CONNECTICUT LAND USE EDUCATION AND RESEARCH

RUNNING A MEETING

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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. Conn. Gen. Stats. § 7-159b (PA 03-184 §1) also authorizes. Should have regulations on this, however. If local regulations allow the commission to actually *approve* a "preliminary plan" during the "informal discussion", can it be appealed? No, per *Gerlt v. South Windsor Planning & Zoning Commission*, 42 Conn. L. Rptr. No. 12, 431 (1-29-07); *but*, on appeal, held that Gerlt was denied due process because in later site plan application, Commission precluded testimony attacking the "preliminary plan," so Gerlt was deprived of opportunity to attack the plan at *any* stage of approval. *Gerlt v. South Windsor Planning and Zoning Commission*, 290 Conn. 300 (2009). See also *Lorenz v. Old Saybrook Planning Commission*, Docket No. MMX CV 05 4002715 S (Middlesex Superior Ct.) (approval of preliminary subdivision plan in connection with open space subdivision special permit is not illegal "two-step" subdivision approval.)

A. When to Hold a Public Hearing.

Can hold one anytime on any topic; don't let anyone tell you that you "can't" hold a hearing. Even under PA 96-157, "public interest" measure for Inland Wetlands and Watercourses Agencies. Interesting case of *Belanger v. Planning and Zoning Commission of Guilford*, 64 Conn. App. 184 (2001): Commission voted to hold public hearing even though none was required but never advertised it. They held a meeting at which the public was allowed to speak, then approved the subdivision. Held that the Commission could change its mind after the vote and hold a meeting, not a public hearing, and fact that public was allowed to speak does not transform the meeting into an illegal, un-noticed public hearing.

However, holding public hearing won't extend your time limits on a site plan approval where no hearing is required. *October Twenty-Four, Inc. v. Planning and Zoning Commission*, 35 Conn. App. 599 (1994). *Clifford v. Planning and Zoning & Commission*, 280 Conn. 434 (2006) (Commission did not abuse discretion by not holding a public hearing for site plan for dynamite bunker when issues of public concern were thoroughly addressed).

1. Zoning Board of Appeals: Easy. Must hold a public hearing on everything. However, if new application is the same as one previously considered and denied, Board can refuse to even set a public hearing because it could not approve the application absent a change in circumstances. *Grasso v. ZBA of Groton Long Point*, 27 Conn. L. Rptr. No. 8, 270 (8-7-00). On appeal, this decision held to apply to variances only, not site plans: *Grasso v. Zoning Board of Appeals*, 69 Conn. App. 230 (2002).

2. Planning and Zoning Commission: By Statute, must have public hearing for zone and regulation changes, adoption or amendment to Plan of Development, resubdivision, special permit/exception, subdivision if your regulations require it (not by Statute). Site plan review you may. No public hearing required for *determination* of subdivision, *Warner v. Salisbury Planning & Zoning Commission*, 43 Conn. L. Rptr. No. 23, 845 (10-1-07); and, on appeal, application of one-year statute of limitations of 8-8(r) for appeals based on defective notice upheld, even where *no* notice published, 120 Conn. App. 50 (2010) . Note that per Public Act 03-177, amending Conn. Gen. Stats. §8-3 and 8-7d(d), no public hearing is required for a zone change initiated by the Commission itself. But I wouldn't recommend it in light of *Gaida v. Planning and Zoning Commission*, 108 Conn. App. 19 (2008) (public hearing required for commission-initiated zone change.)

3. Inland Wetlands and Watercourses Agency: 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. But note *Unistar Properties, LLC v. Putnam Inland Wetlands Commission*, 46 Conn. L. Rptr. No. 14, 509 (January 12, 2009) (if no substantial evidence of adverse impact, then no requirement to show feasible and prudent alternatives; appealed on other grounds, see Supreme Court citation, *infra*.) *Accord*, *Nason Group, LLC v. Haddam Inland Wetlands Commission*, 51 Conn. L. Rptr. No 12, 440 (5-16-2011). 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.

4. 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).

Wetlands: 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. Rptr. No. 5, 183 (May 28, 2007). Not sure I would take the chance.

B. The Public Notice.

Content: 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). Accord, *Cassidy v. Zoning Commission*, 116 Conn. App. 542 (2009) (application for Special Exception to expand church was noticed, but simultaneous application for Special Exception to allow off-site parking was not).

Publish Where: Must use a newspaper having "substantial circulation" in the municipality. Conn. Gen. Stats. §8-3 "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. If zone change: text/map must be in Town Clerk's Office at least 10 days prior for inspection. This is *mandatory* and must be *complete* application, including map or where zoning map change. *Bridgeport v. Planning & Zoning Commission of Fairfield*, 277 Conn. 268 (2006) (map amendment in Clerk's office referenced assessor's map not on file with Clerk; not valid). 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).

Publish When: Twice, the first one not less than 10 nor more than 15 days before the hearing, the second not less than 2 nor more than 10 days before (the so-called "15-10-2 rule.") 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).

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.); *Carlson v. Fire District Committee and Zoning Commission of Watertown*, 31 Conn. L. Rptr. No. 10, 355 (3-18-02); and *Carberry v. Stamford ZBA*, 01-CBAR-0911 (10-16-2001, J.D. Stamford-Norwalk at Stamford). 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)

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.)

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 *except* wetlands decision after public hearing (35 days, not 65). 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 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. Codified as Conn. Gen. Stats. §47-42d.

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 or has actual knowledge of the hearing. *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). *Schiavone v. Urbain, 53 Conn. L. Rptr. No. 22, 833 (7-16-12)* states that only notices to abutters are waivable, but posting of signs is a jurisdictional defect and not waivable, citing to Wright v. ZBA, below. The author considers this a mis-reading of Wright, which held that the failure to post the sign was a jurisdictional defect for the Board (hence justifying revocation of the variance), not a jurisdictional defect for the Court on appeal.

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. *Wright v. ZBA,174 Conn. 488 (1978); Liucci v. Zoning Board of Appeals*, 27 Conn. L. Rptr. No. 17, 624 (Oct. 9, 2000).

Public Act 06-80 created 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*? Also requires the creation of a "registry" for notice of any planning or zoning

regulation or boundary amendment initiated by the commission–not private applicants–and requirement to provide "notice" (no idea what kind) to the public telling them about the registry. Names must be kept on the registry for three years after its creation (what if you request to be on it later?) The Act says that there is no *civil* liability for failure to notify–which there wouldn't be anyway–implying that it *would be* grounds for appeal if a party failed to receive the requested notice. A mess.

Do you have to provide notice to abutter/owner within 100 feet if that is in *another state?* Maybe. *Abel v. Planning & Zoning Commission*, 297 Conn. 414 (2010) (owner within 100', but in *New York*, had standing to appeal. By analogy, that owner might be entitled to personal notice if local regulations so require.)

C. Application Fees. Even if not filed, treat application as "live bomb" and act on it to avoid automatic approval. Beware: Superior Court found no basis for application fee in appeal of ZBA of ZEO decision, *A&M Towing & Recovery, Inc. v. ZBA of Town of Newington*, 16 Conn. L. Rptr. No. 4, 412 (3-25-1996).

D. The Applicant/Application.

Who Can Apply? 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). 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 (10-26-1998). 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 in part by *Ace Equipment Sales v. Buccino*, 273 Conn. 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.

Does owner have sufficient property rights to file the application? Again, commission can't adjudicate title, but must have evidence that applicant has or is reasonably likely to obtain necessary rights. *Lorenz v. Old Saybrook Planning Commission,* Docket No. MMX CV 05 4002715 S (Middlesex Superior Ct.) (applicant needed easement from State, but presented evidence that it could be obtained even though it ultimately wasn't); *Gerlt v. Planning & Zoning Commission of South Windsor*, 290 Conn. 313 (2009) (evidence before commission was that necessary easement would be obtained from the Town, even though it ultimately wasn't.)

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. Compare: *Balf v. Planning & Zoning Commission of the Town of Manchester*, 79 Conn. App. 626 (2003), (Applicant filed the application as a special permit and Commission treated it as such and denied it based on that level of discretion; Court decided it was really a site plan approval, and, based on *that* level of discretion, no authority to deny, so must approve); and *A. Aiudi & Sons, LLC, v. Planning & Zoning Commission of the Town Plainville*, 267 Conn. 192 (2004), (Applicant filed the application as a site plan approval and Commission treated it as such and denied it based on that level of discretion; Court decided it was really a special permit application, and, based on *that* level of discretion, Commission did have authority to deny). Hard to understand how the Court can rewrite history of how an application was filed and processed. But done again in *Richardson v. Zoning Commission*, 107 Conn. App. 36 (2008) (commission decided application was a "farm" and hence site plan review; court said it was "equine facility" and hence special permit.)

