

SEMINAR ON LEGAL REMEDIES IN ZONING ENFORCEMENT

by

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(Expanding and Updating Prior Outline of
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I. State/Local Legal and Political Relationships

Local Government is a creature of the State and has no powers other than those conferred by Statute or reasonably necessary to carry out those powers.

II. Right to Enter and Inspect Property

1. Actions Apparently Permitted by the State Statute

Connecticut General Statutes §7-148(c)(6)(A)(iii), enumerating powers re “Public Works, Sewers, Highways”: “Enter into or upon any land for the purpose of making necessary surveys or mapping in connection with . . . any municipal purpose, in the manner prescribed by the general statutes.” Also, Connecticut General Statutes §8-12, Zoning Enforcement Officer has authority to “cause any building, structure, place or premises to be inspected and examined. . .” Implies right to enter onto private property against the wishes of the owner. **In general, don’t!**

But see *Wallingford v. Walter Werbiski*, 274 Conn. 483 (2005) authorizing town surveyors to enter onto private property for purposes of doing feasibility study for expanded industrial park.

Can always view land or buildings from a place where you have the right to be: public road, neighbor’s yard (with permission), airplane, etc. Binoculars, etc. are OK. See *State of Connecticut v. Alexander*, 45 Conn. L. Rptr. No. 16, 575 (July 28, 2008) allowing warrantless search of corridor in apartment building shared by several apartments (so not an area of privacy).

Can enter onto land, even if posted “No Trespassing” as long as when asked to leave, you do so at once. Riskier.

Can enter onto land or even in buildings if the adult owner or occupant authorizes you to do so; it never hurts to ask.

If post-judgement order allowing you to enter onto the property for enforcement, you can. *Town of East Lyme v. Wood*, 54 Conn. App. 394 (1999) (Defendant accumulated junk, enforcement action commenced, stipulated judgement entered that defendant would clean it up and if he didn't, town could do it and bill him. He let stuff pile up, they cleaned it up, demanded \$13,000 in cleanup costs. Appellate Court upheld right to enter property, collect clean-up costs.)

2. Constitutional Limitations

Never enter inside a building or vehicle or force entry onto land without a Court Order. State's Attorney can assist you with Administrative Search Warrant if required (very rare). This is true for any space which owner/occupant expects to be private so includes an apartment in multi-family dwelling, room in a rest home, etc. When in doubt, don't. See *Bastian v. DiPaola*, 32 Conn. L. Rptr. No. 15, 533 (9-9-02), where Public Health Department officials inspected a home business without an administrative search warrant.

The existence/availability of "administrative search warrants" is open to question for lack of an express statute authorizing it. One town successfully used an Application for Temporary Injunction to obtain inspection against the owner's will, *Town of Bozrah v. Chmurynski*, 47 Conn. L. Rptr. No. 11, 419 (6-8-09) (on appeal to the Supreme Court).

III. Legal Actions Against the Municipality and/or the Zoning Enforcement Officer

1. Appeal to ZBA/Procedural Aspects

Must be brought within thirty (30) days of receipt of the order unless local Board sets a lesser/greater time limit by "resolution". Connecticut General Statutes §8-7. "Receipt" is usually clear with the violator but not so with neighbors. *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. PA 03-144 amended Conn. Gen. Stats. § 8-3(f) to allow publication by the applicant to trigger the 30-day appeal period. If it is important, publish! This is current grey area of the law. Failure to appeal renders the decision final and incapable of attack in subsequent enforcement action. See also, *Wiltzius v. Zoning Board of Appeals*, 106 Conn. App. 1 (2008) (complex fact pattern turning on when neighbor had knowledge of when each of numerous Certificates of Zoning Compliance for mobile home replacements were issued).

Appeal freezes the status quo: permit issued or permit denied, either way, cannot be used to construct. Appeal from the Board to the Court continues that freeze, regardless of who wins.

Normal rule: staff can address agency after the close of the public hearing. Not in cases where Zoning Enforcement Officer ruling is being appealed. For those purposes, Officer is not “staff” but an interested party.

Zoning Enforcement Officer should come prepared with a presentation of why the violation has been found (photos, copies of Sections, written complaints, etc.)

Party aggrieved by decision of the Board can appeal to Superior Court, per Connecticut General Statutes §8-8. Aggrieved parties can include the violator/appellant, the Zoning Enforcement Officer, the Zoning Commission, or certain neighbors (within 100' or uniquely impacted by the proposal).

Note: Appeal of Certificate of Zoning Compliance at the C.O. stage may be unable to attack noncompliance that was evident on the plans when the Certificate of Zoning Compliance was issued at the Building Permit stage. *Longmoor v. Zoning Board of Appeals*, 33 Conn. L. Rptr. No. 1, 34 (10-21-02).

