PUBLIC HEARING PROCEDURES

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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.

Public hearing must open within 65 days of the "date of receipt" which is the next regularly scheduled meeting of the commission or 35 days, whichever is less; and the hearing must close within 35 days of opening. Both time periods and the time within which to make a decision (65 days except for wetlands, which is 35 days) may be extended by up to 65 days total with the consent of the applicant. Failure to meet the time limits is not, by itself, grounds for denial. *Garrity v. Morris ZBA,* 2021 Conn. Super. LEXIS 2023 (JD of Litchfield at Torrington).

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, except (due to temporary insanity by the General Assembly) automotive site location approvals. Even there, it's a good idea. 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). Wetlands agency cannot just *assume* adverse impact on wetlands because there is an activity; must be some evidence of that impact. *Cocchiola Paving, Inc. v. IWWA*, 59 Conn. L. Rptr. No. 15, 594 (4-13-15).

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 DEEP 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).

Settlement of litigation is very difficult to appeal successfully. See, *Saunders v. Inland Wetlands Commission*, 62 Conn. L. Rptr. No. 12, p. 441 (8-22-16).

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). What's "substantial?" 4% of the households was found to be "substantial circulation" in *Oates v. East Haddam Inland Wetlands & Watercourses Comm'n*, No. CV084009226, 2008 WL 5540470

(Conn.Super., December 19, 2008). But the Middletown Press wasn't of "substantial circulation" in the Borough of Fenwick, *9 Pettipaug, LLC v. PZC of Borough of Fenwick,* 2021WL 1784749 (denial of motion to dismiss, of 83 households in Fenwick, none get the Middletown Press). If in doubt, advertise it again. The fact that a newspaper is mailed for free to residents doesn't disqualify it as a "newspaper." *Jacobson v. Zoning Board of Appeals*, 55 Conn. L. Rptr. No. 11, 409 (4-15-2013).

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 a clear metes and bounds description where zoning map change. *MacKenzie v. Planning & Zoning Commission,* 146 Conn. App. 404 (2013*)* (upholding a metes and bounds description without a map); *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). See also, *Farmington-Girard v. Planning and Zoning Commission*, 58 Conn. L. Rptr. No. 22, 860 (12-8-14) (no metes and bounds description; map was small scale and hard to read, without addresses on the parcels; zone change declared void.) Compare to *Santarsiero v. PZC of Monroe,* 59 Conn. L. Rptr. No. 14, 562 (4-6-15) (map with metes and bounds was timely filed with the Town Clerk, but a water leak required it to be displayed in a different location from typical. Plaintiff's lawyer didn't see it, but Town Clerk testified that all he had to do was ask her where it was. Zone change upheld.)

Strongly recommend that documents in <u>all</u> applications be available for inspection at the time of the first legal ad. Where both a city and a town clerk, filing is sufficient in either one, but don't risk it. *Level Development Corp. v. Zoning Commission of City of Waterbury,* 55 Conn. L. Rptr. No. 16, 603 (5-20-13). 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). Legal notice not invalid because it references positive recommendation of another agency that was later rescinded. *Legal Development Corp., infra.*

<u>Publish When</u>: 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 new PA 05-124 requiring *applicant* to notify holder of any "conservation" restriction (leave land in natural state) or "preservation restriction" (historical preservation) at least 60 days prior to filing of application.** Failure to notify permit 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). Who is an "abutter" entitled to notice? *Kellogg v. City of Norwalk*, 62 Conn. L. Rptr. No. 13 (8-29-16) (owner abutting satellite parking lot that was accessory to the principal use was an "abutter.") *See, also*, *Miller v. Planning & Zoning Commission of Bridgeport*, 2019 WL 4323512, holding that an "abutter" included someone across the street from the proposed development parcel.

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).

New Public Act 06-80 creates new rules for "personal" notices [now codified in CGS 8-7d(a)]: 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*? The intent was the former. The language says that mailed notices, if used, must be sent to abutters "indicated on the property tax map or the last-completed grand list as of the date such notice is mailed." Despite this clear language, a Superior Court ruled that the grand list could not be relied up, and that the Statute "requires an applicant to perform limited title searches to ascertain all of the persons owning property adjacent to the subject parcel." *Arrowhead Point Homeowners Association v. ZBA*, 59 Conn. L. Rptr. No. 23, 909, 912 (6-8-15). This decision was promptly reversed by PA 15-68, effective on passage (June 19, 2015).

Public Act 06-80 also required 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. <u>FOIC Notices.</u>

See Conn. Gen. Stats. § 1-21. File your schedule of meetings at the beginning of each year no later than January 31st. File the agenda no later than 24 hours in advance with Town Clerk; takes 2/3

votes to approve item not on the agenda. Meetings of less than a quorum is now cloudy: If a subcommittee, it is probably a meeting of the agency if it is discussing agency business because it might be deemed a "proceeding" by the Freedom of Information Commission. *The Elections Review Committee of the Eighth Utilities District v. Freedom of Information Commission,* 219 Conn. 685 (1991) (one Commission member and three volunteers on *ad hoc* committee was an "agency" governed by FOIA); but if less than a quorum of the whole agency show up, it is not a meeting. *Emergency Medical Services Commission v. FOIC*, 19 Conn. App. 352 (1989); and meetings of less than a quorum to, for example, review upcoming agenda is not a meeting either. *Windham v. FOIC*, 49 Conn. App. 529 (1989), aff'd. 249 Conn. 291 (1999). See *City of Meriden v. FOIC*, 338 Conn. 310 (2021) for a good discussion of what is a "meeting" under Conn. Gen. Status. §1-200.

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

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

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

Very narrowly construed by the case law: "Personnel" means matters which an employee would expect to have kept confidential. Same with "pending litigation", which can now include threatened litigation or litigation to be brought. *Fuhrman v. FOIC*, 18 Conn. L. Rptr. 7, 253 (1/27/97), but, again, be narrow: *Lizotte v. Welker*, 45 Conn. Sup. 217 (1996) (commission said

"pending litigation" but did not name the very controversial matter involved; FOIC held violation). But see *Fuhrman v. Freedom of Information Commission*, 243 Conn. 427 (1997) (strategy can include, e.g., hiring lobbyist, consultant reports, etc.)

4. Is this seminar a meeting? No. *New London Planning & Zoning Commission v FOIC*, 2 Conn. Ops 613 (June 3, 1996, Maloney). Similarly, staff workshop not converted to a meeting by attendance of a few commission members, *New London Planning & Zoning Commission v. FOIC,* 2 Conn. Ops. 613 (6-3-1996).

D. Application Fees and Other Incomplete Applications. 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 Z.E.O decision, *A&M Towing & Recovery, Inc. v. ZBA of Town of Newington*, 16 Conn. L. Rptr. No. 4, 412 (3-25-1996). *See*, interesting case on charging of application fees at discretion of staff (as opposed to a fixed fee schedule) under the authority of Conn. Gen. Stats. §8-1c; upheld, even though it was an 8-30g affordable housing application. *Stefanoni v. PZC*, 60 Conn. L. Rptr. No. 22, 856 (11-16-15).

See, also, *B. Metcalf Asphalt Paving, Inc. v. North Canaan PZC*, 2019 WL 3782283 and also LLI CV19-6023364-S: In the first case, the owner applied for a site plan modification to add an asphalt plant to an existing earth products use and the Commission simply returned the application fee and the application because they felt that the use wasn't allowed under the local regulations. No actual vote was taken. Their appeal was dismissed because there was no decision from which to appeal. The owner then sought a Writ of Mandamus because the Commission had failed to act on their application within the Statutory time limits, and that Write was granted. The lesson: *vote* on every application, even if it's arguably incomplete. Also see *Farmington-Girard, LLC v. Planning & Zoning Commission of Hartford*, 339 Conn. 268 (2021, reversing 190 Conn. App. 743), where the zoning administrator denied a special permit as incomplete before the Commission saw it and before any public hearing. Applicant did not appeal that decision to the ZBA. Supreme Court held that staff cannot approve or deny a special permit application, period, and so the failure to appeal the decision to ZBA wasn't fatal. Lesson: If an

application is incomplete, set the public hearing and deny it as incomplete.

E. 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); and also, *Patty v. Wilton PZC*, 64 Conn. L. Rptr. No. 8, p. 311 (7-10-17) (youth football league had standing to apply for zoning approval on town-owned field with town's permission).

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.) *Huse v. Zoning Commission*, 59 Conn. L. Rptr. No. 18, 689 (5-4-15) (owner of unit in commercial condo had standing to apply for use of parking spaces owned in common).

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.)

Also remember that the level of discretion is higher for special permit reviews that site plan reviews. *Seacrest Retirement, LLC v. West Haven PZC*, Conn. Law Tribune (8-2-21, Berger).

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 (1-16-2000) 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.

Interesting case of *Pukonen v Guilford PZC*, 60 Conn. L. Rptr. No. 5, 173 (7-20-2015, Corradino): Farmer obtain special permit for a farm stand at a time when special permits were required for that use. Subsequently, regulations were amended to allow farm stands of a right. Farmer wanted to expand the farm stand (which no longer required a special permit) and actually applied for an amendment to the special permit, which was denied. Held that commission couldn't apply special permit requirement to the expansion when it was no longer a special permit use. (Contrary other cases that say the application waives a claim that no application was required).

F. Referrals. Numerous mandatory referrals to other agencies, too many to list here, and not all apply to all towns (e.g., Coastal Area Management, Harbor Management Commission, DEP for Coastal Area Management, Regional Planning Agency, etc.). Make a list for your town. Advisory opinions by such referral agencies are not separately appealable to Superior Court. *Civie v. Planning and Zoning Commission of Orange*, 30 Conn. L. Rptr. No. 15, 568 (11-26-2001), (Planning Commission recommendation not appealable by itself).