Characterizing what should be a special permit application as a site plan application carries the risk of automatic approval that would not otherwise have been available. See *Arigoni Bros., LLC v. Planning and Zoning Commission of Haddam*, 27 Conn. L. Rptr. No. 18, 660 (1-016-2000) where an application that *should have been filed* as a special permit was, instead, filed as a site plan and was not acted upon within the Statutory time frames for a site plan; held, automatic approval.

Compare these cases to *Lallier v. Zoning Board of Appeals*, 119 Conn. App. 71 (2010) where commission approved excavation as a site plan, and then decided later on that it should have been a special permit, and had Z.E.O. issue a Cease and Desist Order. Court said can't do that. Difference from *Aiudi* and *Balf* seems to have been that there was no appeal of the site plan approval, so it was final.

E. 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 (11-26-2001), (Planning Commission recommendation not appealable by itself).

II. CONDUCT OF THE HEARING.

For the controversial hearing:

Democracy can be messy, and no one ever said it was efficient. It just seems to be better than anything else out there. Public hearings can bring out both the best and the worst in people and you need to control them.

What does the law require?

The United States and Connecticut Constitutions guarantee every citizen the right to "procedural due process." *Substantive* due process means that the *decision made* was in accordance with Constitutional principals, but *procedural* due process means that the decision was made *in the right way*. They are separate guarantees of Constitutional rights and both must be accorded.

The touchstone of procedural due process when applied to public hearings and other proceedings is "fundamental fairness." Fundamental fairness has been the subject of thousands of court cases, but in essence it means that the proceeding was conducted in a way that protected the rights of all parties. That would include obvious things like allowing everyone to be heard, not considering *ex parte* communications (communications made outside the hearing room), disclosing the true nature of the proposal, using the applicable regulations as they are written, and having decision-makers (commissioners) who are objective

and open-minded.

It also means conducting hearings in such a way that no one is improperly intimidated, harassed, or disadvantaged in the presentation of their position. When the topic is hot, and the crowd gets hot, and the meeting gets hot, you must expect trouble.

Who cares if the crowd gets nasty?

You do, whether you know or not. First, your decisions are subject to appeal if an "atmosphere of hostility" is allowed to pervade the proceedings. *Pirozzilo v. Berlin Inland Wetlands and Water Courses Commission*, 32 Conn. L. Rptr. No. 3, 103 (1-17-02): The *applicant's* consultant made a joke about his own client's Italian background; a commission member joked back. Held that an atmosphere of hostility had been created against people of Italian ethnicity which prevented the applicant from obtaining a fair hearing. This was an administrative appeal seeking to overturn the commission decision, not a civil case for money damages.

In *Thomas v. West Haven*, 249 Conn. 385 (1999) two commission members were openly hostile to the applicant, using foul language and threats, trying to deny the application before the public hearing was even completed, and demanding information not authorized by the regulations. Thomas brought a civil rights claim–a civil suit for money damages–against the town, claiming that he had been denied procedural due process in the way that the hearing was conducted on his application. West Haven defended on the ground that the two commission members acted on their own, did not reflect the conduct of the majority of commission members, and the town could not be held liable because of two bad apples in the barrel. Held: You can be, and *are* liable for bad apples in the barrel. The public hearing was characterized by an "atmosphere of hostility" that prevented Thomas was getting a fair hearing on his application. The town has an obligation to assure procedural due process–fundamental fairness–in every proceeding. If they fail to do so, they *are liable*. So chairmen, staff, whoever–you owe it to your town and its taxpayers to deal with and control conduct that creates an "atmosphere of hostility."

This is especially critical where the flashpoint is a civil right issue all its own: religion, free speech (adult book stores or other entertainment uses or political signs), ethnic background, race, disability. Examples I have experienced:

- Islamic Cemetery before a wetlands commission.
- Affordable housing where minorities may be expected to reside.
- "Half-way" house for persons recovering from traumatic brain injury (TBI)
- Clinic for disabled persons recovering from alcohol or drug addiction.
- "Half-way" house for juveniles transitioning out of prison.
- Treatment facility for persons suffering from Alzheimer's Disease
- Synagogue in residential zone.
- Christian prayer meeting in residential zone.

If you allow prejudice to flare at a public hearing, you are inviting the overturn of your decision and, even worse, money damages against your town.

Be Prepared

If you suspect trouble, have police on hand, preferably in uniform. Have more than one if any doubt at all and more on call.

Have a large room–oversized, in fact. Packing people together contributes to their anonymity and encourages

heckling or shouting out (the "voice from the crowd.")

Have a board or other way to display plans, etc. It avoids having people shout out, "I can't see that."

Have an AV system. People will sit in the back row and then shout, "I can't hear." Invite persons with hearing problems to sit in the front of the room (they won't.)

Set out the rules of the game before the applicant ever stands up: "We will hear from the applicant; then questions from the Commission and staff; then those in favor; then those opposed; then those who don't wish to be categorized as in favor or opposed. There will be no shouting, applause, booing, heckling, or other disturbance. Those who break these rules will be ejected from the meeting. There will be no exceptions." Explain what kind of proceeding this is (wetlands, zoning, etc.) and what the criteria for review are. Have copies of those criteria available for distribution and ask people to address their comments to those criteria. If need be, state expressly that the religion, race, ethnicity, etc. of the applicant or ultimate occupant/user is irrelevant and no such comments will be entertained. And stick with it!

Keep the Lid On

Nothing spirals out of control faster than a mob mentality. You must react swiftly and decisively to the *very first person* who gets out of order. Shout them down at once and explain that the next person who interrupts the proceeding will be ejected. And then *do it* and have the uniformed personnel to carry out the threat. Be sure that they are ready, willing, and able to perform that function.

If things go crazy, stop the whole show and continue the public hearing to another night. And have more police on hand.

Keep Your Own Troops in Line

Chairmen: Your own colleagues may be your worst enemy if they are playing it up for the crowd, are bigoted people, or are just plain stupid. You have to keep *them* in line, too. If you don't think you can handle that role, have your town attorney present to do it for you. The town attorney doesn't have to run for office and (usually) doesn't live in your town. Let him/her be the lightning rod for misdirected energy. We're used to having people mad at us! We can handle it.

If you have a nut case on your commission, deal with it: A stern lecture from the First Selectman, Town Attorney, party chairman–whoever can reach the jerk. If nothing works, you have to force that person off if your local ordinance or charter provide a proceeding for doing so. Obviously, when their term expires, they shouldn't be reappointed but don't expect the chief executive to know that. The rest of you have a duty to tell the appointing authority that this nut has got to go. Be sure it's nonpartisan, nonpersonal. It's just that the nut is setting you up for trouble.

Keep the Applicant In Line

Some applicants are "trolling" for bigoted remarks just so that they can bring a civil rights claim later on. They may actually try to incite the crowd or goad you into saying something stupid. Make the rules just as clear to the applicant as to the crowd: Address the application and the regulations–nothing else. If they refuse to do so, table the item to the end of the meeting or the next meeting. I prefer the former because the applicant has to pay all their experts to wait around while you go through hours of routine applications, minutes approvals, staff reports, wedding/birth/death announcements, etc. Next time, they'll stick to the point.

Basic Rules

- All comments are directed to the commission. There is to be no argument among proponents and

opponents, applicants and neighbors, etc. If someone demands a right of cross examination, deal with that in an orderly way, but otherwise, no communications except to and from the chair. Even cross examination is under the chair's control, like the way a judge controls it in the courtroom.

- **Never** allow *anyone* to interrupt a member of the commission, especially the chairman. This goes for applicants or the public. You are volunteering your time to sift through this stuff and you deserve to be treated with respect. *Demand* that you be treated with respect. This is especially true for professionals (lawyers, engineers, consultants, etc.) who should know better. It is *your* meeting and *you* are running it. Not them.

- No one speaks–including commission members–unless and until they are recognized by the chair.

- No applause, no booing, no heckling, no shouting out, no disruption. **No show of hands.** It's not a popularity contest!

- Keep people on the point. As soon as they wander off, bring them back or tell them they're finished for now ("compose your thoughts and you can speak again later.")

- Don't run too late at night. As people get tired, they get cranky and harder to control. Better to meet once a week from 7 pm to 9:30 pm than once every two weeks from 7 pm to midnight. It's the same number of hours, but a different dynamic.

- If it's likely to be bad, have your attorney there to assist you.

A. <u>Sequence, etc.</u>

Not 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 (Noiseux v. CT Lean Energy Fund, FIC 2009-254), 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 (9-3-2001), (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 meeting (Conn. Gen. Stats. §1-21), though it is common to request it for a speaker to assist the secretary in doing the minutes or transcript.

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 (9-6-1996), 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. Under case construing a particular statute (not zoning case) *reliance* on hearsay evidence to reach the decision is insufficient; it must be corroborated by other evidence. *King v. Administrator*, 46 Conn. L. Rptr. No. 19, 697 (February 16, 2009) (involved unemployment compensation hearing).

