State of Connecticut -- Dept. of Environmental Protection
Gina McCarthy, Commissioner
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An Annotated Outline:

PUBLIC HEARING PROCEDURES FOR WETLANDS AGENCIES

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Disclaimer: The opinions expressed in this document are the opinions of it's author and not necessarily the opinions of the CT Department of Environmental Protection. In addition, this outline does not constitute legal advice. The law changes over time, and legal conclusions can often be fact-specific and regulation-specific, so agency members should always confer with their own attorneys for guidance.

I. HEARINGS: FOR WHAT AND WHEN?

Prior to the opening of a hearing: Many towns have informal, pre-application conferences. Very valuable procedure, but, until recently, no case law or Statute allowing it. Now, *Bergren v. Planning & Zoning Commission of the Town of Berlin*, 30 Conn. L. Rptr. No. 6, 212 (9-24-01), says it is OK and so does Conn. Gen. Stats. § 7-159b (PA 03-184 §1). Should have regulations on this, however…

A. When to Hold a Public Hearing.

1. Inland Wetlands and Watercourses Permits: Special rules: For a "significant activity" you must; for others, you may. One Superior Court held that *any* destruction of a wetland or watercourse, no matter how small, *is* a "significant activity". *MJM Land v. Madison Inland Wetlands and Watercourses Agency*, 39 Conn. L. Rptr. No. 15, 596 (9-5-05). Note: if you hold a public hearing based on a finding that the activity may be "significant

activity, then you must find that there is "no feasible or prudent alternative" to the proposed activity. PA 96-157 added new requirements for when you can hold a public hearing besides "significant activity", including petition signed by 25 residents of town (current DEP rule). Ambiguity created: When does 30-day limit begin "date of submission"? Clarified by Public Act 98-209 and changed to 15 days from the "date of receipt" as already defined in the Statutes; now fourteen days, per Public Act 99-225, §16.

Be aware what role you are serving: Conservation Commission, Inland Wetlands and Watercourses Agency, combination? See attached article from The Habitat of January, 1999.

2. Settlement of Pending Litigation. Conn. Gen. Stats. §8-8(n) does not allow settlement of a land use appeal "unless and until a hearing has been held before the Superior Court". Procedures and notice requirements for this "hearing" were never spelled out. See detailed discussion by Judge Corradino of the procedure to be followed for settlement "hearings" in *Reed v. Branford ZBA*, 36 Conn. L. Rptr. No. 10, 392 (March 8, 2004), which has been used in settling cases pending before that Court. Effective 1-1-07, Conn. Pract. Bk. §14-7A addresses this: requires that settlement be on the posted agenda–not added the night of the meeting–and must include statement of why the settlement is being entered into. Action to enjoin settlement is not an "appeal" and not governed by time limit for appeals. *Daniel Conron, Jr. V. Gary Swingle*, 43 Conn. L. Rptr. No. 6, 204 (June 4, 2007).

Mere withdrawal, without any settlement *per se*, leaving original approval intact, does not require hearing before the court per Conn. Gen. Stats. §22a-43(d). *Mystic Active Adult v. Town of Groton*, 43 Conn. L. Rprt. No. 5, 183 (May 28, 2007). Not sure I would take the chance.

B. The Public Notice.

Location (with precision–address is best; avoid assessor's map and block numbers); what it is about; who is applicant; time, place and location of the public hearing, including address, even if everyone knows where it is (don't say "at the High School" assuming that alone is sufficient). State where documents are available for inspection and have them there too. Specify *what* the

application is. See *Belanger v. Ashford Planning & Zoning Commission*, 42 Conn. L. Rptr. No. 18, 654 (3-12-07) (two special permits for the same use had to be identified separately in the legal notice). Must use a newspaper having "substantial circulation" in the municipality. Conn. Gen. Stats. § 8-7d and 22a-42a(c)(1). "notice of the time and place of a public hearing shall be published… in a newspaper having substantial circulation". See Sorrow v. Zacchera, 24 Conn. L. Rptr. No. 1, 19 (April 19, 1999). If in doubt, advertise it again. Strongly recommend that documents in all applications be available for inspection at the time of the first legal ad. The legal ad need not contain full text of a proposed regulation amendment. *Collins v. Planning & Zoning Commission of City of Groton*, 25 Conn. L. Rptr. No. 10, 346 (11-8-99).

Note: In counting the days of publication, the terminal days are excluded (that is, the day of publication itself and the day of the hearing). *Lunt v. ZBA of Waterford*, 150 Conn. 532, 536 (1963); *Koskoff v. Planning and Zoning Commission of Haddam*, 27 Conn. App. 443, 445-48 (1992), appeal granted on other grounds, 222 Conn. 912. However, the date of "publication" of newspaper is the date when it "hit the stands", not necessarily the publication date printed in the paper itself. *Dolengewicz v. Westbrook Inland Wetlands and Watercourses Commission*, 29 Conn. L. Rptr. No. 15, 559 (July 9, 2001) (local weekly paper was actually on the stands the night before the stated publication date, validating the legal notice).

1. Continued Public Hearing: Prevailing view is that no additional publication needed as long as date, time, and place of the continued hearing are announced before the adjournment of the initial hearing. Approved in *Roncari Industries v. Planning and Zoning Commission*, 281 Conn. 66 (2007); *Buck v. Stonington Planning and Zoning Commission*, Docket No. 103213, 1994 Ct. Sup. 7347 (Superior Court, J. D. of New London at Norwich, July 13, 1994, Teller, J.); and, *Carlson v. Fire District Committee and Zoning Commission of Watertown*, 31 Conn. L. Rptr. No. 10, 355 (3-18-02). If you have time, re-advertise. Note that public hearing can be "continued" even if not formally opened. *Beeman v. Guilford Planning and Zoning Commission*, 27 Conn. L. Rptr. No. 3, 77 (7-3-00)

2. Change in Location: Typical procedure is to post a sign at the advertised location, "Public Hearing before the [name of commission] on the [name of application] being held at [location, with address and maybe even directions]". If you publish a new legal notice

with the new location, it must conform to the Statutory publication requirements. *Compformio v. Greenwich Planning & Zoning Commission*, 32 Conn. L. Rptr. No. 2, 55 (June 10, 2002, Superior Court at Stamford.

3. Special Notices: Water company for land in watersheds, adjoining towns, sometimes DEP, too numerous to list here and differ by, e.g., whether you are a "CAM" or "Gateway" town. Watch for who has to perform the notice, and be sure that copies of the notices, with certificates of receipt, are submitted for the record. Timing of notices to adjoining municipalities now codified, standardized in Conn. Gen. Stats. §8-7d for all types of land use applications. Note new requirement of P.A. 06-53: Both zoning and wetlands applications within public water supply water shed must be noticed to the water company *and* the Commissioner of Public Health. **Be aware of new PA 05-124 requiring *applicant* to notify holder of any "conservation" restriction (leave land in natural state) or "preservation restriction" (historical preservation) at least 60 days prior to filing of application.** Failure to notify permits holder of easement to appeal approval within 15 days of *actual knowledge* of decision (not date of decision) and *mandates that the approving agency revoke the approval*. Note that this applies not only to land use agencies but also expressly to Building Officials and Directors of Health.

