The Habitat

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

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Journey to the Legal Horizon

by Janet P. Brooks

Author's Note: The Editor of *The Habitat*, Tom ODell, sat through the wetlands legal workshops that Attorneys David Wrinn, Mark Branse and I offered at the CACIWC annual environmental conference, November 2010. He had a few questions for me after the sessions and asked if I would expand our discussion into an article.

Regulating Activities Outside Wetlands Boundary and Upland Review Area: Navigating Court Wetlands Decisions

What does it mean, in general, and then specifically for wetlands agencies, when there are two Appellate Court decisions that aren't consistent?

In our legal workshops I touched upon this very issue that came up in the context of agency jurisdiction. Is a wetlands agency authorized to regulate activities outside of wetlands/watercourse boundaries or an adopted upland review area? That question is answered with opposite outcomes in two Appellate Court decisions. I will address how the Appellate has resolved the jurisdictional issue after I lay out the foundation of how land use appeals go through our state court system.

The Court system: Superior - Appellate - Supreme

The initial court to which wetlands appeals are brought are the Superior Courts, which you probably recognize as trial courts. (As I mentioned at the workshops, do not get confused by the use of the term "Supreme Court" in the television series, *Law & Order*, which is set in New York where the New York Supreme Court is equivalent, in many aspects, to the Connecticut Superior Court.) One Superior Court judge is assigned to a wetlands appeal. That judge's focus is on whether there is any reason for the wetlands agency's action that is legally sufficient and for which there is substantial evidence in the record. Once the judge issues a written decision, that decision is binding on all of the parties to the appeal -- but on no other wetlands agency, person or entity. I like to be aware of Superior Court decisions if they address an area of the law for which there is little case law from our Supreme Court or a new argument is being raised. But I don't get overly exercised about every Superior Court decision, precisely because no other judge or party is bound by it. If the legal analysis is persuasive, I may want to use it in framing a similar issue in a future case. I don't take a Chicken Little approach to a Superior Court decision. The sky is not falling from one Superior Court case. It may affect one town or one applicant very strongly, but not the whole state.

Once the judge has issued a decision and one of the parties (agency, applicant, abutter, CEPA intervenor) is dissatisfied, such party may petition the next higher level of court, the Appellate Court, for further review. While anyone "aggrieved" may bring an appeal to the Superior Court, there exists no absolute right to further appeal in land use matters. These requests for further review are called petitions for certification. That is, the higher court has to certify the appeal, to allow the appeal to pro-

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CACIWC's 33rd ANNUAL MEETING

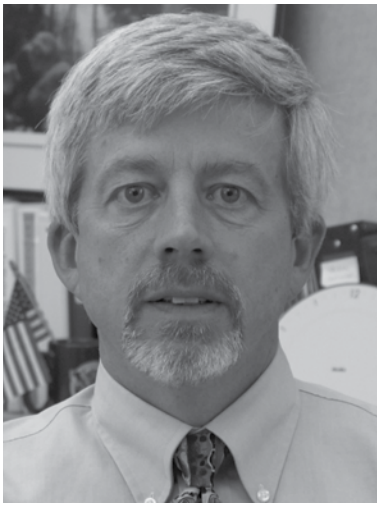
Connecticut Commissioners and Staff Enjoy Successful Conference

Over 200 Connecticut conservation and inland wetlands commissioners along with municipal staff and other professionals attended CACIWC's 33rd Annual Meeting & Environmental Conference held on Saturday November 13, 2010 at MountainRidge in Wallingford. The title of this year's conference, "Celebrating Four Decades of Environmental Conservation and Habitat Protection," recognized the many contributions made by Connecticut commissioners and staff in the decades since the original Earth Day on April 22, 1970. This year's conference provided important new information relevant to both novice and experienced commission members and staff. We again thank the many workshop leaders and display staff who provided us with useful information along with the many attendees who spent their Saturday with us learning and sharing ideas on behalf of their community and our state.

Keynote Speakers:
For this year's conference, CACIWC hosted two keynote speakers to discuss "The State of the Environment in Connecticut and New England; 40 Years after Earth Day." The year 1970, and the decade that followed, was a historic time for national, regional, state, and local efforts to promote environmental protection and conservation. From the celebration of first Earth Day and formation of the U.S. Environmental Protection Agency (EPA) in 1970, through the organization of the Connecticut Department of Environmental Protection (DEP) in 1971, and the expansion of local Connecticut commissions in 1972, profound changes were being made in the role of government on all levels in shaping these efforts.