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 and you cannot avoid that by going out in less-than-quorum groups. *Clow v. IWWC of Sharon*, 2005 FOIC 2005-196 (full commission walked site but excluded the public, ruled a Freedom of Information violation); *In re Zanowiak v. IWWC of Seymour*, 2000 FIC 2000-676 (quorum of commission arrived, but split into small groups to exclude the public, ruled a Freedom of Information violation). Compare to *Davis v. IWWC of Naugatuck*, 1998 FIC 97-431 (only two members visited the site, period, and reported what they saw to the others; not a violation). Open to the public does not create 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, supra.*.

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. The Planning Commission's report on a zone change, where separate planning and zoning commission. *Gupta v. Zoning Board of City of Stamford*, 25 Conn. L. Rptr. No. 20, 690 (1-24-00). In other cases, failure to read the report aloud will not void the decision.

Boris v. Garbo Lobster Co., Inc., 58 Conn. App 29 (2000), cert denied on 9/15/2000, (failure to read DEP Commissioner's CAM report, per C.G.S. 22a-104e).

E. Subpoenas.

Only one case, brand new and only Superior Court, says that an attorney can subpoena parties to appear, with documents ("*duces tecum*"), before a ZBA, per authority of Conn. Gen. Stats. §51-85; chairman can determine, item by item, if the documents sought are relevant to the issue before the Board. Also cites to the power of the ZBA chairman to "administer oaths and compel attendance of witnesses." Conn. Gen. Stats. §8-5(a). Keep an eye on this topic. *Brandon v. Boyden*, 40 Conn. L. Rptr. No. 18, 653 (2-9-09). *Brandon* does follow UAPA precedent, e.g., *Connecticut Handivan, Inc. v. Hunter's Ambulance Service, Inc.*, 20 Conn. L. Rptr. No. 15, 549 (1-5-1998)(authority if intervenor to subpoena witnesses before State proceeding). In State context, held to be denial of due process not to delay hearing until subpoena issue can be resolved by the courts, and same rule could apply to municipal hearings. *Venuti v. State of Connecticut Department of Liquor Control*, 10 Conn. L. Rptr. No. 3, 61 (10-5-93). Note that municipal agencies alone (without an attorney) can't issue or enforce subpoenas. *City Council v. Hall*, 180 Conn. 243 (1980).

F. 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. No need to reward jerks!

III. FAIR HEARING.

A. Testimony/Decorum

Public hearings must be conducted in accordance with Constitutional Due Process and with "fundamental fairness." The two tests are not necessarily coterminous. *Megin v. Zoning Board of Appeals*, 106 Conn. App. 602, 607-608, cert. den. 289 Conn. 901 (2008). See discussion in the variance context, *Vichi v. Zoning Board of Appeals*, 51 Conn. L. Rptr. No. 19, 679 (7-4-2011).

Due Process includes the right to 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).

Persons in attendance at an evening meeting or hearing cannot demand copies of documents to be made for them right then and there because the Freedom of Information Act grants that right "during regular office of business hours." *Planning and Zoning Commission v. Freedom of Information Commission*, 48 Conn. L. Rptr. No. 21, 776 (2-15-10) (now on appeal).

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. ZBA appeals: Note special case for ZBA appeal of ZEO: contrary to the normal situation, the ZEO cannot speak after the close of the public hearing when his/her decision is subject of the appeal. *Pizzola v. Planning & Zoning Commission*, 167 Conn. 202 (1974). Even where non-substantive comments were allowed, court admonishes against it. *Megin v. Zoning Board of Appeals*, 106 Conn. App. 602, 611, fn 8 (2008). No deference to the ZEO.'s decision; the Board's review is "*de novo*", meaning from the beginning.

d. 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:

The Commission does not have to perform a "gatekeeper" function regarding experts the way a court would, i.e. determined if the expert is really qualified to testify as such. *Sunset Manor Association v. Town of Branford,* 55 Conn. L. Rptr. No 2, 53, p.55 (2-11-13).

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. See *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission*, 293 Conn. 93, 120-121 (2009). Odd case re testimony on property values, where commission denial of wind turbine was

upheld because they didn't have to believe results of national property value impact studies because it wasn't expert testimony, experts not present to be cross examined, and national studies not shown to be applicable to Litchfield County. *Optiwind Corporation v. Goshen Planning & Zoning Commission*, 2010 SL 4070580 (9-15-10). So applicant filed again with three appraisers, whose reports were ratified by town's own appraiser, but neighbors' appraiser made conclusory statement about lowered property values, which statement did not conform to the national standards for appraisal practice; held that commission could disregard testimony of applicant's appraisers--who followed the national standards--and believe the testimony of the appraiser who didn't. Cert. Granted, but then withdrawn. *Optiwind v. Goshen Planning & Zoning Commission*, Docket No. CV 09-4008507-S (J.D. Litchfield.)

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. But applicant cannot introduce new evidence or arguments during the "last word." See *Sunset Manor Association v. Town of Branford,* 55 Conn. L. Rptr. No 2, 53, p.55 (2-11-13). (Held that final argument did not contain 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 materials in this book.

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. 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). Can be filed in legislative proceeding (zone change). *Connecticut Post Limited Partnership v. New Haven Development Commission*, 27 Conn. L. Rptr. No. 2, 53 (6-26-00). But 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.) Local commission may be authorized by its regulations to consider environmental issues in a site plan review, allowing intervenor to present evidence on such impacts. *Joshua's Tract Conservation and Historic Trust, Inc. V. Zoning Commission of Town of Windham*, 36 Conn. L. Rptr. No. 7, 239 (February 16, 2004). But see *Diamond 67 v. Planning & Zoning Commission*, 44 Conn. L. Rptr. No. 9, 314 (12-17-07) (no intervention in mandamus action to compel approval where commission exceed site plan approval time limits).

Allegations of "unreasonable adverse impacts" must be specific and must be supported by substantial evidence, *Fort Trumbull Conservancy, LLC v. New London*, 135 Conn. App. 167 (2012). See excellent analysis of this case and lessons to be drawn from it by Attorney Janet Brooks, *The Habitat*, Vol. 24, No. 3.

Note the "no feasible or prudent alternative" requirement upon intervention unless you find that activity "will not unreasonable 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 zoning 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).

Allegations of “unreasonable adverse impacts” must be specific and must be supported by substantial evidence. Fort Trumbull Conservancy, LLC. v. New London, 135 Conn. App. 167 (2012). See excellent analysis of this case and lessons to be drawn from it by Atty. Janet Brooks, The Habitat, Vol. 24 No. 3.

Note also that interventions can be filed to protect historic structures per C.G.S. §22a-19a. Such intervention is available even if the structure is under active consideration for listing on the National Register of Historic Places. *Hill/City Point Neighborhood Action Group v. City of New Haven*, 27 Conn. L. Rptr. No. 6, 206 (7-24-00). Although intervention is limited to raising environmental issues, its use is not limited to agencies reviewing environmental decisions–any land use decision. *The Connecticut Post Ltd. Partnership v. New Haven City Plan Commission*, 28 Conn. L. Rptr. No. 7, 249 (Dec. 18, 2000); also, 27 Conn. L. Rptr. No. 17, 621 (Oct. 9, 2000).

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. Lack of a transcript could result in a remand for new hearing or sustaining of the appeal. With Public Act 05-287 §47, all zoning and planning agencies must record everything, public hearing or not, whenever an application is involved before the agency (site plan, subdivision, whatever). 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). Note contrary holding about remanding for new hearing in *Edwards v. ZBA*, 53 Conn. L. Rptr. No. 12, 472 (5-7-2012).

Minutes: It is said that “history belongs to those who write it,” but don’t try to be excessively creative! See Crisman v. Zoning Board of Appeals, 137 Conn. App. 61, 65 (2012), where deliberations weren’t taped and 2 months later the Board “corrected” the minutes to state the reasons for the decision–the itself Court put the word “corrected” in quotation marks.

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. No case law on this, but it can't hurt to let them (*have to* for an Intervener; 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, under *Meeker v. Planning & Zoning Commission of Danbury*, 7 Conn. L. Rptr. No. 10, 13 (1992, Fuller). Oddly, Judge Fuller's treatise *Land Use Law and Practice*, 3d ed., §47:1, indicates the opposite. *Meeker* was not followed (or cited) in *Seventeen Oaks, LLC v. Middletown ZBA*, 51 Conn. L. Rprtr. No. 6, 226 (April 4, 2011) (allowing newly appointed board member to review transcripts etc. and vote.) Same for wetlands in *Executive Auto Group et al. v. Meriden IWWC*, CV 094036906S (2/5/2010) (wetlands commissioner not on commission for public hearing, but allowed to become familiar with record and vote). The *Meeker* rule seems dead, and good riddance.

If you were absent, 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).

Alternates can participate during the public hearing phase of proceeding, but once deliberations begin, alternate not seated cannot vote or participate in deliberations. *Komondy v. Zoning Board of Appeals*, 127 Conn. App. 669 (2011; *Weiner v. New Milford Zoning Commission*, 14 Conn. L. Rptr. No. 8, 245 (7-10-1995). Once deliberations begin, voting alternate remains so, even if full member returns mid process.) *Weiner v. New Milford Zoning Commission*, *supra*; *Moskaluk v. ZBA of Watertown*, 10 Conn. L. Rptr. No. 5, 154 (11-8-1993).

