

AGENDA
INLAND WETLANDS AGENCY
JULY 13, 2016 - 7:00 P.M.
TOWN HALL ANNEX - 134 GROTON LONG POINT ROAD
COMMUNITY ROOM 2

I. ROLL CALL

II. PUBLIC COMMUNICATIONS

III. APPROVAL OF MINUTES

1. June 22, 2016*

IV. NEW APPLICATIONS

V. PENDING APPLICATIONS

1. IWA 16-07, Steadfast Baptist Church, 256 North Road

VI. NEW BUSINESS

1. Electric Boat, 456 Poquonnock Road, Invasive Species Remediation, Jurisdictional Ruling*
2. Report of Chair
3. Report of Staff
 - CTDEEP Municipal Inland Wetlands Agency Legal and Administrative Updates*

VII. ADJOURNMENT

Next regular meeting: August 10, 2016

* Enclosed

MINUTES
INLAND WETLANDS AGENCY
JUNE 22, 2016 - 7:00 P.M.
TOWN HALL ANNEX - 134 GROTON LONG POINT ROAD
COMMUNITY ROOM 2

I. ROLL CALL

Agency: Scott, Sutphen, Williams
Staff: Jones, Galetta

Chairperson Scott called the meeting to order at 7:02 p.m.

II. PUBLIC COMMUNICATIONS - None

III. APPROVAL OF THE MINUTES

1. June 8, 2016

MOTION: To approve the minutes of June 8, 2016, as written

Motion made by Sutphen, seconded by Williams, so voted unanimously.

IV. NEW APPLICATIONS

1. IWA 16-07, Stedfast Baptist Church, 256 North Road

Staff described the location to the Agency as the former Bishop Seabury Church on Route 117, which is also known as North Road. A number of years ago Stedfast Baptist Church bought the property. This application is to extend an existing fence and pour a concrete pad for a playground that has been donated to the church. Staff noted the activity is in the 100' upland review area which is flat and grassed. The Agency did not see a need to conduct a site walk. The applicant will be present at the next meeting to provide details and answer questions.

MOTION: To classify the application as Minor.

Motion made by Sutphen, seconded by Williams, so voted unanimously

V. NEW BUSINESS

1. Report of Chair - None

2. Report of Staff

Staff noted that the Planning Commission has scheduled a public hearing to receive comments on the Plan of Conservation and Development (POCD) for Wednesday, June 29, 2016 at 6:30 p.m.

Staff reported that Mary Ellen (Bunny) Furlong has given her resignation as alternate Agency member to the Town Clerk.

VI. ADJOURNMENT

Meeting adjourned at 7:15 p.m.

Eunice Sutphen, Vice Chairperson
Inland Wetland Agency

Prepared by Lynda Galetta
Office Assistant II

NOT APPROVED

GENERAL DYNAMICS

Electric Boat

Date: June 29, 2016

From: Electric Boat, 75 Eastern Point Road, Groton, CT. 06340

To: Wetlands Commission
cc. Deb Jones, Assistant Director, 134 Groton Long Point Road Groton, CT
06340-4873

Description: 456 Poquonnock Road, Invasive species remediation work plan.

Background:

Electric Boat and its consultant have been monitoring the former Trails Pond area as part of the State Permit issued previous. Attached is the latest report for your review.

Electric Boat has been working with the State DEEP, Town of Groton staff and EB's consultant to coordinate our efforts to obtain permission and remediate a *Phragmites stand* as illustrated below. The Town of Groton Planning Department has requested that the Wetlands Commission be made aware of the request prior to execution of the work. Please review the recommended plan below and provide concurrence to proceed.

Thank You!

Sincerely;



Paul A. Williams, AIA.

