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Ace Equip. Sales v. Buccino, 797 A.2d 516 (Conn. 2002)

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illustrate how the applicant “can and will” finalize the appropriation.

The court then reviewed the *FWS* case where FWS and the Colorado Division of Wildlife (“DOW”) owned adjacent submerged property. FWS wanted a conditional right to expand its storage right, however, DOW would not grant permission to submerge more land and expand the storage capacity of the lakes. Therefore, the *FWS* court did not grant FWS a conditional right because they did not obtain permission to enlarge the lake and, therefore, could not put water to a beneficial use.

West Elk argued the present case was analogous to *In re Gibbs* where Gibbs requested a conditional right to withdraw water from a well located on adjacent property. The well property owner had not granted access permission. In granting a conditional right, the *In re Gibbs* court did not require such permission at the time of the decree because Gibbs illustrated she could gain access to the well through a prior easement or private condemnation.

The court found this case more factually similar to *FWS* than *In re Gibbs* because the USFS did not grant West Elk an SUP, nor was there evidence that it would grant an SUP in the future. Thus, absent an SUP, West Elk could not and would not put water from Bear Gulch Spring to beneficial use. In finding the water court properly granted summary judgment, the supreme court concluded there was no question of material fact and West Elk could not meet the “can and will” requirement.

Holly Kirsner

CONNECTICUT

Ace Equip. Sales v. Buccino, 797 A.2d 516 (Conn. 2002) (holding that a pond originally created by damming a natural stream is treated under the law in the same way as a natural pond with respect to riparian rights and that owners of abutting land are presumed to possess riparian rights in the adjoining pond).

Ace Equipment Sales (“Ace”) initiated this suit in the Superior Court of Connecticut seeking an injunction to bar Thomas and Irma Buccino (“Buccino”) from entering onto or using Hall’s Pond for recreational purposes, and a declaratory judgment that Buccino owned no part of the pond bed. Buccino claimed ownership of a sliver of subaqueous land at the base of the pond dam and sought a declaratory judgment regarding that boundary and an injunction to enforce their right to use the pond and removal of a fence, erected by Ace, which barricaded their right-of-way. The court granted summary judgment in favor of Buccino and denied Ace’s motion. The issue of the precise location of the boundary between Buccino’s land and that

of Ace remained unresolved by this decision.

Gardiner Hall ("Hall") owned all the land under Hall's pond and surrounding it. The pond was a manmade pond formed by the erection of a dam and spill way at its southwesterly end. On December 23, 1995, Hall conveyed the dam and mill property downstream of the pond to the predecessors in title of Buccino who then acquired the dam and mill property on February 24, 1967. Hall retained the land upstream from the dam until July 1, 1987, when it was conveyed to the predecessors in title of Wellington Fish and Game Club ("WFGG") who acquired the land on July 29, 1996. On September 11, 1996, WFGG conveyed most of this property to Ace but retained a portion including about one-half acre of the pond bed.

Buccino and Ace were the only owners of the land abutting the pond. When Buccino purchased the dam and mill property, they also acquired rights to take and use pond water for industrial purposes to meet the needs of the mill and factory on the property and the obligation to maintain the dam.

Both parties moved for summary judgment on the complaint and counterclaim. The court concluded that a genuine factual dispute existed regarding Buccino's boundary line because the court did not establish whether Buccino owned the sliver of land in issue or had acquiesced to having the dam as their boundary. However, because there was no factual dispute that the dam was constructed on land that Buccino owned and the dam abutted the pond, riparian rights to use the body of water were still appurtenant to land merely bound by that water but not extending underneath it. According to the court, riparian land applies to a tract of land that borders on a watercourse or lake, whether or not it includes a part of the bed of the watercourse or lake.

Ace argued abutters of artificial water bodies have no riparian rights and because the pond was manmade, riparian rights did not apply. However, the court agreed with Buccino's position that riparian rights were appurtenant when property abuts an artificial pond in the absence of contractual restriction or prescriptive extinction of those rights. Additionally, a riparian proprietor can make reasonable use of a pond for recreational purposes.

Ace also argued that this right only applied to natural ponds, not artificial manmade ponds. The court concluded if a natural stream is dammed so as to form a lake or pond permanently, or for an extended period of time, that artificial lake or pond is treated the same as a natural one in terms of riparian rights.

Because Hall's Pond existed as a pond for at least half a century, there was no proof that the pond was constructed temporarily. The court concluded that the pond should be treated under the law similarly to a natural pond with respect to riparian rights. The court held that the owner of abutting land presumes to possess riparian rights in the adjoining lake or pond. Thus, because there was no

evidence that Buccino's predecessors withheld such rights, Ace had, as a matter of law, the right to use Hall's pond for recreational purposes.

Regan Rozier

City of Waterbury v. Town of Washington, 800 A.2d 1102 (Conn. 2002)
(holding exhausting administrative remedies is unnecessary to a Connecticut Environmental Protection Act claim and finding unreasonable public trust impairment must be consistent with Connecticut Environmental Protection Act statutory scheme)

City of Waterbury ("Waterbury") appealed the Connecticut Superior Court's declaratory judgment for the Town of Washington ("Washington"), which held that Waterbury's Shepaug dam operation violated the Connecticut Environmental Protection Act ("CEPA") because it polluted the public trust, but not by becoming a public or private nuisance. The trial court found alleged excessive diversions interfered with the Washington's riparian rights, breaching the parties' 1921 contract. On appeal to the Connecticut Supreme Court, the Washington cross-claimed for injunctive relief, alleging the diversions unreasonably impaired the public trust, and that relief granted could not cure Waterbury's breach. The supreme court reversed and held that: (1) exhausting administrative remedies was unnecessary to a CEPA claim; (2) the trial court's unreasonable impairment finding was incorrect because it did not consider minimum flow statutes as within CEPA's mandate; and (3) Waterbury established a prescriptive easement against the Washington's riparian rights. On remand, the court must consider CEPA, public trust and riparian rights claims, as well as a new remedy for the contractual claim.

A 1921 contract permitted Waterbury to divert, out of the Shepaug River, only amounts necessary for consumption and storage. Diversions were unlawful when reservoirs were full. When Waterbury built a treatment plant in 1988, a reservoir, from which it did not draw, frequently overflowed. Waterbury also incurred increased costs pumping water uphill to "high-service areas," allegedly with a greater impact on natural resources than necessary. Over-reliance on Shepaug dam diversions resulted, though other reservoirs overflowed.

Waterbury claimed an 1893 agreement allowed these diversions if in accord with minimum flow statutes, and therefore also in accord with CEPA. It challenged the trial court's unreasonable impairment definition, contending that only administrative agencies have jurisdiction to determine whether minimum flow statutes are within CEPA's scope. CEPA, however, did not require exhausting administrative remedies because the requirement was neither statutorily explicit nor implicit. Its legislative history contemplated administrative relief prior to trial, with judicial discretion over whether to retain the case or refer it to the agency. The trial court therefore