2. Mandamus

Mandamus is an “extraordinary writ” to compel a public official to perform a non-discretionary (ministerial) function. Often used to test authority to deny a permit or refuse to issue a ruling (non action, as opposed to action). Zoning Enforcement Officer can never be compelled to enforce the Regulations—discretionary decision. *Sarantopoulos v. Riseman*, 36 Conn. L. Rptr. No. 24, 902 (6-14-04) (if no decision made, no requirement to appeal to ZBA in order to exhaust administrative remedies.) Accord, *Greenfield v. Reynolds, Westport Zoning Enforcement Officer*, 122 Conn App. 465 (2010) (can’t compel Zoning Enforcement Officer to enforce via Mandamus.) And you can’t appeal a decision to enforce or not enforce, even if that decision is made by the Inland Wetlands and Watercourses Commission. See *Davis v. Environmental Commission of New Canaan*, 42 Conn. L. Rptr. No. 19, 691 (3-19-07) (neighbor could not appeal IWWC’s decision not to pursue enforcement of alleged violations). Private parties have the right to enforce the Regulations at their own expense. Can never seek both a mandamus and money damages because, by definition, a mandamus is only available where “there is no remedy at law”, meaning money damages.

3. Injunction

Another “extraordinary writ” which orders someone to do or not to do something. The most common form of civil action by the Zoning Enforcement Officer against a violator, but the rarest to be brought against the Zoning Enforcement Officer by a private party. May be used to test a legal issue by seeking order to restrain the Officer from enforcing a particular Regulation (but may be attempt to circumvent failure to appeal original order within thirty (30) days to Zoning Board of Appeals. Like mandamus, injunction is only available where “there is no remedy at law”, meaning money damages.

Good discussion in *Driska v. Pierce*, 110 Conn. App. 727 (2008) where Zoning Enforcement Officer obtained injunction against commercial out door recreation use (an ATV park), and violators then changed the use to only “friends” who made a “donation” for use of the track. Nice try, no cigar.

Cobblestone Assoc. LLC and Premier Building & Development, Inc. v. Cromwell P.Z.C., Docket No. CV 06-4005694-S (J.D. of Middlesex): The Commission revoked a Special Permit due to alleged violations and the developer sought an injunction against that revocation. Injunction granted on the grounds that the Commission lacked authority to revoke a Special Permit once granted, citing to *Parish of St. Andrews Church v. Zoning Board of Appeals*, 155 Conn. 350 (1967). Compare to *Polymer Resources, Ltd. v. Planning and Zoning Commission*, Docket No. CV 92-0294472 (J.D. of Fairfield), where Commission realized it could not revoke the Special Permit, so *it* applied for a renewal of the Permit and then denied its own application. Court held N.G.

4. Negligence

More common with Building Officials, but claim of damage due to Officer’s negligence is possible, e.g., where erosion and property damage caused by Officer’s failure to enforce an erosion control plan. *Evon v. Andrews*, 211 Conn. 501 (1989) (failure of city to enforce housing/fire codes produces no liability). Liability was found against the Building Inspector for issuance of C.O. for defective home, but Sovereign Immunity excluded claims other than for health and safety defects (i.e., no recovery for cracked ceilings, other minor or cosmetic defects). Good discussion of the topic. *Satagaj v. Town of Portland*, 47 Conn. L. Rprt. No. 7, 268 (5-11-09). See also *Johnson v. UP Close Home Inspection, Ltd.*, 27 Mun. Lit. Rep. 96, No. 34401-7-II (Wash. Ct. App., 3-17-07) (City not liable for failure to enforce building code). However, a negligence claim cannot be dismissed for lack of jurisdiction based on sovereign immunity. *Vejseli v. Pasha*, 44 Conn. L. Rptr. No 6, 206 (11-26-07).

Other municipal officials: *Elliott v. Waterbury*, 245 Conn. 385 (1998) (Jogger shot

by hunter in Waterbury reservoir watershed land, where hunting *allowed*.) *Malloy v. Colchester*, 33 Conn. L. Rptr. No. 8, 293 (12-9-02) (issue of animal control officer being liable for injuries to motorist who struck wandering farm animal).

