

**ADVANCED PLANNING AND ZONING SEMINAR:**  
**ATTACHING CONDITIONS TO APPROVALS, EXTENSION,**  
**MODIFICATIONS AND REVOCATIONS OF APPROVALS**

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I. ATTACHING CONDITIONS TO APPROVALS

The authorizing General Statutes create confusion for land use agencies because the language is different for different kinds of decisions. Thus, it is desirable to examine each type of decision individually.

A. Subdivision and Resubdivision.

1. “Conditional Approval” to Assure Completion of Improvements. Conn. Gen. Stats. §8-25, as amended by Public Act 81-254, authorizes Planning Commissions to substitute a “conditional approval” for bonding, assessment, or prior completion of public improvements. The Statutes imply that a subdivision which has received “conditional approval” may be “filed”, presumably with the Town Clerk, like any other subdivision, but the mechanics of implementing this system are left to local Regulation. The “conditional approval” may be converted to a “final approval” and the plan “endorsed” when the improvements are constructed or the incomplete items bonded. Since the Commission should not endorse (and, hence, alter) a plan already filed in the Clerk’s office, it must be assumed that a whole new subdivision plan would be prepared to receive the “final approval” and be endorsed. This has created problems: Some Clerks are justifiably reluctant to clutter up their records with duplicate plans and developers don’t want to make a whole new set of plans just so that the “final approval” can be “endorsed” on them. Staff also need to examine the “final approval” set to be sure that no unauthorized modifications have been made. One Town tried to simply file the “endorsement” as a separate document, referencing the originally filed conditional subdivision plans and adding a margin note to those plans, “see final approval endorsement at Volume \_\_\_ Page \_\_\_”; however, the Clerk refused to add the margin note. Still, the system is preferable to filing all new plans. See a form endorsement, Exhibit A, from Westbrook.

The “conditional approval” will lapse in five (5) years if the improvements are not completed, though the Commission may, by Regulation, provide for a shorter period of time and the Commission may grant a renewal of up to five (5) additional years. This five-year period should not be confused with the one in Conn. Gen. Stats. §8-26c, which applies to all subdivisions (not just “conditional approvals”) discussed below.

It is obvious that the implementing regulations are critical in the case of a “conditional approval”. Since long before Public Act 81-254, Wethersfield has utilized a covenant and restriction

which prohibits any conveyance or encumbrance of any portion of the subdivision property until all improvements are completed. This, of course, prevents any mortgage, including a construction mortgage, to build the very improvements which the restriction is designed to assure. A better system would be to exempt mortgages for the exclusive purpose of completing public improvements.

Use the “conditional approval” vehicle used to be rare, with most Towns preferring conventional bonding (including letters of credit and cash) or prior construction of public improvements; however, the practice has grown in the past five years or so. A sample Restrictive Covenant is attached as Exhibit B (Willington).

2. Normal Approval of Subdivisions and Resubdivisions. Conn. Gen. Stats. §8-26 indicates that a Planning Commission may only “approve, modify and approve or disapprove” a subdivision application. In reality, however, Planning Commissions routinely approve subdivisions subject to “conditions” and which cannot honestly be considered “modifications”. A “modification” would be something that alters the plan under consideration, such as combining two driveways or requiring the shifting of a lot line or public improvement. This is clearly authorized by the Statutes. A “condition” would be something that involves a continuing obligation upon the subdivider or the lot owner such as: requiring particular steps to be taken upon the discovery of archaeological artifacts; requiring all driveways to have a turnaround at the end; requiring certain steps for the handling of endangered species which may be encountered during the construction of both public improvements and private buildings; limitations on the clearing of lots; employment of an on-site erosion and sedimentation control officer. I have found no case which holds that “conditions” are not the same as “modifications”, possibly because conditions are expressly authorized in all other land use decisions other than variances, and Judges simply assume that they are authorized for subdivisions as well.

With the decision of the Supreme Court in Smith v. Zoning Board of Appeals, 227 Conn. 71 (1993), the way seems open for the imposition of modifications and conditions which seek to protect both the physical environment and the historic character or other natural resources of the municipality. Despite the case title, Smith actually involved a subdivision application which, under Greenwich’s Special Act Charter, was appealable to the local Zoning Board of Appeals, and, thence, to the Courts. In a sweeping opinion by Justice Katz, the Court concluded that “the phrase ‘public health and safety’ includes environmental factors, it includes historical factors”. Id., p. 86. The Court found the criteria of the Greenwich Regulations, which referenced the Plan of Development and its stated policy for the protection of “historical factors” and “historic streetscapes” were reasonably precise. Id., p. 93, *et. seq.*

A Commission can require a subdivider to deed the Town sufficient land along the edge of the subdivision to allow the street to be brought up to present zoning requirements, Reed v. Planning & Zoning Commission, 208 Conn. 431, 544 A.2d 1213 (1988); Weatherly v. Town Plan & Zoning Commission, 23 Conn.App. 115, 579 A.2d 94 (1990); however, only one-half of the over-all width needed can be sought. Verzillo v. Town of Stonington Planning and Zoning Commission, 30 Conn. L. Rptr. No. 8, 285 (October 8, 2001). Judge Robaina allowed this even though the street would not

be widened on one side only and the net result would be a useless offset to the road. The Town was attempting to secure a 50-foot right of way along a road that presently had only a 33-foot right of way. The Town only required that the applicant grant eight and one-half feet, one-half the difference. The applicant protested that this would just result in a wider off-set, unless the Town obtained the necessary land on the opposite side of the road, which seemed unlikely. Judge Robaina held basically, “the goal is valid, if unlikely, and the discretion whether to pursue it will be left with the town”.

Another common condition of subdivision approval is the posting of bonds. See the discussion below.

3. Off-Site Improvements. The Supreme Court has finally addressed the issue of whether public road improvements or other work on existing public lands can be made a condition of subdivision approval or a ground for denial that was left open in. Property Group, Inc. V. Planning and Zoning Commission of Town of Tolland, 226 Conn. 684, footnote 8, 694-695 (1993). The Supreme Court has unequivocally ruled that off-site improvements, including frontage improvements such as sidewalks, cannot be a condition of subdivision approval or a ground for denial. Buttermilk Farms, LLC v. Planning and Zoning Commission of Town of Plymouth, 292 Conn. 317, 973 A.2d 64 (2009.) See, also, Reed v. Planning and Zoning Commission, 208 Conn. 431 (1988) re right to require additional road right of way.

An unreported case on a closely related matter is Conntech Development Company v. Planning and Zoning Commission of Town of Mansfield, Docket Number 053565, (May 12, 1995), in which Judge Bishop ruled that a Commission could impose as a condition that the applicant construct and maintain lighting along a pathway from the property where the applicant constructed apartments to the University of Connecticut campus. While the pathway was owned by the applicant, it was leased by the State of Connecticut. Judge Bishop held that: (a) the condition was valid due to the strong safety concerns involved; and, (b) that the pathway was really not “off-site”, as the applicant still owned it, though that factor, he stated, was not decisive in his decision. The applicant had also argued that the Commission’s insistence that vandalized light bulbs be replaced constituted an illegal expansion of the original condition. Judge Bishop disagreed, holding that the concept of “maintenance” included replacement of the bulbs.

4. Agreement for Construction of Public Improvements. Many local subdivision Regulations are now beginning to require applicants to sign an actual contract with the municipality which sets forth the requirements for construction of subdivision public improvements. The concept is to provide the municipality with another (perhaps stronger) count sounding in breach of contract in an action against a subdivider who fails to construct public improvements or fails to construct them correctly. An action for breach of contract can be easier for Judges to understand than one which involves the interpretation of local Subdivision Regulations and road specifications. See Exhibit C for a form of such an agreement (from Glastonbury).

5. Bonding. Many Towns now refuse to accept insurance company performance bonds due to the abysmal record of the sureties to pay claims. Most now accept only cash or Letters of Credit. See the attached sample assignment forms for a savings account assignment and a sample Letter of Credit form, Exhibits D and E, respectively.

