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Vennont Agency of Nat. Resources v. Irish, No. 97-509, 1999 WL 424317 (Vt. June 25, 1999)

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VERMONT

Vermont Agency of Nat. Resources v. Irish, No. 97-509, 1999 WL 424317 (Vt. June 25, 1999) (holding that without sufficient factual findings, classifying excavation work as conditional or allowed as defined in the Vermont Wetland Rules is improper, and application of conditional penalties are not allowed).

Defendant-appellant Frank Irish ("Irish") owned a twenty-six acre parcel of land in South Burlington, Vermont ("City"). A wetland that appeared on Vermont's National Wetland Inventory ("NWI") maps was located in the middle of Irish's property. In February 1996, the Irish Development Corporation applied for a permit to build a subdivision on Irish's property. In March 1996, the City asked the Agency of Natural Resources ("Agency") to send a wetlands coordinator to visit the site. On site, the coordinator informed one of the development corporation's agents that the site included significant wetlands and required a conditional use determination ("CUD"). The coordinator also advised the corporation to hire a wetlands consultant.

Later that month, Irish began excavating a drainage ditch on the site. The ditch caused substantial erosion and discharged silt into a nearby stream. In April 1996, the same coordinator from the Agency visited the site in response to a complaint. After this visit, the City and the Agency sent notice of violation to the Development Corporation. In May 1997, the Secretary of the Agency found that Irish had failed to obtain a CUD before beginning excavation of the wetland, causing discharge into state waters. That same month, the city filed a complaint claiming Irish violated some of the zoning bylaws. The City's complaint was consolidated with the administrative order. Irish requested a hearing with the Environmental Court. The Environmental Court found that Irish had committed the violations. Irish appealed on six assertions.

First, Irish claimed he was not adequately notified about the need for a CUD. The Environmental Court found that the wetland was clearly shown on the NWI maps, and the Agency's coordinator notified the corporation of the need for a CUD in two follow-up letters. Since these determinations were not clearly erroneous, the Supreme Court of Vermont affirmed the lower court's decision that there was adequate notice.

Second, Irish argued that by law, the Water Resources Board should have evaluated the site to designate it as a significant, and therefore protected, wetland. Any wetland designated on a NWI map was a Class Two wetland, and all Class Two wetlands were considered significant. The supreme court affirmed the lower court's ruling that because all Class Two wetlands were significant, there was no need for the Water Resources Board to review each wetland separately.

Third, Irish noted that under the Vermont Wetlands Rules,

agricultural land, or any land being prepared to become agricultural land, was not classified as a wetland. The lower court found that the site was not currently used for agricultural purposes, but failed to determine if Irish were preparing the land for agricultural use. The supreme court reversed the lower court's findings that Irish violated the Vermont Wetlands Rules and remanded for further factual findings on the issue.

Fourth, Irish argued there was no conclusive evidence that he violated Vermont Statutes by discharging without a permit. Irish argued the discharge was due to the Agency's stop-work order. He claimed he did not intend the violation, and had he been allowed to finish the discharge would not have occurred. The lower court found that the statute did not require intent to violate, and the coordinator from the Agency observed the discharge a month before the agency issued the stop-work order. Since the lower court's finding that the State did not need to prove Irish's intent to violate the statute was not clearly erroneous, the supreme court affirmed the lower court's decision that Irish violated the statute.

Fifth, Irish claimed that the evidence did not support the findings of zoning bylaw violations. The bylaws stated that one cannot qualitatively or quantitatively damage waters and may not excavate beyond what is necessary for the permitted use. The lower court found that Irish had damaged surface water and had excavated beyond necessity, thus violating the statute. Because the lower court adequately assessed this issue, the supreme court affirmed.

Finally, Irish argued the penalties were improper. However, the supreme court agreed that the base fine penalties and the penalty for avoiding the costs of a wetland consultant were proper. However, the supreme court recognized that Irish could be liable for civil penalties if he sold his land for residential development. Thus, if Irish sold his land for purposes other than agriculture or open space, enhanced penalties were justified.

At trial, Irish was assessed conditional penalties totaling \$34,755. The lower court reasoned that the penalties should be large because of the potential for Irish to sell the land at an increased value due to the violation. The supreme court found that the lower court did not make the necessary factual findings necessary to justify the penalties. If Irish were preparing the land for agricultural use, it could not be sold at an increased value. The supreme court reversed and remanded for the lower court to determine whether Irish was using his land for an agricultural purpose, and if he sold his land at an increased value.

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