LAND USE AGENCIES OVERVIEW

TOWN OF WILTON

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LAND USE REGULATION

A member of the Planning and Zoning Commissions (PZC) and a member of the Zoning Board of Appeals (ZBA) exercises extraordinary responsibility in our system of government. Your commission or board deals directly with the most basic of rights over private property. Your Planning and Zoning Department staff, as well as our Town Counsel office, are here to assist you in your deliberations. Other resources are available in the Planning and Zoning office, including the well-regarded treatise on land use by Robert Fuller and Michael A. Zizka's ″What′s Legally Required?″

Land use law balances the rights of property owners versus the powers of the state in order to protect the health, safety and welfare of our citizens. Your authority comes directly from the state statutes, along with a body of case law which has interpreted the statutes. Your actions are further governed by the U.S. Constitution, by federal laws, and, of course, our own Zoning Regulations. Please keep the Regulations handy, as it will become the most well-read book in your household!

NOTICE

Proper legal notice is a prerequisite for P&Z and ZBA hearings. Legal notice must be published in one of the local newspapers have sufficient circulation in Wilton. Failure to publish the notice is a jurisdictional defect. Our Regulations also require in most applications that notice of the hearing be mailed to property owners.

PARTICIPATION/ATTENDANCE

It is important for each Board or Commission member to attend all meetings. When it is impossible to attend, members must make contact with the Chairman or staff and see that an alternate is available. If a member misses one session of a particular application, he/she has the option of listening to the tape/video of the earlier session, reviewing the record, and then participating in the deliberations.

TIME REQUIREMENTS

A site plan application must be decided within sixty-five days after receipt. If the Commission fails to do so, the site plan is automatically approved. The P&Z must also decide a subdivision application within sixty-five days after receipt. Special permit applications to the P&Z, as well as variance applications to the ZBA, require decisions within sixty-five days. If a public hearing is held on an inland wetlands application for a regulated activities permit, it must be decided within thirty-five (35) days after the completion of the public hearing per Conn. Gen. Stat. §22a-42a(c).

The board must determine if an application is complete and if it should go forward with the hearing. Because of the time restrictions above, sometimes a board must either assist the applicant

in completing the application or deny it without prejudice.

Public hearings on applications to zoning commissions, ZBAs and inland wetland agencies must be completed within thirty-five days after the hearing commences.

CONFLICT OF INTEREST

When a commission or board reviews an application, each member must determine whether he or she has a conflict of interest which might disqualify them from participating in consideration of the application. There are statutes which prohibit participation if a member has a personal or financial interest in the issue (Conn. Gen. Stat. §8-11 and §8-21; for Conservation, §22a-42(c)). Beyond these statutes, many conflict issues result in individual judgments. A Board member should not appear for or represent any person, corporation or entity (including a neighborhood association of which they are a member) in any matter pending before the ZBA or PZC. This applies whether or not the member is paid for the representation. If a member decides to recuse himself or herself, that fact should be noted on the record.

Section 7-148t bars any member of a commission or board exercising any power over any municipal land use decision from appearing for or representing anyone before that agency or participating in any decision of it in which the agency member knowingly has pecuniary interest.

There are some cases which are clearly conflicts. If the applicant is one of your business partners, that is an obvious one. If you have an ongoing personal or business relationship – for instance, suppose you do regular, ongoing business with a catering company, which now appears before you – that would be a conflict on interest. A relative, or your neighbor appearing would be an easy example. But many examples are not that clear: The mere fact that you have dined in a restaurant once or twice a year would not normally be a reason to abstain if the restaurant owner appears before you. What if it was not you who had the relationship, but your spouse? The prudent approach is to abstain if in doubt. You have highly competent alternates to step in, and you do not want to take a chance of jeopardizing the Commission′s action. Don′t forget, a conflict of interest can be a ground for an appeal. My informal rule is this: ″If you have to think about it for more than 30 seconds, you should probably recuse yourself.″

Often it is not the actual conflict, but the appearance of conflict. That appearance can cause a problem also. The cases say that in determining whether there is a conflict of interest, an *appearance* of impropriety is enough to undermine public confidence. It is up to the individual to decide what he/she has a conflict. It is not up to the Town Counsel, the Town Planner or the Commission. *But remember that the decision you make can impact or jeopardize the Commission decision.* A court finding of prejudice or bias could cause reversal of the Commission's action. Feel free to contact us at any time. It is less embarrassing to work this out in advance than to have the discussion during the meeting.