75 Eastern Point Road
Groton, CT 06340-4989
Cell: 860 861-2456
Fax 860-433-6440

General Dynamics Private Information

BI-ANNUAL INVASIVE SPECIES INSPECTION

**FORMER TRAILS POND AREA DAM ID #5903
DAM SAFETY AUTHORIZATION DS-201006654**

PREPARED FOR:
GENERAL DYNAMICS ELECTRIC BOAT CORPORATION

PREPARED BY:

Kleinschmidt

OCTOBER 2015

**BI-ANNUAL INVASIVE SPECIES INSPECTION
FORMER TRAILS POND AREA DAM ID #5903**

GENERAL DYNAMICS ELECTRIC BOAT CORPORATION

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Figure 1: Survey Area and Mapped Invasives

Appendix A: Non-Native Invasive Species List

Appendix B: Photo Documentation

2.0 STUDY AREA

The former Trails Ponds area, within the scope of this inspection, includes all the land down gradient of former pond's ordinary high water mark (OHWM). This area was initially distinguished in 2012 and mapped for purposes of defining the limits of this reporting effort and study area (Figure 1). Photos illustrating the general characteristics of the project site are provided in Appendix B Photo Documentation.

The Trails Pond dam was breached in February 2012 and Photo 1 depicts the channel flowing south from the current wetland area. Since the breach, the former pond has been allowed to naturally re-vegetate into an established emergent wetland (Photos 2-4). Birch Plain Creek enters the existing wetland from the north (Photo 5) and meanders through the eastern side of the former pond's edge. Notable emergent wetland species include wool grass (*Scirpus cyperinus*), Cattail (*Typha latifolia*) and a mixture of wetland sedges, rushes, and grasses. The surrounding topography rises quickly from the ponds former edge. The land cover east of the former pond is characterized by a red maple (*Acer rubrum*) and oak-hickory broad-leafed deciduous forest which abuts a subdivision on Mirra Drive. The western edge of the pond is bordered by a very steeply sloping hillside intermingled with rock outcroppings and cliffs with a mesic oak-hickory forest canopy and a dense Mt. laurel (*Kalmia latifolia*) shrub stratum. The southern extent of the project abuts the upstream side of the old earthen dam face. The north is characterized by an oak-hickory forest and is associated with the perennial stream that flows through the former Trails Pond area.

3.0 METHODOLOGY

Field inspections will occur on or before June 15 and October 1 of each year, as outlined in EB's CTDEEP Dam Safety Permit. A Professional Wetland Scientist will perform a meander survey below/within the former pond's OHWM (study area). Invasive botanical species encountered will be spatially documented using a global positioning system. To document an infested area, the stand is delineated based on the dominate canopy cover, of the invasive plant. Areas containing only occasional or sparse invasive species (non-dominant) will be characterized by using estimates of areal coverage and species present. Location(s) of invasive species will be documented using a Global Positioning System (GPS). All sampling areas containing invasive botanical species and methods to eradicate them will also be photo documented. These survey methods are adapted from the protocols described by the US Fish and Wildlife Service's *Managing Invasive Plants, Concepts, Principles and Practices* (USFWS, 2009).

5.0 RECOMMENDATIONS AND ACTIONS TAKEN

As stated in Section 4, a single sparsely populated stand (20% areal cover) of invasive common reed was observed within the former Trails Pond area during the June and September 2015 inspections. Early control actions should be taken to ensure the stand does not become more established. Based on the CTDEEP guidance, the most effective treatment method is the application of a Glyphosate based herbicide and an aquatic approved surfactant. Spraying may occur during the summer months or until the first frost, followed by cutting or removal (one month after application). The mapped stand of common reed is sparse at this time, and therefore it is possible that hand pulling or cutting and herbicide application, may be effective in suppressing this population.

EB will continue to monitor the area in accordance with the Dam Safety Permit. The next inspection is scheduled to take place on or before June 15, 2016. This report will be submitted to the Commissioner of the CTDEEP Bureau of Water Protection and Land Reuse Inland Water Resources Division for review.

