

*Inland Wetlands Agency*

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**SPECIAL MEETING**  
**APPROVED MINUTES**

**Thursday, October 26<sup>th</sup>, 2017 at 7:30 PM**

**Canoe Brook Senior Center, 11 Cherry Hill Road, Branford, CT**

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BRANFORD, CONNECTICUT

Commissioners Present: Peter Bassermann, Suzanne Botta, Richard Greenalch, Sandra Kraus, James Sette, Eric Rose and Rick Ross.  
Commissioners Absent: Jim Goggin and Mark June-Wells.  
Staff Present: Enforcement Officer Diana Ross & IW Assistant Jaymie Frederick  
Chairman Bassermann called the meeting to order at 7:30pm

**Commissioner Training Session, with Attorney James Perito**

Jim Perito introduced that he has been a Branford resident since 1989, he is a lawyer at Howard and Sage and has worked for the town. Previously he has been on the Conservation Commission and Inland Wetland Commission in Branford. His objective for tonight's training is to go over the Commission's jurisdiction, what evidence can be considered relevant by the Commission and the decision process. Wetland law is evolving. While it is a scientifically based determination; the Commission's job is to balance the harm to the wetlands and watercourses against property rights and economic impact. DEEP has delegated regulation of wetlands and watercourses to the towns. At least one Commissioner needs to have DEEP training. The Commission can delegate duties to the Agent but it has to be spelled out what the Agent can and can't do. Powers and duties of the Agency are set forth by the Act. Regulations are a continuing process to account for changes at the state level. Commission hears applications for activity in a wetland or that may impact a wetland. Connecticut defines wetlands by soil type.

Chairman Bassermann asked if there is any move to be more inline with the federal laws.

Atty. Perito stated not that he is aware of. Went over watercourses and regulated activity definitions. The Queach Corp case law allowed Commissions to look beyond the wetland/watercourse border to consider potential impacts to the wetland. Upland review area gives the Commission flexibility to determine whether upland area activity may impact regulated areas.

EO Ross stated that the Commission had tried to set buffers in 1998 and the state stated you cannot do that. Upland review area is based on potential impacts, not distance. It is an administrative tool to initiate the review process.

Comm. Botta stated the critical aspect is determining the nexus between activity in the upland review area and impact to the wetland. Value of the wetland is not a part of the determination.

Comm. Ross stated that it is tricky because distance can be more than 100ft and there is no real trigger but there could still be a nexus.

EO Ross stated there is a clause that covers that.

Comm. Botta stated Queach and Pisgah Brook are good examples of where this clause applies. They have very steep slopes that are incredibly erodible.

Comm. Kraus asked if Piscitello Dr would be an example.

Comm. Botta affirmed that it is; that whole section of Town is.

Atty. Perito stated upland review area in the regulations is defined as any area outside of wetlands and watercourses, on which activities are likely to impact or affect wetlands or watercourses. The Commission needs to apply knowledge of the town in determining how an activity may impact wetlands.

Atty. Perito stated putting conditions on an application can get to be a problem. Cannot ask for additional materials that staff will review after. It is up to the Commission to determine that they have enough information to make a decision. Be careful of conditions designing the application.

Chairman Bassermann asked the more significant the conditions are the more the Commission is going beyond their responsibility.

Atty. Perito affirmed that is true. It is not for the Commission to design the plan.

Comm. Rose asked if there can be discussion as to what the application ought to be so that the applicant can modify their application.

Atty. Perito stated that is fine. Ideally that would be done informally prior to the application.

Comm. Botta stated that the Commission has done some concept reviews.

Atty. Perito stated critters are not the commission's jurisdiction.

Comm. Botta stated if there is a likely impact to the wetland or watercourse's water quality; that is their jurisdiction. It is easier to think of the critters, but it is really the function of the resource to support them that is their jurisdiction.

Comm. Rose stated that the critters can be evidence of the impact.

Atty. Perito agreed.

Atty. Perito went over definition of significant activity. Activity with a dam goes to the state. Once the Commission determines there is a significant activity, then the issue of prudent and feasible alternatives applies. It's the applicant's burden to show that there are no prudent and feasible alternatives. Cost can be a factor in feasibility, but it isn't the only factor. It has been upheld that a Commission cannot deny an application based on speculative risks.

Comm. Botta stated that 'could' is not sufficient, needs to be 'would' or 'is likely' and needs to be presented by an expert in the appropriate field. It is up to the Commission state on the record what testimony they are relying on when there is contradictory testimony from experts. Cannot rely upon testimony given outside of an individual's area of expertise.

Atty. Perito a mere worry is not substantial evidence. Record needs to support Commission's action.

Chairman Bassermann asked if the Commission doesn't feel that it has the expertise to address an application and the applicant doesn't want to provide funds for a third party, whether the Commission deny the application.

Atty. Perito stated that if the regulations provide for it he thinks that the Commission could. If you find that an expert is not credible you have to state that on the record so that they have a chance to respond.

Comm. Botta stated this has to happen during the public hearing, cannot be introduced during deliberations.

Atty. Perito stated that a Commissioner needs to present their expertise. Evidence in the record to support the decision is important. The peer review is important. Would not advise the Commission to have discussions about a draft report. Commission can address concerns of omissions from the report but once the consultant has written their report they have written what they have written.

