



Ethical Considerations in Environmental Law

June 10, 2019

2:15 p.m. – 3:15 p.m.

**Connecticut Convention Center
Hartford, CT**

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

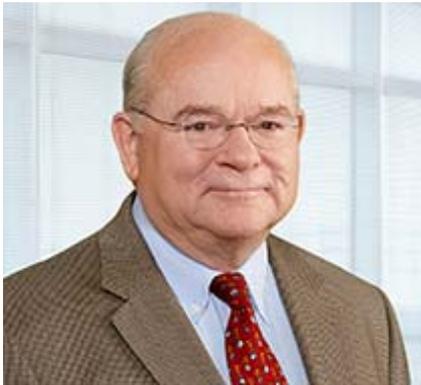
I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Faculty Biographies



Dwight H. Merriam, FAICP, a lawyer and land use planner, is a Fellow in the American College of Real Estate Lawyers, a Fellow and Past President and of the American Institute of Certified Planners, and Past Chair of the ABA Section of State and Local Government Law. He has published over 200 articles and 13 books, including co-editing the treatise Rathkopf's *The Law of Zoning and Planning*. UMass BA (cum laude), UNC MRP, and Yale JD.



Christopher P. McCormack practices environmental law, environmental litigation, and complex commercial litigation. His environmental experience ranges from transactional due diligence to lead counsel responsibility for Superfund cost recovery litigation. He is a past chair of the CBA Environmental Section and serves as its Legislative Liaison. He is a member of ASTM Committee E50 on Environmental Site Assessment and Risk Management and chairs the Task Group for ASTM Standard Practice E1903 on Phase II site assessments. Yale BA, Fordham JD.



Nancy K. Mendel is a member of Winnick Ruben Hoffnung Peabody and Mendel, LLC and has been practicing environmental law for over twenty-five years, counseling private and public sector clients in transactional, permitting, compliance, and enforcement matters in all areas of environmental law. With a focus on brownfield redevelopment, she advises clients on corporate and real estate due diligence, including permitting, environmental insurance, financing, liability and risk assessments, site investigations, remediation, RCRA Corrective Action, Superfund, and federal and state environmental enforcement matters. She represents clients regularly in front of Connecticut Department of Energy & Environmental Protection and the US Environmental Protection Agency. Nancy is proud to have been part of the original group of drafters of Connecticut's landmark state liability relief Brownfields Revitalization and Remediation Act providing first of its kind in the nation state liability relief for Brownfield developers.

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June 10, 2019 2:15 pm-3:15 pm

Moderator

Nancy K. Mendel

Speakers

Christopher P. McCormack

Dwight H. Merriam

2:15-2:20 – Panel Introductions – Nancy K. Mendel

2:20-2:40 – Common Ethical Tricks and Traps that Occur in Environmental and Land Use Matters – Dwight H. Merriam

2:40-3:00 – Ethical Issues Associated with Retaining and Using Technical Experts and Consultants – Christopher P. McCormack

3:00-3:15 – Questions from the Moderator and from the Audience

PUBLIC HEARING PROCEDURES

**Outline by Mark K. Branse ©2019
Halloran & Sage, LLP**

**To be Presented by Peter S. Olson, Esq.
Land Use & Conservation Counsel, Bethel, CT**

I. HEARINGS: FOR WHAT AND WHEN?

Prior to the opening of a hearing: Many towns have informal, pre-application conferences. Very valuable procedure, but, until recently, no case law or Statute allowing it. Now, *Bergren v. Planning & Zoning Commission of the Town of Berlin*, 30 Conn. L. Rptr. No. 6, 212 (9-24-01), says it is OK. Conn. Gen. Stats. § 7-159b (PA 03-184 §1) also authorizes. Should have regulations on this, however. If local regulations allow the commission to actually *approve* a “preliminary plan” during the “informal discussion”, can it be appealed? No, per *Gerlt v. South Windsor Planning & Zoning Commission*, 42 Conn. L. Rptr. No. 12, 431 (1-29-07); *but*, on appeal, held that Gerlt was denied due process because in later site plan application, Commission precluded testimony attacking the “preliminary plan,” so Gerlt was deprived of opportunity to attack the plan at *any* stage of approval. *Gerlt v. South Windsor Planning and Zoning Commission*, 290 Conn. 300 (2009). See also *Lorenz v. Old Saybrook Planning Commission*, Docket No. MMX CV 05 4002715 S (Middlesex Superior Ct.) (approval of preliminary subdivision plan in connection with open space subdivision special permit is not illegal “two-step” subdivision approval.).

A. When to Hold a Public Hearing.

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

speaking does not transform the meeting into an illegal, un-noticed public hearing.

However, holding a 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 a site plan for a 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 a new application is the same as one previously considered and denied, the 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 a 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 DEP rule). Ambiguity created: When does 30-day limit begin “date of submission”? Clarified by Public Act 98-209 and changed to 15 days from the “date of receipt” as already defined in the Statutes; now fourteen days, per Public Act 99-225, §16. Be aware what role you are serving: Conservation Commission, Inland Wetlands and Watercourses Agency, combination? See attached article from *The Habitat* of January, 1999.

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

“appeal” and not governed by time limit for appeals. *Daniel Conron, Jr. v. Gary Swingle*, 43 Conn. L. Rptr. No. 6, 204 (June 4, 2007).

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). 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 all 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*.

Publish When: Twice, the first one not less than 10 nor more than 15 days before the hearing, the second not less than 2 nor more than 10 days before (the so-called "15-10-2 rule.") Note: In counting the days of publication, the terminal days are excluded (that is, the day of publication itself and the day of the hearing). *Lunt v. ZBA of Waterford*, 150 Conn. 532, 536 (1963); *Koskoff v. Planning and Zoning Commission of Haddam*, 27 Conn. App. 443, 445-48 (1992), appeal granted on other grounds, 222 Conn. 912. However, the date of "publication" of newspaper is the date when it "hit the stands", not necessarily the publication date printed in the paper itself. *Dolengewicz v. Westbrook Inland Wetlands and Watercourses Commission*, 29 Conn. L. Rptr. No. 15, 559 (July 9, 2001) (local weekly paper was actually on the stands the night before the stated publication date, validating the legal notice).

Continued Public Hearing: Prevailing view is that no additional publication needed as long as date, time, and place of the continued hearing are announced before the adjournment of the initial hearing. Approved in *Roncari Industries v. Planning and Zoning Commission*, 281 Conn. 66 (2007); *Buck v. Stonington Planning and Zoning Commission*, Docket No. 103213, 1994 Ct. Sup. 7347 (Superior Court, J. D. of New London at Norwich, July 13, 1994, Teller, J.); *Carlson v. Fire District Committee and Zoning Commission of Watertown*, 31 Conn. L. Rptr. No. 10, 355 (3-18-02); and *Carberry v. Stamford ZBA*, 01-CBAR-0911 (10-16-2001, J.D. Stamford-Norwalk at Stamford). If you have time, re-advertise. Note that public hearing can be “continued” even if not formally opened. *Beeman v. Guilford Planning and Zoning Commission*, 27 Conn. L. Rptr. No. 3, 77 (7-3-00)

Change in Location: Typical procedure is to post a sign at the advertised location, “Public Hearing before the [name of commission] on the [name of application] being held at [location, with address and maybe even directions]”. If you publish a new legal notice with the new location, it must conform to the Statutory publication requirements. *Compformio v. Greenwich Planning & Zoning Commission*, 32 Conn. L. Rptr. No. 2, 55 (June 10, 2002, Superior Court at Stamford.)

Special Notices: Water company for land in watersheds, adjoining towns, sometimes DEP, too numerous to list here and differ by, e.g., whether you are a “CAM” or “Gateway” town. Watch for who has to perform the notice, and be sure that copies of the notices, with certificates of receipt, are submitted for the record. Timing of notices to adjoining municipalities now codified, standardized in Conn. Gen. Stats. §8-7d for all types of land use applications *except* wetlands decision after public hearing (35 days, not 65). Note new requirement of P.A. 06-53: Both zoning and wetlands applications within public water supply water shed must be noticed to the water company *and* the Commissioner of Public Health. **Be aware of 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.”)

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. FOIC Notices.

See Conn. Gen. Stats. §1-21. File your schedule of meetings at the beginning of each year no later than January 31st. File the agenda no later than 24 hours in advance with Town Clerk; takes 2/3 votes to approve item not on the agenda. Meetings of less than a quorum is now cloudy: If a subcommittee, it is probably a meeting of the agency if it is discussing agency business because it might be deemed a “proceeding” by the Freedom of Information Commission. *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).

1. Special Meetings: Special meeting notice 24 hours in advance, except in case of
[8]

“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. 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).

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 *Aiudi & Sons, LLC, v. Planning & Zoning Commission of the Town Plainville*, 267 Conn. 192 (2004), (Applicant filed the application as a site plan approval and Commission treated it as such and denied it based on that level of discretion; Court decided it was really a special permit application, and, based on *that* level of discretion, Commission did have authority to deny). Hard to understand how the Court can rewrite history of how an application was filed and processed. But done again in *Richardson v. Zoning Commission*, 107 Conn. App. 36 (2008) (commission decided application was a “farm” and hence site plan review; court said it was “equine facility” and hence special permit.)

Characterizing what should be a special permit application as a site plan application carries the risk of automatic approval that would not otherwise have been available. See *Arigoni Bros., LLC v. Planning and Zoning Commission of Haddam*, 27 Conn. L. Rptr. No. 18, 660 (1-16-2000) 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 snow storm 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".)

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

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

B. Cross Examination, etc.

Explain to the public/applicant why cross examination and questions must be permitted, despite formality. Look for opportunity for "waiver", i.e., ask person seeking it if they would mind allowing chairman to ask the questions or other procedure that is less "Perry Mason" in style. If they say OK, can't object later. Note that refusal of witness to be cross-examined is grounds for "motion to strike" per *Fromer v. Inland Wetlands and Watercourses Commission*, 17 Conn. L. Rptr. No. 8, 259 (9-6-1996), which asks commission to ignore any testimony by the witness who refused to be cross examined.

You are not bound by the rules of evidence: Hearsay is OK, but you may give it less weight. Under case construing a particular statute (not zoning case) *reliance* on hearsay evidence to reach the decision is insufficient; it must be corroborated by other evidence. *King v. Administrator*, 46 Conn. L. Rptr. No. 19, 697 (February 16, 2009) (involved unemployment compensation hearing). 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. Viera, 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.

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 if they had stated *evidence* why they didn't believe the expert.

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). 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.

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

Can intervention alone (without other aggrievement) allow a party to appeal to Superior Court? YES: *Branhaven Plaza, LLC v. Inland Wetlands Commission*, 251 Conn. 269, 276, n.9 (1999). And no settlement without consent of the interveners. *Brycorp, Inc. v. Planning and Zoning Commission of* [21]

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

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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).

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

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

C. Staff Input.

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

D. 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 [27]

(1998), (can use Plan of Development where expressly referenced in criteria 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.

Cannot use a condition to obtain post-approval evidence which was necessary to make a finding of regulatory compliance in the first instance. *Finley v. Inlands Wetlands Commission of Orange*, 289 Conn. 12 (2009). Commission can deny application as incomplete where applicant does not submit substantial evidence sufficient to find compliance. *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission*, 293 Conn. 93 (2009). Burden is on the applicant to provide evidence to support approval. *Id.*, pp. 124-127. Compare *Finley* to *Haines v. Brooklyn*

Planning & Zoning Commission, 2010 WL 4351727 (10-4-10), where commission approved WalMart with condition delegating rather extensive design changes to staff, but subject to final approval by the commission; approval and delegation upheld.

4. Level of Discretion. Differs depending on the type of application that it is: legislative is highest level of discretion (adoption or amendment of regulations for zoning/wetlands map); administrative is next (acting on the applications under those regulations); ministerial is lowest (issuing permits, including site plan review). For good discussion, see *Konigsberg v. Board of Alderman*, 283 Conn. 553 (2007). 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 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 of its own previously-granted variance to overturn cease and desist order; ZBA decision upheld on appeal.

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.)

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

For Inland Wetlands and Watercourses Agencies: Two parts to your task: your own permit (issue or deny), and, also, the "report" to Planning and Zoning Commission or Zoning Board of Appeals. The report typically consists of simply of the motion to approve/deny but can contain more as well. However, a recent Superior Court case held that the "report" must be *a separate and distinct statement identified as such*. *Weinstein v. Madison Inland Wetlands Agency*, 46 Conn. L. Rptr. No. 21, 756 (March 2, 2009); reversed on appeal, 124 Conn. App. 50 (2010) (failure to "report" does *not* invalidate agency decision). Remember to make finding 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.)

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 there almost always do), the requirement is directory rather than mandatory. The result is that the failure to state reasons for the decision on the record will not invalidate the commission’s decision and the court will search the record to find reasons to support that decision. *However*, if the local regulations mandate a statement of reasons, case law indicates that the Court *will* invalidate the decision for failure to state the reasons of decision. See *Gillespie v. Montville Inland Wetlands Commission*, 37 Conn. L. Rptr. No. 6, 222 (7-26-2004); *Ahlberg v. Stratford Inland Wetland Commission*, 50 Conn. L. Rptr. No. 6, 218 (10-4-10); and *Northern Heights v. Clinton Inland Wetlands and Watercourses Commission*, 52 Conn. L. Rptr. No. 21, 786 (7-18-11), *Ahlberg v. Inland Wetlands and Watercourses Commission*, 2010 WL 3025622 (7-6-10) for four wetlands cases; *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. Den. 294 Conn. 909: decision differing from past decision was OK because past decision was in error. See *Vanghel, supra*, for discussion of inconsistent approach to interpretation of a regulation. 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 *Lamoureux 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 accidentally sets an effective date which is prior to or same day as publication, it cannot establish a new effective date

and publish a new legal notice. *Wilson v. Planning and Zoning Commission of East Granby*, 260 Conn. 399 (2002); *Ozanne v. Darien Zoning Board of Appeals*, 28 Conn. L. Rptr. No. 9, 315 (Jan. 8, 2001). However, failure to publish the post-decision legal notice at all may still void the decision, *RBF Assoc. v. Torrington Planning & Zoning Commission*, 18 Conn. L. Rptr. No. 17, 591 (April 7, 1997), and will not be cured by the Validating Act. *Taft v. Wheelabrator Putnam, Inc.*, 55 Conn. App. 359 (1999). ([Judgment of the appellate court reversed and remanded with direction to dismiss plaintiff's original appeal for lack of aggrievement. *Taft v. Wheelabrator Putnam, Inc.*, 255 Conn. 916 (2000)]. Note different result for legislative decisions, where validating act can cure a notice defect, *Hayes Family Limited Partnership v. Planning & Zoning Commission*, 98 Conn. App. 213 (2006), cert. den. 281 Conn. 916 (2007) (overturning *Taft* for legislative decisions, i.e., zoning amendments). If file second notice of decision, that starts the appeal period. *Graziano v. Southbury Planning and Zoning Commission*, 18 Conn. L. Rptr. 13, 465 (3-10-97).

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.

Variations 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 *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. *Hackett v. J.L.G. Properties, LLC*, 285 Conn. 498 (2008) (construction over Candlewood Lake exempt from zoning under Federal Power Act).

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

Private entity is not exempt from zoning merely because it is performing a State function or program. *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. 216 (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).

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*, 59 Conn. L. Rptr. No. 14, 562 (4-6-15).

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. *Sammartino 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).

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 (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

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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).

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

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agencies can as well (planning commission in subdivision situation, §8-26; see below). Can review activities in upland areas to determine and regulate adverse impacts on wetlands and watercourses. *Aaron v. Conservation Commission*, 183 Conn. 532 (1981); *Lizotte v. Conservation Commission of Somers*, 216 Conn. 320 (1990); *Queach Corporation v. Inland Wetlands Commission*, 28 Conn. L. Rptr. No. 2, 44 (11-13-00), affirmed in *Queach Corp. v. Inland Wetlands Commission of Branford*, 258 Conn. 178 (2001). One case says agency can do this even without regulations to that effect. Can regulate uses of uplands if evidence of impact on wetlands/watercourses, *Bain v. Inland Wetlands Commission of Oxford*, 78 Conn. App. 808 (2003), and regulations authorize it, *Prestige Builders, LLC v. Inland Wetlands Commission*, 79 Conn. App. 710 (2003).

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

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

Note: Inland Wetlands Agency has no jurisdiction over open space preservation but can recommend to Planning and Zoning (and should); applicant may find it prudent to designate, in order to avoid full review of activity which is not needed, proposed, or intended. Commission can consider probable/foreseeable activities even if not shown on the plans. *Peterson v. Oxford*, 189 Conn. 740 (1983); and *Glasson v. Portland*, 6 Conn. App. 229 (1985). 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, 266 Conn. 150 (2003), the holding of which was limited by P.A. 04-209: Agency can consider habitat impacts in the wetland or watercourse, just not in the “upland review area;” 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. ZBA Appeals of Z.E.O. Decisions/Orders.

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 Trail, 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 there is consideration or increased development potential as long the number of parcels is the same before and after the reconfiguration.

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*
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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.)

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?

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*. 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 [56]

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
[57])

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). 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).

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).

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. Plunsk*, No. 278150 (4-11-85, J.D. of Danbury).

Requirement that rear lot have “unobstructed legal accessway” held met by corridor owned by applicant but subject to a conservation easement with actual access from another point, *Egan v. Stamford Planning Board*, 49 Conn. L. Rptr. No. 7, 237 (4-26-10). 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).

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). 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).

Uniformity Rule: Does not preclude regulation that applies to only some properties. *Roncari Industries, Inc. v. Planning & Zoning Commission of Windsor Locks*, 281 Conn. 66 (2007). *Kingston v. Old Lyme Zoning Commission, supra*.

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!* 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). But 14-53 and 14-55 were repealed (but see *East Coast Towing*, below). Now, PA -05-218 has sent these decisions to zoning commission, i.e., back to the 02-70 situation, *except* that for municipalities with a population of less than 20,000, ZBA location approval is still required and still with no standards and no public hearing requirement! So what standards apply now? “Suitability of the location,” and zoning commission has discretion. See *East Coast Towing, Ltd. v. City of Stamford*, 50 Conn. L. Rptr. No. 6, 225 (10-4-10). See follow-up decision in *East Coast Towing, Ltd. v. Stamford ZBA*, 51 Conn. L. Rptr. No. 15, 572 (6-6-2011) (error in the official “blue book” set of General Statutes; Section 14-55 *not* completely repealed, but amended and reinstated.)

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*, but 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).

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
[65]

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).

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. No.292 (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). 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. *Oygaard 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).

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 Walkberg* cases. Rev. 6-4-18 to add *Priore* case, and again 7-30-18 to updated *Priore* holding on reargument and add the *Kutchka* case. Rev. 2-1-19 to add *Cady* case.

CONFLICT OF INTEREST AND
PREDISPOSITION
IN
CONNECTICUT ZONING LAW

RICHARD P. ROBERTS, ESQ.
HALLORAN & SAGE LLP
ONE GOODWIN SQUARE
HARTFORD, CONNECTICUT

MARCH 23, 2019

CONFLICT OF INTEREST AND PREDISPOSITION

Richard P. Roberts
March 23, 2019

A. General

Conflict of interest and predisposition in zoning situations are different, although they may cause similar results. The rules relating to conflict of interest are based upon two Connecticut statutes, Sections 8-11 and 8-21, which read as follows:

"Sec. 8-11. Disqualification of members of zoning authorities. No member of any zoning commission or board and no member of any zoning board of appeals or of any municipal agency exercising the powers of any zoning commission or board of appeals, whether existing under the general statutes or under any special act, shall appear for or represent any person, firm, corporation or other entity in any matter pending before the planning or zoning commission or board or said board of appeals or any agency exercising the powers of any such commission or board in the same municipality, whether or not he is a member of the board or commission hearing such matter. No member of any zoning commission or board and no member of any zoning board of appeals shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense. In the event of such disqualification, such fact shall be entered on the records of the commission or board and, unless otherwise provided by special act, any municipality may provide by ordinance that an elector may be chosen, in a manner specified in the ordinance, to act as a member of such commission or board in the hearing and determination of such matter, except that replacement shall first be made from alternate members pursuant to the provisions of sections 8-1b and 8-5a."

"Section 8-21. Disqualification of members in matters before planning or zoning commissions or zoning board of appeals. Replacement by alternates. No member of any planning commission and no member of any municipal agency exercising the powers of any planning commission, whether existing under the general statutes or under any special act, shall appear for or represent any person, firm or corporation or other entity in any matter pending before the planning or zoning commission or zoning board of appeals or agency exercising the powers of any such commission or board in the same municipality, whether or not he is a member of the commission hearing such matter. No member of any planning commission shall participate in the hearing or decision of the commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense. In the event of such disqualification, such fact shall be entered on the records of the commission and, unless otherwise

provided by special act, replacement shall be made from alternate members pursuant to the provisions of section 8-19a, of an alternate to act as a member of such commission in the hearing and determination of the particular matter or matters in which the disqualification arose."

These statutes, which apply to all planning and zoning agencies, appear to be clear and simple to follow and understand. Such, however, is not always the case. There are many Connecticut decisions which have interpreted and applied these statutes over the years in a variety of situations, and which have created something of a pattern, as discussed infra.

Note that there is a similar provision in the statutes establishing inland wetlands commissions. Section 22a-42(c) provides, in part, as follows:

"... No member or alternate member of such board or commission shall participate in the hearing or decision of such board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense. In the event of such disqualification, such fact shall be entered on the records of such board or commission and replacement shall be made from alternate members of an alternate to act as a member of such commission in the hearing and determination of the particular matter or matters in which the disqualification arose."

Furthermore, there is another statutory provision which applies to municipal agencies and commissions making land use or purchasing decisions above and beyond Sections 8-11, 8-21 and 22a-42(c). Section 7-148t, which would apply to such other boards as historic district commissions, aquifer protection agencies, etc., provides as follows:

Notwithstanding the provisions of any special act or municipal charter and in addition to any provisions of sections 8-11, 8-21 and subsection (c) of section 22a-42, no member of any municipal commission or board having any jurisdiction or exercising any power over any municipal land use or purchasing decisions shall appear for or represent any person, firm, corporation or other entity in any matter pending before the commission or board. No member of any such commission or board shall participate in any hearing or decision of the board or commission of which he is a member upon any matter in which he knowingly has a pecuniary interest. In the event of such disqualification, such fact shall be entered on the records of the commission or board and any municipality may, by ordinance, provide that an elector may be chosen, in a manner specified in the ordinance, to act as a member of such commission or board in the hearing and determination of

such matter, except that replacement shall be made first from alternate members of such commission or board designated pursuant to the general statutes or any special act or municipal charter or ordinance, if any.

On the other hand, predisposition has no statutory basis and has evolved on a case-by-case basis. Predisposition means a predetermination of the issues by the zoning authority; that is, a showing that the board or commission had made up its mind and essentially decided the application before the public hearing. It is more difficult to establish predisposition than conflict, but once proven, the result is the same: the action of the board or commission is deemed to be invalid.

B. Predisposition

A distinction must be made between tentative or preliminary findings, and final conclusions. The mere fact that a board or commission has dealt with a proposal for a long time, perhaps with considerable advice and assistance from staff members, is not necessarily evidence of predisposition. The fact that the chief executive officer of a town, who appointed the commission members, appeared before the commission and urged adoption of the application has been held not to constitute predetermination. Schwartz v. Hamden, 168 Conn. 8 (1975).

The test for predisposition was set out in Furtney v. Zoning Commission, 159 Conn. 585 (1970), as follows:

"The law does not require that members of zoning commissions must have no opinion concerning the proper development of their communities. It would be strange, indeed, if this were true. The decisive question in the instant case is whether (the person claimed to have had a predisposition) had actually made up his mind, in advance of the public hearing, that he was going to approve the proposed change of zone regardless of any changes or arguments in opposition which might be urged at the hearing. To discover the truth of the matter, his state of mind as a member of the commission had to be determined as a question of fact, and the burden of proving the illegality of his action was on the plaintiff."

Prejudgment is established where it is proved that the commissioners had made up their minds prior to the public hearing, regardless of any evidence or arguments that might have been advanced at the hearing. Cioffoletti v. Planning & Zoning Commission, 209 Conn. 544 (1989); Daviau v. Planning Commission, 174 Conn. 354 (1978). As you would expect, that is a fairly difficult test to pass.

A leading Connecticut decision dealing with predisposition is Marmah, Inc. v. Greenwich, 176 Conn. 116 (1978). In that case, Marmah's application for site plan approval was rejected without prejudice for failure to have obtained approval of the architectural review board. Within two weeks, notice was given of a public hearing to delete the proposed use from the zoning regulations. On a second application, Marmah was again rejected even though the architectural review board approval had been obtained, on the ground that the regulations as amended now precluded the proposed use. The Supreme Court held that since the amendment had been adopted specifically to prevent Marmah from proceeding with its proposed project, the commission acted with predisposition and predetermination, and reversed its decision.

Marmah, Inc. v. Greenwich represents an extreme example of predetermination. In a much closer call, a commission member had made public statements opposing further zone changes on a certain highway. A bank applied for a zone change on that highway and the commission member refused to disqualify himself. The court on appeal found no predisposition, saying that the public statements were vague and general, and that announced resistance to change does not by itself constitute a sufficient reason for disqualification. South Norwalk Savings Bank v. Wilton, Superior Court, No. 171859, Judicial District of Fairfield, 1980.

Public statements by a commission or board member are the most common grounds for a claim of predisposition. When a commission member has publicly stated, prior to a public

hearing, that he favors one application for a zone change for a shopping center as compared with another for a second shopping center at a different location, the Supreme Court has held that the member was required to disqualify himself. Mills v. Windsor, 144 Conn. 493 (1957). Public statements indicating a preconceived opinion about the desirability of a specific application for a zone change have also been held to be a sufficient basis for disqualification of a commission member. Lage v. Zoning Board of Appeals, 148 Conn. 597 (1961).

The moral to be drawn from these cases is that it is best for a commission member to make no public statements concerning any zoning action. If he must do so for some reason, as, for example, when running for office, he should be as general as possible in his remarks and should refrain from commenting on any specific proposal one way or the other.

There are several recent cases involving the question of predetermination which reach varied results, and which illustrate the adage that truth is stranger than fiction:

- a. A board of appeals has not made a predetermination of an application for a special exception where the granting of approval will result in a financial benefit to the town as a whole, including members of the board. Constas v. Planning & Zoning Board of Appeals of the Town of Greenwich, 1991 WL 32023, Conn. Super. Ct. (1991).
- b. A commission is found not to have predetermined an application where at the meeting held after the public hearing a member makes a motion to deny by reading from a prepared statement listing the reasons for rejection, and there was no discussion among the members before the vote was taken. Massimo v. Planning Commission, 41 Conn. Supp. 196 (1989).
- c. No predetermination was found where the appellant claims that a board

member, prior to the board of appeals hearing, tells the applicant: "We beat people like you in court and don't you forget it.", because the applicant could not prove on appeal that the statement was made. Sack v. Old Lyme Zoning Board of Appeals, Super. Ct., 2 Conn. L.Rptr. 645 (1990). Presumably, if the applicant had been able to meet his burden of proof, that statement would constitute evidence of predetermination.

- d. An application for a zone change is denied and an appeal is sustained on the grounds of predetermination and personal bias against the applicant. At the public hearing on remand, the applicant asked the chairman and another member to disqualify themselves because of that decision. That request was denied and then granted after the city attorney advised these two to disqualify themselves, and have two alternates appointed. The two disqualified commissioners engaged in a heated discussion with the applicant's attorney and then left. The court held that under these circumstances, the applicant was unable to obtain a fair hearing. Thomas v. Planning & Zoning Commission of the City of West Haven, 3 CSCR 587 (1988).
- e. The same case, upon appeal, constituted a groundbreaking decision which held that the property owner, whose application for a zone change had been denied twice by the West Haven Planning and Zoning Commission, can recover damages from the City for violation of his constitutional rights and violation of the Federal and civil rights law when the conduct of two commissioners is such as to deny the applicant a fair hearing. The two

commissioners insisted that the application was incomplete because it lacked a site plan although none was required, and the application was denied. At a hearing on a second application the two commissioners refused to excuse themselves when asked to do so on the ground of predetermination. Tapes of the hearing reflected an attitude of animosity and disdain on the part of the two commissioners for the applicant. Thomas v. City of West Haven, 249 Conn. 385 (1999).

- f. A member of a planning commission is also the chairman of the conservation commission, and opposed the applicant's subdivision at a public hearing of the DEP. Held, no predetermination since his concerns were based on environmental and conservation grounds. Honeycomb Associates v. Planning & Zoning Board of the City of Milford, 6 CSCR 365 (1990).
- g. Predetermination was not found in a case involving an appeal of a building official's decision to a zoning board of appeals. In Frank X. Baument v. Hartford Zoning Board of Appeals, (7 CSCR 364, March 23, 1992).

In Baument, a member of the Hartford Zoning Board of Appeals attended a community meeting at which the plaintiff's appeal was discussed. The plaintiff claimed the commissioner was, therefore, predisposed against the appeal. Judge Schimelman's decision rejected this argument for two reasons. First, as predetermination is an issue of fact, the burden was on the plaintiff to prove the commissioner was biased, citing Cioffoletti, supra. The plaintiff did not present evidence to the court

regarding how attendance at the meeting biased the commissioner. Moreover, the plaintiff failed to move to disqualify the commissioner at the time of the hearing. The court also rejected the plaintiff's argument that a hand count of proponents and opponents of the appeal somehow biased the Board.

- h. The chairman of a planning and zoning commission was found to be prejudiced with regard to an application for special permit for the construction of a skeet shooting range. Plaintiffs filed an appeal from the decision granting the special permit, claiming (among other things) that the commission chairman had prejudged the application. The court agreed, citing to the record for evidence of such prejudice - for example: the chairman had removed the name of one plaintiff from the agenda at least once; the chairman did not object to the exclusion of the public from a noise test at the site; and the chairman failed to attend a scheduled FOI hearing. The chairman cast the deciding vote in this case. The court held that the chairman's course of dealings "imperiled the open-mindedness and sense of fairness which a zoning official in our state is required to possess in order to participate in the decision-making progress [sic]." Johnson v. Stafford Planning & Zoning Commission, Super. Ct. No. CV 91-47170S, J.D. of Tolland at Rockville (1993) (Booth, J.).
- i. Comments by a commission member made during the course of a public hearing, even though expressed forcibly and in "an unfortunate manner" do not constitute partiality or predisposition. Remarks by a commission

member during public hearings and deliberations do not indicate predisposition that would have resulted in disqualification if made before the public hearing. Greenberg v. Haddam Zoning Board of Appeals, 1999 Sup. Ct. 15379, citing Cioffoletti v. Planning & Zoning Commission, supra.

- j. At a public hearing of the Enfield zoning board of appeals, the chairman and the attorney for the applicant engaged in a fairly sharp exchange of views on the subject of hardship to the point when the chairman asked the attorney to leave the room and asked for the police to be called. The applicant appealed from the denial on the ground that the conduct of the chairman demonstrated prejudicial bias and predisposition. The court on appeal held that the failure of the applicant to raise the claim before the board closed the hearing constituted a waiver of the claim. Kaplan v. Zoning Board of Appeals of Enfield, 2006 Conn. Super LEXIS 243 (January 27, 2006). In another similar situation, impatience and sarcasm from commissioners, and telling the applicant's attorney "just move on", were held not sufficient to justify disqualification if not made the basis of a challenge at the hearing. Raymond Realty Co. v. Litchfield Inland Wetlands Commission, 2004 Conn. Super LEXIS 160.
- k. The chairman of the commission owned property in a development owned by the plaintiffs who appealed from the adoption of amendments to the zoning regulations affecting this property. The chairman had participated in "workshops" relating to the proposed amendments but recused himself

from the public hearing, commission meetings and the vote on the amendments. Held, no predetermination since the chairman was not present to influence the vote on the amendments. Timber Trails Assoc. v. Sherman Planning and Zoning Commission, No. CV-04-0351308, 2005 Ct. Sup. (LOIS) 9695 (J.D. of Danbury at Danbury, May 20, 2005).

- l. No predetermination was found to exist where the Town of West Hartford supports, and is a co-applicant for, major zoning changes, pursuant to agreement between the Town Council and the developer, and the Council is the zoning authority. Sadler v. Town of West Hartford, No. CV-04-4001119, 2005 Ct. Sup. (LOIS) 7317 (J.D. of Hartford at Hartford, April 22, 2005).
- m. No predetermination was found where a proposed multi-family development was denied in the waterfront district despite the fact that draft regulations already existed which would have prohibited such uses in that zone. The regulations in effect at the time of application were the ones which were used and there were several reasons for the denial which were adequate to support the decision. Jimmie's, Inc. v. West Haven Planning and Zoning Commission, CV-06-4018289 (J.D. of New Haven at New Haven, April 2, 2007).
- n. No predisposition was found based on the statement by a commissioner that "you can sit here for the next three weeks and you'll never get my vote. Never." The court found that the statement was made *near the end* of a lengthy hearing and that there was no indication that the

commissioner had made his mind up *prior to* the hearing. Adams v. Stamford Environmental Protection Board, FST-CV-06-4010316S (J.D. of Stamford-Norwalk at Stamford, July 24, 2008).

- o. No predisposition was found to exist where a commissioner opined that he didn't believe that the plaintiff's application, which had been submitted twice previously, had been changed sufficiently to allow the commission to consider it again. The plaintiff failed to demonstrate that this statement alone constituted sufficient evidence of predisposition. 53 Prospect Street, LLC v. Putnam Zoning Commission, CV-07-4006674-S (J.D. of Windham at Putnam, June 30, 2009).
- p. Statement by the chairman during the hearing that he was philosophically opposed to having zone boundaries bisecting lots, because it made it difficult for the commission and property owners to know what requirements apply and where they would apply, does not constitute predetermination or bias with respect to the applicant or the application. NeJame v. Bethel Planning and Zoning Commission, DBD-CV-084008308S (J.D. of Danbury at Danbury, July 29, 2010).
- q. In a case with facts somewhat similar to Marmah, it was held that the comments by commissioners which were critical of developments proposed in reliance on two sections of the subdivision regulations – which sections were repealed by the commission on the date that the plaintiff filed its application - did not constitute predisposition against the application, particularly in light of the scores of alleged deficiencies noted

by staff. While the commission may have shown animosity toward the type of development proposed in reliance on those sections of the subdivision regulations, the court found that the plaintiff had not proven “that [the commissioners] made up their minds about the application *prior* to the public hearing and that no amount of evidence would have swayed their decision.” Amos Lake Development, LLC v. North Stonington Planning & Zoning Commission, CV-07-4006873S (J.D. of New London at New London, September 15, 2010).

- r. Predisposition was found in a denial which involved participation by a commissioner who indicated at the hearing that he would not agree to waive a requirement “under any circumstances” and by a second commissioner (1) whose father-in-law vehemently opposed the plaintiff’s application at the inland wetlands commission hearing and (2) who initially recused himself stating “I will step down because you want to know what? I don’t even want to hear their proposal. How’s that?”, yet later participated in later deliberations and voting on a resubmitted application. Masi v. Watertown Planning & Zoning Commission, CV-09-4018313S (J.D. of Waterbury at Waterbury, November 30, 2010).
- s. Allegations that commission members had predetermined application because they “didn’t ask a lot of questions”, “opponents were cut off”, and that the chairperson “steered the proceeding in a biased way” and “showed deference to members of the public who were in support of the application” not supported by sufficient evidence. Y Downtown, Inc. v.

Westport Planning & Zoning Commission, FST-CV-08-4018081S (J.D. of Stamford-Norwalk at Stamford, January 19, 2011).

- t. Commission found not to have predetermined application although, in the decision, court “strongly advises that Chairman ..., along with all of the commissioner members, should undertake some remedial training and orientation concerning their duties as municipal public officials sitting on boards and commissions, including their obligation to remain impartial and non-judgmental during such proceedings, and to withhold judgment until all of the evidence and arguments have been presented for their deliberation.” Wykeham Rise, LLC v. Zoning Commission of the Town of Washington, CV 09-4007939S (J.D. of Litchfield, October 11, 2011).
- u. Commission’s denial of a special use permit application was reversed and remanded based on the “biased, aggressive and vociferous arguments” against the applications by a commission member who believed the applicant had “screwed her” in another matter and “wanted him to suffer the same fate of denial by the Commission that she had suffered”. In addition, there was a finding that certain communications by the commissioner with a town official were inappropriate *ex parte* communications. Villages, LLC v. Enfield Planning & Zoning Commission, CV-095033925-S and CV-095033926-S (J.D. of Hartford at Hartford, May 30, 2012). The Appellate Court affirmed this decision in Villages, LLC v. Enfield Planning & Zoning Commission, 149 Conn. App. 244 (2014), appeals dismissed, 320 Conn. 89 (2015).

