

CONSERVATION COMMISSION

SPECIAL MEETING OCTOBER 2, 2012

CONFERENCE ROOM L 101

These minutes are not verbatim, but represent a summary of major statements and comments. For minutes verbatim, refer to audiotapes on file in the Office of the Town Clerk. Audiotapes are retained for the minimum period required under the retention schedule as provided under Connecticut Law.

Chairman Block called the roll call at 6:05 p.m. and noted Commissioners Clark, Igielski Sadil, Shapiro and Zelek were present. Also present was Town Engineer Chris Greenlaw.

ITEM III

PUBLIC PARTICIPATION ON NON-AGENDA ITEMS: NONE

ITEM IV A

Workshop Re: Conference with Town Attorney

Chairman Block noted the purpose of tonight's meeting is to educate ourselves on the protocols of complex litigation. There are issues as to what is on the record now, what can be put on a future agenda, possession of prior knowledge of a Commission member on an application and how to present these concerns when the Commission should go to a public hearing as to what can be referred to and what can not be referred to.

Town Attorney Peter Booman noted that he has prepared two (2) packets for tonight's meeting, which have been passed out by Mr. Chris Greenlaw, Town Engineer and are described below:

- A. 10-2-1 INLAND-WETLAND/ CONSERVATIONCOMMISSION PRESENTATION
- B. BASIC INFORMATION RE; Inland Wetlands Agencies & Conservation Commissions

10-2-12 INLAND-WETLAND/ CONSERVATION COMMISSION PRESENTATION

The following subjects of interest have been prepared as an aide in the 10-2-12 presentation by the Town Attorney to the Commission. Subjects of interest, as suggested by staff, are noted below:

Commission required fees by an applicant, especially as to the payment of expert expense:

Attorney Boorman noted that Mr. Greenlaw asked for a discussion as to a reasonable fee for an expert witness that might be retained by a Commission. He noted that we are not dealing with a specific application, but with the operation of the Commission. Fees should represent a reasonable costs associated with an application to include the costs related to reviewing and acting on the application, implementation of the permit conditions and/or Commission orders.

Attorney Boorman noted that Section 19.5 of the Regulations allows for additional fees as outlined in the 2006 Model Regulations prepared by DDEP, which allows for a fee for an expert witness services who may be retained by the Commission. It was suggested that consideration be given that prior to retaining the services of an expert, the Commission's Administrative Officer should contact the office of the Town Attorney.

Commissioner Zelek asked if it would be proper for the Commission to contact the Town Attorney prior to the presentation of a (new) application? Attorney Boorman responded that it would not be necessary. However, the Administrative Officer of the Commission could contact the office of the Town Attorney early in the process if there may be a need for the services of an expert down the road.

Commissioner Sadil asked who would pick the expert, who would provide a service to the Commission? Attorney Boorman responded the Commission would pick the expert along with a possible fee. If a public hearing is involved, the hearing should not be closed until the expert has been retained by the Commission and has entered his/her remarks into the record.

Chairman Block noted that a Commission can not delve into an application until a public hearing is called, when the issues are put on the table and it would be determined if there may be the need of expert advise. The Commission is also working against the clock. Does the Commission have an option to extend the clock? Attorney Boorman responded the State Statues dictate the time limits.

Chairman Block noted that the Commission may not be able to process an application within the time limits (per the Regulations). Is there injunctive relief available to the Commission? Attorney Boorman responded that the time limits can not be changed.

Commissioner Zelek noted the Commission may not have in hand all the information available to render a decision within the (allotted) time limits (per the Regulations). Is there any injunctive relief available? Attorney Boorman responded no.

Commissioner Igielski noted that time could be required to discuss an application prior to a public hearing. For example, an application could be submitted with supporting documentation that is two (2) inches thick. Areas of discussion could include the complexity of the application, issues to be addressed, the need for expert testimony and review time required by staff. Can the Commission discuss these matters prior to a public hearing? Attorney Boorman responded yes, buy move quickly.

Commissioner Igielski noted that it would be desirable to have an applicant make a preliminary presentation to (the Commission) to determine the possible need for expert testimony and the need for more information. Can the Commission make use of the 65 day period in the Regulations before calling for a public Hearing? Attorney Boorman responded yes, but the Commission should be careful to stay in house and move forward quickly.

What to do about prior applications:

Attorney Boorman noted "Prior decisions on applications to an inland wetlands agency are not grounds for denying an application; the agency has to decide if the particular activity proposed would significantly impact a wetland." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (3d Ed. 1999) 11.5, p. 360.

