DOCKET NO. KNL-CV-18-6037379-S	:	SUPERIOR COURT
BRIAN LEPKOWSKI	:	J.D. OF NEW LONDON
V.	:	AT NEW LONDON
TOWN OF EAST LYME WETLANDS AGENCY AND REAL ESTATE SERVICE OF CT, INC.	:	FEBRUARY 25, 2020

MEMORANDUM OF DECISION

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts are not in dispute. This matter involves the second of two applications to the defendant, Town of East Lyme Inland Wetlands and Watercourses Agency (Agency), by the defendant, Real Estate Service of CT, Inc. (RESC) to conduct regulated activity on property located on Green Valley Lakes Road in East Lyme, Connecticut known as Twin Valley 23-Lot Re-subdivision at Green Valley Lakes Road and Spring Rock Road. The property consists of approximately 97 acres, 70% of which would remain open space. (2017, ROR, A). This second application, like the first one, sought a permit to construct a roadway and attendant utility work and drainage improvements. (2018, ROR, A). RESC's first application, which was filed in 2017 showed a conceptual site plan for a 25 lot subdivision, mapping out individual lots and possible locations of homes and septic systems. (2017, ROR, A).

Pursuant to Section 9.1 of the East Lyme Inland Wetlands Regulations, a petition was signed requiring a public hearing on RESC's 2017 application.[1] (2017, ROR, J and K). At the time of that first public hearing, the plaintiff, Brian Lepkowski, filed a petition to intervene in the proceeding pursuant to CGS § 22a-19(a)(1), which states in pertinent part: ". . . any person . . . may intervene as a party . . . asserting that the proceeding . . . involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." (2017, ROR, W).

The Agency denied the 2017 application and RESC appealed that denial to the court. (2017, ROR, Resolution dated August 28, 2017 and Q). While that appeal was pending, RESC submitted a second application to the Agency, which is the subject of this appeal. The appeal from the Agency's first denial was subsequently withdrawn.[2] This second application was for the same purpose as the 2017 application: construction of a road and attendant grading for future infrastructure and drainage. (2017, ROR, A; 2018 ROR, A)

A public hearing on RESC's second application was held on three dates: June 25, 2018, July 2, 2018 , and July 16, 2018. (2018, ROR, Meeting Minutes and 2018 Public Hearing

---

[1] Section 9.1 of the East Lyme Inland Wetlands and Watercourse Agency states: "The inland wetlands agency shall not hold a public hearing on an application unless the inland wetlands agency determines that the proposed activity may have a significant impact on wetlands and watercourses, a petition signed by at least twenty-five persons who are eighteen years of age or older and who reside in the municipality in which the regulated activity is proposed, requesting a hearing is filed with the inland wetlands agency not later than fourteen days after the date of receipt of such application, or the inland wetlands agency finds that a public hearing regarding such application would be in the public interest.

[2] *Real Estate Service of CT, Inc. v. East Lyme Inland Wetland Agency.* KNL-CV-176031339. The matter was withdrawn on November 7, 2018.

Transcripts). At the June 25, 2018, hearing, the plaintiff once again filed a petition to intervene under the Connecticut Environmental Act (CEPA) and pursuant to Section 9.1 of the Agency's regulations. (2018, ROR, T). On September 17, 2018, the Agency approved RESC's application with required modifications for regulated activities. (2018, ROR, UU). The agency also addressed the plaintiff's intervenor status and determined ". . .the activity resulting from approval of the Application is not reasonably likely to unreasonably adversely affect the public trust in air, water or other natural resources of the state, pursuant to General Statutes 22a-19." (2018, ROR, UU, p. 4). It is from this decision that the plaintiff appeals.