BIAS AND PREDETERMINATION

Predetermination is not based upon a specific statute, but rather a finding that a member (or the entire commission) has made up its mind and essentially decided the application before the public hearing. A member should not take a public position on a matter which is about to come before the Board. Similarly, it is prudent to avoid comment on a matter which you reasonably suspect may come before your board. This means avoiding letters to the editor and other public comments. This does not mean that you are expected to have no opinions on anything. However, it is important to avoid comments which suggest that you have made up your mind before the conclusion of a particular application. It is also important to keep an open mind on a particular topic. It is understood that you may have familiarity with a particular property or issue, and you may use this information as part of your deliberations, but it is best to allow the applicant and public a full opportunity to speak and rebut any information gained outside the hearing room. In one case a finding of predetermination was found where the actions of the chair of the commission ″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 process. Johnson v. Stafford Planning & Zoning Commission, Super. Ct. No. CV 91-47170S, J.D. of Tolland (1993) (Booth, J.).

REHEARING

Sometimes an applicant will return again after a denial. The PZC is not required to hear a petition relating to a proposed change in a zoning regulation or zoning map if it has heard a petition relating to the same within the previous year. The PZC is not required to consider a subdivision application if another application for subdivision of the same or substantially the same parcel is pending before the Commission. This does not mean that the Zoning Commission cannot hear the application; it means that it is not required to do so.

The ZBA is not required to hear any application for a variance if an application for the same or substantially the same variance was decided within the previous six months.

Ordinarily, a commission or board considering an application substantially similar to the previous one should not reverse its earlier decision unless there has been some material change in conditions or circumstances.

PUBLIC INSPECTION OF DOCUMENTS

Under the Freedom of Information Act, all records maintained by Zoning Boards of Appeals and Planning & Zoning Commissions are public records, and the public has the right to inspect such records promptly during regular office business hours or to receive a copy of such records. Any memos passed on to the staff become part of the public file. Communications to or from the Town Counsel may be privileged. Please note also that emails may be seen by others. You should assume anything you write or submit goes into a public file. While an application is pending, you should not communicate by email with members of the public regarding any aspect of the application. You should also not email your other board members about a pending application.

THE SITE VISIT

Often the Board or Commission members will view the property involved in the application before the hearing. These are usually arranged by the P&Z staff. Evidence acquired by personal observations can be considered as part of your deliberations. During such site visits, it is best to avoid discussion at the site, saving such discussion for the public hearing. It is usually best to be accompanied by a member of the P&Z staff. It is often best to discourage attendance by the applicant or the applicant's representative.

THE PUBLIC HEARING

It is important that all interested parties and citizens be permitted to participate in the public hearings. Basic fairness and due process applies, although court rules and strict rules of evidence do not apply. This includes inspection of any documents and plans presented at the hearing in connection with the application.

THE RECORD

All written reports and comments received by the Commission at or prior to a hearing should be included in the official record. There are no evidentiary rules which apply. In addition to the official reports or comments solicited from other commissions, municipalities or regional planning agencies, the record should contain all correspondence and testimony from municipal personnel and officials. Usually the Town Planner will submit a long list of materials. For example, information from health departments, engineers, police and fire officials and any technical or scientific experts and any other information presented to the Commission in connection with the application should be included in the record.

When a commission member intends to use his or her own expertise or personal knowledge of a site as basis for a decision, he or she should disclose that expertise or knowledge at the public hearing. The disclosure helps protect the record and apprises those concerned with the application of the factual basis for the decision. Interested parties therefore have a chance to respond or rebut or provide their own expert.

