

2016 MUNICIPAL INLAND WETLANDS AGENCY  
CONTINUING EDUCATION WORKSHOP

*Legal and Administrative Updates*

By the Connecticut Attorney General's Office

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RECENT COURT CASES

**Appellate Court Case**

1. *H-K Properties, LLC v. Town of Mansfield Planning & Zoning Comm'n*, 165 Conn. App. 488 (2016)

East Brook F, LLC, East Brook T, LLC, and East Brook W, LLC (defendants) filed an application for a special permit to build an addition to the East Brook Mall with the Town of Mansfield Planning and Zoning Commission (commission). By checking a box on the application, defendants acknowledged that they would notify neighboring property owners of their proposal pursuant to Article 5, § B (3) (c) of the Mansfield Zoning Regulations. The commission adopted the regulations by the authority granted to it through General Statutes § 8-7d (a).

The commission complied with proper notice requirements. The commission held a public hearing and approved defendants' application on February 21, 2012. On February 27, 2012 the commission published notice of its decision in the Willimantic Chronicle (Notice Date).

Defendants, however, never gave notice to neighboring property owners, including H-K Properties, LLC (plaintiff). Plaintiff appealed the commission's decision on October 26, 2012, eight months after the commission approved the application. Plaintiff argued that it had not received proper notice and, therefore, the commission's decision was not valid.

Defendants moved for dismissal of plaintiff's appeal based on untimeliness. They claimed that General Statutes § 8-8 (b) governed the appeal, and that the plaintiff lost its right to an appeal when it failed to appeal within 15 days of the Notice Date. Conversely, plaintiff claimed that § 8-8 (r) governed, and under that provision, plaintiff had not lost its right to an appeal, because it could appeal up to one year after the Notice Date.

The trial court heard the appeal and found in favor of plaintiff. The trial court ordered the matter remanded to the commission. The defendants appealed. The Appellate Court reversed the trial court's ruling, and vacated it for lack of subject matter jurisdiction over the plaintiff's appeal. In other words, the trial court could neither hear, nor decide the case because plaintiff had failed to appeal within 15 days of the Notice Date in accordance with § 8-8 (b).

Under § 8-8 (b), an aggrieved party must start an appeal in a zoning case within 15 days from the date the land use board publishes a notice of decision. Section 8-8 (r) alters the time-frame for an appeal when *a board* fails to comply with notice requirements. When a board fails to comply with notice requirements, an aggrieved party may appeal up to one year after the notice of decision.

Section 8-8 (r) was not triggered in this case. Section 8-8 (r), in pertinent part, reads: *In any case in which a board fails to comply with a requirement . . . any appeal . . . shall be taken not more than one year after the date of that decision or action.* Thus, § 8-8 (r) is triggered only in cases where *a board* fails to comply with notice requirements.

In this case, plaintiff argued that § 8-8 (r) was triggered because the commission failed to give plaintiff proper notice. The *commission*, however, did give plaintiff proper notice, because it duly published its decision; having done so, the publication gave "constructive notice" to the community, including the plaintiff. Thus, the commission did not fail any requirement and § 8-8 (r) was not triggered.

Plaintiffs also argued that § 8-8 (r) was triggered when the commission failed to make sure that defendants notified neighboring property owners as required by the commission's regulations. The Appellate Court rejected this argument. Although § 8-7(d) granted the commission authority to adopt the regulations such as these that imposed additional notice obligations on the applicant, the enabling statute did not require the commission to ensure that defendants comply. Thus, the commission had no duty to ensure that the defendants notified the plaintiff, the commission did not fail any requirement, and, once again, § 8-8 (r) was not triggered.

Since § 8-8 (r) was never triggered, § 8-8 (b) governed plaintiff's appeal. Based on § 8-8 (b), plaintiff's appeal was untimely and plaintiff lost its statutory right to appeal from the commission to the courts.