Attorney Boorman noted that the agency (Commission) can rely on personal knowledge related to an application. Such knowledge should be made known to the Commission, the applicant and public as part of the hearing and during the public hearing. The applicant should be given the opportunity to respond to such remarks during the public hearing.

Attorney Boorman noted that the "Agency (Commission) members can act based on their own personal knowledge on the history of the property involved in the application..."

Commissioner Sidal asked how can the Commission distinguish between the old record and a new application? Attorney Boorman responded the previous record is not part of a new application. However, a Commission member can make a remark/remarks related to previous knowledge to discuss a current application.

Chairman Blocked asked what happens if an applicant refuses to enter material that may be from a previous application? Attorney Boorman responded that the applicant be allowed to finish the sentence. The Chair would then ask the applicant if the material is from a previous application? If the response is yes, then applicant should be asked to submit the material (for example a report) into the record.

Mr. Greenlaw asked if the entire report would be entered into the record? Attorney Boorman responded no. He was referring to the record of the proceedings. If the applicant should make reference to a portion of the report; maybe the full report should be submitted into the record to allow staff to review the content that may be related to an area of the report under discussion.

Commissioner Zelek asked if a paragraph was entered into the record from a previous study, can the Commission asked for the entire report into the record? Attorney Boorman responded yes, you can ask for the entire study to be entered into the record or have staff look for the study to evaluate and make a determination if the Commission would want to make it part of the record. The idea would be to have an open pathway for the Commission to seek information. You do not want to make demands of the applicant that have nothing to do with an application. Attorney Boorman noted from his outline that if the Commission may decide to reject the conclusion of an expert. "However, for the agency (Commission) to disregard

evidence from an expert, there must be some evidence in the record which undermines either the expert's credibility or their final conclusions".

Commissioner Clark asked that in determining the legitimacy of the applicant's expert, can we go outside of the record to secure additional information? Attorney Boorman responded the Commission should stay within the limits of the application.

Attorney Boorman recommended that all experts be put under oath before his/her presentation.

Chairman Block asked Attorney Boorman to provide the Commission with suggested wording of an oath? Attorney Boorman responded that he would provide the suggested wording.

Attorney Boorman suggested that Commission members look at the information presented by the expert as part of his/her qualifications and then ask questions.

Commissioner Zelek asked if the public could bring in its own expert to the hearing and put his/her credentials into the record. Would he/she then be part of public participation? Attorney Boorman responded yes.

Mr. Greenlaw asked if a "Special Meeting" could be called by the Commission during the public hearing process? Attorney Boorman responded yes.

Applications and interaction with public:

Attorney Boorman noted that Commission members can not talk with a member of the public once the public hearing is opened or at an ensuing meeting of the Commission. The goal is to have all parties participate in the process.

Chairman Block asked that after the public hearing is opened and information has been received, can a member of the Commission go out and do research on his/her own? Attorney Boorman responded that it should not be done.

Commissioner Igielski asked that if any request to staff has to be done at a Commission meeting? Attorney Boorman responded that it would be desirable to do it at a meeting to keep the playing field level. However, a request could be made after a meeting and should be put on the record at the next meeting.

Attorney Boorman noted that all staff discussion should be put on the record.

Attorney Boorman noted "Discussions with municipal personnel (such as a town engineer or planner) or consultants employed by the agency (Commission), regarding a pending application, should take place only at regularly scheduled meetings when the matter appears on the published agenda, or at public hearings".

Attorney Boorman noted that "No member of any commission should not publically take a position on the granting or denial of an application before the application has been formally heard and considered by the commission...{E}ach commission member should avoid making statements that could suggest that the member has made up his or her mind about a application before its merits have been fully considered. The purpose of this rule is to protect and preserve public confidence in the commission's ability to make a fair decision".

Ex parte communications:

Attorney Boorman noted "In general, commission members should not discuss a pending application, appeal or other matter with anyone except at the public hearing, where all parties have an opportunity to participate....".

Attorney Boorman noted that a Commission member may require additional information from staff relative to new information that has been entered into the record. The hearing should be kept opened, provided it would be in conformance with time lines outlined in the Regulations. You do not want staff coming back with information when the hearing has been closed.

Commissioner Zelek noted that new evidence could become available to the Commission after the public hearing has been closed. Can the hearing be reopened? Attorney Boorman responded no. Once the hearing is closed it can not be reopened.