APPENDIX A
NON-NATIVE INVASIVE SPECIES LIST

Dame's rocket	H	<i>Hesperis matronalis</i> L.		Y
Japanese hops (P)	H	<i>Humulus japonicus</i> Sieb. & Zucc.	Japanese hop	Y
Hydrilla	A	<i>Hydrilla verticillata</i> (L.f.) Royle	Water thyme	Y
Ornamental jewelweed (P)	H	<i>Impatiens glandulifera</i> Royle	Tall impatiens	Y
Yellow iris	A	<i>Iris pseudacorus</i> L.	Yellow flag iris; Pale yellow iris	Y
Perennial pepperweed	H	<i>Lepidium latifolium</i> L.	Tall pepperwort	Y
Border privet (P)	S	<i>Ligustrum obtusifolium</i> Sieb. & Zucc.		Y
California privet (P)	S	<i>Ligustrum ovalifolium</i> Hassk.		N/A
European privet (P)	S	<i>Ligustrum vulgare</i> L.		N/A
Japanese honeysuckle*	V	<i>Lonicera japonica</i> Thunb.		Y
Amur honeysuckle	S	<i>Lonicera maackii</i> (Rupr.) Herder		Y
Morrow's honeysuckle	S	<i>Lonicera morrowii</i> A. Gray		Y
Tatarian honeysuckle (P)	S	<i>Lonicera tatarica</i> L.		Y
Belle honeysuckle	S	<i>Lonicera x bella</i> Zabel	Bell's honeysuckle (<i>misapplied</i>)	Y
Dwarf honeysuckle^ (P)	S	<i>Lonicera xylosteum</i> L.	European fly-honeysuckle	Y
Ragged robin (P)	H	<i>Lychnis flos-cuculi</i> L.		Y
Moneywort* (P)	H	<i>Lysimachia nummularia</i> L.	Creeping jenny	N/A
Garden loosestrife* (P)	H	<i>Lysimachia vulgaris</i> L.	Garden yellow loosestrife	Y
Purple loosestrife	A	<i>Lythrum salicaria</i> L.		Y
European watercress (P)	A	<i>Marsilea quadrifolia</i> L.	Water shamrock	Y
Japanese stilt grass	G	<i>Microstegium vimineum</i> (Trin.) A. Camus		Y
Eulalia* (P)	G	<i>Miscanthus sinensis</i> Andersson	Chinese or Japanese silvergrass	N/A
Forget-me-not	A	<i>Myosotis scorpioides</i> L.	True forget-me-not; Water scorpion-grass	Y
Parrotfeather (P)	A	<i>Myriophyllum aquaticum</i> (Vell.) Verdc.		Y
Variable-leaf watermilfoil	A	<i>Myriophyllum heterophyllum</i> Michx.		Y
Eurasian watermilfoil	A	<i>Myriophyllum spicatum</i> L.		Y
Brittle water-nymph (P)	A	<i>Najas minor</i> All.	Eutrophic water-nymph	Y
Onerow yellowcress (P)	A	<i>Nasturtium microphyllum</i> Boenn. ex. Rchb.	<i>Rorippa microphylla</i>	Y
Watercress (P)	A	<i>Nasturtium officinale</i> W.T. Aiton	<i>Rorippa nasturtium-aquaticum</i>	Y
American water lotus (P)	A	<i>Nelumbo lutea</i> Willd.	American water lotus	Y
Yellow floating heart (P)	A	<i>Nymphoides peltata</i> (S.G. Gmel.) Kuntze		Y
Scotch thistle (P)	H	<i>Onopordum acanthium</i> L.		Y
Star-of-Bethlehem (P)	H	<i>Ornithogalum umbellatum</i> L.		N/A
Princess tree (P)	T	<i>Paulownia tomentosa</i> (Thunb.) Siebold & Zucc. ex Steud	Empress-tree	Y
Reed canary grass	G	<i>Phalaris arundinacea</i> L.		N/A
Common reed	G	<i>Phragmites australis</i> (Cav.) Trin. ex Steud.	Phragmites	Y
Water lettuce^ (P)	A	<i>Pistia stratiotes</i> L.		N/A
Canada bluegrass (P)	G	<i>Poa compressa</i> L.		Y
Bristled knotweed	H	<i>Polygonum caespitosum</i> Blume	<i>Persicaria longiseta</i> ; Oriental lady's thumb	Y
Japanese knotweed	H	<i>Polygonum cuspidatum</i> Siebold & Zucc.	<i>Fallopia japonica</i>	Y
Mile-a-minute vine	H	<i>Polygonum perfoliatum</i> L.	<i>Persicaria perfoliata</i>	Y
Giant knotweed (P)	H	<i>Polygonum sachalinense</i> F. Schmidt ex. Maxim.	<i>Fallopia sachalinense</i>	Y
White poplar (P)	T	<i>Populus alba</i> L.		Y
Crispy-leaved pondweed	A	<i>Potamogeton crispus</i> L.	Curly pondweed or Curly-leaved pondweed	Y
Kudzu (P)	V	<i>Pueraria montana</i> (Lour.) Merr.	<i>Pueraria lobata</i>	Y
Fig buttercup	H	<i>Ranunculus ficaria</i> L.	Lesser celandine; <i>Ficaria verna</i>	Y
Common buckthorn	S	<i>Rhamnus cathartica</i> L.		Y
Black locust*	T	<i>Robinia pseudoacacia</i> L.		N/A
Multiflora rose	S	<i>Rosa multiflora</i> Thunb.		Y
Rugosa rose* (P)	S	<i>Rosa rugosa</i> Thunb.*	Beach, Salt spray, Japanese, or Ramanas Rose	N/A
		*Note: This plant is especially aggressive in coastal areas		
Wineberry	S	<i>Rubus phoenicolasius</i> Maxim.		Y
Sheep sorrel (P)	H	<i>Rumex acetosella</i> L.		Y
Giant salvinia^ (P)	A	<i>Salvinia molesta</i> Mitchell		Y
Tansy ragwort^ (P)	H	<i>Senecio jacobaea</i> L.	Stinking Willie	Y
Cup plant (P)	H	<i>Silphium perfoliatum</i> L.		Y
Bittersweet nightshade (P)	H	<i>Solanum dulcamara</i> L.	Climbing nightshade	Y
Water chestnut	A	<i>Trapa natans</i> L.		Y
Coltsfoot	H	<i>Tussilago farfara</i> L.		Y
Garden heliotrope (P)	H	<i>Valeriana officinalis</i> L.	Garden Valerian	Y