4. Personal Notices: Some local regulations require mailed notice to abutters, posting of signs, etc. Such requirements, unlike the Statutorily-mandated published notices, are waivable if the person attends. *Koskoff v. Planning & Zoning Commission*, 27 Conn. App. 443, 446, cert. den. 222 Conn. 912 (1992); *Gourlay v. Georgetown Trust*, Superior Court, J.D. of Stamford-Norwalk at Stamford, 17 Conn. L. Rptr. 149 (June 19, 1996); *Sorrow v. Zacchera, supra; Carlson v. Fire District Committee and Zoning Commission of Watertown, supra; Fitzgerald v. Newtown Planning & Zoning Commission*, 43 Conn. L. Rptr. No. 17, 604 (8-20-07). Posting of sign on private road open to the public is OK. *Sorrow, supra.* Party giving notice has duty to inquire or follow up if mailed notices are returned unopened. *Gourlay, supra.* Zoning Board of Appeals may "vacate" a granted variance if it discovers that applicant did not provide required personal notice, if done promptly upon discovery. *Liucci v. Zoning Board of Appeals*, 27 Conn. L. Rptr. No. 17, 624 (Oct. 9, 2000).

New Public Act 06-80 creates new rules for "personal" notices: It implies that *if* a

Town requires personal notice to abutters (not a requirement), that notice shall be by regular mail with a certificate of mailing, *not* certified mail, as many towns require. Does this mean you *can't* use certified mail or only that you don't *have to*?

C. FOIC Notices.

See Conn. Gen. Stats. §1-21. File your schedule of meetings at the beginning of each year no later than January 31st. File the agenda no later than 24 hours in advance with Town Clerk; takes 2/3 votes to approve item not on the agenda. Meetings of less than a quorum is now cloudy: If a subcommittee, it is probably a meeting of the agency if it is discussing agency business because it might be deemed a "proceeding" by the Freedom of Information Commission; (Eighth Utilities case, Manchester); but if less than a quorum of the whole agency show up, it is not a meeting. *Emergency Medical Services Commission v. FOIC*, 19 Conn. App. 352 (1989); and meetings of less than a quorum to, for example, review upcoming agenda is not a meeting either. *Windham v. FOIC*, 49 Conn. App. 529 (1989), aff'd. 249 Conn. 291 (1999).

1. Special Meetings: Special meeting notice 24 hours in advance, except in case of "emergency" (whatever that is), setting forth the nature of the emergency. Conn. Gen. Stats. §1-21. Only business on the agenda shall be discussed. Notice must be delivered to members (waived if they attend or file waiver), but be careful: Just announcing a special meeting is not sufficient, even if all or objecting member(s) is/are present to hear the announcement.

2. Agenda: Describe items with reasonable completeness. For a regular meeting agency can add new items to the agenda by 2/3 vote. Necessary to do that by a separate vote even though one case says merely approving the proposal itself by 2/3 vote is sufficient. *ZBA of Plainfield v. Freedom of Information Commission*, 66 Conn.App. 279 (2001).

3. Executive Sessions: 2/3 vote required: For "personnel"; strategy and negotiations with respect to pending claims and litigation to which agency is a party; selection, purchase, lease, etc., of real estate. Can have staff there to assist you only so long as needed.

Very narrowly construed by the case law: "Personnel" means matters which an employee would expect to have kept confidential. Same with "pending litigation", which can now include threatened litigation or litigation to be brought. *Fuhrman v. FOIC*, 18

Conn. L. Rptr. 7, 253 (1/27/97), but, again, be narrow: Enfield example (commission said "pending litigation" but did not name the very controversial matter involved; FOIC held violation). But see *Fuhrman v. Freedom of Information Commission*, 243 Conn. 427 (1997) (strategy can include, e.g., hiring lobbyist, consultant reports, etc.)

4. Is this a meeting? No. *New London Planning & Zoning Commission v FOIC*, 2 Conn. Ops 613 (June 3, 1996, Maloney).

D. Application Fees. Even if not filed, treat application as "live bomb" and act on it to avoid violation of time lines for action. If the application is incomplete for any reason, such as nonpayment of fees, then deny it on that basis.

E. The Applicant/Application. Who can apply? Most regulations require owner or someone with his consent (wise provision). Holder of an easement for a sign can appeal regarding that sign: *Philip Ireland v. ZBA of Rocky Hill*, 22 Conn. L. Rptr. No. 17, 590 (October 26, 1998). See *Richards v. Planning and Zoning Commission*, 170 Conn. 318, 323 (1976) (real party in interest may apply). Issue of who is the owner–a civil matter which agency cannot determine–clouds issue of who can apply. *Ace Equipment Sales, Inc. v. Buccino*, 82 Conn. App. 573 (2004) (reversed by *Ace Equipment Sales v. Buccino*, 273 Conn.App. 217 (2005), as to who the legal owner was, not to the civil rather than agency determination) was a property case, but underlying issue was wetlands: Buccino wanted to file wetlands application, but Ace said he couldn't because he was not an owner, so property case determined who could apply for wetlands permit.

Although corporations cannot represent themselves in court, they apparently can do so before an administrative agency. *Briteside, Inc. v. Department of Health*, 31 Conn. L. Rptr. No. 5, 162 (February 11, 2002). The application form need not be any particular form or format unless the regulations specify otherwise. *Biafore v. City Council of Meriden*, 31 Conn. L. Rptr. No. 12, 446 (4-1-02).

What kind of application is it? Be sure that you have filed for the right type of application and/or that the Commission is handling it under that procedure. For example, there is a difference between an application for a declaratory ruling—a determination of jurisdiction—and an application for a regulated activity that *accepts* the agency's jurisdiction.

F. Referrals. Numerous mandatory referrals to other agencies, too many to list here, and not all apply to all towns (e.g., Coastal Area Management, Harbor Management Commission, DEP for Coastal Area Management, Regional Planning Agency, etc.). Make a list for your town. Advisory opinions by such referral agencies are not separately appealable to Superior Court. *Civie v. Planning and Zoning Commission of Orange*, 30 Conn. L. Rptr. No. 15, 568 (November 26, 2001), (Planning Commission recommendation not appealable by itself).

G. Informal Pre-application discussions: Used in many towns and now authorized expressly by P.A. 03-184. Just beware of prejudgment, even in so-called "non-binding" procedure.

II. CONDUCT OF THE HEARING

A. Sequence, etc..

Note legally required but desirable to have the proponent(s), then opponent(s), then those who do not wish to be classified as either. You must allow reasonable opportunity for everyone to be heard. Beware of: room too small, bad weather, no seats, fire code violations, late hours, etc. No case law directly on these issues, but don't take a chance. Helpful case: *Organized North Easterners & Clay Hill & North End, Inc. v. Capital City Economic Development Authority*, 30 Conn. L. Rptr. No. 3, 93 (September 3, 2001), (State DEP advertised hearing for one night and "if necessary" for a second night; major snow storm forced cancellation of first meeting, but signs were posted on the doorway and hearing was held on second night; held that hearing notice was valid).

