

The Habitat

A newsletter of the Connecticut Association of Conservation & Inland Wetlands Commissions, Inc.

Winter 2017 volume 29 number 1



CACIWC's 39th Annual Meeting & Environmental Conference; Supporting Local Commission Habitat Protection Efforts

The CACIWC Board of Directors extends their appreciation to the many members and guests who were able to attend our 39th Annual Meeting and Environmental Conference. The conference was held on Saturday, November 12, 2016 at a new venue, the Sheraton Hartford South Hotel in Rocky Hill. This upgraded facility provided a fresh new setting for our conference with its twelve workshops and extensive display areas. The CACIWC Board of Directors and its Annual Meeting Committee worked throughout 2016 to bring attendees a wide variety of informative workshops and exhibitors, while coordinating with our venue to provide you with a new display and refreshment layout.

Keynote Speaker Panel

For our 2016 Annual Meeting and Environmental Conference, CACIWC invited three legislative leaders for a panel discussion during our conference luncheon. This panel consists of State Representative James M. Albis (99th House District) Co-Chair, Environmental Committee; State Representative Mary M. Mushinsky (85th House District) Member and former Co-Chair, Environmental Committee; Co-Chair, Program Review and Investigations Committee; and State Senator Ted M. Kennedy, Jr. (12th Senate District); Majority Whip, Connecticut General Assembly (CGA) and Co-Chair, Environmental Committee. Although State Senator Ted Kennedy, Jr. was unable to attend, State Representatives Mary Mushinsky and James Albis provide their insight on expectations for the upcoming legislative session including the ongoing efforts to enact a state constitutional amendment designed to permanently protect state parks and forests. Representative Mushinsky was able to stay throughout the remainder of the luncheon to respond to questions from members concerned with the

risk of decreasing land conservation funding and elimination of federal environmental protection and climate change programs by the new President-elect. The initial responses from our conference surveys revealed praise for our keynote speaker panel and we thank them for their presentations and discussions.



State Representative Jim Albi. Photo by Brenda Cataldo, Moments in Time Photography.

Workshops & Displays

Four new workshop tracks were organized for the 2016 annual conference with topics on Conservation Biology & Habitat Management, Legal and Regulatory Updates & Issues, Climate Adaptation & Resiliency Planning, and Local Environmental Protection & Planning. Individual workshops focused on invasive plant and forest diseases, wetlands exemptions, vernal pool biology, the benefits of urban forestry, attracting pollinators, NOAA climate change and flood frequency data, wetlands case law and regulation, gypsy moth outbreaks, primary stormwater quality practices, regional and local water resource protection, promoting local recycling efforts, and promoting environmental cluster housing as a conservation tool.

Our new conference venue hosted a revised layout of informative displays in an arrangement adjacent to our workshops that promoted open discussion opportunities among our members and other conference attendees. The initial responses from our conference surveys revealed an appreciation for the networking opportunity provided by these adjacent display and break areas.

Annual Award

The CACIWC Board of Directors and Annual Meeting Committee determined that a special award was

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CACIWC

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www.caciwc.org

CACIWC News

The winter of 2016-17 will be remembered as an important transition period for CACIWC and our members.

Increasing discussion on state and federal budget deficits and potential cuts to conservation funding along with sweeping changes in the federal executive branch, raise concerns over continued support of existing commitments to environmental protection and climate change resiliency efforts. The CACIWC Board of Directors will closely monitor these changes and inform our members of important initiatives that may affect Connecticut commissions and their work.

This winter of transition has also affected CACIWC directly. This issue of *The Habitat* will be the second issue following the retirement of **Tom Odell** as editor. To help us maintain the value of our publication to our readers, the CACIWC Board of Directors has formed a new Habitat Advisory Committee to help identify topics and articles for upcoming issues. We will be actively seeking new topics for articles from our members, which you can email to us at TheHabitat@caciwc.org along with other suggestions.

In other news:

1. In response to your comments from the 2014 and 2015 meeting surveys, CACIWC held our **39th Annual Meeting and Environmental Conference** on Saturday, November 12, 2016 at a new venue, the Sheraton Hartford South Hotel in Rocky Hill. This upgraded facility provided a fresh new setting for our conference with its twelve workshops and integrated space for commercial and non-profit educational displays to encourage networking.

2. The CACIWC Annual Meeting Committee has already been reviewing the comments and suggestions submitted on the survey distributed at our annual meeting. If you did not have an opportunity to complete the 2016 meeting survey, please contact us with your comments and suggestions at AnnualMtg@caciwc.org. We also welcome any early suggestions for workshop topics and

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Journey to the Legal Horizon

by Attorney Janet Brooks

Revisiting

Indian Spring Land Company v. Inland Wetlands and Watercourses Agency

322 Conn. 1 (2016)

Revision to column published in Summer 2016, volume 28, number 3

~I originally wrote a column on the *Indian Spring Land Company* case which was published in the summer 2016 issue. Two readers contacted me and questioned my reference to the road to be constructed in *Indian Spring* case as constructed with gravel, pointing out that the proposal was for a bridge over wetlands. I relied on the Supreme Court where it characterized in the final paragraphs of the decision the proposed farm road as a gravel access road. Revisiting the case I realized that this mischaracterization by the court is inconsistent with the court's earlier reference to the road as a bridge. The confusion that will likely arise from the internal contradiction is good reason to revisit my original article. The entire article with the revision is printed here. The revision affects only the second half of the article and will be indicated in the text. For those of you in attendance at the 2016 Wetlands Law Update Workshop at the 2016 CACIWC Annual Meeting in November, our discussion there is consistent with this revised article.~~

Farmers and grammarians will be happy to read *Indian Spring Land Company v. Inland Wetlands and Watercourses Agency*¹, officially released by the Supreme Court on July 5, 2016. In the first paragraph of its decision the Supreme Court tackled the difficult second sentence of the agricultural exemption and held: "Upon review of § 22a-40 (a) (1), road construction directly related to farming operations is permitted as of right under the Inland Wetlands and Watercourses Act...and, therefore, that the agency did not have jurisdiction to regulate the construction of the plaintiff's access road."² Clear and concise.