II. CONDUCT OF THE HEARING.

A. Sequence, etc.

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). But on the other side, *Gibbons v. ZBA*, 61 Conn. L. Rptr. No. 5, 190 (1-18-16) held that failure to hold a public hearing due to a snowstorm requires re-advertisement of the hearing. Court notes that Chairman and one

member (note—not a quorum) could have opened and continued the hearing and that would have avoided re-advertising.

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".) Re COVID-19 restrictions on personal attendance, see *Wahlberg v. Zoning Commission of Town of Stratford*, 2022 Conn. Super. LEXIS 637 (JD of Bridgeport) (upholding restriction on written comments only, with no opportunity to appear in person; but don't rely on this because it was based on the now-expired executive orders.)

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 <u>requiring</u> 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.

Robert's Rules of Order: Do not adopt bylaws that bind your agency to using Robert's Rules of Order. There are many provisions that aren't suitable for public agencies, like the chairman only votes if there's a tie. In land use proceedings, the chairman votes like anyone else. Bylaws should say that proceeding will be "guided by Robert's Rules of Order to the extend they are applicable to public agencies."

B. <u>Cross Examination, etc.</u>

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). See also, *Miller v. Department of Agriculture*, 168 Conn. App. 244 (2016) (hearsay is admissible as long as it is "reliable and probative," and defendant could have subpoenaed the witnesses for cross examination but did not do so).

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 there is a separate planning commission 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 of 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). See, also, *Villages, LLC v. Lori Longhi*, 56 Conn. L. Rptr. No. 4, 155 (7-28-14) (absolute immunity for commission members). *Accord Priore v. Haig*, 65 Conn. L. Rptr. No. 787 (4-9-18), affirmed on reargument, 66 Conn. L. Rptr. No. 467 (7-30-18).

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).

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

B. Staff and Expert Input.

1. Staff Input:

a. Normal rule is that your staff and other objective advisors, such as State or other government agencies, can comment even after the public hearing closes (see discussion under IV.C., below); BUT, not carte blanche: Even staff cannot provide you with totally new information or raise totally new arguments not previously discussed. Staff can and should help you to evaluate what you have heard. Use common sense: the idea is to give the applicant and the public a fair chance to comment on each other and the factual and regulatory issues. If staff raises totally new material/arguments/issues, that goal is thwarted. See *Ruscio v. PZC of Berlin*, 58 /Conn. L. Rptr. No. 11, p. 414 (9-15-14), where subdivision application was denied after staff, in post-public hearing comments, recommended open space exaction that wasn't required by the regulations was never raised during the public hearing; held improper. Compare to *Three Levels Corp. v. Conservation Commission of Redding*, 148 Conn. App. 91 (2014), where receipt of a post-hearing letter from the Commission's expert was found to be permitted, though reliance on that letter was found to be improper. Similar outcome in *Purnell v. Inland Wetlands and Watercourses Commission*, 209 Conn. App. 688 (2022), where plaintiff's expert raised issues during the public hearing, and the commission's expert merely responded after the close of the public hearing.

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 Z.E.O: contrary to

the normal situation, the Z.E.O 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 Z.E.O.'s decision; the Board's review is "*de novo*", meaning from the beginning.

d. IWWC: 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., determining 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. *Feinson v. Conservation Commission*, 180 Conn. 421, 427 (1980). Can reject any testimony of non-experts in most cases. See *200 East Main Street, LLC v. Zoning Commission,* 62 Conn. L. Rptr. No. 22, 856 (10-31-16) where lay commission members didn't believe a traffic expert about traffic congestion but never *said why* while the hearing was open and expert could respond. Held lack of sufficient evidence on the record to disregard expert testimony. Decision would have been upheld is they had stated *evidence* why they didn't believe the expert. For an excellent discussion of questioning an applicant's expert, see , *Cornacchia v. Environmental Protection Commission*, 2006 WL

829722 (Conn. Super.)

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. Commission members aren't bound by expert opinion concerning situations that don't *call for* expertise, i.e., things that any local resident would know, such as local traffic congestion, traffic safety, and traffic patterns. *Dram Associates v. Planning & Zoning Commission*, 21 Conn. App. 538, 542 (1996). Same for water quality where the applicant presented no expert testimony of its own, *Rural Water Company, Inc. v. ZBA of Ridgefield*, 287 Conn. 282 (2008). But the evidence relied upon still has to be stated during the public hearing, *200 East Main Street, LLC, supra.*

d. 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. See, for example, *Cornacchia v. Environmental Protection Commission*, 2006 WL 829722 (Conn. Super.) where the denial of a wetlands application was upheld, despite expert testimony from the applicant, based on the report of the Commission's staff.

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). *Pond View, LLC v. PZC*, 288 Conn. 143 (2008) held that there can be no CEPA intervention in a *legislative* decision, which makes sense since it's hard to imagine a regulation of broad applicability having a specific adverse impact on any particular resource. But that did not apply to intervention in a sewer capacity determination, which was found to be quasi-judicial rather than legislative. *Landmark Development Group, LLC v. East Lyme Water & Sewer Commission,* 56 Conn. L. Rptr. No. 16, 609 (11-4-2013).

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 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 does not bar separate injunction action under Conn. Gen. Stats. §22a-16. See *City of Waterbury v. Town of Washington,* 260 Conn. 506 (2002), over ruling *Fish Unlimited v. Northeast Utilities Service Company*, 254 Conn. 1 (2000).

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).

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. 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). But see *Lowney v. Zoning Board of Appeals*, 144 Conn. App. 224 (2013), where minutes were stipulated by the parties to be adequate when recording malfunctioned.

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 Court itself 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. Rptr. 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 the absence of a 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). But note the different rule for "home rule" towns that don't use the General Statutes: *Murphy v. Zoning Board*, 63 Conn. L. Rptr. No. 12, p. 486 (2-20-17).

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! See also *Murphy v. Zoning Board,* 63 Conn. L. Rptr. No. 12, p. 486 (2-20-17).

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).

A minor clarification may be OK, *Towson v. IWWC of Portland*, 2022 Conn. Super. LEXIS 325 (JD of Middlesex at Middletown.) But avoid that if at all possible.

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 an aggrieved party with standing to appeal (e.g. approval of alcohol within 500 feet of a school), *New Haven Board of Education v. ZBA*, 26 Conn. L. Rptr. No. 16, 565 (5-15-00).

D. Use of Experts.

You cannot ignore uncontradicted expert testimony if you do not question it, so, if you have doubts, question the expert on the record. If major issue, get your own experts--ERT, Town personnel, State, UConn, etc. TAKE YOUR TIME. If you have special expertise upon which you will rely, say so on the record (while hearing is open). You can use your own expertise. *Wasfi v. Dept. of Public Health*, 60 Conn. App. 775 (2000) (UAPA case, but analogous reasoning).

E. Criteria.

1. The Record. What you saw and heard during the public hearing or allowable staff input thereafter, plus personal knowledge of the area and common sense. 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 as they exist, not DEEP model or some other source. 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).

Criteria may be different for a non-substantial amendment to a previously approved permit than for a new application. See *Village of Bee Brook Crossing HOA v. IWWC,* 59 Conn. L. Rptr. No. 15, 603 (4-13-15) (minor modification to wetlands permit did not require review of all six factors enumerated in the regulations).

3. Substantial Evidence: Not just speculation or *possibility* that criteria might not 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. v. 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. While case law allows a zoning commission to deny a special permit for noncompliance with general standards of the regulations, *St. Joseph's High School v. Planning*

and Zoning Commission of Trumbull, 176 Conn. App. 570 (2017), but that denial must still be supported by substantial evidence, *McLoughlin v. Planning and Zoning Commission of the Town of Bethel*, 342 Conn. 737 (2022) (reasons for denial were per the general standards of the regulations, but the support for those reasons why speculative and unsupported by facts or expert testimony).

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), but staff cannot (see *Farmington-Girard*). 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 WalMart with condition delegating rather extensive design changes to staff, but subject to final approval by the commission; approval and delegation upheld; versus *Fusco v. Trumbull PZC* (J.D. of Fairfield at Bridgeport), 2021 Conn. Super. Lexis 32 (architectural design delegated to staff, held illegal delegation). Compare to *547 North Avenue RE v. Bridgeport PZC*, 70 Conn. L. Rptr. 575 (3-2-21) where confirmation of dimensional requirements was delegated to the City Engineer as a condition of approval; held to be a purely ministerial delegation.

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). Also, see *Greenwood Manor, LLC v. Planning & Zoning Commission*, 150 Conn. App. 489 (2014) (no abuse of discretion to decline proposed zone change).

Historic District Commission. Has discretion. See *Morena v. Historic District Commission*, 50 Conn. Sup. 398 (2007). WPCA: Have broader discretion than 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)

F. The Motion.

Always have a motion prepared in advance for controversial or complex application. Can and should contain findings of fact and how that relates to regulatory criteria. Get some preliminary discussion, then appoint subcommittee to work with staff to draft motion for consideration at next meeting. You may have heard not to state reasons (many town attorneys feel 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 do 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. The discussion below about specificity in a variance motion also applies to zoning motions (site plan, special permit). See *Caporaso v. Prospect Zoning Board of Appeals*, 56 Conn. L. Rptr. No. 3, p. 110 (8-5-2013), where special permit was issued for a commercial greenhouse, but with a condition prohibiting off-site direct sales to the general public. Held that while a "community-supported agriculture" plan is permitted, i.e., is not retail sale to the general public, the special permit condition was violated to the extent that there is on-site delivery of the product to "members." Good discussion of verbal representations in support of an application.