Keeping people moving: Don't discourage or cut off--just move them along. When in doubt, let them speak! Note, however, that just being cut off does not, by itself, create standing to appeal. *Horton v. East Lyme Zoning Commission*, 40 Conn. L. Rptr. NO. 10, 353 (1-30-06). Beware of time limits on speakers, *Timber Trails Associates v. Planning & Zoning Commission*, 99 Conn.. App. 768 (2007) (3 minute time limit per speaker upheld, but only because hearing went on for 3 nights and everyone was allowed to speak again after the first "round".)

You can help people to be more effective: Explain at the outset what is going on, i.e., this is not majority rules--applicant has legal right to get what they seek if regulations are satisfied. Comments should be informational, directed to the criteria of the Regulations. May be nice to have copies of relevant sections available for people to pass around.

Note: FOIC prohibits you from requiring members of the public to "sign in" at public meetings, though it is common to request it to assist the secretary in doing the minutes or transcript. See Conn. Gen. Stats. §1-21.

B. Cross Examination, etc.

Explain to the public/applicant why cross examination and questions must be permitted, despite formality. Look for opportunity for "waiver", i.e., ask person seeking it if they would mind allowing chairman to ask the questions or other procedure that is less "Perry Mason" in style. If they say OK, can't object later. Note that refusal of witness to be cross-examined is grounds for "motion to strike" per *Fromer v. Inland Wetlands and Watercourses Commission*, 17 Conn. L. Rptr. No. 8, 259 (9/6/96), which asks commission to ignore any testimony by the witness who refused to be cross examined.

You are not bound by the rules of evidence: Hearsay is OK, but you may give it less weight.

C. Site Walks.

If there is a site walk, NO COMMENTS OR QUESTIONS. If you see something or think of a question, jot it down for later when the hearing is reconvened. If you absolutely must speak and discuss, bring a tape machine and speak into it. Best to do this prior to the opening of the public hearing (so don't need to transcribe), but you don't always have any choice. If there is a site walk while the public hearing is open, there must be legal notice or announced continuance to a date certain like any other public hearing, even if the site walk is "posted" per the Freedom of Information Act. *Grimes v. Conservation Commission*, 43 Conn. App. 227 (1996; Lavery dissenting). However, the Commission need not provide personal notice to abutters or other parties of a site visit, *Grimes v. Conservation Commission*, 243 Conn. 266 (1997), and the absence from a site walk by a Commission member does not disqualify him/her where there was no testimony at the walk, and, at the reconvened hearing, the results of the site walk were discussed by the full Commission. *Grimes v. Conservation Commission*, 49 Conn. App. 95 (1998).

Stay together. The walk must be open to the public, but it is not a free-for-all. The site walk exists only where the Commission members are walking. Can't force the Commission to view any property except what is relevant to the pending application. *Grimes v. Conservation*

Commission, 49 Conn. App. 95 (1998).

You are allowed to use your personal knowledge of a neighborhood or parcel, but say so while the hearing is open.

D. Exhibits, Letters.

Best, in contested case, to note, at the opening of the public hearing, the documents which have been received so far: can just list them by date and description, or, if you think it necessary or desirable, read them aloud (not required, however). Allow anyone who wishes to examine documents to do so, but, obviously, do not alter them--avoid making notes etc., on originals. Mark exhibits if there are a lot of them.

Unanswered question: Time to examine and evaluate technically complex material. Some case law says you can examine it at the hearing, period. (See, *Gelfman v. Planning & Zoning Comm.*, 1996 WL 24586 Conn. Super., Jan. 5, 1996), but as issues become more technical, that old rule may weaken. Safest to continue the public hearing if the applicant submits a lot of new material, especially technical material. See *Timber Trails Associates v. Planning & Zoning Commission*, 99 Conn.. App. 768 (2007), (claim was made, but Court held that material *was* made available in sufficient time to allow review. Implication is that it would be otherwise if that was not the case.)

Note that certain letters must be read aloud or decision is void.

E. Extensions.

Always get them in writing, even handwritten at the table. Specify how many days, not just "extension". Make sure the applicant understands: if you don't extend, the Commission will make its decision on what it has in front of it or call special meeting within the time limit.

III. FAIR HEARING

A. Testimony/Decorum

Cross examine witnesses under oath; ask questions and get them answered. NO QUESTIONS TO THE AGENCY MEMBERS!! You are not testifying! But make sure that you don't "testify". If you start to testify to facts or special expertise, applicant may be able to question you about it. Your task is to listen, question, consider what you hear.

Everyone must identify themselves. No case law on non-residents but can't hurt to let them

speak.

DEMAND that you be treated with respect!, especially by lawyers and other hired representatives. Feel free to table, postpone, or otherwise derail those who are rude. You are volunteers, but you exercise governmental authority and are to be addressed with courtesy and respect. Try to refer to each other and speakers with some formality: "Attorney Smith has asked . . ." Looks bad to the public and to a reviewing judge when you refer to applicant or his attorney as "John" or "Billy" or other informal or familiar references. Same with your staff: When you address him/her, can say "Craig, what do we have on this?", but when addressing audience, "Mr. Minor has assembled certain documents for the Commission . . . "

Try to keep it civil, but note no grounds for defamation for statements before agency. *Dlugolecki v. Vieria*, 98 Conn. App. 252 (2006).

Watch out for jokes: What may sound funny in person loses something when transcribed. Ethnic slur, though clearly intended as a joke (and started by the applicant's own consultant), was still grounds to sustain appeal because it created negative atmosphere. *Pirozzilo v. Berlin Inland Wetlands and Water Courses Commission*, 32 Conn. L. Rptr. No. 3, 103 (1-17-02).

B. Staff and Expert Input.

1. Staff Input:

a. Normal rule is that your staff and other objective advisors, such as State or other government agencies, can comment even after the public hearing closes (see discussion under IV.C., below); BUT, not carte blanche: Even staff cannot provide you with totally new information or raise totally new arguments not previously discussed. Staff can and should help you to evaluate what you have heard. Use common sense: the idea is to give the applicant and the public a fair chance to comment on each other and the factual and regulatory issues. If staff raises totally new material/arguments/issues, that goal is thwarted.

b. You are never bound by staff opinion; it is merely guidance and ultimate decision is yours. That is why the Commission can, if it so desires, allow a staff member with a declared conflict of interest to participate and comment, *Beeman v. The Guilford*

Planning and Zoning Commission, 27 Conn. L. Rptr. No. 3, 77 (7-3-00); same for some other town official, like the Mayor. *Kusznir v. Zoning Board of Appeals*, 60 Conn. App. 497 (2000).

c. IWWA: Cases imply that DEP is comparable to your "staff" and can comment but same cautions as above about raising new issues or new evidence. *Norooz v. Inland Wetlands Agency*, 26 Conn. App. 564 (1992).