You may recall the farming exemption in C.G.S. § 22a-40 (a) begins:

(a): The following operations and uses shall be permitted in wetlands and watercourses, as of right: (1) Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation...**The provisions of this subdivision shall not be construed to include road**

construction or the erection of buildings not directly related to the farming operation, relocation of watercourses with continual flow, filling or reclamation of wetlands or watercourses with continual flow, clear cutting of timber except for the expansion of agricultural crop land, the mining of top soil, peat, sand, gravel of similar material from wetlands or watercourses for the purposes of sale.

If "**road construction or the erection of buildings not directly related to the farming operation**" does not fall within the exemption, exactly what does fall within it? The agency argued that the phrase "**not directly related to the farming operation**" only modified erection of buildings and not what came before the "or": road construction. The Supreme Court definitively disagreed: "the plain language of the text of § 22a-40 (a) (1), as evinced by the legislature's sentence structure and use of punctuation, makes it clear that road construction directly related to farming operations is exempt from the regulatory oversight of municipal wetlands agencies." And then it supported its decision, relying on cases from the United States Supreme Court and the D.C. Circuit Court of Appeals, opining on sentence structure and use of punctuation.

The questioning from one of the justices during oral argument in this case foreshadowed the importance that grammar would play in the decision. I was sitting on the edge of my seat, delighting in the questions being peppered on the commission's lawyer. I don't think you have to share the Supreme Court's sustained attention to the structure of the second sentence of the farm exemption or my enthusiasm for grammar and punctuation. You can be content to know that the Supreme Court has definitively ruled "that the modifying phrase 'not directly related to the farming operation,' applies with equal force to both 'road construction' and 'the erection of buildings.'"

The Supreme Court also was mindful that it should eschew an interpretation of a statute which might lead
revisiting, continued on page 12

Open Space and Environmental Cluster Subdivisions: Another Tool to Preserve Open Space

by Mark Branse, Esq., Branse & Willis, LLC

Open space preservation is an objective that all of us share, but government budgets can't fund the acquisition of all the land that we should be preserving for wildlife habitat, water quality protection, and recreation. Both Connecticut and Federal case law allow municipal planning commissions to require the dedication of open space in subdivisions without compensation, provided that there is a nexus between the quantity, type, and location of the open space and the burdens on existing open space that the new development is expected to generate.¹ For example, you can't very well prove that a 10 lot subdivision generates the need for a new soccer field, even though the need may be genuine. Besides the legal limits on such open space exactions, developers understandably resist having areas of developable land just taken away by the local planning commission with only limited benefit to the value of the remaining lots.

Therefore, it's beneficial to create incentives for developers to set aside more open space than an exaction could require. One such incentive is to allow the developer to reduce lot area and frontage in exchange for greater open space, so that the total number of lots remains the same as it would have been, but with more useable and viable open space. Besides retaining the same lot count, developers can also market the lots by extolling the benefits of nearby open land, trails, or recreation fields. Another benefit of clustering is that developers have an incentive to avoid fragile portions of the property and concentrate development where the land can more easily (and hence economically) support it.

Open Space Subdivision as Compared to Cluster Subdivision

Enter the open space or cluster subdivision as a way to expand open space in subdivisions. While most planners use these terms interchangeably, we have to be careful here in Connecticut because the legal authority for each of those is different here. A cluster subdivision is a *planning* power authorized for a *planning* commission, and it is defined in Connecticut General Statutes Section 8-18 as follows:

“cluster development” means a building pattern concentrating units on a particular portion of a parcel so that at least one-third of the parcel remains open space to be used exclusively for recreational, conservation and agricultural purposes except that nothing herein shall prevent any municipality from requiring more than one-third open space in any particular cluster development.

So a planning commission (or a planning & zoning commission wearing its “planning” hat) can adopt a *subdivision* regulation that allows for the concentration of dwellings and the requirement for *at least* one-third open space.² In a cluster subdivision, the planning commission can reduce lot size under the authority of the subdivision regulations without amending the zoning regulations, *as long as they require at least one-third open space*. In towns that rely on private septic systems and wells, this can limit the usefulness of the cluster subdivision device because there may be parcels where such substantial lot size reductions just won't work.

An open space subdivision is part of the *zoning* power and can only be adopted by a *zoning* commission (or a planning & zoning commission wearing its “zoning” hat), and so it has to be located in the *zoning* regulations. Because it's not governed by Section 8-18, the open spaced subdivision can require any level of open space dedication, and not just one-third—it could be more or less. In nearly all cases that I've seen, the open space subdivision is allowed by special permit or special exception (legally, the terms are interchangeable) which gives the commission a high level of discretion over the location, amount, improvement, and use of open space areas.³ In some towns, the regulations allow

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The Traffic Engineer

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the commission to *require* the developer to use the open space subdivision, while in others it's at the developer's option. Unlike the cluster subdivision, there has (until recently) been no express statutory definition or authorization for open space subdivisions, but courts have upheld them and Connecticut General Statutes Section 8-2 was amended in 1987⁴ to authorize transfer of development rights, which is really what an open space subdivision is—a transfer of density from the open space areas to the area containing smaller lots.⁵

The degree to which the lot sizes are reduced is a matter of local policy. Sometimes the lot size can be reduced to the next most dense zone; in others, the reduced lot sizes are specified dimensionally; and in others, it's a percent. There is no right or wrong way to do this. I always recommend substantial reductions in lot *frontage* requirements because road costs are among the greatest expenses for developers; are usually excessive; and money can be saved by the town in the long run, which has to maintain, plow, and police every mile of new road no matter how many or few houses are on it. More houses per lineal foot of road means more property taxes per lineal foot of road! Plus, less road means less impervious surface, and so reduced impacts from detention ponds and other stormwater management measures; and more groundwater infiltration—a rare win-win in land use!