**BI-Annual Invasive Species Inspection
Photo Documentation for September 9, 2015
Former Trails Pond Area Dam ID #5903**



PHOTO #1 Breached portion of former Trails Pond dam (facing south).



PHOTO #2 Southeast corner (facing northwest) of former Trails Pond.

BI-Annual Invasive Species Inspection
Photo Documentation for September 9, 2015
Former Trails Pond Area Dam ID #5903



PHOTO #5 Northern portion of former Trails Pond where Birch Plain Creek enters the existing wetland that occupies the pond's footprint. View facing north.



PHOTO #6 North end of former Trails Pond area, facing south. Birch Plain Creek visible in center of photo.

**BI-Annual Invasive Species Inspection
Photo Documentation for September 9, 2015
Former Trails Pond Area Dam ID #5903**



Photo #9 Common reed stand located north of former Trails Pond study area.

2016 MUNICIPAL INLAND WETLANDS AGENCY
CONTINUING EDUCATION WORKSHOP

Legal and Administrative Updates

By the Connecticut Attorney General's Office

RECENT COURT CASES

Appellate Court Case

1. *H-K Properties, LLC v. Town of Mansfield Planning & Zoning Comm'n*, 165 Conn. App. 488 (2016)

East Brook F, LLC, East Brook T, LLC, and East Brook W, LLC (defendants) filed an application for a special permit to build an addition to the East Brook Mall with the Town of Mansfield Planning and Zoning Commission (commission). By checking a box on the application, defendants acknowledged that they would notify neighboring property owners of their proposal pursuant to Article 5, § B (3) (c) of the Mansfield Zoning Regulations. The commission adopted the regulations by the authority granted to it through General Statutes § 8-7d (a).