Amey Marrella, Commissioner of the Connecticut Department of Environmental Protection (DEP) discussed the many significant environmental improvements that have occurred in Connecticut during since the 1970s, reviewing the numerous programs and legal tools that are now available to ensure environmental protection and promote habitat conservation. Mrs. Marrella, who is a graduate of Williams College and Harvard Law School, was able to provide attendees with a unique perspective on these programs, having served as DEP's Deputy Commissioner for environmental quality before being selected as DEP Commissioner by Governor M. Jodi Rell in September of 2009. Prior to joining DEP, Mrs. Marrella had served as the First Selectman of the Town of Woodbridge and as an Attorney Advisor for the U.S. Environmental Protection Agency. Commissioner Marrella completed her talk by reviewing some of the remaining environmental challenges for Connecticut, emphasizing the important role played by Connecticut's conservation and inland wetlands commissions and their agents in continuing progress through the decades to come.

Amey Marrella, Commissioner CT DEP, Key Note Speaker



Stephen S. Perkins, Director of the U.S. Environmental Protection Agency (EPA) New England's Office of Ecosystem Protection, Key Note Speaker

Stephen S. Perkins, Director of the U.S. Environmental Protection Agency (EPA) New England's Office of Ecosystem Protection provided the New England perspective to the keynote discussions**.** Mr. Perkins, whose office is responsible for the federal air, water, climate and tribal programs in the six New England states, had graciously agreed to substitute for EPA Regional Administrator H. Curtis "Curt" Spalding, who was recovering from surgery. Mr. Perkins reviewed EPA's role, and gave an inspiring discussion on the value of joint federal, state, and local efforts in conservation and environmental protection. Mr. Perkins, who joined EPA in 1981

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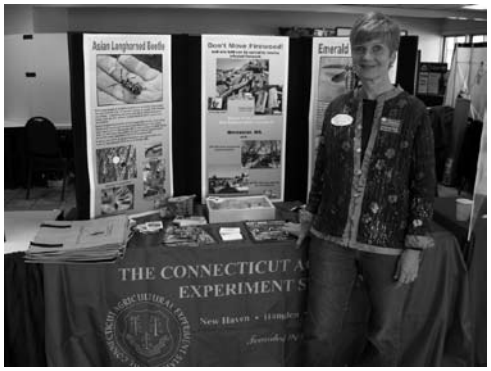
as an air quality dispersion modeler after working in the private sector as an air quality consultant, has also served as Director of the regional Office of Environmental Stewardship which implements EPA's enforcement and compliance assistance programs and as the Director of the Office of Administration and Resource Management. Stephen, who received his Master of Science degree in Atmospheric Science from Yale University and a Bachelor of Arts in Political Science from Brown University, encouraged all those in the audience to continue their ongoing efforts, in cooperation with others throughout the region.

Teresa Gallagher, CT Greenways Council, presenting workshop on CT Greenways and Trails.

Workshops & Displays: Twelve informative workshops were provided by various experts in fields of interest for conservation and wetlands commissioners and their staff. These covered a variety of topics relevant to Connecticut commissioners including wetlands law and procedures, riparian corridors, changing mammal population dynamics, stopping the Emerald Ash Borer & Asian Longhorned Beetles and the latest invasive plant species, along with new approaches to land conservation.

We thank all the workshop leaders for their time spent preparing and presenting these well-received forums.



Display by CT Agriculture Experiment Station. photo credit: Jeff Mills

Over twenty commercial entities and non-profit groups provided a rich array of displays to further inform visitors of current issues relevant to their work and volunteer efforts. The CACIWC Board of Directors has 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 other 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 those suggestions coming! We thank the staff at MountainRidge for hosting the conference again this year and extend our sincere appreciation to our 2010 conference sponsors. We look forward to seeing you again at our 2011 Annual Meeting and Environmental Conference!

Attendees trying on CACIWC hats.

Attendees at lunch. photo credit: Jeff Mills

Awards:

Two major CACIWC awards were given at the Saturday November 13, 2010 ceremony.