### **Major Points:**

- Section 22a-43 of the Inland Wetlands and Watercourses Act incorporates the time requirements of § 8-8 into the appeals procedure. Generally, aggrieved parties must appeal within 15 days of the date that a commission publishes its notice of decision. However, where a board fails to meet requirements (such as notice requirements), an aggrieved party may appeal within one year of the date of notice of decision.
- A commission does not automatically assume a duty to ensure an applicant's compliance with regulations it adopts through the authority contained in § 8-7(d) for additional notices.

### **Superior Court Cases**

1. *Dichello v. Hamden*, 2015 WL 7055199 (Oct. 16, 2015)

The plaintiff applied for a permit to construct a driveway, septic system, and utilities with associated grading for the purpose of accessing the upland area of a property that contained

wetlands. The plaintiff also intended to construct a single-family residence on the upland area. There were also offsite wetlands. Neighbors opposed the application and hired an expert to present findings to the commission. The commission denied the application, citing the applicant's failure to provide prudent and feasible alternatives to reduce the impact of the construction on the surrounding wetlands and failure to consider mitigation measures to reduce the adverse impact of the construction on wetlands. (Half the property was wetlands; the proposed driveway was 600 feet through wetlands and the application involved a proposal to fill wetlands.)

The plaintiff appealed the decision, arguing that feasible and prudent alternatives were presented to the commission and that detailed mitigation plans were provided, pursuant to § 22a-41(a). Furthermore, the plaintiff alleged that the commission had predetermined the denial of the permit before considering the evidence presented at the public hearing.

The court began its analysis by discussing the concept of fundamental fairness. Although an administrative agency's hearings are often informal and do not follow the strict rules of evidence, the hearings must be conducted "so as not to violate the fundamental rules of natural justice." In other words, parties involved in the hearings have a right to produce relevant evidence, know the facts on which the commission is asked to act, cross-examine witnesses, and offer rebuttal evidence. The court noted that there is a strong presumption that proceedings of municipal commissions are conducted in a fundamentally fair manner. However, not all procedural irregularities require the reviewing court to nullify the commission's decision.

The plaintiff's claims were: 1) that the commission failed to state the reasons for the denial of the application on the record; 2) the site inspection of the commission was scheduled *after* the public hearing had commenced; 3) the commission's expert gave opinions not covered by his report; and 4) the previous three claims and the general conduct of the hearings constituted predetermination by the commission.

In general, the court ruled that it was entitled to search the record in default of a set of reasons of record for the decision the commission did make; there was nothing in the content of the site inspection report that drove any of the issues explored in the public hearing; the circumstances surrounding the engagement of the commission's expert weren't material; and the expert's report and testimony were entirely open to rebuttal by the plaintiff's experts and adequate opportunity to do so was a matter of record.

As to the claim of predetermination, the court rejected the plaintiff's claim. A plaintiff has a difficult burden to prove predetermination. In order to prevail, the plaintiff must show that the agency members had made up their minds to deny the application no matter what evidence was used to support it: a claim of predetermination goes to the process by which a decision is made and not to the content of the decision. In fact, even if the commission had been entirely wrong in denying the application, it does not mean that its decision was predetermined. Ultimately, the court, having searched the administrative record, concluded that the commission displayed no improper conduct. The commission continued to ask for further information during the hearing and proposed alternatives to the plaintiff's plans, indicating that had not determined to deny the application; in fact, hiring an expert to review the application and report to it was itself an indication of the commission's lack of predetermination on this file.

Turning to its review of the merits of the commission's decision, the court noted the difficulties inherent in review of an entire record where the commission has not articulated on the record its reasoning. This task is made all the more difficult when a reviewing court applies other

precedent to its review, such as the Supreme Court's observation that what constitutes an "adverse impact" to the regulated resource(s) is a "technically complex issue" frequently requiring the testimony of experts. Where there is such conflicting testimony among experts, a commission's failure to articulate the reasoning for its decision on the record necessarily puts the reviewing court at a disadvantage when it comes to applying the substantial evidence standard of review. After all, one of the key aspects of the IWWA is the charge to regulatory authorities to *balance* the protection of the resource against the property owner's right to use his property.

The court summarized the main issue for determination as whether the proposed impact of the location of the driveway and of the house and associated septic system posed an adverse impact and constituted the only feasible and prudent alternative plan. Its review of the record, which was very detailed, allowed it to conclude that the commission had erred in denying the application.