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. Zone Changes: *Burndy v. Milford Planning & Zoning Commission*, 17 Conn. L. Rptr. No. 10, 361 (Sept. 23, 1996) - Majority of full Commission for zone change. Also, *Thomaston Savings Bank v. Zoning Commission of City of Waterbury*, 26 Conn. L. Rptr. No. 13, 433 (April 24, 2000) (two yes votes + one abstention = failure to approve zone change by majority of five-member commission). ZBA is always four out of five, including a vote to amend a previously imposed condition, *Fleet National Bank v. ZBA of Winchester*, 54 Conn. App. 135 (1999). Defeat of motion to deny does not constitute approval. *Wittemen v. Redding Zoning Commission*, 21 Conn. L. Rptr. No. 15, 517 (May 25, 1998).

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;) overturned on appeal because the motion wasn't really an approval anyway. 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. Rptr. 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!

5. Extraordinary Majority: Note that all ZBA decisions must be four out of five even for a special permit/exception. Same is true for a decision to modify a previous variance or condition attached thereto. *Fleet National Bank, Trustee, v. ZBA of Town of Winchester*, 54 Conn. App. 135 (1999). Not the case for motor vehicle location decisions. See below.

6. Ex Officio Members: Per CGS 8-19, the First Selectman/Mayor, Town Engineer, or Director of Public can be "ex officio" members of the Planning Commission. Sometimes, by local charter or special act, the same is the case for the zoning commission. What power does such a status entail? Per *Borer v. Board of Education, City of West Haven*, 34 Conn. L. Trib. No. 20, 751 (7-28-03), that includes the ability to make a motion. The decision relies on *Ghent v. Zoning Commission of the City of Waterbury*, 220 Conn. 584 (1991).

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).

Note that, for the most part, you are stuck with the record on appeal. A court can't "remand" the matter back to the agency to obtain more evidence just because one party feels that they wanted to say more than they did. *Graziano v. Southbury Planning and Zoning* , 20 Conn. L. Rptr. No. 6, 198 (10-27-1997).

For odd situation, see *Schiavone v. Urbain*, 53 Conn. L. Rptr. No. 22, 833 (7-16-12) where allegation was that petition submitted in support of variance application contained forged signatures. Held not to invalidate the variance where the appeal period had passed. Query: Would it support invalidating the variance upon a timely appeal?

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. 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. Appellant could not use discovery on appeal to get into the record statements allegedly made by application two years after the approval was decided. *Brandon v. Zoning Board of Appeals*, 51 Conn. L. Rptr. No. 19, 707 (7-4-2011).

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.). *In Estate of Casimir Machowski v. Inland Wetland Commission*, 137 Conn. App. 830 (2012) cert. den. 307 Conn. 921 (2012) agency found violations of the Stormwater Quality Manual and used that as a basis for denial. "The guidelines do not themselves have the force of law, and although they may contain a set of beneficial recommendations, nonadherence does not in itself imply a likelihood of adverse impact on wetlands." 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 criterial 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. Substantial evidence requires expert testimony for technically complex topics, and mere concerns do not equal substantial evidence. *Fanotto v. Inland Wetlands Commission*, 108 Conn. 235 (2008), affirmed 293 Conn. 745. The fact that something could happen is not the same as that it probably will. *Estate of Casimir Machowski v. Inland Wetland Commission*, 137 Conn. App. 830 (2012) cert. den. 307 Conn. 921 (2012) (denial based on possibility that detention pond would fail and cause damage to wetlands but no evidence that would happen.)

Same reasoning would apply to zoning decisions: *Wesfair Partners, LLC. City Plan Commission*, 55 Conn. L. Rptr. No. 6, 216 (3-11-2013), where denial based on traffic was not supported by testimony from either the applicant's traffic engineer or the commission's own. Case also refused to accept off-site speeding as a ground for denial because that's an enforcement matter, not zoning.

Cannot use a condition to obtain post-approval evidence which was necessary to make a finding of regulatory compliance in the first instance. *Finley v. Inlands Wetlands Commission of Orange*, 289 Conn.

12 (2009). Commission can deny application as incomplete where applicant does not submit substantial evidence sufficient to find compliance. *Unistar Properties, LLC. V. Conservation & Inland Wetlands Commission*, 293 Conn. 93 (2009). Burden is on the applicant to provide evidence to support approval. *Id.*, pp. 124-127. Compare *Finley* to *Haines v. Brooklyn Planning & Zoning Commission*, 2010 WL 4351727 (10-4-10), where commission approved Wal-Mart with condition delegating rather extensive design changes to staff, but subject to final approval by the commission; approval and delegation upheld.

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). Historic District Commission. Has discretion. See *Morena v. Historic District Commission*, 50 Conn. Sup. 398 (2007). WPCA: Have broader discretion that zoning commissions, *Forest Walk, LLC v. Water Pollution Control Authority*, 44 Conn. L. Rptr. No. 9, 328 (12-7-07).

5. "Consideration" of the Report of the Inland Wetlands Agency: See *Weinstein* discussion below. Referral back to the wetlands commission will not necessarily be required for changes to the plans during the zoning/planning review process. *Vine v. Planning & Zoning Commission*, 122 Conn. App. 112 (2010) (original plan showed a house and kennel, but revised in zoning to delete the house with no other changes; held no need for second referral to wetlands); *Newman v. Avon Planning & Zoning Commission*, Docket No. HHD CV-06-4024608-S (unpublished; on remand from Supreme Court, held that widening of drainage channel to become a "watercourse" did not require referral back to wetlands.)

6. Miscellaneous: The existence of zoning violations on a property is not grounds to deny a subdivision for that property, *Garrison v. Planning Board of Stamford*, 66 Conn. App. 317(2001), on the grounds that the zoning violation was not inherent in the plans submitted. Regardless, if the Commission is going to attempt a denial on this basis, it is best to include a provision in the subdivision regulations expressly authorizing such denial for zoning violations on the parcel (a point not discussed by the Appellate Court in Garrison). Also, the local agency must assume that state laws and regulations are valid and cannot rule that they are unconstitutional. Only a court can do that. See, *Town of Canterbury v. Rocque*, 25 Conn.

L. Rptr. No. 20, 695 (1-24-00) (Town cannot attack Constitutionality of State regulation); (*Town of Canterbury v. Rocque*, 78 Conn. App. 169 (2003) (reversed and remanded, town decision was entitled to judicial review).

7. Procedural: If the use requires a Special Permit/Special Exception, so does accessory use. *Donovan v. Putnam*, 18 Conn. L. Rptr. 17, 602 (4-7-97)

E. 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: Commission deliberately approved plans previous to final ones because they were better). Staff can't fix an inadequate motion by adding more reasons for denial later on. *Cacace v. Branford Inland Wetlands Commission*, 49 Conn. L. Rptr. No. 2, 39 (3-22-10).

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 ZBA: Be sure to describe the scope of the variance granted. Refer to a plan where there is one (and there should always be one) and limit variance to what is shown on it. Where ZBA granted yard variance for one structure, was held to reduce that yard for any/all other structures within the reduced yard. *Dodson's Boatyard, LLC v. Planning & Zoning Commission*, 77 Conn. App. 334, cert. den. 265 Conn. 909. Accord, *112 Washington Street, LLC v. ZBA of Norwalk*, 43 Conn. L. Rptr. No. 6, 197 (June 4, 2007), (verbal representation by application before board was not binding unless made an express condition of variance). Even worse, see *Anatra v. ZBA of*

Madison, 127 Conn. App. 125 (2011): applicant signed variance application form, which said under the signature, all capital letters, "THE PLANS SUBMITTED WITH THE BUILDING APPLICATION MUST BE THE SAME AS THOSE SUBMITTED WITH YOUR VARIANCE APPLICATION." Got variance, built house with "suspended" french doors at second level; then added deck not shown on variance plans but *conforming* to rear setback. Z.E.O. said ZBA must approve the change, appealed, affirmed by ZBA, but overturned by the Appellate Court, based on *Dodson's Boatyard*–conformance to submitted plan was not an *express* condition of the variance approval. Cert. Granted, 301 Conn. 902 (2011). **Overturned,** 307. Conn 728 (2013): scope of variance to be determined based on entire record. See also *Barton v. Westbrook ZBA*, 52 Conn. L. Rptrs. No. 15, 553 (12-5-11) where ZBA interpreted the scope if its own previously-granted variance to overturn cease and desist order; ZBA decision upheld on appeal.

For Planning and Zoning Commission: Same issues as with *Dodson's* case (say what you mean). Once you approve the application, can't go back and decide you didn't mean it. *Lallier v. Zoning Board of Appeals*, 119 Conn. App. 71 (2010).