2. Experts: Wetlands decisions are more science-based than other land use decisions, and the courts have therefore demanded a heavier reliance on the testimony of experts. Applicants and opponents, in turn, have increased their use of experts in wetlands proceedings and agencies are urged to retain their own consulting experts to help them sort out the conflicting testimony. For the purposes of the public hearing, remember this:

a. If you don't believe an expert, SAY SO DURING THE PUBLIC HEARING and say WHY; for example, testimony does not square with your own observations, or you have expertise comparable to the "expert's" or his/her testimony sounds inconsistent, etc. Law is that as long as party has notice during the hearing that credibility is under question, chance to respond or reinforce, you can reject even uncontradicted testimony of an expert. Can reject any testimony of non-experts in most cases.

b. You do not have to believe an expert's opinion about the ultimate issue before you. For example, you don't have to accept expert's opinion that wetland impact is "not significant" or traffic congestion won't be at "unacceptable levels". Such determinations are yours to make.

c. Whenever possible, get opinions on both sides of technical issue, so you have latitude. This is one of staff's central functions so that your prerogatives are preserved.

3. Last Word: Who gets the "last word"? No case law on this, so again, use common sense, but remember: applicant has the burden of demonstrating compliance with the Regulations, so, like plaintiff in court, should have last word as long as that last word does not include new material.

Wherever possible, obtain full expert opinion while the hearing is open so that you have some latitude in making the decision (below). Must say, while on the hearing, any facts or expert opinions upon which you are relying.

C. Conflict of Interest, Prejudgment.

See other Handout Materials.

D. CEPA/22a-19a Interventions.

Unclear exactly what they do. I think opportunity to speak, with or without public hearing. Certainly allow non-residents to speak. DEP advises that a CEPA intervenor has the same rights as the applicant for all proceedings before the agency, and I concur. Intervenor can raise environmental issues but also procedural issues. *Branhaven Plaza, LLC v. Branford Inland Wetlands Commission*, 22 Conn. L. Rptr. No. 9, 303 (August 31, 1998); *Animal Rights Front, Inc. v. Town Plan and Zoning Commission of Glastonbury*, 30 Conn. L Rptr. No. 20, 751 (January 7, 2002). Filing intervention cannot expand the jurisdiction of the agency beyond its existing authority. *Nizzardo v. State Traffic Commission*, 259 Conn. 19 (2002) (State Traffic Commission has no environmental authority and cannot acquire any just because an intervention is filed.) The intervenor has the burden of proving the unreasonable adverse impact which they claim, and those claims must be specific, not generic. If the claims involve technical findings, the intervenor must introduce expert testimony just like the applicant.

Note the "no feasible or prudent alternative" requirement upon intervention unless you find that activity "will not unreasonably impair public trust", etc. Case law implies, however, that "two-step" inquiry is really a circle. You can't evaluate if impairment of the public trust is "unreasonable" unless/until you know if the alternative is "feasible and prudent". So to be safe, examine both and make findings on both.

Failure of intervenor to appeal a decision or unsuccessful appeal, now appears to bar separate injunction action under Conn. Gen. Stats. §22a-16. *Fish Unlimited v. Northeast Utilities Service Company*, 254 Conn. 1 (2000) effectively overturning *Animal Rights Front, Inc. v. Plan and Zoning Commission of Glastonbury*, 23 Conn. L. Rptr. No. 8, 269 (January 18, 1999), which held to the contrary.

Can intervention alone (without other aggrievement) allow a party to appeal to Superior Court? YES: *Branhaven Plaza, LLC v. Inland Wetlands Commission*, 251 Conn. 269, 276, n.9

(1999). And no settlement without consent of the interveners. *Brycorp, Inc. v. Planning and Zoning Commission of Harwington*, 29 Conn. L. Rptr. No. 17, 647 (July 23, 2001).

E. Keeping the Record.

Under Middlesex County case *Coronella v. Planning and Zoning of Portland*; 9 Conn. L. Rptr. No. 13, 410 (Aug. 16, 1993, Higgins, J.), tape everything, even if it is not a formally advertised public hearing. My recommendation: use one tape for formal public hearings which you save for the long term, then start second tape for deliberations and non-public hearings which you tape over the next month or so. Lack of a transcript could result in a remand for new hearing or sustaining of the appeal. *Pollard v. Zoning Board of Appeals*, 28 Conn. L. Rptr. No. 12, 446 (January 29, 2001), (application was approved, so applicant could just re-apply; might be different result where denial).

REMEMBER THAT ON APPEAL, THE JUDGE WILL ONLY GET THE TRANSCRIPT OF WHAT IS SAID. Be aware of that and watch out for testimony like: "The area right here on the map is one that is of concern to me." Better to say, "The area just east of that steep escarpment is one that is of concern to me". Try to have everyone, even you, identify each time you speak, though it is a nuisance I realize. Of course, stop everything at tape change.

F. Other People Taping or Filming the Meeting.

This is allowed by FOIA, as long as not disruptive. Same for court reporters, which is actually a benefit to all parties--but don't let that intimidate you (a common purpose).

G. Who Gets to Speak ?

Common issue is if people who do not live or own property (i.e., are not electors) of the town can speak at a public hearing of the agency. No case law on this, but it can't hurt to let them (*have to* for an Intervenor; see above).

IV. MAKING THE DECISION

A. Who Gets to Vote.

1. Absent for all or part of public hearing: If you were not a member of the agency when the

public hearing opened, you can't vote, period. *Meeker v. Planning & Zoning Commission of Danbury*, 7 Conn. L. Rptr. No. 10, 13 (1992, Fuller). If you were, must listen to the tapes, review all of the documents submitted (including maps, etc.) and STATE, ON THE RECORD, THAT YOU HAVE DONE SO AND THAT YOU FEEL QUALIFIED TO VOTE. Burden then shifts to the challenger to prove you didn't. One Superior Court says that challenger must have raised the defect before the hearing closes or it is deemed waived. *MJM Land v. Madison Inland Wetlands and Watercourses Agency, supra*. If tape has a significant gap (25 minutes), that will preclude absent member from participating. *Scrivano v. Cromwell ZBA*, 26 Conn. L. Rptr. No. 18, 617 (5-29-00). Malfunctioning tape prevents the absent member from participating. *Ostrager v. Planning & Zoning Commission*, 43 Conn. L. Rptr. No. 24, 875 (10-8-07). Once deliberations begin, voting alternate remains so, even if full member returns mid process. *Weiner v. New Milford Zoning Commission*, 14 Conn. L. Rptr. No. 8, 245 (July 10, 1995); *Moskaluk v. ZBA of Watertown*, 10 Conn. L. Rptr. No. 5, 154 (November 8, 1993). Alternate not seated cannot vote or participate in deliberation. *Weiner v. New Milford Zoning Commission, Supra*.

2. Quorum, etc.: If seven-member agency, and four are present and voting, how many needed to approve/deny–three out of four (less than majority of full agency) or four out of four? No appellate case law; Statutes are silent. Only one superior court case (from Colchester) which held that IN ABSENCE OF BYLAW, majority of a quorum carries the motion. So, if you want majority of votes of full commission/agency, must adopt bylaws to that effect.