- v. Plaintiff abutter appeals ZBA variance and PZC special permit, in part, claiming a violation of CGS 8-11 based on the fact that the applicant's attorney was a member of the Fairfield Board of Selectmen at the time of the respective applications and was, therefore, an ex officio member, without vote, on all town boards and commissions. The Court rejects the claims noting that there was "not a scintilla of evidence to suggest a claim of actual bias" and differentiates between elected members of zoning authorities and those who serve ex officio without a vote. Further, because both the ZBA and PZC are directly elected, the contention that they are "subordinate to" or "under the control" of the Board of Selectmen "would no doubt provoke a quiscal (sic) expression of disbelief from members of those land use bodies. Any such suggestion would instantly prompt a declaration of independence." E & F Associates, LLC v. Fairfield ZBA and E & F Associates, LLC v. Fairfield PZC, CV 12-6026129S and CV 12-6028919S, (J.D. of Fairfield at Bridgeport, Radcliffe, J., June 26, 2013).
- w. The applicant alleged that the participation of the PZC chairman was improper under CGS 8-11 because of his public opposition to the application prior to his service on the commission and various other actions and statements during the course of the proceedings, for example, tabling the application because the abutter's attorney was unavailable to attend the hearing. The Court held that the chairman's limited participation may have constituted a "procedural irregularity" but,

combined with his ultimate recusal from the discussion and vote, did not sufficiently taint the process to invalidate the commission's actions. Complete Construction Co. v. Ansonia PZC, and Complete Construction Co. v. Ansonia PZC, CV 08-4065921S and CV 09-4065922S, (Land Use Litigation Docket at Hartford, Berger, J., September 6, 2013).

- x. Plaintiff appealed from PZC's denial of its own application to enact Natchaug River Watershed Overlay Zone Regulations, claiming improper participation, bias, conflict of interest and predetermination on the part of one commission member who had publicly opposed the proposal. After a detailed review of the applicable tests, the Court held that the plaintiff had failed to prove that the commissioner at issue had **unequivocally** predetermined the issue regardless of any testimony at the public hearing. Howard v. Chaplin PZC, CV 12-6004728, (J.D. of Windham, Boland, J., April 4, 2014).
- y. Predetermination was not proven despite allegations that the commission member "walked out of the hearing basically arm-in-arm with the neighbor who opposed his deck" and "admit[ted] that he was leaning against approval when he visited the site but that was after the hearing and just before the vote." Burgess v. Norwich ZBA, CV 12-6015423S (J.D. of New London and Norwich, Moukawsher, J, March 4, 2015) and Burgess v. Norwich ZBA, CV 15-6024762, (J.D. of New London at Norwich, Handy, J., October 5, 2016).

- z. Insufficient allegations of predisposition or bias where the commission chairman had run for First Selectman and, thereafter, changed their position on text change allowing crematoria. (McLoughlin v. Bethel PZC, LND-CV-15-6063334-S, J.D. of Hartford, Berger, J., July 15, 2017).
- aa. The court rejected the plaintiff's implication that the mere enactment of the zoning amendment establishes predetermination. Both parties cited Marmah in support of their position. (Recycling, Inc. v. Milford PZB, CV-09-4012214-S, J.D. of Ansonia-Milford at Milford, Stevens, J., May 25, 2017).

C. Conflict of Interest

The grandfather of Connecticut conflict decisions arose in simpler, and perhaps more casual, times. In Low v. Madison, 135 Conn. 1 (1948), a husband sat as a member of a commission hearing his wife's application for a zone change. That was held to be improper, not surprisingly. However, since that time, many cases have arisen, not quite as obvious, and involving all kinds of situations.

The general rule is not whether the private interest of a commission or board member in fact conflicts with his public duty in fact, but whether it might do so - that is, whether there is the appearance of a conflict. Josephson v. Planning Board, 151 Conn. 489 (1964). A corollary to that rule soon followed to the effect that local government would be seriously handicapped if any conceivable interest, no matter how remote or speculative, would require disqualification. Anderson v. Norwalk Zoning Commission, 157 Conn. 285 (1968). In that case, the chairman of the commission, affiliated with a local bank, disqualified himself because he was a neighbor of

the subject property, and suggested another bank employee as an alternate. Another member of the same commission was a major shareholder in a building company which was represented by the same law firm as the applicant for a zone change. Neither of these circumstances was held to be a conflict of interest.

1. Where the line is to be drawn is not always easy to tell. In the following situations, no conflict was found to exist:

- a. a member of a commission was a bank official where the applicant did his banking business. Furtney v. Zoning Commission, 159 Conn. 585 (1970).
- b. a city councilman whose law firm occasionally represented a party benefitted by a street widening decision. LaTorre v. City of Hartford, 167 Conn. 1 (1974).
- c. a commission member who was a law partner with the Town attorney. Schwartz v. Hamden, 168 Conn. 8 (1975). Likewise where a lawyer who is a member of the board of appeals acts on an application opposed by a condominium association, and the lawyer had represented one of the condominium members in the purchase of her unit, and in other matters, held not to be a conflict. Heyman v. Darien Zoning Board of Appeals, 1996 Sup. Ct. 4302.
- d. a commission member who was also a member of the conservation commission in the same town and who had participated in two consecutive commission meetings which discussed the subject zoning application, and was aware of a letter sent to the zoning commission by the conservation commission to the effect that if certain conditions were met, the

conservation commission might view the conservation implications of the proposal favorably. Holt-Lock, Inc. v. Zoning and Planning Commission, 161 Conn. 182 (1971). The Holt-Lock, Inc. decision was cited as persuasive in a situation where two commissioners whose participation in little league and a ballfields committee was held not to involve a personal interest in an application for the construction of a municipal outdoor recreational facility including two ballfields. Brooks v. Haddam Planning and Zoning Commission, 2000 WL 177195, Conn. Super. Ct. (2000).

- e. a commission member who together with his mother and sister were stockholders of a company providing housing for college students acted on an application for a proposed apartment complex seven-tenths of a mile from the college. Dana-Robin Corp. v. Common Council, 166 Conn. 207 (1974).
- f. board member will share the same financial benefit as other residents of the town because of the granting of the application. Constas v. Planning & Zoning Board of Appeals of the Town of Greenwich, 1991 WL 32023, Conn. Super. Ct. (1991). For a similar case, see Conntech Dev. Comp. v. Mansfield Planning & Zoning Comm., 1995 Ct. Sup. 5297, holding that the interest of the Commission, as a public entity, in obtaining federal funding for a walkway which was part of the application before the Commission, was not a conflict of interest.
- g. board member who is also chairman of conservation commission and opposes subdivision application at DEP hearing on environmental grounds

has no personal interest requiring disqualification. Honeycomb Associates v. Planning and Zoning Board of the City of Milford, 6 CSCR 365 (1990).

To the same effect see Macchio v. Darien Zoning Board of Appeals, 1996 Sup. Ct. 4225, holding that it is not a conflict for the chairwoman of the RTM Planning, Zoning and Health Committee to appear before the board in opposition to an application.

- h. mayor as ex officio member of planning commission can appear on behalf of zoning amendments at public hearing of zoning commission. Ghent v. Zoning Commission, 220 Conn. 584 (1991).
- i. the wife of a disqualified commissioner can speak at a public hearing of the commission, even where she is voicing his opinions on the ground that the commissioner himself was not participating in the hearing. Cioffoletti v. Planning & Zoning Commission, 209 Conn. 544 (1989).
- j. Along the same line, the statute is not violated where a zoning board of appeals allows the husband of a disqualified member to submit a letter in opposition to an application. Ziegler v. Thomaston, 43 Conn. Sup. 373 (1995).
- k. Likewise, there is no conflict where a commission member recuses himself because he owns property adjacent to the applicant, and his wife speaks in opposition at the public hearing on the application. Ashe v. New Fairfield Conservation Commission, 2001 WL 1265867, Conn. Super. Ct. (2001).
- l. town proposes to establish moderate income housing on property to be

acquired by the town, and chairman and secretary of zoning commission act as advocates for the project before the town meeting because there is no personal or financial interest. Gray v. Darien Planning & Zoning Commission, 1992 WL 11088, Conn. Super. Ct. (1992).

- m. alternate member of zoning commission who lives across street from the applicant's property can oppose the application individually at a public hearing of the planning commission. Massimo v. Planning Commission, 41 Conn. Supp. 196 (1989).
- n. member of board of appeals who lives "near" the subject premises, Marchetti v. Winchester Zoning Board of Appeals, 1991 WL 162172, Conn. Super. Ct. (1991).
- o. member of zoning commission owning property 400 to 500 feet away. Connecticut Conservation Association v. Bridgeport Zoning Commission, 1991 WL 303649, Conn. Super. Ct. (1991).
- p. member of zoning board of appeals can appear before zoning commission in opposition where he acts on his own behalf and not for another. R.C. Associates v. West Hartford Zoning Board of Appeals, 1991 WL 162318, Conn. Super. Ct. (1991).
- q. Likewise, a member of a zoning board of appeals can disqualify herself from acting on an application involving property adjacent to the board member's home and can then speak in opposition to the application. Gagnon v. Town of Stratford, 8 Conn. Ops. 1034 (Sept. 9, 2002).
- r. Participation of a commission member's wife against a wetlands

application has been permitted when the commission member recused himself from participating in the proceeding, since under the wetlands statute (C.G.S. 22a-42(c)) a board member is not precluded from appearing before the agency. Ashe v. New Fairfield Conservation Commission, 7 Conn. Ops., 1218 (Oct. 19, 2002).

- s. Commission member challenged after time of public hearing and thereafter did not participate in consideration of application where there is no evidence he influenced decision. Sypniewski v. Seymour Planning & Zoning Commission, 1990 WL 2271546, Conn. Super. Ct. (1990).
- t. where claim of conflict is raised for the first time on appeal. Fiero v. East Lyme Zoning Commission, 1991 WL 230324, 6 CSCR 1040 (1991). Must object on ground of disqualification at the public hearing. R.C. Associates v. West Hartford Zoning Board of Appeals, 1991 WL 162318, Conn. Super. Ct. (1991); Wilmot v. Coventry Planning & Zoning Commission, 15 CLR 515, 1995 Ct. Sup. 14535; Marcarelli v. New Haven Zoning Board of Appeals, 1995 Ct. Sup. 4483. Although the right to raise a claim of conflict on an appeal is waived if not raised before the commission, it is sufficient if anyone raised the issue before the commission. It need not be the appellant. Fedus v. Colchester Conservation Commission, 34 Conn. L. Rptr. No. 17, 638 (July 7, 2003).
- u. An Appellate Court case deals with the issue of conflict of interest and deals with the parameters of when one's business interests mandate that a commissioner excuse himself from participation in a Board decision. In

Max F. Brunswick, et al v. Inland Wetlands Commission of Bethany, 29 Conn. App. 634 (December 8, 1992), Judge O'Connell held that it is the appearance of impropriety that serves to invalidate an agency decision, rather than proof of an actual conflict of interest. In Brunswick, a commissioner was in the construction business and subsequent to voting to approve subdivisions, the commissioner received contracts to build roads in the approved subdivision. He voted in favor of the subdivision and reserved the right to bid on its roads. While the trial court found that the commissioner had no conflict of interest at the time he cast his votes, the Appellate Court reversed in that the trial court reached an improper conclusion on the basis of the facts presented. The Appellate Court cited Daly v. Town Planning & Zoning Commission, 150 Conn. 495, that the situation created a situation "tending to weaken public confidence." The commissioner's practice of obtaining work on subdivisions he had voted to approve created an appearance of a conflict of interest, and, therefore, under the test first established in Low v. Madison, the agency's action was successfully appealed. It is clear under the standard in Brunswick that a potential bidder on subdivision work may possess the type of "personal interest" mandating disqualification, should he or she serve on a land use commission. It will be interesting to see how lower courts apply this standard.

- v. A zoning commissioner may participate in the hearing, discussion, and decision of Town's special permit and site plan application, where

commissioner's spouse is a member of the Town's Parks and Recreation Commission. The commissioner's spouse did not participate at the hearing. The spouse was not the applicant and did not own property in the vicinity of the land involved in the decision, and the Commissioner had no interest which could confer a personal or financial benefit upon the relative. Floch v. Planning & Zoning Commission, 10 Conn. L.Rptr. No. 8, 235 (December 6, 1993) (Fuller, J.); see also Carnese v. Planning & Zoning Commission, Super. Ct. No. CV 92 029969 S, 1993 Casebase 6610, J.D. of Fairfield at Bridgeport (1993) (Levin, J.) (appeal withdrawn).

- w. Where the record does not show that the commission member was directly or indirectly interested in a personal or financial sense nor that she bore animosity toward the plaintiff, a commission's unanimous decision will not be invalidated because she failed to recuse herself, where no timely demand for recusal was made and the commission's decision was unanimous. Van Stone's Cypress v. Zoning Commission, Super. Ct. No. CV 92 0292015, 1993 Casebase 926, J.D. of Fairfield at Bridgeport (1993) (Levin, J.).

In this case, a subsequent owner of property who requested an extension of time in which to obtain a building permit sought to challenge a condition of a special case permit for the property years after that permit had been granted to the previous owner. The challenged condition required that a building permit be granted within 18 months of the special case permit approval. The subsequent owner requested an additional 18

month extension, and appealed from the decision of the commission granting only a 3 month extension. The subsequent owner also claimed, on appeal only, that a member of the commission who had voted on the extension request was biased.

The court concluded that the subsequent owner could not collaterally attack the condition of the previously imposed special case permit. The court also concluded that the commission's decision denying the extension request would not be invalidated as a result of the commission member's failure to recuse herself, since the record failed to reveal a direct or indirect interest, in a personal or financial sense, in the subject matter of the request. The court held that the commission did not abuse its discretion in denying the extension request.

- x. Mere act by First Selectman of submitting memorandum to ZBA outlining contents of municipal files on plaintiff's property is not sufficient to prove conflict of interest, where First Selectman, albeit an ex-officio member of the ZBA, did not participate in any way on plaintiff's application for variance. Hainsworth v. Zoning Board of Appeals, 10 Conn. L.Rptr. No. 16, 516 (1994); Westlaw 540890, J.D. of Fairfield at Bridgeport (1993) (Fuller, J.).
- y. A member of one zoning board does not violate §8-11 by appearing before another zoning board to represent the member's own agency. Sharp v. Zoning Board of Appeals, 11 Conn. L.Rptr. No. 13, 399 (1994) (Levin, J.).

- z. No conflict found to exist where members of Conservation Commission are individually members of a land trust which owned land adjacent to the property which was the subject of the application before the Commission. Segerson v. Conservation Comm. of the Town of Redding, 1995 Conn. Sup. Ct. (J.D. of Danbury at Danbury, January 24, 1995).
- aa. Fact that a member of the Planning and Zoning Commission was on a waiting list for a slip at a Town owned marina when the Town applies for permission to expand the marina, held not to be a conflict of interest. Westporters Who Love Compo v. Westport Planning and Zoning Commission, 1995 Sup. Ct. 1127.
- bb. Alternate member of board of appeals appears in opposition to appellant's application before zoning commission to change applicable regulations, prior to her appointment to the board of zoning appeals. Since she did not vote on the plaintiff's application before the board of appeals, held not to be a conflict. Walanskas v. Woodbury Zoning Board of Appeals, 1995 Ct. Sup. 1557.
- cc. Statements critical of an applicant made by a member while publicly announcing the reason for his disqualification do not create a conflict since that member did not participate in the action taken by the Commission. Crossroads v. Cheshire Planning & Zoning Commission, 1995 Sup. Ct. 1989. The decision makes clear however that it is probably not good practice for a disqualified member to make critical comments concerning a pending application.

- dd. No conflict found when a member of a zoning commission acts on the application of a hospital of which her deceased husband had been president and an honorary trustee. Byrnes v. Greenwich Planning and Zoning Commission, 1996 Sup. Ct. 30.
- ee. Not improper for member of Town council, which appoints members of the zoning commission, to appear at a public hearing to express opposition to an application. In this situation, the plaintiff must demonstrate actual bias, rather than potential bias. Mobil Oil v. Wallingford Planning and Zoning Commission, 1999 Sup. Ct. 16286.
- ff. Facts that town planner lives in the neighborhood of property which is the subject of an application for a special permit and is on the board of directors of an organization related to the applicant does not constitute conflict requiring disqualification where those interests are disclosed in a timely manner, no one asks for disqualification and no prejudice stemming from his participation is shown. Beeman v. Guilford Planning & Zoning Commission, 27 Conn. L. Rptr. No. 3, 77 (2000) (Downey, J.).
- gg. Ownership of undevelopable, nearly valueless land in close proximity (200 feet) to a proposed development does not require recusal of a commission member concerning an application related to that development. Fedus v. Colchester Conservation Commission, 34 Conn. L. Rptr. No. 17, 638 (July 7, 2003).
- hh. On a hearing for a special permit, the chairman of the commission recuses himself because he lives on property adjacent to the plaintiff's proposed

site for a clubhouse, and speaks against the application at the public hearing. Held that although this conduct violates C.G.S. Sec. 8-11, in the absence of a showing that the decision denying the application was a product of the chairman's influence, the decision of the commission is sustained. The Durham Agricultural Fair Association, Inc. v. Durham Planning & Zoning Commission, Conn. Super. Ct., J.D. of Middlesex, at Middlesex, Case No. CV-01-0094500S, 3 Conn. Ops. 814 (2004).

- ii. Wetlands agency approves contested application. Plaintiff appeals claiming predetermination on grounds that applicant's attorney was former chairman of the agency, and that applicant's wife is a municipality land use contractor. Held that plaintiff failed to carry its burden of proof that the agency predetermined its approval. Hunt v. Canton Inland/Wetlands and Watercourses Agency, Conn. Super. Ct. No. CV-03-0520838, J.D. of New Britain, at New Britain (2004) (Shortall, J.).
- jj. Text change to zoning regulations which would affect property owned, among others, by a church whose members included relatives of the chairman of the zoning commission, without any further evidence of financial or other benefit found not to constitute a conflict of interest. Kingston v. Old Lyme Zoning Commission, CV-06-4005983 (J.D. of New London, July 25, 2007).
- kk. Living within visible distance from the plaintiff's property might be grounds for disqualification of member of commission but that must be proven as an issue of fact. An allegation in the plaintiff's brief on appeal of

that claim is insufficient. Moreno v. Historic District Commission, 50 Conn. Supp. 398 (2007).

- ll. Wife of a planning and zoning commission member is denied a variance by the town's zoning board of appeals, which found no hardship. Claim that the zoning board of appeals was biased because of an isolated statement regarding tension between the two land use agencies was found to be "woefully deficient". Ingram v. Weston Zoning Board of Appeals, CV-06-4010115S (J.D. of Stamford-Norwalk and Stamford, August 18, 2008).
- mm. No conflict found to exist where resident had contacted chairman of zoning board of appeals in his capacity as either an attorney in private practice or as chairman of a political party within the town with generalized concerns about a land use activity that later came before the board. Kobyluck Brothers, LLC v. Salem Zoning Board of Appeals, CV-06-4104122 (J.D. of New London at Norwich, July 7, 2008).
- nn. Despite the fact that a commissioner's wife's parents own property adjacent to the property which is the subject of an application, the court distinguished Thorne by indicating that the commissioner had never acted on behalf of his in-laws regarding a zoning issue, and further distinguished Fruscianti by finding that the commissioner had never publicly expressed an opinion about the application. Dooley v. Pomfret Planning & Zoning Commission, TTD-CV-08-4010759S (J.D. of Tolland at Rockville, June 16, 2009).

- oo. Commission's denial of zoning permit not tainted by fact that commissioner, who had a clear conflict of interest which was known to the commissioner, the chairman of the commission and the plaintiff, recused herself from participating in any manner with respect to the proceedings. Cockerham v. Montville Zoning Board of Appeals, CV-05-4004221 (J.D. of New London at New London, September 30, 2009).
- pp. Decision of commission not overturned where a commission member who had entered into an agreement to acquire a strip of land from the applicant if the subdivision approval were granted recused himself from the proceedings but the commissioner's wife spoke in support of the application at the public hearing. Rosztoczy v. Darien Planning & Zoning Commission, FST-CV-06-40009426S (J.D. of Stamford-Norwalk at Stamford, September 6, 2007).
- qq. No conflict of interest found where commission member had "nodding or chatting acquaintanceship" with applicant and was tenant in one of the apartment properties owned by an affiliate of the applicant. Saviano v. Norwalk Zoning Commission, FST-CV-10-6002917S (J.D. of Stamford-Norwalk at Stamford, March 18, 2011).
- rr. Ten individual abutters appealed the Zoning Commission's approval of a special permit application for the construction of athletic fields by The Gunnery. The plaintiffs claimed that the participation of one member of the commission who was formerly a teacher at The Gunnery constituted a conflict of interest or, alternatively, that he was biased and predisposed to

approve the application because of his past affiliation with the school, the school's recognition of his late son's service to the school and the country, and his past statements regarding the desirability of having more athletic facilities constructed. After a detailed review of the relevant tests, the Court found no conflict of interest, bias or predisposition on the part of the commissioner. Stern v. Washington Zoning Commission, CV 12-6007231S, (J.D. of Litchfield, Danaher, J., September 11, 2013).

2. On the other side of the line, a conflict of interest was found to exist in the following situations:

- a. a common council member disqualified himself because his firm represented the opposition to a proposed site plan, but did not resign from the council. Bossert v. City of Norwalk, 157 Conn. 279 (1968).
- b. a commission member owning a boat yard one-quarter of a mile from the applicant's boat yard. Spicer v. Noank, Superior Court, 5 CLT No. 7, p. 16, February 12, 1979.
- c. a commission member who had known the applicant for seven years, saw him socially on a monthly or more frequent basis including dinner at one another's home, and had recently participated with the applicant in a commercial joint venture. Gordon v. North Branford, Superior Court, No. 113413, Judicial District of New Haven, 1980.
- d. the commission chairman whose parents and sister owned property adjacent to the applicant's. Thorne v. Zoning Commission, 178 Conn. 198

(1979).

- e. a member who appeared before the planning commission in opposition to an application, but did not vote on the application before his agency. R.K. Development Corporation v. Norwalk, 156 Conn. 369 (1968).
- f. a member of a zoning board of appeals who appeared before the zoning board in opposition to an application. Luery v. Zoning Board, 150 Conn. 136 (1962).
- g. a member who is a personal friend of the applicant. (Attended his wedding and reception, rents an apartment from the applicant's family, attended a reception at applicant's home to welcome new police chief, attended grand opening of business at applicant's business before and after permit approval). Stanley v. New London Planning & Zoning Commission, 1991 WL 172828, 6 CSCR 847 (1991).
- h. member who lives 400 feet from the applicant's premises and therefore disqualifies himself cannot appear in opposition at public hearing even on own behalf. Sunny Wood Convalescent Home, Inc. v. Norwich Zoning Board of Appeals, 1991 WL 172845, 6 CSCR 848 (1991).
- i. member who owns property across the street from the applicant's premises. East St. Residential Partnership v. East Granby Planning & Zoning Commission, 1990 WL 284338, Conn. Super. Ct. (1990).
- j. lawyer who is a member of planning commission and who represents a client before that commission on an application for subdivision approval but who does not participate in that proceeding. Hoerle v. New Hartford

Planning & Zoning Commission, 1991 WL 27837, Conn. Super. Ct. (1991).

- k. lawyer/member of zoning commission whose former law firm had represented another developer in direct competition with this applicant and it was not clear if he was still sharing in the revenues of his former firm at the time of the public hearing on this application. Sciortino v. Trumbull Planning & Zoning Commission, 1990 WL 284346, Conn. Super. Ct. (1990).
- l. Commissioner's father-in-law living "across the street" found to be a conflict of interest even though he didn't own the property and the relationship was not as close as in Thorne where commissioner participated actively in opposition to plaintiff's application. Fruscianti v. Westbrook Zoning Board of Appeals, 6 Conn. L. Rptr. 298 (J.D. of Middletown, April 7, 1992).
- m. the appeal of a denied applicant was sustained when the commission chairman's wife appeared at the public hearing in opposition to the application. The chairman participated in the decision and, since there was a personal interest at stake, the decision was lacking impartiality. Olympic Village v. Barkhamsted Planning & Zoning Commission, 8 Conn. L.Rptr. 241 (1993).
- n. the amount of participation by a disqualified commissioner was the issue in Wilmot E. Tyers et al v. Planning & Zoning Commission of Shelton, 7 Conn. L.Rptr. 618 (1992). In Tyers, a commissioner served on the Board

of Directors of an applicant to this commission. While the commissioner in question abstained from voting on the application, he seconded the motion to approve the subdivision. Judge Sequino cited the text of C.G.S. 8-21 in his decision. "No member of any planning commission shall participate in the hearing or decision of the commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense." As membership on the applicant's board of directors was a personal interest, the commissioner's action in seconding the motion to approve the application was illegal participation in the commission's decision.

- o. where zoning commission member's statements, relationships and conduct before ZBA are such that he should be considered to have appeared on behalf of opponents to the plaintiff's variance application before the ZBA, held, §8-11 was violated. The ZBA's denial of the plaintiff's variance was illegal and invalid. Hendel Family Trust v. Old Saybrook ZBA, 1994 Casebase 2947, J.D. of Middlesex at Middletown (1994) (O'Keefe, J.).
- p. In Town of Woodbury v. Taylor, 1993 Casebase 11284, J.D. of Waterbury (1993) (Sullivan, J.), the plaintiff's Town, Zoning Commission and ZEO sought a permanent injunction restraining the defendant from promoting or holding a concert at a ski and racquet club without receiving a special permit from the Zoning Commission. The requirement of a special permit was the result of certain amendments to the zoning regulations which restricted the number of concerts to be held per year as well as the timing

of such concerns, including amendments in 1989 and 1991. The defendants alleged that members of the Zoning Commission had a conflict of interest when they voted for the amendments to the zoning regulations.

The Chairman of the Zoning Commission testified at trial that he had recused himself from defendants' matters from March 1986 to March 1988, as a result of defendants' requests for recusal as well as his negative experience with and opinion of defendants. However, he ceased to recuse himself in the spring of 1988. The court stated that "the better course of action" would have been for the chairman to continue recusing himself, but noted that there was no evidence of any improper influence by the commissioner, nor of any prejudice or bias.

The court concluded that the amendments to the zoning regulations were valid, and that the commission members who were challenged for conflict did not have to disqualify themselves when the Zoning Commission voted on amendments to the regulations which affected every resident of the town. "The fact that a Zoning Commission[er] has a conflict with one resident of a town does not cause him or her to have to recuse himself or herself from participating in decisions that affect all the town residents." However, because the Commissioner should not have participated in any matters involving the defendants after March 1988 in light of his past recusals and the potential creation of a situation in which the public confidence in the exercise of zoning power could be weakened, the court denied the request for permanent injunction.

- q. where alternate Board member owned property in proximity to the property that was the subject of a special permit application, the alternate should recuse himself from any further consideration of the application. The court noted that the issue was not raised until the appeal, and that the evidence of conflict was inconclusive. The court sustained the plaintiff's appeal and remanded the matter to the ZBA. Nere v. Killingworth Zoning Board of Appeals, 1994 WL 442722, J.D. of Middlesex at Middletown (1994) (Gaffney, J.).
- r. A seller of property to an applicant before a zoning board of appeals is disqualified from participating in an application for a variance affecting that property. Purtill v. Glastonbury Zoning Board of Appeals, 8 Conn. Ops. 925 (August 12, 2002).
- s. Ethnic remarks by zoning commissioner concerning an applicant's ethnic origin, even if intended as humor, require reversal of a decision adverse to the applicant. Pirozillo v. Berlin Inland Wetlands and Watercourses Commission, 32 Conn. L. Rptr. No. 3, 103 (June 17, 2002).
- t. A member of one local land use agency (Flood & Erosion Control Board) may not act as a consultant or expert witness in an application to the Planning and Zoning Commission. Frank v. Westport Planning & Zoning Commission, 40 Conn. L. Rptr. No. 1 (November 14, 2005).
- u. A second selectman who is an ex officio member of a commission and actively participates in a proceeding before that commission is disqualified when he is a member of the applicant [gun club looking to relocate a skeet

range] and the owner of the only gun shop in town. Nazarko v. Conservation Commission, 50 Conn. App. 548, cert. denied 247 Conn. 940 (1998).

- v. Participation by a member of an Historic District Commission who recused himself and then testified extensively against an application, purportedly as an expert witness, denies the applicant fundamental fairness at a public hearing. Barry v. Litchfield Historic District Commission, 49 Conn. Sup. 498 (2006), citing and following Nazarko for the proposition that the test is the appearance, rather than the fact, of impropriety by a public official.
- w. Commissioner lived within yards of the property that plaintiff had sought to have removed from classification as wetlands and was aware of water issues in the neighborhood and commissioner's wife had signed petition opposing the map change. Held, while there was no evidence of an actual conflict, the commissioner has a potential personal interest in the application and therefore is subject to disqualification. Limestone Business Park, LLC v. Plainville Inland Wetlands Commission, CV-07-4012851S (J.D. of New Britain at New Britain, October 30, 2007).
- x. Conflict of interest was found and matter was remanded to the commission for a new hearing without the participation of a commissioner who had written letters to the editor and was repeatedly identified in the press as a spokesman for or leader of the opposition. Lorusso v. Naugatuck Zoning Commission, CV-05-4006883S (J.D. of Waterbury at

Waterbury, May 21, 2008).

- y. Conflict of interest found where applicant's attorney, who was integral to the presentation, was also the personal and business attorney for one of the agency members. No evidence of bias was demonstrated but the court found "the relationship too close, the role of the applicant's attorney was too prominent, and the application was too publicly contentious to ignore the proven facts." Caruso v. Meriden Zoning Board of Appeals, CV 08-4033705 (J.D. of New Haven at New Haven, August 9, 2012). This portion of the holding was not reviewed in subsequent appeals to the Appellate Court or the Supreme Court, as other issues were found to be dispositive.

3. Some general principles and laws do apply. A member of one zoning or planning agency should not appear before another zoning or planning agency. Close friends or business associates should disqualify themselves. Business competitors should probably do the same. Lawyers whose firms or partners are involved in an application on either side should not participate. A member who owns (or whose family owns) adjacent or nearby property, should disqualify himself.

It is better and safer practice not to have the same individual on two boards or commissions at the same time. It is probably prudent not to have lawyers who practice in that community on a board or commission.

D. Procedural Considerations

Where there is a known situation of conflict of interest or predisposition, that fact should be made known to the commission or board in advance of the public hearing so that an alternate can sit. If a commission member is aware of such a situation, he or she should do the same, and an appropriate statement to that effect should be placed in the record at the beginning of the public hearing.

If the issue is presented for the first time at the public hearing, the applicant should be asked to state his claim in detail for the record. The commission or board should then act on that claim before commencing the public hearing. If necessary, a recess can be declared to give the commission an opportunity to consider its response. The commission's decision should then be publicly stated, together with the reasons for its action.

A prudent policy to follow would be to disqualify whenever there is a serious question raised, bearing in mind that there need be no actual conflict, but only the appearance of a conflict. The paramount consideration at all times is to preserve the confidence of the public in the actions of the planning and zoning agencies, even at the expense of some hurt feelings or disjointed noses.

Finally, when in doubt, seek the advice and guidance of the town attorney, and follow it. Do not attempt to deal with a potential conflict or predisposition claim without counsel if that can possibly be avoided. As the decisions mentioned above demonstrate, this is a complex area of the law, and common sense, unfortunately, may not provide the proper answer to a conflict or predisposition claim.

E. Ex Parte Communications

Don't have them. Fine, you say, but how do you recognize a due-process-violating *ex parte* communication from a proper or harmless communication? And what do you do if the *ex parte* communication occurred inadvertently or was completed before the speaker or writer could be stopped? Now what?

An *ex parte* communication is any communication outside of the formal process. It may be a chat with a commissioner in the local grocery store after the close of the first night of a hearing and before the second and final night. It might be a letter sent to the commission after the hearing is over and before it votes.

That fact that a communication is *ex parte*, or outside of the formal process, is not the core problem. The real issue is whether the communication included evidence, such that other parties and participants are prejudiced by not having an opportunity to hear it and confirm or rebut the evidence. There is a substantial body of case law that addresses the consequences of receiving *ex parte* communications from staff or experts and the circumstances under which that is permissible. See, e.g., Norooz v. Woodbury Inland Wetlands Commission, 26 Conn. App. 564 (1992); Megin v. New Milford Zoning Board of Appeals, 106 Conn. App. 511 (2008); Buddington Park Condominium Assn. v. Shelton Planning & Zoning Commission, 125 Conn. App. 114 (2010).

A similar issue arises when a commission member is contacted by a resident outside of the confines of the public hearing process. Suppose the chance encounter at the grocery results in a neighbor telling the commissioner: "I can't wait until the continuation of the hearing. You're going to hear some amazing things about what Danny Developer's proposal really means for our town." This is *ex parte* but not evidentiary. It is unlikely anyone would be prejudiced by it, even

though the tone suggests something negative.

Now, suppose the neighbor says: "Danny Developer has had 14 zoning enforcement proceedings brought against him in 10 towns over the last six years. You can't trust him." This is evidentiary and highly prejudicial. Although it is probably irrelevant to the current proceeding, you can bet Danny Developer would want to be heard on it.

Here's a real example. A town planner contacted the applicant after the hearing and the applicant wrote the planner to request the application be tabled. The letter was received after the application was voted on. The court found this letter about a procedural, not an evidentiary, matter was not a prejudicial ex parte communication that would require invalidation of the decision. Boris v. Garbo Lobster Co., Inc., 58 Conn.App. 29 (2000).

Another real example: A property owner files a resubdivision application and the commission holds a public hearing. Later, after the hearing has closed and during deliberations, the commission receives a memorandum from the town planner raising the issue of potentially required open space dedication or a fee in lieu of open space for the first time. Ultimately, the commission denies the application based on the planner's recommendations that the proposal does not comply with the open space requirements of the regulations. The court found that the commission's reliance on the planner's memorandum and the applicant's inability to respond to it were sufficient grounds to sustain the appeal and remand the matter back to the commission for a new hearing. Ruscio v. Berlin PZC, CV 13-6020234S (J.D. of New Britain, Tanzer, JTR, June 20, 2014).

The measuring stick is one of prejudice. Even where the communication is evidentiary and is made after the hearing and before the decision, if it is not prejudicial to anyone, it may not necessarily invalidate the decision. In Ridgefield, for example, the town planner asked the

applicant about open space, after the hearing was closed and before the vote. All the open space issues had been discussed during the hearing. The opposition had requested the information about possible increased open space and there was no advantage to the applicant in providing it by letter through the applicant's engineer. While soliciting additional information after the hearing is a risky practice, the court found no prejudice to the plaintiff-opponent. Dellalla v. Ridgefield Planning & Zoning Commission, 8 Conn.Ops.83 (2001).

What to do if a loose-lipped local citizen fills the ear of a decision-maker with evidence outside the record? If the hearing isn't over, the commissioner should direct the individual to come to the hearing and put on the evidence. The chair of the commission and town attorney in most cases should be told so they can help fashion a corrective solution, which might include the commissioner describing the conversation on the record. The key is to make sure the information is on the record and anyone can fully comment on it.

The difficult case is when the evidence comes in after the hearing is closed and before the vote. The commission might vote to reopen the hearing, including publishing full notice. If that is deemed impractical or simply impossible because of the timing, the commissioner might need to recuse herself or himself from the vote to avoid tainting the proceeding. If the communication is truly evidentiary -- e.g. "I heard what the applicant said at the hearing and he is wrong... There have been three deaths at that intersection..." -- it may be impossible to cleanse the decision-maker of the taint.

Like many procedural problems, the best defense is to make sure commissioners know their responsibilities and help them gain the skills to avoid and cut off the evidentiary communication before it does any damage.

Ethics in Land Use – The Last 4 Years

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*The author also thanks Matthew Loeser, Esq. who contributed some of the summaries to Law of Land that are included in this presentation. <http://lawoftheland.wordpress.com>

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X. Conclusion

I. Introduction

While it has been tradition to have an annual ethics program at the ABA Land Use Institute, sometimes it adds perspective to look at cases over a period of time rather than simply an annual snapshot. One thing is clear, as time marches on, the more things change, the more things stay the same. Sadly, I continue to receive content with my daily news clip set to capture articles across the country where there is an allegation of conflicts of interest, corruption or bias in the land use decisionmaking process. Through the reported (or unreported) court decisions discussed below, the following themes emerge: players in the land use game are being watched more closely than ever before as the value of real estate and real estate transactions continues to escalate; it is relatively easy to make allegations of unethical conduct; courts struggle to find legal answers to allegations of unethical conduct where the conduct is either not statutorily prohibited and/or where the accusers fail to meet their burden of proof; and more self-awareness or consciousness about the appearance of impropriety should be on everyone's mind who has the ability to influence the land use process. The close to 60 decisions and opinions below form the basis of our discussion at the 33rd Annual Land Use Institute.

II. Conflicts of Interest

Conflicts of interest represent the largest number of reported cases in the ethics and land use field. Conflicts may arise based on any number of factors – relating to financial self-interest and relationships, and may include: employment; family; geography (e.g., where you live); investments; and associational relationships.

a. Financial Self-Interest

1. IA Appeals Court Upholds Rezoning to Permit Wind Farm and Finds No Conflicts of Interest on the Part of two Board Members

On August 29, 2013, MidAmerican Energy Company filed a request with the Grundy County Board of Supervisors, to amend the county zoning ordinance to rezone approximately 1200 acres from an A-1 Agricultural District to an A-2 Agricultural District. The rezoning would allow them to place larger wind turbines on the land than the wind turbines that would be permitted. Although the County Planning and Zoning Commission voted against amending the ordinance, the County Board of Supervisors set the matter for a public hearing and approved the proposed amendment to rezone the property. Susan Miller filed a petition for a writ of certiorari with the district court, alleging the board acted improperly in approving the amendment because it failed to conduct a study before rezoning the land. The district court granted the defendants' motion to dismiss and annulled the writ. Miller alleged, in part, that the Board acted improperly because two of the voting supervisors had a conflict of interest that required recusal. Miller first claimed that Supervisor Barb Smith was required to recuse herself because she is one of the owners of the AmericInn, which offered discounted rates to wind energy officials who stayed there. However, Miller was unable to offer evidence that any discounts received by wind energy officials were different than discounts available to anyone else staying at the AmericInn. Miller next alleged that Supervisor James Ross had a conflict of interest stemming from his alleged interest in land subject to wind-energy options or easements. This claim also failed because the court found

Ross's relationship to this tract, relationship to the other owners, and partial ownership of this tract, presented no disqualifying conflict of interest.¹

2. ME Supreme Court Holds Planning Board Member Could Present His Own Site Plan Application to Board Where He Disclosed his Interest and Recused Himself from Voting.