5. Civil Rights

42 U.S.C. §1983 authorizes actions in Federal or State Courts against persons acting “under color of state law” to deprive the plaintiff of rights assured by the U. S. Constitution or the laws promulgated thereunder. Thus, municipal official acting under “color” of his/her office but abusing that office can be sued.

a. Good Faith Immunity

Differences of opinion doth not a civil rights violation make. Public officials cannot be sued for good faith mistakes or disagreements about

interpretation. There must be some indication that a clear right has been knowingly deprived.

b. Valid Property Interest

1983 actions can only be brought where the plaintiff has a “clear legal right” to the permit or other approval that was sought and denied, thereby creating a property interest. See *Carrier Enterprises, Inc. v. Town of Wallingford*, U.S. Dist. Court, Dist. Of Conn., Civil No. 3:95CV2267(JBA), ruling on Cross Motions for Summary Judgment, August 29, 1997: Certificates of Zoning Compliance denied for subdivision lots where base course was found by Town Engineer to be inadequate. Key element was that *regulations* prohibited issuance of the Certificate of Zoning Compliance where base course not installed and “inspected and approved by the Town Engineer.” Here, the Town Engineer found the base course inadequate and directed that no Certificates of Zoning Compliance be issued. Held: There was no “clear legal right” to the issuance of the Certificates of Zoning Compliance.

c. Punitive Damages

Punitive damages are recoverable. See discussion in *New England Estates, LLC v. Branford*, 294 Conn. 817 (2010), accepting civil rights liability for bad faith use of eminent domain power to block affordable housing, but rejecting award because NEE held only an option on the property.

d. Equal Protection: Those similarly situated will be receive similar treatment by government. Claims of “Selective enforcement.” See *Cadlerock* decision

from last course.

6. CUTPA

The Connecticut Unfair Trade Practices Act (“CUTPA”) is a law that allows people to sue businesses for unfair trade practices, such as deceptive advertising or unfair contracts. Municipalities are exempt from CUTPA. *Ippoliti v. Town of Ridgefield*, 27 Conn. L. Rptr. No. 18, 629 (10-16-00).

7. Financial Protection for the Zoning Enforcement Officer

1. Statutory Obligation of Municipality

- a. Negligence: Municipality must provide all defense costs and protect employees from financial harm for any negligence or civil rights claim arising while acting in the discharge of his/her duties. Connecticut General Statutes §7-101a and §7-465. This includes alleged “malicious, wanton or willful act[s] or ultra vires act[s]”, but, if found guilty of such actions, employee must reimburse municipality for defense costs and employee pays damages. So effectively, no indemnification for such acts if proven. Two year Statute of Limitations. This applies to the defense of a claim brought before a municipal ethics commission. *Spatola v. Town of New Milford*, 44 Conn. L. Rptr. No. 7, 242 (12-3-07).
- b. Civil Rights: Same as above.
- c. Willful Acts: See above.
- d. Libel and Slander: Not indemnified per §7-465, but most towns carry insurance. Make sure your town does!
- e. Injury to Fellow Employees: Not included, so don’t punch out the Building Official!

2. Potential Exposure to Personal Liability of Zoning Enforcement Officer

Besides above, note the triple damage liability of Connecticut General Statutes §8-12a(c) for issuing citation “frivolously or without probable cause”. Presumably, would still be subject to municipal indemnification. Towns are not required to carry insurance for the indemnification obligations, but most of them do so, including libel and slander, because such suits are often brought merely to intimidate enforcement officers and municipalities.

Zoning Enforcement Officer is liable for stopping work on, e.g., construction, but difficult to prove willful/wanton standard. Best to promptly get an injunction and if a big project, skip the order and go right to the injunction.

IV. Legal Action by the Zoning Enforcement Officer

1. Courses Available for Zoning Violations

- a. “Notice of Violation”: Note required to be sent but often done as a first step. Says, basically, “This looks like a violation to me. Am I missing something?” Be careful to use language that does not create appealable ruling. Unlike citations for violations of ordinances adopted per Conn. Gen. Stats. § 7-148, no requirement that you do so for zoning Cease and Desist Order. *Tristany v. Polinsky*, 33 Conn. L. Rptr. No. 12, 243 (1/13/03).
- b. Cease and Desist Order: Says “stop doing what you are doing”. Must take effect in no less than 10 days, unless involving excavation/grading and then can be immediate. Connecticut General Statutes §8-12. Best to serve by Marshall if you anticipate a fight or by certified mail, return receipt requested, if you think violator will pick it up. Usually served on the owner, but §8-12 allows service on broader range of person. Always serve at least owner and violator, if different entities. Cease and Desist Order can be filed on the Land Records and should be so filed. *Cabinet Realty v. Planning and Zoning Commission of the Town of Mansfield*, 17 Conn. App. 344 (1989). But note *Cadlerock Properties v. State of Connecticut*, 44 Conn. L. Rptr. No. 19, 663 (3-3-08) where DEP remediation order filed against an entire property where only part of it was contaminated; held that the State had inversely condemned the uncontaminated portion by filing the order against the entire property. May have limited value in the zoning field, but we aware. Similarly, *Mator v. Ecorse, Michigan*, No. 07-1868 (6th Cir., Nov. 18, 2008, unpublished), 28 Mun. Lit. Rep. 237 (12-15-08), where city put up placards on nonconforming properties until they obtained variances. Found to be procedural due process violation because no hearing other proceeding available to contest the placarding before it was done.
- c. Action for injunction which can be restraining order (“stop that”) or mandatory (affirmative) injunction relief (“do this”). An injunction normally requires a showing of “irreparable harm” and “no adequate remedy at law”, but a violation of law is, by definition, proof of such harm and no remedy at law. *Venditti v. Giansiracusa*, 35 Conn. L. Rptr. No. 20, 74 (12-29-03). Note that this is even the case between private parties, *K & S Nam, LLC v. Corso*, 45 Conn. L. Rptr. No. 1, 26 (4-14-08). Cease and Desist Order is not

