DOCKET NO. CV03 048 04 7 1 S DOCKET NO. CV03 048 17 05S	:	SUPERIOR COURT
CHERYL SACKLER, and HAVEN MARK SACKLER	:	JUDICIAL DISTRICT OF NEW
V.	:	AT NEW HAVEN
INLAND WETLANDS AGENCY OF THE TOWN OF WOODBRIDGE	:	OCTOBER 26, 2006

MEMORANDUM OF DECISION

In these appeals the facts are not in general disputed but the legal consequences of those facts are.

Cheryl Sackler is a veterinarian who raises and trains horses as a hobby. She lives on a residential house lot of 2.6 acres with her husband. She had rocks and stumps pulled out of a ¾ acre portion of her property and had some trees cut down in that area; the purpose of this activity was to have a fenced-in pasture area for grazing and a defined so-called "turnout" area for training and the keeping of her horses. She represented that she wanted to replant the fenced-in area with the grasses that were in the area before she started having work done on it.

An Inland Wetland Agency (IWA) enforcement officer in May 2003 issued a cease and desist order for her continuing activities in the designated area and after a hearing, the agency voted to sustain the order. The Sacklers appealed that decision; that appeal is CV03 048 04 71S.

Prior to this hearing an agency clerk told Mrs. Sackler that since the turnout area was within 100 feet of the wetlands, she had to prepare an application for removal of tree stumps and rocks as a regulated activity. The application was submitted but later amended by her lawyer. The amended application stated that:

> "The applicant proposes to complete the establishment of a fenced-in area on her land (including installation of fencing) for the grazing, raising, care, training and management of her horses. This has involved the cutting and removal of some mature trees and their stumps, the excavation and removal of surface stone and the temporary storage of fill from the excavation for the barn (a) within the 100 foot "wetlands buffer", of wetlands located partly on her property and partly off her property; and (b) may involve the use of wetlands on her property. It will also include introduction of grazing vegetation, such as clover or grass."

The application went on to say that,

> "The applicant believes that all of these activities are 'as of right', 'exempt', or `non-regulated' under the Inland Wetlands and Watercourses Act of this State."

Hearings on the application were held and the agency chairman expressed the opinion at the final hearing that he "had no problem with the fence, because people are entitled to put a fence up on their property."

However, in the notice of decision provided to the Sacklers, it also made the following findings:

> "1. Pursuant to Connecticut General Statute (CGS) 22a-40 and 1-1(q), infringement of wetlands and review areas by horse activities are exempt from wetland regulation; however the reclamation and tree removal that was conducted in connection with the applicant's prior activities and proposed activities at the property are not exempt and therefore are subject to regulation by the IWA.
>
> 2. The proposed activity does not fall within the definition of "farm" since Woodbridge zoning regulations require five acres for a farm and the applicable state statute, CGS 1-1(q), expressly contemplates that farm may be defined differently pursuant to local zoning regulations implemented pursuant to CGS Chapter124. Even without legislative deference to the power of a local zoning authority to define farming, Section 22a-40 does not exempt all "farming" activities from regulation. Section 22a-40 expressly provides that filling and reclamation of wetlands in connection with farming are not exempt from regulation. Further, under that statute, clear-cutting is only permitted as of right in connection with cropland expansion. The applicant's effective clear-cutting of a portion of the upland regulated review area is not cropland expansion.
>
> 3. Per Department of Environmental Protection (DEP), wetland regulations review of activities in wetland areas are equally applicable to the regulation of activities in the review areas as defined in the Woodbridge wetland regulations. Therefore, the IWA has the authority to review the application and regulate the applicant's activities on the property except to the extent that they are specifically exempt, i.e., the keeping of the horse is exempt."

Based on the foregoing findings which in effect held that the Sacklers' proposed activities were not exempt from agency regulation, the agency proceeded to in effect regulate those "activities" and went on to decide that:

"4. The applicant's plan is approved subject to the following stipulations:

a. Soil and erosion controls shall be maintained as needed and as per the order of the Inland Wetlands Enforcement Officer.
b. Stabilization of the soil shall be completed by September 15, 2003.
c. A swale (along Wiznia property boundary) and retention basin shall be designed by an engineer of applicant's selection (and the design approved by the Inland Wetlands Enforcement Officer and the Agency's consulting engineer) and be constructed to collect runoff caused by the deforestation. The retention basin shall be located in the area shown as the southerly area of the Grassy Paddock shown on the Map to contain any runoff before it enters the adjoining property.
c. Grazing of horses which by definition requires growing grasses and herbage shall not be done until vegetation growth has matured to prevent further soil erosion.
5. Plans shall be revised to show the "True Paddock" as described in the Land Management Plan submitted with the application. The True Paddock area shall have a sand and stone dust base.
6. Land Management Plan submitted with the application shall be adhered to.
7. Removed stones shall be placed in the stone wall as shown on the Map.
8. Brush and other material deposited beyond property lines shall be removed.