Regarding the posting of a bond for on-site improvements, the Supreme Court has now held that even if no lots have been conveyed out of a subdivision, the language of Conn. Gen. Stat. § 8 - 26c (c) allows a Town to call the bond to complete the improvements itself. Town of Southington v. Commercial Union Insurance Company, 254 Conn. 348 (2000). While the requirement a Town call the bond is mandatory if lots are sold, the Statute permits the Town the discretion to call the bond, even if the subdivision expires with no lots sold. Note, upon remand, the Appellate Court reviewed the claim that since the Town of Southington had acquired the property through foreclosure, the Town had become a successor developer and that its role as successor developer destroyed the surety relationship, preventing the bond from being called. Town of Southington v. Commercial Union Insurance Company, 71 Conn.App. 715, 724 (2002). The Appellate Court disagreed, holding that the purpose of the bond was precisely to prevent the Town from being stuck with incomplete improvements. Flatly, the bond did not limit the defendant's obligations to the Town, and, therefore, it was available to be called. The bond was for the protection of the public, not the benefit of the surety. Id. at 727.

DANGER: If the Commission requires a bond, it may have liability if it fails to actually obtain a bond and buyers rely on the condition of approval and assume that a bond does, in fact, exist. Torrington Farms Association, Inc. v. City of Torrington, 28 Conn. L. Rptr. No. 6, 199 (December 1, 2000); however, adjoining owner lacks standing to *compel* Town to call the bond to complete improvements, Somers v. Town of Oxford, 36 Conn. L. Rptr. No. 10, 372 (March 8, 2004). Similarly, a private lot buyer cannot enforce a subdivision bond or to prevent the town from releasing it. Parikh v. Creative Realty of CT, LLC, 47 Conn. L. Rptr. No. 4, 143 (4-20-2009).

B. Site Plans, Special Permits and Exceptions.

1. Special Permits/Exceptions

Conn. Gen. Stats. §8-2 creates an exception to the general rule favoring uniformity of permitted uses within each zone by authorizing a Planning Commission, Zoning Commission or Zoning Board of Appeals to issue a “special permit” or “special exception” for uses set forth in the Zoning Regulations.<sup>1</sup> Section 8-2 specifically authorizes the issuing agency to approve special permits and exceptions “subject to . . . conditions necessary to protect the public health, safety, convenience and property values”. This broad authority is usually detailed in the local Regulations.

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<sup>1</sup> The terms “special permit” and “special exception” have been held to be interchangeable, A.P.&W. Holding Corp. v. Planning and Zoning Board, 167 Conn. 182 (1974), though some Towns, as a matter of convenience, assign one label to permits issued by the Planning and Zoning Commission and the other to those issued by the Zoning Board of Appeals.

A common example is excavation permits, which usually have quite detailed conditions spelled out for bonding, methods of operation and restoration, hours of operation and traffic flow; however, conditions can be imposed on special permits/exceptions (and they can even be denied) based on very general language about the “public health, safety, and welfare”. See, Whisper Wind Development Corporation v. Planning and Zoning Commission, 32 Conn. App. 515 (1993, Dupont, C.J. dissenting). For good discussion of conditions in special permit/exception, see Kobyluck v. Planning & Zoning Commission, 84 Conn. App. 160 (2004).

With Public Act 97-296 §2, Conn. Gen. Stat. Section 8-2(a) was amended to add the following language:

“Such regulations may provide for conditions on operations to collect spring water or well water, as defined in Section 21a-150, including the time, place and manner of such operations.”

Presumably, this change to the Statute was made over a dispute as to the power of Zoning Commissions to place time, place and manner conditions on spring water operations.

Once conditions of approval are imposed upon a special permit/special exception, the applicant must either appeal them or be bound by them. Upjohn Co. v. Zoning Board of Appeals of Town of North Haven, 224 Conn. 96 (1992), involved an application for a permit (the decision does not specify if it was special permit/exception or a site plan review) to construct various wastewater treatment facilities at Upjohn’s North Haven facility. The Commission granted the permit, subject to 20 conditions, the seventh of which required Upjohn to submit a timetable and plan for eliminating the generation of sludge and the removal of sludge already on the site. Upjohn did not appeal this condition, proceeded to use the permit for three years and then refused to comply with condition #7. In a subsequent enforcement action, Upjohn raised a number of defenses, including, *inter alia*, that the sludge storage was a legal nonconforming use (and, hence, protected by Conn. Gen. Stats. Section 8-2); that existing State and Federal permits preempted the Town’s authority and that the condition was unrelated to the permit which Upjohn had sought. All of these defenses ran to the very heart of the Commission’s authority, but none were effective.

We conclude that Upjohn, having secured the permits in 1983 subject to condition seven and not having challenged the condition by appeal at that time, was precluded from doing so in the 1986 enforcement proceedings at issue in this case.

Id., p. 102.

A more recent Superior Court case applied this theory to the unappealed denial of a Historic District Certificate of Appropriateness . East Haddam Historic District Commission v. Bronson, Docket No. CV-95 0075913 S (applicant was denied a Certificate of Appropriateness for a structure already built, and the Motion for Denial included an Order to remove the offending structure within six months. Applicant did not appeal the denial with the Order but neither did he comply with it. In a

subsequent enforcement action, Special Defenses and Counterclaims predicated on alleged defects in the original process were stricken). The lesson is clear: If a permit is subject to conditions, they must be appealed at the time of issuance; or, they will be held valid regardless of the merits of a later collateral attack. Note, however, that even an unappealed condition may be challenged if it is outside the scope of the Agency's jurisdiction. See the discussion below about the Reid and Gay cases. See, also, Ike, Inc. v. East Windsor, 20 Conn. L. Rptr. No. 19, 666 (2-2-1998) (holder of night club special use permit could not challenge age restriction condition place on original approval at the time of permit renewal.)

Apparently, the personal restriction on variances (see below) also applies to special permits/exceptions. N&L Associates v. Planning & Zoning Commission of City of Torrington, 39 Conn. L. Rptr. No. 12, 466 (August 15, 2005) (excavation special exception was transferable to new owner, despite neighbor's claim to the contrary).

Off-Site Improvements: Condition requiring installation of traffic light upheld in Briad Lodging Group Rocky Hill, LLC v. Planning & Zoning Commission of Rocky Hill, 01-CBAR 1366, 8 Conn. Ops. 32 (January 14, 2002) (Cohn, J.); also, new Regulation containing requirement for construction of sidewalks, both on the property frontage, and, also, potentially open-ended distances beyond upheld in Samben Realty Co. Inc. v. Watertown Planning & Zoning Commission, CV 97 0143362S, 1999 WL 494106 (Conn.Super., Waterbury, Pellegrino, J.) (one of four appeals of the same amendments).

## 2. Site Plans

Traditionally, site plans generally cannot be denied solely on the basis of off site or general health and welfare considerations. This has been modified to allow such factors to be relied upon to the extent that the Zoning Regulations specifically authorize the consideration of those factors. A. Aiudi & Sons, LLC v. Plainville Planning and Zoning Commission, 27 Conn. L. Rptr. No. 11, 411 (August 28, 2000), relying on Friedman v. Planning and Zoning Commission, 222 Conn. 262 (1992). Also of similar import is the recent case of Smith Brothers Woodland Management, LLC v. ZBA of Brookfield, 108 Conn. 621 (2008). Smith applied for a site plan approval (Certificate of Zoning Compliance in this case) from the Planning and Zoning Commission for general contracting and logging. The Certificate was granted with the condition, *inter alia*, that no logs be stored on the premises. When Smith violated that condition, a Cease and Desist Order was issued. Smith appealed the Order to the ZBA claiming the storage of logs was a legal nonconforming use. Held that by seeking the Certificate of Zoning Compliance and accepting it with the "no log storage" condition, Smith had abandoned any claim of nonconformity. See also Christiano v. Prospect Planning & Zoning Commission, 02-CBAR-1811, 8 Conn. Ops. 972 (July 24, 2002) (Wolven, J.) (upholding condition limiting scheduling of clients in site plan approval for home occupation).

Are conditions "integral" to the approval, such that invalid condition will invalidate the entire approval? Heim v Zoning Board of Appeals of New Canaan, 288 Conn. 628 (2008): Site plan approved for veterinarian as constituting a permitted "medical, dental or similar health-oriented"

facility, but subject to conditions about sound proofing and limitations on overnight keeping of pets. The trial court held that the use was permitted, but the local site plan regulations did not authorize the imposition of conditions. It upheld the site plan approval but struck the conditions. On appeal, the Supreme Court held that the conditions were integral to the approval and ordered a remand to the Commission to determine if it would issue the permit absent the stricken conditions. (After remand and on reargument before the Supreme Court, the issue of conditions became moot because the Court, after analyzing the language of the regulation, held that the use was permitted by right and thus could not be subjected to conditions in any event. 289 Conn. 709.)

