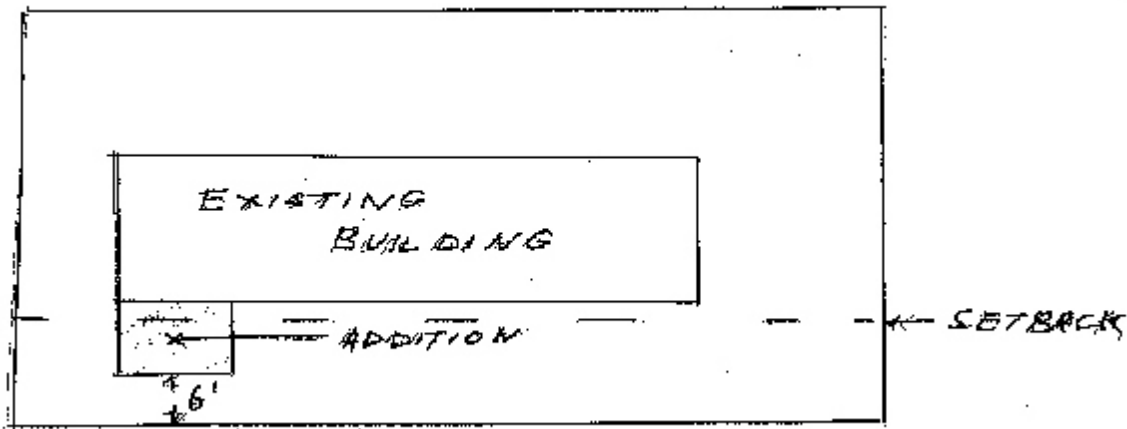
The commission provided citations to particular evidence within its written findings. For example, in deciding that the fragmentation and isolation of the area would result in a substantial reduction of the capacity of the wetlands to maintain animal life, the commission made a direct citation to § 4.0 of the report prepared for the staff, stating that "the concerns set forth in [the] report, and the failure of the applicant to adequately address said concerns in its applications, makes it unacceptable to grant a permit for this proposed activity." The commission went on to discuss, relying on the testimony of the plaintiff's experts, that certain types of species that live in the wetlands, including wood frogs and spotted salamanders, need upland wooded areas extending 750 feet from the edge of the vernal pool. In this case, impacts to frogs result in impacts to wetlands. While the commission's jurisdiction extends only 100 feet from the wetlands, per its regulations, it is allowed to consider all proposed activity that would affect that area.

*Id.*, pp. 660-661.

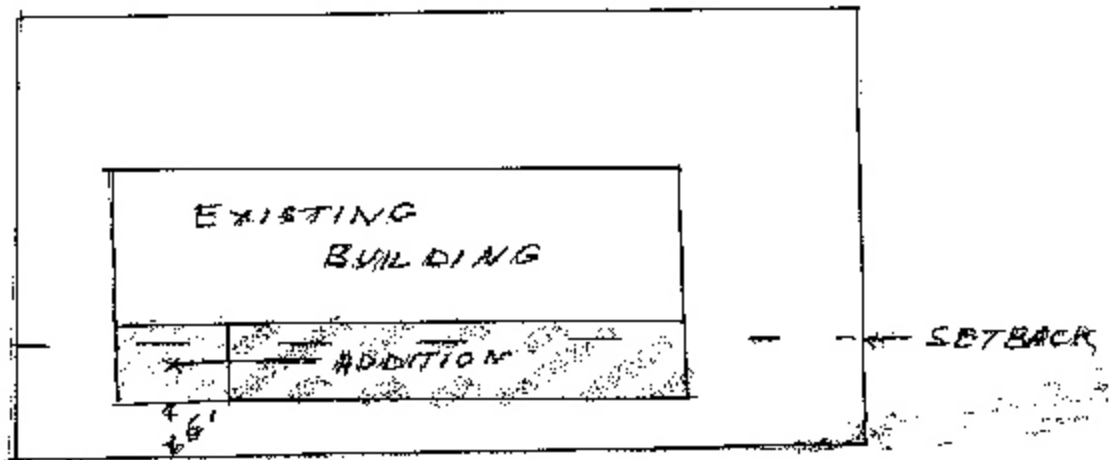
\_\_\_\_\_ The lessons of *River Sound* are that you can regulate wetlands to protect wildlife *if* you have the expert testimony to establish that activities will adversely impact the wildlife, and that those wildlife impacts will in turn adversely impact the physical characteristics of the wetland or watercourse. Citing to that testimony in the motion is also helpful.