II. LAW AND DISCUSSION

A. AGGRIEVEMENT

"[P]leading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an administrative appeal. . . . [I]n order to have standing to bring an administrative appeal, a person must be aggrieved." *Alvord Investment, LLC v. Zoning Board of Appeals*, 282 Conn. 393, 399, 920 A.2d 1000 (2007). "Aggrievement presents a question of fact for the trial court and the party alleging aggrievement bears the burden of proving it." (Internal quotations omitted.) Id., 400. It is well established that a party may be aggrieved for purposes of an appeal by virtue of a person's status as a property owner. *Moutinho v. Planning & Zoning Commission*, 278 Conn. 660, 671, 889 A.2d 26 (2006); see also *Bossert Corp. v. Norwalk*, 157 Conn. 279, 285, 253 A.2d 39 (1968). A plaintiff may prove aggrievement by testimony at trial; *Winchester Woods Assocs. v. Planning & Zoning Commission*, 219 Conn. 303, 308 n.4, 592 A.2d 953 (1991); or "by the production of the original documents or certified

copies from the record." (Internal quotation marks omitted.) *Quarry Knoll II Corp. v. Planning & Zoning Commission*, 256 Conn. 674, 703, 780 A.2d 1 (2001).

At the hearing held before this court on December 18, 2019, the plaintiff, Brian Lepkowski, testified that he has been the owner of property located at 27 Green Valley Lakes Road in East Lyme since June of 2014. He further testified that RESC's property abuts his property on both the west and south sides. The plaintiff's abutter status is further confirmed by the record, listing him as an abutter to the RESC property. (2018, ROR, B). Accordingly, the court finds that the plaintiff is aggrieved.[3]

B. TIMELINESS OF THE APPEAL

CGS § 22a-43(a) states in pertinent part ". . . any person owning or occupying land which abuts any portion of land within . . . the wetland or watercourse . . . may, within the time specified in subsection (b) of section 8-8, from the publication of such . . . decision or action, appeal to the superior court for the judicial district where the land affected is located . . . Such appeal shall be made returnable to the court in the same manner as that prescribed for civil actions brought to the court . . . ." Further, ". . . for any such appeal taken on or after October 1,

[3] The plaintiff is also seeking aggrievement status on the basis of his intervention before the Agency and its finding that the ". . . activity resulting from approval of this application is not reasonably likely to unreasonably adversely affect the public trust in air, water, or other natural resources of the state, pursuant to General Statutes 22a-19." (2018, ROR, UU, p. 4). "This court has repeatedly held that a person who intervenes in an administrative proceeding pursuant to Section 22a-19, and who is aggrieved by the agency's decision, is entitled to appeal from that decision pursuant to the statutory provisions governing appeals from the decisions of that particular agency. *Finley v. Inland Wetlands Commission*, 289 Conn. 12, 25-26, 959 A.2d 569 (2008). "Because the plaintiffs filed a notice of intervention at the commission hearings in accordance with Section 22a-19(a), they [have] standing to appeal the environmental issues associated with that commission's decision." *Branhaven Plaza, LLC v. Inland Wetlands Commission*, 251 Conn. 269, 276, n. 9, 740 A.2d 847 (1999). Accordingly, the plaintiff also has standing to appeal on this basis.

2004, service of process for purposes of such notice to the inland wetlands agency shall be made in accordance with subdivision (5) of subsection (b) of section 52-57."

In the instant case there are two defendants. As to the defendant Inland Wetlands Agency, CGS § 8-8(b) provides in relevant part: "The appeal shall be commenced by service of process in accordance with subsections (f) and (g) of this section within fifteen days from the date that notice of the decision was published as required by the general statutes." CGS § 8-8(f)(2) states: "[s]ervice of legal process for an appeal under this section shall be directed to a proper officer and shall be made as follows: ". . . (2) For any appeal taken on or after October 1, 2004, process shall be served in accordance with subdivision (5) of subsection (b) of section 52-57." CGS § 52-57(b) provides that "[p]rocess in civil actions against the following described classes of defendants shall be served as follows: . . . (5) against a board, commission, department or agency of a town, city or borough, notwithstanding any provision of law, upon the clerk of the town, city or borough, provided two copies of such process shall be served upon the clerk and the clerk shall retain one copy and forward the second copy to the board, commission, department or agency. . . ."