EX PARTE COMMUNICATIONS

Board and Commission members should not discuss a pending application except at a public hearing where all parties have an opportunity to participate. Discussions with interested parties held outside the public hearing are known as *ex parte* communications and are regarded suspiciously by the courts. Caution should be exercised during any "breaks" in hearings. Sometimes an applicant or member of the public will use that opportunity to speak to you. This should be avoided. If you should see an applicant at, for example, the movies, you should avoid conversation except for pleasantries. (This does create the risk that you will be viewed as unfriendly, but that is the price you pay for taking this job!)

TAPE RECORDING/VIDEO

Boards and commissions are required to have an audio recording made of each hearing in which the right of appeal lies to the superior court. Video is often used today. Work sessions will also now be recorded. It is important that all members speak into the microphone and identify themselves before they speak. All applicants and citizens should also be requested to speak into the microphone.

POST-HEARING INFORMATION

Information received after the public hearing should not be permitted in the official record. Receiving anything after the public hearing has closed is risky. If further information is needed, the better approach is to keep the hearing open for the further information and then give all parties the opportunity to review the information and comment on it when it is available.

VOTING

In general, in order to vote, a quorum must be present. In general, a majority of the quorum is required to reach a decision. There are certain special voting requirements. Zoning regulations and boundaries may only be adopted or amended by a majority vote of the total authorized number of members even if there are currently vacancies on a board. If residents lodge a "protest" with the commission protesting a proposed zone or regulation change, the change requires a two-thirds vote of all the total authorized number of commission members. A "protest" is a petition signed by property owners of 20 percent or more of the area of lots included in the proposed change or of lots within 500 feet in all directions of the area in question.

A vote of three-quarters of the authorized members of the PZC is required to waive certain requirements under the subdivision regulations. To grant a variance or to reverse the order of a zoning enforcement officer requires the concurring vote of four members of the ZBA. A tie vote results in a denial.

ENFORCEMENT

PZC is empowered by statute to specify how the regulations will be enforced. The Zoning Enforcement Officer (ZEO) may issue a cease and desist order or file a civil action to attempt to correct a violation. A ZEO may initially issue a less formal letter request to a violator prior to issuing a cease and desist order or filing a civil action. Any order of a ZEO may be appealed to the ZBA. The Town Counsel can be instructed to bring a legal action.

EXECUTIVE SESSION

Executive sessions may be held with regard to pending litigation, personnel matters, security and several others matters as provided by statute. All other sessions must be in public.

MUNICIPAL IMPROVEMENTS: CONN. GEN. STAT. SECTION 8-24

You will often hear Town officials refer to the need for an "8-24" report, and you will likely wonder the first time you hear it if this is a new interstate highway, the time of day, or what. Actually, the reference is to Section 8-24 of the Connecticut General Statutes, which states that the planning commission is entitled to review certain specified municipal improvements, including, among others, acquisition of land, sale or lease of municipal property, location of extension of public utilities, and location, acceptance, abandonment, widening, narrowing or extension of any streets. The Town cannot carry out such a project until it receives a favorable report consistent with planning considerations from the commission. The commission has 35 days to make the report. If an unfavorable report is received, the Town can only proceed if an annual or special town meeting approves the project by a majority vote.

ZONING BOARD OF APPEALS

Appeals from a decision of the zoning enforcement officer

State law empowers the ZBA to hear and decide appeals where it is alleged that there is error in any order or decision made by the zoning enforcement officer. A zoning enforcement officer may issue a cease and desist order (or fail to issue one) or may approve or deny zoning permits. In deciding whether a use of property violates the zoning regulations, the zoning enforcement officer interprets the zoning regulations and makes a factual determination whether the use of the property complies with the regulations. The ZBA reviews that decision and has the authority to interpret the regulations and to decide whether it applies to the situation before it. The ZBA can affirm, reverse or modify the decision appealed from, and it must state the reasons for its decision.

Variances

The ZBA is empowered to hear and decide applications for variances of the zoning regulations. A variance is authorization from the ZBA to use property in a manner otherwise forbidden by the zoning regulations. For a variance to be granted two conditions must be met: 1) the variance must be shown not to substantially affect the comprehensive zoning plan, and 2) adherence to the regulations must be shown to cause unusual hardship. Such hardship must be unique, which means that the property has physical characteristics different from other properties in the area, such as unusual soil, drainage or topography conditions.