Chairman Bassermann asked if the third party and staff can be communicating before the document is published.

Atty. Perito stated yes. It is most prudent to have in the scope of work what is that the Commission wants them to do. Commission should make their own report of their conclusions of all reports that were submitted. Some of the ultimate issues cannot be put on the expert. Only the Commission can determine if the impact is acceptable. The act requires that the Commission states their reasons, it is important that the reasons are supported by the record. Conduct of the hearings; it is important to

keep everyone as civil as possible. If you need to, have a special meeting so that the hearing is more sequential. When it is pushed out over time things end up re-iterated and the public may not feel they are getting the opportunity to comment. Cross examination, questions should always be asked through the Commission. Only evidence on the record can be considered. Site walk is for orientation only, you don't get into any specifics discussing the application.

Comm. Botta stated no why and no how, that should occur at the meeting.

Atty. Perito stated that it is important to see the site.

Chairman Bassermann asked if the Commission can ask their hired expert to come up with prudent and feasible alternatives.

Atty. Perito stated that is the applicant's burden.

Comm. Botta stated Commission can ask for analysis of applicant's prudent and feasible alternatives.

Atty. Perito stated you can have your expert look at the scientific aspect of the applicant's review of prudent and feasible alternatives.

Comm. Ross asked if you can ask the hired consultant whether there are prudent and feasible alternatives to what was presented.

Comm. Botta stated that you can.

EO Ross stated to look into what might be a prudent and feasible alternative, not to assess whether or not it is but to ask the applicant if they have looked into these things.

Comm. Botta stated a reviewer could review whether there are additional considerations the applicant should look at that perhaps they haven't.

Comm. Rose asked if there is an interaction with a hired consultant ever amongst staff, the hired party and the applicant.

EO Ross stated that there is no direct correspondence between the hired consultant and the applicant without staff involved. Staff is always involved so that staff knows what is going on.

Atty. Perito asked if that is going to be on the record.

EO Ross stated that it is going to be in the record.

Comm. Rose stated discussion of alternatives could be going on at the staff level before it comes to the Commission to help the applicants put together a better application.

EO Ross stated if there isn't correspondence in-between meetings it is hard to keep things moving.

Chairman Bassermann asked if hired expert can meet with staff without the applicant present

Atty. Perito stated they could.

Comm. Kraus asked if the question whether the Commission's expert can offer other alternatives to the applicant was answered.

Atty. Perito stated he will have to get back to the Commission on that.

Chairman Bassermann asked if there are any court cases that he is aware of that would alter the Commission's regulations at this point.

Atty. Perito stated that he is not aware of any.

Atty. Perito stated the Commission's job is to make the process as fair and open as possible. If the Commission has any questions they can be submitted to him through EO Ross.

*At 8:28 PM the commission took a brief break.*

**IW#08.12.01/CC#16.01.01 – 40 Laurel Hill Rd – new home; site status and possibly consider lifting CC#16.01.01**

Chairman Bassermann asked for an update.

John Torello, architect and planner, and Richard D'Antonio, owner, were present to discuss project status.

Commission discussed with project representatives that timing is an issue with the request to modify the conservation easement. Get the site into compliance now and then come back later to request changes.

J. Torello stated that they are addressing the concerns. The storm drainage easement has been staked out and the plunge pool is located within the easement, manipulation of the stone still needs to be done to contour it properly.

Chairman Bassermann asked if wetlands were filled during this process.

J. Torello stated some wetlands were filled; those have been identified and cleaned up.

EO Ross stated the buried silt sock needs to be removed. Erosion controls need to be re-installed.

Chairman Bassermann asked if it is clear what needs to be done going forward.

EO Ross stated the sheets that they gave them, the November 4<sup>th</sup> 2016 letter and the yellow highlighted things [by IWEO in ZEO's email dated 9/28/17] need to be done. Before the mitigation plan is started she needs to confirm plants and wants meet them at the site to confirm locations.

J. Torello stated that they have a modified landscape plan that doesn't work.

EO Ross stated that she agrees some of the planting plans don't work.

J. Torello stated it doesn't make sense to put plantings in wooded area. Thinks it would be better to put plantings along the wooded area.

Chairman Bassermann asked if there is a plan showing what they want on paper.

Bonds were discussed. EO Ross stated that the 16,000 bond is for zoning. The Inland Wetland Agency has a 1,600 bond and 300 needs to be submitted for the wetland mitigation plantings.

Commission discussed topo information needed.

Comm. Rose asked if it would make sense to have a soil scientist inspect the conditions and confirm that any fill in the wetland has been removed. Grading information may not provide the information needed.

EO Ross agreed, stated that would be the best way to do it.

Commission discussed that there are outstanding items that need to be done prior to lifting the order that cannot be covered by a bond. Fix it; certify that it is done, either by elevation or soil scientist, and come back in two weeks. It is a checklist. The agent legally cannot lift the cease and correct order. The Commission cannot lift the order when there are things that are not in compliance.

**Adjournment:** Comm. Greenalch motioned to adjourn the meeting at 9:06pm, Comm. Sette seconded. Motion passed unanimously (7-0-0).

No other business was conducted

Respectfully Submitted,



Jaymie Frederick, Inland Wetland Assistant