The commission complied with proper notice requirements. The commission held a public hearing and approved defendants' application on February 21, 2012. On February 27, 2012 the commission published notice of its decision in the Willimantic Chronicle (Notice Date).

Defendants, however, never gave notice to neighboring property owners, including H-K Properties, LLC (plaintiff). Plaintiff appealed the commission's decision on October 26, 2012, eight months after the commission approved the application. Plaintiff argued that it had not received proper notice and, therefore, the commission's decision was not valid.

Defendants moved for dismissal of plaintiff's appeal based on untimeliness. They claimed that General Statutes § 8-8 (b) governed the appeal, and that the plaintiff lost its right to an appeal when it failed to appeal within 15 days of the Notice Date. Conversely, plaintiff claimed that § 8-8 (r) governed, and under that provision, plaintiff had not lost its right to an appeal, because it could appeal up to one year after the Notice Date.

The trial court heard the appeal and found in favor of plaintiff. The trial court ordered the matter remanded to the commission. The defendants appealed. The Appellate Court reversed the trial court's ruling, and vacated it for lack of subject matter jurisdiction over the plaintiff's appeal. In other words, the trial court could neither hear, nor decide the case because plaintiff had failed to appeal within 15 days of the Notice Date in accordance with § 8-8 (b).

wetlands. The plaintiff also intended to construct a single-family residence on the upland area. There were also offsite wetlands. Neighbors opposed the application and hired an expert to present findings to the commission. The commission denied the application, citing the applicant's failure to provide prudent and feasible alternatives to reduce the impact of the construction on the surrounding wetlands and failure to consider mitigation measures to reduce the adverse impact of the construction on wetlands. (Half the property was wetlands; the proposed driveway was 600 feet through wetlands and the application involved a proposal to fill wetlands.)

The plaintiff appealed the decision, arguing that feasible and prudent alternatives were presented to the commission and that detailed mitigation plans were provided, pursuant to § 22a-41(a). Furthermore, the plaintiff alleged that the commission had predetermined the denial of the permit before considering the evidence presented at the public hearing.

The court began its analysis by discussing the concept of fundamental fairness. Although an administrative agency's hearings are often informal and do not follow the strict rules of evidence, the hearings must be conducted "so as not to violate the fundamental rules of natural justice." In other words, parties involved in the hearings have a right to produce relevant evidence, know the facts on which the commission is asked to act, cross-examine witnesses, and offer rebuttal evidence. The court noted that there is a strong presumption that proceedings of municipal commissions are conducted in a fundamentally fair manner. However, not all procedural irregularities require the reviewing court to nullify the commission's decision.

The plaintiff's claims were: 1) that the commission failed to state the reasons for the denial of the application on the record; 2) the site inspection of the commission was scheduled *after* the public hearing had commenced; 3) the commission's expert gave opinions not covered by his report; and 4) the previous three claims and the general conduct of the hearings constituted predetermination by the commission.

In general, the court ruled that it was entitled to search the record in default of a set of reasons of record for the decision the commission did make; there was nothing in the content of the site inspection report that drove any of the issues explored in the public hearing; the circumstances surrounding the engagement of the commission's expert weren't material; and the expert's report and testimony were entirely open to rebuttal by the plaintiff's experts and adequate opportunity to do so was a matter of record.

As to the claim of predetermination, the court rejected the plaintiff's claim. A plaintiff has a difficult burden to prove predetermination. In order to prevail, the plaintiff must show that the agency members had made up their minds to deny the application no matter what evidence was used to support it: a claim of predetermination goes to the process by which a decision is made and not to the content of the decision. In fact, even if the commission had been entirely wrong in denying the application, it does not mean that its decision was predetermined. Ultimately, the court, having searched the administrative record, concluded that the commission displayed no improper conduct. The commission continued to ask for further information during the hearing and proposed alternatives to the plaintiff's plans, indicating that had not determined to deny the application; in fact, hiring an expert to review the application and report to it was itself an indication of the commission's lack of predetermination on this file.

