**TOWN OF EAST WINDSOR**
**INLAND WETLANDS WATERCOURSE AGENCY**

**Regular Meeting – August 5, 2015**

***MEETING MINUTES***
*****Draft Document Subject to Commission Review/Approval*****

**CALL TO ORDER:** Vice Chairman Slate called the Meeting to order at 7:00 p.m. in the Town Hall Meeting Room, 11 Rye Street, Broad Brook, CT.

**ESTABLISHMENT OF QUORUM:**

**Present:** Regular Members Robert Slate (Vice Chairman), Alan Baker, Dave Menard, Richard Osborn, Richard P. Pippin, Jr. , and Alternate Member Steve Smith.

**Unable to Attend:** Alternate Member Sawka

**Guests:** Kathy Pippin.

Vice Chairman Slate noted the establishment of a quorum with 5 Regular and 1 Alternate Member as noted above. All Regular members will sit in on votes this evening.

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Also in attendance was Wetlands Enforcement Official Robin Newton .

**AGENDA ADDITIONS:** None.

**APPROVAL OF MINUTES – July 1, 2015 Regular Meeting:**

**MOTION: To APPROVE the Minutes of Regular Meeting dated July 1, 2015 as written.**

**Osborn moved/Pippin seconded/VOTE: In Favor: Unanimous**

**APPROVAL OF MINUTES – July 22, 2015 Special Meeting:**

**MOTION: To APPROVE the Minutes of Special Meeting dated July 22, 2015 as written.**

**Baker moved/Osborn seconded/VOTE: In Favor: Unanimous**

**CONTINUED PUBLIC HEARINGS:** None.

**NEW APPLICATIONS TO BE RECEIVED:** None.

**NEW BUSINESS:** None.

**OLD BUSINESS:** None.

**MISCELLANEOUS/1) Election of Officers:**

Vice Chairman Slate opened discussion to nominations for officers. Both Vice Chairman Slate and Commissioner Baker volunteered to serve as Chairman.)

**MOTION: To CLOSE the nominations for Chairman**

**Osborn moved/Pippin seconded/*DISCUSSION:* None**
**VOTE: In Favor: Unanimous**

**MOTION: To ELECT Robert Slate for Chairman.**

**Osborn moved/Pippin seconded/*DISCUSSION:* Vice Chairman Slate noted he accepted the nomination.**
**VOTE: In Favor: Osborn/Pippin/Slate**
**Opposed: No one**
**Abstained: No one**

**MOTION: To ELECT Alan Baker for Vice Chairman**

**Pippin moved/Osborn seconded/*DISCUSSION:* None.**
**VOTE: In Favor: Unanimously**

**MOTION: To CLOSE the nominations for Vice Chairman.**

**Osborn moved/Pippin seconded/DISCUSSION: None.**
**VOTE: In Favor: Unanimous**

**MOTION: To NOMINATE Rick Osborn as Secretary.**

**Pippin moved/Baker seconded/*DISCUSSION:* None**
**VOTE: In Favor: Unanimous**

**AGENT DECISIONS:** None.

**STATUS REPORTS:**

Wetlands Enforcement Official Newton reported the developer for Newberry Village is finally fixing the problems at the site. None of the roads within the project have been completed with the final coat. There is currently a bond in place for Blue Heron Drive;

the developer still needs to post a bond for the final phase. The developer's proposed plan is to complete the final coat on all roads within the project when he completes the final two (2) units.

**VIOLATIONS:** None.

**CONFERENCES/SEMINARS/TRAINING/1) Session 1 - Inland Wetlands**

**Commissioner Training:**

Wetlands Enforcement Official Newton advised the Commission she will be unable to initiate the on-line training session scheduled for this evening due to the unavailability of information technology staff at CCSU who would have provided her access to the training module. She will schedule installments of the training at future meetings.

As an alternative Wetlands Enforcement Official Newton the following Legislative updates. See Attachments A and B.