3. Tie Vote: Tie is defeat of the motion. Beware of "non-action", automatic approval, though one case said that *was* an action. *109 North, LLC v. New Milford Planning Commission*, 43 Conn. L. Rptr. No. 2, 71 (May 7, 2007). Defeat of motion to approve is a denial, per case law, but don't take the chance. Non-approval of motion to approve means there are no reasons stated or even discernable--dangerous. Inland Wetland Watercourses Commission: Time limit to act not extended by tie vote on approval motion. *Lowe v. Meriden Inland Wetlands*, 22 Conn. L. Rptr. No. 17, 592 (Oct. 26, 1998). Also note risk of conflicted member voting in what ends up as tie vote, *Limestone Business Park, LLC v. Plainville Inland Wetlands and Watercourses Commission*, 44 Conn. L. Rprtr. No. 11, 399 (1-7-08) (requiring remand for new decision).

4. Abstentions: *Biasucci v. ZBA of City of Ansonia*, 13 Conn. L. Rptr No. 3, 100 (Jan. 6, 1995) - abstaining = no vote (not affirmative vote); directly contra case of *U-Haul of Conn. v. Bridgeport Planning and Zoning Commission*, 12 Conn. L. Rptr. No. 11, 367 (Oct. 10, 1996), saying abstention = an affirmative vote. Best advice: don't abstain!

B. Decision on the Record.

Must make your decision based on WHAT YOU HEARD AT THE PUBLIC HEARING. Can use personal knowledge if it is that of a layman--readily observable--but even then, SAY IT ON RECORD SO PARTIES CAN DISPUTE IT if they want to. *Fact* provided by the public (as opposed to "we don't want it" opinions) can provide basis for decision. *Children's School, Inc. v. Zoning Board of Appeals of Stamford*, 66 Conn. App. 615 (2001). See also *Municipal Funding, LLC v. Zoning Board of Appeals*, 270 Conn. 447 (2004), (upholding denial of special exception for long-term residential drug treatment facility based on health/safety impacts raised by public). Weight can also be given to advisory agency opinions. *Heithaus v. Planning and Zoning Commission of Greenwich*, 258 Conn. 205 (2001) (P.Z.C. accepted, but was not bound by, recommendation of Historic District Commission.) Commission members should NOT EVER come up with their own research or facts after the hearing--too late. If they don't have enough information, extend the hearing or deny without prejudice (covered below).

C. Staff Input.

No new information, objective, no prejudice. Try to avoid where you can--keep it on the record. "Staff" can include disinterested public agencies, such as The Board of Education. *Daniels Hill Development LLC v. Planning and Zoning Commission of Newtown*, 26 Conn. L. Rptr. No. 10, 338 (4-3-00). Interesting because Board of Education could also be a aggrieved party with standing to appeal (e.g. approval of alcohol within 500 feet of a school), *New Haven Board of Education v. ZBA*, 26 Conn. L. Rptr. No. 16, 565 (5-15-00).

D. Use of Experts.

You cannot ignore uncontradicted expert testimony if you do not question it, so, if you have doubts, question the expert on the record. If major issue, get your own experts--ERT, Town personnel, State, UConn, etc. TAKE YOUR TIME. If you have special expertise upon

which you will rely, say so on the record (while hearing is open). You can use your own expertise. *Wasfi v. Dept. of Public Health*, 60 Conn. App. 775 (2000) (UAPA case, but analogous reasoning). Because wetlands decisions frequently turn on science-based issues that can be very technical, the agency must rely on expert testimony relative to those technical issues. If there is conflicting testimony among the experts, you can believe whichever one(s) you choose. But as noted above, you do not have to believe an expert as to the ultimate decision before you, such as how much adverse impact is "unreasonable."

E. Criteria.

1. The Record. What you saw and heard during the public hearing or allowable staff input thereafter, plus personal knowledge of the area and common sense. Ex parte Communications: Obviously, DON'T.

2. The Regulations. YOUR regulations (one case where the Inland Wetlands and Watercourses Agency that tried to use provisions in the State model regulation that they hadn't adopted--n.g.). Must make your decision based on the criteria in the Regulations; or, if variance, what is stated in the case law. Be sure to use regulatory standards to focus your discussion. Some agencies actually run down the list, which is simple and ideal. Ask, aloud, and DISCUSS, "What evidence did we hear about this criteria? What do we conclude based on that evidence? Were the criteria met?" Judges look for this as sign of your diligence and use of proper criteria. DON'T SHORT CUT! Even if decision is obvious (to you), HAVE SOME DISCUSSION to demonstrate that you thought about it. One case was lost because, after hours of testimony, Commission simply voted without discussion. Judge felt instant vote was proof that they had not based decision on evidence and regulations (bad decision, but judges are human). Plan of Development alone (no reference in zoning regulations) not valid criteria. *M&E Land Group v. Planning & Zoning Commission of the Town of Newton*, 22 Conn. L. Rptr. No. 4, 143 (July 27, 1998). But see *Irwin v. Planning & Zoning Commission of the Town of Litchfield*, 244 Conn. 619 (1998), (can use Plan of Development where expressly referenced in criteria for special exception).

3. Substantial Evidence: Not just speculation or *possibility* that criteria might no be met; must

be some evidence of *probability* that the alleged adverse impact or violation of standards will exist. *Lord Family of Windsor, LLC v. Inland Wetlands & Watercourses Commission of Windsor*, 103 Conn. App. 354 (2007). Especially the case for wetlands commissions where technical issues predominate. This is especially important for wetlands decision because of their reliance on scientific and technical issues.

4. Level of Discretion. Differs depending on the type of application that it is: legislative is highest level of discretion (adoption or amendment of regulations for zoning/wetlands map); administrative is next (acting on the applications under those regulations); ministerial is lowest (issuing permits, including site plan review). For good discussion, see *Konigsberg v. Board of Alderman*, 283 Conn. 553 (2007).

F. The Motion.

Always have a motion prepared in advance for controversial or complex application. Can and should contain findings of fact and how that relates to regulatory criteria. Get some preliminary discussion, then appoint subcommittee to work with staff to draft motion for consideration at next meeting. You may have heard not to state reasons (many town attorneys feels this way); I disagree, AS LONG AS TOWN ATTORNEY CAN BE THERE TO WORK WITH YOU ON THE MOTION. Problem is that if you state reasons, court will only examine those not search the record for others. See discussion in *Orzel v. Zoning Board of Appeals*, 33 Conn. L. Rptr. No. 19, 699 (3-3-03). There is no such thing as a motion that is too long. If plan revisions, cite to revision dates you are approving (East Haddam example: Wetlands Commission deliberately approved plans previous to final ones because they were better). If verbal representations made on the record, include them as modifications/conditions. Note that citing a reason for denial that was never raised during the hearing may be due process violation. *Forian v. Cheshire Planning and Zoning Commission*, 35 Conn. L. Rptr. No. 2, 74 (8-11-03).