required prerequisite to injunction but usually best to start with the order, allow the 30 days to go by and then begin civil action because all defenses are cut off. If appeal to Zoning Board of Appeals, best to wait until that process is completed because judge will hesitate to issue injunction while underlying legal/factual issues are still in dispute. But watch out for the 3-year rule of §8-13a (nonconforming “buildings”). Must be brought in Superior Court only.

Injunctions can be temporary while the matter is pending or permanent, when the final judgement is made. The burden of proof is higher for temporary mandatory injunctions; damage upon denial must be “extreme or very serious.” *Mirabelle v. Prospect Little League, Inc.*, 32 Conn. L. Rptr. No. 5, 161 (7-1-02); *Granby v. Schlicht*, 31 Conn. L. Rptr. No. 7, 275 (2-25-02). *Canterbury v. Kukevitch*, 35 Conn. L. Rptr. No. 1, 14 (8-4-03) (Irreparable harm *is* required for temporary injunction, even though not permanent ones.)

Historic buildings: Interesting case where temporary injunction was issued not just to prohibit demolition of a historic structure (restraining order) but also an affirmative order to the owners to protect the property from gradual deterioration through non-use and vandalism. Court went so far as to reject claims by the owner that it lacked any assets to do the required work, holding that *another corporation* was the “alter ego” of the owner and did have the funds to do the work. *Norwalk Preservation Trust, Inc. v. Norwalk Inn & Conference Center, Inc.*, 47 Conn. L. Rptr. No. 5, 167 (4-27-09).

Weird case: Injunction issued against wetlands violation, including placement of fill and horse barn. Trial Court ordered the fill removed, but held that the horse barn was an exempt “agricultural” activity. The commission appealed. While the appeal was pending, owner asked the Trial Court for permission to remove the fill, which was granted, but without any supervision or bonding by the commission, as they would typically require in a permit situation. Still, Appellate Court dismissed the appeal as moot because the illegal fill was already gone. *Conservation Commission v. DiMaria*, 119 Conn. App. 763 (2010).

- d. Citations: Fairly new, per Connecticut General Statutes §8-12a, allowing towns to adopt ordinances allowing zoning officers to issue “tickets” to violators, fines of up to \$250. Same now for Inland Wetlands and Watercourses Officers, up to \$1,000/day: Connecticut General Statutes §22a-42g (P.A. 96-269). CAZEO has a model ordinance prepared by M. Zizka modified by me. Citations can be appealed to a local hearing officer per Connecticut General Statutes §7-152c.

- e. Criminal Prosecution: Housing, Building and Health Code violations, plus Zoning violations, constitute both civil and criminal violations. If you need fast action (public safety issue), refer to the local prosecutor. They often get rapid attention of a violator who will ignore you. Most prosecutors don't like these cases but will bring them if they can be convinced there is imminent peril to public safety. Must apply for warrant backed up by detailed affidavit. Requires assistance of your attorney and a lot of persistence.
- f. Bonding: Many towns require bonding for site plans, special permits, etc. You can do this *as long as it is in your regulation*. Interesting case where lot owners tried to enjoin (prevent) the town from releasing the bonds because of private disputes that they had with the subdivider. Denied. The bonds are for the purpose of securing obligations *to the town* and it is within their discretion to release them or not. *Parkh v. Creative Realty of CT, LLC*, 47 Conn. L. Rptr. No. 4, 143 (4-20-09).
- g. Subdivision Approvals: Cannot require elimination of a zoning violation as a condition of a subdivision approval. *Horelick v. Planning & Zoning Commission of Weston*, 36 Conn. L. Rptr. No. 3, 93 (1-19-2004).

2. Courses Available for Wetlands

- a. Cease and Desist Order with “show cause” hearing within ten (10) days required. Conn. Gen. Stats. §22a-44(a). Good idea to include in the Order a remedy that you seek, e.g., restoration. *Ventres v. Goodspeed Airport, LLC et al*, 37 Conn. L. Rptr. No. 5, 197 (7-19-04); affirmed 275 Conn. 105 (2005) (commission could not collect the *per diem* civil penalty for the period following the aborted show cause hearing because order did not direct any remediation/restoration and violator stopped violating; he was done.