9. Stabilization and further plantings shall be of non-invasive wetlands species.
10. No other "fast" stones shall be removed from the property.
11. No additional soil shall be brought onto the property without further approval of the Agency except as otherwise provided herein.
12. The cease and desist order dated May 12, 2003, as affirmed by a letter dated May 22, 2003, is also hereby revised to allow the work to be performed under this permit!

The Sacklers' appeal of that decision is now CVO3 -48 04 71 S.

Both appeals have been consolidated.

A.

Pursuant to §22a-43, the Sacklers, as owners of the land affected by the actions of the agency, are persons aggrieved by the decisions and action of the defendant agency and thus may take these appeals.

The court further finds that the appeals were timely commenced under §22a-43a and §8-8(b) and that the marshal's return shows such timely service in the case of both appeals on the agency and the town clerk as well the Commissioner of Environmental Protection.

B.

The parties do not disagree on the burden of proof to be applied in this case. The plaintiff bears the burden of proving that the record does not support the agency's decision and that decision can be overturned only if the agency has acted illegally, arbitrarily or has abused its discretion, Samperi v. Inland Wetlands Agency 226 Conn., 579, 587 (1993) Caserta v.

Zoning Board of Appeals 28 Conn. App. 256, 258 (1992).

In Samperi the court said at 226 Conn. page 584:

> "In reviewing an inland wetlands agency decision made pursuant to the act, the reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given....The evidence, however, to support any such reason must be substantial; (t)he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency…..This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred....The reviewing court must take into account (that there is) contradictory evidence in the record……but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence……

Also see Tarullo v. Inland Wetlands 263 Conn. 572, 584 (2003); Huck v. Inland Wetlands 203 Conn. 525, 540-542 (1987).

Also in this case the plaintiffs claim an exemption from the Inland Wetlands Act. Aaron v. Conservation Commission 183 Conn. 532 (1981) interpreted the proper ambit of an exemption under that act, specifically §22a-40(a)(4), and said as the plaintiffs fairly note:

> "One claiming the benefit of an exemption under a statute has the burden of proving that he (or she) comes within the limited class for whose benefit it was established....exemptions are to be strictly construed."

C.

The exemptions to the application of the Inland Wetlands Act are set forth in §22a-40(a) and the court must therefore interpret the ambit of those exemptions to decide this case. Keeping in mind the just quoted language from Aaron v. Conservation Commission, the court will set forth the principles of statutory construction it will apply. Limiting the operation of State v. Corchesne the Legislature passed Public Act 03-154 which basically reinstated the so-called "plain meaning" rule. Section 1-1 of the General Statutes gives a common sense guideline to application of the rule. Commenting on the predecessor statute to §1-1, the court in SNET Co. vs. P.U.C. 144 Conn. 516, 522 (1957) said,

> "the words of a legislative enactment... .are to be interpreted in their natural and usual meaning unless the context indicates that a different meaning was intended."

Section 1-1 itself refers "to the commonly approved usage of the language." Thus, courts have decided "that approved usage of words can

be established by the definitions of a recognized dictionary", Statutes and Statutory Construction, 5th ed., Singer §47.28, page 353, see Aaron v. Conservation Commission supra at 183 Conn. P 532 (interpreting §22a-40(a)(4), if also Metropolitan District v. Town of Barkhamstead 199 Conn. 294, 301 (1986) which said, "where a statute uses a technical term associated with a trade or business, that term should be accorded the meaning (it) would convey to an informed person in the….trade or business" id, also see Hardware Mutual Gas Co. v. Premo 153 Conn. 465, 475 (1968), Manchester v. Manchester Police Union. 3 Conn. App 1, 19 (1984).

D.

Keeping the foregoing discussion in mind, the court will now attempt to discuss the issues presented by this appeal.

