EXPERT TESTIMONY

Expert testimony is a routine aspect of inland wetlands and watercourses application review, and it may figure prominently in commission order proceedings as well. Here are some basic pointers regarding how to handle expert presentations.

- Who is an "expert"?
  - An expert is someone who possesses specialized knowledge brought from training or experience (soil scientist, engineers of various stripes, ecologists, and so forth).
  - A municipal agency member may be an expert if he/she has such experience or training (but one is not an expert merely by virtue of being an agency member).
- Agency members in the public hearing context should develop or refine their ability to ask questions of any expert who presents before them, especially if the municipal inland wetlands agency cannot hire its own expert(s), as substantial evidence to support their determination may well rest upon a thorough exploration of what the expert before the agency is setting forth as an "expert opinion." (*Huck v. Inland Wetlands and Watercourses Commission,* 203 Conn. 525 (1987))[1]
  - What is the expert's area of expertise and does the expertise of the expert elucidate the issue(s) before the agency about which a decision needs to be made?
  - Is testimony offered on an issue within that expert's area of expertise? (E.g., a "sanitary engineer" may be well capable of discussing the surficial surface water run-off impacts, but may not be professionally equipped to opine on the design requirements to cope with the run-off associated with the proposed development; one might need perhaps a civil engineer, a "P.E.", for that aspect of the proposal.)
  - What observations, and what kind of observations, did the expert make? For example, did the expert visit the site or did the expert formulate an opinion based on a paper or data-layer review?
  - What assumptions did the expert make? E.g., assumptions about design storms; or the capacity of the storm drain system, or the size of a detention basin relative to the projected size of a proposed development. Agency

[1] Reference is made to certain key cases that illustrate the summary comments. You are encouraged to read these for the fact patterns and the general discussion by the reviewing court.

members might want to inquire whether the expert has taken a conservative approach or is pushing the design envelope.

- What facts has the expert used to support his or her conclusions?

- Does the expert offer a conclusion(s) that reasonably follows from the facts, observations and assumptions?

- Every expert can (and should) be questioned, even about the testimony of other experts if there is more one similarly "expert" present and commenting on a particular aspect of the application. *See, e.g.*, the *Huck* case.

- A municipal agency appropriately considers expert testimony and reports, submitted on behalf of parties/intervenors, as part of the record. An expert who shows up to speak during the public comment portion of a public hearing and is not presenting on behalf of a party or intervenor is really only offering "comment" like other members of the public. If, however, the agency offers such person the opportunity, if time allows, to provide comment under oath, then the testimony can be received as expert in nature, but it is subject to cross-examination by the parties to the application. (Agencies that are presented with this prospect, sometimes driven by neighborhood groups or associations wanting to make a more impactful presentation without intervening, need to be aware of the limitations on "public comment.")

  - If a municipal agency member is in fact an "expert," and wishes to apply that expertise to the consideration of a matter pending before the agency, it is incumbent upon that member to disclose that expertise on the record while the record is still "open," that is, prior to the time for deliberation.

  - By doing so, one neutralizes potential post-decision appeal allegations of surprise or bias or improper procedure by an applicant or intervenor, claiming that the agency did not afford the participant(s) a fundamentally fair proceeding on the application to conduct regulated activities (or on an order that has gone to hearing before the agency).

  - If it is important to understand whether the purported expertise of the applicant's expert is actually material and relevant to the issue(s) to be decided (see above), it is equally important for all and sundry to get a sense of whether the agency member's expertise also is material and relevant to the analysis of that issue or issues.

  - If an agency member discloses his/her expertise and actively opines on the expert issue(s) arising out of active consideration of a pending application, especially in the public hearing process, one should fully expect that the applicant's expert would/should have time to respond or even rebut the agency member's opinion, as the *Feinson* case observes (see below). (Note, the

distinction here is one between the agency member disclosing his/her expertise and actively opining on the expert issue(s) up for discussion in, say, the public hearing.)

- A lay commission without expertise in the area may not substitute its own judgment for contrary expert testimony. (*Feinson v. Conservation Commission,* 180 Conn. 421 (1980))

  - To do so without making public the basis of its decision and without offering the applicant an opportunity for rebuttal is to act arbitrarily and without fundamental fairness.

  - The municipal inland wetlands agency cannot disregard the only expert evidence on the issue when the agency members lack their own expertise or knowledge. (*Tanner v. Conservation Commission,* 15 Conn. App. 336 (1988))

  - For the rule in *Tanner* to apply, there has to exist on the record of the agency's proceeding an "absolute disregard of the unanimous contrary expert opinion." In *Tanner,* there were multiple experts and they were in agreement about the probable non-existence of any "adverse impact on the wetlands." This is the key issue, of course; that the experts had differing emphases or views of the proposed project based upon their particular subject matter expertise, did not mean that the commission could freely "pick and choose" among them as if there were a disagreement about the *adverse impact to the regulated resource(s).*

  - Non-experts may offer reliable and substantial evidence (*Kaeser v. Conservation Commission,* 20 Conn. App. 309 (1989)), which may be relevant to an issue for determination by the agency; for example, "Every time we have a lot of rain, the water in the stream backs up behind the existing culvert over there." In other words, it is all of the evidence in the record on the issue of adverse impact, properly considered, and not a mere head count of experts that matters.

- Application fees can assist municipal inland wetlands agency with hiring their own expert(s) who, at a minimum, can review applicant's expert testimony or reports.

- Experts sometimes give opinions about their "concerns," or "*possible* impacts." That's mere speculation, and an agency shouldn't rely upon them. A properly prepared expert should be capable of rendering an opinion about what is "probable" or "reasonably likely" to occur respecting impacts. If the expert is not willing to commit to this level of prediction (and the agency should certainly ask about it), then the agency likely has good grounds to ignore the opinion altogether, and certainly ignore it in favor of a more definite opinion given by an opposing expert.

- Experts often testify on the "significance" of a wetland, but no such distinguishing standard exists in the Inland Wetlands and Watercourses Act (IWWA, "Act") to differentiate these resources as higher or lower on the scale of "value" – the term "significance" as used in the Act only modifies the word "impact" and not the words "wetland" or "watercourse." In other words, "impact" to a "low-value" wetland is nevertheless fully a "regulated activity" and is analyzed no differently than "impact" to a "high-value" wetland.

  - Section 22a-36 of the IWWA, the Legislative Finding, is crucial to understanding *what is subject to regulation and why.*
    "... Such unregulated activity has had, and will continue to have, a <u>significant</u>, adverse <u>impact</u> 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 <u>significant</u> <u>impact</u> on wetlands or watercourses, ..."

  - As an example of expert assumptions that the agency needs to probe, the expert may have "assumed" that the wetland was of no great significance, and, therefore, planned activities to occur on the site that otherwise would properly constitute an "impact" and under the guidance provided by the Act be subject to avoidance, or less impactful alternatives.