Notice of the Agency's decision was published in The Day on September 24, 2018.[4] The plaintiff commenced this appeal against the Agency on September 28, 2018, four days from the date of publication and within the fifteen day statutory mandate, by service of process on that same date with the Town Clerk of the town of East Lyme. (Marshal's Return, Docket

[4] The notice of publication does not appear in the record returned to the court. The plaintiff states in his brief that September 24, 2018 was the publication date. Neither defendant has challenged that, so the court assumes there is consensus as to the September 24, 2018 publication date.

Entry 100.32). Accordingly, the service of process on the defendant Agency was proper and timely. The court, therefore, has subject matter jurisdiction at it relates to the Agency.

On that same date, the plaintiff commenced his appeal against the defendant, RESC, by service of process in hand to Robert Fusari, Sr., agent for service for Real Estate Service of Connecticut. (Marshal's Return, Docket Entry 100.32). CGS § 52-57(c) provides in part: "In actions against a private corporation, service of process shall be made . . . upon . . . its general or managing agent . . . ." As previously noted, publication of the Agency's decision was published on September 24, 2018, and service was made on Mr. Fusari on September 28, 2018. Accordingly, the court finds that the service of process on this defendant was proper and timely, and the court has subject mater jurisdiction as to RESC.

C. SCOPE AND STANDARD OF REVIEW

1. Substantial Evidence

Under CGS § 22a-41, a wetlands commission in granting a permit must consider a series of factors, including environmental impact, alternatives, long-term versus short-term impacts, maintaining environmental quality, health and safety, and other adjacent wetlands. The standard of review is that of substantial evidence. *Huck v. Inland Wetlands and Watercourse Agency*, 203 Conn. 525, 540-41, 525 A.2d 940 (1987). "In reviewing an inland wetlands agency decision made pursuant to [its regulations], 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. . . . 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. . . ." (Internal quotation marks omitted.) *Tarullo v. Inland Wetlands & Watercourses Commission*, 263 Conn. 572, 584, 821 A.2d 734 (2003). Even though CGS § 22a-41(b) requires a written determination regarding a permit, as with zoning commissions, if the wetlands commission fails to provide reasons, the court is still permitted to search the record to determine the reason for the wetlands commission's action. *Gagnon v. Inland Wetlands & Watercourses Commission of Town of Bristol*, 213 Conn. 604, 607-608, 569 A.2d 1094 (1990). Further, substantial evidence requires more than mere speculation or generalized effects; it must be quantifiable. "Evidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence." *River Bend Assocs., Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 70-71, 848 A.2d 395 (2004). "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 characteristics of such wetlands or watercourses." CGS § 22a-41 (d).

CGS § 22a-41 sets out the factors for consideration by a wetlands commission as they affect the wetlands and the watercourses. In sum, those six factors include (1) the environmental impact of the proposed activity, (2) the applicant's purpose for, and any reasonable and prudent alternatives to, the proposed activity which alternatives would cause less or no environmental impact, (3) the relationship between the short-term and long-term impacts of the proposed regulated activity, (4) irreversible and irretrievable loss of wetland or watercourse resources which could be caused by the proposed regulated activity, (5) the

character and degree of injury to, or interference with, safety, health, or the reasonable use of the property which is caused or threatened by the proposed regulated activity, and (6) impacts of the proposed regulated activity on wetlands and watercourses outside the area for which the activity is proposed. CGS § 23a-41. See also Section 10.2 of the Agency's regulations which restates these factors. (2017, ROR, TTT). It should further be noted that "[t]he absence of substantial evidence in the record to support a finding of an adverse impact on wetlands or watercourses, renders a balancing act of the commission's six factors unnecessary. *Helie v. Conservation Commission of Fairfield*, Superior Court judicial district of Fairfield, Docket No. CV-05-4012772-S (July 6, 2007, Radcliffe, J.) ". . . [T]he agency [is] also required to review the applicant's purpose for, and any feasible and prudent alternatives to, the proposed regulated activity *which alternatives would cause less or no environmental impact to the wetlands or watercourses*." (Emphasis added.) *Starble v. Inland Wetlands Commission*, 183 Conn. App. 280, 292, 192 A.3d 428 (2018). "By its plain terms . . . the consideration of alternative plans [is only required] where the commission first determines that it is reasonably likely that the project will cause unreasonable pollution, impairment, or destruction of the public trust in the natural resource at issue." (Internal quotation marks omitted.) *Paige v. Town Plan & Zoning Commission,* 235 Conn. 448, 462-63, 668 A.2d 340 (1995)