In this case the Inland Wetlands Agency (IWA) determined that it had "the power to regulate the plaintiffs' cutting down of mature trees, the removal of their stumps and the excavations and removal of surface stones from an area set aside by the plaintiffs for pasture and for the raising, feeding, caring for, training and management of their horses", page 2 of plaintiffs' brief.

As the plaintiff goes on to argue "the only matter before the agency in July 2003 was the Sacklers' request for a ruling on whether these activities (and the installation of a fence) were ‘as of right’, ‘non-regulated’ or ‘exempt’ from wetlands regulations because they constitute `grazing' and 'farming' which are 'as of right' activities under CGS §22a-40(a)(1)".

This case, it is argued, presents the issue left open in Cannata v DEP 239 Conn. 124 (1996) - does this ‘prepatory activity’—readying the land to make it suitable for caring for and managing horses—constitute an exempt farming or agricultural use", 239 Conn. P143, fn 27.

In other words, the plaintiffs argue they sought a declaratory ruling that certain of their activities were exempt from regulation by the IWA but instead the IWA proceeded to regulate their proposed activities, in effect holding those activities are not exempt from regulation.

In its brief, the defendant agrees with the plaintiffs' characterization of the issue before the court as being the regulatory jurisdiction of the IWA under the statutory scheme. At page 17 of its brief, it is said that "the primary issue in dispute between the parties is whether the work conducted on the property prior to the submission of the May 20, 2003 application and the proposed activities therein, and in the subsequent amended

application, are exempt from regulation by the IWA pursuant to C.G.S. §22a-40."

Two state statutes have a bearing on the issue presented to the court. The portion of §22a-40 relevant to this case reads as follows:

> "Sec.22a-40. Permitted operations and uses. (a) The following operations and uses shall be permitted in wetlands and watercourses, as of right:
> (1) Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation, and activities conducted by, or under the authority of, the Department of Environmental Protection for the purposes of wetland or watercourse restoration or enhancement or mosquito control. The provisions of this subdivision shall not be construed to include road construction or the erection of buildings not directly related to the farming operation, relocation of watercourses with continual flow, filling or reclamation of wetlands or watercourses with continual flow, clear cutting of timer except for the expansion of agricultural crop land, the mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale."

Section 1-1(q) of the General Statues says the following:

> "(q) Except as otherwise specifically defined, the words "agricultural" and "farming" shall include cultivation of the soil, dairying, forestry, raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, including horses, bees, poultry, fur-bearing animals and wildlife, and the raising or harvesting of oysters, clams, mussels, other molluscan shellfish or fish; the operation, management, conservation, improvement or maintenance of a farm and its buildings, tools and equipment, or salvaging timber or cleared

> land of brush or other debris left by a storm, as an incident to such farming operations; the production or harvesting of maple syrup or maple sugar, or any agricultural commodity, including lumber, as an incident to ordinary farming operations or the harvesting of mushrooms, the hatching of poultry, or the construction, operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for farming purposes; handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market, or to a carrier for transportation to market, or for direct sale any agricultural or horticultural commodity as an incident to ordinary farming operations, or, in the case of fruits or vegetables, as an incident to the preparation of such fruits or vegetables for market or for direct sale. The term "farm" includes farm buildings, and accessory buildings thereto, nurseries, orchards, ranges, greenhouses, hoophouses and other temporary structures or other structures used primarily for the raising and, as an incident to ordinary farming operations, the sale of agricultural or horticultural commodities. The term "aquaculture" means the farming of the waters of the state and tidal wetlands and the production of protein food, including fish, oysters, clams, mussels and other molluscan shellfish, on leased, franchised and public underwater farm lands. Nothing herein shall restrict the power of a local zoning authority under Chapter 124."

A zoning regulation of the Town of Woodbridge must also be discussed with reference to its relationship to the state statutory scheme and its bearing on the jurisdictional authority of the IWA. Section 1.4 of the regulations contains definition wherein it says:

> "Farm. A tract of more than five (5) acres used for agricultural, dairy, orchard or horticultural purposes, and

including, without limitation, truck gardens, nurseries, pasturage, woodland, and other unimproved land."

Basically three separate questions are presented.

