

High court affirms riverkeeper's right to challenge permit

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The state's highest court ruled last week that an environmental group may challenge the construction of a road near a Prince George's County shopping center.

But for Patuxent Riverkeeper Fred Tutman, the Court of Appeals' decision was about more than just one lawsuit involving one wetlands permit. The 5-2 opinion, he said, eliminates one of the most popular weapons in the developers' arsenal of legal tactics.

"This is huge for the environment. It is tectonic. It is earthshaking," Tutman said. "Until now, (developers) always have trashed our cases by trying to keep them from getting in front of a judge. ... Well, no more."

The lawsuit involved the construction of the Woodmore Towne Center in Glenarden - a shopping center near Landover anchored by a Wegmans, a J.C. Penney and a Costco Wholesale.

It was the first such lawsuit filed after a 2009 change in the law relaxed the state's rules on who is allowed to challenge environmental permits.

The old law allowed someone to sue only when the "aggrieved" individual experienced a loss of personal property or money, attorneys said. The new law reduced the standard to a loss of aesthetic, recreational and economic value.

According to court documents, the Patuxent Riverkeeper sued the state's Department of the Environment in April 2010 over its approval of a nontidal wetlands permit. The permit allowed the developers of the Woodmore shopping center to build a road over a stream.

David Linthicum - an avid paddler, mapmaker and member of the Patuxent Riverkeeper group - claimed the roadwork would cause "nitrogen and other pollutants" to leach into the water and flow downstream. He said he enjoyed paddling and wading in the water about 8.5 miles downstream.

A Prince George's County Circuit Court judge dismissed the lawsuit last December, saying Linthicum did not have standing to challenge the permit.

The judge determined that the injuries Linthicum alleged were "conjectural and hypothetical," partially because he did not realize the roadwork had even started until long after it had been completed.

The Court of Appeals, which heard oral arguments June 6 in Annapolis, disagreed. In an opinion drafted by Judge Lynne A. Battaglia and issued Friday, the court ruled that Linthicum had standing, since the roadwork could have affected the water quality.

"The judge failed to credit the reasonable concern that Mr. Linthicum manifested about the future harm to the ecology of the Western Branch that would result from 'diverting and/or compromising' upriver streams," the opinion said.

Edward C. Gibbs Jr., Woodmore's attorney, said yesterday he would ask the Court of Appeals to reconsider its decision. He said he also was considering an appeal to the U.S. Supreme Court, since the new state law was designed to mirror a federal law.

Regardless, Gibbs said Tutman should not read too much into the court's decision. He said the legislature relaxed the rules regarding who could file a lawsuit; it did not do away with the regulations.

"There is still a standard," he said, explaining that the person's perceived injury "must be concrete and particular ... not conjectural or hypothetical."

Plus, Gibbs noted, a federal judge sided with his client in a related case just four days before the state Court of Appeals issued its opinion.

Specifically, U.S. District Court Judge Alexander Williams Jr. ruled Sept. 26 that the riverkeeper did not have standing to challenge another permit issued by the U.S. Army Corps of Engineers regarding the shopping center.

G. Macy Nelson, the riverkeeper's attorney, said yesterday he would appeal Williams' decision. He described the U.S. District Court as the "Circuit Court of the federal system."

"It's not the court of last resort," said Nelson, who also challenged the construction of a development in Gambrills that will be anchored by a Wegmans.

"I'm optimistic that (the federal decision) ... will be overturned," he said.

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