Cohen, who submitted a proposal to build an expansion to his warehouse, was also a member of the Planning Board.² A neighbor who lived next to the proposed site (where Cohen already had a building) sued, alleging that Cohen's presentation of his application to the Planning Board violated Maine's conflict-of-interest law.³ The court held that, because Cohen disclosed his interest and recused himself from voting on his application (as required by Maine state law, 30-A M.R.S. § 2605(4)), and because there was no evidence of improper influence, the Planning Board's vote to approve the Cohens' site plan review application was not voidable.⁴

3. Fed. Dist. Court in NH Dismisses Conflict of Interest Claim Where Applicant Failed to Demonstrate How Board Member's Company Would Benefit from Variance Denial

After the ZBA denied its petition for rehearing, Bel-Air appealed.⁵ Bel-Air asserted, among other things, that the decision should be reversed due to an alleged conflict of interest since one board member owned a sign company that competed with the sign company that Bel-Air engaged to construct its proposed sign.⁶ Bel-Air also argued that the ZBA decision violated its constitutional rights to equal protection and due process because other businesses on commercial lots were allowed to install internally-illuminated signs.⁷ The Superior Court rejected all of Bel-Air's arguments and affirmed the ZBA's decision.⁸ The Court found no conflict of interest, as Bel-Air failed to demonstrate how the board member's company would benefit from denying the variance.⁹ The Court also noted that Bel-Air was not generally prohibited from constructing any

¹ Miller v Grundy County Board of Supervisors, 2015 WL 1817096 (IA App. 4/22/2015)

² Bryant v. Town of Wiscasset, 2017 ME 234 (2017).

³ Bryant v. Town of Wiscasset, 2017 ME 234 (2017).

⁴ Bryant v. Town of Wiscasset, 2017 ME 234 (2017).

⁵ Bel-Air Nursing & Rehab Ctr., Inc. v. Town of Goffstown, New Hampshire, 2018 WL 264091 at *1 (D.N.H. 1/2/2018).

⁶ Bel-Air Nursing & Rehab Ctr., Inc. v. Town of Goffstown, New Hampshire, 2018 WL 264091 at *4 (D.N.H. 1/2/2018).

⁷ Bel-Air Nursing & Rehab Ctr., Inc. v. Town of Goffstown, New Hampshire, 2018 WL 264091 at *7 (D.N.H. 1/2/2018).

⁸ Bel-Air Nursing & Rehab Ctr., Inc. v. Town of Goffstown, New Hampshire, 2018 WL 264091 at *8 (D.N.H. 1/2/2018).

⁹ Bel-Air Nursing & Rehab Ctr., Inc. v. Town of Goffstown, New Hampshire, 2018 WL 264091 at *9 (D.N.H. 1/2/2018).

sign and that it had later received approval for a different sign designed by the same contractor hired to construct the proposed sign.¹⁰

4. NJ Appeals Court Finds Mayor's Personal Financial Interest Too Speculative to Require Recusal

New catering business Exquisite Caterers sought use of parking spaces for valet parking in lot outside of the Freehold Center Core (FCC), a zone created by the Borough of Freehold Redevelopment Plan.¹¹ Exquisite was inside the FCC along with several plaintiff businesses.¹² When Exquisite sought the Freehold Borough Council's approval for the use of the parking spaces, there was a tie vote which the mayor broke, approving the application.¹³ Plaintiffs alleged that the mayor had a conflict of interest because he owned a funeral home within the FCC and that he should have recused himself.¹⁴ Plaintiffs argue that having a catering hall in that location will preclude a competing funeral home from being there, and that it benefits the mayor's funeral home since food cannot be served in the funeral home.

The court noted that a conflict of interest exists when "the public official has an interest not shared in common with the other members of the public," but also that "local governments would be at a severe disadvantage if every possible conflict, 'no matter how remote and speculative, would serve as a disqualification of an official.'" ¹⁵ The court concludes that the plaintiffs' allegation was speculative, since there was no evidence that a competing funeral home ever sought the location, or that his business will benefit from the existence of the banquet hall.¹⁶

5. Fed. Dist. Court in PA Allows Amended Complaint Regarding Alleged Conflict of Interest Over Parking Dispute

Plaintiffs T.I.C.B. operated a parking lot company and acquired parcels near PPL Park to use for public parking to make money during sporting events.¹⁷ PPL Park stadium operator, Global

¹⁰ *Bel-Air Nursing & Rehab Ctr., Inc. v. Town of Goffstown, New Hampshire*, 2018 WL 264091 (D.N.H. 1/2/2018).

¹¹ *Kash v. Mayor of Freehold*, 2017 N.J. Super. Unpub. LEXIS 1103, at *1 (Super. Ct. App. Div. 5/5/2017).

¹² *Kash v. Mayor of Freehold*, 2017 N.J. Super. Unpub. LEXIS 1103, at *2 (Super. Ct. App. Div. 5/5/2017).

¹³ *Kash v. Mayor of Freehold*, 2017 N.J. Super. Unpub. LEXIS 1103, at *3 (Super. Ct. App. Div. 5/5/2017).

¹⁴ *Kash v. Mayor of Freehold*, 2017 N.J. Super. Unpub. LEXIS 1103, at *4 (Super. Ct. App. Div. 5/5/2017).

¹⁵ *Kash v. Mayor of Freehold*, 2017 N.J. Super. Unpub. LEXIS 1103, at *11 (Super. Ct. App. Div. 5/5/2017).

¹⁶ *Kash v. Mayor of Freehold*, 2017 N.J. Super. Unpub. LEXIS 1103 at *12 (Super. Ct. App. Div. 5/5/2017).

¹⁷ *T.I.B.C. Partners, LP v. City of Chester*, 2016 U.S. Dist. LEXIS 52010, at *1 (E.D. Pa. 4/19/2016).

Spectrum, also had its own parking area.¹⁸ The city of Chester issued a cease and desist order to plaintiffs pertaining to the use of the lots for public parking, saying that TIBC's attendants were creating an unsafe and disorderly environment, waving drivers to their lots while falsely claiming the regular stadium lots to be full.¹⁹ The city also claimed that the lots were not properly zoned for public parking.²⁰ Plaintiffs appealed to the zoning board and were granted continued use of the lots while they applied for a variance.²¹ A few months later, police cars blocked off TIBC's lots.²² Plaintiffs allege that police commissioner Bail and three other top officers were W-2 employees of Global Spectrum, were paid \$400 every time they blocked TIBC's parking during events, and therefore had a financial conflict-of-interest in diverting visitors and possible customers from TIBC's lots to Global Spectrum's lots.²³ Plaintiffs further allege that defendant Bail failed to report the income he received from Global Spectrum on his Statement of Financial Interest Form in violation of 65 Pa.C.S. § 1105(a).²⁴

Plaintiff's brought civil RICO, federal due process, and state law claims against the defendants.²⁵ The Court determined the RICO claims were insufficiently pleaded because it could not be definitively shown that the officers acted with improper motive when blocking off the lots.²⁶ They were given 30 days to amend their complaint.²⁷ The due process claims were dismissed.²⁸ The state law claims against the police officers were dismissed.²⁹

¹⁸ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *1 (E.D. Pa. 4/19/2016).

¹⁹ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *5 (E.D. Pa. 4/19/2016).

²⁰ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *5 (E.D. Pa. 4/19/2016).

²¹ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *6 (E.D. Pa. 4/19/2016).

²² T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *9 (E.D. Pa. 4/19/2016).

²³ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *4 (E.D. Pa. 4/19/2016).

²⁴ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *4 (E.D. Pa. 4/19/2016).

²⁵ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *12 (E.D. Pa. 4/19/2016).

²⁶ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *12 (E.D. Pa. 4/19/2016).

²⁷ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *36 (E.D. Pa. 4/19/2016).

²⁸ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *23 (E.D. Pa. 4/19/2016).

²⁹ T.I.B.C. Partners, LP v. City of Chester, 2016 U.S. Dist. LEXIS 52010, at *23 (E.D. Pa. 4/19/2016).

6. MA Land Court Finds Lack of Evidence to Support Alleged Financial Conflict of Interest Where Board Member was Part-Owner in Competing Business

Neighbors complained to the Town regarding the filling and grading of a 16-acre lot zoned for agricultural use.³⁰ The Zoning Board of Appeals issued a Cease and Desist order to 429 Whitney St. Realty Trust (Defendant) regarding the activity and Defendant appealed. Among other things, Defendant claimed that ZBA member Gerald Benson had a financial conflict of interest, thus invalidating the ZBA decision. The complaint was based on Benson's part ownership of CDM, Inc., which oversaw the Rowe Quarry project, one of the largest landfill operations in Massachusetts. CDM's and Benson's involvement in that project rendered them direct competitors with 429 Whitney for the soil re-use materials that were used by 429 Whitney (thus giving Benson and CDM an incentive to halt Defendant's work and use of such materials).

The Court found that although G.L. c. 268A Section 19 prohibits participation in decisions by municipal officials involving financial conflicts of interest, "the request for invalidation of a decision must come from the Zoning Board itself." While the Court could have reached the "conclusion that the Zoning Board decision was arbitrary and capricious based on a conflict of interest," it declined to do so. The Defendants failed to present evidence showing a conflict of interest, and the conflict issue was not listed in the joint pre-trial memorandum. The Defendant bore the burden of presenting sufficient facts to establish a violation of the Massachusetts Constitution and failed to do so.

7. TX AG Notes that Members of Historic Landmark Commission Who Lived in the Historic District May Have a Substantial Interest in Property in the District and Should Refrain from Voting Where a Decision Could Have a Special Economic Effect on Their Property Value

The City of Beaumont created a historic cultural landmark preservation district and a Historic Landmark ("HL") Commission was created to "approve or recommend action on buildings and structures within the district." At a Planning and Zoning ("P&Z") Commission hearing regarding a permit for an office building in this historic district, at least two members of that Commission also lived in that district. Furthermore, a city employee who prepared staff reports for both the Planning and Zoning Commission and the HL Commission lived in the historic district. The Chair of the Committee on Land and Resource Management, asked the Texas Attorney General whether these Commissioners and the staff person who reside in the historic district may vote on matters that affect that district.³¹

First, Attorney General noted that P&Z Commissioners and HL Commissioners are local public officials because they have *more* than an advisory role. However, based on previous Office of the Attorney General Opinion Letters, a city employee who prepares staff reports is not considered to be a local public official for the purpose of the conflict of interest statute.

³⁰ Ward v Rand, 2017 WL 2951639 (MA Land Ct. 7/10/2017).

³¹ Tex. Att'y Gen. Op. KP-0105 (2016).

Second, the Attorney General noted that under Texas law, only local public officials who have a substantial property interest shall file an affidavit reporting their interest before they vote on a matter. With respect to real property, such a substantial interest is real property valued at \$2,500 or more.

Third, the Attorney General opined that that local public officials must abstain from a vote when it is reasonably foreseeable that voting for or against a particular action will have a special economic effect on the value of the local public officials' property.

b. Associational Conflicts of Interest

1 - NJ Supreme Court Remands Claim for Conflict of Interest in Zoning Amendment Vote by Two Municipal Officials Based on Leadership Positions Held in Applicant Church

Plaintiff challenged the validity of an ordinance allowing the construction of an assisted living facility next to a church due to the alleged conflicts of interest of two members of the Township council.³² Specifically, Plaintiff, a property owner, argued that one member should have been disqualified for a direct personal interest in the outcome based on his comment that he might admit his mother to the proposed assisted living facility one day.³³ Additionally, Plaintiff argued that this same member and another member should have been disqualified on another ground that they were also members of the church and thus had indirect personal interests in the outcome.³⁴

As for the one member's comment that he might seek to admit his mother in the proposed assisted living facility, the court held that this comment alone did not create a conflict of interest that would disqualify him from voting on the ordinance because there was no evidence that the mother depended on the construction of the facility for her care and the comment alone did not distinguish the member from any other person in the community who may or may not send their family members to the facility one day.³⁵ The court remanded this issue so that the trial court could develop the record as to whether the comment revealed an actual personal interest.³⁶

As for the other ground, the court held that when an organization "owns property within 200 feet of a site that is the subject of a zoning application, public officials who currently serve in substantive leadership positions in the organization, or who will imminently assume such positions, are disqualified from voting on the application."³⁷ The court clarified that the church's interest in this ordinance is not automatically imputed to all its members but only to those members who occupied a position of substantive leadership.³⁸ The court remanded on this issue so that the trial

³² Grabowsky v. Twp. of Montclair, 115 A.3d 815, 817 (2015).

³³ Grabowsky v. Twp. of Montclair, 115 A.3d 815, 817 (2015).

³⁴ Grabowsky v. Twp. of Montclair, 115 A.3d 815, 817 (2015).

³⁵ Grabowsky v. Twp. of Montclair, 115 A.3d 815, 827 (2015).

³⁶ Grabowsky v. Twp. of Montclair, 115 A.3d 815, 827 (2015).

³⁷ Grabowsky v. Twp. of Montclair, 115 A.3d 815, 818 (2015).

³⁸ Grabowsky v. Twp. of Montclair, 115 A.3d 815, 829 (2015).

court could determine whether the two members held substantive leadership positions in the church.³⁹

2 – NJ Appeals Court Finds Potential for Conflict Where Board Members Were Members of Applicant Church

Plaintiff sued to enjoin the Township of Berkeley Heights and the Planning Board of the Township of Berkeley Heights from considering a proposal to exchange municipal property with a church.⁴⁰ She argued that there was a conflict of interest because a majority of Township and Board were also members of the church.⁴¹ Specifically, she alleged that:

the Council and Board were disqualified from acting on the proposed land exchange due to conflicts of interest; (2) the Township was required to exercise its power of reversion over the Church's property; (3) the Township breached its fiduciary duty to the residents in pursuing the property exchange in light of the conflict of interest; (4) the Township improperly spent funds in furtherance of the proposed exchange, which Township officials had already decided should occur; and (5) the transfer of land to the Church violated the New Jersey Constitution.⁴²

The court held that it could not determine whether there was a conflict of interest for the first, second, third and fifth counts until the Township and Board took a final vote to approve the municipal property exchange with the church.⁴³ At the time of the decision, the Township and Board were merely investigating the value of the proposed exchange.⁴⁴ Therefore, the matter was not yet ripe for adjudication, and Plaintiff had not yet exhausted her administrative remedies “to make her opinion known of the land transfer.”⁴⁵

However, Plaintiff alleged in her fourth count in her complaint that the Township passed three final resolutions in 2013 that were voted on by Township council members who had conflicts of

³⁹ Grabowsky v. Twp. of Montclair, 115 A.3d 815, 830 (2015).

⁴⁰ Matula v. Twp. of Berkeley Heights, 2015 WL 5009859, at *1 (N.J. Super. Ct. App. Div. 8/21/015).

⁴¹ Matula v. Twp. of Berkeley Heights, 2015 WL 5009859, at *1 (N.J. Super. Ct. App. Div. 8/21/2015).

⁴² Matula v. Twp. of Berkeley Heights, 2015 WL 5009859, at *2 (N.J. Super. Ct. App. Div. 8/21/2015).

⁴³ Matula v. Twp. of Berkeley Heights, 2015 WL 5009859, at *4 (N.J. Super. Ct. App. Div. 8/21/2015).

⁴⁴ Matula v. Twp. of Berkeley Heights, 2015 WL 5009859, at *4 (N.J. Super. Ct. App. Div. 8/21/2015).

⁴⁵ Matula v. Twp. of Berkeley Heights, 2015 WL 5009859, at *4 (N.J. Super. Ct. App. Div. 8/21/2015).

interest.⁴⁶ For this count, the court noted that the church's interest in the outcome of the proceeding could be imputed to a Township council member who also has a role in the church if that council member "holds, or who will imminently hold, a position of substantive leadership in an organization reasonably is understood to share its interest in the outcome of a zoning dispute."⁴⁷ In order for a conflict to disqualify a member from voting on a resolution, that conflict must be "distinct from that shared by members of the general public."⁴⁸ The court held that the record did not provide enough information regarding the substantive roles of the Township council members in the church.⁴⁹ Therefore, it was impossible to determine whether any of the members had a disqualifying conflict of interest.⁵⁰ It remanded the case so that the record could be developed.⁵¹

3 - First Circuit Court of Appeals Upholds Dismissal Under TCA Claim Arising from Denial of Permit and Found No Unethical Conflict of Interest on the Part of Board Members Who Maintained Membership in a Conservation Association.

Applicants acquired a leasehold interest in land in Rome, on which land they sought to build a wireless communications tower.⁵² Rome regulates the siting of wireless towers via the "Town of Rome Wireless Telecommunications Facility Siting Ordinance" which requires applicants first to seek permission to build from the Rome Planning Board. After the Planning Board denied its application, appellants brought suit in District Court. The District Court granted the municipality's motion to dismiss. Their substantive due process claim alleged that certain Planning Board members, through their membership in the Belgrade Region Conservation Association (the "BRCA"), had a financial interest in conservation easements the BRCA held. The court found these vague allegations of conflicts of interest and financially motivated conspiracy were insufficient to show that the Planning Board acted in the kind of conscience-shocking fashion required for substantive due process challenges. Accordingly, the District Court's dismissal of the case was affirmed.

4 – Connecticut Court Finds No Conflict Where Commission Member Was a Spokesperson for Applicant

⁴⁶ *Matula v. Twp. of Berkeley Heights*, 2015 WL 5009859, at *4 (N.J. Super. Ct. App. Div. 8/21/2015).

⁴⁷ *Matula v. Twp. of Berkeley Heights*, 2015 WL 5009859, at *6 (N.J. Super. Ct. App. Div. 8/21/2015).

⁴⁸ *Matula v. Twp. of Berkeley Heights*, 2015 WL 5009859, at *6 (N.J. Super. Ct. App. Div. 8/21/2015).

⁴⁹ *Matula v. Twp. of Berkeley Heights*, 2015 WL 5009859, at *6 (N.J. Super. Ct. App. Div. 8/21/2015).

⁵⁰ *Matula v. Twp. of Berkeley Heights*, 2015 WL 5009859, at *6 (N.J. Super. Ct. App. Div. 8/21/2015).

⁵¹ *Matula v. Twp. of Berkeley Heights*, 2015 WL 5009859, at *7 (N.J. Super. Ct. App. Div. 8/21/2015).

⁵² *Global Tower Assets, LLC v. Town of Rome*, 810 F.3d 77 (1st Cir. 1/8/2016).

The Darien Planning and Zoning Commission considered the application of Darien Athletic Foundation, Inc. (DAF) to make changes to sports fields at Darien High School.⁵³ Before the Commission made its decision, Plaintiff objected to the participation of commission member John Sini because he was a prior spokesperson for the Darien Junior Football League (DJFL) and a founding member of DAF.⁵⁴ Despite this objection, the Commission ultimately granted the application with Sini's participation as a commission member.⁵⁵ Plaintiff appealed, arguing that application's approval was invalid due to Sini's conflict of interest.⁵⁶ The court held that Sini's previous affiliations with DAF and DJFL did not disqualify him because the record showed that his "open mindedness was not imperiled and that he considered whether the application conformed with the regulations in a fair and impartial manner."⁵⁷ Additionally, there was no evidence that Sini had a financial or pecuniary interest in the outcome of the application.⁵⁸

As such, the court reasoned that not every "conceivable interest" is sufficient to disqualify a zoning official.⁵⁹ If this were true, many individuals, especially those who are active in their communities, would not be able to participate on zoning commissions.⁶⁰ Rather, courts must determine whether an interest disqualifies an official on a case-by-case basis, requiring a review of whether such interests indicate "the likelihood of corruption or favoritism."⁶¹

5- NJ Appeals Court Reverses Dismissal of Disqualifying Interest Claim Against Town Council member

The Township of Bloomfield adopted Ordinance 3729, which appropriated \$10,500,000 for the acquisition and improvement of a tract of land to be used as a public park, and authorized the issuance of \$9,975,000 in Township bonds or notes to finance part of the cost. The subject property had previously been approved by the Township Planning Board for construction of a 104-

⁵³ Michalski v. Planning & Zoning Comm'n of Town of Darien, 2015 WL 5976190, at *1 (Conn. Super. Ct. 9/14/2015).

⁵⁴ Michalski v. Planning & Zoning Comm'n of Town of Darien, 2015 WL 5976190, at *1 (Conn. Super. Ct. 9/14/2015).

⁵⁵ Michalski v. Planning & Zoning Comm'n of Town of Darien, 2015 WL 5976190, at *2 (Conn. Super. Ct. 9/14/2015).

⁵⁶ Michalski v. Planning & Zoning Comm'n of Town of Darien, 2015 WL 5976190, at *3 (Conn. Super. Ct. 9/14/2015).

⁵⁷ Michalski v. Planning & Zoning Comm'n of Town of Darien, 2015 WL 5976190, at *14 (Conn. Super. Ct. 9/14/2015).

⁵⁸ Michalski v. Planning & Zoning Comm'n of Town of Darien, 2015 WL 5976190, at *13 (Conn. Super. Ct. 9/14/2015).

⁵⁹ Michalski v. Planning & Zoning Comm'n of Town of Darien, 2015 WL 5976190, at *12 (Conn. Super. Ct. 9/14/2015).

⁶⁰ Michalski v. Planning & Zoning Comm'n of Town of Darien, 2015 WL 5976190, at *12 (Conn. Super. Ct. 9/14/2015).

⁶¹ Michalski v. Planning & Zoning Comm'n of Town of Darien, 2015 WL 5976190, at *12 (Conn. Super. Ct. 9/14/2015).

unit townhouse development known as Lion Gate. The Ordinance was first introduced at a meeting chaired by defendant Nicholas Joanow, a Township Councilman, who owned a home that directly bordered the property. Joanow also cast the deciding vote approving the Ordinance. Plaintiffs Russell Mollica, James Wollner, Ray McCarthy, and Chris Stanziale, a group of Township residents, challenged the validity of the Ordinance and sought to enjoin the Township from issuing the bonds, alleging that Joanow had a disqualifying interest when he voted on the Ordinance. The trial court dismissed the neighbors' claims. On appeal, Plaintiffs argued that Joanow should have recused himself from participating in any of the proceedings that led to the passage of the bond ordinance due to his ownership interest in property adjacent to the proposed public park that created a legally insurmountable conflict of interest. Defendants responded that Council member Joanow was "set to gain no more than all the residents of the Township who will benefit from the creation of the public park and maintenance of open space." The court found that Joanow had a direct personal interest since he owned property directly abutting the Lion Gate site. The court held that his ownership of property immediately adjacent to the Lion Gate site was sufficient in itself to disqualify him from voting on the Ordinance. Furthermore, since the disqualifying interest of Joanow was in its subject matter of the Ordinance, the court found that the remedy was to invalidate the Ordinance.⁶²

c. Conflicts Based on Family Members and Friends

1 - NJ Supreme Court Remands Claim for Conflict of Interest in Zoning Amendment Vote by Two Municipal Officials Based on Leadership Positions Held in Applicant Church⁶³

Grabowsky challenged the validity of an ordinance adopted by the Township to permit the construction of an assisted living facility on a site located next to the Unitarian Universalist Congregation Church of Montclair. He asserted that a statement made by Township Mayor Jerry Fried, a member of the Township Council and Planning Board, demonstrated that Fried had a direct personal interest in the development and should have been disqualified from voting on the zoning issue. Specifically, the alleged comment by the mayor that he might seek to admit his mother into the proposed facility. The trial court granted summary disposition and dismissed the complaint with prejudice. The Appellate Court found the dismissal improper but agreed there was no conflict of interest, and the plaintiff appealed. Adhering to the principle that in order to determine whether there is a disqualifying interest, a court need not ascertain whether a public official has acted dishonestly or has sought to further a personal or financial interest; the decisive factor is "whether there is a potential for conflict," the Court reversed and remanded the proceedings.

2 - MI Appeals Court in Dictum Suggests a Conflict of Interest Where Board Member's Spouse Wrote a Letter and Appeared at Hearing in Opposition to Request

⁶² Mollica v. Township of Bloomfield, 2016 WL 6068242 (NJ App. 10/2016), *cert den.* 2017 WL 658259 (NJ 2/13/2017).

⁶³ Grabowsky v. Twp. of Montclair, 221 N.J. 536, 551-52 (2015).

Rogers purchased a building used for industrial purposes which was non-conforming since 1994. He requested that the Zoning Board recognize the prior nonconforming use and was denied. Fowler, a member of the Board, owned the adjacent property, had tried to purchase the subject property but was outbid by Trail Side, and offered to purchase the property from Trail Side at the hearing. Fowler's wife both wrote a letter and appeared at the hearing as a member of the public in opposition to Rogers' petition, and Fowler did not abstain from voting on Rogers' petition but instead supported another member's motion to deny Rogers' petition. He was absent at the next meeting of the Zoning Board of Appeals when the minutes from Rogers' appeal hearing were approved. Rogers argued that this created a clear conflict of interest and that he was denied a fair, impartial hearing. Fowler was asked by Rogers' counsel to disqualify himself from voting on this matter in light of his conflict of interest, but Fowler voted on and denied Rogers' petition. The Michigan Court of Appeals reversed on the merits of the use running with the land, and so did not issue a holding regarding the alleged conflict of interest. However, it stated that there did in fact seem to be a conflict of interest because of the reasons stated above.⁶⁴

3 - NY Trial Court Finds No Conflict of Interest Where One Board Member was Related to a Former Attorney for the Law Firm Representing the Applicant

A Greek Orthodox Church and religious education center sought special exceptions and variances to build a 25,806 square foot 2-story cultural center directly adjacent to the church. The zoning board of appeals granted the permit with conditions attached following a full-day public hearing that lasted more than 12 hours with 16 witnesses appearing in support of the application and 24 witnesses opposed. Three homeowners that live across the street challenged the granting of the permit on a number of grounds including irregularity in the conduct of the administrative hearing and an alleged conflict of interest of one of the members of the Board. Although the petitioners claimed that they were not given the ability to cross-examine the Church's witnesses, the Court said that this did not violate their due process rights as they clearly had notice and more than ample opportunity to be heard. The alleged conflict of interest centered on the fact that one member of the Board is the sister-in-law of an attorney who used to work for the law firm representing the Church. Further, the law firm's current managing partner was a campaign manager for the Board member's estranged husband. The Court noted that the petitioners failed to point to a specific violation of General Municipal Law Article 18, and they did not identify any pecuniary or material interest in the application by the Board member. Further, the Court noted that since the vote was unanimous, the Board member did not cast the deciding vote. Therefore, the Court found no prohibited conflict of interest.⁶⁵

4 – NH Supreme Court Dismisses Conflicts Claim on the Part of the ZBA Chair Due to Longtime Relationship with Applicant Since Claim was Untimely

The Rochester City Council appealed the lower Court's dismissal of their claims. The plaintiffs updated a local zoning ordinance which eliminated manufactured housing parks. The Rochester Zoning Board of Adjustment heard a case in which a company, "Toys" requested a variance to

⁶⁴Trail Side LLC v. Vill. of Romeo, 2017 WL 2882554 (Mich. Ct. App. 7/6/2017).

⁶⁵Healy v. Town of Hempstead Board of Appeals, 61 Misc. 3d 408 (NY Suffolk Co. 8/28/2018).

expand their manufactured housing park. This variance was requested after the plaintiff's instituted the change to the zoning ordinance. The defendants granted the variance request seemingly without the addition of Toys meeting their burden of proving unnecessary hardship. The plaintiffs claim that the ZBA chairman is a longtime friend and associate of Toys. There may have been discussions about this transaction outside of an official meeting. The Court held that the plaintiff did not raise the issue of a potential conflict in a timely manner. "The conflict of interest or potential bias issues must be raised at the earliest possible time in order to allow the local board time to address them."⁶⁶

5- CT Appeals Court Finds that Judge Did Not Err in Failing to Recuse Himself in Defamation Case over Alleged Conflicts with Developers

Plaintiff, an affordable housing developer and a resident of Darien, Margaret Stefanoni, appealed from the judgment of the trial court denying her request for judicial recusal. In August, 2010, her son registered for the highest division in the defendant's fall program, and the defendant subsequently reassigned her son to an intermediate division comprised of players at his grade level. On September 16, 2010, the Darien Times published an article on an investigation by the Department of Justice into Darien's zoning and land use practices. It also noted that the plaintiff and her husband accused the town of retaliation for their involvement in the town's affordable housing development. In response, the defendant's board of directors sent a letter to the editor of the Darien Times, published on September 23, 2010, which stated that the plaintiff's allegations were "demonstrably false" and a "half-baked conspiracy theory." The plaintiff brought a defamation claim, and early in that testimony the plaintiff described a parcel of land owned by "a longtime Darien Little League board member who was not a board member." The land owner happened to be a friend and former co-worker of the judge in a prior law firm; however, the judge declined to recuse himself, finding that this interest did not have a bearing on the case.

Here, when land owner's name first was raised in this litigation during the plaintiff's testimony at trial, the judge immediately halted the proceeding to disclose his relationship with him, thereby alerting the parties to a potential recusal issue. Furthermore, even after declining to recuse himself, the judge nevertheless provided the plaintiff some latitude with respect to the land owner's alleged involvement in the case by permitting her to introduce what he considered to be non-relevant evidence. Moreover, the potential conflict was neither a witness, party, or had any involvement with the defamation at issue. Because a reasonable person knowing all the facts would not conclude that the judge's relationship with the land owner compromised his impartiality, the judge was not required to disqualify himself.⁶⁷

6- NJ Appeals Court Holds that Trial Court Did Not Err In Its Finding That No Conflict of Interest Existed Between President Of Township Council and Spouse

The Committee to Stop Mahwah Mall is an informal group of residents challenging the validity an ordinance that permits retail and commercial development on a 140-acre tract of land.

⁶⁶ Rochester City Council v. Rochester Zoning Bd. of Adjustment, 194 A.3d 472 (NH 2018).

⁶⁷ Stefani v Darien Little League, Inc., 2015 WL 5797563 (CT App. 10/13/2015).

Plaintiffs alleged, among other things, that since the ordinance in question includes a provision for the construction of a 6 acre recreational field within the 140 acre tract of land, and the Township Council president's wife is the director of the town's recreational department, a conflict of interest existed.⁶⁸ The trial court held that the President/Mayor did not have a conflict of interest based on his wife's position. On appeal, the court affirmed, finding that the Plaintiffs did not meet their burden of proving that the President's vote benefited his wife in a non-financial way.⁶⁹

d. Conflicts Based on Employment

1 – NJ Appeals Court Holds Removal of Consultant from Process Due to Potential Conflict was Sufficient

The consultant hired by the Board to do traffic study regarding ShopRite's proposal was indirectly connected to ShopRite on another project (without at first even realizing it), and Stop & Shop (competitor) complained. The trial judge found that Dolan's relationship was with an engineering firm retained by the developer, and Inserra was not the developer of the New Milford project. Further, he found that Inserra was only a prospective tenant of the proposed project. The Court found the conflict issue to be a "close question," but that early on in the hearings, Dean was not aware that Inserra was a potential tenant in the other project until later in the process. When Dean and Dolan did become aware, it was reflected in the Board's meeting minutes. The Court stated that by then, there was a potential conflict between the consultants' now having Inserra as a client in one project and going through a hearing in another where they were retained as consultants. Stop and Shop wanted a completely new hearing, but the Court stated that the low court's action in removing Dean and Dolan from the process and having a new consultant start a new assessment from scratch was sufficient.⁷⁰

2 – NJ Appeals Court Finds No Conflict of Interest Where Town's Retained Consultant Performed Work for Applicant in the Past

Plaintiffs appealed a decision of the Town of Litchfield's Planning and Zoning Commission approving a site plan application by Stop & Shop, alleging, among other things, that the Commission's retained consultant had a conflict of interest that rendered his recommendations on the site plan application inappropriate.⁷¹ Specifically, Plaintiff argued that because the consultant had performed work for Stop & Shop ten years ago, it was inappropriate for the Commission to rely

⁶⁸ Stop Mahwah Mall v. Township of Mahwah, 2014 WL 10102328 (NJ Super. Ct. unrep. 7/20/2015).

⁶⁹ Stop Mahwah Mall v. Township of Mahwah 2014 WL 10102328 (NJ Super. Ct. unrep. 7/20/2015).

⁷⁰ Munico Assocs., L.P. v. Inserra Supermarkets, Inc., 2016 WL 4395678 (N.J. Super. Ct. App. Div. 8/18/2016).

⁷¹ Baker v. Planning & Zoning Comm'n of Town of Litchfield, 2015 WL 776510, at *1 (Conn. Super. Ct. 1/29/2015).

on his recommendations in making its determination on the site plan application.⁷² The court held that there was no case law to support Plaintiffs' allegation that the consultant's prior work with Stop & Shop raised "the specter of a conflict of interest and fundamental unfairness in the process."⁷³ The relevant Connecticut statute regarding zoning board conflicts of interest applied "only to members of zoning authorities, not to experts an authority retains to assist it in its work."⁷⁴ Regardless, even if the court were to find a conflict of interest, the remedy would be to order the Commission to hire a different consultant, not to overturn the Board's decision in its entirety and sustain the appeal.⁷⁵

3 – NJ Appeals Court Finds No Conflict Where Consultant Had No Personal or Financial Interest Resulting from Dual Role in Application Process

Starting in 2004, Wal-Mart sought a variety of variances and waivers needed in order to build a new store in a commercial zoning district of the Township of Egg Harbor.⁷⁶ Years earlier the township had adopted an ordinance to create "minimum buffers around property perimeters for all new major site plans and subdivisions."⁷⁷ However, since the Township never enforced this ordinance, it was rescinded and replaced with another ordinance in 2011.⁷⁸ Before the 2011 ordinance was adopted, the Township Administrator, Peter Miller, had testified about the ineffectiveness of the 2000 ordinance and how the 2011 ordinance would codify actual existing practices.⁷⁹ This case began when ShopRite sued the Township to challenge its approval of Wal-Mart's application and its adoption of the 2011 ordinance and other ordinances.⁸⁰ At the trial level in New Jersey, David Zimmerman, ShopRite's planning consultant, opposed the 2011 ordinance because he argued that it constituted prohibited spot zoning, and that it was only passed for the easy approval of Wal-Mart's application, which originally required numerous variances

⁷² Baker v. Planning & Zoning Comm'n of Town of Litchfield, 2015 WL 776510, at *9 (Conn. Super. Ct. 1/29/2015).

⁷³ Baker v. Planning & Zoning Comm'n of Town of Litchfield, 2015 WL 776510, at *9 (Conn. Super. Ct. 1/29/2015).

⁷⁴ Baker v. Planning & Zoning Comm'n of Town of Litchfield, 2015 WL 776510, at *9 (Conn. Super. Ct. 1/29/2015).

⁷⁵ Baker v. Planning & Zoning Comm'n of Town of Litchfield, 2015 WL 776510, at *9 (Conn. Super. Ct. 1/29/2015).

⁷⁶ Vill. Supermarkets, Inc. v. Twp. of Egg Harbor, 2014 WL 8481103, at *2 (N.J. Super. Ct. App. Div. 4/8/2015).

⁷⁷ Vill. Supermarkets, Inc. v. Twp. of Egg Harbor, 2014 WL 8481103, at *2 (N.J. Super. Ct. App. Div. 4/8/2015).

⁷⁸ Vill. Supermarkets, Inc. v. Twp. of Egg Harbor, 2014 WL 8481103, at *2-*3. (N.J. Super. Ct. App. Div. 4/8/2015).

⁷⁹ Vill. Supermarkets, Inc. v. Twp. of Egg Harbor, 2014 WL 8481103, at *3 (N.J. Super. Ct. App. Div. 4/8/2015).

⁸⁰ Vill. Supermarkets, Inc. v. Twp. of Egg Harbor, 2014 WL 8481103, at *1 (N.J. Super. Ct. App. Div. 4/8/2015).

and waivers under the 2000 ordinance.⁸¹ Miller, who had previously voted for Wal-Mart's application, also testified at the Township's witness.⁸² The trial judge upheld the 2011 ordinance.⁸³

On appeal in the New Jersey Superior Court, Appellate Division, ShopRite argued, as one of its points, that Miller's involvement in Wal-Mart's application approval process and his active role in the proposal and promotion of the 2011 ordinance presented a conflict of interest.⁸⁴ Specifically, ShopRite argued that the 2011 ordinance was actually "generated by Wal-Mart's application."⁸⁵ The court held that Miller did not have a conflict of interest because he had no interest in the outcome of Wal-Mart's application whatsoever.⁸⁶ The relevant statute allowed him to serve on the board as a municipal official.⁸⁷ Even if it were true that Miller "actively promoted and pursued zoning changes and new ordinances while Wal-Mart's application was pending before the Board," the court held Miller's lack of personal or financial interest allowed him to have a dual role in Wal-Mart's application process and the 2011 ordinance regardless of the timing of the application and ordinance approvals.⁸⁸

4 – NJ Appeals Court Does Not Reach Alleged Conflicts of Real Estate Broker Board Members

Plaintiff sued their neighbor and the zoning board after the board approved their neighbor's plans to divide their lot into 2 lots. The Plaintiff alleged that four Board members had conflicts because they were in the real estate business and more than one wanted to be the listing agents for the new house that would be built. The Court did not address conflict issue because the lower court found that, in making the allegation, plaintiff committed a technical violation of *N.J.S.A. 2A:15-59.1* prohibiting frivolous complaints.⁸⁹

⁸¹ *Vill. Supermarkets, Inc. v. Twp. of Egg Harbor*, 2014 WL 8481103, at *3 (N.J. Super. Ct. App. Div. 4/8/2015).