How Many Lots?

Some people object to open space subdivisions because they feel it increases density over what the developer could have gotten without that device. They claim that the open space offered is wetlands or otherwise unbuildable, and hence worthless; and that since such land couldn't be built on, the developer is getting an improper density bonus. This will be addressed in the next section, but for purposes of setting a lot count that fairly represents the parcel's correct development potential, there are two methods: a formula or a "yield plan." Towns used to use formulas so that the developer didn't have to fully design two subdivision plans, only one of which was going to be built. Sometimes, the formula *did* allow more lots that the parcel could really have supported, but other times less, causing the developer to resist the open space subdivision approach.

Today, with the widespread availability of computer assisted design (CAD), most towns require the preparation of a yield plan, which is a subdivision layout without the benefit of the open space or cluster lot size reductions. That plan is used to set

the maximum number of lots that the subdivision may contain. The yield plan must be realistic in that it complies with applicable zoning and subdivision regulations, but need not represent the best or most prudent development pattern.

At my seminar at the annual meeting, I displayed two sets of yield and open space plans that were generously provided to me by Joe Wren of Indigo Design and Mark Friend of Megson & Friend engineers. (Due to space limitations, I've provided the yield plan and a cluster plan prepared by Joe Wren for placement on the CACI-WC website.) You can readily see how much more open space is preserved with the cluster design, and how much less road is required to serve those lots.

What Kind of Open Space Should Be Accepted?

Some regulations limit the composition of open space, requiring no more than a certain maximum, percentage to be wetlands or a certain minimum percentage to be level and useable for active recreation. I don't agree with such limits because the commission has the discretion to determine where open space should be and, in many cases, the most valuable land for preservation will be stream valleys and their associated wetlands. It's also a mistake to view wetlands as "unbuildable" and therefore safe, because, first, they *do* count toward minimum lot size in a standard subdivision, and, second, under the residential home exemption in the inland wetlands statutes, lot owners *can* use wetlands for residential purposes under certain circumstances. The only way to truly protect open space is by ownership or a conservation (or agricultural) easement. Similarly, not every subdivision may need active recreation space; the most valuable resource on that particular parcel might be watershed protection or wildlife habitat. Give yourselves the flexibility to determine, case by case, which land should be preserved in each subdivision.

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Project Green Space

A “Local Option” for Funding Land Conservation

by David B. Bingham, MD, Audubon CT Policy Chair

In this legislative session, conservationists will introduce a proposal to allow municipalities, if they so choose, to impose a small fee on buyers of real estate, to pay for land protection and stewardship. The amount of the fee is suggested to be no more than 1% and would be determined by the municipality. It’s an idea that has worked remarkably well in our neighboring states, saving thousands of acres of prime habitat. It is an idea whose time has come for Connecticut!

The legislation would be introduced by the legislators representing interested municipalities. After the approval of the general legislature, the interested municipality would approve the program with the fee structure they desired. If many towns indicate an interest, there remains the possibility that the enabling legislation could be adopted state-wide allowing any town in the state to avail itself of this opportunity to preserve land in its community. It would not be imposed on any town uninterested in the program. The legislation is necessary because municipalities may only impose fees if enabled by State law. Limits and controls may be set by the enabling legislation to prevent abuse of the privilege, assuring that such funds are utilized in the manner prescribed by law.

Audubon CT is spearheading Project Green Space (PGS), a coalition of organizations working to pass legislation to enable this tool for local funding of farmland and open space preservation and stewardship. Communities could use funds raised by the fee only to:

- acquire land in fee,
- purchase conservation easements
- provide stewardship of public lands

To limit the impact on low-cost housing, the fee would be waived on the first \$100,000 of the conveyance price at a minimum. Communities could be permitted to raise amount waived.

Audubon CT is uniquely positioned to provide evidence of the need to provide healthy habitats for people, because of the sensitivity of birds to pollution and environmental changes that not only affect the health of birds but also people. Ultimately the degradation of our natural world impacts the health of the economy as

well. One need only consider the effect of polluted water and air on local land values

Habitat protection and stewardship is central to the quality of life in every community, whether urban or rural, in large projects or small oases. But for birds and other wildlife, it is often a question of survival. Loss of habitat has resulted in plunging population levels for dozens of bird species, such as Cerulean Warblers and Wood Thrush in our forests, Blue-winged Warblers and Field Sparrows in our meadows and shrub lands, Piping Plovers and Sandwich Terns on our beaches, Rails and Salt-marsh Sparrows in our marshes.

While birds and other wildlife are critically affected at this moment, we all are at risk if we do not preserve the health of our environment, Water quality depends on intact forest landscapes. Global warming is reduced with healthy forest. Streamside protection reduces erosion and promotes clean water.

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In addition to health, protected land is shown to lead to higher property values. Communities with open space are more sought after as places to live. The argument advanced that increasing land protection will yield to economic loss for a community has been shown to be incorrect. Real estate agents who have lived in communities in the states like New York and Massachusetts report that more preserved land has resulted in higher house prices and increased sales, the opposite of the prediction that a fee on sales will lead to decreased real estate activity.