2. The Plaintiff's Burden of Proof

a. Generally

A plaintiff challenging the action of a wetlands agency has to demonstrate that substantial evidence does not exist to support an agency's decision. *Feinson v. Conservation Commission*, 180 Conn. 421, 425, 429 A.2d 910 (1980). As noted earlier, ". . . the possibility

of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (Internal quotation marks omitted.) *Huck*, supra at 542. "Determining what constitutes an adverse impact on a wetland is a technically complex issue . . . Inland wetlands agencies commonly rely on expert testimony in making such a finding." (Citations omitted.) *River Bend*, supra at 78. "Issues involving the credibility of such witnesses and the determination of facts are properly committed to the agency." *Manor Development Corp. v. Conservation Commission,* 180 Conn. 692, 697, 433 A.2d 999 (1980).

b. CGS § 22a-19

CGS § 22a-19(a)(1) states in part: "In any . . . administrative . . . proceeding . . . any person . . . may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water or other natural resources of the state." Subsection 22a-19(b) continues "In any administrative . . . proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect as long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."

Intervention under CGS § 22a-19 is limited to the raising of environmental issues. *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 148, 788 A.2d 1158 (2002). At the

agency level, the plaintiff petitioned to intervene and was granted intervenor status to participate. (2018, ROR, T). Subsequently, at the conclusion of the agency's hearings, the plaintiff was found not to have established the requisite requirements to satisfy the intervenor status. (2018, ROR, UU, p. 2, para. 2, p. 4, para. 3-4). As stated in footnote 3, supra, the plaintiff has standing to appeal from the Agency's decision, but only to raise claims alleging the pollution, impairment or destruction of the state's inland wetlands and watercourses. *Finley*, supra at 34-35.

D. DISCUSSION

1. There is substantial evidence to support RESC's application.

a. Expert Testimony

This application involved three public hearings held over three evenings and consisting of over ten hours of testimony and evidence by engineering and soil scientist experts on behalf of both RESC and the plaintiff. Many members of the public appeared and spoke or submitted written letters and photographs to the Agency, all of which have been included in the record. (2018, ROR, N, MM, NN, OO, PP, and QQ). The plaintiff and his wife also addressed the Agency and submitted written materials. (2018, ROR, FF, GG, HH, and JJ).

The record is replete with the contradictory opinions of the respective parties' experts. The plaintiff and his experts claim that the RESC application did not comply with the applicable regulations. RESC's experts claim complete compliance. As noted earlier, while it is necessary that "[t]he reviewing court take into account contradictory evidence in the record . . . the possibility of drawing two inconsistent conclusions from the evidence does not

prevent an administrative agency's finding from being supported by substantial evidence. . . ." *Frank v. Dept. of Children & Families*, 312 Conn. 393, 411-12, 94 A.3d 588 (2014).

This is RESC's second application and its attempt to address the concerns from the denial of its first application in 2017. (2017, ROR, Resolution 8/8/17). This application was determined to be complete when submitted. It had been reviewed by the town's wetlands agent, Gary Goeschel, who was in agreement with RESC's experts that the development plan would not impact any wetlands. (2018, ROR, UU and Tr. 7/30/18, pp. 7-10). It had been reviewed by the town's engineer, Victor Benni, P.E. (2018, ROR, L). In addition, Kimberly White, a registered sanitarian from the Ledge Light Health District, reviewed the application and determined that all lots in the proposed subdivision were suitable for development. (2018, ROR, M). The defendant's own expert engineer, Steven Trinkaus, agreed that RESC's application created no impact to the wetlands. "I agree there is no direct impact." (2018, ROR, Tr. 6/25/18, p. 134). Despite this assertion, however, Mr. Trinkaus still contended that RESC's application should be denied.

