

## WHAT'S FREE ADVICE WORTH? WHAT YOU MAKE IT WORTH!

Many towns have separate conservation commissions, i.e., not combined with an Inland Wetlands and Watercourses agency having regulatory powers for wetlands permits. A combined commission wears two "hats" (see Habitat Vol. XII, No. 4, January, 1999), and has the advantage that applicants *must*, in most cases, at least appear before the commission and get a permit. The separate conservation commission has no such leverage and is purely advisory to other land use agencies. How do you make that advice count?

### Know Your Own Role.

Conn. Gen. Stats. §7-131a authorizes municipalities to create conservation commissions. The relevant provisions are as follows:

(a) Any town, city or borough, by vote of its legislative body, may establish a conservation commission **for the development, conservation, supervision and regulation of natural resources**, including water resources, within its territorial limits.  
\* \* \*

(b) A conservation commission shall conduct research into the utilization and possible utilization of land areas of the municipality and may coordinate the activities of unofficial bodies organized for similar purposes, and may advertise, prepare and distribute books, maps, charts, plans and pamphlets as necessary for its purposes. It may propose a greenways plan for inclusion in the plan of conservation and development of the municipality prepared pursuant to Section 8-23. It may inventory natural resources and formulate watershed management and drought management plans. Such plans shall be consistent with water supply management plans prepared pursuant to Section 25-32d. It shall keep an index of all open areas, publicly or privately owned, including open marshlands, swamps and other wetlands, for the purpose of obtaining information on the proper use of such areas, **and may from time to time recommend to the planning commission or, if none, to the chief executive officer or the legislative body plans and programs for the development and use of such areas. It may make recommendations to zoning commissions, planning commissions, inland wetlands agencies and other municipal agencies on proposed land use changes.** \* \* \*. (Emphasis added).

So you have authority, by Statute, to *advise* your sister land use agencies, as well as other municipal agencies concerning a wide variety of land use topics.

### Can the Other Agency Heed Your Advice?

There is no case law concerning the weight to be given to a conservation commission recommendation, but the courts have held that it is not an abuse of discretion for a land use agency to act upon the advice of an agency that is statutorily authorized to render such advice. In *Arway v. Bloom*, 29 Conn. App. 469 (1992), affirmed 227 Conn. 799 (1993), the Redding Inland Wetlands and Watercourses Commission granted a permit and transmitted

its decision to the Zoning Commission per its duty under Conn. Gen. Stats. §8-3(g) and 8-3c(b) to file a report with that Commission, which in turn, was required to give “due consideration to the report” of the Wetlands Commission. *Id.* The Zoning Commission approved the use subject to a number of conditions, the first of which was drawn verbatim from the Wetlands Commission’s approval. Neighbors appealed the Wetlands and Zoning approvals, and the trial court sustained the Wetlands appeal on procedural grounds. The trial court then sustained the Zoning appeal on the grounds that since the Wetlands decision was void, the Zoning Commission had acted illegally in giving “due consideration” to that permit when approving the site plan. The Appellate Court overturned the trial court decision:

Here, the zoning commission acted on the applicants' site plan and special permit application with a favorable final report from the wetlands commission in hand. The fact that the wetlands decision was later reversed by the trial court on procedural grounds did nothing to disturb the zoning commission's jurisdiction to render its own decision at the time it considered the wetlands report.

*Id.*, pp. 479-480.

So it would appear that other land use agencies *can* heed the advice you are Statutorily authorized to give them and the courts will support that.

### Getting Them to Listen

OK, the other agency *can* heed your advice. But why *should* they?

Know the Ground Rules: In order for your advice to be effective, you have to know the scope of authority and discretion of the receiving agency to accept it. What kind of application is being heard—text or map amendment for wetlands or zoning, subdivision text amendment, special permit, wetlands permit, subdivision, or site plan review? They all have different levels of discretion that the agency can exercise, and they are arranged in the preceding sentence from highest to lowest levels of discretion. If it’s a permit application, what are the criteria of the regulations that the agency is applying? To the extent that you can couch your recommendations by reference to *the words used in the regulatory criteria*, you increase the agency’s confidence that it can heed your advice, and you also boost the agency’s chances for being upheld on appeal. The worst thing you can do is recommend that another agency do something that, by its own regulations, it is not authorized to do. You lose credibility and, if they heed your advice, you expose them to a successful court appeal.

Know the Facts: Unlike the combined wetlands commission, you have no way to *force* an applicant to come in and make a presentation to you. Some zoning and/or subdivision regulations include a requirement for referral to the conservation commission, and I would certainly urge you to seek such regulations. Without that, you have two options: invite the applicant before you (with adequate notice) and hope that they will appear; or get the facts from town staff members. But whatever it takes, know what you are talking about.

Know the Schedule: A last-minute recommendation is less likely to be heeded by either the applicant or the receiving agency. I represent applicants, and they always try to accommodate every possible concern *if they hear it early enough*. Once the final drainage

calculations are completed, it is a lot more expensive and time-consuming to make what would otherwise be a small tweak in the stormwater management plan. So try to get into the process at the earliest possible moment.

Be Honest: Let's face it, a lot of the opponents who appear at a public hearing and waive the flag of "environmental protection" never gave a damn until there was an application in their own back yard. Don't get sucked into that. Treat all applicants and applications equally. Adopting a set of guidelines (such as criteria for open space) will help you to be consistent and demonstrate to both the agency and the applicant that you are playing fair.

Be Specific: A recommendation that is vague is less likely to be heeded. State *as precisely as you can* what should change about the proposal and why. Recommendations like, "the development is too dense" or "the open space is located in the wrong place" are sure to be ignored—and they *should be*.

Be Constructive: Wherever possible, specify the changes that you are seeking. The authority of a land use agency to just deny an application is much lower than its authority to modify or condition one. Seek ways that the proposal can reasonably be modified to achieve both your goals and the applicant's. Remember: An applicant would like to go to the regulatory agency with a positive recommendation from you, so if they can make changes to their plan to achieve that, they will.

Be There: Letters and e-mails are great for setting forth a joint position of your commission, but the applicants will be at the agency hearing in person, with their entourage of experts. If you really want your advice to be taken, you need to be prepared to send one or more live bodies to attend the hearing and present your letter, amplify on it if need be, and respond to questions or comments.

Be respectful: The problem with being "just" an advisor is that there will be times when your advice is ignored. Don't get mad! Always give the agency a face-saving way out if you can: "We felt that open space in the northwest corner made sense for the reasons articulated in our letter, but we understand the agency giving a higher priority to an active recreation field in the southwest corner." Throwing a tantrum will not increase your credibility with the agency and will almost surely decrease it.

Be Watchful: There is a fine line between "I told you so" and "please note what happened on that other project when you didn't heed our advice. Gosh, it would be good not to have *that* happen again!" In Glastonbury, we were able to persuade the Council to hire the Town's first environmental planner because of a costly and destructive error that would have been easily avoidable by proper review. Use past mistakes to make your point, but don't humiliate the ones who *made* those mistakes—they're probably the people whose support you are seeking.

Infiltrate: Many land use agencies have trouble getting volunteers to serve, and with the long hours, lack of public gratitude, and low "wages," it's no wonder. *You* are prime candidates. Volunteer!

You *can* make a difference in the process! Know the rules, be constructive, be alert!