Every town in the State has one land worth protecting, whether for wildlife, for recreation, for clean water, for community improvement. Concern about priority areas for protection that could benefit from PGS funding is reflected in Plans of Conservation and Development for towns and for the State at large.

Other organizations supporting PGS include groups that are:

- protecting other natural resources, such as air and water quality, wildlife, native plants, natural areas, and farmland; and
- concerned with rural character, scenic views, climate change, invasive species, urban oases, public health, and trails for hiking and outdoor education.

Land trusts, garden clubs and environmental groups all are stakeholders in land conservation, often working in partnership with local municipalities on local projects. Final land ownership of the land and/or easements may differ in each community, depending on its willingness and commitment to long-term protection and stewardship. Some land and easements are held in perpetuity by municipalities, and some by partner land trusts.

CACIWC has supported versions of the PGS proposal in the past, led by the valiant educational efforts of Tom O'Dell, as readers of this newsletter are aware. CACIWC's membership represents Conservation and/or Inland Wetland Commissions throughout the State. Each community has local Open Space, farmland and watershed protection lands that are at risk of inappropriate development and subdivisions that impact habitat, and thus might wish to use this funding tool to address that risk.

CACIWC members are in a key position to let the Project Open Space coalition know of instances in their municipality where such funding could make a difference in providing the matching funds needed to protect local open space or farmland, or could provide jobs such as invasive species removal and native landscaping to restore and enhance local habitats.

CACIWC members are in a key position to educate community leaders and their legislators about the need for such projects and about the opportunity to provide funding for on-going or future projects if the enabling PGS legislation passes. But unless legislators are asked by local officials to do so, they may be reluctant to introduce or cosponsor legislation that may be opposed by those local builders or realtors who fail to appreciate the long-term benefits that accompany land conservation (including a rise in local community land valuations).

Many think that land conservation funding should come from the State. Given the nature of the present budget, this will certainly remain inadequate. State grants for protection usually require local matching funds, even when available.

Currently, local funds for land protection usually are obtained only through raising the property tax mill rate. Property tax rates are already notoriously high in Connecticut, and conservation has stiff competition from schools, town roads etc., when annual local budgets are drawn up.

Without other options for funding, communities often fail to meet the goals of their local Plans of Conservation and Development. The Project Green Space proposal aims to meet those goals. But to do so PGS needs the active support of CACIWC members throughout the State. The coalition is looking forward to working with local commissions or members to get this enabling legislation passed.

For further information about PGS, for providing information to PGS of the land conservation concerns of your community, and for information you may provide to the coalition on the position of local legislators, please contact: Genese Leach, Policy Manager, Audubon Connecticut, 613 Riversville Road Greenwich, CT 06831. Email Address: gleach@audubon.org. 🍂

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appropriate for 2016. This CACIWC 2016 “Lifetime Achievement in Conservation Education & Editing Award” was designed for Tom ODell to honor his many decades of service to the Conservation and Inland Wetland Commissions of Connecticut as the CACIWC President, Executive Director, and Editor of *The Habitat* along with his tireless advocacy work for open space conservation as one of the lead environmental champions in Connecticut.

While many people have served on the CACIWC Board of Directors or worked on publication of *The Habitat* during the last four plus decades, no one person has contributed more to its success than Tom ODell. Tom’s long service as Editor has perhaps influenced more CACIWC members during



Edward Capone of NOAA presents workshop. Photo by Brenda Cataldo, Moments in Time Photography.

its 42-year run than any other aspect of our education and outreach efforts. It was with great reluctance, but with profound gratitude, that the CACIWC Board of Directors accepted the resignation of Tom ODell as Editor the of *The Habitat* following the Summer 2016 issue.

To truly understand Tom’s many contributions to our state’s conservation efforts requires a brief review of the history of conservation and inland wetlands commissions in Connecticut and the formation of CACIWC. Many of our members are aware of the long history of land conservation and habitat protection by their fellow conservation and inland wetlands commissioners and staff throughout Connecticut.

Following the enabling legislation of 1961 and legislation to expand their role in 1963, conservation commissions began to form in towns throughout our state. In 1964, the Connecticut Association of Conservation Commissions (CACC) was organized to help educate the expanding number of conservation commissioners volunteering to serve their towns. CACC provided literature and other information to help these new commissioners investigate and protect local habitats.

Tom’s early efforts as editor began in 1970 when, as a new member of the Westbrook Conservation Commission, he volunteered to assist in researching and developing content for the CACC newsletter, entitled Connecticut’s Environment. This CACC newsletter was first printed by the State of Connecticut Department of Agriculture and Natural Resources for distribution throughout the state. In 1971, when most state conservation and environmental protection activities were transferred to the newly formed Department of Environmental Protection (DEP), CACC and its newsletter continued to be supported along with publication of the first Handbook for Conservation Commissions.

Major changes occurred with the passage of the 1972 Inland Wetlands and Watercourse Act creating a new municipal government function, followed by Public Act 73-293, which increased the size of conservation commissions. Following the passages of these acts and within four years of the first Earth Day, the Connecticut annual meeting, continued on page 9

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Association of Conservation and Inland Wetlands Commissions (CACIWC) was organized to help support the major expansion of municipal land use roles and responsibilities. CACIWC published the first issue of *The Habitat* in 1974 with Tom as its Interim Editor. *The Habitat* received financial support from the DEP until 1993 with several others periodically helping out as supporting and interim editors. In 1994, Tom again accepted the position as Editor following his retirement from the US Forest Service. For the next 22 years Editor Tom and Associate Editor Ann Letendre expanded and strengthened *The Habitat*. In 2006, the CACIWC Board of Directors supported the further expansion of newsletter, with stable advertising revenue support organized by Jeff Mills of J.M. Communications. *The Habitat* is now a major tool of the CACIWC education and outreach triad, along with our annual conference and our www.caciwc.org website. Tom's many contributions to these efforts are widely recognized and much appreciated by the CACIWC Board of Directors and our members.