Public Hearings-the record:

Attorney Boorman noted that the Statues do not require a public hearing to be held on an inland wetlands application. However, the local wetlands agency (Commission) may choose to hold such a hearing. The Chairperson should conduct the hearing with a firm hand and keep the focus on the issues under discussion.

Commissioner Zelek asked once an expert makes a presentation, can he or she be questioned by all parties including the public? Attorney Boorman responded only the parties who are physically part of the application (can participate). This does not include the public.

Chairman Block asked if it was possible to have "Intervener Status" during the public hearing. Attorney Boorman responded that he was not aware of any "Intervener Status" in the Commissions proceedings.

Commissioner Clark noted that there is a reference to "Intervenens Status" in the general statutes. Attorney Boorman noted the statute refers to the judicial level not the administrative hearing level. He noted that he would look further into the matter.

Attorney Boorman noted that it is important to keep a good record of the hearing procedures.

Attorney Boorman noted that if a bulky report is submitted into the record, it is only necessary to accept the report and focus only on the applicable areas.

Attorney Boorman noted that "The Agency (Commission) 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 the physical characteristics of such wetland or watercourses. Inland Wetlands and Watercourses Regulations of the Town of Newington Section 10.6"

Commissioner Igielski asked what about a blasting operation occurring outside of the regulated area? Attorney Boorman responded that it would not be considered unless it can be shown there is a physical impact on the regulated area. The Commission can seek information to make a determination.

Chairman Block raised the question as to what is the definition of "Physical"? Attorney Boorman noted that he would do further research into the matter. However, he noted there is a very narrow band as to what would apply.

Commissioner Zelek asked if time limitations could be imposed where nesting would be occurring outside of the regulated area? Attorney Boorman responded no.

Attorney Boorman noted that the Commission can not act on supposition; it must be shown from the record.

Commissioner Zelek asked what if an activity occurs outside of the regulated area that could kill all animal life and vegetation within the regulated area? Attorney Boorman responded no. Some other agency would have to address the matter.

Site walks in general:

Attorney Boorman noted that the Commissions could co ordinate with the applicant if it intends to conduct a site walk. However, the applicant does not have to be present at the site walk.

Mr. Greenlaw asked if a site walk could be treated as a "Special Meeting" with a posted notice? Attorney Boorman responded yes.

Decision making-generally:

Chairman Block asked what if the Commission missed a dead line in the Regulations, would the court probably rule in favor of the applicant? Attorney Boorman responded yes.

There was a general discussion on the duties of the Conservation Commission and the Inland Wetlands and Watercourses (Agency or Commission). Attorney Boorman noted that you can not mix and/or the responsibilities. He noted that the Conservation Commission can only make recommendations.

Commissioner Zelek noted in Section 1.1 of the Regulations it states "Such unregulated activity has had, and will continue to have a significant, adverse impact on the environment and ecology of the state of Connecticut and has and will continue to imperil the quality of the environment thus adversely affecting the ecological, scenic, historic and recreational values and benefits of the state for its citizens now and forever". He asked, for example, could the Commission consider the ecological, scenic, historic issues where a relationship could be shown with the application? Attorney Boorman responded no because Section 1.1 refers to a policy statement. Commission should look to the state statute for its responsibilities.

NOTE: Members of the Commission noted several "What if" scenarios" (Listen to audio tape) involving an exchange of hats between the Inland Wetlands and Watercourses Agency and the Conservation Commission relative to a wetland application. The discussion focused on whether the Conservation Commission could address an issue (outside of a regulated area) that did not fall under the jurisdiction of the wetland agency; but could be looked under the hat of the Conservation Commission. Attorney Boorman noted possibly yes; but noted that the Conservation Commission has no "Implementation authority", and can only make a "Recommendation".

BASIC INFORMATION RE: Inland Wetlands Agencies & Conservation Commissions

Refer to handout for particulars.

Commission went into recess at 7:40 p.m.

Commission came out of recess at 7:48 p.m.

ITEM V

PUBLIC PARTICIPATION: NONE

ITEM VI

COMMUNICATIONS AND REPORTS

Authorized Agent—Discussion of Agent Guidelines, amend Internal Ruled and Regulations

Mr. Greenlaw noted the "Authorized Agent is allowed in the wetland statutes. The agent would only act on minor activity in the 100 foot upland buffer area and go through the same process as the Commission in evaluating an application. The item would appear on the October meeting agenda.

Authorized Agent—Application 2012-21AA, Ridgebrook, HOA Property

Mr. Greenlaw reported that a permit was issued to remove debris, take down and remove trees and remove and replace a fence, all within the 100 foot upland buffer area on the subject property.