RESC's engineering expert, Joe Wren, testified extensively. He stated that the 2018 application carefully addressed the Agency's reasons for its denial of the 2017 plan. Those reasons included storm water drainage issues, nitrogen analysis, the length of the road and the number of lots. (2018, ROR, Tr. 6/25/18, p. 63). Mr. Wren pointed out that the plan had been reviewed be Victor Benni, the town's engineer. Mr. Benni concluded ". . . the proposed drainage features substantially result in a net balance of volume draining to the wetlands on the site for 2 through 100-year storm events, will enhance stormwater quality and recharge

groundwater. The proposed stormwater quality basins . . . will . . . enhance stormwater quality." (2018, ROR, L).

The 2018 proposed plan included a nitrogen analysis that was submitted with the application. (2018, ROR, AA). As Mr. Wren testified, "And we did the nitrogen analysis that was submitted . . . Those septics are outside on 10, 11, 12, and 13 . . . Those septics are beyond the 100 foot review area. They were approved by the health district then and now . . . . We also provided the nitrogen analysis which also . . . shows they . . . work." (2018, ROR, Tr. 6/25/18, p. 65). As Wren testified, these results had been approved by the health district. (2018, ROR, M).

In addition to addressing the Agency's prior concerns, this application decreased the number of lots from 25 to 23. The road stayed in the same location as the 2017 application, but additional conservation easements were added to the backs of all the lots. (2018, ROR, pp. 65-66).

Robert Russo, RESC's soil scientist, testified that he classified and logged all the test pits on the site, and the shoals were definitely suitable for onsite septic disposal for residential development. (2018, ROR, Tr. 6/25/18, p. 75). He also strongly disagreed with plaintiff's soil scientists, Mr. Danzer and Ms. Moch, regarding the location of vernal pools on the property. The Danzer report stated, " . . . it is reasonable to assume that there may be additional vernal pool areas located nearby." (2018, ROR, U). To this claim Mr. Russo responded, ". . . there are no vernal pools on the site . . . due to the low number of egg masses found, the site was not important for the reproduction of wood frog and spotted salamanders. Further investigation,

including four trips to investigate in the spring of 2018 at appropriate times, revealed no use of the wetlands by any pool obligate species." (2018, ROR, CC).

Mr. Russo went on to state that ". . .there will be no major change in the watershed of this wetland . . . there will be no portion of the southern flank of the watershed diverted . . . . The project will have no direct wetlands impact; it will provide sound stormwater management, and is protective of the existing wetlands resources." (2018, ROR, CC). He remarked at the public hearing ". . . there isn't any direct wetland impact proposed anywhere. There's no filling, no cutting of vegetation, or removal of vegetation of these sites. . . . The plans follow both the 2002 and 2004 Connecticut DEEP manuals, which are our means of preventing impacts to the wetlands. As shown on the plans, there's no direct impact to wetlands." (2018, ROR, Tr. 6/25/18, pp. 78, 82).

Mr. Russo disagreed with Mr. Danzer's concerns about the construction of the road, particularly the cul-de-sac. Mr. Danzer claimed that construction would lead to removal of vegetation which would increase sunlight and warm the wetlands. (2018, ROR, Tr. 7/2/18, p. 94). Mr. Russo addressed this at the hearing and in his written response to plaintiff's experts. "CLA has investigated the site . . . and notes that several trees will remain between the wetlands and the driveway and will provide shade over the wetland. CLA does not believe that water temperatures in the wetland will be elevated." (2018, ROR, Tr. 7/2/18, p. 94 and CC, p. 3).