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 typically consists of simply of the motion to approve/deny but can contain more as well. However, a recent Superior Court case held that the "report" must be *a separate and distinct statement identified as such*. *Weinstein v. Madison Inland Wetlands Agency*, 46 Conn. L. Rptr. No. 21, 756 (March 2, 2009); reversed on appeal, 124 Conn. App. 50 (2010) (failure to "report" does *not* invalidate agency decision). 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). If you find that there is a feasible and prudent alternative, *must* deny the application or condition approval on *one* of the identified alternatives. *DeSilver v. North Branford Conservation Commission and Inland Wetlands Agency*, 51 Conn. L. Rptr. No. 16, 599 (6-13-2011) (commission found that there were three feasible and prudent alternatives, but instead of denying, approved the application based on condition that applicant

revise to reflect one of the three. Held that commission had to deny, make suggestions about the three alternatives as guidance to applicant, and that applicant had to return with new application reflecting the selected alternative.)

F. Conditions and Modifications.

Tricky area. Except for Inland Wetlands, Statutes don't even authorize "conditions", only "modifications", so use that term whenever you can. Zone changes cannot be conditional at all, though possible exception now for affordable housing. *Kaufmann v. Zoning Commission*, 232 Conn. 122 (1995). Variances can be conditional, especially to achieve "harmony with the purpose and spirit of the regulations".

Don't rely too much on the condition: sometimes, judge will strike down the condition but leave the approval intact, as the trial court did in *Reid v. Lebanon ZBA*, 235 Conn. 850 (1995), ("Life use only" illegal condition and severed from variance). Same for special permits, *Gozzo v. Simsbury Zoning Commission*, 46 Conn. L. Rptr. No. 3, 110 (10-13-08). Question is whether the conditions are "integral" to the approval, and, hence not separable from it. *Kobyluck v. Planning & Zoning Commission of Montville*, 84 Conn. App. 160 (2004), (upholding conditions imposed on gravel pit and finding that they were integral to the approval, contrary to trial court conclusion). Variances cannot be personal, per CGS §8-6(b), Public Act 93-385. Note that in most cases, once applicant accepts conditions without appealing, they are stuck with them and cannot challenge them in a later enforcement action or permit renewal. *Upjohn Co. v. ZBA*, 224 Conn. 96 (1992); *Spectrum of Connecticut, Inc. v. Planning and Zoning Commission*, 13 Conn. App. 159 (1988); *Ike, Inc. v. Town of East Windsor*, 20 Conn. L. Rptr. No. 19, 666 (February 2, 1998); *L.A. Development v. Sherwood, Or.*, 741 So. 2d 720 (Lg. Ct. App. 1999), cert. Den. (U.S. Jan. 18, 2000). If condition/modification is the heart of the application, you may want to deny the application instead (if you have the evidence).

For subdivisions at least (probably other decisions, as well), the commission has the discretion to modify the application to bring it into conformance with the regulations or to simply deny due to a noncompliance, even if it is a minor one. *Krawski v. Planning and Zoning Commission of Town of South Windsor*, 21 Conn. App. 667 (1990), cert. den. 215 Conn. 814.

Also, fair hearing issues can arise: When conditions/modifications become too numerous or too far-reaching, applicant or opponents may claim that application as approved is so different, they should have had the chance to comment on "new" (i.e. extensively revised) proposal. No case law on this, and we don't want to be the

test case. But see *109 North, LLC v. Planning Commission*, 111 Conn. App. 219 (2008), where motion to "modify and approve" was such a wholesale redesign of the subdivision as to constitute a new application; so tie vote on that motion was not "action" on the *pending* application.

Be sure conditions are authorized: to allow year-round occupancy of a college. For example, a variance could not be conditioned on the continued occupancy of the applicant. *Reid v. Lebanon ZBA*, 235 Conn. 850 (1996). But limitation on "no rental" was valid because it applied to any owner. *Gangemi v. Fairfield ZBA*, 54 Conn. App. 559 (1999) [reversed because zoning regulations were amended to allow all other cottages in the zone to be occupied year round, 255 Conn. 143 (2001)]. Board cannot condition on a subject governed by a State agency, e.g., hours of operation. *Kenyon Oil Company, Inc. v. Planning and Zoning Commission of Hamden*, 18 Conn. L. Rptr. 11, 392 (2-24-97), (hours of operation of a convenience store cannot be condition of site plan). See also, *Sacred Heart University, Inc. v. ZBA of the City of Bridgeport*, 21 Conn. L. Rptr No. 10, 346 (April 20, 1998).

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. But beware: a condition can't substitute for evidence that was required in order to make a finding of compliance, *Finley*, above.

G. 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. See *Unistar Properties, LLC v. Putnam Inland Wetlands Commission*, 46 Conn. L. Rptr. No. 14, 509 (January 12, 2009) (Commission requested information on wildlife and applicant refused, saying there won't be any. Court said t hat's not the applicant's call to make; information was sought to inform that determination; remanded the application back for consideration of that information.)

H. Permit to the Land, Not the Applicant.

Especially confusing for ZBA: permit is to the APPLICATION NOT THE APPLICANT. "Hardship" is to the land, not the owner or applicant. Means you cannot rely on identity of the applicant ("Joe Smith always does good work, so no problem."). Permit/approval can be sold to new owner with the land so don't rely on verbal assurances, generalities, "not to worry", etc. Make sure everything is on the plans or in the motion and CLEAR.

Verbal statements made by the applicant not displayed on the plans: if they are important, put in the regulations or the approval motion; still risky.

I. Statement of Reasons.

The general rule is that where the Statutes require that the commission state the reasons for its decision (and there almost always do), the requirement is directory rather than mandatory. The result is that the failure to state reasons for the decision on the record will not invalidate the commission's decision and the court will search the record to find reasons to support that decision. *However*, if the local regulations mandate a statement of reasons, case law indicates that the Court *will* invalidate the decision for failure to state the reasons of decision. See *Gillespie v. Montville Inland Wetlands Commission*, 37 Conn. L. Rptr. No. 6, 222 (7-26-2004); *Ahlberg v. Stratford Inland Wetland Commission*, 50 Conn. L. Rptr. No. 6, 218 (10-4-10); and *Northern Heights v. Clinton Inland Wetlands and Watercourses Commission*, 52 Conn. L. Reptr. No. 21, 786 (7-18-11), *Ahlberg v. Inland Wetlands and Watercourses Commission*, 2010 WL 3025622 (7-6-10) for three wetlands cases; *Marella v. Planning & Zoning Commission*, 52 Conn. L. Rptr. No. 19 (1-9-2012) for a coastal site plan application for four wetlands cases; and *Gross v. Planning & Zoning Board of Appeals*, 171 Conn. 326 (1976) for a ZBA variance case. The lesson: Do not include a requirement to state reasons in your regulations.

J. 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). 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).

"Reconsideration" can arise in other contexts: Approval of Coastal Site Plan constitutes a finding of zoning compliance (since it is a zoning process) and estops a subsequent challenge to the legality of the proposed use. *Bishop v. Guilford ZBA*, 92 Conn. App. 600 (2006). See also, *Horton v. East Lyme Zoning Commission*, below. Decision by ZBA to approve liquor store as site plan approval could not be challenged when ZEO. issued Certificate of Zoning Compliance, where neighbor claimed that original decision should have been a *special permit*, not a site plan. The ZEO. could only consider if the liquor store had been built in accordance with its approved site plan; neither he nor the Board could reconsider the original decision to treat the application as a site plan. *Mohler v. Suffield ZBA*, 42. Conn. L. Rptr. No. 21, 793 (4-2-07), replacing earlier opinion at 42 Conn. L. Rptr. No. 11, 410 (1-22-07).

"Reconsideration" on extension of time: Commission can't add more conditions to an approved special permit when it comes in for a mere extension of time (presume same result for site plan or subdivision), absent change in circumstances, Handsome, Inc. v. Planning and Zoning Commission, 55 Conn. L. Rptr. No. 7, 267 (3-18-13).

<u>"Precedent" as binding commission action:</u> 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. Rptr. 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 estopped 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*, 117 Conn. App. 333 (2009), cert. Den. 294 Conn. 909: decision differing from past decision was OK because past decision was in error. See *Vanghel*, supra, for discussion of inconsistent approach to interpretation of a regulation.

For good discussion of reconsideration in the context of two successive applications (appeals in this case), see *Madore v. Haddam ZBA*, 54 Conn. L. Rptr. No. 14, p. 519, 522 (11-5-12).

K. 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 Zoning Commission accidently sets an effective date 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). (Judgment of the appellate court reversed and remanded with direction to dismiss plaintiff's original appeal for lack of aggrievement. *Taft v. Wheelabrator Putnam, Inc.*, 255 Conn. 916 (2000). Note different result for *legislative* decisions, where validating act can cure a notice defect, *Hayes Family Limited Partnership v. Planning & Zoning Commission*, 98 Conn. App. 213 (2006), cert. den. 281 Conn. 916 (2007) (overturning *Taft* for legislative decisions, i.e., zoning amendments). If file second notice of decision, that starts the appeal period. *Graziano v. Southbury Planning and Zoning Commission*, 18 Conn. L. Rptr. 13, 465 (3-10-97).

