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2005

Connecticut: Ace Equip. Sales, Inc. v. Buccino

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Recommended Citation

Michael J. Graetz, *Connecticut: Ace Equip. Sales, Inc. v. Buccino*, 9 U. DENV. WATER L. REV. 242 (2005).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/941

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an activity which destroys unique educational or scientific value of the inland wetlands.

The court held the construction of the house did not create a significant impact based on any of the significant impact factors. Citing past decisions, the court held an “activity that merely impacts or affects wetlands is not a significant activity.” Accordingly, the Commission did not have to hold a public hearing. The court also noted that the Osborns were present and able to communicate their concerns about the permit during the Commission’s regular meetings.

After finding no requirement for a public hearing to grant the permit, the court analyzed whether the permit was complete. A complete permit required a proper application and a record of why the Commission granted the permit. The court does not require specific reasons for granting the permit if the record contains substantial evidence supporting the conclusion to approve the permit.

In finding the permit was complete and the record was sufficient, the court looked at the entire application process and the restrictions placed on building permit as granted. The Commission met four times to discuss the permit application. During the meetings, the Commission and Osborn communicated concerns about how the proposed building would affect the inland wetlands. Between meetings, Rachamkin revised his application to address the concerns of the Commission. To comply with the Commission’s grant of the permit, Rachamkin reduced the proposed size of his house, changed the location, and agreed to build a silt fence and stone wall to protect the inland wetlands. Rachamkin also provided the Commission soil science reports showing that the building site was suitable. The court found this evidence sufficient to consider the permit complete.

The court dismissed the appeal holding no public hearings were required and the permit was complete.

Thomas Jantunen

Ace Equip. Sales, Inc. v. Buccino, 869 A.2d 626 (Conn. 2005) (reversing adoption of the civil law rule that afforded an inherent riparian right by virtue of abutting property ownership).

Ace Equipment Sales, Inc., Willington Fish and Game Club, LLC, and Willington Fish and Game Club, Inc. (collectively “Ace”), were owners in fee simple of ninety-nine percent of the bed underlying a man-made, non-navigable pond formed by a dam that impounded waters from a non-navigable brook. Thomas and Irma Buccino (“Buccinos”) owned the dam and downstream mill property that abutted the southwesterly end of the pond. The Buccinos’ deed contained an easement for flow rights to use pond water for industrial purposes and a right-of-way across Ace’s property for pond access. The deed also required that the Buccinos maintain minimum water levels in the

pond. Ace licensed the pond to Willington Fish and Game Club for recreational purposes but never gave permission to the Buccinos to use the pond for the same.

In 1999, the Buccinos began leasing the rights to use the pond for recreational purposes. In response, Ace brought suit in the Superior Court, Judicial District of Tolland seeking to enjoin the Buccinos' recreational use as well as damages for trespass. The Buccinos counter-claimed, requesting a determination of their rights to use the pond. The court found in favor of the Buccinos and adopted the civil law rule that affords riparian rights as an incident to ownership of abutting land, irregardless of underlying bed ownership or navigability. Under this rule, all abutting property owners have a right to make reasonable use of the entire surface in common with all other abutting property owners. The Appellate Court of Connecticut affirmed the lower court's ruling.

The Connecticut Supreme Court granted certiorari to hear Ace's appeal. Ace asserted that the lower courts erred by adopting the civil law rule of riparian rights. Instead, Ace advocated adoption of the common law rule that grants exclusive riparian rights to the owners of an entire bed of a non-navigable body of water. In such cases, riparian rights do not extend to abutting land owners. Ace also claimed that the Buccinos had no right to enter and use the pond for recreational purposes, because the Buccino's deed limited their access and use to industrial purposes. The Buccinos countered with the arguments that: (1) the pond had become a natural body of water because it had existed for a long period of time, (2) navigability or lack thereof is irrelevant to riparian rights, and (3) the easement granted recreational use as an extension of their rights and duties as the dam owners.

The Connecticut Supreme Court reversed the lower courts' decisions. The court found no compelling policy rationale for adopting the civil law rule, and noted those states that adopted the civil law rule tended to have an extensive number of natural lakes and a policy for favoring maximum recreational use. Connecticut lacked topography requiring a departure from the common law rule. Connecticut also has a strong policy of protecting private property rights.

The court declined to rule on the relevancy between man-made and naturally occurring bodies of water and instead based its decision on the distinction between navigability and non-navigability for common law purposes. The court concluded that Ace's ownership of the underlying bed of a non-navigable pond afforded them an absolute right to exclude the Buccinos' recreational use. The court further held that the Buccinos' deed restricted their pond use to industrial operations.

The court reversed the judgments of the lower courts and remanded the case to the trial court to determine the factual issue of

whether the Buccinos owned one percent of the underlying bed and the rights that accompany such ownership.

Michael Graetz

DELAWARE

Wien v. Delaware, 882 A.2d 183 (Del. 2005) (holding that a statute requiring a permit for wetland activity was not unconstitutionally vague because states have legitimate power to regulate private riparian rights and that requiring a permit for activity is not an absolute prohibition of access to navigable waters).

Under the Delaware Wetlands Act, portions of appellant Daniel Wien's land fell within the definition of "wetlands." The statute prohibits a person from constructing any structure on wetlands without a permit. Wien was aware of the wetland designation, but proceeded to build a concrete "erosion barrier" on a wetland portion of his land. The Department of Natural Resources and Environmental Control ("DNREC") issued a cease and desist order, but only after the barrier was over 400 feet long.

Following the receipt of a complaint about activities on Wien's wetlands, a DNREC officer determined that appellant did not have any permits for wetland activity, and went to observe appellant's property. From the road, the officer could see the barrier, which was made of forty-pound bags of concrete. The Superior Court charged and convicted Wien for conducting activity on wetlands without a permit.

On appeal to the Delaware Supreme Court, Wien contended that the statute at issue was unconstitutionally vague and overbroad. Wien asserted that the statute was vague and overbroad because (1) it unnecessarily restricted his constitutional right to access navigable waters, (2) it did not precisely define the term "construction," and (3) it did not provide minimum guidelines for enforcement. The court found that because Delaware has legitimate power to regulate private riparian rights, the Wetlands Act did not regulate constitutionally protected conduct. The statute does not *prohibit* access to navigable waters; it merely requires a landowner to obtain a permit before conducting activities on wetlands. The court also held that although the statute did not specifically define "construction," the general public understands the ordinary meaning of the term and the statute is therefore not unconstitutionally vague. Finally, by articulating six criteria that the DNREC must consider when issuing wetland permits, the statute satisfied the constitutional requirement that legislative mandates provide adequate standards to guide discretion. The court affirmed the Superior Court's conviction on all three counts.