Be sure that the Order reaches the violator: Some people won't sign for certified mail, knowing that it contains bad news, so use a marshal if you're not sure. Example of a problem: *Harrigan v. Ackerman*, 51 Conn. L. Rptr. No. 12, 452 (5-16-2011), where Order was sent to address of seasonal cottage during the “off-season,” not to permanent address which the town had in its records; held, can't prosecute for violation of the Order.

- b. Civil Enforcement action in Superior Court. As with zoning, you don't have to issue an Order first; can proceed straight to court under Conn. Gen. Stats. §22a-44(b).
- c. Criminal Action by Prosecutor: Conn. Gen. Stats. §22a-44(c). Can be brought by the Commission or the IWEO. *Ventres* decision, above.

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- d. Connecticut Environmental Protection Act, Conn. Gen. Stats. §22a-16, for injunction and attorney's fees for "unreasonable" impairment, destruction, or pollution of public trust in the waters of the State. Violation of Wetlands Act is "unreasonable," *per se*. *Rocque v. Goodspeed Airport, LLC*, 275 Conn. 161 (2005).
 - e. Revocation: Unlike the zoning statutes, Conn. Gen. Stats. §22a-44a(d)(1) expressly allows the agency to "suspend or revoke a permit if it finds after giving notice to the permittee of the facts or conduct which warrant the intended action . . ."
 - f. Ex Post Facto Applications: The age old question: Is it better to ask forgiveness after the fact than to ask for the permit beforehand? In *Litchfield County Homes, LLC v. Morris Conservation Commission*, 44 Conn. L. Rptr. No. 17, 592 (2-18-08) the answer was yes. The court overturned the denial of the post-violation wetlands application "to protect the permitting process" where the violation was minor and the agency itself had encouraged the violator to remedy his violation by filing a permit application (which he did). Court compared this case to *Lang v. Brookfield*, 40 Conn. L. Rptr. 742, which was not a permit application proceeding but an enforcement proceeding. Court there rejected claim of "no impact to wetlands" because that determination was to be made in a proper application proceeding, not an enforcement proceeding.

3. Building the Case

Complaints: Differ from town to town. No requirement that they be written or that complainant be identified. You don't need any complaint to pursue a violation. Some Officers don't like to act on anonymous complaints because they think it looks like they are persecuting the violator. I don't buy that. If an anonymous caller called the police and said, "Fleet Bank is being robbed" would they refuse to act if the caller didn't identify himself?

Remember: The Judge is not going to go out there and look (typically), is not going to hear the neighbor's complaints and is not going to know your Zoning Regulations. Each document you send (Notice of Violation, Cease and Desist Order) should succinctly state: (a) what it is the violator is doing; (b) what section of the Regulations that activity is violating; (c) briefly, what that section requires or prohibits; (d) what the violator must do to come into compliance; (e) for Orders or final rulings, the route of appeal to the Zoning Board of Appeals and the time limit for filing it. Get photos or other evidence and keep a log of the dates you took photos, direction you were facing, and what they purport to depict. If neighbors saw something you didn't, get affidavits and explain that they must be prepared to testify

in person. If they don't want to, don't force them, but realize you can't prove what you or some other live body did not see and testify to in open court.

3. Legal considerations

A. Collateral Estoppel: The reverse of them using it against you—the violator may be estopped from disputing the violation by their own past conduct. *Ann Brown v. Dmitry Tolchinsky et al*, Docket No. 05-4004571 (J.D. New London at New London, 11-14-06): Owner got a variance to increase the height of nonconforming dwelling, which was granted. They then sought to construct house taller than their variance allowed and were issued a Cease and Desist Order. They appealed the Order and sought to modify their original variance from the ZBA, which denied both requests. Owner appealed to Superior Court and lost. In the enforcement action, owner again challenged the Zoning Enforcement Officer's original finding of noncompliance. Held that by applying for the variance modification, owner had admitted that dwelling height was in excess of that approved originally by the ZBA..

B. Res Judicata: Once something has been litigated, you can't litigate the same one again. See *Brown* above, same facts. In the enforcement action, owner again challenged the Zoning Enforcement Officer's original finding of noncompliance. Held that the issue had already been litigated in the appeal of the ZBA decision of the Order.