Motion made by Commissioner Sadil to adjourn meeting at 8:25 p.m. and was seconded by Commissioner Shapiro. There was no discussion. Vote was 6 yes, no and motion was carried.


Peter M. Arburr, Recording Secretary

Commission Members

Tayna Lane, Town Clerk
Town Manager, John Salamone
Town Planner
Councilor Myra Cohen

Chairperson, Town Plan and Zoning Commission.
Peter Boorman, Esquire, Town Attorney
Chris Greenlaw, Town Engineer

10-2-12 INLAND-WETLAND/CONSERVATION COMMISSION PRESENTATION

The following has been prepared as an aide in the 10-2-2 presentation by the Town Attorney to the Commission. Subjects of interest, as suggested by staff, as follows:

1. Commission required fees by an applicant, especially as to the payment of expert expense:

The inland wetlands agency may require a filing fee to be deposited with the agency. The amount of such fee shall be sufficient to cover the reasonable cost of reviewing and acting on applications and petitions, including, but not limited to, the costs of certified mailings, publications of notices and decisions and monitoring compliance with permit conditions or agency orders. Conn. Gen. Stat. § 22a-42a

Section 19.5 of the Newington Inland Wetlands Regulations lists the appropriate application fees that may be imposed by the Agency. Subsection (b) authorizes Supplemental Application Fees for certain applications as follows:

The Agency may charge additional fees sufficient to cover the cost of reviewing and acting on applications. Such fees may include, but not be limited to, the cost of retaining experts to analyze, review, and report on issues requiring such experts. The Agency or the duly authorized agent shall estimate the supplemental application fees, which shall be paid by the applicant by certified check or money order payable to the Town of Newington, within ten (10) days of the applicant's receipt of notice of such estimate. Any portion of the supplemental application fees, in excess of the actual cost, may be refunded to the applicant after a final accounting of the Agency's actual cost has been determined. No license shall be issued until all fees pursuant to this subsection 19.5b are paid. Inland Wetlands and Watercourses Regulations of the Town of Newington, §19.5 (b).

2. What to do about prior applications?

"Prior decisions on applications to an inland wetlands agency are not a ground for denying an application; the agency has to decide if the particular activity proposed would significantly impact a wetland." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (3d Ed.1999) 11.5, p. 360.

It is well established that lay members of a commission may rely on personal knowledge concerning matters readily within their knowledge, such as street safety, traffic congestion or local property values. If, however, the commission relies on its special knowledge outside the scope of that of an ordinary trier of fact, it must afford the plaintiff a fair opportunity to respond. If an administrative agency chooses to rely on its own judgment, it has a responsibility to reveal publicly its special knowledge and experience, to give notice of the material facts that are critical to its decision, so that a person adversely affected thereby has an opportunity for rebuttal at an appropriate stage in the administrative proceedings.

United Jewish Center v. Town of Brookfield, 78 Conn.App. 49, 57 (Conn.App. 2003)(Internal citations omitted).

Agency members can act based upon their own personal knowledge on the history of the property involved in the application.... However, for the agency to disregard evidence from experts there must be some evidence in the record which undermines either the experts' credibility or their final conclusions.... When the agency chooses to rely upon special knowledge or expertise of some its members, it must bring the matter up at an appropriate stage of the proceedings, generally at or prior to the public hearing, so that anyone adversely affected by that information has an opportunity to question and rebut it. Furthermore, [a]gency members cannot rely upon facts learned from a first hand investigation without giving the parties Before them an opportunity to rebut the evidence. Id at 59 (Internal citations and quotations omitted).

When a commission member intends to use his or her own expertise or personal knowledge of a site as a basis for a decision, the member should disclose that expertise or knowledge at the public hearing. For instance, if a commission member is a civil engineer and has technical comments or questions on an engineering aspect of a proposal, the member should disclose those qualifications to the public. While this procedure may seem a bit awkward to the commission member, it helps to protect the record. In some case, particularly those involving undisclosed commission expertise, the courts have refused to uphold commission actions because the applicants were never properly apprised of the factual bases for the actions and therefore never had a chance to respond or rebut.

Commission members should not be afraid to view or to use their personal knowledge of any property that is the subject of an application. Again, the important procedural point is disclosure: let the applicant and the public know what facts are being considered by the commission before the decision is made. Zizka, M. CDEP, What's Legally Required? A Guide to Legal Rules for Making Local Land-Use Decisions in the State of Connecticut, p. 51 (6th Ed.) (1997).