**CORRESPONDENCE:** None.

**GENERAL BOARD DISCUSSION:**

Commissioner Baker requested a refresher on the status of stump removal. Wetlands Enforcement Official Newton reported that DEEP does not presently exempt stump clearing for crops. This Commission changed its regulations to require an application be filed which shows the wetlands near any proposal for clear cutting. Clear cutting for agricultural purposes continues to be an exemption but an application must come before this board for permission.

Wetlands Enforcement Official Newton also noted a ruling has recently been made that farm roads are not exempt from Wetlands Regulations; they are not an exempt activity. .

**PUBIC PARTICIPATION (On non-agenda items only):** None.

**ADJOURNMENT:**

**MOTION: To ADJOURN this Meeting at 7:45 p.m.**

**Osborn moved/Pippin seconded/VOTE: In Favor: Unanimous**

Respectfully submitted: Peg Hoffman

Peg Hoffman, Recording Secretary, Inland Wetlands and Watercourse Commission

# 2015 LEGISLATION

**NOTE: The following are excerpts from 2015 Public Acts. For the entire Public Act language please see: www.cga.ct.gov**

1. **Public Act No. 15-68** (Substitute House Bill No. 6942)

AN ACT VALIDATING THE ACTION OF A MUNICIPAL ASSESSOR, EXTENDING THE FILING DEADLINE FOR CERTAIN PROPERTY TAX EXEMPTIONS AND CONCERNING NOTICE REQUIREMENTS FOR ZONING APPLICANTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Sec. 2. Subsection (a) of section 8-7d of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

(a) In all matters wherein a formal petition, application, request or appeal must be submitted to a zoning commission, planning and zoning commission or zoning board of appeals under this chapter, a planning commission under chapter 126 or an inland wetlands agency under chapter 440 or an aquifer protection agency under chapter 446i and a hearing is required or otherwise held on such petition, application, request or appeal, such hearing shall commence within sixty-five days after receipt of such petition, application, request or appeal and shall be completed within thirty-five days after such hearing commences, unless a shorter period of time is required under this chapter, chapter 126, chapter 440 or chapter 446i. Notice of the hearing shall be published in a newspaper having a general circulation in such municipality where the land that is the subject of the hearing is located at least twice, at intervals of not less than two days, the first not more than fifteen days or less than ten days and the last not less than two days before the date set for the hearing. In addition to such notice, such commission, board or agency may, by regulation, provide for additional notice. Such regulations shall include provisions that the notice be mailed to persons who own land that is adjacent to the land that is the subject of the hearing or be provided by posting a sign on the land that is the subject of the hearing, or both. For purposes of such additional notice, (1) proof of mailing shall be evidenced by a certificate of mailing, [and] (2) the person who owns land shall be the owner indicated on the property tax map or on the last-completed grand list as of the date such notice is mailed, and (3) a title search or any other additional method of identifying persons who own land that is adjacent to the land that is the subject of the hearing shall not be required. All applications and maps and documents relating thereto shall be open for public inspection. At such hearing, any person or persons may appear and be heard and may be represented by agent or by attorney. All decisions on such matters shall be rendered not later than sixty-five days after completion of such hearing, unless a shorter period of time is required under this chapter, chapter 126, chapter 440 or chapter 446i. The petitioner or applicant may consent to one or more extensions of any period specified in this subsection, provided the total extension of all such periods shall not be for longer than sixty-five days, or may withdraw such petition, application, request or appeal.

EXPLANATION: The Inland Wetlands and Watercourses Act, sec. 22a-42a, mandates that public hearings be held in accordance with the provisions of Connecticut General Statute sec. 8-7d. Section 8-7d states that notice of the public hearing is to be mailed to adjoining property owners,

or provided by posting a sign on the land that is subject to the hearing, or both. Public Act 15-68 allows municipalities to forego a title search when attempting to contact adjacent land owners.