C. Exhaustion of Administrative Remedies. If the law provides for a route of administrative appeal, it *must* be used; if it is not used, party cannot challenge the decision or issue which would, and should, have been the subject of that administrative procedure. So, if Cease and Desist Order issued based on, e.g., expansion of nonconforming use, violator *must* appeal to ZBA if challenge is to the validity of the Order's premise (that use has expanded, etc.). Failure to appeal prevents raising that as a defense in enforcement action. But see *Donovan v. Neri*, 35 Conn. L. Rptr. No. 6, 213 (9-8-03), where violator was allowed to challenge violation despite prior unsuccessful appeal to ZBA because court challenge was based on Constitutional claims over which the ZBA had no jurisdiction.

V. Preparing the Case

1. Working with the Lawyer

Conversations with counsel are privileged, but make sure you identify them as such to avoid disclosure per Freedom of Information Act. Be especially careful with e-mails! The lawyer will need copies of everything you have and originals of photos, orders, etc., so be sure to make extras for your own file. Lawyer will need to serve the violator so be sure of correct name(s), residential address(es) or other methods of service. Lawyer needs to know the potential flaws in the case so as to be ready to respond to them.

2. Getting the Facts

Who is the violator? Watch out for names you cannot identify, e.g., “ABC Enterprises”. Is it a “d/b/a” (an individual “doing business as” a title that is not incorporated, etc.), a partnership, a corporation, or a limited liability company (LLC)? The method of service is different for each so it can be critical.

Who owns the property? **Check the land records.** All owners of record should be served. Naming only one owner of a two-thirds interest, but not her husband (owner of one-third interest) was failure to name an indispensable party and enforcement was stopped until he was joined as a party. *Labulis v. Kopylec*, 128 Conn. App. 571 (2011).

What happened when? Date all photos, notes, letters. Keep careful records, including *contemporaneous notes* for verbal conversations.

3. Proper Documentation for Trial

Remember to get certified copies of all public documents such as Zoning Regulations in force as of the date of the violations (not before, not after), orders, decisions of the Zoning Board of Appeals (minutes, legal notices pre and post action), etc. Deeds for the property can be helpful if there are doubts about ownership, boundaries, etc.

4. Proper Foundation

Your worst enemy is often the very regulations that you are trying to enforce: ambiguity, lack of defined terms, contradictions, poor indexing or organization. See discussion of permitted uses and “analogous” uses in *Collins Group, Inc. v. Board of Zoning Appeals*, 32 Conn. L. Rptr. No. 9, 341 (1-12-02). See also *Tendler v. Bethel ZBA*, 51 Conn. L. Rptr. No. 13, 466 (5-23-2011), where permitted home occupation allowing “teachers” held to include yoga classes for groups and

individuals, and hence not in violation of the regulations despite parking demands.

VI. Presenting the Case

1. Problems of Proof: Burden of proof is on you as plaintiff. Must prove each allegation of the complaint by “preponderance of the evidence” (more likely than not).
2. Testifying: The Judge is your friend (keep telling yourself that). Always address the Judge no matter who is asking the question. Get the Judge involved—show him/her particular things in the photos, explain why you did what you did, tell him/her about the complaints you were responding to. Always be polite, especially with opposing counsel (it will drive him nuts). If you don’t understand a question, say so. Take your time—no time limit on your answer. Think about the question, think about the answer. This is especially true for any question that begins with, “Is it not true that” Speak loud and clear: it bespeaks confidence and provides for a good record; many Judges are elderly and have hearing impairments and most Courtrooms have lousy acoustics.

Dress professionally—this is time for your Sunday best. No sneakers or jeans. When you are testifying, *look at the judge*, not the lawyer who asked the question.

On direct examination, be conversational and complete—you have nothing to hide. On cross examination, answer the question as asked—no more, no less, but don’t be cute. Be alert to openings in the cross examination like, “How can you say that?” or “What do you mean by that?”. Stupid lawyers sometimes lose their cool and ask open-ended questions like that and rule is that you cannot be stopped from answering such a question in your own words to your heart’s content.

3. Possible Defenses
 - a. Municipal Estoppel: Claim that official (1) with apparent authority in this matter (2) gave answer to question which he/she could reasonably have expected would be relied upon by the person asking (3) which was in fact relied upon to induce violation (4) to detriment of the person asking (5) and it would be highly inequitable or oppressive to enforce the regulation under these special circumstances. Note that each and every one of these elements must be present. *Dornfield v. October Twenty-Four, Inc.*, 230 Conn. 221 (1994), and it has to be as the same issue, *Ammirata v. ZBA of Redding*, 81 Conn. App. 193 (2003), affirmed 264 Conn. 737 (2003) (*number of horses as opposed to the area to be used*). See interesting case of *Levine v. Sterling*, 300 Conn. 521 (2011) where town adopted a land use *ordinance*, not a *zoning regulation*. Levine asked the Board of Selectmen if his plans were

“grandfathered” as legal nonconforming use, and they said yes. In fact, there is no grandfathering under an *ordinance*, and when they realized that, they revoked their finding. Held that the first four elements above were established, but question of whether Levine had spent enough money to sustain element #5.