Given that the Agency is permitted to credit or discredit expert testimony and evidence, the Agency did not err in choosing not to credit the plaintiff's experts. Based on this analysis, there is substantial evidence to support the Agency's approval of RESC's application.

b. Consideration of feasible and prudent alternatives.

CGS § 22a-41(b)(1) provides in relevant part: "In the case of an application that received a public hearing . . . or . . . a finding by the inland wetlands agency that the proposed activity *may have a significant impact* on wetlands or watercourses, a permit shall not be issued unless the commissioner finds on the basis of the record that a feasible and prudent alternative does not exist." (Emphasis added.) The consideration of alternatives, however, is not required when the commission concludes that the proposed activity will have no significant impact on nearby wetlands. Feasible and prudent alternatives are not required to be considered when the commission concludes that the proposed activities "will . . . have *no significant impact on the site's wetlands and watercourses* natural capacity to support desirable biological life, to prevent flooding, to supply water, to control sediment, to facilitate drainage and to promote public health and safety." (Emphasis in original; internal quotation marks omitted.) *Grimes v. Conservation Commission*, 49 Conn. App. 95, 104, 712 A.2d 984, cert. denied, 247 Conn. 903, 720 A.2d 514 (1998). When the agency "finds no evidence to support an impact on the wetlands, there is no obligation on the part of the [applicant] to demonstrate absence of a feasible and prudent alternative." *Unistar Properties, LLC v. Inland Wetlands Commission*, Superior Court, judicial district of Windham, Docket No. CV-07-4005682-S (September 10, 2008, Booth, J.) (46 Conn. L. Rptr. 509, 511), aff'd. 293 Conn. 93, 977 A.2d 127 (2009).

The Agency concluded that the proposed development plan would have no significant impact on the nearby wetlands, a decision that was supported by substantial evidence and a consensus of RESC's experts and the town's wetlands agent and its engineer. Therefore, the Agency had no obligation pursuant to CGS § 22a-41(b)(1) to consider feasible or prudent

alternative development plans. Nevertheless, in the present case, the Agency did in fact consider an alternative development plan and concluded that the 2018 plan as proposed would have the least impact on the surrounding wetlands. As Mr. Wren stated in his written statement, the plaintiff's expert's suggestion that the proposed road be moved, to be placed further away from the plaintiff's property, would in fact, place that road closer to the wetlands, and, therefore, would have had a greater impact on the wetlands than RESC's proposal. "The feasible and prudent alternative proposed by the intervenor's consultants places a significant length of paved road in the upland review zone. This would result in removal of vegetation and creation of impervious surface quite close to the adjacent wooded swamp . . . this alternative presents a greater likelihood for wetland impact both during and after construction, than the applicant's proposal." (2018, ROR, CC, p. 6). This proposed alternative was clearly countered by Mr. Wren when he stated, "I don't see for one percent how that would be a prudent and feasible alternative versus this one." (2018, ROR, Tr. 7/10/18, p. 78).

Accordingly, the Agency did not fail to meet its burden to consider feasible or prudent alternatives, because it considered an alternative development plan even though no such consideration was required.

2. RESC has not inappropriately segmented its application.

The plaintiff argues that the filing of an application for a proposed road, utility work and drainage improvements is a segmented application. The plaintiff claims that by segmenting its application, the Agency did not have an opportunity to consider RESC's future 23 lot subdivision. Once again, the record belies the plaintiff's claim. "A [wetlands] commission should not ignore potential impacts of future development. Under Section 22a-41(a)(6)

commissions are empowered to ask and should be asking questions, for example, about what the real impact of the inevitable future development on the natural resources will be . . . ." *Serdechny v. Inland Wetlands, Watercourses & Conservation Commission*, Superior Court, judicial district of Hartford, Docket No. CV-12-6038412-S (August 29, 2014, Berger, J.) (59 Conn. L. Rptr. 35, 40).