Decision to extend time within which to complete subdivision is appealable decision so publish notice of it. *Flateau v. Planning and Zoning Commission of Sherman*, 23 Conn. L. Rptr. No. 17, 579 (March 22, 1999). Signing (endorsement) of final subdivision "mylars" or recording of those mylars is not appealable decision so *don't* publish notice of it. *Carlson v. East Haddam Planning and Zoning Commission*, Docket # CV 05 4003677 S (J. D. Of Middlesex, McWeeny, J.) 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. 8-26, but failure merely entitles the applicant to apply again. Whoopee. *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.

L. Filings.

Zone change amendment MUST BE FILED WITH TOWN CLERK with effective date, EVEN IF IT IS EXACTLY THE SAME AS PRE-HEARING FILING. Special Permits/Exceptions have to be filed to be effective (no Statutory time limit). Subdivisions have time limits for endorsement and filing but very unclear under current law. Site Plans/Zoning Permits/Certificate of Zoning Compliance: no filing requirement but beware. Lack of filing creates trouble for future enforcement. 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.

Variances must be recorded with the Clerk per Conn. Gen. Stats. §8-3d but held that failure to file does not invalidate the variance. *Heritage House Associates v. Charles Street Associates, LP*, 1 Conn. Ops. 985, September 11, 1995 (Booth, J.).

M. Time Limits for Decision.

Now standardized, for the most part, in Conn. Gen. Stats. § 8-7d for zoning by PA 03-177: 65 days to act if no public hearing; 65 days to hold public hearing; 35 days to close public hearing; then 65 days to act after public hearing except for wetlands, which remains at 35 days to act, as before. Applicant can consent to extension of any/all of the time period, provided total extensions do not exceed 65 days (different from before). 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). Note that automatic approval applies to site plans and subdivisions by a planning or zoning commission, but not to Special Permits/Exceptions, variances, ZEO appeals, zone changes, etc., or actions by other agencies. *R & R Pool and*

Patio, Inc. V. ZBA of Ridgefield, 102 Conn. 351 (2007), (even site plan application has no automatic approval when ZBA is reviewing agency or planning and/or zoning commission). Just because applicant has to file a site plan as part of a Special Permit/Exception application does not transform such an application into a site plan application. *Center Shops of East Granby, Inc. v Planning and Zoning Commissions*, 253 Conn. 183 (2000), effectively overruling *SSM Associates Ltd. Partnership v. Plan and Zoning Commission*, 211 Conn. 331 (1989); *Lauver v. Planning & Zoning Commission*, 60 Conn. App. 504 (2001). See also, *North American Family Institute v. Litchfield Planning & Zoning Commission*, 28 Conn. L. Rptr. No. 18, 643 (March 12, 2001), (failure to timely close public hearing on special permit and site plan does not produce automatic approval). Superior Court held that even where site plan should have been automatically approved by failure to act, Court still has discretion to reject application for Writ of Mandamus, *Jalowiec Realty Associates v. Planning and Zoning Commission,*, 38 Conn. L. Rptr. No. 12, 644 (2-28-05), (site plan application did not include required sewer permit and plan did not comply with regulations, and so mandamus denied on the "public interest" principle); but reversed by *Jalowiec Realty Associates v. Planning and Zoning Commission of City of Ansonia*, 278 Conn. 408 (2006), (plaintiff was entitled to writ of mandamus).

However, be safe: Never require or accept a "site plan application" form in conjunction with a Special Permit/Exception. Note that if use actually requires a Special Permit/Exception, but Commission erroneously accepts the application as a site plan review, automatic approval will apply under *Arrigoni Bros. v. Planning and Zoning Commission*, 27 Conn. L. Rptr. No. 18, 660 (Oct. 16, 2000). Compare to *A. Aiudi & Sons, LLC v. Planning and Zoning Commission of Town of Plainville*, 72 Conn. App. 502 (2002), where applicant filed site plan application but Court determined that it was, in fact, a special permit application and reviewed it under that standard. *Aiudi* seems to contradict Arrigoni decision. Appellate Court did the same thing in reverse in *Balf Co. v. Planning & Zoning Commission*, 79 Conn. App. 626 (2003). *Aiudi* was affirmed at 267 Conn. 192 (2004). See also, *Mohler v. Suffield ZBA* above.

N. Effective Dates:

A zoning map or text amendment should state the date upon which it becomes effective, which date cannot be earlier than the date of the post-decision legal notice. This means that a permit application which relies on the adoption of a zone change or amendment cannot be granted the same right that the map change or

amendment adopted because that change or amendment will not yet be effective. *Eighth Utilities District v. Manchester Planning and Zoning Commission*, 27 Conn. L. Rptr. No. 7, 240 (7-31-00).

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: Applicant must have standing to apply. See above. Agency must have jurisdiction to hear the application and/or to impose its regulations, and jurisdiction must be established before the merits of the issue will be reached. *Ross v. Planning and Zoning Commission*, 118 Conn. 55 (2009). Jurisdiction cannot be waived, such as by filing an application that you didn't need to file. *Id.*, p. 60.

Zoning: Statutory limitations, such as on manufactured houses or family day care homes, per Conn. Gen. Stats. § 8-2. See, *Ridgefield Planning and Zoning Commission v. Ridgefield Zoning Board of Appeals*, 31 Conn. L. Rptr. No. 19, 703 (5-20-2002). Protection extended to Community Residences, 8-3e, per PA 05-28, §56. Also, municipality *may* regulate outdoor wood-burning furnaces, PA -5-160. *Hacket v. J.L.G. Properties, LLC*, 285 Conn. 498 (2008) (construction over Candlewood Lake exempt from zoning under Federal Power Act).

Regulation of adult entertainment uses *can* be a zoning function (even though many towns do it by ordinance). *VIP of Berlin, LLC v. Town of Berlin*, 44 Conn. L. Rptr. No. 2, 70 (10-22-07).

Private entity is not exempt from zoning merely because it is performing a State function or program. *Community Renewal Team of Greater Hartford, Inc. v. Planning and Zoning Commission of City of Shelton*, 19 Conn. L. Rptr. No. 6, 223 (June 9, 1997). Land owned by one town in another is not exempt from "host" town zoning regulations. *City of Hartford v. Town Council of West Hartford*, 35 Conn. L. Rptr. No. 7, 258 (9-15-03).

Zoning Commission cannot require a special permit for a subdivision just because of the number of lots that the subdivision is to contain. *Lord Family of Windsor, LLC v. Planning & Zoning Commission*, 288Conn. 730 (2008), contra result if it were a special permit, *Goldberg v. Zoning Commission*, 173 Conn. 23 (1977) (one retail store on one lot is not the same use as a shopping center with multiple retailers).

ZBA: The full agency must make the decision; the chairman cannot "screen" the applications. *Grasso v. Zoning Board of Appeals*, 69 Conn. App. 230 (2002). ZBA *can* hear appeal of Special Exception decision of Planning & Zoning Commission *if local regulations so provide*. *Jewett City Savings Bank v. Franklin*, SC17499, 280 Conn. 74 (2006). Note contrary result for site plan decisions per P.A. 02-74, §2, amending C.G.S. §8-8(b). For ZEO appeals, see E below.

ZBA has jurisdiction to construe the terms of a stipulated judgment to which it was a party. *Hasychak v. Zoning Board of Appeals*, 296 Conn. 434 (2010).

B. Interagency Overlapping Jurisdiction.

Local Overlaps in General: 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/Wetlands/Subdivision: 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.

Zoning/Subdivision Regulations: Planning Commission cannot adopt lot requirements that exceed zoning regulations–planning commission is usurping the authority of the zoning commission. *Lewis v. Planning and Zoning Commission of the Town of Ridgefield*, 76 Conn. App. 280 (2003). Bad decision because it is logical to impose a higher standard for new lots than for existing ones.

Planning and Zoning Commission/Zoning Board of Appeals: Zoning Board of Appeals' approval of gas station location does not insure issuance of Special Permit/Exception by Planning and Zoning Commission. Note that before Board can approve location for gas station etc., any required Special Permit/Exception must be granted by the zoning commission. *Sun Oil Co. v. ZBA of Hamden*, 154 Conn. 32 (1966); and *Clark Heating Oils, Inc. v. ZBA*, 159 Conn. 234 (1970). Land left over as "other land of" the developer in a subdivision and not approved as a building lot could not obtain variance to validate the lot; lot was not a legal nonconforming lot for lack of subdivision approval. *Cimino v. ZBA*, 117 Conn. 569 (2009).