1. Do the Sacklers' activities and proposed activities fall within the §22a-40(1) definition of exempt activities, thus barring IWA regulation?
2. The foregoing question has two components (a) are the activities merely preparatory and thus not exempt; (b) are the activities not exempt because as the language of §22a-40(1) reads, they involve "filling or reclamation of wetlands or watercourses with continual flow" or the "clear cutting of timber except for the expansion of agricultural land."
3. What is the effect on the question of exemption from regulation under §22a-40(a)(1) of the provision §1.41 of the Woodbridge Zoning Regulations which in subsection (q) defines the required acreage for a farm?

1.

The first issue presented is whether the activities engaged in and proposed by the Sacklers are exempt under §22a-40(a)(1). This subsection which defines activities exempt from regulation is really

divided into two parts. The first sentence defines broadly those activities that are exempt as such - included are "grazing" and "farming". The second sentence limits and modifies the broad grant of exemption by in effect saying certain activities (which otherwise might be said to be a possible adjunct to activities permitted as exempt) are not allowed. For purposes of this case, they would be "relocation of watercourses with continual flow, filling or reclamation of wetlands or watercourses with flow, clear cutting of timber except for the expansion of cropland.[1]

The court will first discuss the general exemption set forth in the first sentence of §22a-40(a)(1).

What then is "grazing" or "farming? Are the Sacklers' proposed activities properly to be considered "grazing" and "farming"? The Inland Wetlands Act itself contains no definition of these terms so the language of Section 1-1(q) of the General Statutes can be looked to

[1] Two of the modifying provisions in the second sentence do not fall within any rational definition of farming or any
of the other listed exempt activities. Thus road and building construction "not directly related to the farming operation" and the "mining of topsoil, peat, sand, or similar material from wetlands or watercourses for the purpose
of sale" are not exempt activities

which defines "agriculture" and "farming" for purposes of statutory interpretation of these words on subsequent statutes. Chapter 1 of the General Statutes of which §1-1 is a part, is entitled "Construction of Statutes"— obviously the definition of terms in that statute is meant to apply to interpretation of all other statutes; Cannata v. DEP 239 Conn. 124, 141 (1996) certainly did so in aid of its interpretation of §22a-349.

That statue says in relevant part:

> "(q) Except as otherwise specifically defined, the words "agriculture" and "farming" shall include cultivation of the soil, dairying, forestry, raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, including horses... ". The term "farm" includes farm buildings and accessory buildings thereto, nurseries, orchards, ranges..."[2]

"Farming" under this language, explicitly includes the "raising, feeding, caring for, training, and management of livestock, including horses". Horses can "feed" themselves by "grazing" so in that sense, "grazing" as used in §22a-40(i) is an aspect of "farming" insofar as it is part

[2] The last sentence of § 1-1(q)(of which more later) says: "Nothing herein shall restrict the power of a local zoning authority under Chapter 124."

of the general "farming" activities necessary for the caring, training, and raising activities the Sacklers proposed with regard to these horses. Section 1-1(q) explicitly says farming includes "the production or harvesting of……...any agricultural commodity", again, horses graze, that is eat ground vegetation. "Graze" is defined in Webster's Third New International Dictionary as "to feed on growing herbage", "grazing" is defined as "the feeding or method of feeding animals that graze". The word "farming" is defined as "the practice of agriculture". The word "agriculture" is defined as "the science or art of cultivating the soil, harvesting crops and raising livestock."

Nothing in §22a-40(1)(a) limits the broad definition of "farming" in §1-1(q). In fact, it explicitly adds "grazing" to "farming". As noted above, horses to eat "graze", if they do not eat, how can you be engaged in "raising" them or "caring for" them in §1-1(q) terms.

Under §22a-40(a)(1), even clear cutting, otherwise not exempt, is permitted "for the expansion of agricultural cropland" (emphasis by court). The dictionary defines crop as ...."a plant or animal product that can be grown and harvested extensively for profit or subsistence" - horses subsist on grass. One definition of "crop" in Webster's Dictionary is "to feed on

grass: graze (it was so quiet I could hear the sheep cropping - Mary Webb)". Also see the ancient dictionary cited by plaintiff, Complete Farmer or A general dictionary of husbandry in all it's branches which defines "crop" as "the produce, or the quantity of corn, grass, etc. growing \ on any parcel of land."

The record is replete with citations by the plaintiff to agricultural and land use literature indicating from the early settlement of New England, land was cleared so crops could be grown and pasture provided for grazing animals.

The activities conducted by the Sacklers and their proposed activities seem to clearly fall within the definition of "grazing" and "farming" set forth in §22a-40(a)(1) ,of §1-1(q).