However, when expert testimony is offered on a scientific or technically complex issue; ... one that is not generally within the knowledge of lay commission members, the agency cannot simply disregard the testimony without providing a credible justification and allowing the applicants and members of the public an opportunity to comment or rebut. What's Legally Required?, p. 59.

3. Applications and interaction with public:

The agency members may not discuss the application with anyone, except at the public hearing or the next meeting when they convene to discuss and decide upon the application. This way, all parties can participate. Discussions involving agency members or any interested parties held outside of the public hearing are known as "ex parte communications" and they endanger agency decisions. Such discussions have sometimes caused an agency's decision to be reversed upon appeal. Discussions with municipal personnel (such as a town engineer or planner) or consultants

employed by the agency, regarding a pending application, should take place only at regularly scheduled meetings when the matter appears on the published agenda, or at public hearings. Wetlands Commissioner's Handbook: A Guide for Municipal Wetlands Agency Operations, Connecticut Department of Environmental Protection, p. 16.

No member of any commission should publicly take a position on the granting or denial of an application before the application has been formally heard and considered by the commission ... [E]ach commission member should avoid making statements that could suggest the member has made up his or her mind about an application before its merits have been fully considered. The purpose of this rule is to protect and preserve public confidence in the commission's ability to make a fair decision. What's Legally Required?, p. 30.

4. Ex parte communications:

In general, commission members should not discuss a pending application, appeal or other matter with anyone except at the public hearing, where all parties have an opportunity to participate ... One exception to this rule concerns discussions with municipal personnel (such as a town engineer or planner) or consultants employed by the commission. The exception is based on the need for lay commission members to obtain guidance and analysis from their own experts on technical materials or reports already presented to the commission. However, the courts have not interpreted the exception broadly enough to allow commission staff and consultants to freely submit *new* information of their own after the hearing is closed. As a general rule, if the information being discussed is likely to influence the commission's decision, the information should be entered into the official hearing record. What's Legally Required?, p. 52.

Any correspondence or other written materials received after the public hearing has been closed should not be permitted in the official record, unless it is in response to the commission's request, at the hearing, for additional information or reports from specific persons. A preferable procedure, however, is to recess the hearing, reconvening it when the information is available. All parties would then have an opportunity to review the information and to comment on it. Wetlands Commissioner's Handbook, p.16.

5. Public Hearings – the record:

A public hearing is required on any proposal or petition to adopt or amend the inland wetland regulations or the official inland wetlands boundaries or watercourse designations. The statutes do not require a public hearing on any other inland wetlands application, but a local wetlands agency may choose to hold such a hearing. The local wetlands agency must determine if a proposed activity may have a significant impact upon wetlands or watercourses. If the wetlands agency concludes that it may, they should hold a public hearing to allow the applicant and any other interested persons to present evidence supporting their views. Wetlands Commissioner's Handbook, p. 13 (1994 ed.).

Section 9.1 of the Inland Wetlands and Watercourses Regulations of the Town of Newington also requires a public hearing if a petition signed by at least 25 town residents is filed with the agency within 14 days of submission of the application.

The wetlands agency is not required to institute courtroom-like proceedings at the public hearing. The hearing can be run informally and yet protect the rights of all parties. However, the wetlands agency may wish to conduct a more formal hearing for a contested application, especially one involving attorneys. For all hearings, the agency should consider requiring sworn testimony from all expert witnesses. Also, every party to the hearing should be allowed to cross-examine witnesses and/or respond to all evidence entered into the record. Wetlands Commissioner's Handbook, p. 15.

It is essential that the wetlands agency establish a comprehensive hearing record for each hearing since it is limited to the information contained in the record when deciding on an application. Written reports, correspondence, and other material the agency receives should be incorporated into the hearing record by reading them aloud at the hearing. They may also be incorporated by specific reference to any exhibit. Wetlands Commissioner's Handbook, p. 14. Inland Wetlands and Watercourses Regulations of the Town of Newington, §10.7.

In making a decision, the wetlands agency should make sure that all information it receives or uses in connection with the applications is maintained in the official application record. Since future court challenges will be based mostly or entirely on the record, a complete record is necessary to accurately reflect the agency's position. All information that a statute or regulation requires the agency to receive and review must be included in the public record. Wetlands Commissioner's Handbook, p. 18.