Jennifer Allcock, a member and chairperson of the Guilford Conservation Commission received the 2010 **"Conservation Commissioner of the Year"** award. Dr. Allcock, who served on the Conservation Commission from 2004 to 2010 and as its chairperson for five years, was recognized for her extraordinary contributions to the Town of Guilford. Jennifer has led or been involved in virtually every significant conservation activity undertaken by the Town. She has continuously supported the efforts of the Planning and Zoning Commission in developing conservation related plans and implementing them, including the Town's *Plan of Conservation and Development 2002,* Growth Management Strategies 2004, and the 2007 Municipal Coastal Plan. She worked closely with the

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Dr. Jennifer Allcock, Guilford Conservation Commission

P&Z Commission and its staff in developing zoning to implement these plans including Stormwater Management, Low Impact Development Guidelines and new Coastal Zone regulations. She has served on the Planning Committee of the P&Z Commission and monitors the agendas of the Commission to insure the continuing commitment to conservation principles in the day to day activities relating to the development of the Town.

She, along with other advocates in the Town, created the *Natural Resource Inventory and Assessment* in 2005. This detailed comprehensive description of the Town's resources has proved to be an invaluable tool in making land use and conservation decisions and has served as a model to land use professionals throughout the state. Not content to work only at the policy level, Jennifer has also led the Conservation Commission in the ongoing management of the Town's 500-acre Timberlands property and created and managed a research orchard on Town land in support of a nationwide effort to develop a blight resistant American chestnut tree.

In 1965, Dr. Jennifer Allcock co-founded the pioneering Covenant House Health Services in Philadelphia and served as its Director for 25 years. She received the Philadelphia Award, given each year to a citizen who acted and served on behalf of the best interests of the community, and went on to earn an M.A. in Landscape Design. In addition to participating on the Guilford Conservation Commission from 2004 to 2010 and serving as its Chairperson for five of those years, Jennifer led many conservation initiatives in town and served as a Director of The American Chestnut Foundation's Connecticut Chapter**.** Jennifer is a model conservation citizen and leader and although she will be returning to Pennsylvania this year, her contributions will be long remembered in Guilford.

George A. Ziegra, a member and chairman of the Salem Inland Wetlands and Conservation Commission was honored with the 2010 **"Lifetime Achievement Award."** Mr. Ziegra was recognized for his more than three decades of service to the Town of Salem. Mr. Ziegra first became a commission member within the first decade of the original Earth Day on January of 1980, when the Commission was known as the Conservation Commission. He and his fellow commissioners took on the additional task of regulating inland wetlands on April 1992, when the commission expanded to become the Salem Inland Wetlands and Conservation Commission.

Sally Snyder and George A. Ziegra, Salem Inland Wetlands Commission

Mr. Ziegra, a retired engineer from Electric Boat, has dedicated almost 31 years of service to the Town of Salem and its residents as a member of the Inland Wetlands and Conservation Commission, serving as its Chair for many of those 31 years. Through those years, he has proven to be a valuable asset and member, who has grown and continues to grow in his knowledge and experience, re-ensuring the protection of Salem's valuable natural resources.

Mr. Ziegra's passion for promoting conservation and natural resource protection also led him to become involved in many regional efforts. His participation in a working group that reviewed the Niantic River Watershed Plan is a recent example. George invested many hours with the workgroup conducting a detailed review of the plan, which resulted in numerous recommendations for improved implementation of protective actions.

His fellow commission members know that they can count on Mr. Ziegra. He rarely misses a meeting, and places high value on the importance of wetlands and conservation. Moreover, he is always willing to respond to requests from new members to share his perspective and guidance based on his many years of experience. CACIWC is pleased award this special honor in recognition of his dedicated efforts on behalf of his town.

Order in the Court! *by Mark Branse*

Democracy can be messy, and no one ever said it was efficient. It just seems to be better than anything else out there. Public hearings can bring out both the best and the worst in people and you need to control them.

What Does the Law Require?
The United States and Connecticut Constitutions guarantee every citizen the right to "procedural due process." *Substantive* due process means that the *decision made* was in accordance with Constitutional principals, but *procedural* due process means that the decision was made *in the right way*. They are separate guarantees of Constitutional rights and both must be accorded.