2. **Public Act No. 15-85** (Substitute Senate Bill No. 1033)

AN ACT CONCERNING COURT OPERATIONS AND THE CLAIM AGAINST THE STATE OF LORI CALVERT.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Sec. 3. Subsection (a) of section 22a-43a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2015*):

(a) The court, after a hearing, may reverse or affirm, wholly or partly, or may revise, modify or remand the decision from which the appeal was taken in a manner consistent with the evidence in the record before it. If upon appeal pursuant to section 22a-43, the court finds that the action appealed from constitutes the equivalent of a taking without compensation, [it] the court (1) shall set aside the action or [it] may modify the action so that it does not constitute a taking, [. In both instances the court] and (2) shall remand the order to the inland wetland agency for action not inconsistent with its decision.

EXPLANATION: For appeals from a municipal inland wetlands agency, the law allows the court to set aside the agency's action or modify it if the action constitutes a taking without compensation. In other circumstances, the bill allows the court, after a hearing, to reverse, affirm, modify, or return the decision in a manner consistent with the evidence in the record.

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ATTACHMENT B - PAGE 1

# 2015 MUNICIPAL INLAND WETLANDS AGENCY TRAINING PROGRAM

Connecticut's Inland Wetlands and Watercourses Act:
*A Legal and Administrative Update*

by the Connecticut Attorney General's Office

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## RECENT COURT CASES

### A. U.S. Court of Appeals, Second Circuit

i. *Harding v. Borner*, 581 Fed.Appx. 14 (2014)

This is the most recent development arising from a dispute that began in 2004, when Kenneth Watrous bought property in Preston overlooking Poquetanuck Cove, a tidal estuary of the Thames River. No inland wetlands or watercourse is located on the property, but, at the base of a cliff, tidal wetlands border the Cove. Mr. Watrous received both Zoning Board of Appeals and wetlands commission permits to raze a dilapidated house and build a new house on the property. In compliance with those approvals, he constructed the new house.

Thereafter, in response to a neighbor's complaints, the first selectman visited the site and concluded that the house was built in the wrong location. The first selectman notified the Commission chairman, who directed that a notice of violation be issued. In the ensuing years, the Commission issued three cease and desist orders for the same violation. To resolve the issue, Mr. Watrous hired a surveyor, who confirmed that the house was built in compliance with both permits. The Commission itself hired a surveyor, who reached the same conclusion.

In 2010, Mr. Watrous sued the Commission, the town, the first selectman, the chairman, a commissioner, and the wetlands enforcement office under a federal statute, 42 U.S. Code § 1983, for violation of his 14th Amendment right to substantive due process.

In the context of that case, the U.S. District Court concluded that the Commission lacked jurisdiction over the property. The court found that the Cove, from which the Commission measured its upland review area, lay outside the territorial limits of the town, and belongs to the public (as represented by the state). Therefore, the Commission lacked jurisdiction over activities that may impact the Cove.

In 2013, the U.S. District Court conducted a trial of the alleged constitutional violations. Mr. Watrous produced evidence demonstrating that the Commission lacked proof of a violation when it issued the cease and desist orders, and used the orders as an investigatory tool. In addition, the evidence demonstrated that Commission members discussed issuing the orders as a way to "taint" Mr. Watrous's deed to prevent him from selling the property, and tried to persuade the ZBA to join in enforcement against Mr. Watrous.

The jury found that the first selectman, the former chairman, and the current chairman had violated Mr. Watrous's right to substantive due process. (The town and commission had been previously

dismissed from the case.) The jury did not find the wetlands enforcement officer liable. The jury awarded $6,000 in compensatory damages, to be paid by any or all of the three liable defendants, and further awarded punitive damages of $3,000 each.

The defendants appealed the court's ruling concerning jurisdiction and the jury's verdict, arguing that they were entitled to qualified immunity. Qualified immunity protects a government official fulfilling an executive or administrative function from personal liability if his actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In the words of one court, it "protects all but the plainly incompetent or those who knowingly violate the law."

The Court of Appeals "recognize[d] that the scope of the [Commission's] jurisdiction is a difficult question." The court acknowledged that, if the improper exercise of jurisdiction were the only basis for Mr. Watrous's claims, the defendants might be protected by qualified immunity. However, the defendants' other conduct supported the district court's conclusion and the verdict.