State/Federal Overlaps: There are preemption issues: Local noise ordinances ruled pre-empted by State regulations (per 22a-67, *et. seq.*), although noise is one factor which commission can consider in reviewing applications. *Berlin Batting Cages, Inc. v. Berlin Planning and Zoning Commission*, 76 Conn. App. 199 (2003). 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. See *Watertown Fire District v. Woodbury IWWC*, 46 Conn. L. Rptr. No. 4, 188 (10-2-08) (removal of sediment from a reservoir was "operation of a dam in connection with public water supplies" and hence exempt.) Compare to *Ross v. Planning and Zoning Commission*, 118 Conn. 55 (2010), where jurisdiction held *not* waived just by filing application. See interesting case of *Sams v. Connecticut DEP*, 47 Conn. L. Rptr. No. 14, 531 (June 29, 2009), where owner built seawall without local *or* State permits, then argued before the Town that it was under *State* jurisdiction, and argued before the State that it was *Town* jurisdiction. Court held that despite precise location of "high tide line" was unclear, part of the wall was under DEP jurisdiction which justified order to remove it *all*. Also, note relationship between local review of subdivisions and impacts of drainage on downstream. State highways Public Act 99-131. See also *Rapoport v. Zoning Board of Appeals*, 301 Conn. 22 (2011) (city lacked zoning jurisdiction over improvements to dock that were subject only to State permitting and regulation.)

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. Rptr. No. 5, 197 (7-19-04), affirmed 275 Conn. 105 (2005). Compare to *Tweed-New Haven Airport Authority v. Town of East Haven*, No. 08–0597 (D. Conn.), 28 Mun. Lit. Rep. 207 (11-15-08) (local wetlands, zoning, and flood control board enjoined from interfering with Federally mandated and funded runway project). Re Federal preemption over Conn. Gen. Stats. § 22a-16 environmental claims based on increased radioactive discharges, *Burton v. Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542 (2011).

Also, issues related to Telecommunications Act of 1996 and the Fair Housing Act amendments of 1989 outside the scope of this outline.

Zoning/Liquor Control. Licenses for various forms of sale of alcoholic beverages require that the local zoning enforcement officer certify that the location of the proposed license conforms to local zoning. Thus, the Liquor Control Commission can serve as an additional route of enforcement for zoning violations involving the sale of alcohol, but this creates another overlap. See, e.g, *Hayes Properties-Newington*, 53 Conn. L. Rptr. No. 22, 826 (7-16-12) (local requirement for submission of a site plan for a special permit is satisfied by the submission of the original site plan for the shopping center in which the liquor store is to be located.) For discussion of non-conforming uses and service of alcohol, see *Sound View Property Management v. Old Lyme Zoning Board of Appeals*, 2012 WL 2160189 (Conn.Super.)

C. <u>Agency/Administrative Overlap.</u>

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). Owner can't just perform the activity based on a self-proclaimed exemption. *Canterbury v. Deojay*, 114 Conn. App. 695, 708 (2009;) *Rizzuto, Jr. v. Environmental Protection Board of Stamford*, 51 Conn. Rptr. No. 6, 202 (4-4-2011.) In both cases, the validity of the claimed "farm" exemption was questioned. See also, *Taylor v. Conservation Commission*, 302 Conn. 60 (2011) (no filling of wetlands, even for a road that is "directly related to the farming operation"). However, cleaning accumulated debris out of an existing ditch in connection with a farm is exempt. *Taylor v. Conservation Commission*, 54 Conn. L. Rptpr. No. 17, p. 656 (12-3-12).

Often a question of by what procedure a property owner can challenge wetlands jurisdiction: must the owner file for a determination by the local agency and appeal an unfavorable decision, or can they go straight to court in a declaratory judgment action? See excellent discussion in *Stephanoni v. Environmental Protection Commission of Darien*, 54 Conn. L. Rptr. No. 13, 513 (10-29-12) (inland wetlands regulations adopted to regulate activity in and around tidal pond).

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 <u>if</u> 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).

Indian Tribal Lands. Superior Court holds that tribal lands are subject to Inland Wetlands and Watercourses regulations, *Kent Inland Wetlands and Watercourses Commission v. Rost*, 50 Conn. L. Rptr. No. 19, 694 (1-17-2011, Pickard, J.)

E. ZBA Appeals of Z.E.O. Decisions/Orders.

Conn. Gen. Stat. §8-7 requires appeals from ZEO decision within thirty (30) days of decision or order appealed from, or Board may set longer or shorter period of time by resolution. Time limit is jurisdictional, and if not met, the Board must deny the appeal for lack of jurisdiction. *Phillips v. Darien ZBA*, 20 Conn. L. Rptr. No. 7, 257 (November 3, 1997); *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 221, 231 (1995) and many other cases. Application in phases opens new appeals period for each phase, *Jack Halpert v. ZBA City of Bridgeport*, 22 Conn. L. Rptr. No. 1, 13 (July 6, 1998), but, this has been held to apply only to the recipient of the order or decision; neighbor who wishes to bring injunction cannot be barred by the tolling of an appeal period on a decision he/she did not even know about. *Loulis v. Parrott*, 241 Conn. 180 (1997) (failure to appeal in 30 days does not bar equitable actions), reversing the *dicta* to the contrary in *Koepke v. ZBA*, 30 Conn. App. 395, 402 (1993); Loulis rule followed in *Derham v. Dennis Brown, et al.*, 30 Conn. L. Rptr. No. 4, 155 (September 10, 2001), but *Munroe v. Zoning Board of Appeals of Branford*, 261 Conn. 263 (2002) held that 30 days must run from *actual notice*, overruling anything in *Loulis* to the contrary, and effectively over-ruling *Phillips*, *supra*, where abutter had no notice of decision. PA 03-144 amended Conn. Gen. Stats. § 8-3(f) to allow publication by the applicant to trigger the 30-day appeal period. See *Wiltzius v. Zoning Board of Appeals*, 106 Conn. App. 1 (2008) where neighbor observed *some* activity on adjoining property and not enquire within 30 days; but when he did enquire, held 30 days began *then*.

Although I recommend that Board take a vote on whether or not it has jurisdiction where it is unclear, case law says that even failure to act can be tested by mandamus action. *Battistoni v. Zoning Board of Appeals of Morris*, 29 Conn. L. Rptr. No. 17, 621 (July 23, 2001).

Appeal of Certificate of Zoning Compliance issued at time of C.O. cannot challenge errors/defects present at time of Certificate issued at time of the Building Permit. *Longmoor v. Zoning Board of Appeals,*

33 Conn. L. Rptr. No. 1, 34 (10-21-02).

F. 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.*

G. 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. *200 Associates, LLC v. Planning & Zoning Commission*, 83 Conn. App. 167, 174 (2004). However, court will give deference to "time tested" interpretation of ambiguous term. *Newman v. Planning & Zoning Commission of Avon*, 293 Conn. 209 (2009) (area of the "parcel" can include not only the land within the subject subdivision, but also of "parent" or "root" parcel, despite lack of ownership by applicant). Accord, without cite to Newman, *Cockerham v. Montville ZBA*, 52 Conn. L. Rptr. No. 15, 562 (12-5-11) (lot merger required more than mere single ownership per the regulations as "consistently applied" and in 30 other instances). Compare to *Kraiza v. Planning & Zoning Commission*, 121 Conn. App. 478 (2010, Borden, dissenting, on appeal), where *one* past interpretation did not rise to the level of a "time tested" interpretation, with no cite to *Newman*. The *Newman* rule has been held to *not* apply to mere understandings of what, in the opinion of surveyors and developers, the Commission meant. *Egan v. Stamford Planning Board*, 49 Conn. L. Rptr. No. 7, p. 237 (4-26-10). Compare to Egan v. Planning Board, 136 Conn. App. 643 (2012), citing to Newman, yet over ruling the commission's interpretation because the record didn't support the existence of a "long-standing, time-tested" interpretation (p. 652), but the only support in the Newman record was a single statement by the Town Planner. So is that what it takes to create a "long-standing, time-tested" interpretation, i.e., that someone says it is on the record?

Words and phrases: *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). Also, *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); see also *Kraiza v. Planning & Zoning Commission,* 121 Conn. App. 478 (2010, Borden, dissenting) (cul de sac length measurement included existing road being extended, not just new segment; loop road was still a cul de sac; **on appeal**). Compare to *Nason Group, LLC v. Haddam Planning & Zoning Commission,* 2011 WL 782689 (2-3-11), for definition of cul de sac as "closed at one end by building lots," and subject cul de sac was closed at one end by building lots and open space, so didn't violate cul de sac length limit; but cul de sac ending at property line did violate the cul de sac length limit because it was not a "temporary cul de sac, "there being no evidence that it could be extended in the future.