⁸² *Vill. Supermarkets, Inc. v. Twp. of Egg Harbor*, 2014 WL 8481103, at *4 (N.J. Super. Ct. App. Div. 4/8/2015).

⁸³ *Vill. Supermarkets, Inc. v. Twp. of Egg Harbor*, 2014 WL 8481103, at *4 (N.J. Super. Ct. App. Div. 4/8/2015).

⁸⁴ *Vill. Supermarkets, Inc. v. Twp. of Egg Harbor*, 2014 WL 8481103, at *5 (N.J. Super. Ct. App. Div. 4/8/2015).

⁸⁵ *Vill. Supermarkets, Inc. v. Twp. of Egg Harbor*, 2014 WL 8481103, at *3 (N.J. Super. Ct. App. Div. 4/8/2015).

⁸⁶ *Vill. Supermarkets, Inc. v. Twp. of Egg Harbor*, 2014 WL 8481103, at *9 (N.J. Super. Ct. App. Div. 4/8/2015).

⁸⁷ *Vill. Supermarkets, Inc. v. Twp. of Egg Harbor*, 2014 WL 8481103, at *9 (N.J. Super. Ct. App. Div. 4/8/2015).

⁸⁸ *Vill. Supermarkets, Inc. v. Twp. of Egg Harbor*, 2014 WL 8481103, at *9 (N.J. Super. Ct. App. Div. 4/8/2015).

⁸⁹ *Carine v Planning Board of Borough of Monmouth Beach*, 2016 WL 4162603 (NJ Super. App. Div. 8/8/2016).

5 - CA Fair Political Practices Commission Determined that Architect Who Also Served as a Planning Commissioner Could Represent His Client Before the City's Board of Building Appeals

Planning Commissioner Mark Primack simultaneously worked as a Planning Commissioner for the City of Santa Cruz and as a licensed architect.⁹⁰ He submitted plans to the City for a remodeling project on behalf of a wine bar and restaurant.⁹¹ After some disagreement with the City regarding these initial plans, he submitted revised plans that were subsequently rejected.⁹² He was told he could appeal this decision to the City's Board of Building Appeals—a body separate from the Planning Commission.⁹³

The CFPPC held that California's Political Reform Act allowed Commissioner Primack to represent his client before the City's Board of Building Appeals.⁹⁴ The CFPPC first cited to Section 87100 of the Act, which prohibits "any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has a financial interest."⁹⁵ Here, the CFPPC found that Primack was not making or participating in a governmental decision by bringing an appeal before the City's Board of Building Appeals.⁹⁶ Instead, the CFPPC focused on whether Primack was *influencing* a governmental decision in his position as a Planning Commissioner.⁹⁷ The CFPPC stated that an official uses his or her official position to influence a governmental decision when the official:

- (1) Contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision; or
- (2) Contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act

⁹⁰ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451, at *1.

⁹¹ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *1.

⁹² ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *1.

⁹³ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *1-2.

⁹⁴ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *1.

⁹⁵ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *2.

⁹⁶ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *2.

⁹⁷ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *2.

within his or her authority or on behalf of his or her agency in making the contact.⁹⁸

For the first point, the CFPPC held that Primack would not influence a governmental decision because he was not appearing before the Planning Commission but instead the Board of Building Appeals, which was a separate body.⁹⁹ Additionally, the Board of Building Appeals was not subject to the authority or budgetary control of the Planning Commission.¹⁰⁰ As for the second point, the CFPPC held that Primack would not influence a governmental decision because he was appearing before the Board of Building Appeals in his *private* capacity as an architect and not in his official capacity as a Planning Commissioner.¹⁰¹ Therefore, he had no conflict of interest.¹⁰²

6 - TX Appeals Court Remands Conflicts of Interest Allegation Where Outcome May Have Been Different Had Councilmember Recused Since She Was a Realtor With an Interest in the Subject Property

Plaintiff William Rancher Estates owned property Seneca West and wished to sell it and change its zoning designation through the city of Leon Valley.¹⁰³ Plaintiffs were contacted by Irene Baldrige, a city councilwoman and real estate broker, who said she had a client interested in purchasing the property and that, if plaintiffs didn't accept her client's offer, she would use her government influence to block plaintiff's zoning request. Plaintiffs further alleged that Baldrige et al. illegally trespassed onto the property to dig a trench that "altered the natural flow of water and resulted in continuous and recurring flooding." They alleged that defendants violated the Open Meetings Act by altering transcripts and recordings of council deliberations and that Baldrige should have recused herself from the process. There was a meeting in December 2010 and a vote in March 2011 denying plaintiff's zoning request. In deciding what claims the trial court has jurisdiction over, the Court of Appeals remanded the conflict of interest claim to the trial court for further factual determinations. Plaintiffs issued evidence, including statements from other council members, demonstrating that if Irene Baldrige had recused herself the outcome may have in fact been different.

III. Bias

⁹⁸ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *2.

⁹⁹ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *3.

¹⁰⁰ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *3.

¹⁰¹ ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *3.

¹⁰² ANTHONY P. CONDOTTI, CA FPPC Adv. A-15-190 (Cal. Fair. Pol. Proc. Com.), 2015 WL 7252451 at *3.

¹⁰³ City of Leon v Rancher Estates Joint Venture, 2015 WL 2405475 (TX App. 5/20/2015).

1 - CA Appeals Court Holds Unacceptable Probability of Bias Based on Commissioner's Request for Appeal

In September 2013, the Newport Beach Planning Commission approved an application by a restaurant called Woody's Wharf to allow it to have a patio cover, to remain open until 2 am, and to allow dancing inside.¹⁰⁴ A few days later, Newport Beach City Councilmember Mike Henn appealed of the Commission's decision, arguing that the approval of the application made the restaurant "inconsistent with the existing and expected residential character of the area."¹⁰⁵ The city council, with Henn as one of the participating members, heard the appeal the following month, allowing public commentary and also providing time to Henn for a pre-written "extraordinarily well-organized, thoughtful and well-researched presentation."¹⁰⁶ Thereafter, the city council reversed the Commission's decision.¹⁰⁷

The case was then appealed to the courts. The California Court of Appeal, Fourth District, Division 3, first clarified that Woody's only had to show an "unacceptable probability of actual bias," not actual bias itself.¹⁰⁸ The court held that Woody's had established an unacceptable probability of actual bias because Henn's request for the appeal contained language that showed he was strongly opposed to the Commission's decision from the very beginning.¹⁰⁹ Additionally, the court noted that "Henn's speech to the council had been written out beforehand, wholly belying his own self-serving comment at the hearing that 'I have no bias in this situation.'"¹¹⁰ Thus, the court reasoned that he should have recused himself from voting on this matter as a councilmember.¹¹¹ The court also held that Henn did not have the authority under the city's municipal code to appeal the Commission's decision on the application, and as such, in accordance with case law, the court nullified the city council's decision.¹¹² If the case involved only Henn's bias, then the case would have been returned to the city council for reconsideration without Henn's participation.¹¹³ However, because Henn did not have authority to appeal in the first instance, the council decision had to be nullified in its entirety.¹¹⁴

2. CT Appeals Court Finds Bias on the Part of Commissioner Based on Statements Made and Finds Commissioner Engaged in Prohibited Ex Parte Communication

¹⁰⁴ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1017 (2015).

¹⁰⁵ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1017 (2015).

¹⁰⁶ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1019 (2015).

¹⁰⁷ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1019 (2015).

¹⁰⁸ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1021-22 (2015).

¹⁰⁹ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1021-22 (2015).

¹¹⁰ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1023 (2015).

¹¹¹ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1023 (2015).

¹¹² *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1031-32 (2015).

¹¹³ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1031 (2015).

¹¹⁴ *Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1032 (2015).

Following a denial of Plaintiff's application to construct a 38-unit residential subdivision, Plaintiff appealed alleging that the commission illegally and arbitrarily predetermined the outcome of the applications, and that the public hearing was motivated by bias and personal animus.¹¹⁵ The trial court found that Longhi, a member of the commission, had a conflict of interest due the bias against one of the plaintiffs, a former social friend.

In deciding whether the plaintiff waived a claim of bias when he failed to raise it in the commission hearing, the Connecticut appeals court held that the statements made by Longhi that "she wanted Tallarita [plaintiff] to suffer the same fate of denial by the commission that she had suffered," removed the incident of bias from the waiver rule. The court further found that evidence of bias may be cumulative, that specific evidence of bias is not examined in isolation, and that the comments made after the hearing were an integral part in the denial of the plaintiff's application. The court concluded by finding that Longhi had an ex parte communication when she met with an official from the Hazardville Water Company about the property in dispute, and the Commission failed to show that the ex parte communication was harmless. Given these reasons, the court found that Longhi influenced the other members of the commission, and that the plaintiff did not receive the fair hearing to which it was entitled.

3. Federal Dist. Court in PA Dismissed Bias Claims Based on Board Member Receiving Below-Market Rent Deal from Supervisor Absent Actual Evidence of Improper Motive

Plaintiff Bohmier was issued an enforcement action for a sign at his house that lacked a permit. He appealed and was denied relief by the Zoning Board. Plaintiff claimed that his due process rights were infringed because one of the board members had an undisclosed conflict of interest. Plaintiff claims that this conflict was a result of one of the member's receiving a below-market-value rental rate from the Town Supervisors, who also appoint the zoning board members. Plaintiff believed that the member would be biased after receiving a favorable rental deal from the Supervisors and would not evaluate cases with the Zoning Board objectively, since the member depended on the Supervisors for the rental deal. The township appointed a Solicitor to oversee the hearing with the Zoning Board, when the township itself was a party to the conflict. The plaintiff claimed that this created a conflict of interest because the Solicitor would be biased toward the township. The Court held that the plaintiff's allegation itself was not conscience-shocking, and that it is insufficient merely to say that the member's motive for voting against him was "open to question," even when there is evidence of improper motive. In order to be conscience-shocking plaintiff at least needed a plausible allegation of self-dealing or a pecuniary interest. The Court stated that the jurisdiction has not "permitted assertions of improper motive to be transformed into allegations of self-dealing or corruption."¹¹⁶

4. CT Appeals Court Found No Evidence to Support Claims that Board Member Gave False Information and Engaged un Ex Parte Communications

¹¹⁵ Villages, LLC v. Enfield Planning and Zoning Commission, 149 Conn. App. 448 (4/15/2014).

¹¹⁶ Bohmier v. Arrell, 2018 WL 3818880 (E.D. Pa. 8/10/2018).

Suzanne Studioso brought pool tables into her restaurant that were a hit with customers, however, she needed permits to legally have them in the facility. During a hearing, residents complained that the pool tables resulted in increased noise, traffic, and other disturbances in and around the restaurant premises. She was denied permits for the pool tables and appealed, alleging that Dennis Buckley, one of the Board members, dominated the proceedings. She claimed that Buckley gave false information to the Commission and engaged in ex-parte communications with people opposed to the granting of the special permit. The Court found that there was no evidence for plaintiff's claims, and that even if Dennis Buckley had discussions with opponents of the special permit, notions of fundamental fairness and due process would not necessarily be implicated. The Court further stated that there is a "presumption that members of an administrative agency are not biased," and that "To overcome this presumption, actual bias, not merely potential bias, must be shown."¹¹⁷

5. PA Commwlth Court Finds Board Member's Statements Do Not Constitute Bias

Pennswood applied for a variance to operate a step-down facility for recovering substance abusers in a medium density residential district.¹¹⁸ At the hearing, one of the Board members, Ms. Wardell, stated that she did not believe that the step-down facility belonged in the residential area.¹¹⁹ Pennswood argued that her statement "emboldened the 'tone, and content' of the objectors' subjective statements," causing the Board to take the objectors' side and disregard Pennswood's evidence.¹²⁰ The court held that there was no evidence that the statement constituted bias or that it emboldened the objectors.¹²¹

6. PA Commwlth Court Finds No Bias as Plaintiffs Waived the Right to Object to Statements and that Refusal to Admit Evidence Did Not Constitute Bias or Impropriety

St. Francis Home filed an application in 2014 for a permit to build a single-family dwelling for terminally ill individuals and another application for a permit to construct a curb, sidewalk, and

¹¹⁷ Studioso v. Bridgeport Planning & Zoning Comm'n, 2017 WL 5559299 (Conn. Super. Ct. 10/12/2017).

¹¹⁸ Pennswood Manor Real Estate Assocs., LLC v. Zoning Hearing Bd. of City of Scranton, 2015 WL 5671857, at *1 (Pa. Commw. Ct. 9/24/2015).

¹¹⁹ Pennswood Manor Real Estate Assocs., LLC v. Zoning Hearing Bd. of City of Scranton, 2015 WL 5671857, at *8 (Pa. Commw. Ct. 9/24/2015).

¹²⁰ Pennswood Manor Real Estate Assocs., LLC v. Zoning Hearing Bd. of City of Scranton, 2015 WL 5671857, at *8 (Pa. Commw. Ct. 9/24/2015).

¹²¹ Pennswood Manor Real Estate Assocs., LLC v. Zoning Hearing Bd. of City of Scranton, 2015 WL 5671857, at *8 (Pa. Commw. Ct. 9/24/2015).

driveway entrance for this dwelling.¹²² Both permits were approved.¹²³ Plaintiffs, who owned property neighboring the proposed dwelling, appealed the issuance of both permits.¹²⁴ The zoning hearing board denied the appeal.¹²⁵ Plaintiffs appealed the board's decision, alleging, among other things, that the Township Solicitor acting as an advocate for both the Township and St. Francis Home created an appearance of bias and/or impropriety, and that the zoning hearing board's refusal to admit evidence regarding traffic congestion and decreased property values amounted to bias.¹²⁶ The court held that because Plaintiffs did not object to the Solicitor's statements regarding his own experiences at the hearing, they waived their argument regarding the Solicitor's role.¹²⁷ Additionally, the court held that the zoning board's refusal to admit evidence regarding traffic and property values did not constitute bias and/or impropriety because such evidence was irrelevant to a case about the issuance of building and construction permits.¹²⁸ Thus, the board's decision to not admit this evidence was not improper.¹²⁹

7. CT Appeals Court Finds No Bias in Board Members' Testimony and Letters Expressing Opinion

In 2014, Spinnaker Residential, LLC petitioned New Haven's Zoning Commission and the Board of Alders to amend the New Haven Zoning Ordinance Map to rezone properties and to amend the New Haven Zoning Ordinance.¹³⁰ The legislation committee of the Board of Alders granted both requests.¹³¹ 78 Olive St. Partners, LLC appealed the Board's decision because its property abutted Spinnaker's properties and was therefore affected by the amendments.¹³² As

¹²² *Hartman v. Zoning Hearing Bd. of Cumru Twp.*, 133 A.3d 806, 807–08 (Pa. Commw. Ct.), appeal denied, 141 A.3d 483 (Pa. 2016).

¹²³ *Hartman v. Zoning Hearing Bd. of Cumru Twp.*, 133 A.3d 806, 808 (Pa. Commw. Ct.), appeal denied, 141 A.3d 483 (Pa. 2016).

¹²⁴ *Hartman v. Zoning Hearing Bd. of Cumru Twp.*, 133 A.3d 806, 808 (Pa. Commw. Ct.), appeal denied, 141 A.3d 483 (Pa. 2016).

¹²⁵ *Hartman v. Zoning Hearing Bd. of Cumru Twp.*, 133 A.3d 806, 808 (Pa. Commw. Ct.), appeal denied, 141 A.3d 483 (Pa. 2016).

¹²⁶ *Hartman v. Zoning Hearing Bd. of Cumru Twp.*, 133 A.3d 806, 811 (Pa. Commw. Ct.), appeal denied, 141 A.3d 483 (Pa. 2016).

¹²⁷ *Hartman v. Zoning Hearing Bd. of Cumru Twp.*, 133 A.3d 806, 811 (Pa. Commw. Ct.), appeal denied, 141 A.3d 483 (Pa. 2016).

¹²⁸ *Hartman v. Zoning Hearing Bd. of Cumru Twp.*, 133 A.3d 806, 811 (Pa. Commw. Ct.), appeal denied, 141 A.3d 483 (Pa. 2016).

¹²⁹ *Hartman v. Zoning Hearing Bd. of Cumru Twp.*, 133 A.3d 806, 811 (Pa. Commw. Ct.), appeal denied, 141 A.3d 483 (Pa. 2016).

¹³⁰ *78 Olive St. Partners, LLC v. City of New Haven Bd. of Alders*, 2016 WL 3179433, at *1 (Conn. Super. Ct. 5/12/2016).

¹³¹ *78 Olive St. Partners, LLC v. City of New Haven Bd. of Alders*, 2016 WL 3179433, at *2 (Conn. Super. Ct. 5/12/2016).

¹³² *78 Olive St. Partners, LLC v. City of New Haven Bd. of Alders*, 2016 WL 3179433, at *3 (Conn. Super. Ct. 5/12/2016).

one of its arguments, 78 Olive St. argued that there was evidence of bias during the public hearing before the legislation committee when three members of the Board of Alders testified and/or wrote letters expressing their support for Spinnaker’s petitions.¹³³ Specifically, 78 Olive St. stated that “[t]he participation of the Alders as advocates for the applicant in the process for Amendments on which they will vote as the Zoning Commission is unseemly at least.”¹³⁴ However, the court rejected this argument and held that the members were not biased, as none of the members were actually part of the specific legislation committee that heard the petitions.¹³⁵ Regardless, the court stated that the Board members had an “obligation to represent and advance position which they conclude will be in the best interests of their constituents,” which allowed them to express their support for the petitions.¹³⁶ Therefore, the court held that members’ testimony and/or letters expressing support did not affect the petitions in a prohibited way.¹³⁷

8. NY Appellate Court Finds Expression of Personal Opinion by Board Members is not a Basis for Finding a Conflict

Petitioner was the owner and developer of a proposed mixed-use development in the Village of Pittsford (Village).¹³⁸ After conducting a SEQRA environmental review, the Board of Trustees (“Board”) declared that the project would not have a significant environmental impact and issued the requisite permits to the Petitioner.¹³⁹ However, after the Board later approved a preliminary site plan, it determined that “substantive changes” had arisen creating a “potential significant adverse impact” on the environment.¹⁴⁰ Petitioner commenced an Article 78 proceeding to reinstate the negative declaration.¹⁴¹ It argued that several members of the Board were biased

¹³³ 78 Olive St. Partners, LLC v. City of New Haven Bd. of Alders, 2016 WL 3179433, at *29 (Conn. Super. Ct. 5/12/2016).

¹³⁴ 78 Olive St. Partners, LLC v. City of New Haven Bd. of Alders, 2016 WL 3179433, at *30 (Conn. Super. Ct. 5/12/2016).

¹³⁵ 78 Olive St. Partners, LLC v. City of New Haven Bd. of Alders, 2016 WL 3179433, at *30 (Conn. Super. Ct. 5/12/2016).

¹³⁶ 78 Olive St. Partners, LLC v. City of New Haven Bd. of Alders, 2016 WL 3179433, at *30 (Conn. Super. Ct. 5/12/2016).

¹³⁷ 78 Olive St. Partners, LLC v. City of New Haven Bd. of Alders, 2016 WL 3179433, at *30 (Conn. Super. Ct. 5/12/2016).

¹³⁸ Pittsford Canalside Properties, LLC v. Vill. of Pittsford, 137 A.D.3d 1566, 1566 (N.Y. App. Div. 2016).

¹³⁹ Pittsford Canalside Properties, LLC v. Vill. of Pittsford, 137 A.D.3d 1566, 1566 (N.Y. App. Div. 2016).

¹⁴⁰ Pittsford Canalside Properties, LLC v. Vill. of Pittsford, 137 A.D.3d 1566, 1567 (N.Y. App. Div. 2016).

¹⁴¹ Pittsford Canalside Properties, LLC v. Vill. of Pittsford, 137 A.D.3d 1566, 1567 (N.Y. App. Div. 2016).

against of project and should have been recused from the meetings and decision-making process.¹⁴² The court noted that two of the Board members had expressed opposition to the project before and after they were elected to the Board.¹⁴³ However, the court held that their personal opinions were not a basis for finding a conflict of interest and thus they were allowed to participate in the deliberations and vote on the resolutions.¹⁴⁴ In fact, the court suggested that public officials should be encouraged to voice their opinions in matters of public concern.¹⁴⁵

9. CA Superior Court Find Mayor was not Biased Because He Expressed His Opinion

Petitioners applied for a coastal development permit to authorize the demolition and replacement of a small home with a much larger home.¹⁴⁶ The City of Morro Bay conducted an investigation and heard testimony regarding the proposed project and ultimately denied the application when it determined that the project would result in a home that was inconsistent with land use policies and ordinances.¹⁴⁷ Petitioners argued that the mayor, who participated in the hearings, was biased against the project and thus made the hearings unfair.¹⁴⁸ The court held that the mayor legitimately questioned whether the permit would exacerbate already-existing issues, rendering the project incompatible with the rest of the neighborhood.¹⁴⁹ The court reasoned that such concerns did not “constitute the sort of personal, political, or pecuniary bias that would undermine the integrity of the proceeding.”¹⁵⁰

10. Sixth Circuit Court of Appeals Finds Owner Failed to Establish Prima Facie Case of First Amendment Retaliation

Plaintiff appealed the district court’s order granting summary judgment in favor of defendants, the popularly-elected members of the Rowan County Fiscal Court, in their individual capacities, in this action brought pursuant to 42 U.S.C. § 1983. Plaintiff alleged that defendants violated the First Amendment when the Fiscal Court refused to grant it permission to erect a fence and an electric gate on its property in retaliation for plaintiff’s political support. Plaintiff’s alleged protected speech consisted of erecting a political yard sign on its property in support of Walter Blevins during the 2014 Rowan County Judge Executive election cycle.

¹⁴² *Pittsford Canalside Properties, LLC v. Vill. of Pittsford*, 137 A.D.3d 1566, 1567 (N.Y. App. Div.) (2016).

¹⁴³ *Pittsford Canalside Properties, LLC v. Vill. of Pittsford*, 137 A.D.3d 1566, 1568 (N.Y. App. Div. 2016).

¹⁴⁴ *Pittsford Canalside Properties, LLC v. Vill. of Pittsford*, 137 A.D.3d 1566, 1568 (N.Y. App. Div. 2016).

¹⁴⁵ *Pittsford Canalside Properties, LLC v. Vill. of Pittsford*, 137 A.D.3d 1566, 1568 (N.Y. App. Div. 2016).

¹⁴⁶ *Adamson v. City of Morro Bay*, 2016 WL 7163985 at *1 (Cal.Super.7/22/2016).

¹⁴⁷ *Adamson v. City of Morro Bay*, 2016 WL 7163985 at *1 (Cal.Super.7/22/2016).

¹⁴⁸ *Adamson v. City of Morro Bay*, 2016 WL 7163985 at *1 (Cal.Super.7/22/2016).

¹⁴⁹ *Adamson v. City of Morro Bay*, 2016 WL 7163985 at *4-5 (Cal.Super. 7/22/2016).

¹⁵⁰ *Adamson v. City of Morro Bay*, 2016 WL 7163985 at *4-5 (Cal.Super. 7/22/2016).

The court found that Plaintiff failed to provide any evidence beyond speculation that all, or any, member of the Fiscal Court even knew that plaintiff had supported Blevins in the election. Furthermore, plaintiff conceded that it failed to give its former counsel, Blandford and Frazier, permission to be deposed. These two lawyers had personal knowledge of what County Attorney Cecil Watkins said to them on the conference call after the variance request was denied, and could have therefore confirmed or denied whether Watkins said that the denial was “payback” or “politics” during a deposition or even in an affidavit submitted in opposition to the summary judgment motion. Thus, through its own conduct or inaction, plaintiff failed to obtain the testimony of its own former attorneys with first-hand knowledge of the conversation.

Additionally, the only evidence offered in response to defendants’ summary judgment motion, failed to reveal dates when the sign was erected and when it was removed. Here, the record reflected that almost four months elapsed between the November 4, 2014, election of Blevins and the February 23, 2015, meeting of the Fiscal Court where the variance motion failed. Due to so much time having passed, the court failed to make a temporal inference of retaliatory intent. Accordingly, the court affirmed the judgment of the district court.¹⁵¹

11. Third Circuit Court of Appeals Holds Landowners Failed to Show that Remedial Process Did Not Provide Reasonable Remedies and Claims of Revenge and Spite Failed to Allege Behavior that Shocked the Conscience

In 1996, Plaintiffs bought a five-acre industrial property. Plaintiffs’ property manager sent several letters regarding delinquent rent to tenant Glenn Schaum, who later voluntarily vacated the property. In 1997, Schaum was elected to the Springfield Township Board of Commissioners. Plaintiffs brought a §1983 action against township, claiming procedural and substantive due process violations arising out of a protracted zoning and land-use dispute that followed between it and the township. The United States District Court for the Eastern District of Pennsylvania entered summary judgment for township and township officials, and landowners appealed. On appeal, Plaintiffs argued that there was a genuine issue of material fact regarding their procedural due process claim because the Township’s zoning and land use procedures were “subverted for personal ends and were a sham.”

The court found that Plaintiffs’ due process arguments focused solely on how the Township arrived at the decisions to deny their land use application and fire code appeal. Plaintiffs failed to argue that the remedial process – of which they partly availed themselves – failed to provide reasonable remedies. As this was not alleged, the court held that the District Court did not err in granting summary judgment against their procedural due process claim. Plaintiffs next contended that a reasonable factfinder could conclude that three of the individual Defendants’ actions “rested on revenge and spite.” Plaintiffs failed to allege, however, that the Township’s behavior shocked the conscience. Upon review of the record, the court found that there was no evidence of conscience-shocking behavior, and therefore no genuine factual dispute on the issue. Consequently, the district court’s finding was affirmed.¹⁵²

¹⁵¹ Bluegrass Dutch Trust Morehead, LCC v Rowan County Fiscal Court, 734 Fed. App. 322 (6th Cir CA 5/10/2018).

¹⁵² Guiliani v Springfield Township, 726 Fed. Appx. 118 (3rd Cir. CA 3/6/2018).

12.Fed. Dist. Court in NJ Dismisses Substantive Due Process and Equal Protection Claims Where it was Alleged that the Mayor Had a Competing Business

In 2010, the Sea Isle City Planning Board granted “preliminary and final site plan approval and variance relief” to Plaintiff’s predecessor-in-interest “to construct a three story mixed use building containing 9,669 square feet of interior and ‘outdoor’ restaurant space on the first floor; and thirteen four-bedroom residential units on the second and third floors.” The Complaint reflected that while the permits for the residential units were allegedly issued on April 8, 2015, “the necessary permits for the first floor restaurant space” were allegedly delayed by several months. On September 17, 2015, Defendant Sea Isle City Solicitor Defendant Paul J. Baldini, Esq. wrote a letter to the Sea Isle Zoning Officer Cornelius R. Byrne, stating that the project significantly deviated from the Planning Board approvals. As a result, Byrne issued a Stop Work Order. Plaintiff then filed a complaint in New Jersey Superior Court. The Superior Court held that revocation and denial of the permits were arbitrary, capricious and unreasonable. The Plaintiff filed an amended complaint, asserting numerous claims against the Sea Isle City Defendants.

As to Plaintiff’s substantive due process claim, the court found that while the amended complaint set forth that “Board Member Mayor Desiderio recused himself from the Application and stepped down from the dais,” it failed to plead any facts suggesting why Defendant Desiderio recused and abstained from voting. The court found that absent facts suggesting competition between the Restaurant Defendants and Plaintiff, it could not find that Defendant Desiderio had a conflict. Absent such a conflict, the court could not find that there was self-dealing. As to the equal protection claim, the court found that the allegation that the relevant comparator was “similarly situated residential properties” was both conclusory and overbroad. Here, the Amended Complaint failed to allege how the residential properties were similarly situated to Plaintiff. Accordingly, the Motion to Dismiss was granted as to the New Jersey substantive due process claim and the New Jersey equal protection claim. Since all of the federal claims were dismissed, the federal common law conspiracy claim was also be dismissed.¹⁵³

IV. Bribery and Corruption

1. LA Supreme Court Disbars Attorney Convicted of Racketeering and Taking Bribes for Zoning Permits

Formal charges were filed by the Office of Disciplinary Counsel (“ODC”) against Arthur Gilmore, Jr., an attorney licensed to practice law in Louisiana but then on interim suspension based upon his conviction of racketeering.¹⁵⁴ The indictment charged respondent with engaging in a racketeering enterprise whereby he used his office and position as an elected city councilman to extract bribes in the form of cash and other things of value from individuals and organizations having business before the council, in exchange for which respondent took actions favorable to these individuals and organizations. In July 2015, the ODC filed one count of formal charges

¹⁵³ 8600 Lands, LLC v City of Sea Isle City, 2018 WL 1509088 (D. NJ 3/27/2018).

¹⁵⁴ In re Gilmore, 2016 WL 6125390 (LA 10/19/2016).

against respondent, alleging that he violated Supreme Court Rule XIX, § 19 (lawyers convicted of a crime). Respondent, through counsel, answered the formal charges, essentially admitting to his misconduct and asking for a sanction “other than disbarment.” In mitigation, respondent offered that his conviction was based on only two violations, those being a \$1,000 campaign contribution and a \$207 payment for a constituent’s electric bill.

Here, the court weighed that fact that respondent knowingly and intentionally violated duties owed to the public and to the legal system by engaging in a criminal act while acting in his capacity as an elected official, causing actual harm. The court noted that the baseline sanction for this type of misconduct was disbarment. It found that many aggravating factors were present, included a prior disciplinary record, a dishonest or selfish motive, substantial experience in the practice of law, and illegal conduct. The court weighed that aforementioned against the mitigating factors of full and free disclosure to the disciplinary board and a “cooperative attitude toward the proceedings, character or reputation, imposition of other penalties or sanctions, remorse, and remoteness of the prior disciplinary offense.” After balancing these factors, the court held that temporary, rather than permanent disbarment was an appropriate sanction in this matter.

2. 5th Circuit Court of Appeals Rules on Corruption Schemes at Sentencing Including Existence Fraudulent Zoning Letter

George L. Grace, the former mayor of St. Gabriel, Louisiana, was charged with 13 counts of corruption-related offenses arising out of four schemes: the Hurricane Katrina Scheme, the City Vendor Scheme, the Real Estate Scheme, and the Cifer 5000 Scheme.¹⁵⁵ A jury convicted Grace of seven of those counts, The Court of Appeals, affirmed in part, vacated his sentence, and remanded for resentencing. On remand, the United States District Court for the Middle District of Louisiana sentenced defendant to 240 months’ imprisonment, one year of supervised release, a \$50,000 fine, and forfeiture of at least \$22,000, and the Defendant appealed.

At the outset, the court found that it was constitutional for the district court to consider Grace’s acquitted conduct at sentencing under the preponderance of the evidence standard. Grace next argued that the district court erred by including the loss values of \$18,000 for the Hurricane Katrina Scheme, \$450,000 for the City Vendor Scheme, and \$900,000 for the Real Estate Scheme. Grace contended that the \$18,000 amount represented the value of a bribe and should not have been included cumulatively in the loss amount pursuant to § 2C1.1, and that the \$450,000 amount should have been offset completely because the City of St. Gabriel received \$450,000 worth of equipment and services in the exchange. However, Grace did not raise these arguments regarding the \$18,000 and \$450,000 values in the district court.

Grace next asserted that the \$900,000 in the Real Estate Scheme represented a loan amount that was sought for the purchase of property in the scheme. While Grace acknowledged that he wrote a fraudulent zoning letter to support an attempt to obtain the loan, he argued that the amount of loss attributable to his letter was speculative and could not reasonably be determined. Despite this, he did not present any argument challenging the district court’s finding that the Real Estate

¹⁵⁵ U.S. v Grace, 640 Fed. Appx. 298 (2/18/2016).

Scheme separately entailed a \$1,360,000 loss value stemming from Grace's offer to direct money from various government programs to buy and develop property. Accordingly, the court held that Grace waived any such argument.

3. 11th Circuit Court of Appeals Finds Employee Failed to Adequately Plead that He Spoke as Citizen on Matters Concerning Alleged Violations of Corruption Related to the Local Zoning Process

Defendant-appellants Luigi Boria, Sandra Ruiz, and Christine Fraga, all city officials, terminated plaintiff-appellee Joe Carollo from his position as City Manager for the City of Doral after he reported to law enforcement and other agencies appellants' alleged misconduct and made public disclosures about the same.¹⁵⁶ Among Carollo's allegations of misconduct was that Boria engaged in various forms of corruption such as refusing to recuse himself from a City Council zoning vote on a residential development project in which the developers were his two children and "a long time business associate of Boria with whom Boria has a debtor-creditor relationship." On Carollo's allegation of zoning permit fraud, Boria sought to advantage this project by pressuring the City of Doral Director of Zoning and Planning to drop his support for a competing residential development project and making burdensome demands upon the developer of the competing project.

Carollo brought this civil action against appellants under 42 U.S.C. § 1983, alleging a violation of his First Amendment rights. The district court denied appellants' motion to dismiss on the basis of qualified immunity, finding that the First Amendment protected Carollo's speech because he made the reports to law enforcement and other agencies as well as the public disclosures in his capacity as a citizen and not in connection with his ordinary job responsibilities as City Manager. The district court also found that precedent existing at the time of his termination clearly established Carollo's First Amendment rights.

Here, Appellants acknowledged that Carollo spoke on a matter of public concern and did not argue that they had an adequate justification for terminating him other than his speech. Instead, they disputed only whether Carollo spoke "as a citizen" when he made the reports and disclosures identified in the complaint. Specifically, they argued that Carollo's statements concerning Florida's campaign finance laws was that all of Carollo's allegedly protected speech "falls squarely within" the scope of the City Manager's duty in Section 3.03(4) of the Municipal Charter to "ensure that all laws ... subject to enforcement and/or administration by him/her are faithfully executed." Appellants, however, offered no plausible argument that Carollo's broad administrative responsibilities included enforcing Florida's campaign finance laws, nor could they in the absence of discovery that better reveals Carollo's ordinary job responsibilities as City Manager. However, as Carollo's complaint did not allege whether Carollo ordinarily involved himself in zoning or financial disclosure issues as City Manager.

¹⁵⁶ Carollo v Boria, 2016 WL 4375009 (11th Cir. CA 8/17/2016).

The court found that reasonable public officials would have known at the time of Carollo's termination that it violated the First Amendment to terminate a colleague for speaking about matters of public concern that are outside the scope of his ordinary job responsibilities. The district court therefore did not err in concluding that Carollo's First Amendment right to such speech was clearly established at the time of his termination.

4. 6th Circuit Court of Appeals Finds City's Decision Not to Renew a Host Community Agreement Based on Fraud did not Violate Company's Constitutional Rights

In 2006, the City of Detroit approved a conditional zoning for Systematic Recycling LLC that permitted it to operate a large composting facility within city limits.¹⁵⁷ One of the conditions was that Systematic enter into a host community agreement ("HCA") with Detroit to ensure that the city could adequately monitor its composting activities. After Systematic obtained the HCA, it was discovered that the individual who had procured the HCA had bribed certain members of the City Council in order to ensure its adoption by the city. Due to the fraud, the City of Detroit decided to allow the HCA to lapse rather than renewing it. As a result, Systematic's conditional land use permit and associated zoning grant was revoked. The district court then granted Detroit's motion for summary judgment, finding no reasonable jury could find Detroit violated Systematic's constitutional rights by failing to renew the HCA and subsequently revoking the permit and zoning grant.

Systematic attempted to demonstrate that Detroit's government action lacked a rational basis by negating every conceivable basis which might support the government action. However, the court found that the city officials had a rational basis to allow the Host Community Agreement to expire at the end of the term of two years in order to "uphold the integrity of the system that was compromised and insulted by the payment of a bribe." Because no reasonable jury could conclude that Detroit singled out Systematic from similarly situated peers for no comprehensible reason, Systematic's class of one claim and its due process claim failed. Finally, Systematic's unjust enrichment claim failed because the court found Detroit did not receive money in return for nothing; Systematic received a decided benefit from Detroit in return for its payments, since it was allowed to operate its composting facility during the term of the HCA. Accordingly, the district court's holding was affirmed.

V. Campaign Contributions

1 – MD Court of Appeals Holds Alleged Impropriety of Campaign Contributions to Councilman Were Not Subject to Review Since Actions Were Legislative in Nature.

Developer Whalen Properties submitted a proposal for a Planned Unit Development ("PUD") to Councilman Quirk. A few weeks later, Mr. Whalen, owner, gave \$8,500 to several individuals and told them to give it to Friends of Thomas Quirk, a campaign committee. The court considered 1) whether the alleged impropriety or the alleged appearance of impropriety affected Councilman Quirk's legislative ability to introduce or vote on Resolution 108-11 under Article 7, Title 1 of the Baltimore County Code; 2) whether the alleged appearance of impropriety invalidates

¹⁵⁷ Systemic Recycling LLC v City of Detroit, 2015 WL 3620267 (6th Cir. CA 6/10/2015).