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. **Overturned**, 307 Conn. 728 (2013): scope of variance to be determined based on entire record. But see *Lamoureux v. Thompson,* 62, Conn. L. Rptr. No. 18, 684 (10-3-16) limiting the *Anatra* holding to cases where the variance approval motion says *something* about conditions of approval, even if not listed or stated. 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. See also, *Parker v. Zoning Commission of Town of Washington*, 209 Conn. App. 631 (2022), where the interpretation of a stipulated judgment was at issue. The Court noted that the approved plans did not specify the height of the proposed building, and therefore it could be higher than anticipated. This illustrates the importance of clarity in approvals of all kinds.

For the flip side of site plan submitted in support of variance, see *Wallingford v. ZBA of Meriden*, 146 Conn. App. 567 (2013) (variance granted for *use* could not be appealed based on the traffic pattern depicted on site plan because the ZBA wasn't *approving* the site plan.)

<u>For Planning and Zoning Commission</u>: 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 a case essentially applying the *Anatra* reasoning to a zoning

approval, see *Woodbury Donuts, LLC v. ZBA of Woodbury*, 139 Conn. App. 748 (2022): Property contained a legal nonconforming seasonal take-out restaurant where current regulations do not allow predominantly take-out restaurants. Owner obtained special permit approval for a new retail building which would include the very same seasonal restaurant (identifying it by name); the approval was based on the finding that the legal nonconforming take-out restaurant was a continuation of that use. When owner and restaurant come to terms over a lease, the owner wanted to lease to a Dunkin' Donuts restaurant that would be primarily take-out and year-round. ZEO denied the zoning permit for that use; appealed to ZBA which upheld the ZEO's decision. The Court held that owner had gotten approval for a continuation of the existing legal nonconforming seasonal take-out restaurant, not the creation of an entirely new year-round one, which was an expansion of the nonconformity.

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 regarding 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.)

G. 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). One Superior Court says this applies to neighbors as well as the applicant. *Santarsiero v. PZC of Monroe,* 59 Conn. L. Rptr. No. 14, 562 (4-6-15) (alleged illegal variance cannot be challenged in later application). If condition/modification is the heart of the application, you may want to deny the application instead (if you have the evidence).

While a variance runs with the land, it can be lost by voluntary abandonment. *Russo v. Zoning Board of Appeals*, 61 Conn. L. Rptr. No. 1, 7 (12-14-15) (variance granted for horizontal expansion of

house on nonconforming lot in 1996, and those additions were built. In 2014, owner wanted to demolish the house and rebuild using the 1996 footprint but increase the height of the expansions allowed by the 1996 variance. Held that vertical increase could not be predicated on the 1996 variance because demolition terminated it.) But see *Garrity v. Morris Planning & Zoning Commission,* 2021 Conn. Super. LEXIS 2026 (JD of Litchfield at Torrington), where demolition was not an abandonment due to amendments to CGS 8-2 by Public Act 17-39.

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.

H. Denial "Without Prejudice".

I had a judge tell me that there is no such thing and that is true; but I think it helps to communicate basis for decision as being non-substantive (procedural, incomplete, etc.). No harm in saying that if it is what you mean. See *Unistar Properties, LLC v. Putnam Inland Wetlands Commission*, 293 Conn. 93 (2009) (Commission requested information on wildlife and applicant refused, saying there won't be any. Court said that's not the applicant's call to make; information was sought to inform that determination; remanded the application back for consideration of that information.)

I. 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.

J. Statement of Reasons.

The general rule is that where the Statutes require that the commission state the reasons for its decision (and they 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, , 2010 WL 3025622 (10-4-10) for four wetlands cases; and *Northern*

Heights v. Clinton Inland Wetlands and Watercourses Commission, 52 Conn. L. Rptr. No. 21, 786 (7-18-11); *Marella v. Planning & Zoning Commission*, 52 Conn. L. Rptr. No. 19 (1-9-2012) for a coastal site plan application; 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.

Note different requirement for affordable housing applications, where reasons for denial or conditional approval *must be stated* or you lose. *Seaview Cove, LLC v. Milford PZB*, 62 Conn. L. Rptr. No. 18, p. 697 (10-3-16, Berger, J.)

K. 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). *Accord*, *Lamoureux v. Thompson*, 62 Conn. L. Rptr. No. 18, 684 (10-3-2016), where ZBA could deny an appeal from the zoning enforcement officer based on faulty notice to abutters, and then, upon proper notice, sustained the appeal. Held that a denial based on a technical defect didn't preclude a different decision on re-hearing.

"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 Z.E.O issued Certificate of Zoning Compliance, where neighbor claimed that original decision should have been a *special permit*, not a site plan. The Z.E.O 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).

"Precedent" as binding commission action: Commission may have construed "street" to mean "through street" when measuring maximum cul-de-sac length and may have applied it that way before but that is not what the regulations say. *Pappas v. Enfield Planning & Zoning Commission*, 40 Conn. L. 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. denied. 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. See also, *Williams v. Middletown ZBA*, 61 Conn. L. Rptr. No. 16, 628 (4-4-16), where ZBA vote was 3 to 1 (4 votes needed for decision) and board immediately voted to reconsider at next meeting, where 4 votes were obtained on the motion. Held to be allowable. Also note that estoppel may not be applied to incorrect statement about the administrative appeals period, *Riganese v. North Branford ZBA*, 62 Conn. L. Rptr. No. 19, p. 719 (10-10-16) (Board told appellant the wrong deadline for appeal, but that couldn't change the actual date; appeal saved on other grounds).

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). Also note *Lamoureaux v. Thompson*, 62 Conn. L. Rptr. No. 18, p. 684 (10-13-16) (reconsideration of essentially the same application was allowed where the original denial was on *procedural* grounds and never reached the merits; defect was failure to post sign or notify abutters in "round 1.")

L. 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. denied. 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).

Per Conn. Gen. Stats. § 8-e(g)(1), if the agency fails to publish within fifteen days, as required, the applicant can publish its own legal notice. Sometimes applicants do that if they think that the agency's legal notice wasn't sufficiently detailed or contain mistakes. Applicant can file its own notice even if an appeal is filed after the publication of the agency's. *Walhberg v. Zoning Commission*, 63 Conn. L. Rptr.

No. 9, p. 355 (1-30-17).

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.

M. Filings.

Zone change amendment *must be filed with town clerk* with effective date, *even if it is exactly the same as pre-hearing filing*. *Farmington-Girard, LLC v Planning & Zoning Commission*, 58 Conn. L. Rptr. No. 2, 861 (12-8-14).

Special Permits/Exceptions have to be filed to be effective per Conn. Gen. Stats. §8-3. There is no *Statutory* time limit within which to file, but see *848, LLC v. ZBA*, 62 Conn. L. Rptr. No. 14, 550 (9-5-16) where a time limit in a local regulation was upheld.

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.)

N. 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, Z.E.O 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). See

Jalowiec Realty Associates v. Planning and Zoning Commission of City of Ansonia, 278 Conn. 408 (2006), (site plan application did not include required sewer permit and plan did not comply with regulations, and trial court denied mandamus on the "public interest" principle; reversed on appeal; plaintiff was entitled to writ of mandamus). Beware: Special permit has no automatic approval *by Statute*, but if it's in the local regulations, it's enforceable. *Kids Zone Realty, LLC. v. Shelton PZC*, 58 Conn. L. Rptr. No. 6, p. 245 (8-1-2014).

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, above.

O. 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 solid waste and State preemption: See *MSW Associates, LLC v. Planning & Zoning Commission*, 202 Conn. App. 707 (2021) construing CGS 22a-208B(b) prohibiting zoning from barring solid waste facilities.

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. *Rocky Hill v. SecureCare Realty, LLC*, 315 Conn. 2 *Community* 65 (2015); *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). The fact that a town refers a proposed municipal improvement to the PZC for a recommendation under Conn. Gen. Stats. §8-24 doesn't relieve it of the obligation to obtain zoning approval for that project, unless the town has exempted itself from zoning. *Panek v. Town of Southington*, 61 Conn. L. Rptr. No. 4, 154 (1-11-16).

Zoning Commission can regulate setbacks from watercourses and is not prevented by the concurrent jurisdiction of an inland wetlands agency. *Frances Erica Lane, Inc. v. Stratford ZBA*, 149

Conn. App. 115 (2014).

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*, 288 Conn. 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), but superseded by *TLC Development, Inc. v. Planning and Zoning Com'n of Town of Branford*, 215 Conn. 527, 537 (1990) holding that a zoning commission cannot deny a site plan application for reasons not *specifically* enumerated in regulations/zoning ordinance. Reaffirmed in *2772 BPR, LLC v. Planning & Zoning Commission,* 207 Conn. App. 377 (2021).

Zoning commission can't adopt zoning regulations that purport to grant waivers of zoning requirements, that power being vested solely in the ZBA in a variance application. *MacKenzie v. PZC,* 146 Conn. App. 406 (2013). This includes approving a use which is not listed as permitted in the subject zone, *Modern Tire Recapping Company v. Newington PZC*, 57 Conn. L. Rptr. No. 14, 525 (4-21-14) (zoning regulations could not allow "other uses as may be determined by the commission.") But compare waiver to modification of a buffer requirement for a class of situations (wetlands, in this case), *Santarsiero v. PZC of Monroe,* 165 Conn.App. 761 (2016).

A variance and a special permit are not the same thing, even though the same ZBA could have granted either one. *Castelli v. ZBA*, 2020 WL 8734756 (J.D. of Fairfield at Bridgeport)(applicant filed for a variance to obtain relief that the ZBA could have granted by special permit; rejecting claim by applicant that he could choose either route.)

Under the Uniformity Clause, the provisions of one zone can't extend into an adjacent zoning district. *Farrington-Posner v. Zoning Commission*, Conn. L. Rptr. No. 6, p. 242 (7-11-16).