**Major Points**

- Elected officials, volunteer commissioners, and staff members may be held liable for constitutional violations committed in the course of implementing or enforcing the Inland Wetlands and Watercourses Act.
- Qualified immunity protects from personal liability capable government officials exercising their duties in good faith, but not incompetent or malicious officials.

## B. Connecticut Appellate Court Case

i. *Yorgensen v. Chapdelaine v. Town of Eastford*, 150 Conn. App. 1 (2014)

Chapdelaine applied to the town for a building permit to construct a horse barn. The town granted the permit, and Chapdelaine began construction. From off-site, Yorgensen, the wetlands enforcement officer, noticed construction occurring in the 100-foot upland review area. Yorgensen issued a cease and desist order, which directed Chapdelaine to file an application and a plan to restore the area. The inland wetlands commission later upheld the order.

Chapdelaine filed a request for a jurisdictional ruling that the construction was either an unregulated activity or was exempt as agriculture under section 22a-40. Although Chapdelaine submitted documentation with her application, she did not submit a map identifying wetlands and the location of the allegedly exempt activities. Without this information, the commission concluded that it could not determine its jurisdiction and denied the application as incomplete.

Instead of appealing the denial, Chapdelaine filed an action for declaratory judgment in the Superior Court, asking the court to determine the commission's jurisdiction. Yorgensen commenced an enforcement action in the Superior Court based on non-compliance with the cease and desist order and violation of town wetlands regulations.

The Superior Court consolidated the two cases for trial. The court denied Chapdelaine's request for declaratory judgment, concluding that she had failed to exhaust the administrative process with the commission. The court ruled in favor of Yorgensen on the regulatory violations.

Chapdelaine appealed, arguing that she had properly filed her declaratory judgment action. The court disagreed. The court found that the commission acted properly in requesting additional information to confirm the location of wetlands and of the proposed activities. By refusing to provide the requested information, Chapdelaine truncated the administrative process, and denied the commission the opportunity to determine its jurisdiction.

**Major Points**

- A commission may deny a request for a jurisdictional ruling on the basis of the lack of necessary information.
- An applicant cannot ask a court to determine the commission's jurisdiction before the commission itself has made a determination. "[T]he first arbiter of the jurisdiction of a local inland wetlands and watercourses commission is the commission itself."

## C. Superior Court Cases

i. *Cocchiola Paving, Inc. v. Oxford Conservation Comm'n*, 2015 WL 467508 (Jan. 8, 2015)

The plaintiff applied for permission to construct a crossing of an intermittent watercourse to provide access to a building lot within a residential subdivision. The plaintiff initially proposed to install one 48-inch pipe and rip-rap at the inlet and outlet, but subsequently proposed installing two 36-inch pipes and rip-rap. The plaintiff's expert testified that the revised proposal was designed to slow the flow of water from uphill properties, and provided drainage calculations and drawings.

The town engineer commented to the commission that the plaintiff had not presented feasible and prudent alternatives. The commission voted to deny the application, finding that the crossing "has a direct physical impact" on the watercourse, and the plaintiff had a feasible and prudent alternative of providing access to the lot through an easement across an adjacent property.

The plaintiff appealed, arguing that the commission improperly considered feasible and prudent alternatives without first finding that the proposed crossing would entail an adverse impact on the watercourse.

The court agreed. The court acknowledged that the record demonstrated that the two 36-inch pipes and rip-rap would be placed in the watercourse. The court noted, however, that the record lacked any evidence concerning the *effects* of placing the pipes and rip-rap in the watercourse. The commission discussed erosion and a potential impact on water flow, but "there is no evidence in the record, one way or the other, as to whether this crossing will be harmful or beneficial." The commission wrongly assumed that the placement of the pipes and the rip-rap would be adverse. Without making a finding of adverse impact, the commission improperly considered whether feasible and prudent alternatives to the proposal existed.