On Thursday, October 13, 2016, Tom ODell was honored for his statewide work and 46 years as Westbrook Conservation Commission Chairman at a special ceremony held at the Water's Edge Resort & Spa. CACIWC President Alan Siniscalchi presented Tom with this 2016 Lifetime Achievement award at the ceremony described in a separate article in this issue. We again extend our most sincere thanks to Tom ODell for his many decades of service in support of CACIWC, the Westbrook Conservation Commission, and land conservation efforts throughout Connecticut.

We again thank the conference attendees and all those responsible for organizing our 39th Annual Meeting and Environmental Conference. The CACIWC Board of Directors has already begun a detailed review of the evaluations forms submitted by participants of this conference. In addition to informing us of their opinions of the educational sessions, the participants also provided valuable suggestions for workshop topics for next year's conference. To allow all of our members the opportunity to submit ideas for workshop topics and other suggestions, the CACIWC Annual Meeting Committee has decided to again maintain the AnnualMtg@caciwc.org email throughout the year. Please keep forwarding your suggestions to us. The Board of Directors extends its most sincere appreciation to our 2016 conference sponsors and looks forward to seeing all of you at our 2017 Annual Meeting and Environmental Conference, tentatively scheduled for Saturday, November 11, 2017. 🍀

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Westbrook Honors Tom O'Dell

The Town of Westbrook celebrated the many contributions made by **Tom O'Dell** during his 46 years as Conservation Commission Chairman at a special celebration held on Thursday, October 13 at Water's Edge Resort & Spa. Various honors were announced during the ceremony including the designation by the Westbrook Board of Selectmen of an area of Long Island Sound that includes Duck, Menunketesuck, and Salt Islands as the **Tom O'Dell Wildlife and Conservation Area**. Numerous letters and proclamations from local leaders, state representatives and Lieutenant Governor Nancy Wyman were read at the ceremony. Tom was also treated to testimonials from various environmental leaders from around the state.

CACIWC also participated in the Westbrook celebration to honor Tom's statewide service to Connecticut. CACIWC President Alan Siniscalchi presented Tom with the CACIWC 2016

"Lifetime Achievement in Conservation Education & Editing Award" for his many decades of service to the Conservation and Inland Wetland Commissions of Connecticut as the CACIWC President, Executive Director, and Editor of *The Habitat* along with his tireless advocacy work for open space conservation as one of the lead environmental champions in Connecticut.

Other CACIWC members and friends may wish to honor Tom's work by contributing to the special **Tom O'Dell Scholarship Fund** created by the

Westbrook Foundation, a 501(c)(3) non-profit organization. The fund will be used to support students pursuing conservation and environmental studies. Contribution checks should be written to the Westbrook Foundation with a letter stating that donation should be directed to the Tom O'Dell Scholarship Fund. The letter and check should be mailed to the Westbrook Foundation, PO Box 528, Westbrook, CT 06498. 🍁



Tom O'Dell, center, is honored. Photo by Kit Bishop.



Alan Siniscalchi presents award to Tom O'Dell. Photo by by Kit Bishop.



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speakers that you would like us to recruit for our **planned 40th Annual Meeting and Environmental Conference**, tentatively scheduled for Saturday, November 11, 2017. Please contact us with your ideas for new workshops at AnnualMtg@caciwc.org, along with any other suggestions. Watch for additional conference news in upcoming issues of *The Habitat* and on our website.

3. The Board of Directors appreciated the large number of commissions who renewed their CACIWC membership prior to our annual meeting. For those who have not yet done so, it is not too late to send in your **2016-2017 membership dues**. A copy of the current renewal form and additional information can still be found on our website: www.caciwc.org. Would you or your company like to provide additional support to CACIWC? The website also provides a description of additional individual and business membership categories. Please consider making an additional contribution to support our planned CACIWC education and outreach efforts.

4. The new officers and members the Board of Directors are beginning the second year of their two-year term following the elections that took place at our 2015 annual meeting. Although we were able to

fill several vacancies during 2016, both the New London and Windham County directors along with several other **CACIWC board vacancies** remain unfilled (please see the list in this issue of *The Habitat* and on www.caciwc.org). Please submit your name to board@caciwc.org if you are interested in serving as the New London or Windham County representative, one of the vacant alternate county representatives, or as one of the alternate at large representative positions.

5. Would you like to contribute to CACIWC activities and initiatives, but find your schedule just too filled to join the board? We are organizing a **2017 CACIWC advisory committee** to help us plan our education and outreach efforts, select new goals and objectives for our updated **strategic plan**, or participate in the review of Connecticut **environmental legislative initiatives** being conducted in cooperation with other state partner environmental and land use organizations. Let us know of your interest areas by emailing us at board@caciwc.org.


6. We thank everyone who provided us with their email address to help us **expand our ability to communicate with member commissions and staff**. Our Membership Coordinator and Database Manager Janice Fournier and members of our board may be in touch with you to confirm contact information for use in our existing ListServ and other systems under development. These ListServ systems will be used to provide you with important messages on emerging topics of interest including municipal grants and funding possibilities, legislative issues, job openings, local conferences and other educational opportunities.

We look forward to a productive year in support of all of you, the dedicated members and staff of Connecticut's conservation and inland wetlands commissions. Please do not hesitate to contact us at board@caciwc.org if you have questions or comments on any of the above items or have suggestions for your board of directors.

We thank our members for all of your ongoing efforts and wish you a safe, healthy, and happy new year!