Planning/Subdivision: Per Conn. Gen. Stats. §8-26, the planning commission has the authority to determine if a division of land constitutes a subdivision or resubdivision. The commission does not have

jurisdiction to enforce private covenants or restrictions, even if they appear on an approved subdivision plan. *Maluccio v. East Lyme Zoning Board of Appeals*, 60 Conn. L. Rptr. No. 8, 306 (8-10-15) (approved subdivision showed a parcel as "open space" but no indication in the record that the commission had *required it.* Parcel taken for back taxes, sold to buyer who sought approval for a house lot; denied based on "open space" designation. Held that town couldn't enforce what appeared to be a private restriction, not a condition of subdivision approval. Seems contrary to the *Anatra* case since the approved plan showed open space.)

Subdivision regulations may require provision of fire suppression measures such as cisterns, fire ponds, or individual home sprinkler systems. *Sammmartino v. Andover PZC*, 61 Conn. L. Rptr. No. 23, 878 (5-23-16, Berger).

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 Z.E.O 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); also construe condition of a PZC special permit, *Markatos v. ZBA of New Canaan,* 2021 WL 2303089. See also, *Parker v. Zoning Commission of Town of Washington*, 209 Conn. App. 631 (2022), where the interpretation of a stipulated judgment was at issue.

ZBA lacks the jurisdiction to approve a variance to allow the division of a parcel into two lots subject to the condition that those two parcels not be further subdivided. That power rests solely with the planning commission under the subdivision power, so the condition is void *ab initio* and the parcels *can* be further divided (assuming they comply with zoning). *Jaffe v. Heiss,* 62 Conn. L. Rptr. No. 1, 11 (6-6-16).

Inland Wetlands: See discussion above under wetlands authority.

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-S (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. Agency/Administrative Overlap.

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

decision because he did not appeal sanitarian's decision to the Health Dept.; and regulations required sanitarian's approval for all lots prior to subdivision approval).

D. Inland Wetlands and Watercourses Jurisdiction.

Special case. Case law holds your Inland Wetlands and Watercourses Agency can require owner/user to appear and present evidence regarding 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 L. 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. Rptr. No. 17, p. 656 (12-3-12).

For the farming exemption (a topic of its own), compare *Taylor v. Conservation Commission*, 302 Conn. 60 (2011) with *Indian Spring Land Co. v. Inland Wetlands & Watercourses Agency*, 322 Conn. 1 (2016): former held road construction for farming purposes was not exempt where there was filling of wetlands (an exclusion from the exemption) while later held that road construction was exempt where the road spanned the wetlands and didn't fill it in. Not clear if that was the distinction.

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).

See, Coalition to Save Easton v. Easton PZC, 2019 WL 1283759 (Berger, J.) for an interesting jurisdictional issue: Developer filed for an affordable housing application without first applying to, and obtaining a permit from, the local inland wetlands agency. The developer claimed that they had already

obtained approval for the same activities, but intervenors disputed that. Held that developer had to go to the wetlands agency to obtain a determination as to whether the activities were, in fact, the same as those previously approved.

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 <u>regulations authorize it</u>, *Prestige Builders, LLC v. Inland Wetlands Commission*, 79 Conn. App. 710 (2003). But even having regulations won't allow the agency to regulate the upland review area to protect *that area*, only to protect *wetlands or watercourses. Blue Bird Prestige, Inc. v. Stratford Inland Wetlands and Watercourses Commission*, 69 Conn. L. Rptr. No. 20, 27 (9-9-19, Berger, J.)

<u>Indian Tribal Lands</u>. 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.)

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

Note: Inland Wetlands Agency has no jurisdiction over open space preservation but can

recommend to Planning and Zoning (and should); applicant may find it prudent to designate, in order to avoid full review of activity which is not needed, proposed, or intended. Commission can consider probable/foreseeable activities even if not shown on the plans. *Peterson v. Oxford*, 189 Conn. 740 (1983); and *Glasson v. Portland*, 6 Conn. App. 229 (1985). The Commission doesn't have to examine *all possible* future uses of a property but can also reject "segmentation" of a proposal, where the development is artificially broken into little phases in order to avoid an examination of the total impacts. *Serdechmy v. Griswold Inland Wetlands & Watercourses & Conservation Commission*, 59 Conn. L. Rptr. No. 1, 35, footnote #13 (Berger, J.)

Note limitation on use of wildlife impacts as basis for denial, *Avalonbay Communities, Inc. v. Inland Wetland Commission of Wilton*, 266Conn. 150 (2003), the holding of which was limited by P.A. 04-209: Agency can consider habitat impacts <u>in</u> the wetland or watercourse, just not in the "upland review area;" but can consider impacts to wildlife *if* that, in turn, "will likely impact or affect the physical characteristics of such wetlands and watercourses." See article by Gregory A. Sharp, Esq., in *The Habitat*, Vol. XVI, No. 2 (Spring, 2004). Supreme Court relied on P. A. 04-209 to uphold requirement for wildlife inventory, and denial of application as "incomplete" when developer refused to provide it. *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission*, 293 Conn. 93 (2009). Supreme Court has now affirmed that impacts on wildlife *can* "likely impact or affect the physical characteristics" of wetlands, *where there is expert testimony ("substantial evidence") to support that conclusion*. *River Sound Development, LLC v. Inland Wetlands & Watercourses Commission of Old Saybrook*, 122 Conn. App. 644, 653 *et. Seq.* (2010) (held that evidence from the *plaintiff's* expert supported the conclusion that wood frog tadpoles remove detritus from vernal pools and protect water quality.)

E. <u>ZBA Appeals of Z.E.O. Decisions/Orders</u>.

Conn. Gen. Stat. §8-7 requires appeals from Z.E.O 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. Subdivision Jurisdiction.

Issue of what is a subdivision versus a resubdivision can also be complicated and determination is

to be made by the planning commission per Conn. Gen. Stats. §8-26. See, e.g., *Nafis v. Planning and Zoning Commission of the Town of Southington*, 25 Conn. L. Rptr. No. 18, 620 (January 10, 2000), (property divided into three by splitting off the land at each end and leaving the middle parcel; later division of the parcel in the middle was, thus, resubdivision). This authority to determine what is a subdivision must be made *by the commission* and cannot be delegated to staff, per *Mandable v. Planning & Zoning Commission of Westport*, 60 Conn. L. Rptr. No. 14, 532 (9-21-15) (planning director signed off on a lot line adjustment, authorizing the mylar to be filed with the town clerk; court held that it was not authorized by regulation and couldn't have been, either; no idea what happens with what appears to be a valid change already on file with the Town Clerk.)

For relationship between foreclosure and "first cut," see *Lost Trial, LLC v. Weston Planning and Zoning Commission*, 48 Conn. L. Rptr. No. 3, 90 (9-28-09) (apparently a *proposed* four lot subdivision–case is not clear on this–but not approved. Bank foreclosed on mortgage on one parcel, sought approval of that lot. Owner of balance argued they were taking his "first cut." Commission held that they could not deny bank its first cut, and Court affirmed.)

We now know that "minor" lot line changes without creation of a new lot is not a "first cut" or subdivision event. *Goodridge v. Zoning Board of Appeals*, 58 Conn. App. 760 (2000); followed in *Derham v. Dennis Brown, et al.*, 30 Conn. L. Rptr. No. 4, 155 (September 10, 2001), but with the question remaining of whether a change to a subdivision or lot boundary is "minor" (as permitted in *Goodridge*) versus "major". Compare to *Balf v. Manchester ZBA*, 40 Conn. L. Rptr. 876 (March 13, 2006), (larger parcel conveyed to abutter for compensation and then actually used to expand abutter's building was not "minor" and constituted the "first cut" toward subdivision); and *Lost Trail, LLC v. Planning & Zoning Commission*, 2009 WL 2357704 (Conn. Super.), 48 Conn. L. Rptr. 90; and *Stones Trail, LLC v. Zoning Board of Appeals*, FST CV 064010003S (May 6, 2008). See also *Warner v. Salisbury Planning & Zoning Commission*, 43 Conn. L. Rptr. No. 23, 845 (10-1-07) (two "accidentally" merged parcels eligible for "first cut.") Compare to *CN Builders v. Planning & Zoning Commission,* 45 Conn. L. Rptr. No. 24, 875 (9-22-08), where consolidation of leftover parcels from a subdivision held to

be resubdivision. See also *Sedensky v. Planning Commission*, 61 Conn. L. Rptr. No. 23, 883 (5-23-16) for a discussion of waivers and lot line adjustments. *Cady v. Zoning Board of Appeals*, 330 Conn. 502 (2018) makes it pretty clear that, notwithstanding *Balf*, you can reconfigure parcels even if it there is consideration or increased development potential as long the number of parcels is the same before and after the reconfiguration. "The mere changing of lot lines or adding additional land to lots, no matter how sizeable, does not constitute a subdivision . . . the degree of a lot line adjustment is not determinative of the need for subdivision approval." *500 North Avenue, LLC v. Planning Commission of Town of Stratford*, 199 Conn. App. 115, 127 (2020)

Town line: The town line is a *de facto* lot line because neither town can regulate outside its own boundaries. So a "lot line revision" that moves a lot line from a town line to another location has, in fact, created a new lot. *Green Falls Associates, LLC v. Zoning Board of Appeals of North Stonington*, 50 Conn. L. Rptr. No. 1, 25 (8-30-2010).