The court did rule that the applicant provided feasible and prudent alternatives for the project and suggested measures to mitigate damage to the wetlands. The applicant had submitted an "alternative C" to the commission, which moved the house to an area where it was believed to have a less adverse impact on the surrounding wetlands. Additionally, alternative C moved the location of the driveway, which ran through the wetlands, and included a detailed planting procedure and invasive plant removal plan to mitigate storm water runoff. The commission's experts raised concerns about potential alterations to the hydrology of the site. However, the only alteration to the site recommended by the commission or its experts was the suggestion of a raised driveway, which the commission believed was not addressed by the applicant, leading to the denial of the application.

The court found that the issue was indeed addressed by the applicant's engineer, who opined that the construction of the raised structure would lead to additional soil compaction and tree clearing since a large crane would be needed to put the structure in place. The court found that the commission's soil scientist contradicted himself by proposing the raised structure, but had expressed concerns about soil compaction and clear cutting to make room for the standard driveway. Furthermore, the court found that the applicant's engineer was the only expert who, by virtue of his professional qualifications, was truly capable of assessing the requirements of building a raised structure in lieu of a standard driveway. In addition, the court stated that there was no disagreement by the commission or the experts opposing the applicant's mitigation proposals. Since these experts only made basic suggestions to modify the mitigation plan, the court found that the record did not support any finding that the mitigation proposed was inadequate under the factors for consideration contained in section 22a-41(a) of the IWWA.

The court ruled that there was but one conclusion to which the commission could have come; it sustained the plaintiff's appeal and remanded the matter to the commission with an instruction to issue the permit with such reasonable conditions as it might further determine.

### **Major Points:**

- The rules of fundamental fairness govern each and every commission proceeding.
- In order to prevail on a predetermination claim, the applicant must prove that the agency had made up its mind to deny the application no matter what evidence had been placed before it.

- The impact to the regulated resource(s) requires a close attention to how the "harm" is supported by the evidence. Where the testimony of experts on both sides of the issue is in play, it is important to focus carefully on what the factors for consideration require, and whether the "only feasible alternative" has been fairly proposed in light of the IWWA's requirement that conservation be balanced with respect for the right to use property.

2. *Preston v. Rabon*, 2016 WL 1164979 (Feb. 26, 2016)

Rabon filed a complaint with the commission, alleging that his neighbors, the Benjamins, had committed wetlands violations. The Preston Inland Wetlands Enforcement Officer issued a notice of violation to the Benjamins in response to Rabon's complaint, determining that the Benjamins had completed excavation within 100 feet of wetlands without a permit. It was later determined that the unpermitted excavation work extended into the Rabon property.

The commission approved the Benjamin's remediation plan, which included the Benjamin and Rabon properties, although the commission made no determination that the Benjamins had any legal right to access Rabon's land. Rabon denied the Benjamins access to his land. The Town of Preston then brought an action to compel Rabon either to allow the Benjamins to gain access to his land to perform the remedial work, or to compel him to perform the work himself.

The court rejected Rabon's assertion that he was an "innocent landowner" and therefore could not be compelled to remediate. The court noted that the commission was not compelling Rabon to pay for or perform the remediation himself; rather, the commission wanted Rabon to grant the Benjamins access to the property so that *they* could perform the remediation. Furthermore, the court reasoned that Rabon put himself in the position of having to allow the Benjamins to propose access to his land for remediation purposes due to his complaint. In other words, Rabon's failure to "react" to the existence of the violation also made him a violator. The court ordered Rabon to either allow the Benjamins access to remediate or to remediate the land himself within 45 days.

**Major Points:**

- The maintenance of a violation is a violation itself and exposes the party maintaining the violation to liability and costs of remediation, regardless of whether or not the party committed the initial violation. (A notice of violation can serve as a preliminary enforcement tool, in advance of issuing a formal order. Section 22a-44(a) of the IWWA, which provides for the issuance of orders, states that: 'If the inland wetlands agency or its duly authorized agent finds that any person is conducting *or maintaining* any activity, facility or condition which is in violation of sections 22a-36 to 22a-45, inclusive, or of the regulations of the inland wetlands agency, the agency or its duly authorized agent may issue a written order, by certified mail, to such person conducting such activity or *maintaining such facility or condition* to cease immediately such activity or to correct such facility or condition.' [emphasis added])
- Wetlands and wetland violations are not limited by property lines; they are a function of the documented adverse impact to the regulated resource(s).