But this does not end the discussion.

2.

If read closely, the agency's findings do not seem to dispute these general definitions. The argument seems to be two-fold. On the one hand, it appears to be the claim that since the Sacklers' activity is somehow "preparatory" activity, there is not any exemption. It is also argued that the last sentence of §22a-40(a)(1) qualifies the general

exemption for "grazing" and "farming" and thus apart from whether the Sacklers' activity falls within the general definition of "farming" and "grazing", the relevant part of the last sentence says otherwise exempt activity shall not include "filling or reclamation of wetlands or watercourses with continual flow and the "clean cutting" that took place here which was not for the "expansion of agricultural cropland."

11/2/06 13:04
Comment: This is a typo: should be "cleaR" cutting not "cleaN" cutting"

The court will try to address both these issues.

(a)

There seems to be a suggestion in the record that the Sacklers' activity in cutting trees, removing their stumps and removing stones is preparatory activity to a "farming" operation and therefore not subject to the "farming" exemption in §22a-40(a)(1) and not a "farming" or "agriculture" activity under §1-1(q).

Nothing in the statutory language supports such a position. If its logic is followed through, then it would appear that only farms already in existence at the time the Inland Wetlands Act was passed could claim the exemption, no new farming activity could be started in the wetlands or in buffer zones adjacent thereto.

Also, such a position seems to run afoul of the very language of §22a-40(a)(1). The last sentence says that "clear cutting is permissible if it is done to expand agricultural cropland - but then would not the act of "clear cutting be for the contemplated use of the land for "agricultural cropland" —i.e. preparatory to that use?

Also, in Cannata v DEP, 239 Conn. 124 (1996), the court was defining the ambit, not of §22a-40(a)(1), but of §22a-349 under the Water Resources Act, but its language and reasoning is relevant to this case. Section 22a-349 exempts "farming" and "agricultural" activity from the act's regulation. However, the court looked to §1-1(q) for "guidance" in interpreting "agriculture" and "farming", id p141 and at pages 141-142. The court explicitly said:

> "Furthermore, in light of the magnitude of the clear cutting contemplated by the plaintiffs, it is apparent that their proposal, if effectuated, would drastically and permanently change the topography of their fifty-five acres of floodplain forest. While readying land to make it suitable for farming may, in some circumstances, constitute a farming or agricultural use exempt from regulation under §22a-349, a activity that changes the essential nature and character of the property does not."

Preparatory activity does not remove "agricultural" and "farming" activity from the (§22a-349) exemption as such, so there appears to be no rational reason to read out such activity from §22a-40(a)(1) coverage.

Also, per Cannata there is nothing in the record to indicate the activity here will drastically and permanently change the topography of many acres of the wetlands or is the type of preparatory activity that will change the essential nature and character of the property" – if for no other reason, a miniscule area of "property" is involved here and not the 55 acres before the Cannata court, also see footnote 27 at 239 Conn. Page 143.

In any event, the court cannot accept this aspect of the defendant's argument directed as it seems to be at the preparatory activities of the Sacklers to ready their property for horse caring and training which they otherwise had a right to engage in under the relevant statutory language.

b.

The next issue that must be discussed is best approached as a hypothetical. In other words, even if the Sacklers' activity, "preparatory" or otherwise can be defined as "grazing" or "farming", is such activity not exempt from regulation because it falls under the proscription of the last sentence of §22a-40(a)(1) which tightens up the "grazing" and "farming" exemption and for the purposes of this case in relevant part says these exemptions shall not be construed to include "filling or reclamation of

wetlands or watercourses with continued flow or "clear cutting" not undertaken for "the expansion of agricultural cropland"[3]

11/2/06 11:33
Comment: Actual decision uses "2" for this footnote. It is renumbered here to "3" as there is already a footnote "2" above.

(i)

The first question that must be asked is whether per the last qualifying sentence of §22a-40(a)(1) was there "filling of wetlands or watercourses with continued flow" as a result of the Sacklers' activities or would such prohibited effect occur as a result of the proposed activity. The only remotely relevant evidence in the record is testimony that if horses were kept, they would have to be washed down and this might or would run

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[3] The historical context of the last, limiting sentence of §22a-40(a)(1) should be examined. When the act was originally passed, §22a-40(a)(1) simply said one of the as of right activities permitted in wetlands and watercourses was "(1) grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less".