- b. Laches: An equitable defense to an equitable remedy (injunction). Basically, the equitable equivalent of a statute of limitations: you waited so long to enforce this regulation that it would just be unfair to do it at this point. Often raised, rarely won.
- c. Substantive attacks: That bridge is burned if there was no appeal to the Zoning Board of Appeals, but otherwise, can attack the substance of the claim, i.e., “I did not do it” or “I did it but it is not illegal” or “I did it and it is illegal but I had a legal nonconforming use”. Ambiguities in the regulation can be your worst enemy, so bring those to the attention of the Commission and get them fixed. *Pappas v. Enfield Planning & Zoning Commission*, 40 Conn. L. Rptr. No. 18 (3-17-06) (measurement of cul de sac length from intersection with “nearest intersection” includes another cul de sac, not just a through street as argued by the Commission. *Cote v. Danbury Zoning Board of Appeals*, 29 Conn. L. Rptr. No. 9, 349 (5-28-01) (definition of a “two family dwelling” is defined by the structure of the building, not its use. Owner divided single family home into two separate living quarters, but all residents were related by blood; still a two-family dwelling.) *Worthington Pond Farm, LLC v. Somers ZBA*, 41 Conn. L. Rptr. No. 16, 590 (8-28-06) (Special permit required for “sale of alcoholic beverages for consumption on the premises” does not include consumption of alcoholic beverages where the alcohol is *consumed* but not *sold*. Use was a banquet facility where the per guest fee included alcohol, so it was only being *served* by the establishment, but not “sold.”)
- d. Constitutional, Free Speech Issues: The “neutral time, place and manner” exception; “commercial” free speech. *Guilford PZC. V. Guilford ZBA*, 37 Conn. L. Rptr. No. 1, 35 (6-21-04) (Irish flag in front of Irish pub is not a “sign” and is protected by First Amendment Free Speech); *Brazos Valley Coalition for Life, Inc. V. City of Bryan, Tx*, 25 Mun. Lit. Rep. 155 (9-15-05, 5th Cir. Aug. 15, 2005) (prohibition on signs within public road rights of way is Constitutional); *Bonita Media Enters, LLC v. Collier City Code Enforcement Board*, 28 Mun. Lit. Rep. 50 (3-15-08) (invalidating attempt to regulate signs on vehicles traveling on public highways); *Faustin v. City and County of Denver*, 25 Mun. Lit. Rep. 179 (10-15-05, 10th Cir. Sept. 15, 2005) (ordinance prohibiting signs on highway overpasses is Constitutional). *Kroll v. Steere*, 60 Conn. App. 376 (2000) (enforcement of sign violation by owner

who protested a deer hunt in Groton Long Point was valid because it was the size, not the content, of the sign that was the violation.)

- e. Religious Land Use and Institutionalized Persons Act (RLUIPA) and Religion, Generally: There are both State (Conn. Gen. Stats. §52-57b) and Federal (42 U.S.C. §2000cc) RLUIPA laws to protect religious observance from zoning regulation: “No government shall impose or implement a land use regulation in a manner that imposes a *substantial* burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person; assembly; or institution (A) is in furtherance of a compelling government interest; and (B) is the least restrictive means of furthering that compelling interest.” The word “substantial” appears in the Federal version but not in the State. See good discussion in *Cambodian Buddhist Society of Connecticut v. Newtown Planning and Zoning Commission*, 285 Conn. 381 (2008) (denial of Special Permit for place of worship upheld after thorough analysis of State and Federal RLUIPA, and also traditional Equal Protection claims).

- f. Conn. Gen. Stats. §8-13a, Nonconforming structure: When a building or structure is located for three years on a lot in such a way as to violate a setback, and no enforcement action commenced, it becomes a legal nonconforming building. BUT, only as to setback—not use, height, coverage, etc. Commencement of action means bringing suit, not just issuing a cease and desist order. *Dodson’s Boatyard v. Planning & Zoning Commission of Stonington*, 31 Conn. L. Rptr. No. 9, 314 (3-11-02) (issuance of Order does not constitute “commencement of action.”)

But note: Conn. Gen. Stats. §8-13a validates *only* the location of the building on the lot. Not % coverage, height, use, or other aspects of the development.

- g. Subdivision per a Will: Interesting case where a will devised real estate to two heirs, with the land to be divided. But such a division would violate local zoning laws, and so the Probate Judge refused to honor the division. The Superior Court affirmed. *Shea v. Lomme*, 47 Conn. L. Rptr. No. 6, 213 (5-4-09). Watch out for probate courts. They usually have no clue about zoning and subdivision requirements.