Off-site improvements: Hot topic and was unclear in the wake of *Property Group, Inc. v. Planning and Zoning Commission of Tolland*, 226 Conn. 684 (1992). Now settled with *Buttermilk Farms, LLC v. Planning & Zoning Commission of Plymouth*, 292 Conn. 317 (6-30-09): NO off-site improvements, with "off-site" defined as outside the area of the lots (so not even sidewalks across the existing road frontage). Clearly cannot deny subdivision due to off-site traffic where development density is per zoning, *Pansy Road, LLC v. Town Plan & Zoning Commission*, 283 Conn. 369 (2007); *Sowin Associates v. Planning & Zoning Commission*, 23 Conn. App. 370 (1990), cert. den. 216 Conn. 832 (1991); nor due to poor condition of adjoining roads, *RYA Corp. v. Planning & Zoning Commission*, 87 Conn. App. 658 (2005). Possible exceptions: Poor sight lines for new driveway on existing road. *McElroy v. Town Plan and Zoning Commission of Fairfield*, 48 Conn. L. Rptr. No. 18, 669 (1-25-10); or where off-site impacts on felt in another town which lacks zoning authority over the subject site, *Wellswood Columbia, LLC v. Hebron,* 295 Conn. 802 (2010).

Site Plan/Special Permit: One case holds that the commission can require off-site improvements

for special permits, but not for site plan uses, based on the reasoning of *Cambodian Buddhist Society*. See *Wesfair Partners, LLC v. City Plan Commission,* 55 Conn. L. Rptr. No. 6, 216 (3-11-2013).

Bonding: Subdivision power does not include the authority to bond private driveways, even *common* driveways, *Dunham v. New Milford*, 2002 WL 31124552. Seems like a bad decision for common driveways which are just like private roads.

Conformance to Zoning: Subdivision regulations cannot usurp the zoning authority to set minimum lot sizes. *Cristofarao v. Burlington*, 217 Conn. 103, 107 (2003); *Lewis v. Ridgefield P & Z*, *supra*. Unless local regulations so allow, land outside of the town cannot count toward minimum lot size, *Lee v. New Canaan Planning & Zoning*, 18 Conn. L. Rptr. No. 4, 144 (1-6-1997).

Review of total parcel when only part is being subdivided: *Evans v. Plan & Zoning Commission*, 73 Conn. App. 647 (2002), says can't require but may have been due to language of regulation that referred to land "owned" by applicant, and this applicant didn't own the rest of the land (option).

Odd case: *Subdivision* regulation cannot require that new streets be connected to existing streets; would have to be done by ordinance. *Andrews v. Planning and Zoning Commission*, 38 Conn. L. Rptr. No. 10, 386 (2-14-05), affirmed in 97 Conn. App. 316 (2006). Superior Court decision seems to have been more influenced by "three minute public hearing" than by the text of the Statutes, which allows subdivision regulations to require "that proposed streets are in harmony with existing and proposed thoroughfares shown on the plan of conservation and development". Appellate Court focused on prohibition of use of out of town roads.

H. Zoning Jurisdiction:

General: Definitional issues can affect zoning commission jurisdiction or authority. See, e.g, *Wood v. Somers ZBA*, 25 Conn. L. Rptr. No. 18 (January 10, 2000), ("harvesting" of spring water and commercial sale thereof is not "agriculture". Nice try though) (affirmed in part, overruled in part: 258 Conn. 691 (2001), "harvesting" water still not agriculture but trial court improperly addressed nonconforming use claim, reversed and remanded, in part, to the board). Note that towns can exempt themselves from zoning per Conn. Gen. Stats. §8-2a, and that will exempt even non-municipal projects on

municipal land, per *D.F.C. of Meriden, LLC v. Meriden Planning Commission*, 62 Conn. L. Rptr. No. 19, p. 728 (10-10-16).

Historic Preservation: Zoning regulation (general, not just for Village District) upheld which regulated demolition of historic structures. *Greenwood v. Planning & Zoning Commission*, 51 Conn. L. Rptr. No. 1, 8 (2-28-2011.)

Coastal Area Management: It was proper for trial court to remand appeal of denial of coastal area management site plan back to local commission in order to determine if proposed house addition was more than 200 feet from mean high water line, since if it was, commission lacked jurisdiction to even require the site plan. *Ross v. Planning and Zoning Commission*, 118 Conn. App. 55 (2009).

FHA/ADA and RLUIPA: Many issues now raised by the Fair Housing Act and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), both beyond the scope of this outline. See *Cambodian Buddhist Society of Connecticut v. Planning & Zoning Commission*, 285 Conn. 381 (2008) upholding denial of special permit based on conventional zoning considerations which were not applied differently to the religious use. Bottom line: bring in your counsel when issues involving the rights of "disabled persons" or religious expression are involved. For non-RLUIPA case deferring to religious land uses, see *Bethlehem Christian Fellowship, Inc. v. Planning and Zoning Commission of Town of Morris*, 73 Conn. App. 442 (2002). Compare to *Farmington Avenue Baptist Church v. Farmington Planning & Zoning Commission*, 36 Conn. L. Rptr. No. 12, 441, (March 22, 2004), (applying a higher level of judicial scrutiny to vague standards that could be used to interfere with religious expression, compared to "clearly secular factors", such as building coverage, etc.) See also *Connecticut Commission on Human Rights & Opportunities v. Town of Wallingford & ZBA,* 2021 Conn. Sup. LEXIS 1849 (2021, JD of New Haven at Meriden) (denial of variance sought for alleged disability). For age discrimination, see *Connecticut Commission on Human Rights & Opportunities v. Town of Hamden*, UWY-CY-17-6038897-S (JD at Waterbury) regarding zoning restrictions on student housing.

First Amendment/Free Speech: Regulation on commercial flags did not violate Constitutional Free Speech protections. *Medina v. Town of Waterbury,* 25 Conn. L. Rptr. 5, 149 (1999), but, see,

Guilford Planning & Zoning Commission v. Guilford ZBA, 37 Conn. L. Rptr. No. 1, 35 (June 21, 2004), (cannot prohibit display of flag of Ireland outside Irish bar, even though one purpose may be to attract customers. Note difference where the municipality owns the property: *Uptown Pawn & Jewelry, Inc. v. City of Hollywood* (11th Cir., July 16, 2003), (City allowed businesses to sponsor advertisement on public benches but would not allow pawn shops to purchase ads. Held not a violation of First Amendment free speech). Accord, *Globe Newspaper Co. v. Beacon Hill Architectural Commission*, No. 94-1538 (1st Cir., 1996) (banning all street furniture, including newspaper racks, in historic district).

Basic rule is "content neutral time, place, and manner" regulations are OK. See *Kroll v. Steere*, 60 Conn. App. 376 (2000) (20-foot sign opposing deer hunt exceeded the size limitation and was not protected by First Amendment free speech protections.) Regulation that attempted to categorize commercial signs vs. non-commercial signs, and on-site signs vs. off-site signs was struck down in *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, No. 95-55529 (9th Cir. 1996).

See *Harris v. Z.E.O of Milford*, 61 Conn. L. Rptr. No. 18, 679 (4-18-16), holding that Statutes only authorize regulation of "advertising" signs, so the City had no jurisdiction over a sign that denigrated a particular contractor. The author questions how this holding can be squared with the requirement for content neutrality. If the sign had *promoted* the contractor, it would be regulated, but because it *denigrated* the contractor, the same sign was exempt? Apparently yes according to the Supreme Court in *Kutcha v. Arisian*, 329 Conn. 530 (2018), upholding the trial court and finding that zoning can only regulate *advertising* signs, i.e., one that promotes a business. So what about the content neutral requirement of *Reed v. Gilbert,* 576 U.S. 155*?* See *City of Austin, Texas v. Reagan National Advertising of Austin, LLC,* 142 S. Ct. 1464 (2022) (restrictions on alteration of existing nonconforming signs to prevent conversion to digital format was content neutral and allowed under *Reed.)*

Lanham Act: Restriction of sign color as part of unified shopping center sign plan, did not violate the Lanham Act (Federal law which protects trademarks). *Lisa's Party City, Inc. v. Town of Henrietta (New York)*, No. 98-7695 (2d Cir., July 20, 1999), though it may exceed Statutory authority. Accord, *Blockbuster Videos, Inc. v. City of Tempe*, No. 97-15535 (9th Circ. 1998).

MBL/MABL: So-called "minimum buildable land" or "minimum buildable square" regulations are allowable under the zoning power. *Timber Trails Associates v. Planning & Zoning Commission*, 99 Conn. App. 768 (2007).

Miscellaneous: Voiding of a zone change due to notice defect makes it void from inception so other actions taken in reliance upon that zone change will fail along with it. *Wilson v. Planning & Zoning Commission*, 35 Conn. L. Rptr. No. 5, 165 (9-1-03).

Regulations may require that accessory uses to principal uses requiring a special permit shall also require a special permit. *Donovan v. Town of Putnam*, 18 Conn. L. Rptr. No. 17, 602 (4-7-1997).

Regulations may not impose a shorter time period for completion of site plan improvements than those mandated by Conn. Gen. Stats. §8-3(I), *Kenyon Oil Company, Inc. v. Planning and Zoning Commission of Hamden*, 18 Conn. L. Rptr. 11, 392 (2-24-97).

Conn. Gen. Stats. § 8-26a: Was held to exempt approved subdivision lot from all after-adopted zoning regulations, not just those regarding lot dimensions. *Poirier v. Zoning Board of Appeals of Wilton*, 75 Conn. App. 28 (2003). Fixed by P. A. 04-210: Once a foundation is placed on a lot, it is subject to *current* zoning; only *vacant* lots (meaning ones that never had a building on them) are "grandfathered" under the zoning regulations in force at the time of subdivision approval. Clarified in PA 05-288. This protection includes even State- or Federally-mandated regulatory schemes such as Coastal Area Management and Flood Zone regulations. *Ross v. Zoning Board of Appeals*, 118 Conn. App. 90 (2009.)

I. 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*, 146 Conn. App. 355 (2013) (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*. [Reversed on other grounds, 304 Conn. 447 (2012)]. 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. For cul-de-sac length measured from intersection with unimproved road, see *Fragomeni v. Middletown PZC,* 59 Conn. L. Rptr. No. 16, 637 (4-20-15).