The Agency may grant the application as filed or grant it upon other terms, conditions, limitations or modifications of the regulated activity designed to carry out the purposes and policies of the Inland Wetlands and Watercourses Act, or deny the application. Such terms may include any reasonable measures which would mitigate the impacts of the regulated activity and which would (a) prevent or minimize pollution or other environmental damage, (b) maintain or enhance existing environmental quality, or (c) in the following order of priority: restore, enhance and create productive wetland or watercourse resources. Inland Wetlands and Watercourses Regulations of the Town of Newington, §11.1.

The Connecticut General Statutes require wetlands agencies to state for the record their reasons for adopting or amending their regulations, or for approving, denying, or modifying applications for wetlands permits. The agency should adopt decision making procedures consistent with their regulations. Such procedures should include discussion of the statutory factors to be considered in making a decision, and should also include statements of the agency's findings on the application. These "reasons" for the agency's decision should be stated on the record, summarized in the minutes of the meeting and included in the agency's notification of decision to the applicant. Wetlands Commissioner's Handbook, p. 17.

The 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 the physical characteristics of such wetlands or watercourses. Inland Wetlands and Watercourses Regulations of the Town of Newington, §10.6.

6. Site walks in general:

Site visits have the potential to cause a variety of legal problems for commissions. What's Legally Required?, p. 52. Generally, any site visit should be prearranged with the applicant.

Inspections of properties by wetlands agency members and their authorized agents sometimes may be necessary to fulfill the wetlands agency's statutory responsibilities... (A)lso, the agency or its designated agent may need to get access to private property to conduct routine wetlands inventories and investigate violations. Wetlands Commissioner's Handbook, p. 20.

If commission members walk the site in groups, the walks will probably be considered meetings under the Freedom of Information Act. It is not a good idea for commissions to undertake such group walks if the public is not invited or if the landowner attempts to exclude them; the violation of Freedom of Information Act requirements can result in the invalidation of a commission's decision. What's Legally Required?, p. 31.

When site visits are to be conducted as part of a public hearing process, the commission should treat them as they would any continuation of a hearing. If the commission intends to allow any questions or comments from the applicant or any other person during a site visit, the site visit should be deemed to be a public hearing, and the rules of all such hearings ... should be carefully followed. If there is no way for the agency to tape the discussion during a site walk, it should either make a contemporaneous written record of all verbal communications, or conduct the site walk in silence to the extent feasible. What's Legally Required?, p. 53.

This does not mean that the landowner must be allowed to accompany individual commission members on a site walk. Indeed, if such a visit occurs after a public hearing has commenced, the commission members probably should not be accompanied by the applicant unless members of the public are also allowed to attend. What's Legally Required?, p. 31.

7. Decision making -- generally:

If an application complies with all aspects of the relevant statutes and regulations, including their decision-making standards and criteria, it should be approved. It is improper for a land-use authority to deny or modify an application for reasons that are not properly linked to standards spelled out in the statutes or regulations. In addition, although land-use regulations may, in some instances, allow the decision-making body to exercise discretion in reviewing certain aspects of a proposal, that discretion cannot be exercised arbitrarily. The regulations should provide clear standards for both the applicant and the commission. What's Legally Required?, p. 55.

When in doubt, see your regulations. Follow the guidelines set out in Section 11 - Decision Process and Permit.

As long as the commission is reasonable in its interpretation and application of statutory and regulatory standards and criteria, a court will be unlikely to second-guess it on matters of substance (as opposed to procedural issues). The credibility of all witnesses is for the commission to decide, although it should not simply ignore the only expert evidence offered on a

technical issue ... A commission does not even need to accept its own staff's recommendations.
What's Legally Required?, p. 55.

ton-inland-wetland seminar
TON\Inland-Wetlands Conservation Memo 9-27-12.doc

BASIC INFORMATION RE: Inland/Wetlands Agencies & Conservation Commissions:

I. Inland Wetlands Commission:

A. Municipal Inland Wetlands agencies have the following powers and duties:

1. To establish, change or repeal inland wetlands regulations;
2. To hear, consider, and decide upon applications for regulated activities involving inland wetlands and determine if proposed activities are exempt from, or otherwise not subject to, the regulations;
3. To hear, consider, and decide upon applications for regulated activities involving inland wetlands and determine if proposed activities are exempt from the regulations; and
4. To enforce the inland wetlands regulations and the conditions of permits;
5. May delegate to a duly authorized and trained agent, the authority to approve or extend an activity that is not located in an inland wetland when the agent finds that the activity would have minimal wetland impact; and
6. To hear appeals from any decision of its duly authorized agents. The Commission shall sustain, alter or reject that decision or require that an application be made directly to the agency.