Bill 38-12 (to introduce development of the property) as an improper “special law,” specifically designed to assist Respondent’s PUD application. The court found that the introduction and passage of Resolution 108-11 were legislative actions; therefore, the motivations behind them were not subject to review for the appearance of impropriety. Further, “The alleged appearance of impropriety generated by Mr. Whalen's actions did not invalidate Councilman Quirk’s or the Council’s legislative actions.” Councilman Quirk and the County Council were not involved directly in the proceedings before the ALJ or the Board of Appeals. Any alleged appearance of impropriety involving Councilman Quirk or the County Council would not invalidate the ALJ’s decision or the Board of Appeal’s decision. As a result, the court held that “there was substantial evidence in the record to support the Agency’s final decision to approve the PUD. That decision was not contrary to the law.”¹⁵⁸

VI. Ex Parte Communication

1 – IN Appeals Court Dismisses Claim of Ex Parte Communication Where in Attempt to Communicate, Board Member Did Not Listen

A company filed for a variance to have a concentrated animal feeding operation (CAFO) built. However, the House of Prayer ministries summer camp was a half-mile downwind from the area, and they were afraid it would affect the health of the people at the camp and the property value. During a hearing on the proposed variance, the county commissioner, Bacon, approached one of the members of the zoning board, Trent, and tried to speak to him. Trent claims that he refused to speak to Bacon and did not hear what he tried to say. Bacon did not dispute this. House of Prayer’s claim was dismissed, and they are appealing. The court considered whether Bacon’s attempt to communicate with Trent during the twenty-minute recess at the April 2016 BZA meeting violated House of Prayer’s right to an impartial hearing before the BZA.

The court decided that the dispositive question was whether House of Prayer presented any evidence to show that an *ex parte* communication between Bacon and Trent actually occurred. It found that, despite House of Prayer's claims to the contrary, there was no such evidence. Rather, the record was clear that “Bacon attempted to speak to Trent but that Trent did not listen to Bacon, did not know what Bacon had tried to say to him, told Bacon to talk to the BZA’s lawyer, and walked away.” Bacon testified that he had no reason to doubt Trent’s testimony that Trent did not hear him and the “undisputed evidence thus shows that there was no *ex parte* communication in the first instance.” As a result, House of Prayer’s argument on the issue was dismissed.¹⁵⁹

VII. Attorney Conflicts

1 - IA Appeals Court Finds Board Attorney Did Not Have a Conflict When He Previously Represented the Applicant on Another Matter

¹⁵⁸ Kenwood Gardens Condos., Inc. v. Whalen Props., LLC, 449 Md. 313, 344 (2016)

¹⁵⁹ House of Prayer Ministries v. Rush Cty. Bd. of Zoning Appeals, 91 N.E.3d 1053 (Ind. Ct. App. 2018).

McCleary sought variance for his home in order to be able to use it as a pet boarding business. The zoning board denied the variance and he appealed. The attorney employed by the zoning board had previously been hired by McCleary, and McCleary argued that this presented a conflict of interest. The district court had ruled that there was no conflict with the attorney because he previously represented McCleary in a case “substantially different” from the present one. State said that McCleary “failed to show a conflict of interest that required disqualification.” The Court found that the District Court did not abuse its discretion in refusing to disqualify the board’s attorney. In attorney’s previous work involving McCleary, he helped to draft a business letter, engaged in phone conversation, and emailed McCleary, but never met him. McCleary argued that there is a relation because the same property was involved. Although the attorney “participated in representing McCleary in some capacity,” the nature of the representation was not significant enough to warrant a discontinuation of the attorney’s participation.¹⁶⁰

2 – NJ Appellate Court Find No Conflict for Law Firm Representing Both Sides to Same Real Estate Transaction

In an unpublished per curiam opinion, a New Jersey appellate court found that it was not a conflict for the same law firm representing both sides to the same real estate transaction.¹⁶¹ Here, plaintiffs challenged a resolution authorizing the sale of six properties owned by the City of Orange Township to a redeveloper, alleging, among other things, that there was a conflict of interest because the same law firm represented both the City and the redeveloper in this sale.¹⁶² However, the court reasoned that this dual representation alone was not sufficient to find a conflict of interest that would warrant the resolution to be voided or the agreement between the City and the redeveloper to be rescinded.¹⁶³ Rather, to find a conflict of interest in this case, the court would have had to find that the conflict actually affected the resolution.¹⁶⁴ The court held that there was no evidence that the law firm’s actions were detrimental to the City’s interests or favorable

¹⁶⁰ *McCleary v. City of Des Moines Zoning Bd. of Adjustment*, 900 N.W.2d 617 (Iowa Ct. App. 2017).

¹⁶¹ *Four Felds, Inc. v. City of Orange Twp.*, 2016 WL 3434417, at *1 (N.J. Super. Ct. App. Div. 6/23/2016).

¹⁶² *Four Felds, Inc. v. City of Orange Twp.*, 2016 WL 3434417, at *1 (N.J. Super. Ct. App. Div. 6/23/2016).

¹⁶³ *Four Felds, Inc. v. City of Orange Twp.*, 2016 WL 3434417, at *4 (N.J. Super. Ct. App. Div. 6/23/2016).

¹⁶⁴ *Four Felds, Inc. v. City of Orange Twp.*, 2016 WL 3434417, at *4 (N.J. Super. Ct. App. Div. 6/23/2016).

to the redeveloper's interests.¹⁶⁵ Additionally, Plaintiffs did not show the City and the redeveloper's interests and positions in the agreement were detrimental to the public in any way.¹⁶⁶ Thus, there was no basis to void the resolution or rescind the agreement.¹⁶⁷

3- NY Trial Court Finds No Conflict of Interest Where One Board Member was Related to a Former Attorney for the Law Firm Representing the Applicant

A Greek Orthodox Church and religious education center sought special exceptions and variances to build a 25,806 square foot 2-story cultural center directly adjacent to the church. The zoning board of appeals granted the permit with conditions attached following a full-day public hearing that lasted more than 12 hours with 16 witnesses appearing in support of the application and 24 witnesses opposed. Three homeowners that live across the street challenged the granting of the permit on a number of grounds including irregularity in the conduct of the administrative hearing and an alleged conflict of interest of one of the members of the Board. Although the petitioners claimed that they were not given the ability to cross-examine the Church's witnesses, the Court said that this did not violate their due process rights as they clearly had notice and more than ample opportunity to be heard.

The alleged conflict of interest centered on the fact that one member of the Board is the sister-in-law of an attorney who used to work for the law firm representing the Church. Further, the law firm's current managing partner was a campaign manager for the Board member's estranged husband. The Court noted that the petitioners failed to point to a specific violation of General Municipal Law Article 18, and they did not identify any pecuniary or material interest in the application by the Board member. Further, the Court noted that since the vote was unanimous, the Board member did not cast the deciding vote. Therefore, the Court found no prohibited conflict of interest.¹⁶⁸

4- Fed. Dist. Court in MI Denies Motion for Protective Order in Zoning Variance Case Over a Potential Attorney Conflict

Plaintiff, Bazy Investments, LLC, d/b/a Greenfield Manor, alleged Defendants deprived Plaintiff of the reasonable use of its land, its due process rights, and its equal protection rights in violation of 42 U.S.C. § 1983 by denying its request for a variance to enable them to increase the permitted occupant load of its banquet hall despite limited available parking. Attorney DeBiasi witnessed and publicly participated in the meeting in which Plaintiff's variance application was discussed and ultimately rejected, resulting in this lawsuit.

¹⁶⁵ *Four Felds, Inc. v. City of Orange Twp.*, 2016 WL 3434417, at *4 (N.J. Super. Ct. App. Div. 6/23/2016).

¹⁶⁶ *Four Felds, Inc. v. City of Orange Twp.*, 2016 WL 3434417, at *4 (N.J. Super. Ct. App. Div. 6/23/2016).

¹⁶⁷ *Four Felds, Inc. v. City of Orange Twp.*, 2016 WL 3434417, at *4 (N.J. Super. Ct. App. Div. 6/23/2016).

¹⁶⁸ *Healy v. Town of Hempstead Board of Appeals*, 61 Misc. 3d 408 (NY Suffolk Co., 8/28/2018).

Defendants argue in their motion for the protective order that by naming Attorney DeBiasi as a witness, Plaintiff created a situation in which there was a potential for invasion of the attorney-client privilege, as well as a conflict under Michigan Rules of Professional Conduct 3.7, which prohibits an attorney from acting as an advocate at a trial where he/she is likely to be a necessary witness. The record reflected that Defendants instigated the situation when their counsel retired and chose Attorney DeBiasi, who was already on the witness list, to take over. The court found Defendants could not first create a situation of potential conflict and within a month claim that it was causing them injury. Furthermore, the fact that Attorney DeBiasi's public comments were non-privileged was the actual basis for the magistrate's determination that Attorney DeBiasi was allowed to testify as to what he publically stated at the Zoning Board meeting. Lastly, the court found that Defendants failed to meet their burden that they would be unreasonably prejudiced if Attorney DeBiasi is unable to act as their trial counsel. Accordingly, the court denied Defendants' motion for entry of a Protective Order.¹⁶⁹

5-FL Appeals Court Finds Substantial Evidence Supported the Finding that City Attorney Misused His Position When Seeking Appointment as Zoning Hearing Officer and Code Enforcement Special Magistrate

Robert K. Robinson served for more than thirteen years as the city attorney for the City of North Port pursuant to lucrative contracts, of approximately \$340,000 per year plus travel and other expenses, between the City and Robinson's law firms. A couple of months before the end of Robinson's contract as city attorney, he drafted and presented ordinances to the city commission to create the positions of Zoning Hearing Officer and Code Enforcement Special Magistrate. Robinson then persuaded the city commission to appoint him to those positions without considering anyone else, claiming he was "uniquely qualified" for the positions and the appointments had to be made immediately. In this case, Robinson appealed the final order and public report in which the Commission on Ethics recommended a \$10,000 civil penalty and a public censure and reprimand for ethical violations committed by Robinson while he was serving as a contracted city attorney.

On appeal, Robinson argued that the Commission erred in finding that he violated the statute because the evidence did not establish that he acted "corruptly" as required by the statute. The record reflected that Robinson persuaded the city commission to create and appoint him to the new positions of Zoning Hearing Officer and Code Enforcement Special Magistrate. Furthermore, Robinson had substantial influence over the drafting of the ordinances creating the positions; advised on the qualifications necessary for each position; and offered the commission his services as the best qualified person without providing any option other than to appoint him immediately. Accordingly, the court found Robinson misused his position as city attorney to create an unfair advantage for himself and gain a personal benefit.

Robinson next argued that the Commission erred in finding that he violated section 112.313(16)(c) because the Commission misconstrued that statute. This statute "prohibits a local government attorney from representing a person or entity before the local government for which the attorney provides legal services." The court found that the word "represent," refers to "actual

¹⁶⁹ Bazy Investments v City of Dearborn, 2018 WL 3655135 (ED MI 8/2/2018).

physical attendance on behalf of a client in an agency proceeding” As such, the court determined that the term “client” should not be broadly construed to include Robinson’s representation of himself or his law firm before the city commission. Instead, the court found a local government attorney who is found to have misused his position by “corruptly” obtaining legal work or other special benefits or privileges for himself or his firm, as in this case, could be found guilty of violating section 112.313(6). Since the court found the Commission misconstrued section 112.313(16)(c), the court reversed the Commission’s determination that Robinson violated that statute.¹⁷⁰

6- CT Appeals Court Upholds Use of Emergency Provision of City Code to Demolish Unsafe Porches and Stairways Finding No Violation of Due Process or Equal Protection and No Need to Disqualify City Attorney

Property owner brought action against city, alleging claims for negligence and nuisance, violations of city code, and denial of due process and equal protection after city demolished porches and stairways that a city building inspector determined were in immediate danger of falling so as to endanger life. The Superior Court denied property owner’s motion to disqualify city’s office of corporation counsel, and following a bench trial rendered judgment for city. Property owner appealed. The Appellate Court held that the emergency provision of city code did not violate property owner’s due process rights on the basis it did not contain an appeal provision; that the Superior Court did not abuse its discretion by denying property owner’s motion to disqualify the city’s office of corporation counsel; that Property owner, through counsel, waived his right to a jury trial; and that the property owner did not have a due process right to prior notice and a pre-deprivation hearing before city demolished outside stairways and porches. Superior Court did not err by failing to give preclusive effect to mayor’s opinion that city violated property owner’s right to due process; Superior Court did not abuse its discretion by allowing building inspectors to testify as to their observations of property owner’s premises; and evidence was insufficient to support property owner’s claim for pecuniary damages.¹⁷¹

7 - Fed. Dist. Court in PA Finds That Board’s Decision Not to Require Recusal in Alleged Conflicts of Interest Claim Was Not a Final Decision

In 2012, Plaintiff Selig set up an LLC, Aerotierra, to purchase a 50-acre plot of land that he planned to build a helipad on.¹⁷² When the North Whitehall Township Zoning Board denied his application for a special use permit for the helipad, he appealed pro se the decision in state court. After his claim was dismissed, he sued pro se in federal court. Selig claimed, among other things, that the Town solicitor, Stephen Miller, had a conflict of interest because he was Selig’s “non-amicably released divorce attorney” and that Board chairman Richard Benjamin had a conflict of interest because he was Selig’s across the street neighbor. Selig requested that both men recuse themselves from a second hearing, alleging that Miller was involved in the prior decision and

¹⁷⁰ Robinson Commission on Ethics, 2018 WL 1528504 (FL App 3/29/2018).

¹⁷¹ Brown v. City of Hartford, 160 Conn.App. 677, 2015 WL 6142877 (CT App. 10/27/2015)

¹⁷² Selig v. North Whitehall Township Zoning Hearing Board, 2018 WL 1942510 (ED PA 4/24/2018).

that he based his decision on “personal or political considerations rather than applicable law.” The Board considered the recusal issue and decided against it.

Selig claimed violations of his procedural and substantive due process rights under U.S.C. 42 Section 1983 and conspiracy to violate his constitutional rights under Section 1985. The court held that Selig failed to state a due process claim because the Board’s actions failed to shock the conscience. “Usually, courts look for self-dealing or corruption to see if conduct shocks the conscience.”¹⁷³ The court held that there are three parameters for 1985 claims. The first two were factually inapplicable, and Selig did not meet the third: invidious, class-based discrimination. The Court found that Selig’s appeal of the recusal issue was not ripe for review because the Board’s decision not to force Miller and Benjamin to recuse themselves was not a final decision. The court explained that Selig could try to amend his complaint, but that “In this run of the mill zoning board determination case, the facts are so far short of the standards for relief under sections 1983 and 1985 that amendment would be futile.”¹⁷⁴

9. Superior Court of New Jersey Upholds Adoption of Zoning Ordinances and Township’s Approval of an Application to Construct and Operate an Asphalt Manufacturing Plant

Precast Manufacturing Company, L.L.C. and GPF Leasing (“GPF”) appealed from an order upholding defendant Township of Lopatcong’s adoption of two zoning ordinances: 11-07 and 2011-15.¹⁷⁵ These ordinances allowed asphalt manufacturing as a conditional use in the southern portion of the research, office, and manufacturing zone (“ROM zone south”); designated solar photovoltaic facilities as a permitted use in the Township’s research, office, and manufacturing zone (“ROM zone”), and as an accessory use in the ROM zone and the highway business zone (“HB zone”). The court consolidated Precast Manufacturing Company, L.L.C. and GPF’s appeal and ten other plaintiffs’ appeal from an order upholding defendant Township of Lopatcong Planning Board’s approval of an application by defendant 189 Strykers Road Associates, L.L.C., which sought to construct and operate an asphalt manufacturing plant in Lopatcong.

Intervenors argued, among other things, that ordinance 2011-15 was invalid because it was tainted by the Mayor’s alleged conflict of interest. Specifically, they claimed that the Mayor was a partner in a law firm with the brother of an owner of 189 Strykers, and that this at least created an appearance of impropriety that rendered the ordinance invalid. The court rejected intervenors’ conflict of interest challenge as unsupported by credible evidence, quoting Justice Holmes, who stated, “universal distrust creates universal incompetency” Further weakening intervenors’ claim was the fact that the Mayor recused himself from voting on ordinance 2011-15.

VIII. Miscellaneous Behavior

¹⁷³ Selig v. North Whitehall Township Zoning Hearing Board, 2018 WL 1942510 at *6 (ED PA 4/24/2018).

¹⁷⁴ Selig v. North Whitehall Township Zoning Hearing Board 2018 WL 1942510 at *7 (ED PA 4/24/2018).

¹⁷⁵ Marinelli v. Township of Lopatcong, 2017 N.J. Super. Unpub. LEXIS 949 (7/12/2017).

1 – CT Super. Court Holds that Seeking Evidence of Whispers and Innuendos Among Board Members to Influence Decision Did Not Constitute a Valid Complaint

Walgreens wanted to construct a location on a street in Southport Connecticut, the back of which bordered a residential road. Neighbors brought an action to stop the plans after Walgreens acquired the necessary special permit from the Zoning Board. The neighbors alleged that the plans were contrary to Fairfield's Plan of Conservation and Development, or Master Plan, and it would result in the first commercial building existing along Kings Highway West, which they said contained historic homes. After three separate hearings, the plaintiffs alleged that commission members were inappropriately influencing each other as friends and acquaintances outside of the public process. Sherri Steeneck, initially opposed to the plans, ended up telling Gerald Alessi, over the phone, that she was going to vote in favor of the plans. The Court found that because there were no financial interests alleged or involved, and because the conflict-of-interest complaints were brought so late, the plaintiffs' complaint was not valid. The court said that seeking evidence of whispers and innuendo among members was not sufficient for a valid complaint and that, because the allegations were brought so late they were clearly a last-ditch effort to impugn the defendants' credibility and the credibility of the proceedings.¹⁷⁶

2 – NJ Appeals Court Upholds Payment by Developer of Fee for Extra Meetings to, among other things, Encourage Board Members to Attend Meetings

When developer needed permits, applications and variances to have a large 2,000+ unit apartment building approved, the zoning board allowed developer to pay a fee for extra meetings since zoning board only met once a month. Plaintiff alleged an appearance of impropriety because the money (\$35,000 over 7 years) was distributed to board members directly. The court held that the provision for extra meetings was reasonable because monthly meetings would have been inadequate, especially considering the process still took 7 years. It found that the most relevant statute did not apply, since that statute concerned payments to outside professionals rather than board members. Also, the court emphasizes the small amount--\$5,000 a year among several members--and the fact that the payments were intended to encourage board member attendance at the meetings rather than persuade them to vote a particular way.¹⁷⁷

3 – CT Court Finds Board Not Liable for Failing to Disclose Conflict

In 2011, the City of Milford's zoning enforcement officer issued a certificate of zoning compliance to Plaintiff's neighbor to build a nonconforming structure.¹⁷⁸ Plaintiff appealed the officer's decision to the board, arguing "that a merger between the vacant lot and the neighbor's

¹⁷⁶ Marzziotti v. Plan & Zoning Comm'n of Town of Fairfield, 2016 WL 1099194(Conn. Super. Ct. Feb. 19, 2016).

¹⁷⁷ Bergen Ridge Homeowner's Association, Inc. v Township of N Bergen Planning Board, 2018 WL 4126406 (NJ Sup. Ct. App. Div. 8/30/2018).

¹⁷⁸ Folsom v. Zoning Bd. of Appeals of City of Milford, 124 A.3d 928, 930 (2015).

property prevented the issuance of the certificate of zoning compliance.”¹⁷⁹ The board found there was no merger and upheld the officer’s decision.¹⁸⁰ Plaintiff appealed the board’s decision to the Superior Court and also commenced another action in the same court seeking reimbursement for costs from the administrative appeal from the board’s decision.¹⁸¹ In the reimbursement action, Plaintiff alleged, among other things that the board was liable for failing to disclose a conflict of interest.¹⁸² Although the court did not consider the details of this conflict, it nonetheless held that the board was entitled to governmental immunity.¹⁸³ Specifically, it reasoned that municipalities are generally only liable for ministerial acts of its agents, *not* discretionary acts.¹⁸⁴ Because the issue as to whether a conflict of interest exists is determined on a case-by-case basis, such a determination is a discretionary act and the board cannot not be held liable for its determination that there was no conflict of interest.¹⁸⁵

4- Ninth Circuit Court of Appeals Upholds Denial of Conspiracy Charges Against City Officials Over Development Projects

The Konarskis alleged that city officials, in declining to meet with them to discuss a proposed ordinance and in refusing to reconsider an ordered shutdown of one of their housing development projects, discriminated and retaliated against them in violation of their constitutional and statutory civil rights, causing them economic damage and emotional distress.

The court found that the Konarskis have not pled facts plausibly indicating that the silence they received from city officials was retaliatory in nature. This was because the City Attorney Michael Rankin’s alleged instructions to city council members, that council members were “to avoid meeting” with the Konarskis “specifically because of a lawsuit involving civil rights violations”, indicates only that Rankin had advised his clients to avoid making any statements that might be used against them in pending litigation, not that he acted with retaliatory animus. As to the class-of-one claim, the Konarskis failed to allege that other plaintiffs had been granted private meetings with city officials during pending litigation against the City. Furthermore, with respect to the housing development project shutdown, they had not indicated that the City has in other instances allowed construction of a building in which the parapet wall exceeds the City’s standard height limitations. As a result, the Konarskis have failed to plausibly alleged an equal protection claim.

Additionally, of the Development department employees who allegedly made derogatory statements, the only one whom the Konarskis had suggested had an influence on the decision to shut down their project is director Ernie Duarte. However, the court found Duarte’s alleged comment that “nobody likes you” did not plausibly establish discrimination on the basis of Polish ancestry.

¹⁷⁹ Folsom v. Zoning Bd. of Appeals of City of Milford, 124 A.3d 928, 930-31 (2015).

¹⁸⁰ Folsom v. Zoning Bd. of Appeals of City of Milford, 124 A.3d 928, 931 (2015).

¹⁸¹ Folsom v. Zoning Bd. of Appeals of City of Milford, 124 A.3d 928, 931 (2015).

¹⁸² Folsom v. Zoning Bd. of Appeals of City of Milford, 124 A.3d 928, 931 (2015).

¹⁸³ Folsom v. Zoning Bd. of Appeals of City of Milford, 124 A.3d 928, 933 (2015).

¹⁸⁴ Folsom v. Zoning Bd. of Appeals of City of Milford, 124 A.3d 928, 932 (2015).

¹⁸⁵ Folsom v. Zoning Bd. of Appeals of City of Milford, 124 A.3d 928, 934 (2015).

The fact that one or two of the alleged statements by other lower-level Development department employees could plausibly be interpreted to convey animus against Polish people did not make out a widespread pattern of conduct sufficient to establish a city policy or custom of discrimination. Accordingly, the court affirmed the dismissal, but granted the Konarskis leave to amend the equal protection claim.¹⁸⁶

5 - VT Wind Farm Sponsor Offers to Pay Individual Land Owners Six Figures for their Vote of Support on Election Day

If Election Day 2016 was not interesting enough, voters in parts of Vermont cast ballots yea or nay for a controversial proposed wind project. But can their votes be bought? Apparently so, according to the Vermont AG.¹⁸⁷

IX. Dual Office Holding

1 – FL AG Opines it is a Violation of State Constitution to Hold Local Planning and Zoning Board Appointment and Appointment to Historic Preservation Board

William Gallo, who was appointed to serve on both the City of Lighthouse Point Planning and Zoning Board and the Broward County Historic Preservation Board, asked the Attorney General of the State of Florida whether this simultaneous appointment would violate the Florida Constitution's prohibition against dual office-holding.¹⁸⁸ The Attorney General answered in the affirmative, citing to the relevant section of the Constitution that provided “[n]o person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein.”¹⁸⁹ She determined that because the Planning and Zoning Board had the power to grant variances and decide appeals and the Historic Preservation Board had the power to approve or deny certificates of appropriateness, both Boards were considered “offices” under the Florida Constitution, and Gallo was therefore not allowed to participate in both at the same time.¹⁹⁰ If both Boards had only advisory capacities, then the Boards would have been excepted from the dual office-holding prohibition.¹⁹¹ However, though both had some advisory roles, the fact that they also had powers implying “a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office” led to the conclusion that the Boards were indeed offices under the dual-office prohibition.¹⁹²

¹⁸⁶ Konarski v Rankin, 603 Fed. Appx. 544 (9th Cir. CA 3/4/2015)

¹⁸⁷ http://www.nytimes.com/2016/10/13/us/vermont-wind-project-needs-votes-so-company-offers-to-pay-voters.html?_r=0

¹⁸⁸ Fla. Att’y Gen. Op. 2016-15 (2016).

¹⁸⁹ Fla. Att’y Gen. Op. 2016-15 (2016).

¹⁹⁰ Fla. Att’y Gen. Op. 2016-15 (2016).

¹⁹¹ Fla. Att’y Gen. Op. 2016-15 (2016).

¹⁹² Fla. Att’y Gen. Op. 2016-15 (2016).

2 – OH AG Opines a Person May Serve Simultaneously in Dual Positions So Long as No Contract Between Both Entities

The Attorney General stated that a person may serve simultaneously as 1) director of a regional planning commission and member of a village legislative authority, 2) director of a regional planning commission and member of a board of township trustees, 3) county planner and member of a village legislative authority, and 4) county planner and member of a board of township trustees, so long as no contract exists between the two authorities in which an individual has simultaneous positions.¹⁹³ Additionally, for each of the above simultaneous positions, if the individual is a state or local employee who is paid by federal loans or grants in one position, then that individual may only serve simultaneous positions only if she seeks election to the other position in a nonpartisan election.¹⁹⁴

3 – OH AG Opines One May Serve as Both Administrator of Home Rule Township and Member of County Planning Commission in Same County

Prosecutor Dennis Watkins asked the Attorney General of the State of Ohio whether an individual could serve both as an administrator of a home rule township and a member of a county planning commission within the same county.¹⁹⁵ The Attorney General answered in the affirmative, citing to the following seven-question compatibility test used to determine whether a person may simultaneously serve in multiple public positions:

1. Is either position in the classified civil service of the state, a county, a city, a city school district, or a civil service township as defined in R.C. 124.57?
2. Do any constitutional provisions or the governing statutes of either position prohibit or otherwise limit employment in another public position or the holding of another public office?
3. Is one of the positions subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to perform the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there any controlling local charter provisions, resolutions, or ordinances?
7. Does a federal, state, or local departmental regulation prevent a person from holding both positions?¹⁹⁶

4. WA AG Opines a Person May Not Serve Simultaneously as Both a Member of the School District Board of Directors and as a Member of the Local City Planning Commission

The Honorable Sam Hunt submitted a hypothetical scenario to the Attorney General in which a person simultaneously serves as an elected member of a school district board of directors and

¹⁹³ 2016 Ohio Op. Att'y Gen. No. 2016-034 (Oct. 4, 2016) at *1.

¹⁹⁴ 2016 Ohio Op. Att'y Gen. No. 2016-034 (Oct. 4, 2016) at *1.

¹⁹⁵ 2016 Ohio Op. Att'y Gen. No. 2016-035 (Nov. 2, 2016).

¹⁹⁶ 2016 Ohio Op. Att'y Gen. No. 2016-035 (Nov. 2, 2016).

also as a member of the local city planning commission.¹⁹⁷ The Attorney General held that the two positions were probably incompatible offices because “a person holding both offices could face inconsistent loyalties to the public in different capacities.”¹⁹⁸ For example, if the individual as a school director makes decisions regarding the use of school district property, that same individual in the role of planning commissioner may be forced to review those very same decisions, leading to “dueling loyalties to the constituents of each office.”¹⁹⁹ However, the Attorney General noted that a court may come to a different conclusion, depending on the facts of an actual case.²⁰⁰ He also cautioned that an individual who is serving both as a school director and a planning commissioner who “may be required to recuse from deciding a quasi-judicial matter [as the planning commissioner] when the school district is a party.”²⁰¹

X. Conclusion

As always, the best course of action is to avoid even the appearance of impropriety. Despite the fact that there are only about two dozen reported cases annually, and that the courts often are forced to find that the alleged unethical conduct rises to a legal violation, the costs, even for those who prevail, can be significant economically and reputationally. Taken with the daily availability of news clips reporting on alleged unethical conduct across the country, combined with the willingness of the public to take to social media to express their displeasure over the conduct and behavior of the players in the land use game, land use ethics had never been under a closer microscope. Those who volunteer or who earn a living in the land use game should carefully consider the consequences of their actions and inactions.

¹⁹⁷ Wash. Att’y Gen. Op. 2016 No. 7 (2016) at *2.

¹⁹⁸ Wash. Att’y Gen. Op. 2016 No. 7 (2016), at *1.

¹⁹⁹ Wash. Att’y Gen. Op. 2016 No. 7 (2016), at *1.

²⁰⁰ Wash. Att’y Gen. Op. 2016 No. 7 (2016), at *1.

²⁰¹ Wash. Att’y Gen. Op. 2016 No. 7 (2016), at *2.

ENGAGING ENVIRONMENTAL PROFESSIONALS: CONFIDENTIALITY, CONFLICTS OF INTEREST, AND UNINTENDED CONSEQUENCES

Christopher P. McCormack
Pullman & Comley LLC

INTRODUCTION

An attorney representing clients in environmental matters needs to collaborate with technical environmental professionals to understand issues, frame alternatives, and support decisions. In some cases the client's in-house resources will meet the need. But attorney and client are often best served by engaging outside specialists and service providers.

In many respects, particularly in terms of discovery and evidentiary rules in litigation, the engagement of outside environmental experts has much in common with engagement of other types of experts. But the environmental context injects factors, and in some instances legal obligations, that can be in tension with the attorney's fundamental obligations under the Rules of Professional Conduct, particularly with respect to maintaining client confidences.

These materials survey the nature and scope of support environmental experts may provide to attorneys, as well as considerations relevant to the engagement of such experts. A hypothetical expert engagement scenario serves as a real-world case study in the ethical challenges that may arise in working with environmental experts. An appendix of rules and statutes provides ready reference to pertinent ethical considerations.

TECHNICAL ENVIRONMENTAL ACTIVITIES: A BRIEF OVERVIEW

Environmental professional support may be appropriate to advise clients on any issue falling within the very broad range of regulated activity – that is, requirements imposed by federal and state rules governing day-to-day operations such as materials handling, occupational health and safety, emergency planning and right-to-know (public disclosure) for toxic or hazardous materials, permitting of air and water discharges, or waste management and disposal. Some such requirements involve affirmative obligations to report facts or events. Similarly, the support of consulting or testifying experts may be needed in litigation involving toxic torts, liability for contamination, environmental insurance coverage disputes, or business disputes concerning contract or entity responsibility. The same kind of support may be indirectly relevant to attorney activities in other areas involving contingent claims and liabilities, such as audit responses or securities disclosures. Detailed consideration of these diverse contexts is beyond the scope of these materials.

The focus here will be on environmental site assessment, a subcategory common to transactional and litigation contexts, which presents a fair cross-section of the kinds of ethical issues that can arise in the environmental context. For present purposes, this subcategory can be described as a continuum of investigative activities beginning with documentary review, proceeding through a sequence of intrusive sampling and analysis to understand actual site conditions, and culminating in the design and implementation of remedial action.

Conceptually, this continuum corresponds to a number of relatively standardized activities.

Phase I Environmental Site Assessment consists of documentary review, site inspection, and interviews to understand property use and development, and to identify issues and areas that present possible environmental concerns. Nationally, and in Connecticut, this degree of assessment is most commonly performed in accordance with ASTM Standard Practice E1527-13. The Connecticut practitioner working with a client on a Connecticut site should also be aware of the “Site Characterization Guidance Document” (SCGD) issued by the Connecticut Department of Energy and Environmental Protection, which defines a similar scope of “Phase I” assessment. Strictly speaking, the SCGD applies and must be followed only for properties subject to certain Connecticut remediation programs (Transfer Act, Conn. Gen. Stat. §22a-134 *et seq.*; voluntary remediation program, Conn. Gen. Stat. §22a-133x *et seq.*) or enforcement action by the State itself. For Phase I assessment of a Connecticut property, however, one aspect of the SCGD Phase I must be included – the determination of whether the property being assessed is in fact an “establishment” or otherwise subject to the Transfer Act. In an ASTM Phase I, this determination should be specified as a non-scope task.

Another critical distinction between ASTM and SCGD Phase I assessment is the threshold for identifying matters of interest. The ASTM standard requires the assessor to identify “recognized environmental conditions,” whereas the SCGD Phase I identifies “areas of concern.” The distinction goes beyond nomenclature. Essentially, an ASTM E1527 REC consists of the presence or likely presence of hazardous material together with some objective reason to believe a release has occurred or may have occurred, whereas an SCGD AOC consists of the mere presence of a hazardous material in any form that could have been released. The origins and purposes of these distinctions are beyond the scope of these materials, but the practitioner should be aware that the SCGD criteria set a lower threshold for identifying AOCs. Assessments employing both standards therefore frequently list numerous AOCs but fewer if any RECs.

Phase II and III Site Assessment. Assessment activities beyond Phase I involve obtaining and analyzing samples of soil, ground water, and possibly soil vapor, surface water, and indoor air. “Phase II” generally connotes an initial or screening level of investigation. In many cases,

the scope can be tailored to the specific information needs of the party commissioning the assessment. Thus, for example, ASTM Standard Practice E1903-11 for Phase II site assessment requires consultation to define the objective of the assessment. In the SCGD framework, however, the scope of Phase II assessment is prescribed as an intermediate step in a process leading ultimately to full site characterization. Accordingly, an SCGD Phase II assessment must address all AOCs identified as such by Phase I assessment.

“Phase III” assessment is defined only by the SCGD. Within that framework – again, for purposes of remediation programs under state law – the objective is to achieve full delineation of site conditions sufficient to support design of remedial action.

Remedial Action within the state programs proceeds through a “Remedial Action Plan” (RAP), implementation of which is documented in a “Remedial Action Report.” For sites within the Transfer Act or the voluntary remediation program, completion of site work is confirmed by DEEP approval or by a “verification” issued by a Licensed Environmental Professional.

The foregoing activities involve progressive development of facts about actual on-site conditions. The potential for discovery of unanticipated facts is greatest in the earliest phases of site assessment, so measures to establish and preserve confidentiality are particularly important in the early going. But factual revelations may give rise to legal obligations to take action or make disclosures, and thus give rise to ethical dilemmas for the attorney.

Remedial issues and alternatives come progressively into progressively sharper focus as the foregoing stages of site assessment and remedial design unfold. The RAP is the point in the process where costs to closure can be estimated with relatively high confidence.

ENGAGING ENVIRONMENTAL CONSULTANTS: ANOTHER BRIEF OVERVIEW

Environmental consultants should ideally be engaged only after close consultation between counsel and client. In that consultation, three topics are particularly important.

Who engages the consultant? In order to maximize the prospects for maintaining confidentiality, it is almost always preferable for the attorney to engage the consultant and for the consultant to report directly to the attorney. The engagement letter should specifically recite that the attorney needs the consultant’s services in order to provide legal advice to the client. *See, e.g., Coastline Terminals of Connecticut, Inc. v. United States Steel Corp.*, 221 F.R.D. 14, 16 (D. Conn. 2003) (attorney-client privilege may apply to communications to agent of attorney hired to assist in rendering legal services, reports of third parties made at request of attorney or client to put information from client in usable form).

Is consultant material vulnerable to involuntary disclosure? Whenever there is potential for litigation, which is to say at all times, communications with environmental consultants should remain mindful of the potential for disclosure in discovery. For testifying experts:

- Practice Book §13-4(b)(3): Proponent of testifying expert shall, upon request, disclose or identify “all materials obtained, created and/or relied upon by the expert in connection with his or her opinions.”
- Fed. R. Civ. P. 26(b)(4)(C): Work product protection for “communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B) [i.e. testifying experts subject to Fed. R. Evid. 702, 703, 705];” discovery permitted “to the extent that the communications: (i) relate to compensation for the expert’s study or testimony; (ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.”

For nontestifying experts:

- Practice Book §13-4(f): no discovery absent showing of exceptional circumstances that make it impracticable to obtain facts or opinions on same subject by other means. Accord Fed. R. Civ. P. 26(b)(3)(D).

Both state and federal rules leave ample room for a party to demand and obtain drafts of expert reports and attorney comments on drafts. Caution is in order and the better practice is to assume anything an attorney sends a potential testifying expert will be discoverable from the expert, either in response to a discovery request to the client or by means of the expert’s own response to a deposition subpoena.

Should You Accept the Consultant’s “Standard” Terms and Conditions? Environmental services firms universally employ standard forms of “boilerplate” terms. The attorney engaging a consultant with the idea of preserving confidentiality should examine such terms with care. Particularly problematic are standard terms that purport to authorize the consultant to reuse work product or publicize the work, or that vest ownership of the work product in the consultant.

Ethical Considerations: *Skwecky Kleen Dry Cleaners*

Theme: Common Facts

You represent Skwecky Kleen Dry Cleaner, Inc., which leases space in a strip mall owned by Super Colossal Real Estate Group, Inc. (SCREG). Skwecky is looking to sell its dry cleaning business, including its cleaning equipment, and to assign its lease.

On Skwecky's behalf you have begun negotiations with counsel for Prudent Laundry Operators of New England, Inc. (PLONE), a regional chain of dry cleaners that emphasizes sound and sustainable environmental practices in its branding. PLONE's counsel has made clear that it will only affiliate with dry cleaners that share its philosophy of sound environmental stewardship.

Anticipating concerns of PLONE and other prospective buyers, Skwecky decides to sample soil and groundwater for dry cleaning chemicals, but wants to hedge its bets and keep the results confidential. You tell Skwecky the best way to do that is for you to engage a consultant directly, on the theory that the information they develop will be subject to attorney-client privilege because you need it to provide legal advice to your client. Skwecky agrees with this approach.

You engage Trusty Geological Investigation Firm, LLC, to do the work. Your engagement letter with TGIF expressly relates their work to your role of providing legal advice to Skwecky.