Alan J. Siniscalchi, President 🍁

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to “unreasonable or bizarre results.” It considered that a farmer could erect a building in a wetlands or a watercourse *as of right*. It determined that allowing a commission to regulate the construction of a road to get to and from that barn “unreasonable and does nothing to further the goals of the Inland Wetlands and Watercourses Act.”

In the previous farm road construction case which came before the Supreme Court, *Taylor v. Conservation Commission*, 302 Conn. 60 (2011), I made these same sentence structure and comma comments on behalf of the Connecticut Farm Bureau. At that time, the Supreme Court in *Taylor* favored a Gertrude Stein approach: filling is filling is filling and required a permit from the would-be farmer.

[Note: revisions to previous article begin at this point.]

The Supreme Court’s decision in *Indian Spring Land Company* seemed a turn-around for farm roads. The decision appeared to implicitly overrule the *Taylor* decision. Would the Supreme Court explicitly overrule the 2011 decision? No. At the end of the *Indian Spring Land Company* decision the Supreme Court explicitly *affirmed* its decision in *Taylor v. Conservation Commission*, 302 Conn. 60 (2011), stating “section 22a-40 (a) (1) does not permit the filling of wetlands for the purpose of road construction, regardless of the road’s relation to the farming operation, because the statute clearly provides for the regulation of activities that require wetlands to be filled.”³ Then, it narrowed its holding in the *Indian Spring Land Company* case:

“In conclusion, the plain language of section 22a-40 (a) (1) provides that road construction directly related to a farming operation is excluded from the regulatory

oversight of municipal wetlands agencies, **unless the manner of that construction implicates some other matter within the scope of that oversight, as in *Taylor***. Accordingly, the agency had no jurisdiction to attach special conditions to the plaintiff’s gravel access road into the northeast compartment, as the road was to be constructed solely for the purpose of transporting equipment onto the property to complete forestry work. We therefore conclude that the trial court improperly determined that the agency had jurisdiction over the plaintiff’s access road and improperly rendered judgment dismissing the plaintiff’s appeal.” (Emphasis added.)⁴

What is the Supreme Court allowing in *Indian Spring Land Company*? In the quotation above, the court said it was allowing the construction of “a gravel access road into the northeast compartment.” It concluded that such gravel access road could not be subject to the permit process because, in the court’s own words, “the road was to be constructed solely for the purpose of transporting equipment onto the property to complete forestry work.”

Taking those words at face value, (which I did in my original article), the gravel access roads in the *Taylor* case should also be allowed. The roads proposed in *Taylor* were characterized as “necessary for vehicle/tractor access to the central crop of Highbush Blueberry” and as “necessary for vehicle/tractor access to the nursery crop production.”⁵ The *Taylor* farm roads were also to be constructed with gravel.⁶

But, in fact, the Supreme Court erred in characterizing the road in *Indian Spring* as “a gravel access road.” Earlier in the decision the court described the project as involving the construction of “a 17.5 foot concrete bridge that would span the wetland, yet leave the underlying wetland itself undisturbed.”⁷ Thus, *Indian Spring Land Company* is free to construct its bridge (the footings of which will not be located in wetlands) without a wetlands permit, not a gravel access road. The court, looking at the *Taylor* proposal, characterized the use of gravel as a “manner” of construction as the problem with *Taylor* roads.

It is clear that the Supreme Court’s mistaken characterization of the bridge as a gravel access road is going to muddy this holding and its application in future cases.

The Supreme Court undercut the breadth of its own ruling on farm road construction. The “win” in this case

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is tempered by the fact that only a bridge has been ruled to fall within “road construction.” The materials used to construct the bridge are suspended over the wetlands. But what about roads, as we commonly think of them, constructed on the ground? Such roads are not exempt. The Supreme Court explicitly affirmed the *Taylor* case holding. If a farm road constructed with materials is proposed *in the wetlands* and not *over the wetlands*, a permit is required. Common sense dictates that no road can be constructed without materials. The Supreme Court has implicitly narrowed the road construction that will qualify under this exemption to bridge construction. Had the legislature wanted to limit the farms roads which qualify for the exemption to bridges, it could have easily worded the statute to say so. An agency has always had to read the exemption statute carefully. Now it will have to read the *Indian Spring* case carefully as well. *And not for what the Supreme Court said, but for what it did.*

What’s an agency to do? When considering farming roads where it is feasible to design and build a suspended road across the wetlands, aka a bridge, this case is solid authority that the bridge is exempt from agency regulation. However, when considering those roads on the ground, portions of this case will lead you to believe that agencies cannot regulate them (“road construction directly related to a farming operation is excluded from the regulatory oversight of municipal wetlands agencies”). Alas, you will be led astray, because notwithstanding the court’s statement in the closing paragraph of its decision that it was exempting the *Indian Spring*’s gravel access road, it was, in fact, exempting just the construction of a bridge.

Janet P. Brooks practices law in East Berlin. You can read her blog at www.ctwetlandslaw.com and access prior training materials and articles at www.attorneyjanetbrooks.com.

(Endnotes)

¹ 322 Conn. 1 (2016).

² *Indian Spring Land Company v. Inland Wetlands and Watercourses Agency*, 322 Conn. 1, 4 (2016).

³ *Indian Spring Land Company*, 322 Conn. 1, 19 (2016).

⁴ *Indian Spring Land Company*, 322 Conn. 1, 19 (2016).

⁵ *Taylor*, 302 Conn. 60, 62-63 (2011).

⁶ *Taylor*, 302 Conn. 60, 66 n.8 (2011).