“Preliminary Approvals:” Some towns require (or encourage) that before a formal application is made, the developer file a “preliminary” site plan for the overall property, and then subsequent applications for components of that plan must conform to that overall “preliminary” plan. In the case of Gerlt v. Planning and Zoning Commission of South Windsor, 290 Conn. 313 (2009) and 290 Conn. 300 (2009), the following situation was presented: Evergreen Walk obtained a “preliminary” approval. When Gerlt tried to appeal it, the town argued that since the approval was only preliminary, Gerlt had no standing to challenge it. The Superior Court agreed. When Evergreen Walk came in for their final site plan approval, Gerlt attempted to raise overall issues of access, traffic, etc. but was told that he was too late—such issues had to be raised during the overall “preliminary” site plan review and could not be revisited in the final site plan review. The Court held that the “preliminary” plan had to be just that—preliminary and non-binding—and Gerlt could not be prevented from addressing the full range of land use issues in the final site plan review.

Conditions or Implied Conditions of Action by Other Agencies: This could be a seminar all its own. There has been confusion in the case law about when a commission can condition a site plan or special permit approval on the action of another governmental agency (such as the STC, DEP, etc.). The topic has been much clarified in Gerlt v. Planning and Zoning Commission of South Windsor, 290 Conn. 313 (2009), discussed above. Another facet of that case was that Evergreen Walk’s plan was predicated upon access easements from the Town itself which had not yet been granted. Gerlt argued, based on abundant case law, that the Commission could not approve the final site plan conditioned on the receipt of that easement.

The Court drew a clear distinction between *conditional approvals* and approvals which were merely *predicated on action by another agency*. In the latter situation, the Court held that where the unconditional approval *presumed* an approval by another agency, there had to be evidence in the record that such approval was probable. In the former situation, however, the approval itself would not become final unless and until the agency action was granted. Thus, the Court held that there need be no evidence in the record that the agency approval was reasonably probable because the permit would not be valid unless and until such approval was obtained. *Id.*, pp. 325-236. The Court found that the Evergreen Walk plan was unconditional, but that there was evidence in the record to establish that the required easement from the Town would be forthcoming.

C. Variances.

The language of Conn. Gen. Stats. §8-26 about “approve, modify and approve, or disapprove” is missing from Section 8-6; Section 8-7 speaks of “granting or denying” a variance or appeal. Yet, Zoning Boards of Appeal routinely place conditions on variance applications, and it has been held that such conditions are allowable if they further the purpose of insuring harmony with the general purposes and intent of the local Zoning Regulations. Burlington v. Jencik, 168 Conn. 506 (1975) (setback variance could be granted subject to condition that a garage be used to house private automobiles only); Bloom v. Zoning Board of Appeals, 233 Conn. 198, 207, 658 A.2d 559 (1995).

One common type of condition which has been held expressly unauthorized is the restriction of a variance to the benefit of the applicant but not to any future owner of the subject property. Variances, like all zoning approvals, are granted to a particular piece of property and can be enjoyed by any future owner. Conditions seeking to limit that right may be declared void, even if not appealed at the time of issuance. See Reid v. Lebanon Zoning Board of Appeals, 235 Conn. 850 (1996), which applied Public Act 93-385 retroactively to strike down a condition on a variance which allowed year-round occupancy of seasonal dwelling which restricted such use for the life of the original occupant only. *Dicta* in the case implies that any variance conditioned on the personal identity of the applicant/occupant would have been invalid even without Public Act 93-385 (Id., pp. 857-858), but the Act, now codified at Conn. Gen. Stats. 8-6(b), specifically requires that all variances shall run with the land and shall not be extinguished because of the transfer of title. See, also, Beck v. Board of Appeals of the Town of New Canaan, 6 CSCR 1115 (December 23/30, 1989, Superior Court, Judicial District of Stamford-Norwalk at Stamford), and cases cited therein.

Similarly, a Zoning Board cannot impose conditions which are outside the scope of the Zoning authority itself, such as attempting to regulate the hours of an establishment serving liquor as a condition of a variance. Bora vs. Zoning Board of Appeals of the Town of Norwalk, 161 Conn. 297 (1971). Likewise, a Zoning Board cannot require as a condition of a variance that other property not part of the application never be used as a building lot. Such a condition is beyond the authority of a Zoning Board. Gay v. Zoning Board of Appeals of Town of Westport, 59 Conn.App. 380 (2000). For discussion of conditions on a variance and validity under First Amendment Freedom of Religion, see Farmington Avenue Baptist Church v. Farmington Planning & Zoning Commission, 35 Conn. L. Rptr. No. 6, 209 (September 8, 2003) and, after remand, 36 Conn. L. Rptr. No. 12, 442 (March 22, 2004).

Conditions must be expressly stated, and mere statements or representations by the applicant on the record are not sufficient. 112 Washington Street, LLC, v. Zoning Board of Appeals of Norwalk, 43 Conn. L. Rptr. No. 6, 197 (June 4, 2007) (statement in support of variance for tavern that music would be “subdued jazz” was not a condition, and, hence, not enforceable.) See, also, Dodson Boatyard, LLC v. Stonington Planning and Zoning Commission, 77 Conn. App. 334 (2003) (variance approved to reduce sideyard to allow construction of building as shown on plan submitted; later expansion of the same building within the reduced sideyard held to be within the scope of the original variance, which was not conditioned on the building addition as depicted on the plan.)

As with the site plan and Special Permit/Exception cases, acceptance of a condition on a variance can make it difficult, if not impossible, to challenge later. In Jaffe v. Westport Zoning Board of Appeals, 37 Conn. L. Rptr. No. 8, 309 (August 9, 2004), plaintiff obtained a variance to subdivide a lot into two otherwise illegal lots, but subject to the condition that each of those lots could not be further subdivided. Four years later, plaintiff sought a modification of the variance to eliminate that condition, which was denied. The Court held that the standard for modifying the condition was the same as for obtaining the variance itself—hardship—and found that the plaintiff had reasonable use of its property with the “no further subdivision” condition in place. Arguing, after the fact, that the condition was void as *ultra vires* (as in Reid) can be risky. Ash Creek, LLC v. Zoning Board of Appeals of Fairfield, 40 Conn. L. Rptr. No. 8, 295 (January 16, 2006) (Minimum living space condition on variance not so far out of public policy as to be challenged later on). See, also, Tolchinsky v. Zoning Board of Appeals of Old Lyme, 39 Conn. L. Rptr. No. 20, 785 (October 10, 2005) (variance granted subject to condition that building height be no more than 30 feet in zone that allows up to 35 feet; denial of application to modify the condition was upheld; case suggests that ZBA *lacks authority* to modify former condition of variance).

#### D. Inland Wetlands and Watercourses Permit

Here, the authority to impose conditions is set forth clearly in the Statutes:

In granting, denying or limiting any permit for a regulated activity the inland wetlands agency . . . may grant the application as filed or grant it upon such conditions, limitations or modifications of the regulated activity, designed to carry out the policy of sections 22a-36 to 22a-45, inclusive.

Conn. Gen. Stats. §22a-42a.

The cited policy sections are very broad, so the corresponding scope of “conditions, limitations, or modifications” is also broad. The Supreme Court has permitted the imposition of a condition requiring the construction of mitigation measures on an adjacent property not even owned by the applicant. Red Hill Coalition, Inc. v. Conservation Commission of Town of Glastonbury, 212 Conn. 710 (1989). Similarly, a condition requiring additional drainage and water quality data to be submitted after the approval was upheld in Gardiner v. Conservation Commission, 222 Conn. 98 (1992). But, in Finley v. Inland Wetlands and Watercourses Commission of Orange, 289 Conn. 12 (2008), very similar conditions triggered a reversal of an approval. The Court found that the Commission could not have made the findings required under its regulations because of the missing erosion and sedimentation control plan that the conditions required to be submitted post-approval. The Court distinguished Gardiner by saying that the conditions there were merely to *refine* and *supplement* information that had been submitted into the record, while in Finley the information was not in the record *at all*. A review of the facts, however, reveals that this is a very difficult line to draw. The application *did* contain an erosion and sedimentation control plan for the original application plan, but not for a “feasible and prudent alternative” plan submitted during the public hearing process. Query whether the two plans were different enough that the erosion and

sedimentation control plans for one would not be similar to the other?