Turning to its review of the merits of the commission's decision, the court noted the difficulties inherent in review of an entire record where the commission has not articulated on the record its reasoning. This task is made all the more difficult when a reviewing court applies other

- The impact to the regulated resource(s) requires a close attention to how the "harm" is supported by the evidence. Where the testimony of experts on both sides of the issue is in play, it is important to focus carefully on what the factors for consideration require, and whether the "only feasible alternative" has been fairly proposed in light of the IWWA's requirement that conservation be balanced with respect for the right to use property.

2. *Preston v. Rabon*, 2016 WL 1164979 (Feb. 26, 2016)

Rabon filed a complaint with the commission, alleging that his neighbors, the Benjamins, had committed wetlands violations. The Preston Inland Wetlands Enforcement Officer issued a notice of violation to the Benjamins in response to Rabon's complaint, determining that the Benjamins had completed excavation within 100 feet of wetlands without a permit. It was later determined that the unpermitted excavation work extended into the Rabon property.

The commission approved the Benjamin's remediation plan, which included the Benjamin and Rabon properties, although the commission made no determination that the Benjamins had any legal right to access Rabon's land. Rabon denied the Benjamins access to his land. The Town of Preston then brought an action to compel Rabon either to allow the Benjamins to gain access to his land to perform the remedial work, or to compel him to perform the work himself.

The court rejected Rabon's assertion that he was an "innocent landowner" and therefore could not be compelled to remediate. The court noted that the commission was not compelling Rabon to pay for or perform the remediation himself; rather, the commission wanted Rabon to grant the Benjamins access to the property so that *they* could perform the remediation. Furthermore, the court reasoned that Rabon put himself in the position of having to allow the Benjamins to propose access to his land for remediation purposes due to his complaint. In other words, Rabon's failure to "react" to the existence of the violation also made him a violator. The court ordered Rabon to either allow the Benjamins access to remediate or to remediate the land himself within 45 days.

Major Points:

- The maintenance of a violation is a violation itself and exposes the party maintaining the violation to liability and costs of remediation, regardless of whether or not the party committed the initial violation. (A notice of violation can serve as a preliminary enforcement tool, in advance of issuing a formal order. Section 22a-44(a) of the IWWA, which provides for the issuance of orders, states that: 'If the inland wetlands agency or its duly authorized agent finds that any person is conducting *or maintaining* any activity, facility or condition which is in violation of sections 22a-36 to 22a-45, inclusive, or of the regulations of the inland wetlands agency, the agency or its duly authorized agent may issue a written order, by certified mail, to such person conducting such activity or *maintaining such facility or condition* to cease immediately such activity or to correct such facility or condition.' [emphasis added])
- Wetlands and wetland violations are not limited by property lines; they are a function of the documented adverse impact to the regulated resource(s).

Plaintiffs wanted to conduct activities within the 150 foot upland review area located on the property. There was no proposal to conduct regulated activities within the two wetland systems on the property. Initially, plaintiffs proposed a twelve-lot, conventional subdivision with a 600 foot road ending in a cul-de-sac. After consultations with town staff, the proposal was revised to a twelve-lot, clustered subdivision. The cluster subdivision would convey all wetlands on the property to the town as open space.

On October 6, 2014, the commission opened the public hearing for the application. The commission closed the public hearing on December 10. On January 4, 2015, the entire commission met and each commissioner raised issues he had with the application. On January 7th the commission again met to consider plaintiffs' application. At the end of the meeting, the commission established a subcommittee of three commissioners and one alternate "to review the existing record, organize the materials so that the commission could better consider the evidence as it related to their concerns, and draft a motion."

At a January 21, 2015 meeting, the subcommittee raised concerns about the application. The subcommittee members explained the evidence that supported these concerns. A motion to deny the application was raised. The subcommittee had drafted the motion. The motion contained a list of alternatives for plaintiffs to consider, as well as information found to be lacking. Following some discussion regarding the content of the motion and members' views, the commission approved the motion to deny the application unanimously. The commission denied the application because (1) the proposed activities would have adverse and substantial impacts on wetlands and watercourses and there were other possible feasible and prudent alternatives (which plaintiffs failed to present), and (2) in the alternative, the commission determined that the application was incomplete.

