

EXPERT WITNESS TESTIMONY IN AGENCY PROCEEDINGS

- An expert is a person with specialized knowledge arising from training or experience
- The commission may draw on the expertise of its own members, if expertise is properly disclosed on the record with the ability of the applicant or its/her/his expert to engage the issue(s)
- "Determining what constitutes an adverse impact on a wetland is a technically complex issue," frequently requiring expert testimony
- An expert's opinion as to *adverse impact to wetlands* is key to a commission's decision making
 - For example, an expert may claim that a proposed project will likely change the hydrology of a wetland, but without proof that such changes will have an *adverse impact* on those wetlands, a commission will lack substantial evidence in the record to support a denial (*AvalonBay Communities, Inc. v. Inland Wetlands & Watercourses Agency of the Town of Stratford*)
- To be meaningful, an expert's testimony must be based on "probability," not "potentiality," "concerns" and "possibilities" (*AvalonBay Communities, Inc. v. Inland Wetlands & Watercourses Agency of the Town of Stratford*)
 - Be very careful about experts who "have concerns" and otherwise pull their punches. Get them focused on the impact and whether it is adverse, and how it is adverse, etc.
- Every expert can be questioned
- Evaluating an expert's expertise
 - Develop the ability to ask relevant and probing questions, especially if the commission did not retain its own expert
 - What is the expert's area of expertise?
 - Is testimony offered on an issue within that area of expertise?
 - What facts did the expert consider to support his or her conclusions? Get specific.
 - What observations did the expert make? On site review? Paper review? (If the latter, upon what documents did she/he rely? What significance did she/he give them?)
 - What assumptions did the expert make?
 - Does the expert's conclusion follow from the facts, observations, and assumptions?
- Credibility and factual determinations are solely within the province of the commission; the commission is not required to believe any witness, even an expert

- Although a wetlands commission may disbelieve an expert, it cannot conclude that the opposite of the expert's testimony is true without supporting evidence of that conclusion
- In general, a lay commission without expertise in the subject matter may not substitute its own judgment for contrary expert testimony (*Feinson v. Conservation Commission*)
 - To do so without making public the basis of its decision and without offering the applicant an opportunity to rebut is to act arbitrarily and contrary to principles of fundamental fairness. (See above re disclosing the expertise of a commission member.)
 - The commission cannot disregard the only expert evidence on the issue when agency members lack their own expertise or knowledge (*Tanner v. Conservation Commission*)
 - Non-experts may offer reliable and substantial evidence (*Kaeser v. Conservation Commission*)
- Complex application fees, as provided for in the DEEP model regulations, can assist a commission in hiring its own expert, who, at a minimum, can review the applicant's expert testimony or reports. An amendment to the agency's regulations is needed to place the burden of paying for evaluations on to the applicant
- An expert may testify to the "significance," "quality," or "value" of a wetland, but no such distinction exists in the Inland Wetlands and Watercourses Act. "Significant" as used in the Act modifies "impact" not "wetland" or "watercourse"
 - The Act does not distinguish among wetlands and watercourses by value (but testimony about the nature and quality of the resource is not irrelevant); the emphasis is upon the impact and whether it is adverse
 - Section 22a-36. Inland Wetlands and Watercourses. Legislative Finding. "Such unregulated activity has had, and will continue to have, a significant, adverse impact on the ..."
 - Section 22a-42a(c)(1) "The inland wetlands agency shall not hold a public hearing on such application unless the inland wetlands agency determines that the proposed activity may have a significant impact on wetlands or watercourses"