3. *Crawford v. Fairfield*, 2016 WL 2728401 (Apr. 19, 2016)

In 2010, the defendants applied for and received a permit from the Fairfield Conservation Commission (commission) to transform a nursery into a medical office complex. The plan was to erect an 18,400 square foot building, a 15,000 square foot structure, and 170 parking spaces. The only regulated activity of concern was the parking lot in the upland review area. The commission issued the permit. However, the zoning commission rejected the defendants' application.

In 2014, the defendants presented a "modified development plan" to the commission in which only a single 25,000 square foot building and one hundred twenty-five (125) parking spaces were proposed. A soil scientist's report accompanied the comparison plan, which report concluded that no adverse impacts to regulated resources were now or previously involved. The defendants made no application for a new permit nor did they request a modification of the 2010 permit. After deliberation, the commission determined that neither a new inland wetlands permit nor a public hearing was needed.

The plaintiff challenged the ruling, claiming that a new permit and a public hearing was necessary.

The court rejected the plaintiff's assertion. The court determined that there was substantial evidence that allowed the commission to rule that a new permit or modification of the old permit was not necessary. Specifically, the court cited a soil scientist's finding that the new proposed building plan would be less impactful than the building plan that was approved by the same commission in 2010. Additionally, the permit was not modified or amended, meaning that a notification by publication was not necessary.

**Major Points:**

- Once a permit to conduct a regulated activity is issued, it runs with the land.
- A second permit application is unnecessary where a modified development plan is identical with respect to the effect on the regulated resource(s).
- If a permit is in place, a modified plan that would have less impact than the original submission does not require a new permit, so long as it is entirely within the scope of the prior issued permit.

4. *Calco Construction v. Farmington*, May 12, 2016 (Dubay, J.)

On August 8, 2014, Calco Construction and Development Company and The Gardens, LLC (plaintiffs) filed an application with the Inland Wetlands and Watercourses Commission of the Town of Farmington (commission) to conduct regulated activities associated with developing a residential subdivision.

The subject property consists of approximately 14.23 acres, including approximately 4.24 acres of delineated inland wetlands.

Plaintiffs wanted to conduct activities within the 150 foot upland review area located on the property. There was no proposal to conduct regulated activities within the two wetland systems on the property. Initially, plaintiffs proposed a twelve-lot, conventional subdivision with a 600 foot road ending in a cul-de-sac. After consultations with town staff, the proposal was revised to a twelve-lot, clustered subdivision. The cluster subdivision would convey all wetlands on the property to the town as open space.

On October 6, 2014, the commission opened the public hearing for the application. The commission closed the public hearing on December 10. On January 4, 2015, the entire commission met and each commissioner raised issues he had with the application. On January 7<sup>th</sup> the commission again met to consider plaintiffs' application. At the end of the meeting, the commission established a subcommittee of three commissioners and one alternate "to review the existing record, organize the materials so that the commission could better consider the evidence as it related to their concerns, and draft a motion."

At a January 21, 2015 meeting, the subcommittee raised concerns about the application. The subcommittee members explained the evidence that supported these concerns. A motion to deny the application was raised. The subcommittee had drafted the motion. The motion contained a list of alternatives for plaintiffs to consider, as well as information found to be lacking. Following some discussion regarding the content of the motion and members' views, the commission approved the motion to deny the application unanimously. The commission denied the application because (1) the proposed activities would have adverse and substantial impacts on wetlands and watercourses and there were other possible feasible and prudent alternatives (which plaintiffs failed to present), and (2) in the alternative, the commission determined that the application was incomplete.

**Plaintiffs raised several arguments related to process and record support for its decision. The court could not sustain an appeal on the basis of any of the plaintiffs' claims. The two claims raised by the plaintiffs that had some novelty are the following procedural claims:**

The formation and deliberation of the subcommittee was not improper.