Plaintiffs raised several arguments related to process and record support for its decision. The court could not sustain an appeal on the basis of any of the plaintiffs' claims. The two claims raised by the plaintiffs that had some novelty are the following procedural claims:

The formation and deliberation of the subcommittee was not improper.

Plaintiffs argued that the formation of a subcommittee and deliberation of the subcommittee violated Gen. Stat. § 22a-42 and § 9-2 of the Farmington Ordinances because the commission created a subcommittee. Thus, according to the plaintiffs, the commission improperly delegated the responsibility and obligation of all voting members to a subcommittee without authority.

Plaintiffs also argued that the delegation was improper because the legislature intended to have a full complement of commissioners deliberate every decision. The court rejected plaintiffs' argument based on the plain meaning of § 22a-42(c), which requires only a quorum for decision making. The court reasoned that it would be "illogical" to conclude that a statute calling for a specific number of members and alternate members required all commissioners to deliberate every decision. In any event, the record indicates that the full commission met on January 4, 2014 to deliberate over the application.

Next, plaintiffs argued that deliberating and drafting a motion for decision is "too critical a part of the decision-making process" and that the full commission must be involved. The court rejected plaintiffs' argument. The court explained that a motion is a tool for a commission to

the appropriate party (the Inland Wetlands Commission had not been named), and (2) failure to exhaust his administrative remedies.

Plaintiff simply did not initiate the administrative process with respect to obtaining a wetlands determination and cannot bypass that step by simply captioning his disagreement with prior decisions in related administrative matters as an appeal. Because the plaintiff failed to pursue his administrative remedies, this court granted the defendants' motion to dismiss.

Major Point:

- Aggrieved parties must exhaust administrative remedies before appealing to the courts.

EXPERT TESTIMONY

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

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

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

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

- A lay commission without expertise in the area may not substitute its own judgment for contrary expert testimony. (*Feinson v. Conservation Commission*, 180 Conn. 421 (1980))
 - To do so without making public the basis of its decision and without offering the applicant an opportunity for rebuttal is to act arbitrarily and without fundamental fairness.
 - The municipal inland wetlands agency cannot disregard the only expert evidence on the issue when the agency members lack their own expertise or knowledge. (*Tanner v. Conservation Commission*, 15 Conn. App. 336 (1988))
 - For the rule in *Tanner* to apply, there has to exist on the record of the agency's proceeding an "absolute disregard of the unanimous contrary expert opinion." In *Tanner*, there were multiple experts and they were in agreement about the probable non-existence of any "adverse impact on the wetlands." This is the key issue, of course; that the experts had differing emphases or views of the proposed project based upon their particular subject matter expertise, did not mean that the commission could freely "pick and choose" among them as if there were a disagreement about the *adverse impact to the regulated resource(s)*.
 - Non-experts may offer reliable and substantial evidence (*Kaeser v. Conservation Commission*, 20 Conn. App. 309 (1989)), which may be relevant to an issue for determination by the agency; for example, "Every time we have a lot of rain, the water in the stream backs up behind the existing culvert over there." In other words, it is all of the evidence in the record on the issue of adverse impact, properly considered, and not a mere head count of experts that matters.
- Application fees can assist municipal inland wetlands agency with hiring their own expert(s) who, at a minimum, can review applicant's expert testimony or reports.
- Experts sometimes give opinions about their "concerns," or "*possible* impacts." That's mere speculation, and an agency shouldn't rely upon them. A properly prepared expert should be capable of rendering an opinion about what is "probable" or "reasonably likely" to occur respecting impacts. If the expert is not willing to commit to this level of prediction (and the agency should certainly ask about it), then the agency likely has good grounds to ignore the opinion altogether, and certainly ignore it in favor of a more definite opinion given by an opposing expert.