- h. Divide and Conquer. Great case where owner put up illegal sea wall along the Sound. Told Connecticut Department of Environmental Protection that the wall was in an *inland* wetland and thus under *local* control; told local wetlands commission that wall in a *tidal* wetland and under *State* control. Nice try, no cigar. Held that State had jurisdiction, and DEP denied the

permit. *Sams v. State of Connecticut Department of Environmental Protection*, Docket No. CV 08 4016517 (Superior Court, J. D. Of New Britain at New Britain, unpublished Memorandum of Decision March 26, 2009, Mark H. Taylor, Judge). Now on appeal.

4. Penalties, Recovery

Connecticut General Statutes §8-12 provides for the penalties for violations. Notice that penalties are different for “willful” violations versus otherwise. Important distinction: always search for evidence that the violation is willful (one of the benefits of a Notice of Violation), but even if truly accidental, you can pursue. Example of a landowner whose tenant was violating: landowner is still liable per Connecticut General Statutes §8-12 despite lack of knowledge or intent.

Collecting the money can be tough. Encourage your attorney to use a “pre-judgment remedy”, usually referred to as an attachment of real property. Can be obtained: State of Connecticut v. Philip Morris, et al., 23 Conn. L. Rptr. No. 6, 192 (1/4/99). It need not be the property that is the subject of the violation—any property owned by the violator will do. Unpaid judgments accrue interest at 10% simple interest per year.

Town can collect attorneys’ fees and costs but must be ready to prove them (bills, etc.), and as a practical matter, judges do not like to award them. Thus, there can be a benefit to an owner to delay and obstruct prosecution.

Court can issue Contempt citation where owner violates final judgment, even if that judgment was the result of a stipulation. *Rocque v. Design Land Developers of Milford, Inc.*, 82 Conn. App. 361 (2004).

VII. Settlement

The law favors settlement of cases. Discussions held in pursuit of settlement are not admissible in Court but must be identified as such, so label all meetings, letters, etc. as “settlement” communications. Do not discuss resolution, settlement, or whatever it is called without the attorney once litigation has commenced.

Fact that you are involved in enforcement does not preclude you or the town attorney from advising a zoning board hearing an application which would resolve that enforcement action. *Kovacs v. Zoning Board of Appeals*, 33 Conn. L. Rptr. No. 15, 573 (2-3-03).

Conn. Gen. Stats. §8-8 (zoning) and 22a-43 (wetlands), settlement of a land use appeal requires a “hearing” before the Superior Court. What does that mean? Under new (2007) Practice Book Section 14-7A, settlement of pending land use appeals requires that the item be on the *printed* agenda of the meeting (not added that night), and the reasons for entering

into the settlement must be stated in open session. No requirement for legal notice or public comment, and does not preclude executive session to discuss the settlement.

VII. Other Enforcement Mechanisms

Subdivisions: *Town of Bethlehem v. Icehouse Associates, LLC*, 41 Conn. L. Rptr. No. 21, 760 (10-2-2006), reversing in part 41 Conn. L. Rptr. No. 3, 94 (May 29, 2006): Holds that the Planning Commission has standing and the authority to bring an enforcement action against an illegal subdivision, but so does the Town and the Zoning Enforcement Officer. Bonding is also an enforcement mechanism.

Wetlands: *Wishnafski v. Columbia Inland Wetlands and Watercourses Commission*, 42 Conn. L. Rptr. No. 5, 171 (12-4-2006): Owner obtained wetlands permit for a deck, but then built one twice as big. He then applied for a wetlands permit and was denied because it would reward violators to allow them “ask forgiveness” instead of asking permission first. Upheld as a valid grounds for denial. *Long v. Town of Branford*, 40 Conn. L. Rptr. No. 20, 742 (4-10-06): Court upheld condition of wetlands permit that past violation be remedied, even though no evidence in the record that past violation had adverse impacts on the wetlands.

VIII. The Administrative Role of the Zoning Enforcement Officer

Mohler v. Suffield ZBA, 42 Conn. L. Rptr. No. 11, 410 (1-22-07): ZBA granted a site plan approval for a liquor store. When the liquor store was built, the Z.E.O. issued a Certificate of Zoning Compliance. Neighbors appealed to the ZBA, saying that the original application should have been a *special permit* application, not a *site plan* application, and therefore the Z.E.O. should not issue the C.Z.C. Held: The Z.E.O.’s only authority was to determine if the approved site plan had been complied with, not to modify or reverse the un-appealed decision of the Board regarding the procedure to follow. The Board considered if a special permit was required, and determined that it was not. Without an appeal, that decision was final.

Similar case: *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. Approval as a site plan was final and unappealed.