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). Same issue with "front yard:" In the absence of a definition, if a regulation doesn't allow parking in the "front yard," does it mean the minimum front yard for the zone (50 feet in this case) or nowhere between the building and the street? *Michos v. Planning & Zoning Commission*, 151 Conn. App. 539 (2014).

If a "structure" is defined to exclude something mounted on wheels, does putting "tiny wheels" on a boat shelter remove it from that definition? Does it then become a "trailer?" Judge Berger observed that "someone could add wheels to anything to take it out of the definition of a structure and avoid the regulations," a position he rejected in *Nixon v. ZBA*, Docket No. LND-CV-13-6045938. See also *Slater v. Preston ZBA*, 63 Conn. L. Rptr. No. 11 (2-13-17) where the local regulation required a zoning permit for any "permanent structure." Held that a wooden sunroom on a deck adjoining a camper isn't "permanent" because it could easily be torn down. Query if it was built of stone? It could still be torn down.

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) . *Kawa v. Hartland ZBA*, 56 Conn. L. Rptr. No. 3, 101 (8-5-2013): A "farm" can include the sale of firewood from trees grown on the property, but not from trees harvested elsewhere and brought to the site for processing.

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.) Is a dog grooming business one that involves "more than incidental traffic of clients to the dwelling" (not allowed as a home occupation) or is it comparable to "barbershop" or "beauty parlor" which uses or similar uses are expressly excluded? ZBA said no, and court upheld that on the comparability to "barbershop" or "beauty parlor" rather than the traffic argument. *Lowney v. Zoning Board of Appeals*, 144 Conn. App. 224 (2013). Zoning regulation that allowed "automobile repairer" would also allow "truck repairer." *Nozato v. Clinton ZBA*, 59 Conn. L. Rptr. No. 14 (4-6-15). Is commercial dog-handling business with outside dog runs a home occupation? Not per local regulations in *Bailey v. ZBA of Milford*, 70 Conn. L. Rptr. 237 (8-31-20 (Pickard).

What are the allowable uses in a "park?" Could an adjacent legal nonconforming commercial use (a hotel in this case) periodically hold concerts open to the public on the adjacent municipal park, and would that be an expansion of the nonconforming commercial use? No, such activities are typical of a "park." *Pfister v. Madison Beach Hotel, LLC,* 341 Conn. 702 (2022).

If a zoning regulation has a minimum separating distance between "the entrance" to a package store and a house of worship etc., does that apply only to the main entrance or does it include a secondary entrance? No, per *Brookside Package, LLC v. Planning & Zoning Commission*, 70 Conn. Law Tribune 402 (Radcliffe, J.)

Can an applicant count parking owned in common in a condominium association toward the parking requirement? Yes, per *Huse v. Zoning Commission*, 59 Conn. L. Rptr. No. 18, 689 (5-4-15).

In a zone that allows "health, fitness and recreational uses indoor" was the commission in error in approving an "athletic club?" No, per *Fifth Somerset Associates, LP v. Glastonbury Town Plan & Zoning Commission,* 2019 WL 3412439.

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 some 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).

Is a stone wall with no mortar a "permanent structure?" Though not a zoning case, the Superior Court said no in *Avery v. Medina*, 57 Conn. L. Rptr. No. 5, p. 193 (2-7-14). 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). Is a "fitness center" allowed in a zone that allows "Athletic Clubs" but doesn't mention "fitness center," when another zone allows "health, fitness and recreation uses indoors?" Yes. *Fifth Somerset Associates, LP v. Glastonbury PZC*, 69 Conn. L. Rptr. No. 21, 776 (9-16-19).

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).

Does a zone that allow "single family dwellings" allow short-term rentals, like Air BNB and VBRO? Yes, at least in Pine Orchard, *Whibey v. Pine Orchard Association ZBA,* 2021 WL 5014096 (J.D. of New Haven at Meriden).

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). Can legal frontage for a "lot" be obtained by combining two lots of record, each of which would not satisfy the requirement alone? *Wong v.*

Southington Planning & Zoning Commission, 52 Conn. L . Rptr. No. 22, 825 (1-30-12). For "single family dwelling" as compared to "boarding house*, see 7 Forest Hill Road, LLC v. ZBA of Norwalk*, 2019 WL 3893021; and for "boarding house" versus "family," see *Brian V. Ortiz v. Bristol ZBA*, HHB CV-196049718. For public schools versus private schools, *see Pitts v. Planning & Zoning Commission of North Haven*, 2019 WL 4344367 (Berger, J.), which also invalidates the underlying regulations for its distinction between public and private schools.

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.") *Brady v. Easton ZBA*, 56 Conn. L. Rptr. No. 20, 762 (12-9-2013) held that group of horse owners sharing expenses at a stable isn't "boarding of horses for commercial purposes" because property owner isn't directly getting money and so it isn't "commercial." 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.*

The mere fact that a term isn't defined in the regulations does not automatically mean that the regulation is "void for vagueness" or unconstitutional. *Ogden v. ZBA*, 157 Conn. App. 656 (2015) ("contractor's yard" was not defined, but owner *applied* for a special permit for a "contractor's yard;" it was approved; but then he didn't implement the required improvements yet continued to operate. The fact that he applied indicated that he knew what he was doing constituted a "contractor's yard," whatever it was.

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).

J. Limitations on Use Variances, Conn. Gen. Stats. § 8-6(a)(3) Conn. Gen. Stats. § 8-6(3)(a) allows a zoning commission to specify in its regulations "the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed". However, courts have not permitted wholesale prohibition of use variances, leaving unclear how far Section 8-6(a)(3) can be extended. *Wallingford Zoning Board v. Wallingford Planning & Zoning Commission*, 27 Conn. App. 297 (1992); *Board of Zoning Appeals v. Town Planning & Zoning Commission of Hamden,* No. CV-81-195250 S (Superior Ct., J.D. of New Haven, 1-29-82); *Zoning Board of Appeals of the City of Bridgeport v. Planning & Zoning Commission*, 34 Conn. L. Rptr. No. 19, 705 (7-21-03).

K. 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 regulation is valid when hearing a Z.E.O. appeal or variance.

L. 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. SUBSTANCE.

A. Change of Zone or Regulations. (Zoning or IWWC).

Legislative decision, highest level of discretion, as long as Statutes are complied with. Same if it is a "floating zone" type of planned district. *Campion v. Board of Alderman of City of New Haven*, 34 Conn. L. Rptr. No. 9, 353 (May 12, 2003), affirmed by Supreme Court in 278 Conn. 500 (2006), and again in *Tillman v. Planning & Zoning Commission,* 341 Conn. 117 (2021) Alleged noncompliance with Plan of Conservation & Development does not render decision improper. *Cottle v. Planning & Zoning Commission of Darien*, 100 Conn. App. 291 (2007). On appeal, court is not to substitute its judgment for the broad discretion of the zoning authority. *Konigsberg v. Board of Alderman of City of New Haven*, 283 Conn. 553 (2007). Evidence to support zone change is not the "substantial evidence" test applicable to applications under the regulations, but a lesser standard of proof, *Dutko v. Planning & Zoning Board*, 110 Conn. App. 228 (2008).

"Minimum Buildable Land" requirements OK. *Timber Trails Associates v. Planning & Zoning Commission of Sherman*, 99 Conn. App. 768 (2007).

Floating zone can't "expire" automatically even if approval motion says so. *Blakeman v. Shelton Planning and Zoning Commission of the City of Shelton*, 82 Conn. App. 632 (2004). Amendment to floating zone must follow same procedure as original approval. Id.

Until 2002, with zone changes alone, there was no Statutory provision allowing commission to "modify and approve" the application, although it is routinely done. *AEL Holdings, Inc. v. Board of Representatives of City of Stamford*, 30 Conn. L. Rptr. No. 11, 418 (October 29, 2001), (zone change had to be approved or denied; no changes). Affirmed 82 Conn. App. 6a32 (2004). This has been fixed by PA 02-77, substituting the words "act upon" for "adopt or deny". Even pre-2002, Commission could approve less of a change than what was sought. *Scully v. East Haddam Planning and Zoning Commission*, Doc. No. CV 95 0074314 (J.D. of Middlesex at Middletown), *cert. den*.

Spot Zoning: Concept of "spot zoning" is virtually dead. Even regulation that applied to perhaps

only one property upheld. *Kingston v. Old Lyme Zoning Commission*, Docket No. CV 06-4005983 (Sup. Ct., New London). But see *Gaida v. Planning & Zoning Commission*, 108 Conn. App. 19 (2008) finding spot zoning for attempt to rezone industrial land to residential in the midst of efforts to close down the existing industrial operation. See also, *Roundtree v. Planning & Zoning Commission,* 2007 Conn. Super. LEXIS 2258 (August 14, 2007) (spot zoning to accommodate a lawyer's new office). See also *Tillman v. Planning & Zoning Commission of Shelton*, --- Conn. ---- (2021), applying *Campion v. Board of Aldermen*, 278 Conn. 300 (2006), to hold that a Planned Development District was not spot zoning, even though the *Campion* PDD regulation was adopted under the authority of a special act while the Shelton PDD regulation was adopted under the authority of the General Statutes.

See, *Miller v. Planning & Zoning Commission of Bridgeport*, 2019 WL 4323512 where spot zoning was found for higher density residential zoning. The Court held that other high-density residential uses in the area didn't justify the zone change because those uses were legally nonconforming and not by virtue of their existing zone classification.

Uniformity Rule: Does not preclude regulation that applies to only some properties. *Roncari Industries, Inc. v. Planning & Zoning Commission of Windsor Locks*, 281Conn. 66 (2007). *Kingston v. Old Lyme Zoning Commission*, *supra. See also, Old Mine Associates, LLC, v. Planning & Zoning Commission of Trumbull*, 2020 Conn. Super. LEXIS 546 (2020), concerning the increase in a town-side cap on multi-family housing; held not to violate the Uniformity Rule. *See,* also, *Brookside Package, LLC v. Planning & Zoning Commission*, 70 Conn. Law Tribune 402, holding that text amendment to reduce the required separating distance between liquor stores did not violate the Uniformity Rule.