Tondro, in his first edition of Connecticut Land Use Regulation published in 1979 referred generally to §22-40 exemptions and was certainly correct in saying:

> Generally these exempted uses are low intensity uses such as recreation, residential, boating, etc. However, some of these are surprising in light of the purposes of the statute, such as grazing or farming regardless of the resulting level of the pollution of a wetlands."

In 1987 the Legislature amended the Act and limited the exemptions in subsection (1) by adding the last sentence, which is now under discussion, to restrict the effect on the wetlands of otherwise exempt uses. But it is fair to say the activities still permit uses such as "grazing" or "farming" which will impact the wetlands - it must be remembered that the exempt activities or uses are "permitted" in the very wetlands and watercourses themselves.

into the wetland as the proposed site is on a slope. Also, less delicately perhaps, horses are known to defecate and the runoff from the manure would seep into the wetlands.

But if horse raising and training is permitted under subsection (1), which the court has concluded it is, these minor invasions of the wetlands or watercourses cannot invalidate the exemption or the whole exemption would be practically pointless unless the land bordering the wetland on which the activity occurs is completely flat or runs downslope from the wetlands — is that a common or realistic possibility given the location of wetlands and watercourses?

More to the point, the subject patch of land is not in the wetlands and does not encroach on them or any watercourses from anything that can be gleaned from the record. What is being utilized are upland areas of the wetlands.

11/2/06 11:41
Comment: This would be more clear if it had said , "areas upland of the wetlands" rather than the "upland areas of the wetlands". The entire area being used for pasture and turnout was in the town's "buffer", not the wetlands,

Certainly "reclamation" of the wetlands or watercourses is not contemplated.

The runoff alluded to cannot be said to involve the "filling" of wetlands or watercourses. The American Heritage Dictionary defines "fill" in it's

primary definition as "to put into as much as can be held, load completely; make full." Webster's Third International Dictionary defines "fill" in "to supply with as much as can be held or contained...to place or put as much material in as can be often conveniently contained...: pour as much of a substance into as can be often conveniently held..."

The record is devoid of any evidence or suggestion that given common English usage, the Sacklers' activities or proposed activities raised the possibility of "filling" wetlands or watercourses.

ii

The second issue raises the claim that an exemption cannot be used to bar regulation by the defendant because "clear cutting" has occurred and its purpose was not for "expansion of agricultural cropland."

There is no "substantial evidence" in the record that "clear cutting" occurred here or that even if clear cutting occurred, it was not done to increase agricultural cropland. Plaintiffs' counsel, also an afficionado of dictionaries, general and technical, cites numerous definitions of "clear cutting" in The Dictionary of Forestry, the American Heritage Dictionary, Random House Dictionary, Merriam Webster's Collegiate Dictionary. They

all define "clear cutting" as the removal of all trees in a given area. He also points to Section 25-201 of the General Statutes which is the definitions section of Chapter 484 dealing with Protected Rivers. For the purposes, at least, of that statute §25-201(3) defines "clear cutting" as the "removal of all standing woody vegetation greater than one inch diameter at breast height within a designated river corridor". In Ventres v. Goodspeed Opera House, 275 Conn. 105 (2005), the court interpreted §22a-44(b) of the Act which provides civil penalties for wetlands violations. The case involved, in one aspect, an interpretation of the concept of "clear cutting" and the court's factual reference indicating it had occurred said that agents of the defendant between certain dates "cut down all of the trees, bushes, and woody vegetation on approximately 2.5 acres of land, id page 111. Also see Cannata v. DEP 239 Conn. 124, 126 (1996) where at footnote 3, it says "3. Clear cutting is the removal of all timber from an area."

Several non-Connecticut courts have also defined "clear cutting" as the removal of all the trees from a particular, defined area of land, Sierra Club v. Espy 38F 3d 792, 795 (CA 5, 1994); Texas Committee, Natural Resources 573 F2d 201(CA 5, 1978); West Virginia Division of Isaak Walton v. Butz 522 F2d 945, Footnote 2 (CA4, 1975); Wyoming Outdoor

Coordinating Council v. Butz 484 F2d 1244, Footnote 2 (CA 10 1973); Californians for Native Salmon & Steelhead Assoc et al v. Department of Forestry 221 Cal App 3d 1419, 1423 (1990); Sierra Club v. Morton 405 U.S. 727, 749 (dissent of Justice Douglas) 1972, c.f. Will v. Kulongoski 872 P2d 14 (Ore, 1994) where the court said, "The word `clear cutting' connotes an image of a brown hillside denuded of all trees. The dictionaries support this understanding", id p 18. The court went on to say that: "A specialized service used in the timber industry defines `clear cut', in a timber harvest setting, to mean: 'A logging method in which all of the trees in a given area are harvested, regardless of size', Random Lengths, Terms of the Trade 52 (3d ed. 1993)".