In this case, the Agency was well aware that RESC's proposed application ultimately involved a 23 lot subdivision. The plans showed proposed house locations and septic locations on respective lots. (2018, ROR, A and TT). Additionally, both of RESC's experts, Mr. Wren and Mr. Russo, openly acknowledged that approval for construction of the road, utilities and drainage improvements separately from any residential development was a common industry standard. (2018, ROR, Tr. 7/2/18, p.111). Mr. Russo also addressed this issue with the Agency in his July 2, 2018 letter. "The application does not constitute segmentation and is presented in the same way as many previous applications within the Town of East Lyme and other Towns throughout Connecticut." (2018, ROR, CC, p. 6). Finally, the Agency clearly considered the future impact of such a residential development in its approval of the application by noting such a consideration in its final resolution: "WHEREAS, on May 7, 2018, the East Lyme Planning Commission requested from the Agency an application for a report on the subdivision application . . . and WHEREAS, the Application was filed in response to the Agency's denial of the Applicant's 2017 application for a 25 lot CDD Re-Subdivision and related improvements, to be located on the same property . . ." (2018, ROR, UU, p.1, para, 6-7). The Agency in formulating its decision was certainly cognizant that future development of this property involved a 23-lot residential subdivision.

3. The plaintiff has not proven by substantial evidence any specific adverse impact on the wetlands.

In order to prevail in his argument that RESC's application has an adverse impact on the wetlands, the plaintiff needs to show specific evidence of such a claim. That standard has been articulated in the *River Bend* case. See *River Bend*, supra at 78. *River Bend* requires specific and actual impact to the wetlands, not a mere possibility or speculation. Id. at 61, 69-70, 77, 81. In *River Bend* the court rejected generalized expert testimony that opined something "may increase" or "could result in" as not sufficiently quantifiable to satisfy the substantial evidence standard. Id.

This same standard applies to the plaintiff's experts' conclusions regarding RESC's application. Plaintiff's expert, Mr. Danzer, stated that removal of trees near the cul-de-sac would lead to water temperature increases, but he only spoke in generalities, never specifying the amount of the increase. He stated that there will be a "major" change to the watershed and that the surface flow will be "significantly" diminished. (2018, ROR, U, pp. 2-3). Neither of those terms, "major" nor "significant," were quantified. Plaintiff's expert, Steven Trinkaus, claimed pollution would increase if the application was approved, but again, failed to quantify in what way or by how much. (2018, ROR, Y, p. 3).

Gary Goeschel, the town's wetlands agent, in advising the Agency, noted that both the reports and testimony by the plaintiff's experts lacked specific quantifiable evidence of any adverse impacts. This was reflected when Mr. Goeschel made his comments to the Agency: "Exhibits . . . do not quantify claimed impacts. They do not state what, where or how much or the adverse impact on a valuable wetland function. . . . no specific evidence of an actual adverse

impact from the proposed development . . . . no specific evidence that the impacts on the wetlands are significant and would likely impair or affect the physical characteristics of the wetland or watercourse." (2018, ROR, Minutes, 9/17/18, pp. 203). Mr. Goeschel concluded by stating "Exhibits . . . from Mr. Trinkaus . . . do not specifically identify any impacts to wetlands and watercourses rather they provide generic and unspecified impacts." (2018, ROR Minutes 9/17/18, p. 2-3). The plaintiff has not presented any defined or specific adverse impact to the wetlands, and consequently, the plaintiff has not proven his claim by substantial evidence.

III. CONCLUSION

There is substantial evidence in the record for the Agency to approve RESC's application. The application was not improperly segmented. Though not necessary, both the Agency and RESC considered and the Agency properly rejected the plaintiff's proposed feasible and prudent alternative plan for the location of the road which would have had more impact on the wetlands. The plaintiff has not proven by substantial evidence any specific or quantifiable adverse impact to the wetlands.

For the foregoing reasons, the plaintiff's appeal is dismissed. The Agency's decision approving RESC's application is upheld.

Handy, JTR