Plaintiffs argued that the formation of a subcommittee and deliberation of the subcommittee violated Gen. Stat. § 22a-42 and § 9-2 of the Farmington Ordinances because the commission created a subcommittee. Thus, according to the plaintiffs, the commission improperly delegated the responsibility and obligation of all voting members to a subcommittee without authority.

Plaintiffs also argued that the delegation was improper because the legislature intended to have a full complement of commissioners deliberate every decision. The court rejected plaintiffs' argument based on the plain meaning of § 22a-42(c), which requires only a quorum for decision making. The court reasoned that it would be "illogical" to conclude that a statute calling for a specific number of members and alternate members required all commissioners to deliberate every decision. In any event, the record indicates that the full commission met on January 4, 2014 to deliberate over the application.

Next, plaintiffs argued that deliberating and drafting a motion for decision is "too critical a part of the decision-making process" and that the full commission must be involved. The court rejected plaintiffs' argument. The court explained that a motion is a tool for a commission to

accept, modify, or reject a proposal: the drafting of a motion does not imply consent to the contents of the motion in whole or in part. The court deemed that it was acceptable for the subcommittee to have written a motion for denial of the application and have subsequently raised it before the commission for its consideration.

The court cannot hear claims based on the Freedom of Information Act (FOIA) because plaintiffs did not exhaust administrative remedies.

Plaintiffs alleged that the subcommittee, as a public agency, violated the Connecticut Freedom of Information Act (FOIA), General Statutes § 1-200 *et seq.* The court rejected plaintiffs' claim. Section 1-206 (d) of FOIA provides that appeals by aggrieved parties must be in accordance with the provisions of § 4-183<sup>1</sup>. Plaintiffs should have appealed a claimed violation of the FOIA to the Freedom of Information Commission (FOIC) proper. By not lodging their claim in the appropriate forum, the plaintiffs failed to exhaust administrative remedies, and the court lacked jurisdiction in this appeal under the Inland Wetlands and Watercourses Act over the alleged FOIA violations.

### **Major Points:**

- Commissions may properly delegate the review of the record created for an application to a subcommittee composed of commission members, so long as the report or product of the subcommittee's work is considered by the commission.
- A prepared motion placed before a commission is not improper so long as there is consideration and deliberation by a quorum of the commission.

### 5. *Martin v. Simsbury*, 2016 WL 673417, January 26, 2016

Martin (plaintiff) applied for a building permit on a property he owns in Simsbury. Plaintiff's application was denied. Zoning compliance officers expressed concerns regarding the property's potential for the presence of wetlands soil, which condition needed to be resolved before a permit could be issued. One of the officers required that plaintiff either (1) confirm that his property did not have wetlands soil, or (2) pursue a determination (declaratory ruling) from the Simsbury Inland Wetlands Commission (commission) in order to resolve his claim that his property was not subject to the Inland Wetlands and Watercourses Regulations of the Town of Simsbury.

Plaintiff did not initiate the process of pursuing a determination from the commission because he insisted that the regulations were not intended for people like him who had no wetlands on their property. Plaintiff pointed to the "official approved inland wetlands map" as the basis for his refusal to file for a ruling. He argued that it would not make sense for him to seek a determination of that which he insisted he already knew.

Plaintiff purported to appeal "the decision" of the commission. The municipal defendants (defendants) moved to dismiss the appeal for (1) lack of personal jurisdiction for failure to name

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<sup>1</sup> Under § 4-183 of the Administrative Procedure Act, "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court...."

the appropriate party (the Inland Wetlands Commission had not been named), and (2) failure to exhaust his administrative remedies.

Plaintiff simply did not initiate the administrative process with respect to obtaining a wetlands determination and cannot bypass that step by simply captioning his disagreement with prior decisions in related administrative matters as an appeal. Because the plaintiff failed to pursue his administrative remedies, this court granted the defendants' motion to dismiss.

**Major Point:**

- Aggrieved parties must exhaust administrative remedies before appealing to the courts.