A review of the record and the photos submitted which are a part thereof indicates that clear cutting did not occur here. The defendant agency found that the plaintiff had engaged in "effective clear cutting" - whatever that means. But the court notes arid agrees with the statement in the plaintiff, Dr. Sackler's brief where it says:

> "In an area of only about 3/4ths of an acre, she has left standing 128 trees with diameters ranging from 12 inches to 27 inches and numerous smaller trees present within the proposed grassy paddock." (ROR, Item 43, note 4): and in the north part of the fenced-in area, (where the engineer did not bother to locate or depict any trees), there were 11 trees one foot or more in diameter

11/2/06 11:34
Comment: This is a typo. It was 18 trees 12 inches or more in diameter. [Appellant's Brief p. 5 first bullet.]

(3 of which were more than 15 inches in diameter, (ROR, Item 43, p. 17, lines 16-25)."

"Clear cutting" simply did not occur here.

But let us assume the court is incorrect and "clear cutting" did occur here, such activity would not be subject to regulation if the clear cutting was done "for the expansion of cropland".[4] Here, if "clear cutting" is said to have occurred, it was done for the "expansion of agricultural cropland." The court will not repeat its discussion as to the definition of and ambit of terms like agriculture, crop and cropland and the horse is a horse observations to the effect that horses eat grass to feed themselves which is grazing, etc. But the court based on a common sense definition of these terms in their statutory context concludes that even if clear cutting did occur, it was done to expand agricultural cropland - a necessity if one is to care for and train horses.

Let us assume all of the foregoing observations are correct, one other matter should be discussed. As noted, the Cannata case interpreted §22a-

11/2/06 11:39
Comment: 1: IN THE TEXT OF THE FOOTNOTE: the phrase "BOND or character" should read "KIND or character". On page 142 In Cannata, the Supreme Court said, "large-scale clear-cutting of forest land, undertaken solely to prepare the land for farming and otherwise unrelated to any agricultural endeavor, including forestry, is not of the same kind or character as the activities enumerated in § 1-1" Also: this footnote was misnumbered "3" in the memorandum of decision.

[4] In Cannata v. DEP 239 Conn. 124 (1996) discussed the Water Resources Act (§22a-336 et seq) and interpreted §22a-349 of the Act which exempts from DEP regulation "agricultural or farming uses of land located within the stream channel encroachment lines". In doing so, the court discussed § 1-1(q) which defines "agriculture" and "farming". It held "that the large scale clear cutting of forest land, undertaken solely to prepare the land for farming and otherwise unrelated to any agricultural endeavor, including forestry is not of the same kind or character as the activities enumerated in § 1-1(q)". There, however, the clear cutting involved 55 acres of land and here the activity related to the "caring for" and "training horses" explicitly referred to in § 1-1(q).

349 of the Water Resources Act. Under that statute, "farming" and

agricultural activity is permitted within stream encroachment lines but apparently a permit must be secured pursuant to §22a-342 before such activity can take place. In Cannata, the court held a §22a-349 exemption can be refused by the DEP if the "farming" and "agricultural" activity under that statute and the clear cutting necessary to effectuate it "would destroy an ecosystem of surpassing natural value, one that is among a handful of remaining examples of its kind in Connecticut" 239 Conn. at page 131, footnote 12. There is nothing in the record to indicate such an ecosystem was involved in this case, even if it assumed the interpretative analysis of §22a-349 could be expected to be carried over to §22a-40(a)(1) by the court. The defendant agency here certainly did not rely on such an analysis.

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One final argument raised by the defendant must be addressed. The court has relied on the definitions of "agriculture" and "farming" in §1-1(q) of the General Statutes. It has held that given those definitions the activities of the Sacklers fall within the "grazing" and "farming" exemptions set forth

in §22a-40(a)(1) of the Inland Wetlands and Watercourses Act. But as noted, Section 1-1(q) has a last sentence that reads: "Nothing herein shall restrict the power of a local zoning authority under Chapter 124."