**Major Points**

- A commission cannot assume that the placement of material in a wetland or watercourse will yield an adverse impact.
- Absent a finding of an adverse impact the commission cannot consider, or require an applicant to submit, feasible and prudent alternatives to the proposal.

ii. *Village at Bee Brook Crossing Home Owners Assoc., Inc. v. Inland Wetlands and Watercourses Comm'n of the Town of Washington*, 2015 WL 522158 (Jan. 13, 2015)

The plaintiff is a home owners association for a forty-unit condominium complex. Straw Man, LLC owns a 13.86-acre parcel abutting the plaintiff's property.

In 2009, Straw Man applied to the commission for a permit to construct a temporary bridge over a brook. Straw Man intended to use the temporary bridge to construct a permanent bridge to facilitate the future development of the parcel. After the construction of the permanent bridge, Straw Man proposed to remove the temporary bridge. The commission approved the application, with the condition that construction be limited to June 30 through September 30, when water flow would be lowest.

In 2013, Straw Man applied to permit construction from January to September 30. At the plaintiff's request, the commission conducted a public hearing. The commission approved the application "to revise a condition of approval" of the permit.

The plaintiff appealed, claiming that the commission failed to:

(1) Consider the six section 22a-41 factors;
(2) Consider feasible and prudent alternatives; and
(3) State the reasons for its decision on the record.

The court disagreed with the plaintiff on the first argument, noting that the Appellate Court held in *Lorenz v. Inland Wetlands and Watercourses Comm'n.*, 124 Conn. App. 489 (2010), that a commission must consider the section 22a-41 factors only when issuing a permit, not when considering a modification of a condition of an approved permit.

At the court's request, the parties briefed whether the commission properly concluded that the application was for a modification to an existing permit or whether the commission was required to consider the proposal as a new application. The court acknowledged that the commission had the authority to determine whether the proposal was a modification of the prior approval or whether a new application was required.

In regard to feasible and prudent alternatives, the court noted that section 22a-41 requires the commission to find that a feasible and prudent alternative does not exist in two instances: when the Commissioner of Energy and Environmental Protection determines that the regulated activity for which a permit is sought requires a public hearing, or the commission determines that the proposed

activity may have a significant impact on wetlands or a watercourse. Since neither of those instances applied, the commission was not required to consider feasible and prudent alternatives.

The commission did not prepare a formal statement of the reasons for its decision on the record. However, the court concluded that the commission was not required to do so. The court acknowledged that it had the duty to search the record for any stated reason supporting the commission's decision. The court observed that the record contained substantial evidence that the commission considered the potential impacts of the modification and concluded that the modification would have no adverse impact.

**Major points**

- A commission has the discretion to determine whether a proposal constitutes a modification of an existing approval, or if it requires the filing of a new application.
- There is no bright-line test for making such a determination. Relevant considerations are whether the proposal is within the boundaries of the prior approval (*Consolini v. Torrington Inland Wetlands Comm'n*, 29 Conn. App. 12 (1992) (commission properly concluded that a proposed smaller shopping plaza was a modification of the prior approved shopping mall)) and whether the proposal involves "substantial changes" or is a "significant departure" from the prior approval (*McDonald v. Fairfield Town Plan & Zoning Comm'n*, 2014 WL 6994806 – Oct. 28, 2014 (commission properly concluded that proposed minor lot changes in subdivision plan were a modification to prior approved plan).
- A modification of a prior approval does not require the commission to reconsider the section 22a-41 factors from the original approval, or to consider feasible and prudent alternatives.

iii. *Sard Custom Homes v. West Hartford Planning & Zoning Comm'n/Inland Wetlands & Watercourses Agency*, 2014 WL 4494469 (July 31, 2014)

The plaintiff applied for permits to construct a twelve-lot subdivision. The commission denied the applications and the plaintiff appealed.

In the appeal, a person filed a petition to intervene pursuant to section 22a-19(a), which provides:

> In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, . . . any person . . . may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

The verified pleading must "contain specific factual allegations setting forth the nature of the alleged unreasonable pollution, impairment or destruction of the public trust in air, water or other natural resources" to permit the authority considering the petition to determine whether the intervention raises an issue within the authority's jurisdiction.