Recent cases, Verrillo v. ZBA of Branford, 155 Conn. App. 657 (2015) and E & F Assocs., LLC v. ZBA, 320 Conn. 9 (2015), have limited the scope of variances.

The applicant has the burden of proving hardship peculiarly affecting his land. There are very few true hardships, and the hardship requirement is difficult to prove. For example, there is no unique hardship where all houses in the applicant's neighborhood were built on small lots and were subject to the same setback requirements. Financial loss does not constitute hardship (except in rare cases where the regulations destroy a parcel's value). Self-created hardship is not a proper basis for a variance; these cases often concern location of structures or lot division lines. The statute does not allow a variance to be granted where it would adversely affect public health, safety and welfare, or property values. The test for obtaining a variance is very strict, so the ZBA's authority to grant a variance is limited. The fact that the board granted a variance to another lot on the same street in a virtually identical situation is not a valid basis for granting a variance.

When a variance is granted, the ZBA must state the reasons for its action and must describe the hardship. The ZBA must also state its reasons when it denies a variance. The ZBA may attach reasonable conditions to the granting of a variance, provided the conditions are not impossible to satisfy.

PLANNING AND ZONING COMMISSION (PZC)

Site Plans

A site plan is a plan showing the layout and design of a proposed use which is filed with the commission to determine the conformity of the proposed building or use with the zoning regulations. The commission has no discretion beyond determining whether the plan complies with the regulations and a plan may be modified or denied only if it fails to comply with the regulations.

Subdivisions

A subdivision application requests the commission's approval to allow the division of a parcel of land into three or more lots. The commission must approve, modify and approve or disapprove a subdivision application. The commission cannot disapprove a subdivision application based upon standards not contained in the subdivision regulations. The commission acts in an administrative capacity when it considers subdivision applications, and its authority is limited to

determining whether or not the application conforms to the regulations. Where a subdivision application meets the regulations, the commission must approve the application. If the non-compliance is minor, the commission can modify and approve the application. The general rule is that the commission cannot attach conditions to an approval. However, the commission does have the authority to "modify" an application. The commission cannot consider offsite traffic conditions, municipal services required by the development or the effect of the subdivision on property values or the character of the neighborhood.

Special Permits

A special permit is a use which the regulations expressly permit under conditions specified in the regulations. The commission's function when considering special permit applications is to determine whether 1) the applicant's proposed use of the property is expressly permitted under the regulations, 2) whether the standards and regulations are satisfied, and 3) whether conditions necessary to protect public health, safety and welfare can be established. A special permit allows a use which is generally compatible with the zoning district but requires special attention as to its location and method of operation in order to keep it consistent with uses permitted as of right in the district. A special permit application which conforms with the regulations must be approved. However, recent case law has affirmed that the commission has reasonable discretion in deciding whether the proposed use meets the standards in the regulations and certain conditions attached to a special permit application consistent with the regulations may be upheld.

Changes of zone and changes to the zoning regulations

The commission has the authority to adopt and amend zoning regulations and to change the zone of any zoning district. These actions can only be taken after a public hearing. Zoning amendments and zone changes can be initiated by either the commission itself or by any interested party. The commission acts in a legislative capacity when it undertakes these matters, and has broad discretion as to the content of regulations and the boundary of zones. A regulation or zone change which has some relationship to promoting public health, safety, welfare or property values will almost always be found to be a valid exercise of the commission's power.

AFFORDABLE HOUSING

Although Wilton is in the middle of a moratorium, it is important to understand theses laws. In general, the burden is on the plaintiff to prove that the Commission or the Board acted illegally, arbitrarily or in abuse of its discretion. In view of recent decisions, along with amendments to the law in 2000 (Public Act 00-206), the standard for review has been clarified. In affordable housing actions that are appealed by a developer, the burden shifts to the Commission or Board to justify their decision. The court will then engage in a two-part process. (1) First, the court must determine that the decision and the reasons cited for the decision are supported by sufficient evidence in the

record. (2) If this is satisfied, the reviewing court then examines the record to determine whether there is sufficient evidence for the commission to sustain its burden of proof that (A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development. It is important, therefore, to build a proper record in order to defend against a challenge to an affordable housing appeal. In the majority of cases since the law was passed, municipalities which have denied an application have lost in court.