Variation 1: The “Significant Environmental Hazard” Reporting Trigger

TGIF’s testing reveals that groundwater near and under the strip mall is contaminated with chlorinated solvents associated with Skweezy’s dry cleaning operations.

To your dismay, TGIF informs you that the levels of contamination exceed the “significant environmental hazard” (SEH) threshold under Conn. Gen. Stat. §22a-6u. Specifically, the test results show levels that are considered hazardous for drinking water and that pose a threat of vapor exposure to building occupants.

TGIF further advises that it has an obligation under the statute to disclose the discovery of the SEH condition to its client (you), the client has a statutory obligation to inform the owner (SCREG), and the owner has an obligation to disclose to the Department of Energy and Environmental Protection and take followup action.

When you report this to Skweezy’s manager Lloyd Jones, he is beside himself. He reminds you the results were supposed to be confidential, he insists they’re confidential to Skweezy, and he says you have an obligation to maintain confidentiality. “Neither one of us is going to blab about this to anyone,” he says, “and that goes for PLONE and SCREG.”

What do you do?

- A. The customer is always right, and your obligation to respect client confidences is paramount. You file the results away and don’t disclose them to anybody.
- B. You figure you have no choice but to abide by the client’s instructions, but to maximize plausible deniability, you marinate the test results in a light vinaigrette and eat them.
- C. You tell Jones he’s instructing you not to do something you have an independent legal obligation to do, which creates a conflict and obliges you to withdraw from the representation. Jones says he’ll consent to the conflict but doesn’t want you to report.
- D. You decide you’re getting nowhere with Jones and call Reginald Skweek, Skweezy’s principal owner and president, to explain the situation and lay out the statutory obligations triggered by the SEH discovery.
- E. You decide to ignore Jones and client confidentiality considerations in favor of fulfilling your obligations under the statute. You call SCREG’s counsel to report in accordance with the SEH statute and instruct TGIF to work up a proposal to Skweezy to take required followup action.

Variation 2: Information Material to Third Party

TGIF's investigation reveals significant contamination associated with dry cleaning activities, though without triggering the SEH reporting requirements. You have the reports and have made Skwecky aware of them.

You prepare transaction documents for the PLONE deal, which include the seller's representations and warranties that all known environmental information has been disclosed.

PLONE's counsel has informed you that PLONE would not proceed with the transaction if Skwecky's operations had caused contamination. PLONE is not aware of TGIF's investigative work but its counsel has expressly asked you whether such work has been or will be done.

In the course of discussing the transaction documents, you mention to Jones that the TGIF testing results would be material to PLONE and should be disclosed in response to the request of its counsel and in accordance with the reps and warranties.

To your dismay, Jones is again beside himself. The results are confidential, he says, and he'll take his chances on the representations and warranties. Waxing philosophical, he wonders aloud about the limits of human knowledge ("what can we ever say about what we do and do not know?") but then reverts to practicalities. "Get real. PLONE's going to walk if we tell them this. It's your job to get the deal done, not blow it up. Do your job."

What do you do?

- A. Salute smartly, stash the test results in a locked file cabinet in your office, and reconsider the pros and cons of day drinking.
- B. Do as Jones says but first write an internal memorandum to the file memorializing your conversation and his instructions.
- C. Do as Jones says but first write a confidential attorney-client memorandum to him memorializing your conversation and his instructions.
- D. Go back to your office and write letters to your client and to PLONE's counsel advising that you are withdrawing from representation of Skwecky in the transaction, and in your letter to PLONE's counsel, state explicitly that you are unable to answer her question about environmental investigations.
- E. You decide you're getting nowhere with Jones and call Reginald Skweek to explain the situation and lay out the problems the test results create with respect to transactional reps and warranties and your response to the pending request of PLONE's counsel.

Variation 3: What Have You Done For Me Lately?

Despite your misgivings, you adopt Option B in Variation 2: you sit on the test results, as Skweezy instructed, but put a memo in your file documenting that it was Skweezy's idea. The PLONE transaction closes and you proudly display your deal toy – a stylized sculpture of a laundry bag with the PLONE and Skweezy logos.

To your dismay, a year later, PLONE is back with litigation counsel. They've discovered the contamination and are suing for breach of the reps and warranties. They immediately serve discovery seeking environmental reports in the possession, custody and control of Skweezy and its agents, contractors, and attorneys. They have plenty of time to amend to add a fraud count if it turns out Skweezy knew something it didn't disclose.

You start having flashbacks to the moment you squirreled a copy of the TGIF report away in your file cabinet. Expecting Lloyd Jones to commiserate, you call him, remind him he instructed you to withhold TGIF's data from PLONE, and start to talk about what your next steps should be. He is yet again beside himself, denies having told you not to disclose the TGIF results, and berates you for failing to represent Skweezy competently.

On the eleven-point pain scale, how much of a pain do you have?

- A. About three –noticeable and distracting, but you can get used to it and adapt. After all, even if Jones denies it, you have your memo memorializing his instructions.
- B. Somewhere around five – can't be ignored for more than a few minutes, but with effort you can work and participate in some activities. That rat Jones is going to claim you back-dated the memo and you now wish you'd sent him an email instead.
- C. Getting close to nine – crying out and moaning uncontrollably. When PLONE gets to the bottom of this, it's not beyond the realm of possibility that they'll grieve you and amend to add counts against you and your firm directly.
- D. All the way up to ten – getting delirious, a level of pain few people will ever experience. Because not only is PLONE going to make your life miserable, a professional malpractice firm has just sent you a certified letter demanding that you preserve all documents concerning Skweezy and the PLONE deal. You're sure as heck going to preserve that file memo, but you're not taking a lot of comfort from it.
- E. Nothing a fifth of bourbon wouldn't cure.

APPENDIX OF RULES AND STATUTES

Rules of Professional Conduct and Official Commentary: Excerpts

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal consequences of any proposed course of conduct with a client; (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; or (3) counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

Official Commentary to Rule 1.2

Criminal, Fraudulent and Prohibited Transactions. Subsection (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed. When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally believed legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16 (a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Subsection (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Subsection (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. Subsection (d) (2) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. Subsection (d) (3) is intended to permit counsel to provide legal services to clients without being subject to discipline under these Rules notwithstanding that the services concern conduct prohibited under federal or other law but expressly permitted under Connecticut law, e.g., conduct under An Act Concerning the Palliative Use of Marijuana, Public Act 12-55, effective Oct. 1, 2012. Subsection (d) (3) shall not provide a defense to a presentment filed pursuant to Practice Book Section 2-41 against an attorney found guilty of a serious crime in another jurisdiction.

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4 (a) (5) [obligation to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law"].

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to:

(1) Prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another;

(2) Prevent, mitigate or rectify the consequence of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

- (3) Secure legal advice about the lawyer's compliance with these Rules;
- (4) Comply with other law or a court order.
- (5) Detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (d) A lawyer may reveal such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.
- (e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Official Commentary

Personal Interest Conflicts. *The lawyer's own interests must not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients; see also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).*

Rule 1.13. Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Unless the lawyer reasonably believes that it is not in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) Except as provided in subsection (d), if

(1) Despite the lawyer's efforts in accordance with subsection (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law and

(2) The lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Subsection (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

Official Commentary

The Entity as the Client. *An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Commentary apply equally to unincorporated associations. "Other constituents" as used in this Commentary means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.*

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Subsection (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

In determining how to proceed under subsection (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the persons involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably believe conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

Subsection (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules. *The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 and 4.1. Subsection (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6 (b)(1)--(6). Under subsection (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the*

violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances, Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.6(a)(1) may be required.

Subsection (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in subsection (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to subsection (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these subsections, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in subsection (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) The representation will result in violation of the Rules of Professional Conduct or other law;
- (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) The lawyer is discharged.

(b) Except as stated in subsection (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;

- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

OFFICIAL COMMENTARY

Mandatory Withdrawal. *A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.*

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (1) Make a false statement of material fact or law to a third person; or
- (2) Fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

OFFICIAL COMMENTARY

Misrepresentation. *A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A*

misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact. *This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.*

Crime or Fraud by Client. *Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Subdivision (2) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under subdivision (2) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.*

Conn. Gen. Stat. §22a-6u. Notification requirements re discovery of contamination of soil or water. Exceptions. Content of notice. Drinking water supply well sampling. Acknowledgment of receipt. Posting of notice. Civil penalty. Forwarding of notice.

(a) For the purposes of this section:

(1) “Commissioner” means the Commissioner of Energy and Environmental Protection, or his designee;

(2) “Mitigation” means actions, including, but not limited to, placement of gravel or pavement, fencing, water filtration or such other interim measures, taken to control the contamination or condition that reasonably prevent exposure, including continuing inspection, maintenance or monitoring as necessary for the specific measures taken;

(3) “Parcel” means a piece, tract or lot of land, together with buildings and other improvements situated thereon, a legal description of which piece, parcel, tract or lot is contained in a deed or other instrument of conveyance and which piece, tract or lot is not the subject of an order or consent order of the commissioner which involves requirements for investigation or reporting regarding environmental contamination;

(4) “Person” means person, as defined in section 22a-2;

(5) “Pollution” means pollution, as defined in section 22a-423;

(6) “Release” means any discharge, uncontrolled loss, seepage, filtration, leakage, injection, escape, dumping, pumping, pouring, emitting, emptying or disposal of oil or petroleum or chemical liquids or solids, liquid or gaseous products or hazardous wastes;

(7) “Residential activity” means any activity related to (A) a residence or dwelling, including, but not limited to, a house, apartment, or condominium, or (B) a school, hospital, day care center, playground or outdoor recreational area;

(8) “Substance” means an element, compound or material which, when added to air, water, soil or sediment, may alter the physical, chemical, biological or other characteristics of such air, water, soil or sediment;

(9) “Upgradient direction” means in the direction of an increase in hydraulic head; and

(10) “Technical environmental professional” means an individual, including, but not limited to, an environmental professional licensed pursuant to section 22a-133v, who collects soil, water, vapor or air samples for purposes of investigating and remediating sources of pollution to soil or waters of the state and who may be directly employed by, or retained as a consultant by, a public or private employer.

(b) (1) If a technical environmental professional determines in the course of investigating or remediating pollution after July 1, 2015, which pollution is on or emanating from a parcel, that such pollution is causing or has caused contamination of a public or private drinking water well with: (A) A substance for which the Commissioner of Energy and Environmental Protection has established a groundwater protection criterion in regulations adopted pursuant to section 22a-133k at a concentration above the groundwater protection criterion for such substance, or (B) the presence of nonaqueous phase liquid, such professional shall notify his or her client and the owner of the parcel, if the owner of the parcel that is the source of such contamination can reasonably be identified, not later than twenty-four hours after determining that the contamination exists. If, seven days after such determination, the owner of the subject parcel has not notified the commissioner, the client of the professional shall notify the commissioner. If the owner notifies the commissioner, the owner shall provide documentation to the client of the professional which verifies that the owner has notified the commissioner.

(2) The owner of a parcel on which exists a source of contamination to soil or waters of the state shall notify the commissioner if such owner becomes aware that such pollution is causing or has caused contamination of a private or public drinking water well with either (A) a substance for which the commissioner has established a groundwater protection criterion in regulations adopted pursuant to section 22a-133k at a concentration at or above the groundwater protection criterion for such substance, or (B) the presence of nonaqueous phase liquid. Notice under this section shall be given to the commissioner verbally, not later than one business day after such person becomes aware that the contamination exists, and in writing, not later than five days after such verbal notice.

(3) Not later than thirty days after the date the owner of such parcel that is the source of the contamination becomes aware of such contamination, such owner shall determine the presence of any other water supply wells located within five hundred feet of the polluted well by conducting a receptor survey and such owner shall seek access to sample drinking water supply wells that are located on adjacent parcels of property if such wells are within five hundred feet of the polluted well. If such access is granted, such owner shall sample and analyze the water quality of such wells. Not later than thirty days after becoming aware of such contamination, the owner of such parcel shall submit a report to the commissioner that includes proposals, as necessary, for further action to identify and eliminate exposure to contaminants on an ongoing basis.

(c) (1) If a technical environmental professional determines in the course of investigating or remediating pollution after July 1, 2015, which pollution is on or emanating from a parcel, that such pollution is causing or has caused contamination of a public or private drinking water well with: (A) A substance for which the commissioner has established a groundwater protection criterion in regulations adopted pursuant to section 22a-133k at a concentration less than such groundwater protection criterion for such substance; or (B) any other substance resulting from the release which is the subject of the investigation or remediation, such professional shall notify his client and the owner of the parcel, if the owner can reasonably be identified, not later than seven days after determining that the contamination exists.

(2) The owner of a parcel on which exists a source of pollution to soil or the waters of the state shall notify the commissioner if such owner becomes aware that such pollution is causing or has caused contamination of a private or public drinking water well with: (A) A substance for which the commissioner has established a groundwater protection criterion in regulations adopted pursuant to section 22a-133k at a concentration less than such groundwater protection criterion for such substance; or (B) any other substance which was part of the release which caused such pollution. Notice under this subdivision shall be given in writing not later than thirty days after the time such person becomes aware that the contamination exists.

(3) Not later than thirty days after the date such owner becomes aware that such contamination exists, such owner shall perform confirmatory sampling of the well. Not later than thirty days after the date such owner becomes aware of such contamination pursuant to subdivision (1) of subsection (c) of this section, such owner shall submit a report concerning such confirmatory sampling to the commissioner that includes proposals, as necessary, for any further action to identify and eliminate exposure to contaminants on an ongoing basis. If such confirmatory sampling demonstrates a concentration above the groundwater protection criterion for such substance, such owner shall proceed in accordance with the provisions of subdivisions (2) and (3) of subsection (b) of this section.

(d) (1) If a technical environmental professional determines in the course of investigating or remediating pollution after July 1, 2015, which pollution is on or emanating from a parcel, that such pollution of soil within two feet of the ground surface contains a substance at a concentration at or above thirty times the industrial/commercial direct exposure criterion for such substance if the parcel is in industrial or commercial use, or at or above fifteen times the industrial/commercial direct exposure criterion for antimony, arsenic, barium, beryllium, cadmium, chromium, copper, cyanide, lead, mercury, nickel, selenium, silver, thallium, vanadium, zinc or polychlorinated biphenyls, excluding arsenic or lead from the lawful application of pesticides, if the parcel is in industrial or commercial use and such soil pollution is not more than three hundred feet from any residence, school, park, playground or daycare facility, or at or above fifteen times the residential direct exposure criterion if the parcel is in residential use, which criteria are specified in regulations adopted pursuant to section 22a-133k, such professional shall notify his client and the owner of the parcel, if such owner is reasonably identified, not later than seven days after determining that the contamination exists, except that notice will not be required if either: (A) The land-use of such parcel is not residential activity and the substance is one of the following: Acetone, 2-butanone, chlorobenzene, 1,2-dichlorobenzene, 1,3-dichlorobenzene, 1,1-dichloroethane, cis-1,2-dichloroethylene, trans-1,2-dichloroethylene, ethylbenzene, methyl-tert-butyl-ether, methyl isobutyl ketone, styrene, toluene, 1,1,1-trichloroethane, xylenes, acenaphthylene, anthracene, butyl benzyl phthalate, 2-chlorophenol, di-n-butyl phthalate, di-n-octyl phthalate, 2,4-dichlorophenol, fluoranthene, fluorene, naphthalene, phenanthrene, phenol and pyrene, (B) the substance is total petroleum hydrocarbons, or (C) the substance is antimony, arsenic, barium, beryllium, cadmium, chromium, copper, cyanide, lead, mercury, nickel, selenium, silver, thallium, vanadium, zinc, or polychlorinated biphenyls below thirty times

industrial/commercial direct exposure criteria at an area of an industrial/commercial property that is covered with pavement that is maintained in a manner that preserves the integrity of such coverage or fenced off from the general public.

(2) The owner of the subject parcel shall notify the commissioner in writing not later than ninety days after the time such owner becomes aware that the contamination exists except that notification will not be required if by the end of said ninety days: (A) The contaminated soil is remediated in accordance with regulations adopted pursuant to section 22a-133k; (B) the contaminated soil is inaccessible soil as that term is defined in regulations adopted pursuant to section 22a-133k; (C) the contaminated soil which exceeds thirty or fifteen times such criterion, as applicable, is treated or disposed of in accordance with all applicable laws and regulations; or (D) the substance is lead on a residential property that is already in a lead abatement program administered by the local health department for the town in which such residential property is located. Any owner who is not required to notify the commissioner pursuant to subparagraph (A), (B) or (C) of this subdivision may voluntarily submit a notification at any time to the commissioner and the department shall issue a certificate of completion for purposes of this section if the area that exceeds fifteen or thirty times such criterion, as applicable, was treated or disposed of in accordance with all applicable laws and regulations. The department shall wait until ninety days after the notice is received before determining whether to post a notification received under this subsection on its Internet web site list of notices received under this subsection.

(3) If notice is not otherwise exempted pursuant to the provisions of subdivision (2) of this subsection, not later than ninety days after the owner becomes aware of such contamination, such owner shall, at a minimum: (A) Evaluate the extent of such contaminated soil that exceeds fifteen or thirty times the applicable direct exposure criteria, as applicable, (B) prevent exposure to such soil, and (C) submit, with the required notification, a report on such evaluation and prevention to the commissioner that includes proposals for other action, as necessary, including, but not limited to, maintenance and monitoring of interim controls to prevent exposure to soil that exceeds fifteen or thirty times, as applicable, the applicable criteria.

(e) (1) If a technical environmental professional determines in the course of investigating or remediating pollution after July 1, 2015, which pollution is on or emanating from a parcel, that such pollution is causing or has caused groundwater within fifteen feet of an industrial or commercial building to be contaminated with a volatile organic substance at a concentration at or above ten times the industrial/commercial volatilization criterion for groundwater for such substance or, if such contamination is within fifteen feet of a residential building, at a concentration at or above ten times the residential volatilization criterion, which criteria are specified in regulations adopted pursuant to section 22a-133k, such professional shall, not later than seven days after determining that the contamination exists, notify his client and the owner of the subject parcel, if such owner can reasonably be identified.

(2) The owner of such parcel shall notify the commissioner in writing not later than thirty days after such person becomes aware that the contamination exists except that notification is not required if: (A) The concentration of such substance in the soil vapor beneath such building is at or below ten times the soil vapor volatilization criterion, appropriate for the land-use for the parcel, for such substance as specified in regulations adopted pursuant to section 22a-133k; (B) the concentration of such substance in groundwater is below ten times a site-specific volatilization criterion for groundwater for such substance calculated in accordance with regulations adopted pursuant to section 22a-133k; (C) groundwater volatilization criterion, appropriate for the land-use of the parcel, for such substance specified in regulations adopted pursuant to section 22a-133k is fifty thousand parts per billion; (D) not later than thirty days after the time such person becomes aware that the contamination exists, an indoor air monitoring program is initiated in accordance with subdivision (3) of this subsection; (E) the parcel contains a building that is not occupied, provided the owner shall submit the required notification not later than the date such building is reoccupied, unless by the date of reoccupancy data confirms concentrations no longer exceed the notification threshold or another exception in this subdivision applies; or (F) the parcel contains a building in an industrial/commercial use and such volatile organic compounds are used in industrial activities, and the use of such volatile organic compounds in such building is regulated by the federal Occupational Safety and Health Administration.

(3) An indoor air quality monitoring program for the purposes of this subsection shall consist of sampling of indoor air once every two months for a duration of not less than one year, sampling of indoor air immediately overlying such contaminated groundwater, and analysis of air samples for any volatile organic substance which exceeded ten times the volatilization criterion as specified in or calculated in accordance with regulations adopted pursuant to section 22a-133k. The owner of the subject parcel shall notify the commissioner if: (A) The concentration in any indoor air sample exceeds ten times the target indoor air concentration, appropriate for the land-use of the parcel, as specified in regulations adopted pursuant to section 22a-133k; or (B) the indoor air monitoring program is not conducted in accordance with this subdivision. Notice shall be given to the commissioner in writing not later than seven days after the time such person becomes aware that such a condition exists.

(4) Not later than thirty days after the date the owner becomes aware of such contamination, the owner shall submit to the commissioner with the required notification a proposed plan to mitigate exposure to or permanently abate the contamination or condition.

(f) (1) If a technical environmental professional determines in the course of investigating or remediating pollution after July 1, 2015, which pollution is on or emanating from a parcel, that such pollution is causing or has caused contamination of groundwater which is discharging to surface water and such groundwater is contaminated with: (A) A substance for which an acute aquatic life criterion is listed in appendix D of the most recent water quality standards adopted by the commissioner at a concentration which exceeds ten times (i) such criterion for such substance in said appendix D, or (ii) such criterion for such substance times a site specific dilution factor calculated in accordance with regulations adopted pursuant to section 22a-133k,

or (B) a nonaqueous phase liquid, such professional shall notify his client and the owner of such parcel, if such owner can reasonably be identified, not later than seven days after determining that the contamination exists.

(2) For nonaqueous phase liquid that is not otherwise reported to the commissioner pursuant to the general statutes or regulations of Connecticut state agencies, the owner of such parcel shall notify the commissioner (A) verbally, not later than one business day after such person becomes aware such contamination entered a surface water body, and (B) in writing, not later than thirty days after the date such owner becomes aware of such contamination. For contamination with a substance, as described in subdivision (1) of this subsection, such owner shall notify the commissioner, in writing, not later than thirty days after the time such person becomes aware that the contamination exists. Notice shall not be required pursuant to this subdivision if such person knows that the polluted discharge at that concentration or in such physical state was reported to the commissioner, in writing, within the preceding year.

(3) For any contamination with a substance as described in subdivision (1) of this subsection, not later than the date written notification is due pursuant to this subsection, the owner shall submit with such notification a proposed plan to monitor, abate or mitigate the contamination or condition.

(g) (1) If a technical environmental professional determines in the course of investigating or remediating pollution after July 1, 2015, which pollution is on or emanating from a parcel, that such pollution is causing or has caused contamination of groundwater within five hundred feet in an upgradient direction or two hundred feet in any direction of a private or public drinking water well which groundwater is contaminated with a substance resulting from a release for which the commissioner has established a groundwater protection criterion in regulations adopted pursuant to section 22a-133k at a concentration at or above the groundwater protection criterion for such substance, such technical environmental professional shall notify his client and the owner of the subject parcel, if such owner can reasonably be identified, not later than seven days after determining that the contamination exists.

(2) The owner of the subject parcel shall notify the commissioner in writing not later than thirty days after the time such owner becomes aware that the contamination exists.

(3) Not later than thirty days after the date such owner becomes aware of such contamination, such owner shall determine the presence of any other water supply wells located within five hundred feet of such polluted groundwater by conducting a receptor survey. Such owner shall seek access for the purpose of sampling drinking water supply wells that are on adjacent properties if such wells are within five hundred feet of such polluted groundwater. If such access is granted, such owner shall sample and analyze the water quality of such wells. Not later than thirty days after the date such owner becomes aware of such polluted groundwater, such owner shall submit with the required notification a report to the commissioner concerning such evaluation that includes proposals, as necessary, for further action to identify and eliminate any exposure to contaminants on an ongoing basis.

(h) (1) If a technical environmental professional determines in the course of investigating or remediating pollution after October 1, 1998, which pollution is on or emanating from a parcel, that such pollution is causing or has caused polluted vapors emanating from polluted soil, groundwater or free product which vapors are migrating into structures or utility conduits and which vapors pose an explosion hazard, such technical environmental professional shall immediately notify his client and the owner of the subject parcel, if such owner can reasonably be identified, not later than twenty-four hours after determining that the vapor condition exists. If the owner of such parcel fails to notify the commissioner in accordance with this subsection, such client shall notify the commissioner. If the owner notifies the commissioner, the owner shall provide documentation to the client of the professional which verifies that the owner has notified the commissioner.

(2) The owner of such parcel shall orally notify the commissioner and the local fire department immediately and under all circumstances not later than two hours after the time a technical environmental professional notifies the owner that the vapor condition exists, and shall notify the commissioner in writing not later than five days after such oral notice.

(i) In the event the commissioner orders the testing of any private drinking well, and such testing indicates that the water exceeds a maximum contaminant level applicable to public water supply systems for any contaminant listed in the Public Health Code or for any contaminant listed on the state drinking water action level list established pursuant to section 22a-471, the commissioner shall require the respondent to such order to provide written notification of the results of any testing conducted pursuant to such order not later than twenty-four hours after said respondent receives such results to the following: (1) The owner of record of the property upon which any such private drinking well is located, (2) the local director of public health, (3) any person that files a request with the local director of public health to receive such notification, and (4) any other person the commissioner specifically identifies in such order. Not later than twenty-four hours after receiving such notification, such owner shall forward a copy of such notification to at least one tenant of each unit of any leased or rented dwelling unit located on such property and each lessee of such property. Not later than three days after receiving such notification, the local director of public health shall take all reasonable steps to verify that such owner forwarded the notice required pursuant to this subsection.

(j) All notices, oral or written, provided under this section shall include the nature of the contamination or condition, the address of the property where the contamination or condition is located, the location of such contamination or condition, any property known to be affected by such contamination or condition, any steps being taken to abate, remediate or monitor such contamination or condition, and the name and address of the person making such notification. Written notification shall be clearly marked as notification required by this section and shall be either personally delivered to the Remediation Division of the Department of Energy and Environmental Protection or sent by certified mail, return receipt requested, to the Remediation Division of the Department of Energy and Environmental Protection.

(k) (1) The commissioner shall provide written acknowledgment of receipt of a written notice pursuant to this section not later than ten days after receipt of such notice and in such acknowledgment may provide any information that the commissioner deems appropriate.

(2) In accordance with the time frames specified in this section, the owner of the parcel shall submit to the commissioner either (A) (i) a mitigation plan to prevent exposures, (ii) a plan to remediate the contamination or condition, or (iii) a plan to abate the contamination or condition, (B) documentation that the contamination or condition was mitigated and that there are no exposure pathways from the contamination, along with a plan to maintain such mitigation measures, or (C) documentation that describes how the contamination or condition was abated, as applicable. Submittals described in this subsection may be submitted concomitantly with other notices required in this section.

(3) If such plan, as described in subdivision (2) of this subsection, is not submitted or is disapproved by the commissioner, the commissioner shall prescribe the action to be taken or issue a directive as to action required to mitigate or abate the contamination or condition. If a plan is submitted which details actions to be taken, or a report is submitted which details actions taken, to mitigate or abate the contamination or conditions and such plan or report is acceptable to the commissioner, the commissioner shall approve such plan or report in writing. When a report is submitted that demonstrates permanent abatement of the contamination or condition, such that notice under this section would not be required, the commissioner shall issue a certificate of compliance upon finding such report to be acceptable.

(l) An owner who has submitted written notice pursuant to this section shall, not later than five days after the commencement of an activity by any person that increases the likelihood of human exposure to known contaminants, including, but not limited to, construction, demolition, significant soil disruption or the installation of utilities, post such notice in a conspicuous place on such property and, in the case of a place of business, in a conspicuous place inside the place of business. An owner who violates this section shall pay a civil penalty of one hundred dollars for each offense. Each violation shall be a separate and distinct offense and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense. The Attorney General, upon complaint of the commissioner, shall institute an action in the superior court for the judicial district of Hartford to recover such penalty.

(m) Not later than ten days after receipt of any written notice received under this section, the commissioner shall forward a copy of such notice to the chief elected official of the municipality in which the subject pollution was discovered and to the local health director of such municipality or region. Any forwarding of such notice, as required by this subsection, may be performed by electronic means. The commissioner shall maintain a list of all notices received under this section that pertain to conditions that have not been mitigated or permanently abated at the time of notification. Such list shall be on the department's Internet web site and shall be amended to remove notices after the condition is mitigated or permanently abated.

(n) Nothing in this section and no action taken by any person pursuant to this section shall affect the commissioner's authority under any other statute or regulation.

(o) Nothing in this section shall excuse a person from complying with the requirements of any statute or regulation except the commissioner may waive the requirements of the regulations adopted under section 22a-133k if he determines that it is necessary to ensure that timely and appropriate action is taken to mitigate or minimize any of the conditions described in subsections (b) to (h), inclusive, of this section.



Christopher P. McCormack is a partner in the Connecticut law firm Pullman & Comley LLC. His environmental law practice includes litigation of liability and cost recovery actions including lead counsel responsibility for Superfund site coalitions, as well as enforcement defense and administrative proceedings. He has extensive experience with environmental aspects of corporate and real estate transactions. His litigation practice also includes prosecution and defense of commercial litigation matters involving contract and business loss claims, commercial torts and unfair trade practices for clients in manufacturing, computer equipment, insurance and the professional services sectors.

He is a member of ASTM International’s Committee E50 on environmental assessment standards and served as Membership Secretary from 2011-2015. He chairs the Task Group responsible for ASTM Standard Practice E1903 on Phase II Environmental Site Assessments. His article, “The ASTM Standard Practice for Phase II Environmental Site Assessment,” published by Bloomberg BNA in November 2012, was recognized in 2013 by a “Distinguished Writing Award” conferred by the Burton Awards, an honor open to the largest American law firms and bestowed on only thirty private-practice authors annually.

He is the immediate past Chair and Legislative Liaison for the Environmental Law Section of the Connecticut Bar Association, a Fellow of the American Bar Foundation and a Sustaining Life Fellow of the Connecticut Bar Foundation.

Mr. McCormack holds degrees from Yale, the Eastman School of Music, and Fordham Law School, where he was Writing and Research Editor of the Fordham Law Review. He clerked for Judge Thomas J. Meskill on the United States Second Circuit Court of Appeals

Ethics in Land Use in the News
March-April 2019

- 1) Is it a conflict of interest where the applicant before the zoning board of appeals for a project involving a family owned car wash and gas station is a longtime member of the local board of education and where five of the seven members of the zoning board or members of their immediate family are employed by the school district?
Garfield, NJ
- 2) Is it a conflict of interest for a city engineer to review project plans submitted by company where her spouse is employed?
Stamford, CT
- 3) Is it a prohibited conflict of interest for a member of a preservation commission to participate in making a recommendation to the planning and zoning department regarding a proposed project in close proximity to his own property?
Howard County, MD
- 4) Is it a conflict of interest where a member of the planning commission voted on a proposed PUD ordinance (recommendation to Town Council) where he was a developer and part owner of the land that was sold to the applicant twenty years ago?
Chesterton, Indiana
- 5) Is it a good idea to enact an ordinance providing that any board or commission member having more than a 25 percent annual recusal rate based on total meetings, may be removed from that board or commission?
Scottsdale, AZ
- 6) Is it a conflict of interest where an individual is both a township board trustee and the proprietary owner of an a company that owns the appearing before the board for approval of a proposal for a gravel pit to become an 11- to 12-acre pond in a subdivision of roughly 20 houses?
Grass Lake Township, MI
- 7) Is it a problem where a member of the city council does not disclose that she was the co-owner of a rental management company with her son when discussing or voting on legislation regarding rental properties, nuisances or certain zoning changes?
Springfield, MO
- 8) Is it a conflict of interest where the chair of the planning board participates in discussions of a proposed project where he worked as a landscaper for the project applicant in the past but not on the current project and there is no current contractual relationship between the two?
Saratoga, NY
- 9) Is it unethical for a city council member who wanted a project, already approved by the planning and zoning commission, to include affordable housing to engage I private negotiations with the developers who then offered to contribute to the Community Land Trust instead, and agreed on a \$40,000 donation to the trust in exchange for the Councilman's support of the development plans?
Columbia, MO
- 10) Is it a conflict of interest for a County Council to vote on amendments to the county's zoning regulations for camping areas where she is in the recreational vehicle business?
Logan County, CO

Garfield school board member may have swayed zoning board vote, court finds

Tom Nobile, North Jersey Record Published 5:41 a.m. ET April 4, 2019

The state Supreme Court has cited a potential conflict of interest between Kenneth Conte, a longtime Garfield Board of Education member, and the city's zoning board, which approved a gas station and car wash project by the Conte family despite its connections to the school district.

Five of the seven zoning board members or their immediate family members were employed by the city school district when the zoning board unanimously awarded site plan approval in 2014, while Conte was the school board's president, the court wrote in a March 27 ruling.

In its decision, the high court stopped short of declaring a conflict of interest, but it said a lower court should determine whether Conte had financial authority over zoning members and their immediate family as the Board of Education president, and whether any members and their family had any "meaningful patient-physician relationship" with him.

The board's vote must be vacated "if the answer to either of those questions is yes," according to the decision.

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"If any zoning board members had reason to believe that voting against the development application might be a bad career move for them or their family, a disqualifying conflict of interest would be present," the Supreme Court's ruling said.

More: [Why are some Garfield school district phone bills hundreds of dollars a month? \(/story/news/bergen/garfield/2019/04/03/garfield-nj-looking-into-high-phone-charges-racked-up-staff/3269414002/\)](#)

More: [Garfield looks to ease its parking problems with new fees \(/story/news/bergen/garfield/2019/03/14/garfield-nj-looks-ease-parking-problem-new-fees/3133476002/\)](#)

The Conte family proposed a gas station, car wash and quick lube on three lots across from Conte's family medical practice on Midland Avenue.

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Conte owned the lots with his brother, but had transferred the properties to private trusts benefiting his nieces and nephews in order to avoid conflict of interest, according to the court decision.

"We maintain all along that Dr. Ken was not the applicant and not the property owner," Charles Sarlo, Conte's attorney, said Wednesday.

But neighbors who opposed the project cried foul when no members of the zoning board recused for the final vote. Garfield resident Vincent Piscitelli and his wife, Rose Mary, responded by filing suit against the board and the Contes, claiming that Kenneth Conte "had the ability to influence the careers of zoning board members and their immediate family."

An attorney for the Piscitellis could not be reached Wednesday.

The case reached the state Supreme Court in November. In its decision, the court also remained leery of Conte's influence, calling him a "prominent citizen" of Garfield for his longtime medical practice and decades of service on the school board.

During the hearings, zoning board members referred to Conte and the trusts interchangeably, and four of the school board's nine members testified in favor of the project, the court noted.

The decision overturned an appellate finding that no conflicts of interest had impaired the members. But on appeal, the Supreme Court punted the question to trial court because it had "insufficient information" to make a ruling.

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<https://www.stamfordadvocate.com/local/article/Stamford-ethics-board-cites-city-engineer-in-13700422.php>

Stamford ethics board cites city engineer in conflict-of-interest case

By Angela Carella Updated 11:20 pm EDT, Tuesday, March 19, 2019



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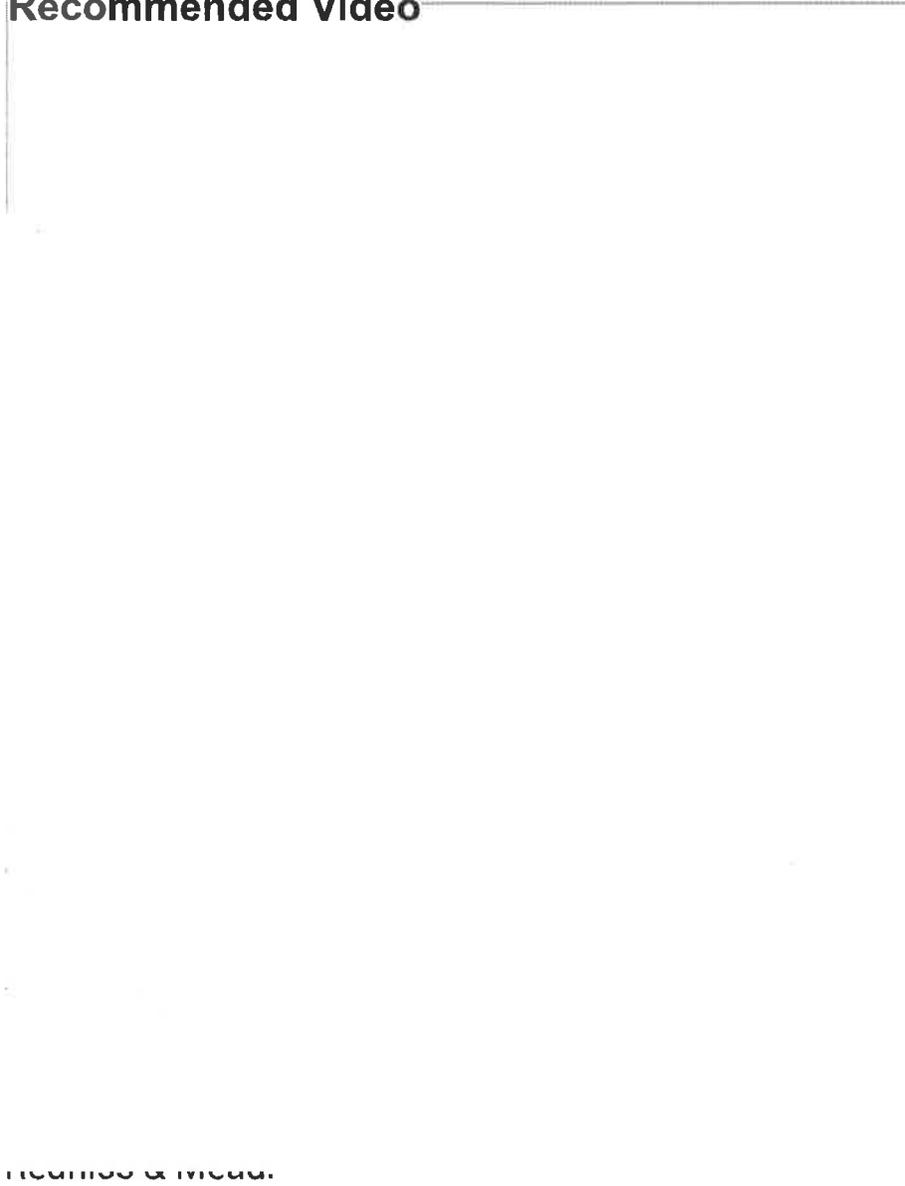
Susan Kiskien, left, an engineer with the city, helps to assemble a jungle gym during a community effort to build a new playground at McKeithen Park in Stamford, Conn., on Friday, Aug. 28, 2015. The Board of Ethics has found probable cause that Kiskien had a conflict of interest when she reviewed project plans submitted by a company that employs her husband.