Motion forms: Some towns use them, but there is no legal requirement. It is an easy way to keep track of who voted how.

For Inland Wetlands and Watercourses Agencies: Two parts to your task: your own permit (issue or deny), and, also, the "report" to Planning and Zoning Commission or Zoning Board of Appeals. The report can consist simply of the motion to approve/deny but can contain more as well. Remember to make finding re feasible and prudent alternatives if there was a

public hearing and if intervention per 22a-19a. Two part process: Is the activity one which will cause "unreasonable impairment of public trust", and, if so, is there feasible and prudent alternative? The terms "feasible" and "prudent" are now defined in PA 96-157. Statement of alternatives requirement is directory not mandatory. *Mulvey v. The Environmental Commission of the Town of New Canaan*, 22 Conn. L. Rptr. No. 19, 665 (November 9, 1998).

G. Conditions and Modifications.

Tricky area. For Inland Wetlands only, Statutes expressly authorize you to grant the permit "upon other terms, conditions, limitations, or modifications of the regulated activity which are designed to carry out the policy" of the inlands wetland act. Conn. Gen. Stats. Sec. 22a-42a(d)(1).

Too fix or not to fix: That is, add conditions which will address deficiencies in the application or just deny it based on those deficiencies. Case law here is clear: the choice is yours.

H. Denial "Without Prejudice"

I had a judge tell me that there is no such thing and that is true; but, I think it helps to communicate basis for decision as being non-substantive (procedural, incomplete, etc.). No harm in saying that if it is what you mean.

I. Reconsideration.

If notice is already published, you can't reconsider. Decisions become final when published. *Sharpe v. Zoning Board of Appeals*, 43 Conn. App. 512, 526 (1996). Even prior to publication, you need a "good reason". See *Kinney v. Inland Wetlands & Watercourses Commission of Enfield*, 29 Conn. L. Rptr. No. 13, 486 (June 25, 2001), (denied application was reconsidered and approved only because applicant's lawyer claimed that the Commission had simply made the wrong decision, not to correct errors due to oversight or "some other extraordinary reason", quoting *Sharpe.*) See, also, *Dugas v. Zoning & Planning Commission of Suffield*, 29 Conn. L. Rptr. No. 16, 585 (July 16, 2001). See variance cases below. In State administrative case, held that refusal of agency to reconsider was not appealable to Superior Court; same reasoning might apply to land use appeals. *Peter F. Sielman v. Connecticut Siting Council*, 36 Conn. L. Rptr. No. 11, 400 (March 15, 2004). "Precedent"

as binding commission action: Commission may have construed "street" to mean "through street" when measuring maximum cul de sac length and may have applied it that way before but that is not what the regulations say. *Pappas v. Enfield Planning & Zoning Commission*, 40 Conn. L. Rtpr. No. 18, 668 (3-27-07). May be different for a general practice: Commission was in the habit of approving partial bond releases at various stages of subdivision road completion but was not stopped from reversing that practice. *Grandview Farms, LLC v. Town of Portland*, 42 Conn. L. Rptr. No 8, 285 (1-1-07). See, also, *Goulet v. Chesire Zoning Board of Appeals*, 44 Conn. L. Rptr. No. 12, 430 (1-14-08) re decision differing from past decision because past decision was in error.

J. Post-Decision Notice.

Specific; also, conditions by reference or generically; some towns print the whole thing because no case law directly on point. It is expensive, but the safest way for controversial applications. Failure to publish the post-decision legal notice on time voids the decision, and, if Commission accidentally sets an effective date for a regulation amendment which is prior to or same day as publication, it cannot establish a new effective date and publish a new legal notice. *Wilson v. Planning and Zoning Commission of East Granby*, 260 Conn. 399 (2002); *Ozanne v. Darien Zoning Board of Appeals*, 28 Conn. L. Rptr. No. 9, 315 (Jan. 8, 2001). However, failure to publish the post-decision legal notice at all may still void the decision, *RBF Assoc. v. Torrington Planning & Zoning Commission*, 18 Conn. L. Rptr. No. 17, 591 (April 7, 1997), and will not be cured by the Validating Act. *Taft v. Wheelabrator Putnam, Inc.*, 55 Conn. App. 359 (1999). Publication of legal notice starts appeal process (15 days). One court has ruled that a decision to settle a pending appeal must be published, even though the standing of a party to challenge such a decision is in doubt. See *Oppenheimer v. Redding Planning Commission*, 26 Conn. L. Rptr. No. 10, 335 (4-3-00). Also note that the notice of action to the applicant must be by certified mail, not regular mail, per C.G.S. 22a-42a(d)(1), but failure merely entitles the applicant to apply again. *MacBrien v. Oxford Planning & Zoning Commission*, 25 Conn. L. Rptr. No. 12, 404 (11-22-99). *Oppenheimer v. Planning and Zoning Commission of Redding*, 23 Conn. L. Rptr. No. 14, 492 (March 1, 1999). Same case leaves open the question of whether decision to settle pending litigation must be published.

K. Filings.

No requirement to file Inland Wetlands and Watercourses permits. Bottom line: Land use agencies must develop their own filing systems for plans, with proper indexing and ability to reproduce copies. I recommend endorsement of site plans and special permit/exception plans to avoid confusion.

L. Time Limits for Decision.

Danger! Your time limits are *almost* the same as for all other land use agencies specified in Conn. Gen. Stats. Sec. 8-7d, but not *quite*. You have 65 days to act if there is not public hearing. If there is a hearing, you have 65 days to open the hearing; 35 days to close the hearing; and **35 days** thereafter to make a decision (*not 65* days like your colleagues on other commissions.) Per 8-7d, the applicant can consent to a cumulative *total* of 65 days in extensions for any or all of these time limits. This is different from prior law that allowed *each* time period to be extended by the amount of the original period. So applicant can allocate those 65 days as desired. Failing to open public hearing within time limits will not invalidate decision per *Superior Court* decision (not 100% reliable), *Wise v. Zoning Commission of Simsbury*, 36 Conn. L. Rptr. No. 14, 511 (April 5, 2004).

Decision to "reject" subdivision application as "premature" was a decision which met commission's obligation to act. *Miles v. Foley*, 253 Conn. 381 (2000). Same where vote to approve conditionally did not carry, *Wiznia v. Town Plan and Zoning Commission*, 34 Conn. L. Rptr. No. 13, 495 (June 9, 2003), same for tied vote, *109 North, LLC v. New Milford Planning Commission*, *supra.*

V. JURISDICTIONAL ISSUES

Can be complex. Generally, administrative agency has authority to determine its own jurisdiction in the first instance. *Episcopal Church of St. Paul and St. James v. Department of Public Health*, 42 Conn. L. Rptr. No. 6, 235 (12-11-06).