(Conn. Gen. Stat. § 22a-42a; Roles and Responsibilities of Local Land Use Officials, "Inland Wetlands Commission", University of Connecticut Land Use Academy (2009); Wetlands Commissioner's Handbook: A Guide for Municipal Wetlands Agency Operations, CDEP (1994 ed.).

B. In carrying out these duties, the commissioners are required to consider all relevant facts and circumstances, including but not limited to:

1. The environmental impact of the proposed regulated activity on wetlands or watercourses;
2. The applicant's purpose for, and any feasible¹ and prudent² alternatives to, the proposed regulated activity which alternatives would cause less or no environmental impact to wetlands or watercourses;
3. The relationship between the short-term and long-term impacts of the proposed regulated activity on wetlands or watercourses and the maintenance and enhancement of long-term productivity of such wetlands or watercourses;
4. Irreversible and irretrievable loss of wetland or watercourse resources which would be caused by the proposed regulated activity, including the extent to which such activity would foreclose a future ability to protect, enhance or restore such resources, and any mitigation measures which may be considered as a condition of issuing a permit for such activity including, but not limited to, measures to (a) prevent or minimize pollution or other environmental damage, (b) maintain or enhance existing environmental quality, or

¹ Feasible is defined as able to be constructed consistent with sound engineering principles.

² Prudent is defined as economically and otherwise reasonable in light of the social benefits to be derived from the proposed activity. Cost may be considered, however, a mere showing of expenses will not necessarily mean an alternative is imprudent.

- (c) in the following order of priority: Restore, enhance and create productive wetland or watercourse resources;
5. The character and degree of injury to, or interference with, safety, health or the reasonable use of property which is caused or threatened by the proposed regulated activity; and
 6. Impacts of the proposed regulated activity on wetlands or watercourses outside the area for which the activity is proposed and future activities associated with, or reasonably related to, the proposed regulated activity which are made inevitable by the proposed regulated activity and which may have an impact on wetlands or watercourses. (Conn. Gen. Stat. §§ 22a-42a(d) and 22a-41(a); Roles and Responsibilities of Local Land Use Officials, "Inland Wetlands Commission", University of Connecticut Land Use Academy (2009)).

Another way to put this is upon reviewing any application for a regulated activity, an inland wetlands agency must consider:

- a. What is the environmental impact of the proposed action?
- b. What are the alternatives to the proposed action?
- c. What is the relationship between short-term uses of the environment and the maintenance of long term productivity (E.g. will significant long-term benefits of a wetland for water quality renovation or flood control be sacrificed by loss of the wetland through filling for a non-essential, short-term use)?
- d. What irreversible and irretrievable commitments of resources would be involved in the proposed activity? (Note; most wetland filling and development proposals involve an irretrievable and irreversible commitment of at least part of a wetland resource)
- e. How and to what degree will the proposed property use injure or interfere with health and safety?
- f. How suitable or unsuitable is such activity to the area for which it is proposed?
- g. The wetlands agency may also consider comments and reports from other agencies and commissions, which may include the municipal conservation commission, planning and zoning commission, town planner, building official, soil conservation district, health officer or district, regional planning agency, water company, watershed association and the like. However, non-receipt of comments solicited from such agencies must not delay or prejudice the wetlands agency's decision.

Wetlands Commissioner's Handbook: A Guide for Municipal Wetlands Agency Operations, Connecticut Department of Environmental Protection, p. 16-17.

Any application denied on the basis of a finding that there may be feasible and prudent alternatives to the proposed regulated activity which have less adverse impact on wetlands or watercourses, the Agency shall propose on the record in writing the types of alternatives which the applicant may investigate, although the burden remains on the applicant to prove that he/she is entitled to the permit or to present alternatives to the proposed regulated activity. Inland Wetlands and Watercourses Regulations of the Town of Newington, §10.4.