Finley also held that merely by voting to approve the application, the Commission failed to make an *express finding* that the application as modified was in compliance with the criteria of the Inland Wetlands and Watercourses Regulations and the Statutes. What *else* would an approval vote signify? Apparently, it is now required that every Inland Wetlands and Watercourses approval include the mantra, “The Commissions finds that the application, as conditioned and modified in this approval motion, complies with the standards and criteria of the Inland Wetlands and Watercourses Regulations and Chapter 440 of the Connecticut General Statutes.”

Performance Bonds: Performance bonding was upheld in Cioffoletti v. Planning and Zoning Commission of Town of Ridgefield, 209 Conn. 544 (1989); however, as with all land use permits, the permit cannot be conditioned on the continued ownership of the land by the applicant. Fromer v. Two Hundred Post Associates, 32 Conn. App. 799 (1993). As with the variance cases, the commission cannot impose conditions that exceed its jurisdiction, Lorenz v. Old Saybrook Inland Wetlands and Watercourses Commission, 04-CBAR 1446, Docket No. CV 00 0092863 (J.D. Middlesex at Middletown (Munro, J.) (Wetlands Commission cannot impose condition on permit, even with consent of the applicant, that requires applicant to post bond to repair/replace wells of abutters if they are ever damaged by the proposed development). See, also, Avalonbay Communities, Inc. V. Milford Inland Wetlands Agency, 36 Conn. L. Rptr. No. 10, 383 (March 8, 2004), applying the Supreme’s Court decision in Avalonbay Communities, Inc. v. Inland Wetlands Commission, 266 Conn. 150 (2003), to invalidate conditions of approval related to protection of box turtles.

Modified Application During Appeal of Prior Application: Note the potential effect of filing a modified application after an appeal has been filed: In F B New Hartford, LLC v. New Hartford Inland Wetlands & Watercourses Commission, 21 Conn. L. Rptr. No. 9, 317 (April 13, 1998), applicant was denied a wetlands permit for a commercial building and appealed. While that appeal was pending, he filed a new application for a scaled-back development, which was approved. The Court determined that the pending appeal had been rendered moot by the subsequent approval. This is contrary to the reasoning applied in Meng v. ZBA of New London, *supra*.

Conservation Easements: One increasingly common issue involves Conservation Easements. Many Inland Wetlands Agencies are requiring that certain portions of a site be protected in perpetuity by use of a Conservation Easement as a condition of permit approval. The argument in support of the practice is sometimes couched in terms of “mitigation” for the proposed activity or sometimes as an aid to requiring future lot owners to honor the commitments made by the original developer (for example, to not clear certain portions of the lots). Although I routinely counsel clients to grant such Easements when requested and have offered them even when not requested, I think, legally speaking, the local Inland Wetlands Agencies have no authority to impose such conditions. The best argument in support of their use is that the agency is allowed to consider not only what the plan depicts, but, also, future activities which are reasonably foreseeable. Manatuck Associates v. Conservation Commission, 28 Conn. App. 780 (1992). Thus, the Agency can examine the full range

of activities which the zone might permit on the site and can rule on the permit based on those activities, even if the applicant is not proposing them. The applicant can say, “Don’t consider the adverse impacts of that activity; I am not proposing it”, but the Agency responds, “This is an activity which is made reasonably foreseeable by the development which you are proposing, so we must evaluate your application in that light.” It thus makes sense for both sides to rule out, in advance, activities which both the Agency and the developer recognize will have adverse impacts on regulated areas. Agencies, however, are cautioned: do not just impose a Conservation Easement as a condition of approval without developing a full record of what evil you are seeking to protect against and obtaining the developer’s consent wherever possible.

Statement of Reasons: See Gillespie v. Montville Inland Wetlands Commission, 37 Conn. L. Rptr. No. 6, 222 (7-26-2004) where the Court held that despite the prevailing rule that the requirement to state reasons contained in the Statutes [22a-42(d)(1)] is directory rather than mandatory does *not* apply where the *local regulation* requires a statement of reasons.

#### E. Changes of Zone

It is an established principle of zoning that there can be no “contract zoning”, and, hence, changes of zone cannot be conditioned on any future action by the applicant. See, generally, Tondro, Connecticut Land Use Regulations, 2nd Ed., Chap. 3, Section C.3. Two exceptions apply:

First, the Supreme Court in Kaufman v. Zoning Commission of City of Danbury, 232 Conn. 122, held that for affordable housing applications subject to Conn. Gen. Stats. §8-30g, the Zoning Commission can condition approval of a zone change on the development of housing which meets the definitions of that Section. See pp. 147-148.

Second, a question often arises when a Zoning Commission seeks to approve only a portion of a zoning map or text change: Is this “conditional” or “contract” zoning? I have been able to discover no cases directly on point, but I think that if a Zoning Commission can approve or deny the entire application, there is no reason why it cannot approve part and deny part or approve a lesser amendment. For example, it seems a Commission could approve only 50 acres of a 100-acre zone change application. A case where this was a side issue was Scully v. East Haddam Planning and Zoning Commission, Docket No. CV 95-0074314S, Superior Court for Middlesex at Middletown, (Commission approved only part of total zoning map amendment requested; neighbor did not directly raise conditional zone change issue but implied that partial change was evidence that the criteria for the zone change was not really met. The court dismissed the appeal.) Similarly, the Commission should be able to approve a text change to increase the minimum front yard setback from an existing 40 feet to 50 feet, even if the applicant sought an amendment to allow an increase to 60 feet (the increase granted was still less than what the Commission advertised as a possible extent of increase). A recent case that seems to point in the other direction is AEL Realty Holdings, Inc. v. Board of Representatives of City of Stamford, 30 Conn. L. Rptr. No. 11, 418 (October 29, 2001). This case actually deals with the City of Stamford’s Charter which contains a provision similar to that in the Statutes indicating that the Board of Representatives may either “approve or

reject” proposed amendments to the zoning map, if, after such changes had been approved by the Planning Board, twenty percent (20%) of the owners of the land in the affected area petition the Board to do so. The plaintiffs alleged that the Board of Representatives had erred in failing to even consider removing some of the buildings from the proposed zone change. Judge Mottolese disagreed, holding the Board to be without power to modify the terms of the amendment, as the language of the Charter granted that power in other locations, but not here. While this is clearly limited in effect to a Charter interpretation issue, the General Statutes previously contained exactly the same combination of language as the Charter. While other locations specified ‘approve, modify and approve or disapprove’, until the passage of Public Act 02-77, Conn. Gen. Stat. § 8-3(c) said merely, “adopt or deny”. The new public act modifies this language to read “act upon”. It is hoped that this new language will clarify once and for all that proposed zoning text can be modified by a Zoning Commission as a part of the approval process.

## II. EXTENSIONS

### A. Subdivision and Resubdivision.

1. Completion of Public Improvements. The time limits for action and further steps in subdivisions and re-subdivisions are set forth in the Statutes. As discussed previously, the period for completion of public improvements in the case of a “conditional approval” is five (5) years, per Conn. Gen. Stats. §8-25, and may be extended for an additional five (5) years or for a shorter period if set forth in the local Regulations. For other subdivision approvals, the time periods are set forth in Sections 8-26c and 8-26g, but amendments have created some ambiguity: Section 8-26g provides that subdivisions of four hundred (400) or more dwelling units shall be completed within ten (10) years of approval. If the subdivision was approved on or after June 19, 1987 (the effective date of public Act 87-371), the expiration of that period shall “result in automatic expiration of the approval of such plan and the Commission shall file on the Land Records of the Town . . . notice of such expiration”, with the result that no more lots may be sold and a mandatory calling of any bond held by the town; Section 8-26c(c) contains comparable provisions for subdivisions of less than four hundred (400) dwelling units, stating a five-year period for completion of the public improvements and automatic expiration for subdivisions approved on or after October 1, 1977 (the effective date of Public Act 77-545, §4).