Here the IWA found that the subject property is not a "farm" as defined in the Zoning Regulations for the Town of Woodbridge. Section 1.41 of those regulations says a "farm" is "a tract of more than five (5) acres used for agricultural, diary, orchard or horticultural purposes and including without limitation, truck gardens, nurseries, pasturage, woodland and other improved land." The defendant argues: "The property at issue is not a farm because it is only 2.6 acres in size." The argument is made that the Legislature gave local zoning commissions the authority under §8-2 of the General Statutes to regulate property uses in conformance with the comprehensive plan. Section 8-2 says that: "Such regulations shall be designed to lessen congestion in the streets to secure safety from fire, panic, flood and other dangers, to promote health, and the general welfare, to provide adequate light and air, to prevent the overcrowding of land, to avoid undue concentration of population, and to facilitate the adequate

provision for transportation, water, sewerage, schools, parks and other public requirements."

The defendant's brief then argues that the present appeals ask the court "in essence to ignore the acreage requirement imposed by Section 1.41 of the Zoning Regulations", thus "the Sacklers are attempting to go in through the back door and circumvent the authority granted to Woodbridge's Zoning Commission by the State Legislature". It cannot be argued that §22a-40(a)(1) preempts Section 1.41 of the Town's zoning regulations it is said.

The argument is well done and the issue is a difficult one at least for the court. The defendant cites Connecticut Resources Recovery Authority vs. Planning and Zoning Commission 225 Conn. 732 (1993). But there the trial court held Wallingford's regulation banning solid waste disposal over an aquifer was preempted by state statutes dealing with solid waste and water protection. The Supreme Court disagreed and noted that §22a-208a(b) (part of Solid Waste Management Act) provides "nothing in this chapter or Chapter 446e shall be construed to limit the right of any local governing body to regulate, through zoning, land usage for solid disposal". The court went on to say "that this language demonstrated that the

Legislature did not intend to preempt local zoning regulation of solid waste disposal", id page 754. In other words, in Connecticut Resources the trial court sustained the plaintiffs' appeals by holding the town's regulations were an invalid use of its police powers and were preempted by state statute.

That is not what would be involved here if the court were to sustain the plaintiffs' appeals. This court would not be nullifying the right of the town to enforce by means of its own zoning officers the provisions of its regulations and Section 1.41 in particular.

Also, nothing in the language of Section 1-1(q) or its last sentence gives the town's Inland Wetlands Agency the power to enforce the town's zoning regulations which are not concerned with the Inlands Wetlands Act. Furthermore, the fact that §1.1(q) states nothing in its language is meant to limit a local zoning authority's power under Chapter 124 should not be taken to mean that a local authority can define what §1-1(q) says constitutes "farming" or "agriculture".

If the interpretation of the last sentence of §1.1(q) is given that one suggested by the defendant, it would authorize an Inland Wetlands Agency the power to wander outside its sphere of expertise and responsibility

through a town's zoning regulations on a willy-nilly basis to in exercising its own regulatory powers which have nothing to do with enforcing local zoning regulations as such.

All §1.1(q) says is that despite the language of that statute, the local zoning authority has the power to enforce its own regulations - as noted, nothing in a decision by this court favoring the plaintiff belies that.

Before ending this too long opinion, the court would note an incongruity. Despite the 1987 language added to §22a-40(a)(1) it cannot be denied that the exempt grazing and farming activity still permitted within and directly adjacent to wetlands and watercourses would present the danger of pollution in those otherwise protected areas. It seems somewhat odd that the defendant agency, charged with protecting our wetlands would be relying on a local zoning provision contemplating a minimum size for farms — a provision which one would think would increase the possibilities of pollution or alteration of the wetlands by authorizing, if not encouraging, larger farms.

In any event, the court sustains the plaintiffs' appeals based on the fact that the Sacklers' activities and proposed activities are exempt from regulation under the Inland Wetlands and Watercourses Act.

However, in light of the reservation of power to local zoning authorities under Chapter 124 which is set forth in Section 1-1(q) of the General Statutes, the court will make the effective date of it's decision December 1, 2006 and would request counsel to mail a copy of this decision to the Zoning Commission of the Town of Woodbridge for whatever action is deemed appropriate by the zoning authorities.

Corradino, J

10/30/06