⁷ *Indian Spring Land Company*, 322 Conn. 1, 6 (2016). ↴



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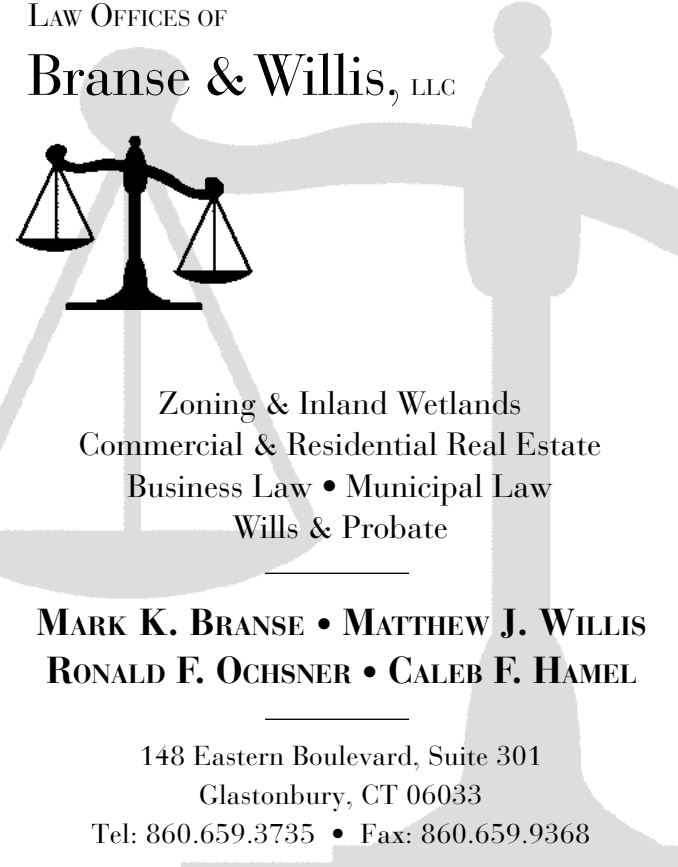

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subdivisions, continued from page 5

Lastly, remember that because an open space subdivision is in the nature of a transfer of development rights, the open space and the developed land need not be contiguous, as long as you can demonstrate that the open space benefits the future subdivision residents. That benefit need not be exclusive. It's alright if others enjoy the open space benefit, too, as long as the future subdivision owners receive some direct benefit from the open space.⁶

Conclusion

We hear a lot about the way that sprawl chews up large areas of Connecticut and creates densities that can't be economically served by public transit, and costs us valuable farmland. A cluster or open space subdivision can maintain a town's total projected population, while concentrating houses on the most developable land. It reduces impervious surface, stormwater management impacts, long-term road maintenance costs, loss of forest and farmland, and give developers an incentive to preserve open space. It's a tool you should have in your land use toolbox!

(Endnotes)

¹ There's a lot of case law about what fulfills the nexus requirement, but for our purposes it's that the open space is proportional to the demands created by the subdivision's future residents and provides a benefit to them that is logically related to meeting those demands.

² Note that is a departure from the usual legal requirement that subdivision lots must comply with the zoning regulations.

³ A special permit/exception requires a public hearing, but also extends your time frame for action beyond the flat 65 days for site plan approval. Instead you get 65 days to open the hearing, 5 days to close it, and 65 days to make a decision. Holding a public hearing on the underlying subdivision would allow both applications to proceed on the same timeline. Any of these time limits may be extended by the applicant for up to a cumulative total of 65 days.

⁴ P.A. 87-490 added, "Such regulations may provide for a municipal system for the creation of development rights and the permanent transfer of such development rights, which may include a system for the variance of density limits in connection with any such transfer."

⁵ Note that Connecticut General Statutes Section 8-2e allows inter-municipal agreements for transfers of development rights, and Section 8-2f requires that an application for a transfer of development rights must be made by both the transferor and the transferee.

⁶ An example would be where the lots and the open space are in the same elementary school district, or in the same watershed, or formed part of the same open space/trail corridor. 🍂

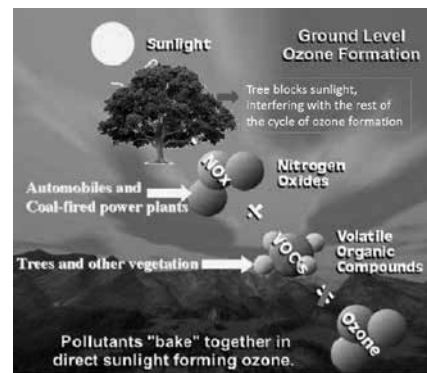
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them to be washed into the soil where they can be captured and mitigated.

About half of any tree is not usually seen by people – this is that great mass of roots that helps to anchor the tree into the soil and allows the tree to absorb water as it needs it. The tree captures the airborne pollutants and directs them down its trunk and to the soil level. The tree's roots help open up the soil, providing passageways down into the subterranean world and the biological activity it harbors. Trees are great participants in this soil ecology, contributing to feeding the system through its root exudates and the shedding of its root hairs, while pulling hundreds of gallons a day out of the soil, up through its trunk and branches, and out through its leaves. This transpired water further cools the air mass locally while helping to drive the water cycle. The soil is the primary filter for cleaning ground water.



Another cycle in which trees have a direct role is that by which ozone is created, particularly in urban centers. This happens in conjunction with areas of high concentra-



tions of automobile exhaust. The car exhaust raises the level of NOx gasses locally which, in combination with volatile organic compounds (VOCs) and sunlight, catalyzes the production of ozone. Concerns are sometimes

raised regarding the potential for trees, particularly certain species of trees such as oaks, to emit VOCs. Researchers have found that the reduction in ozone production caused by the shade produced by the trees more than offsets any contribution to increased production due to the tree's VOCs. The judicious planting of trees to reduce these urban "hot spots" can go a long ways towards reducing the local build-up of ozone.