A. Jurisdiction to Hear/Decide the Application.

General: Often question of standing to apply for permit (not to be confused with the concept of standing to appeal the decision to Superior Court). Some local regulations require evidence of ownership or consent of the owner but that may not be appropriate in all cases, e.g., change of zoning map or text. In the absence of such regulations, ownership *per se* is not required, but, rather, a substantial interest in the permit sought. See *Gladysz v. Planning & Zoning Commission*, 256 Conn. 249 (2001).

B. Interagency Overlapping Jurisdiction.

You each exercise authority under your own Statutory grant of power as implemented by your own Regulations. Thus, approval by wetlands agency of drainage system on basis that it has no adverse impact on wetlands/watercourses does not mean Planning and Zoning Commission must approve it under provisions concerning flooding, nuisance, proper engineering practices, public works considerations. Zoning Board of Appeals' approval of gas station location does not insure issuance of Special Permit/Exception by Planning and Zoning Commission.

Note that some jurisdictions overlap in part (storm drainage), others totally (erosion and sedimentation control is under both Planning and Zoning Commission and Inland Wetlands and Watercourses Agency). Means you need to work together to avoid "catch 22" for the applicant, which undermines your credibility. Another example is open space: Board of Selectmen/State/land trust, whoever, must be willing to accept it. Open space for environmental (Inland Wetlands and Watercourses) reasons may not be the same as recreational or visual (Planning and Zoning Commission).

Statutes require SIMULTANEOUS applications to IWWA and zoning boards, but I strongly recommend that zoning and subdivision regulations require PRIOR APPROVAL by Inland Wetlands and Watercourses Agency before even APPLYING for other land use approvals. It prevents "the clock" from starting on what will probably be half-baked plan and avoids confusion, delay, and risk of closed public hearing with Inland Wetlands and Watercourses Agency comments coming in later. No case law on this.

There are pre-emption issues: Very interesting case was *Phoenix Horizon Corp. v. North Canaan Inland Wetlands and Conservation Commission*, CV 95 0068461 (Litchfield

Sup. Ct., Pickett, J.), where applicant filed application for wetlands permit. Proposed activity included a detention pond. Applicant then applied for DEP permit for pond which, per C.G.S. 22a-403(b), is exclusive jurisdiction of the State DEP, preemption local review. Meanwhile, local Commission denied the application. On appeal held that applicant shouldn't have applied for pond if claim was state preemption and Commission had no choice but to act on it. Can be Federal preemption. *Hackett v. JLG Properties, LLC*, 41 Conn. L. Rptr. No. 24, 883 (10-23-06), (Federal jurisdiction over hydroelectric projects preempts local zoning authority, such that structures under Federal jurisdiction not subject to local zoning control), but note that FAA guidelines did not preempt local wetlands regulations. *Ventres v. Goodspeed Airport, LLC et al*, 37 Conn. L. Rprtr. No. 5, 197 (7-19-04), affirmed 275 Conn. 105 (2005) .

Also, note relationship between local review of subdivisions and impacts of drainage on downstream. State highways Public Act 99-131. Also, issues related to Telecommunications Act of 1996 and the Fair Housing Act amendments of 1989 outside the scope of this outline.

C. Agency/Administrative Overlap.

Same issues. Sanitarian's approval of septic system as meeting Public Health Code doesn't mean Inland Wetlands and Watercourses Agency must approve it re impact on wetlands/watercourses or that Planning and Zoning Commission must approve it under broader "public health" provisions or that Zoning Board of Appeals must grant variance for lot size, setback, etc. Sanitarian, Fire Marshall, and other local officials, or State, can only approve what is within their authority; you approve/deny what is in yours. DOT curb cut permit does not mean you have to approve it, etc. See *C. Bruno Primus v. Coventry Planning & Zoning Commission*, 35 Conn. L. Rptr. No. 13, 479 (10-27-03) (Commission denied subdivision based on denial of septic system by sanitarian; subdivider could not appeal Commission decision because he did not appeal sanitarian's decision to the Health Dept.; and regulations required sanitarian's approval for all lots prior to subdivision approval).

D. Inland Wetlands and Watercourses Jurisdiction.

Special case. Case law holds your Inland Wetlands and Watercourses Agency can require owner/user to appear and present evidence re extent of jurisdiction. *Wilkinson v. Inland Wetlands and Watercourses Commission of Town of Killingworth*, 24 Conn. App. 163 (1991).

Wetlands agency cannot condition permit on bond to remedy possible damage to domestic wells of abutters–not within wetlands jurisdiction. *Lorenz v. Old Saybrook Inland Wetlands & Watercourses Commission*, 37 Conn. L. Rptr. No. 3, 94 (July 5, 2004). Probable that in comparable situations, other agencies can as well (planning commission in subdivision situation, §8-26; see below). Can review activities in upland areas to determine and regulate adverse impacts on wetlands and watercourses. *Aaron v. Conservation Commission*, 183 Conn. 532 (1981); *Lizotte v. Conservation Commission of Somers*, 216 Conn. 320 (1990); *Queach Corporation v. Inland Wetlands Commission*, 28 Conn. L. Rptr. No. 2, 44 (11-13-00), affirmed in *Queach Corp. v. Inland Wetlands Commission of Branford*, 258 Conn. 178 (2001). One case says agency can do this even without regulations to that effect. Can regulate uses of uplands if evidence of impact on wetlands/watercourses, *Bain v. Inland Wetlands Commission of Oxford*, 78 Conn. App. 808 (2003), and regulations authorize it, *Prestige Builders, LLC v. Inland Wetlands Commission*, 79 Conn. App. 710 (2003).

Enforcement: Best if wetlands enforcement officer issues "notice of violation" rather than "cease and desist" in cases of question; if he is sure, go ahead with Cease & Desist. Note, however, that cease and desist order by zoning enforcement officer is appealable only to Zoning Board of Appeals, order by wetlands agent only to the agency. See changes in PA 96-157.

Note: Inland Wetlands Agency has no jurisdiction over open space preservation but can recommend to Planning and Zoning (and should); applicant may find it prudent to designate, in order to avoid full review of activity which is not needed, proposed, or intended. Commission can consider probable/foreseeable activities even if not shown on the plans. *Peterson v. Oxford*, 189 Conn. 740 (1983); and *Glasson v. Portland*, 6 Conn. App. 229 (1985).

Note limitation on use of wildlife impacts as basis for denial, *Avalonbay Communities, Inc. v. Inland Wetland Commission of Wilton*, 266Conn. 150 (2003), the holding of which was limited by P.A. 04-209: Agency can consider habitat impacts in the wetland or watercourse, just not in the "upland review area". See article by Gregory A. Sharp, Esq., in *The Habitat*, Vol. XVI, No. 2 (Spring, 2004).