B. Plan of Development Adoption/Amendment (legislative).

C. Special Exception or Permit.

Administrative decision; next level of discretion. Can apply criteria of the regs, but only those and no others. Could be PZC or ZBA. If ZBA, *no hardship* required but still four affirmative votes needed. Very high level of discretion. See *Children's School, Inc.*, *supra*. Commission has discretion to apply regulatory requirements, *N&L Associates v. Planning and Zoning Commission*, 39 Conn. L. Rptr.

No. 12, 466 (8-15-05), (regulations said excavation SX shall not be renewed if "violations" but commission could ignore minor, technical violations and grant renewal.). Compare to *Smith Bros. Woodland Management, LLC v. Planning and Zoning Commission*, 88 Conn. App. 79 (2005), where *regulation*, by its text, permitted the use but Commission unsuccessfully attempted to deny it on other grounds (health & safety, Plan of Conservation & Development, etc.). Moral: **Discretion won't extend to the point of ignoring your own regulations.**

D. ZBA Automotive Location Designations.

A complete mess! Eliminated by PA 02-70, §87, and then reinstated in the trailer session but *without the standards*! After much confusion, held that the public hearing requirement and standards were not reinstated. *One Elmcroft Stamford v. ZBA,* 337 Conn. 806 (2021), reversing 192 Conn. App. 275. ZBA is acting as a STATE AGENCY per CGS 14-54; different standards; not hardship. Standard *was* in Section 14-55, "such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway, and effect on public travel". Denial because of property values impact, conflict with master plan, or other typical "health, safety, and welfare" zoning criteria is not authorized. *Vicino v. ZBA*, 28 Conn. App. 505 (1992); *Auto Placement Center, Inc. v. East Haven ZBA*, 19 Conn. L. Rptr. No. 6, 207 (6-9-97

Also, note the question of whether the motor vehicle dealing is actually occurring on the site. Compare *A Better Way Wholesale Autos, Inc. v. Commissioner of Motor Vehicles*, 167 Conn. App. 207 (2016), where the Court held that there was no evidence of a motor vehicle sales at a satellite storage lot which did not have location approval from the ZBA; to *Brais v. Mahey*, Docket No. WWM-CV-16-6010225 (J.D. of Windham at Putnam) where there was abundant evidence that autos were being shown and marketed from the satellite "storage" lot without a certificate of location approval.

E. Subdivision.

Administrative decision, and historically narrow discretion: subdivision must comply with Subdivision Regulations, no more no less. *See*, *Krawski*, *supra, b*ut rule may be getting broader. See

Laux v. Westport Planning & Zoning Commission, 29 Conn. L. Rptr. No. 1, 25 (April 2, 2001), (proper to deny subdivision even where lots conformed to regulations because they was so gerrymandered and odd in shape as not to be "building lots"). See, also *Smith v. Greenwich Zoning Board of Appeals*, 227 Conn. 71 (1993), (denial of subdivision was proper to protect historic street scape because historic factors are natural resources and commission could consider protection of natural resources). Denial due "character of the land" factors upheld where criteria is in the regulations and facts indicate massive earth-moving would be required, *Jackson, Inc. v. Planning and Zoning Commission*, 118 Conn. App. 202 (2009.)

If Commission is going to require a plan for the entire property before approving phased subdivision, must be in the regulations. *Szymanska v. Planning and Zoning Commission of Ridgefield*, 30 Conn. L. Rptr. No. 14, 520 (11-19-01). Every lot in a subdivision must conform to the zoning regulations--PZC can waive SUBDIVISION requirements by 3/4 vote IF there is authorizing provision in your Regs (Conn. Gen. Stats. §8-26) but CANNOT ISSUE VARIANCES.

Resubdivision: Combining lots is not a resubdivision but changing a through-street to cul-de-sac is. *Arvin Gregory Builders v. Brookfield Planning Commission*, 33 Conn. L. Rptr. No. 18, 672 (2-24-03).

F. Zoning, Site Plan:

Some of the same considerations as for subdivision since level of discretion is the same, e.g., Commission can consider off-site impacts of application *if the regulations so authorize*. *A. Aiudi & Sons, LLC v. Plainville Planning & Zoning Commission*, 27 Conn. L. Rptr. No. 11, 411 (August 28, 2000). But compare to *229 Post Office Road, LLC v. Enfield Planning & Zoning Commission*, 2007 Conn. Super. LEXIS 2576 (10-1-07) holding that commission could not consider off-site impacts in site plan review.

G. Wetlands Permit.

Declaratory, Plenary and Summary (sig. vs. not sig.); Exempt or permitted uses. Many regs don't have "Declaratory" procedure *but it exists due to inherent authority to determine jurisdiction*. See above.

H. Variance.

Hardship is to the land, not the person; not financial; unique; not self created by applicant or its predecessor in title; in harmony with the purpose and spirit of the regulations. For extreme example, see

Santos v. ZBA of Stratford, 100 Conn. App. 644 (2007), (illegally created lot could not be used at all without variances, but held self-created and financial hardship only). Note factor of reducing nonconformity, *Vine v. ZBA of North Branford*, 281 Conn. 553 (2007). "Hardship" test not satisfied just because granting of the variance would arguably produce a better site plan for the neighborhood. *Swiconek, Trustee v. Glastonbury ZBA*, 47 Conn. L. Rptr. No. 13, 492 (June 22, 2009), 51 Conn. Supp. 190 (2009). For interesting case, see *Vichi v. Zoning Board of Appeals*, 51 Conn. L. Rptr. No. 19, 679 (7-4-2011) (same judge upheld denial of variance to allow a dwelling on nonconforming lot, *Vichi v. Zoning Board of Appeals*, Docket No. 565653; but on a new application, overturned ZBA denial of variance on grounds of "fundamental fairness" because 3 other adjoining lots from the same original development had been allowed to construct homes.) There is no "de minimus" variance in Connecticut (variance granted just because it's such a small nonconformance). *Morikowa v. ZBA*, 126 Conn. App. 400, 413 (2011); *Long Shore, LLC v. Madison ZBA,* 52 Conn. L. Rptr. No. 10, 359 (10-24-2011).

Once variance denied or court appeal overturns the approval, Board cannot approve same application later. *Daw v. ZBA of Westport*, 63 Conn. App. 176 (2001); *Rutter v. Haddam ZBA*, CV 96-079420 (Middlesex). See *Benson v. ZBA*, 89 Conn. App.324 (2005). But see *Vine v. ZBA of North Branford*, *supra*, which did allow reversal of previous denial without mentioning the *Benson* case. See contrary rule for special permits, *Richardson v. Zoning Commission,* 107 Conn. App. 36 (2008). Note also that *erroneous* granting of past variance won't prevent Board from acting correctly under the same facts in another situation. *Goulet v. Cheshire Zoning Board of Appeals*, 44 Conn. L. Rptr. No. 12, 430 (1-14-08).

Taking of portion of property by eminent domain constitutes hardship for the balance. *Couture v. Bristol Zoning Board of Appeals*, 34 Conn. L. Rptr. No. 9, p. 351 (May 12, 2003). There is no such thing as a "*de minimis* exception" to the hardship requirement (i.e., if variance is request is small enough, no hardship need be shown). *Ransom, Jr. v. ZBA of New Milford*, 42 Conn. L. Rptr. No. 9, 336 (1-8-07). Standards for what constitutes "hardship" is based on Statutes and case law, and Board cannot impose additional requirements, even if local zoning regulation says so. *Jersey v. ZBA of Derby*, 101 Conn. App.

350 (2007). But see, *E and F Associates, LLC v. Zoning Bd. of Appeals of Town of Fairfield*, 320 Conn. 9 (2015) "peculiar characteristics of property that made it difficult to construct a second story on building that would comply with zoning setback requirements did not justify granting a variance, overruling . . . *Jersey*" on that point.

Reduction in a nonconformity may be grounds for a variance but *only if* the variance is essential to reducing the nonconformity–not just as a barter, "you give me a variance and I'll reduce this unrelated other nonconformity." *Lavoie v. Voluntown ZBA*, 49 Conn. L. Rptr. No. 5, 153 (4-12-10).

I. Appeals of Z.E.O Decision.

Adjudicative--different from any of the others. Acting like a court, weighing facts and law. After the close of public hearing, Z.E.O cannot speak, contra normal situation (see "Staff Input"). Z.E.O refusal to issue a Certificate of Zoning Compliance is not grounds for Writ of Mandamus because ZBA appeal is available remedy. *Quinn v. Kerr*, 25 Conn. L. Rptr. No. 15, 527 (12-13-99)

J. Site Plan Approval, If You Have It.

Ministerial. No discretion at all (in theory). Same for staff "Zoning Permit". Beware standards in Regs. which are not ministerial (e.g., Willington logging regs).

K. Affordable Housing Applications.

CALL THE TOWN ATTORNEY!! The rules are totally different and you will need legal counsel at once.

L. Enforcement.

I think you can file cease and desist orders in the land records per *Cabinet Realty v. Planning and Zoning Commission of the Town of Mansfield*, 17 Conn. App. 344 (1989); can obtain prejudgment remedy, *State of Connecticut v. Philip Morris, et al.*, 23 Conn. L. Rptr. No. 6, 192 (January 4, 1999); *Town of East Lyme v. Wood*, 54 Conn. App. 394 (1999). There is no "sovereign citizen" defense. *Kelly v. Thweatt*, Conn. Law Tribune at p. 29 (3-15-21.)

There is a presumption that Cease & Desist Order mailed to a post office box that the violator acknowledged constitute sufficient evidence of receipt, even though violator claimed that he never got it.