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Trees are a great weapon, in general, against the occurrence of the urban heat island effect. The heat island effect occurs due to the sun's heat being absorbed during the day, leading to locally higher daytime temperatures, and then this heat being released after dark, extending the effect of these raised temperatures. For people living and working in these heat islands, these heightened and extended temperatures encourage the use of air conditioners to provide relief, which in turn requires that more fossil fuels be burned at the local power plant, in turn increasing the atmospheric burden in terms of air pollutants and CO₂ emissions.

Much is made of the ability of urban trees to sequester carbon, but this is a situation in which one should be careful not to overstate what it is that urban trees can do. Growing a tree in a location where there was no tree before does, indeed, lead to an overall reduction in atmospheric carbon. However, if a full-sized tree already exists in that spot, replacing that tree with another tree does not cause a net reduction in atmospheric, if the carbon from the first tree is allowed to return back to the atmosphere. This is what happens when that first tree is cut down and its wood allowed either to be burned or to decay. In fact, taking the analysis one step further, the use of a truck, a chainsaw, or a mechanized shovel in conjunction with planting or maintaining that tree adds carbon from fossil fuel sources to the atmosphere. These additional carbon releases, often a necessary component in the retention of an urban tree at a site, incrementally increase atmospheric carbon over each succeeding generation of tree.

That is, unless the wood from that tree can be put to use as lumber or in some sort of other durable product. In that case, the carbon sequestered by a tree remains out of the atmosphere well past the life of the tree. There is, indeed, a very active effort these days to make use of the wood from urban trees – taking advantage of an often overlooked resource while also helping to mitigate, in a very small way, global climate change.

So – trees help regulate local temperatures, improve air quality, help facilitate the water cycle, reduce the production of ozone and also participate in the reduction of fossil fuel use – are there any numbers to quantify this?

Yes. A few years ago, a study was done of the trees of Hartford – this report is available on the DEEP Urban Forestry web page (www.ct.gov/deep/urbanforestry). This report shows that the combined trees of that city remove from the atmosphere 73 tons of pollutants, remove on an annual basis 2,440 tons of carbon (although, as noted, this carbon will be returned

eventually, unless these wood from these trees is put to use in some long-term manner) and reduces the city's energy needs by the annual equivalent of some 2,400 barrels of oil.

This city-wide analysis can easily be done at the local tree level by using the tools provided, for free, by the US Forest Service through the i-Tree suite. These tools can be found at www.itreetools.org. In particular, the "Design" application is very useful for either the single tree or the trees on a single property.

Chris Donnelly is Urban Forestry Coordinator for CT DEEP Forestry. He can be contacted at chris.donnelly@ct.gov, www.ct.gov/deep/urbanforestry. 🌿

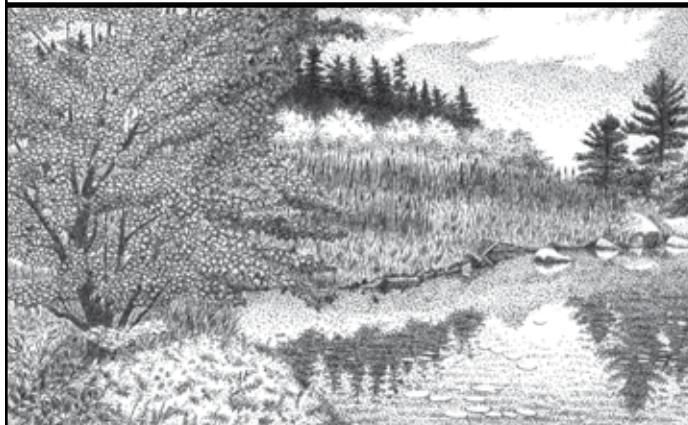
Hartford's Urban Forest - a Summary
Number of Trees: 568,000
Number of Larger Trees (over 20" in diameter): 55,000
Most Common Trees: red maple, tree of heaven, black cherry, American elm and red oak
Tree Canopy Cover: 26%
Amount of Carbon Removed by Hartford's Trees Annually: 2,440 tons
Amount of Major Air Pollutants Removed Annually: 73 tons
Oil Saved due to Energy Reduction by These Trees: 2,400 barrels a year
Replacement Cost for These Trees: \$590 million dollars

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The Value of Urban Forests and Their Effects on Microclimates

by Chris Donnelly

Let me start off my saying that I am not a climatologist and so I am fairly uncomfortable in making any definitive, or even not so definitive, comments on microclimates – but I can talk about how urban trees effect the local environment. I hope that works for these purposes.

Trees in the city are like trees elsewhere – a large life-form that tends to have a dominating influence over the local environment. Of course, in urban ecosystems, trees are matched up against the works of that other large life-form, humans. Increasingly, we have better understandings just how it is that one offsets the other. In particular, urban foresters spend a lot of time discussing the specific benefits of trees in the urban environment.

We can start with perhaps the most obvious – trees intercept sunlight. By casting shade on the surroundings

around and below them, trees tend to make for a much livable street level environment. This helps encourage all sorts of human activity, including economic activities such as shopping or buying a house (houses with

well-maintained shade trees tend to be preferred). It also simply encourages people to be active, and so pays off in health benefits, by getting people to exercise, breathe fresh air and interact with other people.

Of course, clean air is one of those additional benefits of trees. People often cite trees' role in producing oxygen, which is something that they do but is not their main bene-

fit (there would be plenty of oxygen in the atmosphere with or without urban trees). The leaves of the trees act as filters, pulling particles and chemical contaminants out of the air, in many cases helping to direct

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