STAMFORD — The Board of Ethics has found probable cause that a city engineer failed to follow rules governing conflict of interest when she reviewed project plans submitted by a company that employs her husband.

The board found evidence supporting a complaint that Susan Kiskien, coordinator of inspections and plan review in the Engineering Department,

violated the city's Code of Ethics. Kisken's husband is a principal with Redniss & Mead, a prominent land-use consulting company that brings development projects before the city for approval.

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The Code of Ethics requires that city employees disqualify themselves from

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Redniss & Mead.

"She did disclose that. No question. It was known from the day she was hired," Cassone said. "It wasn't an issue."

Kisken herself worked at Redniss & Mead before taking the city job, Cassone said.

The ethics complaint was filed by Sam Magliari who, like Kisken, worked for Redniss & Mead and for the city, where he was an engineering technician from 1986 to 2000.

Magliari's complaint says Kisken inspects the work of Redniss & Mead, and "reviews their plans, approves their plans, supplies information and orders other employees to provide research information" for the company.

Magliari sent a letter to the Board of Ethics saying the agreement reached with Kisken is inadequate.

It costs taxpayers, Magliari said.

"The stipulated agreement allows her to continue the work, and it has to be reviewed at taxpayers' expense," Magliari said. "It's an abuse of our tax dollars."

In ethics investigations, the city defends employees and covers their legal costs unless they go to a full hearing and are found to have violated the Code of Ethics. Kisken's case never went to a hearing because she and the board reached an agreement.

A spokesman for Mayor David Martin said Tuesday he does not yet have an amount for the legal fees.

During the ethics board's deliberations, City Engineer Lou Casolo said Kisken "is the sole plan reviewer" in the department. Her job is not to approve plans but to make comments on them and send them on to the Zoning Board and Land Use Bureau, Casolo said.

"It's not just Susan's eyes only. There are a lot of other people looking over these development plans," he said.

Ethics board Chair Cheryl Bader said she was concerned that lack of staff is not a sound basis for an agreement.

"It says because we don't have a better solution, it means the conflict is somehow resolved," Bader said.

"I think the right solution is to have somebody else reviewing" plans submitted by Redniss & Mead, Bader said, because Kisken "has the ability to influence whether a project goes forward."

Cassone reminded the board that "there has been no allegation or proof that there has been some material benefit" to Redniss & Mead.

Through the agreement, "we are trying to insert some accountability," Cassone said, "to ensure that the citizens of Stamford don't feel that there is any favoritism."

There isn't, said Rick Redniss, president of Redniss & Mead, which employs surveyors, engineers, and planning and zoning consultants to help developers launch projects large and small.

"This is an unfortunate situation," Redniss said. "We received absolutely no preferential treatment. In fact a review of our applications ... will show we are held to a higher standard, and are always happy to achieve to that standard."

The Kisken case came up Monday night, when Martin held a Mayor's Night Out at Twin Rinks on Hope Street, an event videotaped by the Springdale Neighborhood Association and attended by Magliari.

Near the end of the meeting Magliari told Martin the agreement is unfair. Martin pointed out that he met with Magliari last fall, when Martin said he learned of a potential conflict of interest in the Engineering Department, and during that discussion Magliari asked him for a job.

Martin declined through his spokesman to comment for this story.

Magliari confirmed Tuesday that he did ask Martin for a job when they met.

"I said, 'How come I'm not being hired as a clerk of the works?'" Magliari said Tuesday. "They stop me from being hired. Since I left the city they have discriminated against me."

He would not say why he no longer works in the Engineering Department, except that he "was forced out."

His ethics complaint, however, had merits, according to what Martin told the residents gathered at Twin Rinks.

The city will "test to see whether there was any material favoritism that might have been awarded to anybody," Martin said. "We are changing procedures in the Engineering Department to eliminate any potential conflicts of interest."

acarella@stamfordadvocate.com; 203-964-2296.

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H E A R S T

County dismisses ethics complaint against Howard preservation commissioner over proposed Elkridge subdivision



The Howard County Ethics Commission has dismissed a complaint filed by a developer seeking to build a subdivision in Elkridge against a member of the Historic Preservation Commission. (Baltimore Sun file)



By **Erin B. Logan**
Howard County Times

MARCH 26, 2019, 2:00 PM

The Howard County Ethics Commission has dismissed a complaint filed against a member of the Historic Preservation Commission.

a subdivision in the Lawyers Hill area

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Don Reuwer has proposed building a subdivision of 17 single-family homes in the historic district located in Elkridge off Interstate 95.

Reuwer in an interview said he filed a request to the ethics commission for them to reconsider their dismissal.

The project needs approval from the Department of Planning and Zoning and advisory comments from the preservation commission. Reuwer would also need approval from the commission to build homes on the 8.76-acre property.

When Reuwer first went before the preservation commission last April, he asked commissioner Drew Roth to recuse himself, citing his property's proximity to the proposed development as a conflict of interest. Roth declined to do so.

The complaint Reuwer filed in January argued Roth has an "interest in the disposition of [the] case" and that he "has used the prestige of his office or public position for his own private gain."

In January, Roth declined to comment on the ethics complaint but wrote in an email that he "seriously considered the matter and consulted the [county's] Office of Law and determined that it was not necessary for me to recuse myself."

"I have no financial interest in the project and no personal interest other than my normal interest in preserving the history of Howard County," he previously said.

County law requires at least two members of the preservation commission to live in historic Ellicott City and Lawyers Hill.

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Planners vote 5-2 against John Nekus post office development

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By **KEVIN NEVERS**

John Nekus returned to the Chesterton Plan Commission Thursday night with a sharper pencil, but in the end it wasn't sharp enough to ease planners' concerns about the density of his proposed planned unit development and its possible impact on the Primrose Circle and Richter Street neighborhoods.

Planners voted 5-2 to forward the PUD to the Town Council with an unfavorable recommendation. Voting against the PUD were Tom Kopko, Fred Owens, Sharon Darnell, Jim Kowalski, and Nate Cobbs. Voting in favor of it were George Stone and Jeff Trout.

The PUD ordinance will now go to the Town Council for final action.



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The meeting began with members' unanimous vote to re-open the public comment portion of the public hearing, which was formally closed in December. Nekus' attorney, Greg Babcock, then walked the commission through an amended plan of development, under which Nekus had reduced the total number of living units to 62, from the 71 presented in December: 58 paired patio homes, down from 68; and four single-family "cottage" homes, up from three.

Also: the rear-yard setbacks for the four lots on the west edge of the PUD, bordering Primrose Circle, were increased to 25 feet, per the Zoning Ordinance for R-2 districts; the front-yard setbacks for all lots were increased to 25 feet, also per the Zoning Ordinance; and the total number of variances for all lots was reduced by 16 percent.

By Babcock's calculation, the resulting density of the proposed PUD--62 living units on 11.82 acres--would be .190 units per acre, comparable to the .184 units per acre for the Pere Marquette Cottages

project, the .190 units per acre at the Touch of Green, and the .197 units per acre for the Village Green Townhomes at Coffee Creek.

Members then opened the floor to comments from the public. Two persons spoke in favor of the PUD. Joe Troop, who resides on North Brummitt Road, said, "I think it's a good idea. It fits the mold for me personally." Rob Carstens, who resides on East Oakhill Road, concurred. "This is what I've been looking for. Less maintenance. You don't see a lot of property like this."

Six persons, all residents of Primrose Circle or Richter Street, spoke against the PUD. Kelly Clark began by reading in its entirety the text of her Voice of the People published in a form edited for length in the Tuesday, March 19, edition of the *Chesterton Tribune*. "Mr. Nekus made an investment," Clark stated. "He sat on it. If he chooses to flaunt accepted ordinances it's not our responsibility to allow his development. He made a bad investment under the impression it was going to be pushed through. That is his fate."

Tom Albano, for his part, questioned the propriety of planner Jeff Trout's sitting in judgment of the PUD, inasmuch as he was one of the developers who originally sold the property to Nekus 20 years ago. "Mr. Trout, no disrespect, but you were part owner of that land," Albano said. "Conflict of interest, that's all we're saying."

Albano also suggested that Nekus' amended plan of development didn't go far enough. "I didn't really address the density," he said. "You still got a major density issue. You're looking at a lot of traffic going down Richter Street and Second Street. You're talking about another (South) Calumet (Road)."

Linda Vogt, a resident of Richter Street, acknowledged that Nekus has reached out to the Primrose Circle residents over the last few months. "He met with people in Westchester South," she noted. "But there are six houses on Richter Street. He never met anyone on Richter."

Bonnie Thanos, who resides on Washington Ave., similarly expressed concerns about the

impact of traffic generated by the PUD in her neighborhood. "The streets are narrow and right now in bad repair. A hundred more cars will be traveling those roads."

Tom Byrnes wanted to know this: if the property were developed strictly according to the Zoning Code, without variances, how many homes exactly would it support? "What's the break-even point you could have with all houses in code?" he asked. "At what density level does it go out of code? Anyhow, stick to the code."

Finally, Dave Krieter, who resides on Washington Ave., expressed unease about the potential impact of the PUD on runoff in his neighborhood. "We can't take any more water on Washington Ave.," he said. "It's already a tough street for traffic."

Discussion

Members then closed the public comment portion of the public hearing for discussion. Trout spoke first, specifically on Albano's accusation that his former ownership of the property in question constitutes a conflict of interest. "There's no

need to recuse myself because I have no financial interest" in the project, he said.

Associate Town Attorney Chuck Parkinson agreed. For a recusal to be appropriate and necessary, Trout would need to have either a direct financial interest in the PUD or an indirect one, the latter being--for instance--a family member with ties to it. "I take you at your word that you have no direct or indirect financial interest," Parkinson said. "I gather that if your interest was 20 years ago, you have sufficiently severed all financial ties with the petitioner."

Trout premised his support of the PUD on his belief that density per se is not a bad thing and pointed, by way of example, to the Barrington Bridge Apartments directly across the street from the Chesterton Post Office, to the Enclave Apartments on Dickinson Road, and to the condo complex on South Fifth Street south of Bailly Elementary School. "People don't mind density," he said. "If you don't like density, you don't move



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Home News The power of perception atop the Scottsdale Planning Commission

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The power of perception atop the Scottsdale Planning Commission

Apr 9th, 2019 · by Melissa Rosequist · Comments: 0



The Scottsdale Planning Commission is an advisory board, which makes recommendations on land use and zoning matters to the Scottsdale City Council. (File photo)

Aside from City Council, a municipality's Planning Commission could be considered one of the more important governing bodies shaping any given city.

In Scottsdale, the Planning Commission reviews, evaluates and approves myriad requests including rezoning, General Plan amendments, use permits, abandonments and municipal use master site plans. Ultimately, the seven-member Commission acts as an advisory board to the City Council on land use and zoning matters, with the council having the final ruling.

These agenda items can range from a request for a zoning map amendment for the purpose of constructing a mixed-use development with 282 residential units, to a conditional use permit for a wireless communication tower being disguised as a 60-foot artificial palm tree.

Each regular Scottsdale City Council meeting — generally happening once to twice a month — has several requests up for approval, many of which have made their way through the Planning Commission process. These requests can land on the consent agenda, which is a single vote approving numerous requests or amendments.

Larger projects are reserved for the regular agenda, with a staff presentation on the topic and generally garnering discussion amongst council members prior to a vote.



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While the Planning Commission does not have the final say on any given matter, the issue of conflict of interest matters arising at the dais is taken seriously as some appointed volunteers are a part of the professional field in which their board is evaluating.

When recusing oneself, the commissioner can choose to declare a conflict of interest for two reasons: Having a substantial interest in the decision, or having a perceived perception of undue influence or impropriety.

While no legal wrong doings are being alleged of the Commissioners, the Scottsdale City Council earlier this year did ask city staff to return to a future meeting with an ordinance adding a provision to city code that any board or commission member having more than a 25 percent annual recusal rate based on total meetings, may be removed from that board or commission.

For the Planning Commission specifically, Councilwoman Solange Whitehead says having non-development professionals on the board may open up a wider-spectrum of discussion of projects.



Solange Whitehead

“When you bring in laypeople, people who don’t have blinders on about what is and what isn’t done in the development field, you do get very valuable input. You will bring more voices, more trust to the Commission, and finally will get more use out of that Commission,” Ms. Whitehead said at a Feb. 12 work study session.

“Last year we had 33 recusals from that Commission, 16 of those recusals were one commissioner. So I appreciate these people saying, ‘I need to step out and not vote’ but the problem is we’re losing this valuable opportunity to have another voice discussing issues that will effect our community forever. Development issues effect our community forever.”

Close community ties

The current Scottsdale Planning Commission is comprised of Paul Alessio, Kevin Bollinger, Ali Fakih, Larry Kush, Christian Serena and Prescott Smith.

Mr. Alessio is in real estate; his firm UrbanREaz, specializes in a residential and commercial real estate. Mr. Bollinger, is an architect and is president of Bollinger Consulting Architects.

Mr. Fakih is an engineer, serving as principal and project manager at SEG — Sustainable Engineering Group. Mr. Kush is senior vice president with Orion Investment Real Estate.

Mr. Serena is a Senior Financial Advisor with Chin-Williams & Associates, a part of the Merrill Lynch family. Mr. Smith is vice president of Technical Solutions, a communications firm specializing in public outreach and fulfillment services for development projects.



Larry Kush

When a project for the Planning Commission to review works its way through the municipal process, the members of the Commission are required to recuse themselves. Commissioners must abide by the state conflict of interest laws, and the city’s code of ethical behavior. Additionally, Arizona law prohibits local

governments from imposing different conflict of interest laws than state laws, the city's code states.

Scottsdale Revised Code states:

"A conflict of interests arises when a city official, a relative of that official, or an entity in which a city official has a substantial interest is actively engaged in an activity that involves the city's decision-making processes. 'Decision-making processes' is broader than just voting and includes being involved with any aspects of any decisions the city makes, such as contracting, sales, purchases, permitting, and zoning."

And, "During a public meeting when an agenda item in which a city official has a conflict of interests comes up for consideration, the city official shall state publicly that he or she has a conflict, recuse himself or herself, and leave the room while the matter is being discussed and acted upon by others on the public body."

According to a March public records request, the Planning Commissioners between 2017-19 have recused themselves:

Larry Kush: 5

Kevin Bollinger: 1

Prescott Smith: 27

Ali Fakhri: 21

Paul Alessio: 1

Kelsey Young: 2

Ms. Young has recently resigned from the Commission as she is no longer a resident of Scottsdale.

Mr. Smith serves as Planning Commission vice chair, and was on the Development Review Board prior to being appointed to the planning group.

"I think the City Council obviously appoints citizens based on their personal and professional experience to serve on boards and commissions in Scottsdale," Mr. Smith explained of his role on the Commission.

"Given my experience and what we do, my background helps understand community input and making sure everyone's voices are heard. There are hundreds of

zoning issues every year, the recusal process is there to ensure there isn't any impropriety."

While Mr. Smith does have to recuse himself due to his work with local projects, the role of Planning Commission, Mr. Smith points out, is in an advisory capacity and does not have a final say on any project.

"Whether we approve or deny a case, it goes on to council regardless," he said. "My portion and involvement in Scottsdale revolves around community input and making sure people's voices are heard along the way."



Prescott Smith

Within the records request, Mr. Smith's handwriting is sprawled across 27 different declaration of conflict of interest or personal interest forms. Most state, in some variation or another, "I have done work on this project."

He has recused himself on projects including:

Scottsdale Heights

Scottsdale Fashion Square

Villages at Troon North

Rose Lane Commercial Parcel

The Outpost

Wolff Scottsdale Senior Living

Winfield Hotel

Valley View Homes

Sereno Canyon

Spectrum Camelback

Don & Charlie's

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"I very much enjoy my service on the boards and commissions of Scottsdale," Mr. Smith said.

"I do think it's important, given the uniqueness of what my company does for work — understanding the importance of input on these projects — I think it's important to have someone with that voice on these boards to ensure everyone's voices are heard."

To Mr. Smith's point, the topic of public outreach and having resident involvement and communication in projects is often vocalized by residents. In the recent Papago Plaza application, Councilwoman Virginia Korte's stipulation of increased resident outreach and input was a factor in the south Scottsdale project moving forward.



Scottsdale City Council meets at City Hall, 3939 N. Drinkwater Blvd. (File photo)

A recommending body

Councilwoman Korte says when it comes to the operation of Planning Commission, she believes the system is working correctly.

“I don’t think our process is broken, we have done business in this manner for decades and never had a problem — I don’t think we have a problem now,” she said.

“The council reviewed this issue a couple of months ago — we changed some policy, we broached that subject — and I believe that took care of any perceived issue with that. I don’t personally see it as an issue.”

According to Mayor Jim Lane, the Planning Commission is the only committee in the city required by state statute.

“There really is no specific guidelines. It is required that we have citizens, there isn’t any criteria or added background,” Mr. Lane said. “I think some people look to people who know the process and that are in-tune with that. Has that created a situation where someone is involved in projects? Several weeks ago we reviewed the boards and commissions and the kinds of things creating some difficulty — this is one of them.”



Scottsdale Mayor Jim Lane (File photo)

Mr. Lane says the city, about six or seven years ago, looked at all of the boards and commissions and created some guidelines, including tardiness and attendance. He estimates the city will look at the proposal to stipulate board and commission recusal frequency after their summer break.

“There’s been a call to exclude certain people — we don’t generally exclude people because of their background. We do include people who have positive

knowledge and background, such as EQAB (Environmental Quality Advisory Board) or transportation,” Mr. Lane said.

“They have to be able to recuse themselves. I don’t think we’ve seen the number of recusals we have with these two individuals.”

A municipal board member or commissioner not recusing themselves could be seen, to some, as a betrayal of public trust.

“The idea of recusing yourself is more numerous now than ever before,” Mr. Lane said.

“Part of the situation we deal with, when we are elected by the public, the balance of things that make a city run – different ideologies, principles, different approaches to how that gets accomplished – when we’re elected the people we appoint are generally reflective of our point of view. We think we’re serving the community with our point of view.”

The rules of Scottsdale, Mr. Lane says, is that anyone with a conflict of interest does need to recuse themselves. However, the commissioners’ only power is to send a recommendation to City Council.

“That’s where it ends, it sits with us to decide whether the decision is consistent with what we believe is legal and in the best interest of the city,” Mr. Lane said. “If they’re not there, they’re not making the recommendations we appointed them to make.”

A request for comment from Commissioner Fakhri was not answered by press time.

Northeast Valley News Editor Melissa Rosequist can be e-mailed at mrosequist@newszap.com or can be followed on Twitter at twitter.com/mrosequist_.

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No gravel pit for Grass Lake Township, judge rules

Posted Apr 9, 10:57 AM



A sign against the proposed gravel pit on E. Michigan Ave. in Grass Lake on Monday, Oct. 2, 2017. (Jake Crandall | Mlive.com)

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GRASS LAKE, MI -- Opponents of a proposed gravel pit in Grass Lake Township

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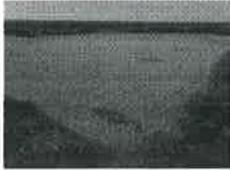
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The court ruling also supported the Friends group's claims that the planning commission made its decision on the special use permit before the October 2017 public hearing, where 275 residents spoke. At the end of the hearing, the commission read an eight-page, single-spaced final decision that the court believed was written prior to the start of the hearing, which violates the zoning ordinance, the ruling said.



Gravel pit approved at 5-hour Grass Lake Township meeting, residents may sue

The ruling also addressed concerns about William Lester being both a Grass Lake Township Board trustee and proprietary owner of Lester Brothers Inc., the ruling said.

“Clearly Lester had a financial interest in this project and should have had no involvement in the decision making surrounding the special use permit,” the ruling said.

The court ordered Lester to be disqualified from any future involvement in the issue and to not have contact with any township officials about it, according to the ruling. However, Lester can address the township as a member of the general public, it said.

1

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Springfield city council to look into conflict of interest accusations against member



By Joe Hickman | Posted: Thu 5:36 PM, Mar 28, 2019 | Updated: Thu 5:37 PM, Mar 28, 2019

SPRINGFIELD, Mo. Springfield's City Council will investigate a conflict of interest complaint filed against councilwoman Jan Fisk, alleging that her family business, Fisk Limousines, benefited financially from work done for the city.

Fisk said that over the past couple of years she's noticed that more and more complaints against council members, who receive no salary, are being made in part because of widespread trolling on social media.

"I'm very disappointed when people are very malicious because I think a lot of times they just try to gather up the mud, throw it, and see what sticks," she said.

Fisk has spent seven years on the city council and her family has been a well-known part of Springfield's cultural scene, operating Fisk Limousine Service for over 40 years.

But this week the city council, including Fisk, agreed to authorize an independent hearing examiner to investigate two allegations of conflict of interest against her.



"I will fully cooperate with any inquiry," she said at Monday's city council meeting. "I'm passionate about public service and service always involves sacrifice. We all understand that comes with the territory. I want to stand up to the harassment and bullying that I am receiving."

The original complaint, filed by local activist Linda Simkins, alleges that Executive Limousine out of Kansas City was hired to supply charter bus service to Springfield's city government only to outsource the work to Fisk Limousine. The complaint alleges that Executive was nothing more than a "middleman to submit a bid on Fisk's behalf" and that it was possible that Fisk might even be part-owner of the Kansas City company.

"No, we do not have any part ownership in Executive," Fisk replied. "We work with them. It's a kind of a buddy system where we all work together."

Fisk explained that charter bus services all across the country work together to provide rides and that it's not uncommon for Fisk Limousine to receive calls from places like Dallas or Los Angeles-based companies who need a bus or limo dispatched to an area on short-notice when they don't have the transportation available themselves.

Fisk also produced a written timeline from the city attorney that stated, "prior to the award of the contract, (then city attorney) Dan Wichmer provided legal advice to city manager Greg Burris that there would be no violation of state law or the City's Charter to award a contract to Executive Limousines even though Executive Limousines might outsource the work to Fisk Limousines."

"I wasn't trying to game the system," Fisk said. "We were just trying to help the city when they said there is no conflict of interest and you're allowed to do it."

There's also a second conflict of interest complaint claiming that Fisk has voted on zoning issues while being involved in rental properties with her son.

"My son does have several properties that I don't have any ownership at all in," Fisk said.



But in a letter to the mayor, the Missouri Ethics Commission said "there are reasonable grounds to refer the case for violation of the local ordinances."

So now there will be an investigation and hearing conducted by an independent legal source outside the city government.

Those findings will then be turned over to the city council, who will make the ultimate decision on what action, if any, to take against Fisk.

When asked if she regrets what's happened?

"Yes, I have regrets," Fisk replied. "Because at the time I was assured there was no problem. I probably should have stepped back. But then again, there was need. They needed us."



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She says her biggest regret though, is the effect this will have on future candidates.

"There were a lot of people thinking about being on council who'll now say it's not worth it," she said. "We're going to lose very qualified people. Remember, it's not paid. It's all volunteer."

Right now there is no date set for the hearing and it's not known how much money the city will have to spend on the investigation.

timesunion

<https://www.timesunion.com/news/article/Neighbors-accuse-Saratoga-planning-board-chair-of-13703970.php>

Neighbors accuse Saratoga planning board chair of conflict of interest



IMAGE 1 OF 5

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Dr. Tom Yannios stands at the edge of his property where a proposed development is planned on Hill Road on Monday, April 24, 2017, in Stillwater, N.Y. Neighbors are upset with developer John Witt. His plans to ... more

SARATOGA – Despite town planning board Chair Ian Murray's January 2016 public vow to not reap any benefit from the proposed Witt Construction project Cedar Bluff, residents who oppose the 31-home subdivision insist Murray has a conflict of interest and should not be involved in deciding the fate of the project.

They argue Murray's past work as a landscaper with developer John V X

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John Cashin, who is among those fighting Witt's Cedar Bluff, said as highlighted e La Femme Home

FEEDBACK



"Sooner or later these developers will be appearing before the planning board, the zoning board of appeals or some other town official for an

approval of one sort or another," Cashin said. "And it is simply good for

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Murray, owner of Brookside Nursery, in a January 2010 statement preserved in planning board minutes, admitted he has worked for the developers, but is not currently doing so.

"I have no ongoing contractual relationship with Witt Construction and no knowledge or expectation of receiving any contractual benefits from this subdivision," the minutes quote Murray, who did not return a Times Union phone call on Wednesday for comment. "I have worked on properties that have been built and/or developed by Witt Construction. All my contractual relationships have been directly with the homeowner, separate and apart from Witt Construction."

The owner of a 2015 award-winning Witt home on Brown Road, says that is not the case. The owner, who would only identify herself as S. Clements, said her house, which won the Saratoga Showcase of Homes People's Choice Award, was landscaped by Brookside Nursery. She also said that she never wrote a check to Brookside. Rather, she said all payments were funneled through Witt who charged her for all of the home's "extras" like landscaping.

Brookside Nursery, according to the Saratoga Showcase of Homes website, also did the landscaping for three other Brown Road homes, built by La Femme Home Builders, that won the showcase in 2016, 2017 and 2018. All of them were built in the town of Saratoga.

However, in 2014, when the Brown Road lots went to the planning board, minutes show that Saratoga Development LLC along with Michael

LaMorgese and David DePaulo were named as the parties seeking

X

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on their business relationships with Murray and his nursery.

Saratoga Supervisor Tom Wood stands behind Murray and said there is no conflict of interest.

"Ian is above board," Wood said. "Ian is a professional in every regard. I don't believe there is any conflict of interest."

Earlier this month, **Wood and the town won a lawsuit**, brought forth by the proposed Witt development neighbors, to remove Murray from the planning board. The neighbors argued that Murray currently lives in Ballston Spa, not Saratoga, and thus is ineligible to hold a seat on the town planning board. State Supreme Court Judge Ann C. Crowell dismissed the suit, ruling that Murray's permanent residence is Saratoga because he intends to move back to the town after he builds a house. In court documents, Murray said he expects to begin living in Saratoga again this summer.

Wood also said there is no reason for Murray, who has chaired the board since 1994, to recuse himself.

"That is not an issue," Wood said. "He will go forward in all cases, not recusing himself."

In addition to working with Witt, in March 2018, Murray and Witt met privately with town engineer Ken Martin to discuss the controversial Cedar Bluff proposal, as previously reported in the Times Union.

Tom Yannios, whose property borders the proposed Cedar Bluffs site, says X

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"These issues have been shoved under the table," Yannios said. "He will continue to do work for Witt and other developers. They form a cabal, one supporting the other. We all know that is happening."

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Saratoga planning board chair meets privately with developer John Witt



Judge dismisses lawsuit against Saratoga planning board chair



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COLUMBIA DAILY TRIBUNE

Councilman Ian Thomas investigated for side deal

By Tess Vrbin / Columbia Daily Tribune

Posted Apr 5, 2019 at 5:40 PM

Two complaints from Columbia residents to the Missouri Attorney General's Office have prompted the Boone County Sheriff's Department to investigate whether a deal Fourth Ward Councilman Ian Thomas made with housing developers was illegal.

Thomas said he does not believe he broke the law and he hopes the investigation is dropped. One of the complainants, Jason Gavan, said he believes Thomas did in fact break the law and should be charged and removed from office.

Boone County Sheriff's Department spokesman Tom O'Sullivan confirmed Friday that the department is investigating the complaints against Thomas. The department rarely receives a request for an investigation from the Attorney General's Office, he said.

Assistant Attorney General Steven Kretzer sent the request to Boone County Sheriff Dwayne Carey on March 7, asking the department to conduct the investigation "if further inquiry is warranted" into the two complaints.

Thomas answered questions from the sheriff's department last week, he said.

He reported himself to the state ethics commission in November after learning he might have violated state law in private negotiations with the developers of the Oakland Crossing subdivision. He wrote in his report that he wanted Oakland Crossing to include affordable housing, and the developers said they could not because the Planning and Zoning Commission had already approved their plans. They offered to contribute to the Columbia Community Land Trust instead, and Thomas and Jay Gebhardt, an engineer with A Civil Group, agreed on a \$40,000 donation to the trust in exchange for Thomas' support of the development plans.

City attorney Nancy Thompson recommended that Thomas send the report to the ethics commission, he told the Tribune.

"There was definitely a question over what I did, and I wanted to be clear that I wasn't trying to hide anything," Thomas said.

Thomas said he has not heard back from the commission since filing the report.

He issued an apology in February, saying he wanted to regain his constituents' trust.

Two days after Thomas' apology, Gavan filed his complaint alleging Thomas broke the law.

The councilman violated both civil and criminal laws, Gavan said in an interview.

Missouri Revised Statute 576.020 states that a public official commits the crime of corruption "if he knowingly solicits, accepts or agrees to accept any benefit, direct or indirect," in return for a vote, recommendation or any other action in his capacity as a public servant.

Section 1 of Missouri Revised Statute 105.452 prohibits public officials from acting in the capacity of their positions in exchange for a payment or promised payment, even to a third party.

Columbia city prosecutor Robert Rinck has not investigated Thomas. Gavan wrote in his complaint that he believed Rinck was “unwilling or unable to pursue this political corruption,” but he told the Tribune on Friday that Rinck cited a conflict of interest. The city prosecutor’s office would probably have to appoint someone to carry out an investigation for them, Gavan said.

His complaint alleges that the Columbia City Council has regularly engaged in “pay to play” activities with commercial real estate developers for decades.

“Those who refuse to engage in this corruption or speak up against it will find their project rejected and receive notices of ‘infractions’ and ‘violations’ if they own properties within Council’s control,” he wrote. “This abuse is typically carried out through off the record communications but has become so common that Mr. Thomas seems to not even be aware that it is considered corruption.”

The threat of retaliation makes this activity very difficult to prove, Gavan told the Tribune, and the situation with Thomas is a rare case of “hard evidence against this practice.”

The other complainant, James Meyer, cited Revised Statute 105.452 in his complaint.

“Although Thomas would not have personally benefited financially from this scheme, it appears to be a corrupt quid pro quo to further his ideological agenda at the expense of the property rights and due process rights of the developer and the landowner,” Meyer wrote.

He also wrote that he tried to file a complaint with the Missouri Ethics Commission, but they refused to accept it because he submitted it within 60 days of the April 2 municipal election, in which Thomas ran unopposed and received a third term on the council.



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County adopts anti-181 resolution

Apr 9th, 2019 | By [South Platte Sentinel](#) | Category: [Lead Article](#)



By Jeff Rice
Staff Writer

Logan County's Board of Commissioners have registered their second formal protest against actions by Colorado's 72nd General Assembly.

With a 2-0 vote, with Commissioner Byron Pelton absent, the commissioners Tuesday, April 2, adopted a resolution opposing Senate Bill 19-181. That bill would make significant changes to the way oil and gas exploration and extraction are regulated in Colorado.

The proposed law has met with widespread opposition in rural Colorado, where gas and oil exploration often are an adjunct to agricultural production and, in some cases, mean the difference

between staying on the land or having to give up generations' worth of farm and ranch legacy.

Although Pelton was absent Tuesday — he was attending a work session in Denver on mental health issues in rural Colorado — he did submit a statement of support for the resolution that Chairman Joe McBride read into the record.

In part, Pelton's statement said he feared SB-181 would "drive successful oil and gas businesses out of Colorado..."

"I believe this loss in revenue will be devastating for ... Colorado and will cause financial hardship for numerous other businesses in the state," Pelton said. "I am also fearful that a blow to Colorado's economy of this size will also make it impossible to increase funding to areas that so desperately need it, like roads, mental health, and education."

Commissioner Jane Bauder agreed, adding that the bill would create an expensive, unnecessary redundancy in the area of public health and safety.

"This bill will eliminate jobs, hurt rural economies and deter investment in Colorado's multibillion-dollar oil and gas industry," Bauder said. "It also makes public safety the top priority of state regulators, which is already being performed by (the Colorado Department of Public Health and Environment.) This means we would be paying two departments to do the same job. That's a waste of taxpayer money."

Logan County resident Jane Glenn also spoke in favor of the resolution. Glenn said that her son teaches school at Rocky Mountain High School in Fort Collins and, while he actually supports the proposed law, she fears the result will be less money for school districts.

"He's very good at what he does, and he deserves the pay raises he gets, but what industry is going to replace oil and gas if (SB-181) passes?" she said. "Where will his pay raises come from then?"

The Senate bill, which has passed both houses of the Legislature, was back in the Senate Tuesday after amendments were made last week in the House. It is expected to eventually end up on Gov. Jared Polis' desk, and the governor has said he will sign it. It would change the mission of the state Oil and Gas Commission from fostering an energy industry in Colorado to protecting citizens from the energy industry and would eliminate some barriers to municipalities banning certain types of oil and gas extraction within their boundaries.

In other business Tuesday, the commissioners opened bids on a new snow plow/dump truck and sent the bids to Road and Bridge Supervisor Jeff Reeves for his recommendation. The board also approved the annual agreement with Computer Information Concepts, Inc., for equipment for the county's finance department.

Two items of business had to be delayed from Tuesday's meeting. Marilee Johnson, who is chairperson of the entertainment committee on the Logan County Fair Board, told the commissioners the contract for the Triple Threat Tour is not yet ready for signing. The entertainment package of BlackHawk, Restless Heart and Shenandoah, is to perform in the Aug. 10 Night Show during the county fair.

The board also postponed adoption of amendments to the county's zoning regulations for camping areas. Bauder said she felt compelled to abstain from voting on the resolution because she is in the recreational vehicle business and that could be viewed as a conflict of interest. With Pelton out of town, there weren't enough commissioners left to vote on the resolution.

Both of those items were postponed until the April 16 meeting.

Ethics in Land Use in the News
March-April 2019

- 1) Is it a conflict of interest where the applicant before the zoning board of appeals for a project involving a family owned car wash and gas station is a longtime member of the local board of education and where five of the seven members of the zoning board or members of their immediate family are employed by the school district?
- 2) Is it a conflict of interest for a city engineer to review project plans submitted by company where her spouse is employed?
- 3) Is it a prohibited conflict of interest for a member of a preservation commission to participate in making a recommendation to the planning and zoning department regarding a proposed project in close proximity to his own property?
- 4) Is it a conflict of interest where a member of the planning commission voted on a proposed PUD ordinance (recommendation to Town Council) where he was a developer and part owner of the land that was sold to the applicant twenty years ago?
- 5) Is it a good idea to enact an ordinance providing that any board or commission member having more than a 25 percent annual recusal rate based on total meetings, may be removed from that board or commission?
- 6) Is it a conflict of interest where an individual is both a township board trustee and the proprietary owner of an a company that owns the appearing before the board for approval of a proposal for a gravel pit to become an 11- to 12-acre pond in a subdivision of roughly 20 houses?
- 7) Is it a problem where a member of the city council does not disclose that she was the co-owner of a rental management company with her son when discussing or voting on legislation regarding rental properties, nuisances or certain zoning changes?
- 8) Is it a conflict of interest where the chair of the planning board participates in discussions of a proposed project where he worked as a landscaper for the project applicant in the past but not on the current project and there is no current contractual relationship between the two?
- 9) Is it unethical for a city council member who wanted a project, already approved by the planning and zoning commission, to include affordable housing to engage I private negotiations with the developers who then offered to contribute to the Community Land Trust instead, and agreed on a \$40,000 donation to the trust in exchange for the Councilman's support of the development plans?
- 10) Is it a conflict of interest for a County Council to vote on amendments to the county's zoning regulations for camping areas where she is in the recreational vehicle business?

Relationships and Ethics in the Land Use Game

Patricia Salkin, Thomas Brown and Aisha Scholes*

Introduction

Ethical considerations in the land use decision making process can be organized into a number of categories including first and foremost the broad subject of conflicts of interest.¹ Players in the land use game can find themselves in real or perceived conflicts situations based on personal financial interests resulting from investments, including businesses and real estate holdings (such as the location of their property vis-à-vis the location of the subject property before the Board), employment for themselves or members of their immediate family, and memberships in nonprofit organizations that may be either passive or active (e.g., simply dues paying member or officer or other volunteer engagement). Other relationships may be problematic, such as private relationships that typically have a shield of confidentiality, including the lawyer-client relationship or the doctor-patient relationship. This could also extend to members of the clergy who may appear before a board where their followers serve as members. This article discusses ethics issues that arise because of various personal relationships between members of land use boards, applicants and other stakeholders. Of course, disclosure of relationships that could be viewed as a potential conflict is always advisable, and the discussion of whether or not such disclosure necessitates a recusal may at times warrant discussion with board counsel.

Membership in Churches

Many people who serve on local boards belong to faith-based organizations and attend houses of worship in the community. Two recent New Jersey cases demonstrate how ethics allegations might arise based on this relationship. In both cases the court remanded the matters for further fact-finding. In the first case, the N. J. Supreme Court remanded the claim of conflict of interest in a zoning amendment vote by two municipal officials who held leadership positions in the applicant church. Specifically, the Plaintiff challenged the validity of an ordinance allowing the construction of an assisted living facility next to a church due to the alleged conflicts of interest of two members of the township council.² The Plaintiff alleged that one member should have been disqualified for a direct personal interest in the outcome based on his comment that he

*Patricia Salkin is Provost of the Graduate and Professional Divisions of Touro College and a land use professor at the Touro College Jacob D. Fuchsberg Touro Law Center. Thomas Brown '20 and Aisha Scholes '20 are students at Touro Law Center. The authors also acknowledge the contributions Matthew Loeser, Esq., a contributing author to Provost Salkin's Law of the Land Blog, who authored some case summaries for the blog that are discussed in this article.