Public Act 09-181 amended Conn. Gen. Stats. §8-26c(e) to extend the initial time frame for subdivision improvement to six (6) years, and the total not to exceed eleven (11) years, but only for subdivisions approved between July 1, 2006 and July 1, 2008, inclusive. For subdivisions of four hundred (400) units or more, the time was extended to eleven (11) years total if they were approved during that same time span.

These Statutes raise many questions: What if the Town doesn’t have a bond to use for completion of public improvements? Is it obligated to use general funds to complete the improvements? Section 8-26g speaks only of subdivisions containing more than four hundred (400) “dwelling units”. What about large industrial or commercial subdivisions? Presumably, the five-

year completion period applies, but this is not clear.

With regard to subdivisions approved prior to October 1, 1977, or over 400 dwelling unit subdivisions approved prior to June 19, 1987, what happens after the expiration of the five-year and ten-year periods, respectively? Do such subdivisions expire? If not, what is the remedy? This question was partially answered by Public Act 91-153, §2, which added a new paragraph (c) to §8-26c, providing that any subdivision approved prior to the effective date of the Act, October 1, 1989, would, in any event, expire “not more than” seven (7) years after approval. This paragraph was “re-lettered” to (d), with the addition of a new paragraph (b) through Public Act 93-19. The triggering date has also been moved from October 1, 1989, to October 1, 1991, by Public Act 95-322. Most land use professionals have interpreted this Act as increasing the time limit for completion of all subdivision improvements from five (5) years to seven (7) years, in recognition of the poor real estate economy in 1989 (and since), which was stalling many approved subdivisions and preventing the sale of lots or completion of improvements. However, Section 8-26c, as a whole, could just as well be read to say that for subdivisions approved after the specified dates, the five- and ten-year completion periods continue to apply just as set forth in paragraphs (a) and (b) but that the seven-year expiration period shall apply to all other subdivisions, i.e, those approved prior to October 1, 1977, and June 19, 1987. That is, Public Act 91-153 may only have placed a seven-year “cap” on the “grandfathering” implied in the pre-existing paragraphs (a) and (b). I have not been able to find any cases on this issue. There has been a case holding that the extension to complete improvement not to exceed 10 years from the original approval date allowed under Section 8-26c(d) is discretionary. See Maple Leaf Construction, Inc. v. Town of Somers Planning Commission, et al., 1996 Conn. Super. LEXIS 1290, 96 C BAR 0366, 16 Conn. L. Rptr. 571. The plaintiff argued that the failure to grant the extension violated the “spirit and legislative intent” of Section 8-26c(d). Maple Leaf at 5. The Court disagreed, holding that the language of the Statute stating the Commission “may” grant an extension, is discretionary, not mandatory. The Court also cited the legislative history, showing that the final language of Public Act 93-19 changed the original text of the Bill, which had an automatic three-year extension.

2. Other Time Limits for Subdivisions Approval. Prior to October 1, 1993, Conn. Gen. Stats. §8-25 provided that an approved subdivision shall be filed in the office of the Town Clerk (and, if applicable, the District) “within ninety (90) days of the date such plan is delivered to the applicant”, and, if it is not so filed, it shall become void. The plan may not be filed until it is endorsed by the Commission Chairman or Secretary, and, so, presumably, it will not be “delivered” to the applicant until such endorsement has occurred. That endorsement was to occur “promptly” after the time for taking an appeal has elapsed, or, if there is an appeal, after the conclusion thereof. However, such endorsement normally does not (and should not) occur until all conditions of approval have been met (such as posting of bonds, filing of deeds for roads and open space, submission of final “wash off” plans reflecting any required conditions/modifications, etc.). The Commission is authorized to grant up to two 90-day extensions of the filing period for up to an additional 180 days.

This Section has always been a source of confusion: Many Towns ignore the language about “delivery” and simply begin the 90-day “clock” immediately after the expiration of the appeals period or the resolution of the appeal. This places a deadline on the applicant to get the plan ready for endorsement and prevents the buildup of approved but unfiled plans. As desirable as this procedure may be, it does not appear to comport to the language of Section 8-25. More perplexing is the concept of “delivering” the plans to the applicant for filing: If the applicant fails to provide a plan suitable for endorsement and filing, how can the Commission “deliver” the non-existent plans to the applicant? What does “delivery” mean? Can it be some kind of constructive delivery, as by a written notice that the plans have been endorsed and are ready to be filed? Must the Commission “deliver” the plans (possibly to an out-of-state applicant) just so that the applicant can turn around and return to the very building from which they originated? Can “delivery” include mailing?

As confusing as this scenario is, it became even worse with the passage of Public Act 93-29. This Act eliminated the “delivery” language the first time it appears, thereby mandating filing within ninety (90) days, or, any extension thereof, of the expiration of the appeals period or the conclusion of the appeal. Thus, the filing must occur within those time limits whether plans are “delivered” to the applicant or not. However, the second reference to “delivery” remains, but such “delivery” need no longer be “promptly”; on the contrary, it is to occur “not less than thirty (30) days after” the expiration of the appeals period or the conclusion of the appeal. “Not less than” thirty (30) days could be years, empowering any Planning Commission to kill any subdivision simply by hanging onto it. I have spoken with the Office of Legislative Research and have been assured that the language of Public Act 93-29 was a mistake, and it should have read, “not more than thirty days”, but it took eight (8) years to fix that mistake. Public Act 01-52 finally fixed this, changing the phrase “not less than” to “not more than” in the two locations where it appears, which was the original intent. That Act also acknowledged the reality that approved plans usually require some modifications before they can be endorsed and filed; however, the irrational requirement for “delivery” remains. The Planning Commission is now required to “deliver” the plans within thirty (30) days after the expiration of the appeal period or a favorable judgement on appeal or within thirty (30) days after they have been modified per the Commission’s approval, whichever 30-day period comes later. For a very good example of an approval letter that sets forth all the time lines, see the sample from Westbrook. See Exhibit F.<sup>2</sup>

The General Assembly needs to discover how the filing of subdivisions occurs in the real world and eliminate the ridiculous “delivery” scheme altogether and replace it with one that requires the applicant to get his subdivision conditions and plans in order, get the commission to endorse them, and get them filed in a timely manner. It is undesirable for both Title Searchers and Planning staff to have large numbers of approved but unfiled subdivision plans.

One common issue which arises is whether the Planning Commission can grant an extension of time after the original time period has expired, i.e., a retroactive extension. While I have seen no case law on this, I have routinely advised that such extensions are allowable.

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<sup>2</sup> Drafted by former Westbrook Town Planner, Jay Northrup.

Another common issue involves the criteria to be employed in granting or denying an extension of time. Again, the case law is silent. I advise municipalities to focus their inquiry on changes in circumstance, changes in the Subdivision Regulations or changes in the proposal itself (if any) to determine if expiration and a new application would serve any valid public purpose.

B. Site Plan Approvals

Expiration of site plans is governed by Conn. Gen. Stats. §8-3, and uses the same five (5) year plus five (5) year extension provisions as for subdivisions. Also as with subdivisions, Public Act 09-181 amended Conn. Gen. Stats. §8-3 to add a new subsection (m) to extend the initial time frame for completion of site plan improvement to six (6) years, and the total not to exceed eleven (11) years, but only for site plans approved between July 1, 2006 and July 1, 2008, inclusive.

C. Special Permits and Special Exceptions.

The Statutes contain no time limit on the “life” of special exceptions or permits and temporary permits are common (such as for excavations); however, as with other conditions, the local Regulations should expressly authorize time limits or automatic expiration for special exceptions or permits. Conn. Gen. Stats §8-3c and §8-3d provide that no permit/exception shall become effective until filed in the office of the Town and District Clerk (where applicable) but no time limit for such filing is provided.

Many Special Permits/Special Exceptions (a common example is excavation permits) have a term of years, and some local regulations impose a term on all such approvals with a provision for renewal. The typical criteria for renewal are if there has been a change in circumstance “or other considerations have intervened which materially affect the merits of the matter decided.” *Laurel Beach Assn. v. Zoning Board of Appeals*, 66 Conn. App. 640, 645 (2001.) *Handsome, Inc. v. Monroe Planning & Zoning Commission*, 50 Conn. L. Rptr. No. 16, 586 (December 20, 2010) ruled that minor deviations from the approved plan and slow progress were not grounds for denial of renewal of excavation Special Permit.