Bolton v. Laura Thweatt, 2019 WL 6745758.

A decision not to enforce regulations is not appealable. *P.R.I.C.E., Inc. v. Canterbury*, Docket No. 93-0047479 (Superior Court, J. D. of Windham at Putnam, March 21, 1995, Potter, J.); *Maier v. Tracy*, 7 Conn. L. Rptr. No292 (1992, Fuller, J.) and also 8 Conn. L. Rptr. 418 (1993, Fuller, J.). Same if it is the planning and zoning commission which decides not to enforce. *Gordon v. Zoning Board of Appeals of Easton*, 31 Conn. L. Rptr. No. 5, 159 (2-11-02). Same result for a Building Inspector, *West Haven Academy of Karate v. Town of Guilford*, 28 Conn. L. Rptr. No. 2, 53 (November 13, 2000). Same for wetlands. *Davis v. Environmental Commission of New Canaan*, 42 Conn. L. Rptr. No. 19, 691 (3-19-07). Same for blight ordinance, *Diamond v. Gonzalez*, Conn. Law Tribune, p. 39 (5-31-21). Enforcement or non-enforcement is a discretionary function of local government, and a municipality cannot be compelled, even by contract, to commence enforcement action against a violation. *Oygard v. Town of Coventry*, 30 Conn. L. Rptr. No. 7, 252 (October 1, 2001), (In settlement of claims of reduced property values, Town entered into contract with neighbor to enforce zoning violation against adjacent owner, then failed to honor that contract. Held that contract was void and unenforceable.)

If there is a Zoning Enforcement Officer, avoid commission votes "directing" or "advising" that Officer what to do. Could trigger a dual appeal to ZBA and also Superior Court. See *Lost Trail, LLC v. Weston Planning and Zoning Commission*, 48 Conn. L. Rptr. No. 3, 90 (9-28-09) (commission voted to give "advice" to Z.E.O. but published a legal notice of the vote; held it was a *de facto* commission decision, hence appealable to Court, not ZBA.) See also, *Lallier v. Zoning Board of Appeals*, 119 Conn. App. 71 (2010) (commission reversed earlier decision and ordered Z.E.O. to issue order). Calculation of *per diem* penalties: See *Town of South Windsor v. Lanata,* 341 Conn. 31 (2021) (penalties not collectable for junk during the period of time that Fire Marshal and insurance company told the violator not to disturb the junk).

Conn. Gen. Stats. §8-13a: Validates structures which violate setbacks if they have existed for more than three years before the "institution of an action". This means a *court* action, not just issuing a Cease and Desist Order. *Adamski v. Bristol Zoning Board of Appeals*, 12 Conn.L. Rptr. 431 (1994).

Fuller, Land Use Law and Practice, 2nd Ed., Section 53.3, p. 575. The three-year limit does not run from discovery but from the erection of the structure in question. *Curran v. Zoning Board of Appeals of Town of Newtown*, 1995 WL 316961. Conn. Gen. Stats. § 8-13a validates only *setback* violations, not *use* violations. *Kelly v. Norwalk Zoning Board of Appeals*, 99 CBAR 0106, 24 Conn.L. Rptr. 95 (1999), Superior Court at Stamford, Docket No. 162660.

Section 8-13a now applies to a building *or* structure, Public Act 13-9, and the Act clarifies what a "structure" is, and expressly places the burden of proof on the party claiming legal nonconforming buildings or structures under this Section. One Superior Court ruled that Public Act 13-9 is retroactive, meaning that a "structure" existing for more than three years is validated, even if the three year period began before the Act was enacted. *Fishman v. ZBA of Westport*, 60 Conn. L. Rptr. No. 17, 648 (10-12-15).

However, mere fact that the *use* was not legal or authorized will not defeat validation of any *setback* violation. *Dodson's Boatyard, LLC v. Planning and Zoning Commission of Stonington*, 77 Conn. App. 334, cert. den., 265 Conn. App. 908 (2003).

Section 13a applies only to *buildings*, not to other structures, like a generator, utility pole, etc. *Wright v. ZBA of Mansfield*, 22 Conn. L. Rptr. No. 1, 76 (7-6-1998). Be aware of *Salzano v. Goulet*, 53 Conn. L. Rptr. No. 11, 425, p. 430 (4-30-12) where, in the context of a malpractice and breach of contract case, the Superior Court found that Conn. Gen. Stats. 8-13a validated an illegal lot and protected it from merger with an adjoining nonconforming lot. I consider this holding to be in error.

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

A. Involve us EARLY.

If you know a controversial application is coming, have your attorney present at the hearing from the beginning; want to work with staff to draft the motion(s); 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.

ZONOUTBR
(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 *Lavoie*, *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. November 9, 2011 to add *Frank's Package Store* and *Long Shore, LLC* cases. Rev. January 9, 2012 to add *Cockerham* and *Barton* cases. Rev. April 25, 2012 to add *Mountain View Association*. Rev. May 1, 2012 to add *Lowney*; Rev. May 7, 2012 to add *Marella*. Rev. May 15, 2012 to add *Fort Trumbull Conservancy* and *Edwards v. ZBA.* July 23, 2012 to add *Wong* and *Eastern USA Realty* cases. Rev. July 27, 2012 to add *Hayes Properties-Newington*, *Sound View Properties*, and *Schiavone*. Rev. July 31, 2012 to add *Egan* case. Rev. August 2, 2012 to add second *Nason Group, Haines, Ahlberg,* and *Optiwind* cases. Rev. August 8, 2012 to add *Crisman*. Rev. August 10, 2012 to add *KJC Real Estate.* Rev. September 19, 2012 to add *Valley Mobile Home Park, LLC.* Rev. November 6, 2012 to add *Stephanoni* case. Rev. December 10, 2012 to add *Taylor* ditch case. Rev. December 17, 2012 to add *Vanghel* and *Madore* cases. Rev. February 19, 2013 to add *Estate of Machowski.; Rev. February 26, 2013 to add Supreme Court decision in Anatra*. Rev. March 14, 2013 to add *Sunset Manor Association, Wesfair Partners.* Rev. April 4, 2013 to add *Handsome, Inc.* and *Grissler* decisions. Rev. May 10, 2013 to add *Jacobson* decision. Rev. August 9, 2013 to add *Lowney*, *Legal Development Corp.* Rev. October 3, 2013 to add *Kawa, Caporaso,* cases and correct ZBA automotive hearing requirement. Rev. 11-24-13 to add *Wallingford v. ZBA.* Rev. 11-24-13 to add *Landmark v. Lyme Swr. & Wtr*. Rev. 12-13-13 to update *Cockerham* decision. Rev. 1-20-14 to add *Brady* case. Rev 3-10-14 to add *Avery* case. Rev. 6-24-14 to add *MacKenzie* and *Modern Tire Recapping Co.* Rev. 8-4-14 to add *Villages*, Michos, and *Greenwood Manor* cases. Rev. 8-18-14 to add *Kids Zone* case Rev. October 20, 2014 to add *Ruscio* case. Rev. 11-4-14 to add *Oates* case. Rev. 11-12-14 to add *Three Levels* case. Rev. 11-20-14 to add *Nixon.*;. Rev. 12-22-14 to add *Farmington-Girard*. Rev. 1-12-15 to add *Serdechny* case. Rev. 1-16-15 to add *Rocky Hill* case. Revised May 31, 2015 to add *Santarsiero, Fragomeni, Huse, Nozato, Village of Bee Brook Crossing HOA, and Cocchiola Paving, Inc.* Rev. 6-29-2015 to add *Ogden* case and *Arrowhead HOA.* Rev. 8-6-15 to add *Pukonen* case. Revised 10-9-15 to add *Erica Frances Lane.* Rev. 10-19-15 to add *Mandable* case. Rev. December 29, 2015 to add *Maluccio*, *Russo*, and *Panek* cases. Rev. 2-18-16 to add *Gibbons*, *Panek*, and *Stefanoni* cases. Rev. 4-13-16 to add *Williams* case. Rev. 6-20-16 to add *Sammartino* and *Sedensky* cases. Rev. 9-9-16 to add *Jaffe* case and *Taylor* and *Indian Springs*. Rev. 9-28-16 to add *Miller*. Rev. 10-24-16 to add *Saunders, Kellogg, Lamoureux, Seaview Cove, LLC, DFC of Meriden, LLC, and Riganese* cases. Rev. 11-3-16 to add *Bais Farrington-Posner,* and *A Better Way Wholesale Autos, Inc.* cases. Rev. 11-11-16 to add *Harris.* Rev. 11-216 to add *200 East Main Street, LLC.* Rev. 7-7-17 to add *Patty, Slater, Murphy,* and *Walhberg* cases. Rev. 6-4-18 to add *Priore* case, and again 7-30-18 to updated *Priore* holding on reargument and add the *Kutcha* case. Rev. 2-1-19 to add *Cady* case. Rev. 8-27-19 to updated *Santarsiero*

citation. Rev. 10-22-19 to add *Fifth Somerset Associates* and *Blue Bird Prestige, Inc.* cases. Updated 10-23-20 to add *Tillman*, *Old Mine Associates, Miller v. PZC, 7 Forest Hills Road, LLC, Pits, B. Metcalf Asphalt Paving, Coalition to Save Easton, Brookside Package, LLC, Fifth Somerset Associates, LP, Ortiz, Bolton.* Updated 1-7-22 with numerous cases. Update 1-15-22 to add *MSW Associates, Tillman, 2722 BPR, LLC, Whibey, 9 Pettipaug, LLC, Markatos, Fusco,* and *Castelli* cases. Updated 9-6-22 to add numerous new cases and update citations. Updated 10-24-22 to add *Purnell* and *Woodbury Donuts* cases. Updated 2-21-24 to add discussion of Robert's Rules of Order.