E. Route of Appeal

Any challenge to administrative jurisdiction must be raised by a timely administrative appeal. *Cannata v. Department of Environmental Protection*, 215 Conn. 616, 622 n. 7 (1990); *Wallingford Board of Education v. State Department of Education*, 18 Conn. L. Rptr. No. 8, 290 (February 3, 1997); *Battistoni v. Zoning Board of Appeals of Morris, supra.*

F. Interpretation of Regulations

Agency can construe or interpret ambiguity in its regulations, and courts will give due consideration to that interpretation if reasonable. *LePage Homes, Inc. v. Planning and Zoning Commission*, 74 Conn. App. 340 (2002); *Alecta Real Estate Greenwich, Inc. v. Planning and Zoning Board of Appeals*, 33 Conn. L. Rptr. No. 8, 277 (12-9-02); *Pelliccione v. Planning & Zoning Commission*, 64 Conn. App. 320 (2001), cert. den. 258 Conn. 915. But agency cannot, under guise of "interpretation," make words say what they do not say. Examples from the zoning context may illuminate the range of wetlands discretion to interpret regulations:

- *Newman v. Planning & Zoning Commission of Avon*, Docket No. HHD CV 06 4024608 S (J. D. Of Hartford), Petition for Cert. granted (area of the "parcel" includes only the land within the subject subdivision, not "parent" or "root" parcel, despite long-standing interpretation to that effect).
- *Trumbull Falls, LLC v. Planning & Zoning Commission of Trumbull*, 97 Conn. App. 17 (2006), (one mile separating distance is measured "as the crow flies" even though the Commission had measured by street distance in the past).
- *Pappas v. Enfield Planning & Zoning Commission*, 40 Conn. L. Rptr. No. 18, 668 (3-27-08) (measurement of cul de sac length from "nearest intersection" could mean intersection with another cul de sac, not just a through street).
- *Smith Bros. Woodland Management, LLC v. Planning & Zoning Commission of Munroe*, 88 Conn. App. 79 (2005) ("The manufacture, compounding, assembling and treatment, including machining and sintering, of articles made principally from previously prepared materials" includes creating mulch).

Despite deference to local agency, interpretation of regulation is still a function of the court. *Field Point Park Ass'n. V. Planning & Zoning Commission of Greenwich*, 103 Conn. App. 437 (2007), (area of lot covered by private road cannot be counted toward minimum lot requirement). Agency can change its interpretation, but if they do, reviewing court will accord their interpretation less deference than otherwise. *JMM Properties, LLC. v. Hamden Planning*

& Zoning Commission, 36 Conn. L. Rptr. No. 23, 878 (June 7, 2004). See also *Keith Mallinson v. Planning & Zoning Commission of Prospect*, 43 Conn. L. Rprt. No. 6, 210 (June 4, 2007). For change in practice (bond releases), see *Grandview Farms, LLC v. Town of Portland*, above.

G. Agency Jurisdiction Over Validity of Statutes, Regulations

An administrative agency cannot rule on the legal validity of the regulations or statutes under which it operates; only a court can do that. *Fullerton v. Administrator, Unemployment Compensation Act*, 280 Conn. 745 (2006).

VI. SUBSTANCE

A. Wetlands Permit.

As noted above, a wetlands agency has the authority to determine its own jurisdiction in the first instance. Such a determination is usually described in the local regulations as a "Declaratory Ruling," but whether it is in your regulations or not, the authority to determine jurisdiction is inherent. Determinations of jurisdiction could concern the scope of a claimed exemption (permitted activity or "as of right" activity), whether an activity was within an upland review area, or (if you are using the language of the current DEP model regulation) whether the activity is likely to impact wetlands or watercourses. If a permit is required, it may be a "significant activity" or not a "significant activity." Former editions of the DEP model wetlands regulations referred to these as "Plenary" and "Summary" applications, but the current edition (4th Ed.) merely describes submission and procedural requirements for significant activities and those that not significant activities. Note that since, by statute, a "significant activity" requires a public hearing, you should determine, as early as possible, if the proposed activity MAY constitute a significant activity. Such a preliminary finding is not binding--the agency may, after a public hearing, find that the activity is not "significant'--but that triggers the public hearing requirement. Because the preliminary determination of significant activity is not binding, DO NOT PUBLISH A LEGAL NOTICE OF THAT DECISION. It is not appealable.

B. Affordable Housing Applications.

CALL THE TOWN ATTORNEY!! People who never cared about the environment in their lives will be urging you to abuse your wetlands powers to deny affordable housing. Don't fall for that! Most of the adverse wetlands decisions of the past decade have been in the context of affordable hosing applications. TREAT THESE APPLICATIONS JUST LIKE ANY OTHERS!

C. Enforcement.

You can file cease and desist orders in the land records per CT Gen. Stats. Sec. 22a-44. *Cabinet Realty v. Planning and Zoning Commission of the Town of Mansfield*, 17 Conn. App. 344 (1989); can obtain prejudgment remedy, *State of Connecticut v. Philip Morris, et al.*, 23 Conn. L. Rptr. No. 6, 192 (January 4, 1999); *Town of East Lyme v. Wood*, 54 Conn. App. 394 (1999).

A decision not to enforce regulations is not appealable. *Davis v. Environmental Commission of New Canaan*, 42 Conn. L. Rptr. No. 19, 691 (3-19-07). Enforcement or non-enforcement is a discretionary function of local government, and a municipality cannot be compelled, even by contract, to commence enforcement action against a violation. *Oygard v. Town of Coventry*, 30 Conn. L. Rptr. No. 7, 252 (October 1, 2001), (In settlement of claims of reduced property values, Town entered into contract with neighbor to enforce zoning violation against adjacent owner, then failed to honor that contract. Held that contract was void and unenforceable.)

VII. HOW YOUR ATTORNEY CAN HELP YOU; HOW YOUR ATTORNEY CAN HELP US HELP YOU

A. Involve us EARLY.

If you know a controversial application is coming, have your attorney present at the hearing from the beginning; want to work with staff to draft the motion(s); want to work with staff re structure (not content) of input. This is key to success: be PROACTIVE to produce strong case, discourage appeals, avoid spending the money to defend them.

B. Don't Be Shy.

If a question arises during a meeting, call a recess and telephone your town attorney at home. If can't reach him/her or he/she requests you not to call after hours, table it, if there is time. One phone call to knowledgeable land use attorney can solve most problems in less than 15 minutes; cheaper than two years in court, especially when you end up losing due to silly procedural glitch and have to do the whole thing again.

C. Do Your Homework.

I was at a commission meeting where none of the members even had a copy of their Regulations with them, heard staff members quoting outdated statutory sections, have seen plans with violations right on the face of them that no one noticed, heard commission members who had not read their own regulations and did not know what was in them, saw voluminous material handed out to the commission members the night of the meeting so there was no way they could read it in advance, saw a commission member break the seal on envelope of material that WAS mailed out in advance. No lawyer can fix these mistakes. READ YOUR REGULATIONS. ATTEND COURSES AND SEMINARS. READ NEWSLETTERS FROM CACIWC, THE DEP, THE BAR, CAPA, , ETC.

D. Don't Knowingly Violate the Law.

May seem obvious, but I have heard commission members say, "I don't care what the law says, my mind is made up!" Keep cool. If things are out of hand, or its late and everybody is freaking out, or commissioners are fighting each other, table or take a recess or move to another topic and then drop back to that one later. When people get mad, they say things on the record that are damaging.

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