D. Variances.

The Statutes contain the same provisions relative to filing as for special permits/exceptions. Variances run with the land (as discussed above), but temporary variances are occasionally granted as for a temporary use of land (a carnival or fair, a tag sale, etc.). I am aware of no case that prohibits temporary variances where the other requirements for variances (hardship, harmony with the purposes of the Regulations) are present.

E. Inland Wetlands and Watercourses Regulations.

As amended by Public Act 92-148, Conn. Gen. Stats. §22a-42a provided that inland wetlands permits shall be issued for no less than two (2) years, with extensions of up to five (5) years. Public

Act 93-305 again amended the permit life to five (5) years, with extensions available for the Agency for up to an additional five (5) years, as long as neither the permit, nor the activity authorized by it, shall extend more than ten (10) years past the original approval. Authorized activities, once commenced, must be completed within one (1) year, although the Agency may set a shorter or longer period of time (again, not exceeding 10 years from the approval of the original permit).

As with subdivision and site plans, Public Act 09-181 amended Conn. Gen. Stats. §22a-42a to extend the initial time frame for wetlands permit improvement to six (6) years, and the total not to exceed eleven (11) years, but only for wetlands permits approved between July 1, 2006 and July 1, 2008, inclusive.

In the case of Fromer v. Two Hundred Post Associates, 32 Conn. App. 799 (1993), the Appellate Court read into the Statutes a “tolling” of a permit during the pendency of an appeal of its issuance. The plaintiff had challenged the Agency’s authority to extend the permit during the pendency of the appeal, but the Court recognized that prior to Public Act 92-148, most inland Wetlands Permits were issued for only one (1) year at a time making any appeal fatal to the Permit. The Court, thus, in a single decision, acknowledged the right to extend Wetlands Permits (now addressed in Public Acts 92-148 and 93-305) and the tolling of that period during the pendency of an appeal. Presumably, reading the Statutes in light of Fromer would mean that the time periods will be tolled without the requirement for any extension by the Agency during the period of an appeal.

### III. REVOCATIONS

#### A. Subdivisions.

There is virtually no law on this topic. I am aware of the unreported case of Town of Glastonbury v. E & M Construction Co., Inc., et al, Docket No. 173553, (Superior Court, Hartford-New Britain at Hartford, 1980), a copy of which is attached hereto as Exhibit G. The case involved a subdivision which was approved for the defendant, but, thereafter, the defendant commenced to conduct a gravel operation on the property, which prompted the Town to bring a zoning enforcement action. The Planning and Zoning Commission revoked the subdivision approval, and, thereby, froze all building permits for undeveloped lots, causing the defendant to file a Counterclaim seeking a declaratory judgment that the subdivision remained valid.

The Court (Bieluch, J.) struck down the purported revocation of the subdivision approval and declared it to be valid (see pp. 10-11); however, the Court appears to have been influenced by the absence of any authorizing provision in the local Subdivision Regulations, raising the possibility that an express authorization for revocation contained in the Regulations might be found valid.

#### B. Special Permits/Exceptions, Site Plans and

C. VariANCES.

I will treat these two issues together because the legal issues are the same. This is an area where the law is unclear. In the case of Cicala v. Administrator, 161 Conn. 362 (1971), the Supreme Court analyzed the authority of an administrative officer to revoke a decision which had not “become final” (the appeal period had not yet expired on the decision) and held that, while not desirable, there is “the need for an opportunity for correction of errors, change of mind, or obtaining more adequate factual grounds for a decision . . . . The mere filing of a decision confers nothing in the nature of a vested right”. Id., at pp. 369-370, quoting from Lyons v. Delaware Liquor Commission, 44 De. 304, 318, 48 A.2d 889. It has also been held that a permit illegally issued is void ab initio. Town of Newington v. Mazzacoli, 133 Conn. 146 (1946).

In the case of Casserta v. Zoning Board of Appeals (see citations below), the issue of revocation of a zoning permit was peripherally involved. In that case, the Zoning Agent issued a permit which, in the opinion of the Planning and Zoning Commission, was illegally issued. At the urging of the Commission’s Chairman, the Zoning Agent revoked the permit and the developer appealed the revocation to the Zoning Board of Appeals. The Appellate Court (23 Conn. App. 232) ruled that the Zoning Board did not have jurisdiction over the revocation issue because the Zoning Agent had not revoked the permit of his own volition, but, rather, at the order of the Planning and Zoning Commission Chairman, and, thus, that revocation was void whether or not appealed. This would imply that had the Zoning Agent acted on his own, the revocation would have been valid and the appeal of the Zoning Board would have been proper. The Supreme Court reversed (219 Conn. 352), holding that the Zoning Agent’s motivation in revoking the permit was irrelevant: His revocation remained an “order” covered by Conn. Gen. Stats. §8-6, and the Zoning Board had the jurisdiction to hear it. Thus, although not central to the case, both the Appellate and Supreme Court’s holdings would imply that the Zoning Agent had the authority to revoke the permit if it had been improperly issued. Indeed, the Supreme Court concludes:

Finally, we disagree with the Appellate Court’s analysis as a matter of policy. The result of that analysis would be that, if [the zoning agent] were incorrect on the merits of the propriety of the permit, and the board, [the planning and zoning chairman], and the other witnesses were correct on those merits, the plaintiff would nevertheless retain a permit to which he was not entitled solely because of purportedly improper reasons that prompted [the zoning agent] to revoke the permit. That does not strike us as rational land use planning procedure.

Id., p. 362.

See, also, Zoning Commission v. New Canaan Building Co., 146 Conn. 170 (1959); Parker-Quaker Corp. v. Young, 23 Conn. Supp. 461 (1962) and Graham Corporation v. Board of Zoning Appeals, 140 Conn. 1 (1953). In UAPA context, see Cornelius dba Focus Mortgage v. Connecticut Department of Banking, 39 Conn. L. Rptr. No. 12, 478 (August 15, 2005).

Another case which explored the authority of a Zoning Agent to revoke a permit is Koepke v. Zoning Board of Appeals of Coventry (see citations below). In that case, the Zoning Agent issued a permit, but it was brought to his attention by a neighbor that he had done so improperly. He revoked the first permit, whereupon the applicant, without appealing the revocation, applied for and received another one which was slightly different from the first. When the neighbor discovered that the second permit had been issued, she continued to feel that despite the changes, it remained illegal and she appealed the issuance of the second permit to the Zoning Board of Appeals. This appeal occurred within the 30-day appeal period in Conn. Gen. Stats. §8-7 of the second permit but more than 30 days from the issuance of the first permit. The Zoning Board ruled in favor of the neighbor, holding that the issuance of the permit before it (the second permit) was illegal, and the applicant appealed. The Trial Court sustained the applicant's appeal on the grounds that the legal notice of the hearing was jurisdictionally defective; the original revocation was illegal, hence, the two permits were part of a single continuous proceeding; therefore, the appeals period began to run from the issuance of the first permit, rendering the neighbor's appeal untimely.

The Appellate Court upheld the Trial Court's decision on the issue of notice and did not reach the revocation issues. 25 Conn. App. 611 (1991). However, the neighbor had requested that if the sole ground for the Court's ruling was the inadequacy of the notice, her appeal should be remanded to the Board for a new hearing, a request which the Appellate Court did not address. The neighbor appealed to the Supreme Court, which upheld the Appellate Court's holding as to notice, but found that if the neighbor's appeal to the Board was timely, it should be remanded to the Board for a new public hearing following proper notice. The Supreme Court remanded the case to the Appellate Court to rule on the timeliness issue, including the question of whether the time limit in Conn. Gen. Stat. §8-7 was mandatory or directory. 223 Conn. 171 (1992).

On remand, the Appellate Court ruled that the time limit was mandatory; that there was no revocation and that it would not have been authorized in any event; and, thus, the appeal period must commence on the date of the issuance of the first permit, voiding the neighbor's appeal. 30 Conn. App. 395 (1993). However, Judge Freedman dissented, arguing that the only permit before the Board was the second one (the first one never even having been presented), and, thus, from the record, the Board had jurisdiction over the neighbor's appeal.