Does "frontage" on a discontinued street count? Depends on the language of the regulation. *KJC Real Estate Development, LLC v. Zoning Board of Appeals,* 127 Conn. App. 16 (2010), cert. Den. 300 Conn., 938 (2011).*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); *Pappas v. Enfield Planning & Zoning Commission*, 40 Conn. L. Rptr. No. 18, 668 (3-27-07); *Worthington Pond Farm, LLC v. Somers ZBA*, 41 Conn. L. Rptr. No. 16, 590 (8-28-06) . *Ruggieri v. Zoning Board of Appeals of Putnam*, 46 Conn. L. Rptr. No. 16, 582 (1-26-09) (retailer of sparklers and fountains was storing "flammable materials" in violation of regulation). Exemption from requirement for excavation permit for activities "directly related to, necessary for, and in conjunction with a bona fide construction or alteration of a building or structure" is not confined only to small excavations, but can include large ones. *Valley Mobile Home Park, LLC v. Naugatuck Zoning Commission,* 54 Conn. L. Rptr. No. 7, p. 254 (9-17-2012).

What does it mean to "store" heavy equipment in a residential zone? *Grissler v. ZBA,* 141 Conn. App. 402 (2013) (good discussion of interpretation of terms in a zoning regulation.)

Competitions for horse roping, barrel racing, etc. in exchange for a fee paid by competitors is not "agricultural use." *Hills v. Middletown ZBA*, 49 Conn. L. Rptr. No. 7, 234 (4-26-10). A child daycare center is

not a "school" even though it may provide so me incidental education. *Frank's Package Store v. Planning & Zoning Commission*, 52 Conn. L. Rptr. No. 10, 362 (10-24-11). "Fine furniture:" Does that mean "high quality," "good quality," "one of a kind, hand-crafted" furniture? *R & R Pool and Patio, Inc. v. ZBA*, 129 Conn. App. 275 (2011). What sort of structures does the term "recreation facilities" include, and does it include a "playset?" *Mountain Brook Association, Inc. v. Zoning Board of Appeals*, 133 Conn. App. 359 (2012). If a home occupation must be 'located within the dwelling,' can it be located in an attached garage? No, per *Lowney v. Black Point Beach Club Association*, 53 Conn. L. Rptr. No. 4, 140 (3-12-12). Definition of "Lot" prevents counting area under a private road toward lot area, *Field Point Park Association, Inc. V. Planning & Zoning Commission*, 103 Conn. App. 437 (2007). Regulation barring "unsightly outdoor storage" is void for vagueness, *Newtown v. Plunske*, No. 278150 (4-11-85, J.D. of Danbury). Requirement that rear lot have "unobstructed legal accessway" held met by corridor owned by applicant but subject to a conservation easement with actual access from another point, *Egan v. Stamford Planning Board*, 49 Conn. L. Rptr. No. 7, 237 (4-26-10). Competitions for horse roping, barrel racing, etc. in exchange for a fee paid by competitors is not "agricultural use." *Hills v. Middletown ZBA*, 49 Conn. L. Rptr. No. 7, 234 (4-26-10).

As with statutory interpretation, a reviewing court may use legislative history to construe an ambiguous ordinance (would probably apply to a zoning regulation). *Witty v. Hartford* Planning and Zoning Commission, 66 Conn. App. 387 (2001).

Different language in the regulation can produce odd results: compare *Richardson v. Zoning Commission*, 107 Conn. App. 36 (2008) ("equine center" is *not* a farm) to *Borrelli v. Zoning Board of Appeals*, 106 Conn. 266 (2008) (same type of facility was permitted "agriculture.") Difference between a "community facility" and a "social service provider," *Eastern USA Realty, LLC* v. Zoning Board of Appeals, 52 Conn. L. Rptr. No. 20, 754 (1-16-12).

If regulation allows commission to "renew a special permit for an additional period of two years," does that mean that the commission can grant only one renewal? Yes, per Vanghel v. Planning & Zoning Commission, 54 Conn. L. Rptr. No 15, p. 589 (11-12-12).

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. Rptr. No. 6, 210 (June 4, 2007). For change in practice (bond releases), see *Grandview Farms, LLC v. Town of Portland*, above. As with statutory interpretation, a reviewing court may use legislative history to construe an ambiguous ordinance (would probably apply to a zoning regulation). *Witty v. Hartford Planning and Zoning Commission*, 66 Conn. App. 387 (2001). The courts can, and often do, defer to "honest judgment" about how to interpret a regulation. *Wong*, supra.

Watch out for zones that allow, by reference, uses permitted in some other zone: The *conditions* under which it is allowed in the referenced zone may not "transfer" to the second zone. *Fair Street, LLC v. Zoning Commission*, 47 Conn. L. Rptr. No. 20, 750 (August 10, 2009).

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). Similarly, a ZBA cannot determine if a zoning regulations is valid when hearing a ZEO. appeal or variance.

H. Historic District

A "structure" subject to the jurisdiction of Historic District Commission need not be physically attached to the ground. *Fairfield Historic District Commission v. Hall*, 282 Conn. 672 (2007), (6-ton sculpture that merely rested on the ground was still a "structure").

VI. 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); structure (not content) of staff input. This is key to

success: be *proactive* to produce strong case, discourage appeals, avoid spending the money to defend them. If your regular attorney has a conflict of interest, you can retain your own and the municipality has to pay for it. *Berchem, Moses, & Devlin, P.C. v. Town of East Haven,* 51 Conn. L. Rptr. No. 10, 350 (5-2-2011).

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 THE BAR, APA, IPS, ETC. Read Terry Tondro's book and have a copy available at meetings. The staff should have a copy of Bob Fuller's book.

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.

(Rev. 2/16/99; Rev. 9/15/99; rev. 10/8/99; rev. 12/21/99; rev. 3/1/00); rev. 4/24/00; rev. 9/25/00; rev. 2/15/01 rev. 9-26, 2001; February 13, 2002; rev. February 25, 2002; rev. September 25, 2002; December 12, 2002; January 26, 2003; October 16, 2003); march 17, 2004; October 7, 2004; June 30, 2005; January 27, 2006 August 9, 2006; September 29, 2006, add Jewett City Savings case; November 20, 2006, add various cases; February 14, 2007, add cases; rev. February 16, 2007 for updates/corrections; February 23, 2007, *Meeker* case added in IV.A.1. MARCH 21, 2007, To correct citation to Gomes case, add Timber Trails. April 17, 2007 to add updated opinion in Mohler V. ZBA; REV. June 7, 2007 TO ADD P. A. 06-53, Public water supply watersheds notice requirements. Updated August 30, 2007 WITH NEW CASES. Updated April 24, 2008 with new cases. Updated September 17, 2008 with Lord Family of Windsor case. Updated December 31, 2008 to add *Tweed-New Haven* case. Updated February 6, 2009 to add Ruggieri and Unistar cases. Updated February 11, 2009 to add Freedom of Information cases re site walks. Updated February 13, 2009 to add Brandon case. Updated February 23, 2009 with additional cases; revised 2-23-09. Revised June 19, 2009 to include *Buttermilk Farms* case. Updated October 5, 2009 with Lost Trail case. Rev. November 11, 2009 with Dunham v. New Milford case. Rev. January 26, 2010 to add *Cimino, Fanotto,* and the two *Ross* cases. Rev. February 18, 2010 to add more subpoena cases and *RYA Corp.*, *Lallier* cases. Rev. March 8, 2010 to add modification to *Taft* cite in light of *Hayes Family Limited Partnership.* Rev. March 18, 2010 to add *Carberry* case. Updated May 28, 2010 to add numerous cases to all sections. Updated June 2, 2010 to add Warner case. Updated June 17, 2010 to add *Laovie*, *Hills, Egan* cases; June 18, 2010 to add *McElroy* and

Wellswood Columbia, Pomfret/FOIC case. Rev. July 6, 2010 to add *Vine* and *Newman* remand cases re wetlands referral. Rev. August 5, 2010 to add *Krazia;* rev. October 1, 2010 to add *The Preserve v. Old Saybrook.* Rev. October 12, 2010 to update *Weinstein* wetlands case. Rev. October 14, 2010 to add *Ahlberg and East Coast Towing*; Rev. January 3, 2011 to add Executive Auto Towing case. Rev. January 4, 2011 for *Green Falls Associates.* Rev. January 18, 2011 to add *Lost Trail* and *Stones Trail* cases. Rev. March 15, 2011 to add *Anatra* case. April 6, 2011 add *Seventeen Oaks* case. April 21, 2011 to add *Seventeen Oaks* with cite,*Rizzuto,* and *C&H Management v. Shelton;* April 25, 2011, add *Greenwood* case, *Kent IWC,* and *Komondy* cases. Rev. June 7, 2011 to add *Burton* case. Rev. June 16, 2011 to add *Rapoport* case. Rev. June 23, 2011 to add *Berchem, Moses, Nason Group, etc.* Rev. July 28, 2011 to add *Northern Heights* case. Rev. August 15, 2011 to add *Megin*, *Vichi, Brandon* cases. Rev. August 18, 2011 to add *Taylor*. Rev. September 2, 2011 to add *DeSilver* and *East Coast Towing #2* cases. Rev. October 11 for CLEAR program. Rev November 6, 2012 for CLEAR program. Rev April 18, 2013 for CLEAR program

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