INLAND WETLANDS COMMISSION (IWC)

The IWC's jurisdiction is under the state Inlands Wetlands laws. Under the Connecticut General Statutes, the IWC may regulate inland wetlands and watercourses by regulating activity which might have an adverse environmental impact on such natural resources. The Commission has set boundaries of inland wetlands and watercourse areas within its jurisdiction. Once such boundaries are established pursuant to the procedure in Conn. Gen. Stat. §22a-42a, no regulated activity can be conducted within the boundaries without a permit approved by the Commission. In addition to the designated wetlands areas, the IWC may regulate activities "outside the wetlands boundaries and upland review areas if such activities are likely to have an impact or effect on the wetlands themselves." See Aaron v. Conservation Commission, 183 Conn. 532 (1981) and Queach Corp. V. Inlands Wetlands Commission, 258 Conn. 178 (2001). However, in the case of Avalonbay Communities Inc. v. Inland Wetlands Commission of Wilton, 266 Conn.150 (2003), the Supreme Court noted that the IWC may regulate activities outside of wetlands, watercourses and upland review areas "only if those activities are likely to affect the land which comprises a wetland, the body of water that comprises a watercourse or the channel and bank of an intermittent watercourse. The legislature did not adopt broad definitions of wetlands and watercourses that would protect aspects of the wetlands apart from their physical characteristics, such as, for example, the biodiversity of the wetlands or wildlife species that might be wetland dependent."

The cases also say that local inland wetland agencies such as the IWC "are not little environmental protection agencies." Rather, the IWC jurisdiction is limited to the wetland and watercourse area that is subject to their jurisdiction.

CONSERVATION COMMISSION

The Conservation Commission's powers are set forth in Chapter 10 of the Wilton Code. The purposes of this Commission are set forth in that section, including "to guide the development and conservation of the natural resources within the Town of Wilton." Other purposes include proposing, managing, and maintaining open space lands, to be an advisory and consulting body on issues involved with the environment, conservation and land use, and to develop and sponsor educational programs, promoting sound environmental practices. In many other respects, the Conservation Commission offers technical assistance and guidance to the Planning & Zoning Commission and other boards.

SECTION 22a-19: ENVIRONMENTAL INTERVENTION

Conn. Gen. Stat. §22a-19 states that in "any administrative, licensing or other proceeding, and in any judicial review thereof," a person, corporation, association or other legal entity may intervene as a party upon the filing of a verified pleading asserting that the proceeding involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

It has been established that interventions may occur before the Conservation Commission and Planning and Zoning Commission for most of their functions (special permit, site plan, subdivisions, and change of zone). Intervention may also occur before the ZBA for a variance. However, the Supreme Court has recently held that "...an individual′s right to intervene in an administrative agency proceeding under §22a-19 must be limited by the jurisdictional authority of the administrative agency conducting the proceeding into which the party seeks to intervene." Nizzardo v. State Traffic Commission, 259 Conn. 131 (2002). Intervenors are limited to raising environmental issues. Most courts have held that an intervenor may raise environmental issues limited to the scope of the particular agency's underlying jurisdiction. As one Court noted, "[t]he planning commission did not become the wetland agency simply as a result of the §22a-19 petition." Edelson v. Planning Commission, 1994 WL 551183 Super. Ct. (Berger, J.).

Upon the filing of the petition, the commission or board must first find that the intervenor's specific claims as set forth in their verified pleading are within the scope of the commission's or board′s statutory jurisdiction. If the allegations are within the jurisdiction, a two-part test must be performed. First, the commission or board must review the claims to determine whether the proposed conduct "does, or is reasonably likely to, ...[cause the] pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state…." Second, if the commission or board determines that the proposed conduct will cause unreasonably pollution, then the commission or board must address whether "there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare." §22a-19(b).

The intervenor must allege specific factual claims in their verified pleading. The intervenor also has the burden of establishing these claims. The burden then arguably shifts to the applicant as to whether the conduct results in unreasonable pollution, and whether feasible and prudent alternatives exist.