The verified pleading alleged that:

(1) The application violates the town's Plan of Conservation and Development;
(2) The detention basin lacks sufficient capacity and efficacy to both prevent downstream flooding and remove contaminants from being deposited in the wetlands and Trout Brook;
(3) The reengineering of the steep slopes and the inadequate protections to the wetlands and the Trout Brook will result in sedimentation of both resources;
(4) The clear cutting of almost 86% of the approximate 5.53 acres site will remove the site's natural filters resulting in increased storm water runoff and increased erosion which in turn will result in increased sedimentation, including pollutants, being deposited in the adjacent wetlands and Trout Brook.

The plaintiff opposed the petition, claiming that the allegations were insufficient because they did not allege the specific harm the proposed development would cause. The plaintiff argued that *AvalonBay Communities, Inc. v. Inland Wetlands & Watercourses Agency*, 130 Conn. App. 69, cert. denied, 303 Conn. 908, 32 (2011), supported its position. In *AvalonBay*, the court considered whether a commission lawfully denied an application because an unspecified amount of sediment would enter the wetlands, even though the record contained no evidence of a likely adverse impact. The court concluded that there was no substantial evidence of an actual adverse impact, and that the commission improperly assumed that the entry of sediment would adversely affect the wetlands and watercourse.

The court disagreed, highlighting the distinction between deciding whether to grant or deny an application, and deciding whether to grant or deny a petition to intervene. Section 22a–19(a) requires only allegation of the nature of the impact, not allegation of actual adverse impact, even if those allegations ultimately prove to be unfounded.

**Major Point**

- Section 22a-19(a) requires only that a petitioner make verified, specific, factual allegations of the nature of the impact from the proposal; the intervenor need not allege the resulting adverse impact.

iv. *Patchen v. Milford Inland Wetlands Agency*, 2015 WL 1244327 (Feb. 25, 2015)

Without obtaining a permit, the plaintiff placed fill to level a portion of her back yard immediately behind her house so that it was level with the house. The work required 234 cubic yards of fill, landscaped with top soil and held in place at the rear of the area by masonry block retaining walls. Past block walls, the elevation drops and remains steady to the Wepawaug River. Although neither the fill nor the masonry block walls are in the wetlands, they are within the upland review area.

The Zoning Enforcement Officer served the plaintiff with cease and desist order, which directed her to apply for a special permit. The plaintiff applied to the agency along with a wetlands, watercourse, and soil report prepared by a soil scientist, a topographic survey by a land surveyor, and an opinion letter from a landscape architect and professional engineer. In sum, the information represented that the filled area would have no effect on the watercourse velocity or capacity, and no impact on upstream or downstream flooding. At the agency's request, the engineer performed a

field investigation of the block walls. In his report, the engineer concluded that there was no significant danger of failure.

In their deliberations, the commissioners discussed whether they would have approved the application if the plaintiff had submitted it before the work, and whether a buffer or plantings would have been required, but made no findings that the work adversely impacted the wetlands or watercourse.

The commissioners voted unanimously to deny the application on the ground that there were feasible and prudent alternatives to the work, including reducing the size of the filled area or moving the fill and walls farther away.

The plaintiff appealed, arguing, in part, that the denial was improper because no substantial evidence demonstrated that the work had or would have any effect on the wetlands or watercourse. The agency countered that the plaintiff had to demonstrate that the suggested alternatives were not feasible and prudent.

The court agreed with the plaintiff. After searching the record, the court found nothing to indicate that the work had or likely would adversely impact the wetlands or watercourse. Although the plaintiff applied for after-the-fact approval, the agency had a duty to evaluate the application on the basis of substantial evidence, rather than merely assuming that the completed work affected the resources and justified a denial. Absent the agency's finding of a likely adverse impact, the plaintiff was not required to present or evaluate feasible and prudent alternatives.

The court remanded the case to the agency to make a finding whether the work adversely affected the wetlands or watercourse.

**Major Points**

- An agency must consider an after-the-fact application in the same manner as an application for prior approval.

- Absent a finding of an adverse impact the commission cannot consider, or require an applicant to submit, feasible and prudent alternatives to the proposal.