¹ Other topics such as bias and prejudice, campaign promises and contributions, bribery and corruption, ex parte communications and dual office-holding to name just some examples where ethical issues arise in the land use game, are beyond the scope of this article. But see, Salkin, *American Law of Zoning*, 5th ed., Chapter 38.

² *Grabowsky v. Twp. of Montclair*, 115 A.3d 815 at 817 (2015).

might admit his mother to the proposed assisted living facility one day.³ Additionally, Plaintiff argued that this same member and another member should have been disqualified because they were also members of the church and thus had indirect personal interests in the outcome.⁴ As for the first member's comment that he might seek to admit his mother in the proposed assisted living facility, the court held that this alone did not create a conflict of interest that would disqualify him from voting on the ordinance because there was no evidence that the mother depended on the construction of the facility for her care, and the comment alone did not distinguish the member from any other person in the community who may or may not send their family members to the facility one day.⁵ The court remanded this issue so that the trial court could develop the record as to whether the comment revealed an actual personal interest.⁶ As for the other ground, the court noted that, "...public officials who currently serve in substantive leadership positions in the organization, or who will imminently assume such positions, are disqualified from voting on the application."⁷ The court clarified that the church's interest in this ordinance is not automatically imputed to all its members but only to those members who occupied a position of substantive leadership.⁸ The court remanded on this issue so that the trial court could determine whether the two members held substantive leadership positions in the church.⁹

In a second case from New Jersey, the Plaintiff sued to enjoin the Township and the Planning Board from considering a proposal to exchange municipal property with a church.¹⁰ She argued that there was a conflict of interest because a majority of Township and Board members were also members of the church.¹¹ Specifically, she alleged that:

the Council and Board were disqualified from acting on the proposed land exchange due to conflicts of interest; (2) the Township was required to exercise its power of reversion over the Church's property; (3) the Township breached its fiduciary duty to the residents in pursuing the property exchange in light of the conflict of interest; (4) the Township improperly spent funds in furtherance of the proposed exchange, which Township officials had already decided should occur; and (5) the transfer of land to the Church violated the New Jersey Constitution.¹²

The court held that it could not determine whether there was a conflict of interest for the first, second, third and fifth counts until the Township and Board took a final vote to approve the mu-

³ Id.

⁴ Id.

⁵ Id at 827.

⁶ Id.

⁷ Id. at 818.

⁸ Id. at 829.

⁹ Id. at 830.

¹⁰ *Matula v. Twp. of Berkeley Heights*, 2015 WL 5009859, at *1 (N.J. Super. Ct. App. Div. 2015).

¹¹ Id.

¹² Id. at *2.

municipal property exchange with the church.¹³ At the time of the decision, the Township and Board were merely investigating the value of the proposed exchange.¹⁴ Therefore, the matter was not yet ripe for adjudication, and Plaintiff had not yet exhausted her administrative remedies “to make her opinion known of the land transfer.”¹⁵ However, Plaintiff alleged in the fourth count in her complaint that the Township passed three final resolutions in 2013 that were voted on by Township council members who had conflicts of interest.¹⁶ For this count, the court noted that the church’s interest in the outcome of the proceeding could be imputed to a Township council member who also has a role in the church if that council member “holds, or who will imminently hold, a position of substantive leadership in an organization reasonably is understood to share its interest in the outcome of a zoning dispute.”¹⁷ In order for a conflict to disqualify a member from voting on a resolution, that conflict must be “distinct from that shared by members of the general public.”¹⁸ The court held that the record did not provide enough information regarding the substantive roles of the Township council members in the church.¹⁹ Therefore, it was impossible to determine whether any of the members had a disqualifying conflict of interest, so the issue was remanded to enable a record to be developed.²⁰

Membership in Nonprofit Organizations

It is also common for members of local boards to be active or passive members of nonprofit organizations in the community. These might be civic groups, clubs and organizations, or educational and advocacy entities. Questions arise based upon where in **the spectrum activity in the organization is** – for example, there may very well be a difference between someone who is simply a dues paying member, and someone who holds an office with the organization.

In Global Tower Assets, L.L.C. v. Town of Rome, The First Circuit Court of Appeals found no unethical conflict of interest on the part of board members who maintained membership in a conservation association that was opposed to the proposed project.²¹ Here the applicants acquired a leasehold interest in land on which they sought to build a wireless communications tower.²² After the Planning Board denied its application, they brought a substantive due process claim alleging that certain Planning Board members, through their membership in the Belgrade Region Conservation Association (the “BRCA”), had a financial interest in conservation easements the BRCA held.²³ The court found these vague allegations of conflicts of interest and financially motivated conspiracy were insufficient to show that the Planning Board acted in the kind of con-

¹³ Id. at *4.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id. at *6.

¹⁸ Id.

¹⁹ Id..

²⁰ Id.

²¹ *Global Tower Assets, L.L.C. v. Town of Rome*, 810 F.3d 77, 90-91 (1st Cir. 2016).

²² Id, at 79.

²³ Id. at 80.

science-shocking fashion required for substantive due process challenges.²⁴ Accordingly, the District Court’s dismissal of the case was affirmed.²⁵

In another Connecticut case, a member of the Planning and Zoning Commission was a former spokesperson for the local athletic foundation who had an application before the Commission to make changes to sports fields at a high school.²⁶ Before the Commission made its decision, plaintiff objected to the participation of a Commission member because he was a prior spokesperson for the Darien Junior Football League (DJFL) and a founding member of DAF.²⁷ Despite this objection, the Commission ultimately granted the application with the participation of the Commission member in question.²⁸ Plaintiff appealed, arguing that the application’s approval was invalid due to the member’s conflict of interest.²⁹ The court held that the member’s previous affiliations with DAF and DJFL did not disqualify him because the record showed that his “open mindedness was not imperiled and that he considered whether the application conformed with the regulations in a fair and impartial manner.”³⁰ Additionally, there was no evidence that the Commission member had a financial or pecuniary interest in the outcome of the application.³¹ The court reasoned that not every “conceivable interest” is sufficient to disqualify a zoning official.³² If this were true, many individuals, especially those who are active in their communities, would not be able to participate on zoning commissions.³³ Courts must determine whether an interest disqualifies an official on a case-by-case basis, requiring a review of whether such interests indicate “the likelihood of corruption or favoritism.”³⁴

A recent lower court case in New York voided the enactment of a local law agreeing that a town supervisor had an admitted conflict of interest, stated on the record that she was recusing herself from participating in the matter, was reminded and was well-aware of her conflict of interest and, yet, continued to participate in the public hearing for the Local Law.³⁵ The supervisor was a member of the homeowner association that was suing in another related action, not only Plaintiffs, but also the Town’s Zoning Board. The court opined that the supervisor “arguably has a personal interest in the outcome of this litigation, not just as a member of the general public, but also as a plaintiff in the related litigation — a fact that she publicly acknowledged.”³⁶ The Court was displeased with the fact that the supervisor “presided over the meetings and remained present during every discussion about this issue, contrary to her stated recusal,” noting that such

²⁴ Id. at 90-91..

²⁵ Id. at 91.

²⁶ *Michalski v. Planning & Zoning Comm’n of Town of Darien*, 2015 WL 5976190, at *1 (Conn. Super. Ct. Sept. 14, 2015).

²⁷ Id.

²⁸ Id. at *2..

²⁹ Id. at *3.

³⁰ Id. at *14.

³¹ Id. at *13..

³² Id. at *12.

³³ Id.

³⁴ Id.

³⁵ *Titan Concrete, Inc. v Town of Kent*, 94 N.Y.S.3d 817 (Putnam Co. 2/27/2019).

³⁶ Id.

participation has the potential to influence other board members who will exercise a vote with respect to the matter in question.³⁷ The court said that while the supervisor

announced she was recusing herself from any voting regarding the matter, it was her presence at the meeting, as well as her engagement in discussions with the public about the issue, that makes her presence problematic. She admitted to having many conversations with community members about this issue and their concerns. She was vague about with whom she spoke, and it is unclear if she relayed the substance of those conversations to her fellow Board members while in executive session or outside of the public meeting. There is an appearance, or the threat of an appearance, that she proverbially “drove the bus” when it came to enacting the subject Local Law.³⁸

The court advised that in this situation, the supervisor should have deferred to the deputy supervisor or to another Town Board member to run the meetings as her presence, “in front of her neighbors and the public, where it was well known that her homeowner association’s lawsuit was pending, could have influenced her fellow Town Board members.”³⁹ The Court concluded that, “Simply put, her continued presence gave her neighbors the impression that they had an ‘in’ with the Town Board, and Plaintiffs with the belief that they ‘didn’t stand a chance.’”⁴⁰

Family Members and Friends

There are many reported cases that discuss potential conflicts of interest based on familial relationships. These arise in the context of family members who may be employed by the applicant (ranging from small businesses and organizations where everyone knows their employees, to large operations where the applicant appearing before the board may not have known that a relationship existed) and family members who are in fact the applicant. In addition, the public may perceive conflicts when friends of board members appear before the board. This is problematic from an ethics perspective since board members in small communities may know many applicants who appear before them, and exactly how close a friendship needs to be to constitute a conflict is an open question. For example, if an applicant appears as a connection on a board member’s LinkedIn page or as one of hundreds of friends on Facebook, that alone should not necessarily be a disqualifying conflict. If, however, the board member was in the applicant’s wedding party, that may signal a much closer relationship warranting further examination.

Below are some examples of recent decisions and opinions involving family and friends. Over the years there have also been a fair number of reported decisions involving spouses who appear before boards in professional- or in member-of-the-public roles, spouses who work for the municipality who appointed the board member and spouses who may serve on different boards within the same jurisdiction and may be in a position to cast votes regarding the spouse or may be reviewing decisions of the board their spouse sits on. The Michigan Appeals Court suggested in dictum that there would be a conflict of interest where a board member’s spouse wrote a letter

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

and appeared at a hearing in opposition to a request.⁴¹ In this case the applicant purchased a building used for industrial purposes which was non-conforming since 1994. He requested that the Zoning Board recognize the prior non-conforming use and was denied. A member of the Board owned the adjacent property and had tried to purchase the subject property but was outbid, and then offered to purchase the property at the hearing. The Board member's wife wrote a letter and appeared at the hearing as a member of the public in opposition to the application, and the Board member did not abstain from voting on the petition, but instead supported another member's motion to deny the petition. He was absent at the next meeting of the Zoning Board of Appeals when the minutes from the appeal hearing were approved. The applicant argued that this created a clear conflict of interest and that he was denied a fair, impartial hearing. The Board member was asked by the applicant's counsel to disqualify himself from voting on this matter in light of his conflict of interest, but he did not. The Michigan Court of Appeals decided the case on the merits in favor of the applicant and so did not issue a holding regarding the alleged conflict of interest. However, the Court stated that there did in fact seem to be a conflict of interest because of the reasons stated above.⁴²

A New York trial court found no conflict of interest where a board member was related to a former attorney for the law firm representing the applicant.⁴³ In this case a Greek Orthodox Church and religious education center sought special exceptions and variances to build a 25,806-square-foot two-storey cultural center directly adjacent to the church. The Zoning Board of Appeals granted the permit with conditions attached following a full-day public hearing that lasted more than 12 hours with 16 witnesses appearing in support of the application and 24 witnesses opposed. Three homeowners that live across the street challenged the granting of the permit on a number of grounds, including irregularity in the conduct of the administrative hearing and an alleged conflict of interest of one of the members of the Board. Although the petitioners claimed that they were not given the ability to cross-examine the Church's witnesses, the Court said that this did not violate their Due Process rights as they clearly had notice and more than ample opportunity to be heard. The alleged conflict of interest centered on the fact that one member of the Board is the sister-in-law of an attorney who used to work for the law firm representing the church. Further, the law firm's current managing partner was a campaign manager for the Board member's estranged husband. The Court noted that the petitioners failed to point to a specific violation of N.Y. General Municipal Law Article 18 (the State statute governing municipal ethics), and that they did not identify any pecuniary or material interest in the application by the Board member. Further, the Court noted that since the vote was unanimous, the Board member did not cast the deciding vote.⁴⁴

The Rhode Island Ethics Commission opined that it is permissible for the spouse of a deputy zoning official to petition the Town Council for an amendment to the zoning regulations to allow the deputy zoning official to open and operate an art studio and gallery on her spouse's proper-

⁴¹Trail Side LLC v. Village of Romeo, 2017 WL 2882554 (Mich. Ct. App. 7/6//2017).

⁴²Id.

⁴³Healy v. Town of Hempstead Board of Appeals, 61 Misc. 3d 408 (NY Suffolk Co. 8/28/2018).

⁴⁴Id.

ty.⁴⁵ Under Rhode Island statute a public official is prohibited, among other things, from participating in any matter in which she or he has an interest and that is in substantial conflict with the proper discharge of their public duties.⁴⁶ Further, public officials may not represent themselves or any other person before an agency of which he or she is a member or by which he or she is employed,⁴⁷ and public officials are prohibited from authorizing another person to appear on their behalf in front of an agency of which they are a member or by which they are employed.⁴⁸ The Commission concluded that since it was the spouse and not the deputy zoning official who wished to appear before the Council, the zoning official was neither a member of the Town Council nor employed by it, and that the Council did not appoint the zoning official, there would be no prohibition.⁴⁹

The New Hampshire Supreme Court dismissed a conflicts claim alleging that the chair of the Zoning Board of Adjustment had a longtime relationship with the applicant on the basis that the claim was untimely,⁵⁰ serving as another important reminder that where actual or perceived conflicts exist, they must be timely raised in the course of the administrative or quasi-judicial review process. In this case the City Council appealed the lower court's dismissal of their claims. The plaintiffs updated a local zoning ordinance which eliminated manufactured housing parks. The Zoning Board of Adjustment heard a case in which a company, Toys, requested a variance to expand their manufactured housing park. This variance was requested after the plaintiffs implemented the change to the ordinance. The defendants granted the variance request seemingly without the addition of Toys meeting their burden of proving unnecessary hardship. The plaintiffs claimed that the board chairman was a longtime friend and associate of Toys and that there may have been discussions about this transaction outside of an official meeting. The Court held that the plaintiff did not raise the issue of a potential conflict in a timely manner, noting that, "The conflict of interest or potential bias issues must be raised at the earliest possible time in order to allow the local board time to address them."⁵¹

In an unreported case, a New Jersey appeals court agreed that no conflict of interest existed between the president of the township council and his spouse who worked in a township department.⁵² The Committee to Stop Mahwah Mall was an informal group of residents that challenged the validity of an ordinance that permits retail and commercial development on a 140-acre tract of land. Plaintiffs alleged, among other things, that since the ordinance in question includes a provision for the construction of a 6-acre recreational field within the 140-acre tract of land, and the Township Council president's wife is the director of the town's recreational department, a conflict of interest existed.⁵³ The trial court held that the President/Mayor did not have a con-

⁴⁵ RI Ethics Commission, Advisory Opinion No. 2019-22 (March 29, 2019).

⁴⁶ Id. Citing R.I. Gen. Laws sec. 36-14-5(a).

⁴⁷ Id. Citing R.I. Gen. Laws sec. 36-14-5(e)(1).

⁴⁸ Id. Citing R.I. Regulation 520-RICR-00-00-1.1.4(A)(1)(b).

⁴⁹ RI Ethics Commission, Advisory Opinion No. 2019-22 (March 29, 2019).

⁵⁰ Rochester City Council v. Rochester Zoning Bd. of Adjustment, 194 A.3d 472 (NH 2018).

⁵¹ Rochester City Council v. Rochester Zoning Bd. of Adjustment, 194 A.3d 472 (NH 2018).

⁵² Comm. to Stop Mahwah Mall v. Twp. of Mahwah, 2014 WL 10102328, at *1 (N.J. Super. Ct. App. Div. July 20, 2015).

⁵³ Id..

flict of interest based on his wife's position. On appeal, the court affirmed, finding that the Plaintiffs did not meet their burden of proving that the President's vote benefited his wife in a non-financial way.⁵⁴

Physician-Patient Relationships

The New Jersey Supreme Court recently decided a novel relationship issue involving the physician-patient relationship, concluding that a "meaningful relationship" between a zoning board member and his or her immediate family member could support a finding of a disqualifying conflict of interest.⁵⁵ Because of the potential life-saving diagnosis that physicians may make for their patients, the Court opined that, "A person may have difficulty judging objectively or impartially a matter concerning someone to whom he would naturally feel indebted."⁵⁶ The court continued, "...we cannot expect Zoning Board members to have a disinterested view of a doctor with which they, or immediate members of their family, have had a meaningful patient-physician relationship."⁵⁷ The Court went into a lengthy discussion of the relationship between individuals and their doctors. They said:

Physicians are responsible for caring for and maintaining the physical and mental health of their patients so that they can enjoy productive and happy lives. In that light, the deep bonds that develop between patients and their physicians are understandable.

Physicians every day diagnose and treat patients for the mild and malignant maladies that afflict the human body and mind. It would be natural for a patient to owe a debt of gratitude to a doctor who has removed a cancerous lesion from the skin, repaired a shoulder injury, replaced a knee, set a broken bone, performed heart or kidney surgery, delivered a child, prescribed life-enhancing or -saving medications, provided psychiatric therapy, or every year treated symptoms for the common cold or flu. It is not unusual for a physician to treat a family over the course of decades.

A person may have difficulty judging objectively or impartially a matter concerning someone to whom he would naturally feel indebted. By any measure, under the conflict-of-interest codes previously discussed, we cannot expect Zoning Board members to have a disinterested view of a doctor with whom they, or immediate members of their family, have had a meaningful patient-physician relationship.

We cannot here fully limn the contours of what would constitute a meaningful patient-physician relationship because that may depend on the length of the relationship, the nature of the services rendered, and many other factors. The determination will be fact specific in each case. A few examples, however, should provide some guidance. On one end of the relationship spectrum may be the physician who, once five years ago, merely inoculated the patient with a flu shot, and on the other end may be the physician who, ten years ago, performed a life-saving heart transplant. A primary-care physician who examines a patient annually and tends to the patient's health-care issues as they arise or the

⁵⁴ Id. at *9.

⁵⁵ *Piscitelli v City of Garfield Zoning Board of Adjustment*, 2019 WL 1371557 (NJ 3/27/2019).

⁵⁶ Id.

⁵⁷ Id.

surgeon who performs a life-altering or -enhancing procedure will fall within the sphere of a meaningful relationship that should prompt disqualification.⁵⁸

The Court next focused on how the disqualification should occur. After all, there is also a special confidentiality that attaches to the physician-patient relationship. The mere existence of the relationship, especially if the physician is a specialist, can create an uncomfortable situation where the board member-patient may not want the existence of the relationship known. The Court acknowledged that, “The potential disclosure of highly intimate and personal health-care information raises legitimate privacy concerns and therefore must be addressed with great sensitivity.”⁵⁹ However, the Court also noted that this must be weighed against the Board member’s duty to the public interest, and concluded that, “. . .the nature of any disclosure relating to a patient-physician relationship must be weighed against the official’s reasonable expectation of privacy.”⁶⁰ Therefore, should the Court determine a meaningful patient-physician relationship exists, “. . .the nature of the disclosure will depend on, among other factors, the degree of need for access to the information, the damage excessive disclosure would cause to a patient’s right to privacy, the adequacy of safeguards to prevent excessive disclosure, and the personal dignity rights of the official.”⁶¹ The Court continued:

Every reasonable precaution must be taken to protect against the unnecessary release of a patient's health-care information. Certain sensible approaches should be kept in mind. A zoning board member who recognizes the applicant as one with whom he or she has a meaningful patient-physician relationship can simply disqualify himself or herself from the case, with nothing more being said. One would expect, in most cases, a zoning board member to know whether that type of meaningful relationship exists, after some explanation by the zoning board attorney. If in doubt, the member can consult with the board attorney and speak in hypothetical terms to gain an understanding whether recusal is appropriate. Erring on the side of disqualification when the board member has had a patient-physician relationship with the applicant is the most prudent course.⁶²

While voluntary disqualification may be the prudent course, it is certainly possible that Board members might conclude that disqualification is not necessary since they might not believe that a meaningful relationship exists. This presents the risk, however, that an objector who has knowledge of the existence of the physician-patient relationship with the Board member or a member of their family might disclose it in a challenge to the member’s participation in review of the matter at hand. The Court opined that, “In such cases, the board member should not be required to disclose anything more than that he or she, or a family member, was at one time a patient of the applicant or objector or someone with a property interest at stake in the outcome of the proceedings.”⁶³ Should the objector contest the participation of the board member further, then the Court opined that disclosures should be heard in camera and ex parte before a Law Division judge, and that

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id.

Only if the judge concludes that disclosure is necessary should some form of disclosure be mandated, and then only to the extent reasonably necessary, minimizing the invasion of privacy into such sensitive matters. A board member should not be required to reveal the precise nature of a medical condition or other intimate details of treatment. Any potential disclosure must be balanced against the sanctity of the privacy of the patient's health information.⁶⁴

Conclusion

As always, the best course of action is to avoid even the appearance of impropriety. Despite the fact that there are only about two dozen ethics cases and opinions reported annually, and that the courts often are forced to find that the alleged unethical conduct rises to a legal violation to sustain the alleged conflict, the costs, even for those who prevail, can be significant economically and reputationally. Taken with the daily availability of news clips reporting on alleged unethical conduct in the land use decision-making process across the country, combined with the willingness of the public to take to social media to express their displeasure over the conduct and behavior of the players in the land use game, land use ethics have never been under a stronger microscope. Those who volunteer or earn a living in the land use process should carefully consider the consequences of their action and inaction.

⁶⁴ Id.



Ethical Considerations in Environmental Law

Environmental Law Section

Nancy K. Mendel, Moderator
Dwight Merriam
Christopher P. McCormack

Monday
June 10, 2019

Your Moderator

Nancy K. Mendel

Winnick Ruben Hoffnung
Peabody & Mendel, LLC
New Haven, Connecticut



Our Panelists

Dwight Merriam

Attorney at Law
Weatogue, Connecticut



Christopher P. McCormack

Pullman & Comley LLC
Hartford, Connecticut



And Special Thanks to Our Session Organizer...

Lee Hoffman

**Pullman & Comley LLC
Hartford, Connecticut**



Agenda

- **Panel Introductions**
- **Common Ethical Tricks and Traps that Occur in Environmental and Land Use Matters**
- **Ethical Issues Associated with Retaining and Using Technical Experts and Consultants**
- **Questions from Moderator and Audience**



Ethical Considerations in Environmental Law

Identifying and Avoiding Ethical Problems in Hearings

Dwight Merriam

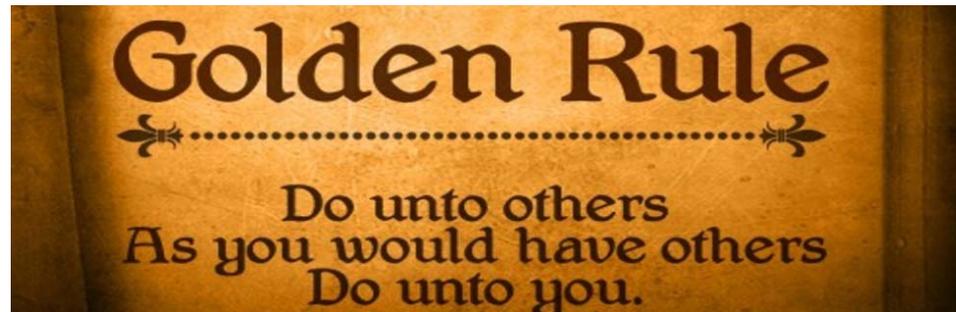
To Be Addressed...

- What are the ethical issues most often encountered in environmental proceedings?
- How can they be avoided?
- What is your judgment about what is, and what is not, ethical?



Two Helpful Rules

- Golden Rule



- Light of Day Test

Ethical tests

The simplest and most universal is 'The **Sunlight Test**' which involves answering three critical questions:

- ▲ *Would you be happy if others acted in the same way towards you?*
- ▲ *Would you be prepared to have your behaviour reported in the press?*
- ▲ *Would others approve of your actions?*

The First Three Are One and the Same



1. Conflict of Interest

- A problem for lawyers, parties, public officials, and advocates.
- *Cioffoletti v. Planning & Zoning Commission*, 209 Conn. 544, 552 A.2d 796 (1989).

“The court found, however, that although Katz was “unquestionably a zealot,” his actions did not demonstrate a conflict of interest or a predetermination of the plaintiffs' application.”

2. Predisposition

- *Burton v. Commissioner of Environmental Protection*, (SC 19664) (Conn. Dec. 13, 2016).

“See *Burton v. Commissioner of Environmental Protection*, supra, 291 Conn. 796 (plaintiff's complaint alleged that "the hearing officer assigned to the permit renewal proceeding ha[s] a **conflict of interest** and [is] **biased**, and . . . the department has **prejudged** the permit renewal application and has declined to consider the environmental impact of Millstone's discharge water“)”

3. Bias

- *Recycling, Inc. v. Commissioner Of Energy And Environmental Protection, (AC 38868) (Conn. App. Ct. Jan. 9, 2018).*

“...must show more than an adjudicator's announced previous position about law or policy. . . . [must] show[] that the adjudicator has prejudged adjudicative facts that are in dispute. . . . A tribunal is not impartial if it is biased with respect to the factual issues to be decided at the hearing. . .

Lessons Learned



- **Lost pilot's 3 C's**
 - Climb
 - Communicate
 - Confess
- **Recusal**
 - None of us are that important
 - Emphasize saving the process

4. Ex parte Communications

“Sec. 4-181. ...no hearing officer or member of an agency who, in a contested case, is to render a final decision or to make a proposed final decision shall communicate, directly or indirectly, in connection with any issue of fact, with any person or party, or, in connection with any issue of law, with any party or the party's representative, without notice and opportunity for all parties to participate.”

- An exception to the rule... *Gardiner v. Conservation Commission*, 222 Conn. 98, 608 A.2d 672 (1992).

“Scott Gardiner, who owns land adjoining the proposed development ... claims that the conditions attached to the permit granted by the commission provide for the ex parte submission by Reynolds of certain engineering data related to the propriety of issuing the permit, which he will have no opportunity to challenge, and that, therefore, his constitutional right to due process of law has been violated.”

- **Ex parte communication undefined in the UAPA... *New England Rehabilitation Hospital of Hartford, Inc. v. CHHC*, 226 Conn. 105, 627 A.2d 1257 (1993).**

“The plaintiffs further argue that even if it was proper for CHHC to conduct an investigation, it was improper to introduce the report containing those findings into evidence in the contested case. This report, the plaintiffs claim, constituted an ex parte communication, and thus, the defendants had the burden of proving that the report did not prejudice the plaintiffs. [W]e conclude that the report was not an ex parte communication.”

Lessons Learned



- Disclose
- Keep the hearing open for limited additional submissions
- If you can't keep it open, make submission narrow and try to get agreement

The Concept of Fundamental Fairness

- *Barry v. Litchfield Historic Dist. Com'n*, 950 A.2d 1, 108 Conn. App. 682 (App. Ct. 2008).

The commission appeals from that judgment, claiming that the court improperly determined that the plaintiff's right to fundamental fairness had been violated because a commission member, who recused himself from voting on the application, testified adversely to the proposal as an expert and as a member of the general public at the time of the public hearing.

5. Conflicting Ethical Codes

“3. We shall not accept an assignment from a client or employer to publicly advocate a position on a planning issue that is indistinguishably adverse to a position we publicly advocated for a previous client or employer within the past three years unless (1) we determine in good faith after consultation with other qualified professionals that our change of position will not cause present detriment to our previous client or employer, and (2) we make full written disclosure of the conflict to our current client or employer and receive written permission to proceed with the assignment.



19. We shall not fail to disclose the interests of our client or employer when participating in the planning process. Nor shall we participate in an effort to conceal the true interests of our client or employer.

- **2018 AIA Code of Ethics and Professional Conduct**
Rule 2.105:

If, in the course of their work on a project, the Members become aware of a decision taken by their employer or client which violates any law or regulation and which will, in the Members' judgment, materially affect adversely the safety to the public of the finished project, the Members shall: ...



FROM THE OFFICE OF GENERAL COUNSEL

- (a) advise their employer or client against the decision,**
- (b) refuse to consent to the decision, and**
- (c) report the decision to the local building inspector or other public official** charged with the enforcement of the applicable laws and regulations, unless the Members are able to cause the matter to be satisfactorily resolved by other means.

- **Society of Wetlands Scientists, Sec. 1.3:**

Accurately and adequately represent the facts and results of investigations and research and not base decisions on theological or religious beliefs, political pressure or client or supervisor pressure.



Lessons Learned



- Address with all consultants
- Ask for their ethics codes
- Agree in writing what will be done
- Counsel client and get acknowledgement

Ethics Scenarios from Real Life

...with special thanks to Dean Patricia Salkin

**Reports in the national press the last two months
with no answers yet...**

but can you guess the outcomes?

Is it a conflict of interest where the applicant before the zoning board of appeals for a project involving a family owned car wash and gas station is a longtime member of the local board of education and where five of the seven members of the zoning board or members of their immediate family are employed by the school district?

Is it a conflict of interest for a city engineer to review project plans submitted by company where her spouse is employed?

Is it a prohibited conflict of interest for a member of a preservation commission to participate in making a recommendation to the planning and zoning department regarding a proposed project in close proximity to his own property?

Is it a conflict of interest where a member of the planning commission voted on a proposed PUD ordinance (recommendation to Town Council) where he was a developer and part owner of the land that was sold to the applicant twenty years ago?

Is it a good idea to enact an ordinance providing that any board or commission member having more than a 25 percent annual recusal rate based on total meetings, may be removed from that board or commission?

Is it a conflict of interest where an individual is both a township board trustee and the proprietary owner of a company that owns the subject property appearing before the board for approval of a proposal for a gravel pit to become an 11- to 12-acre pond in a subdivision of roughly 20 houses?

Is it a problem where a member of the city council does not disclose that she was the co-owner of a rental management company with her son when discussing or voting on legislation regarding rental properties, nuisances or certain zoning changes?

Is it a conflict of interest where the chair of the planning board participates in discussions of a proposed project where he worked as a landscaper for the project applicant in the past but not on the current project and there is no current contractual relationship between the two?

Is it unethical for a city council member who wanted a project, already approved by the planning and zoning commission, to include affordable housing to engage in private negotiations with the developers who then offered to contribute to the Community Land Trust instead, and agreed on a \$40,000 donation to the trust in exchange for the Councilman's support of the development plans?

Is it a conflict of interest for a County Council to vote on amendments to the county's zoning regulations for camping areas where she is in the recreational vehicle business?



Ethical Considerations in Environmental Law

Managing Environmental Professionals: Confidentiality and Conflict Challenges

Rules of Professional Conduct Theme and Variations

Christopher P. McCormack

Nature of the Problem: Attorney and Expert

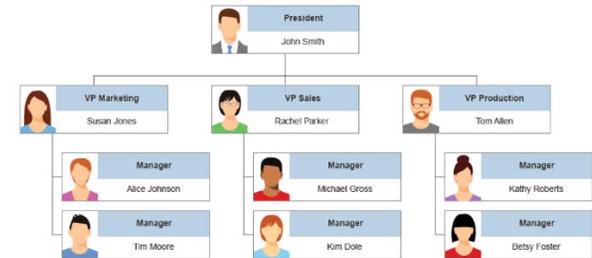
- Objectives of Expert Retention
 - Technical Dimension of Legal (Regulatory) Issues
 - Enforcement/Litigation
 - Transaction Support
 - Privilege and Confidentiality
 - Engagement by Attorney (“to support legal advice”)
 - Confidentiality = *Ethical Obligation* (RPC 1.6)
- Obligations of Technical Environmental Professionals (esp. LEPs)
 - “Hold Paramount”
 - Significant Environmental Hazard

The logo consists of a blue rectangular background with white text. The text reads "Trust Me, I'm An Expert" in a bold, sans-serif font. The background features faint, light blue gear-like patterns.



- **Client Confidentiality Exceptions: RPC 1.6(c) – reasonable belief ...**
 - Prevent client crime/fraud likely to result in substantial injury to financial interest or property of another
 - Prevent/mitigate/rectify client crime/fraud in which lawyer’s service had been used
 - Secure legal advice about attorney’s ethical obligations
 - Comply with law or court order
- **Conflicts of Interest: RPC 1.7 – concurrent conflict ...**
 - Representation of one client directly adverse to another
 - Significant risk that representation will be materially limited by lawyer’s responsibilities to another client, a former client, a third person, or a personal interest of the lawyer

Nature of the Problem: Organizational Client



- **Who's the Client?** RPC 1.13: the organization, acting through duly authorized constituents
- **The Customer is Not Always Right**
 - If lawyer knows anyone associated with organization is acting, intends to act, or refuses to act in a matter related to the representation that is a violation of legal obligation *to organization*, or a violation *imputable to organization*, AND reasonably likely to result in substantial injury to organization, lawyer must act in best interest of the organization.
 - Unless it's not in organization's interest to do so, *report up* ("refer the matter to higher authority in the organization")
 - How far? "If warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."



Nature of the Problem: How Far is Too Far?

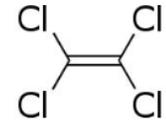
- **Withdrawing from representation: RPC 1.16**
 - *Shall withdraw* if representation will result in violation of RPC or other law
 - *May withdraw* if (inter alia) ...
 - Client persists in action involving lawyer's services that lawyer reasonably believes is criminal or fraudulent
 - Client has used lawyer's services to perpetrate crime/fraud
 - "Other good cause for withdrawal exists"
- **Obligation to Third Parties: RPC 4.1**
 - Lawyer shall not knowingly make a false statement of material fact or fail to disclose a material fact when necessary to avoid assisting client crime/fraud
 - May need to give notice of withdrawal and disaffirm an opinion, document, affirmation, etc.

Skweekly Kleen: Theme

- Client: Skweekly Kleen Dry Cleaners, Inc.
- Lessee from SCREG
- *Sale of business, assignment of lease*
- Negotiation with potential purchaser PLONE
 - PLONE: highest standards of environmental stewardship
- Direct engagement of environmental consulting firm TGIF
 - Test of soil and groundwater
 - Report results *to attorney*



Skwecky Kleen: Variation I



Chemical Formula: C₂Cl₄

- Testing reveals *significant environmental hazard condition*
 - Conn. Gen. Stat. §22a-6u
 - Threat to drinking water, possible vapor exposure to building occupants
- TGIF has *independent statutory obligation* to report to client AND property owner SCREG
- Owner has *independent statutory obligation* to report to DEEP
- Skwecky Manager:
 - Results are privileged and confidential
 - No disclosure to SCREG or PLONE, by attorney or TGIF

Now what?

- A. Follow client instructions.**
- B. Give notice of withdrawal because client instructions create conflict with your legal obligations.**
- C. Report up to company President.**
- D. Ignore client instructions, disclose to SCREG's counsel, instruct TGIF to develop followup plan per SEH statute.**



Skwecky Kleen: Variation II

- Testing reveals contamination but not within statutory “SEH”
 - Client advised of results but not provided with documents
 - Seller’s representation/warranty to PLONE: known environmental information has been disclosed.
 - PLONE’s counsel: would not proceed if there’s contamination.
 - PLONE’s counsel: *has property been investigated?*
- Skwecky Manager: 
 - Results confidential – do not disclose
 - We’ll take our chances on the reps and warranties

Now what?

- A. Follow client instructions.
- B. Follow client instructions but memorialize in confidential internal memo.
- C. Follow client instructions but memorialize in confidential and privileged written communication to client.
- D. Withdraw from representation and tell PLONE's counsel: no answer to question about environmental investigations.
- E. Report up to company President

**INTERNAL
MEMO**

DATE

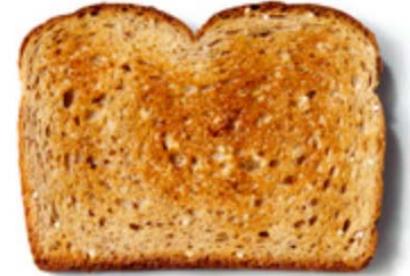
May 14, 2014

Skwecky Kleen: Variation III

- So you opted for the internal memo (Option B).
- Litigation ensues on breach of reps/warranties, and perhaps fraud ...
 - Discovery requests seek environmental reports and related documents
 - Client denies giving instructions, threatens malpractice claim
- Client's malpractice lawyer sends document preservation notice



Now what?



- A. You're fine: you have a file memo.
- B. The client's toast: not only do you have the test results in your file, but your file memo confirms client's knowledge.
- C. You're toast: the client denies what's in the file memo but the results and the memo lead to bad result in the PLONE litigation, which doesn't shape up well for the malpractice claim.
- D. You're really toast: on top of everything else, PLONE could grieve you or even bring direct action for assisting client's fraud.

Questions and Discussion

Nancy K. Mendel

**Winnick Ruben Hoffnung Peabody & Mendel, LLC
110 Whitney Avenue
New Haven, Connecticut
203-772-2763 Ext. 305
nancymendel@winnicklaw.com**

Dwight Merriam

**Attorney at Law
80 Latimer Lane
Weatogue, Connecticut 06089
860-651-7077
dwightmerriam@gmail.com**

Christopher P. McCormack

**Pullman & Comley, LLC
850 Main Street
Bridgeport, Connecticut 06601
203-330-2016
cmccormack@pullcom.com**