C. Inland Wetland Key Terms and Concepts:

1. Regulated Areas:
 - a. Inland Wetlands: Land, including submerged land, not regulated under the Tidal Wetlands Act which consists of soil types designated as poorly drained, very poorly drained, alluvial and flood plain by the U.S Department of Agriculture Natural Resources Conservation Service Soil Survey.
 - b. Watercourses: Rivers, streams, brooks, waterways, lakes, ponds, marshes, swamps, bogs and all other bodies of water, natural or artificial, vernal or intermittent, public or private which are contained within, flow through or border upon this state and are not regulated by the Tidal Wetlands Act.
 - c. Intermittent Watercourses: A defined permanent channel and bank and two or more of the following: (i) Evidence of scour or recent alluvium or detritus deposits; (ii) Standing or flowing water of a duration longer than any particular storm or; (iii) Presence of vegetation that grows in water or very wet soils.
 - d. Buffer/Upland Review Areas: A local wetland agency regulates activities within areas around wetlands and watercourses. Such regulations shall: (i) Be in accord with the wetlands concerning activities in wetlands and; (ii) Apply only to activities that are likely to adversely affect the physical characteristics of wetlands or watercourse.
2. Regulated Activities: Any operation within or use of a wetlands or watercourse involving: (a) Removal or deposition of material; (b) Any obstruction; (c) Construction; (d) Alteration; or (e) Pollution of such wetlands or watercourses. This does not include the activities permitted as of right (see below). Hence, not all activities taking place within a wetland area require a permit.
3. Activities Permitted as of Right: The following uses are permitted as of right in wetlands and watercourses:
 - a. Grazing, farming, nurseries, gardening and harvesting of crops;
 - b. Farm ponds of three acres or less that are essential to the farming operation;
 - c. Residential homes for which a building permit has been issued on or before July 1, 1987;
 - d. Boat anchorage or mooring;
 - e. Uses incidental to the enjoyment and maintenance of residential property including maintenance of existing structures and landscaping, but not including removal or deposition of significant amounts of material from or onto a wetland or diversion or alteration of a watercourse;
 - f. The operation of dams, reservoirs and similar facilities by water companies;
 - g. Maintenance on existing drainage pipes on residential property where the area to be disturbed does not contain vegetation growing in water or very wet soils;
 - h. Conservation of Soil, vegetation, water, fish, shellfish and wildlife provided such activities do not disturb the natural and indigenous character of the wetland; and
 - i. Outdoor recreational activities that do not disturb the natural and indigenous character of the wetland.

The Courts have rules that a wetlands agency may require someone claiming to be engaged in an "as of right" activity to appear before the agency and submit such information as it deems necessary to make a determination as to whether the activity is, in fact, exempt.

II. Municipal Conservation Commission:

- A. Conservation commissions are established for the development, conservation, supervision and regulation of natural resources, including water resources, within the municipal territorial limits (Conn. Gen. Stat. § 7-131a(a)).
- B. Municipal Conservation Commissions have the following powers and duties:
 1. Shall conduct research into the utilization and possible utilization of land areas of the municipality and may coordinate the activities of unofficial bodies organized for similar purposes, and may advertise, prepare and distribute books, maps, charts, plans and pamphlets as necessary for its purposes;
 2. Shall keep an index of all open areas, publicly or privately owned, including open marshlands, swamps and other wetlands, for the purpose of obtaining information on the proper use of such areas, and may from time to time recommend to the planning commission plans and programs for the development and use of such areas.
 3. Shall keep records of its meetings and activities and shall make an annual report to the municipality.
 4. May receive gifts in the name of the municipality for any of its purposes and shall administer the same for such purposes subject to the terms of the gift.
 5. May propose a greenways plan for inclusion in the plan of conservation and development of the municipality;
 6. May inventory natural resources and formulate watershed management and drought management plans, which plans shall be consistent with water supply management plans approved by the Commissioner of Public Health, and concurrence of the Commission of Environmental Protection pursuant to Conn. Gen. Stat. § 25-32d.
 7. May make recommendation to zoning commissions, planning commission, inland wetlands agencies and other municipal agencies on proposed land use changes;
 8. May, with the approval of the legislative body, acquire land and easements in the name of the municipality and promulgate rules and regulations, including but not limited to the establishment of reasonable charges for the use of land and easements, for any of its allowed purposes;
 9. May supervise and manage municipally-owned open space or park property upon delegation of such authority by the entity which has supervisory or management responsibilities for such space or property; and
 10. May exchange information with the Commissioner of Environmental Protection, and said commissioner may, on request, assign technical personnel to a commission for assistance in planning its overall program and for coordinating state and local conservation activities.

A common misconception is that these duties and abilities place conservation commission in competition with other land use agencies such as planning and zoning, which designate land use. *In reality, the duties and abilities given to conservation commissions by the State better fit the role of the "Conservation Consciousness of the Community."* The statutes, however, also place constraints on the actions of conservation commissions. If the commission enters into a grey area or is uncertain of its legal limitations, consult the Connecticut Statutes

themselves and seek legal advice. Conservation Commissions Handbook, Andrew B. Cooper, Connecticut Association of Conservation and Inland Wetlands Commissions, Inc. (3d Ed.)(1998).

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