### **We Approved *What?***

In *Dodson's Boatyard, LLC v. Planning and Zoning Commission of Stonington*, 77 Conn. App. 334, cert. den., 265 Conn. App. 908 (2003), the Zoning Board of Appeals was presented with an application, supported by a site plan, requesting a variance from the side yard to reduce it to 6 feet in order to accommodate a small addition to a large building, like so:



The Board approved the application as presented. Years later, Dodson's added on more building area that also violated the side yard, but not any more than the 6-foot variance granted, like so:



The Zoning Enforcement Officer issued a Cease and Desist Order on the grounds that the Board had only granted a variance for the small addition shown in their application site plan, not the much larger one they later built. The Appellate Court held that since the Board did not *expressly condition* its approval to limit the variance to only the small addition depicted, the variance had the effect of reducing the side yard to 6 feet *across the entire property line*.

Fast forward to 2011, *Anatra v. Madison Zoning Board of Appeals*, 127 Conn.App. 125, (2011). The Madison land use attorney, Mike Zizka, knew about the *Dodson's* decision and had the Madison ZBA application forms modified to include express language in which the applicant agreed to be bound by the plans submitted with the application. That should have solved the *Dodson's* problem. The Appellate Court accepted the Superior Court's statement of facts, as follows:

On October 5, 2001, the [plaintiffs] applied for a variance to the [board] to replace the then-existing house on the footprint of that prior structure. The prior structure was a much aged cottage. The proposed structure was a modern, multistory home. The [plaintiffs'] application requested variances for front yard and side yard setbacks, additional maximum building coverage, and [c]ritical [c]oastal [r]esource setback. Detailed plans were submitted with the application. The application stipulated, immediately above the signature line, that '*THE PLANS SUBMITTED WITH THE BUILDING APPLICATION MUST BE THE SAME AS THOSE SUBMITTED AND APPROVED WITH YOUR VARIANCE APPLICATION.*' (Emphasis in original.)

On January 4, 2002, the [board] considered the application. The [plaintiffs'] architect, Robert Mangino, presented a floor plan and a model of the proposed house to the [board]. The minutes of the meeting state that Mangino 'referred to the model and said the house will not change from the model, although there may be a change in the windows.' Neither the application nor the model included a deck extending beyond the footprint of the house. The [board] approved the application. The [plaintiffs] subsequently built a new structure, conforming with the submitted plans and model, on the site.

*Id.*, pp. 127-128.

The plaintiffs, however wanted to add a deck which would be *within* the required rear yard, but not depicted on the site plans for the 2001 variance. In 2006 they applied for a "modification" of their variance, but were denied. In 2007, they tried a different approach, filing an application for a building permit on the grounds that the deck required no variances and the Zoning Enforcement Officer had to issue a Certificate of Zoning



Compliance. The Zoning Enforcement Officer refused, citing to the statement that the plaintiffs signed in 2001 and saying that the plaintiffs had to return to the Board of further approvals. Plaintiffs appealed that decision to the Board, which upheld the Zoning Enforcement Officer's decision, and the Plaintiffs appealed to Superior Court. The Superior Court upheld the Board's decision, prompting further review by the Appellate Court. The Appellate Court reviewed the holding in *Dodson's Boatyard*; reaffirmed that Boards can attach conditions to variance; noted that all variances must be filed in the land records in order to become effective; and that future buyers would rely on that filed variance to determine the conditions. The Court noted that the 2001 variance (and a subsequent modification unrelated to the deck) did contain certain conditions but those conditions did not include the language of the application form quoted above. The Court concluded:

Similarly [as in the *Dodson's Boatyard* case,] in the present case, the variances granted to the plaintiffs very clearly set forth the conditions attached to them. There was no condition placed on the certificates that would give anyone knowledge that the plaintiffs or the future owners of this property forever would be precluded from modifying the property in any manner that was inconsistent with the plans submitted at the time that the plaintiffs' variances were granted, even if such modifications fully complied with the zoning regulations. We see no meaningful distinction between the case at bar and our holding in *Dodson Boatyard, LLC*. A variance runs with the land and is not personal to the parties applying for it; see General Statutes § 8-6(b); and, if all interested parties, including subsequent purchasers of this property or neighboring property owners, are to have knowledge of the conditions placed on the property benefited by the variance, such conditions must be stated explicitly on the certificate of variance recorded in the land records.

*Id.*, pp. 137-138.

The lesson: If the Board *relies* on the site plans, it must *expressly state, as a condition of approval, that the plans submitted are binding and that has to be on the copy of the variance filed in the land records*. The same would probably be true for site plan and special permit/exception cases. This case is now on appeal to the Supreme Court, so stay tuned.