On its second trip to the Supreme Court, the Court essentially adopted Judge Freedman's dissent, holding that the neighbor's appeal period began with the issuance of the second permit because the first permit had been revoked and that revocation had not been appealed by Koepke to the Board. The Court did specifically hold that the Zoning Agent did have the authority to revoke the first permit, holding only that "whether the zoning enforcement officer had the authority to revoke the first permit was an issue to be decided in the first instance by the board [of appeals], not the trial court" (Id., p. 458) and citing to its decision in Caserta, discussed above.<sup>3</sup> Furthermore, the

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<sup>3</sup> On remand to the Coventry Zoning Board of Appeals, the Board ruled that the second permit was illegally issued, and Koepke's appeal of that decision was later settled by the removal of the radio tower from its site.

Appellate Court appears open to the idea that the enforcement mechanisms set forth in Conn. Gen. Stats. Section 8-12 are not exclusive because of the remedies set forth therein are “*in addition to other remedies,*” (emphasis original). Cabinet Realty, Inc. v. Planning and Zoning Commission of the Town of Mansfield, 17 Conn. App. 344, 350 (1989).

One thing is clear from the preceding cases: If the local zoning authority intends to use revocation of permits as an enforcement vehicle, it should include provisions to that effect in its Zoning Regulations. This appeared to be one factor in the decisions of the Trial Court in both the Koepke and Town of Glastonbury cases. Most of the new local regulations which address telecommunications towers under the Telecommunications Act of 1996 contain revocation clauses.

In addition, I would advise that any permit revocation be conducted only after a public hearing with notice to the permit holder. The law abhors the loss of a right without notice or an opportunity to be heard. See TMK Associates v. Town of East Lyme Conservation Commission, 7 CSCR 318 (March 9, 1992, Superior Court, New London). A Massachusetts Appellate Court case, also requiring reinstatement of a permit pulled without a hearing, Lomelis v. Board of Appeals of Marblehead, 17 Mass. App. Ct. 962; 458 N.E. 2d 740 (1983), which involved a situation where a plaintiff was renovating his house with a permit when a windstorm demolished it. The builders completed the demolition and then commenced new construction. After complaints by the neighbors, the permit, which was not for new construction, was revoked without a hearing. Eventually a second and a third new permit were issued. The Appellate Court held that the original permit should not have been revoked in the manner it had been and the second and third permits were just reinstatements and could not, therefore, be separately appealed by the neighbors.

I would note, however, that Judge Maloney in Liucci v. Zoning Board of Appeals of Suffield, 27 Conn. L. Rptr. No. 17, 624 (October 9, 2000), held otherwise in a situation where the original variance was voided before even taking effect. In Liucci, the Board failed to notify all neighbors within 100 feet of a variance application. There was no regulatory requirement to do so; it was just standard Board practice, and there was a space on the application requiring those individuals be notified. A variance was granted varying a minimum lot size requirement. The next day, the Chairman was notified by a neighbor who had not received notice of the hearing. The Chairman unilaterally called the Town Clerk and the applicant and advised that the decision was “null and void”, and no notice of the decision was published. Judge Maloney held that prior to publication, a Board’s decision to grant a variance could be reconsidered for good cause. Despite no Statutory or Regulatory requirement for the notice to neighbors, Judge Maloney held that the failure to notify the neighbors qualified as ‘good cause’ and upheld the voiding of the granting of the variance.

For another variation on revocation see Lallier v. Zoning Board of Appeals, 119 Conn. App. 71 (2010), where the Planning and Zoning Commission granted an excavation permit as a site plan for a farmer who said he wanted to prepare the land for crops. No appeal was filed. When neighbors appealed, the Commission decided that it has been in error to treat the application as a site plan; that a special permit was required; and order the Z.E.O. to issue a Cease and Desist Order. That Order was appealed to the ZBA, which upheld it. On appeal, the Appellate Court ruled that once the site

plan approval had been published and no appeal filed, it was final and the commission could not, in effect, revoke it. Compare to : *Balf v. Planning & Zoning Commission of the Town of Manchester*, 79 Conn. App. 626 (2003), (Applicant filed the application as a special permit and Commission treated it as such and denied it based on that level of discretion; Court decided it was really a site plan approval, and, based on *that* level of discretion, no authority to deny, so must approve); and *A. Aiudi & Sons, LLC, v. Planning & Zoning Commission of the Town Plainville*, 267 Conn. 192 (2004), (Applicant filed the application as a site plan approval and Commission treated it as such and denied it based on that level of discretion; Court decided it was really a special permit application, and, based on *that* level of discretion, Commission did have authority to deny). It's hard to see why the *review court* can overturn a commission action because it was mis-characterized, but the commission itself can't.

For another variation on this theme, see, also, *Arigoni Bros., LLC v. Planning and Zoning Commission of Haddam*, 27 Conn. L. Rptr. No. 18, 660 (1-016-2000) where an application that *should have been filed* as a special permit was, instead, filed as a site plan and was not acted upon within the Statutory time frames; held, automatic approval. It's hard to square this holding with the one in *Balf* and *Aiudi*.

Finally, an odd pair of revocation cases which have created confusion about when a zoning enforcement officer has made a "decision" which can and must be appealed to the zoning board of appeals in order to exhaust that administrative remedy. In *Holt v. Zoning Board of Appeals*, 114 Conn. App. 13 (2009), a property owner was trying to sell a vacant nonconforming lot, but prospective buyers kept asking how they could be sure that a house could be built on the lot. So seller went to the zoning enforcement officer, who wrote her a letter saying that the lot was a legal nonconforming lot and that "Based on the RH-10 zone requirements, a single-family residence could be built on this lot if it does not exceed a total floor area of approximately 1750 SF." The letter said construction of such a house would be subject to approval of a Coastal Site Plan and a Certification of Zoning Compliance. These two routine approvals were required for *any* lot in the area, not just nonconforming ones. Holt bought the lot in reliance on the Z.E.O.'s letter. Holt then published a legal notice of the Z.E.O.'s decision. More than 30 days after publication of the decision, and far more than that after actual knowledge of the decision, Hescocock appealed the decision to the ZBA in order to block construction of a home on the Holt property. The ZBA over ruled the Z.E.O. and held that the lot was not buildable and Holt appealed. While the appeal was pending, the Z.E.O. revoked his decision in order to block an anticipated civil rights action by Holt. Both the Superior Court and the Appellate Court held that Hescocock's appeal was not timely, *but* it didn't matter because the decision of the Z.E.O. was not a decision at all and hence was not appealable to the ZBA. The only appealable decision would have been the approval of the CAM site plan and the Certificate of Zoning Compliance.

Compare *Holt* to *Piquet v. Town of Chester*, 124 Conn. App. 518 (2010), where Piquet buried her husband in the back yard, per his wishes, and indicated that upon her death, she would be buried next to him. The Z.E.O. issued an order to Piquet, ordering her to perform no further burials in her back yard because such a use was not a customary accessory use in a residential zone (health code

compliance was not an issue). Piquet appealed the order to the ZBA, but before it could be heard, the Z.E.O. issued Piquet a letter revoking the order and saying she would pursue no enforcement action at this time, but telling Piquet that the use was not legal and that Piquet could not enter herself in her yard. Piquet brought a declaratory ruling to seek an interpretation of the accessory use issue, believing that she could not appeal to the ZBA when the Z.E.O. withdrew the order. The Appellate Court ruled that Piquet had failed to exhaust her administrative remedy of appeal the revocation letter to the ZBA. This case is now before the Supreme Court.

It is difficult to square these two cases and know when an appeal to the ZBA will be mandated in response to a “decision” by a Z.E.O. I have seen property owners actually applying for a certificate of zoning compliance or site plan approval for a hypothetical house, just to trigger a ZBA appeal from some unknown objecting party and be sure that a vacant lot is buildable. Greater clarity is needed on when a “decision” is a “decision” that can and must be appealed to the ZBA.

#### D. Inland Wetlands.

Here, the Statutory authority for revocation is clear: Conn. Gen. Stats. §22a-42a(d) provides specifically that an Inland Wetlands Agency may “suspend or revoke a permit if it finds . . . that the applicant has not complied with the conditions or limitations set forth in the permit or has exceeded the scope of the work as set forth in the application”. This suspension or revocation may occur “after giving notice to the permittee of the facts or conduct which warrant the intended action and after a hearing at which the permittee is given an opportunity to show compliance with the requirements for retention of the permit . . . .”

With regard to permits which lapse due to the expiration of the time limits set forth therein, a Superior Court case holds that a hearing must be held if there is an issue about such expiration. See, TMK Associates v. Town of East Lyme Conservation Commission, *supra*. This case was not appealed.

#### E. Building Permit

Similar to the rules for Special Permits or Site plans: there has to be a due process hearing. *Tri County Industries, Inc. V. District of Columbia*, No. 96-7022 (D.C. Cir., 1997).

### IV. RECONSIDERATION/SERIAL APPLICATIONS

“Reconsideration” can come in two forms: Actually reconsidering a vote immediately (or shortly) after it has been made; or, receiving an application that is arguable the same as a prior one that was denied and approving it.

#### A. Reconsideration

If notice is already published, you can’t reconsider. Decisions become final when published.

Sharpe v. Zoning Board of Appeals, 43 Conn. App. 512, 526 (1996). Even prior to publication, you need a “good reason”. See Kinney v. Inland Wetlands & Watercourses Commission of Enfield, 29 Conn. L. Rptr. No. 13, 486 (June 25, 2001) (denied application was reconsidered and approved only because applicant’s lawyer claimed that the Commission had simply made the wrong decision, not to correct errors due to oversight or “some other extraordinary reason”, quoting Sharpe.) See, also, Dugas v. Zoning & Planning Commission of Suffield, 29 Conn. L. Rptr. No. 16, 585 (July 16, 2001). See variance cases below. In State administrative case, held that refusal of agency to reconsider was not appealable to Superior Court; same reasoning might apply to land use appeals. Peter F. Sielman v. Connecticut Siting Council, 36 Conn. L. Rptr. No. 11, 400 (March 15, 2004). Zoning Board of Appeals may “vacate” a granted variance if it discovers that applicant did not provide required personal notice, if done promptly upon discovery. Liucci v. Zoning Board of Appeals, 27 Conn. L. Rptr. No. 17, 624 (Oct. 9, 2000).

“Reconsideration” can arise in other contexts: Approval of Coastal Site Plan constitutes a finding of zoning compliance (since it is a zoning process) and estops a subsequent challenge to the legality of the proposed use. Bishop v. Guilford ZBA, 92 Conn. App. 600 (2006). See, also, Horton v. East Lyme Zoning Commission, 40 Conn. L. Rptr. No. 10, 353 (1-30-06). Decision by ZBA to approve liquor store as site plan approval could not be challenged when ZEO issued Certificate of Zoning Compliance, where neighbor claimed that original decision should have been a *special permit*, not a site plan. The ZEO. could only consider if the liquor store had been built in accordance with its approved site plan; neither he nor the Board could reconsider the original decision to treat the application as a site plan. Mohler v. Suffield ZBA, 42. Conn. L. Rptr. No. 21, 793 (4-2-07), replacing earlier opinion at 42 Conn. L. Rptr. No. 11, 410 (1-22-07).

“Precedent” as Binding Commission Action: Commission may have construed “street” to mean “through street” when measuring maximum cul de sac length and may have applied it that way before but that is not what the Regulations say. Pappas v. Enfield Planning & Zoning Commission, 40 Conn. L. Rptr. No. 18, 668 (3-27-07). May be different for a general practice: Commission was in the habit of approving partial bond releases at various stages of subdivision road completion but was not estopped from reversing that practice. Grandview Farms, LLC v. Town of Portland, 42 Conn. L. Rptr. No 8, 285 (1-1-07). See, also, Goulet v. Chesire Zoning Board of Appeals, 44 Conn. L. Rptr. No. 12, 430 (1-14-08), re decision differing from past decision because past decision was in error.

- B. Serial Applications. Revisiting a decision in a subsequent application is more complex.
  - 1. Subdivision/Resubdivision. I have found no case law to date.
  - 2. Site Plans, Special Permit/Exception.

Fact that previous two-year excavation permit was granted does not preclude Commission from denying subsequent two-year renewal. A. Aiudi and Sons, LLC v. Planning &

Zoning Commission of Plainville, 72 Conn. App. 502, 511 (2002).

Fact that Building Official erroneously granted builder permit for one of four illegal lots does not preclude Board from denying similar permits for the others. Goulet v. Cheshire Zoning Board of Appeals, 42 Conn. L. Rptr. No. 15, 558 (February 19, 2007), and, on reconsideration, 44 Conn. L. Rptr. No. 12, 430 (January 14, 2008).

The successive application rule for variances (discussed below) does not apply as strictly to special permit/exceptions because *any* change that brings the application into conformance with the regulations is “substantial”, even if the change itself is arguably minor. See Richardson v. Zoning Commission, 107 Conn. App. 36, 41 (2008).

### 3. Variances.

In order for the ZBA to consider a second application, an applicant must “show a change of conditions or other consideration materially affecting the merits, intervening since the former decision”. Laurel Beach Assoc. v. Zoning Board of Appeals of City of Milford, 166 Conn. 385 (1974). In 2001, this standard was clarified by the Connecticut Appellate Court in a case also called Laurel Beach Assoc. v. Zoning Board of Appeals of City of Milford. In the 2001 Decision, the Appellate Court found that submission of new evidence into the record that “was not presented to the Zoning Board when [the previous applicant] applied for a permit” was a valid basis for consideration of an application “even if it did view the relief requested as substantially similar”. Laurel Beach Assoc. v. Zoning Board of Appeals of the City of Milford, 66 Conn.App. 640, 647 (2001).

This line of reasoning was followed in Vine v. Zoning Board of Appeals, 102 Conn. 863 (2007), holding that new information was sufficient to allow granting of previously denied variance. The second Laurel Beach Decision and Vine would appear to tacitly overrule cases like Daw v. ZBA of Westport, 63 Conn. App. 176 (2001); Rutter v. Haddam ZBA, CV 96-079420 (Middlesex).

Res Judicata on Appeal: An odd issue was presented in Palmieri Cove Associates v. New Haven ZBA, 45 Conn. L. Rptr. No. 22, 797 (9-9-2008, Corradino). The plaintiff applied for a variance, which was denied and, on appeal, the denial was sustained. New Haven has a regulation to the effect that the ZBA cannot be *compelled* to hear the same application is less than 12 months. Following the loss of its appeal, plaintiff re-filed the identical variance application 13 months after the denial of the first one. This application included evidence that the court had noted was missing from the first public hearing proceeding. The variance was again denied, and plaintiff again appealed. The ZBA moved to dismiss on grounds of *res judicata*. Plaintiff responded that the ZBA’s own regulations allowed them apply for the same relief after more than 12 months, and since they had a right to *apply* and be heard, they should have a right to *appeal* and be heard. The court did not agree, holding that the ZBA could hear applications as often as it wished, but the court was bound by *res judicata* and could not simply reverse the same relief for the same property. Like all Corradino opinions, this one is scholarly, clear, and thorough.

Mootness: Approval of a variance to allow a one-half story addition to a house does not moot a pending appeal to add a full story to the same house. The Court analyzed other mootness cases, and drew a distinction between those cases where the subsequent approval foreclosed any benefit from the prior one, versus those situations where the implementation of the prior approval would still allow the plaintiff to benefit from the subsequent one. The court ruled that, though it might be expensive, the plaintiff could remove the half-story addition and construct the full-story addition. Meng v. ZBA of New London, 45 Conn. L. Rptr. No. 21, 768 (9-1-2008).

4. Wetlands. No cases found expressly for wetlands, though the reasoning of the other land use cases would probably apply.

5. Effect on Appeal. Does a modified Decision commence a new appeal period? Yes, at least per UAPA. Platinum Limousine Service, LLC v. Connecticut Department of Transportation, 37 Conn. L. Rptr. No. 3, 85 (July 5, 2004).

H:\Aspire Clients\Branse Willis Knapp\Documents\010411\Conditions and Modifications Outline.wpd; rev. October 17, 2008 to include the *Heim* and *Finley* case discussions. Rev. May 28, 2010 with many additional cases. Rev. October 26, 2010 to add new *Heim* citation; Rev. December 27, 2010 to add *Piquet* and *Holt* caess. Rev. January 4, 2011 to add *Handsome, Inc.* case.