The touchstone of procedural due process when applied to public hearings and other proceedings is "fundamental fairness." Fundamental fairness has been the subject of thousands of court cases, but in essence it means that the proceeding was conducted in a way that protected the rights of all parties. That would include obvious things like allowing everyone to be heard, not considering *ex parte* communications (communications made outside the hearing room), disclosing the true nature of the proposal, using the applicable regulations as they are written, and having decision-makers (commissioners) who are objective and open-minded.

It also means conducting hearings in such a way that no one is improperly intimidated, harassed, or disadvantaged in the presentation of their position. When the topic is hot, and the crowd gets hot, and the meeting gets hot, you must expect trouble.

Who Cares if the Crowd Gets Nasty?
You do, whether you know or not. First, your decisions are subject to appeal if an "atmosphere of hostility" is allowed to pervade the proceedings. *Pirozzilo v. Berlin Inland Wetlands and Water Courses Commission*, 32 Conn. L. Rptr. No. 3, 103 (1-17-02): The *applicant's* consultant made a joke about his own client's Italian background; a commission member joked back. Held that an atmosphere of hostility had been created against people of Italian ethnicity which prevented the applicant from obtaining a fair hearing. This was an administrative appeal seeking to overturn the commission decision, not a civil case for money damages.

In *Thomas v. West Haven*, 249 Conn. 385 (1999) two commission members were openly hostile to the applicant, using foul language and threats, trying to deny the application before the public hearing was even completed, and demanding information not authorized by the regulations. Thomas brought a civil rights claim–a civil suit for money damages–against the town, claiming that he had been denied procedural due process in the way that the hearing was conducted on his application. West Haven defended on the ground that the two commission members acted on their own, did not reflect the conduct of the majority of commission members, and the town could not be held liable because of two bad apples in the barrel. Held: You can be, and are *liable* for bad apples in the barrel. The public hearing was characterized by an "atmosphere of hostility" that prevented Thomas from getting a fair hearing on his application. The town has an obligation to assure procedural due process–fundamental fairness–in every proceeding. If they fail to do so, they *are liable.* So chairmen, staff, whoever– you owe it to your town and its taxpayers to deal with and control conduct that creates an "atmosphere of hostility."

This is especially critical where the flashpoint is a civil right issue all its own: religion, free speech (adult book stores or other entertainment uses or political signs), ethnic background, race, disability. Examples I have experienced:

- Islamic Cemetery before a wetlands commission.
- Affordable housing where minorities may be expected to reside.
- "Half-way" house for persons recovering from traumatic brain injury (TBI).
- Clinic for disabled persons recovering from alcohol or drug addition.
- "Half-way" house for juveniles transitioning out of prison.
- Treatment facility for persons suffering from Alzheimer's Disease.
- Synagogue in residential zone.
- Christian prayer meeting in residential zone.

If you allow prejudice to flare at a public hearing, you are inviting the overturn of your decision and, even worse, money damages against your town.

Be Prepared
If you suspect trouble, have police on hand, preferably in uniform. Have more than one if any doubt at all and more on call.

Have a large room–oversized, in fact. Packing people together contributes to their anonymity and encourages heckling or shouting out (the "voice from the crowd.")

Have a board or other way to display plans, etc. It avoids having people shout out, "I can't see that."

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Have an AV system. People will sit in the back row and then shout, "I can't hear." Invite persons with hearing problems to sit in the front of the room (they won't.)

Set out the rules of the game before the applicant ever stands up: "We will hear from the applicant; then questions from the Commission and staff; then those in favor; then those opposed; then those who don't wish to be categorized as in favor or opposed. There will be no shouting, applause, booing, heckling, or other disturbance. Those who break these rules will be ejected from the meeting. There will be no exceptions." Explain what kind of proceeding this is (wetlands, zoning, etc.) and what the criteria for review are. Have copies of those criteria available for distribution and ask people to address their comments to those criteria. If need be, state expressly that the religion, race, ethnicity, etc. of the applicant or ultimate occupant/user is irrelevant and no such comments will be entertained. And stick with it!

Keep the Lid On

Nothing spirals out of control faster than a mob mentality. You must react swiftly and decisively to the *very first person* who gets out of order. Shout them down at once and explain that the next person who interrupts the proceeding will be ejected. And then *do it* and have the uniformed personnel to carry out the threat. Be sure that they are ready, willing, and able to perform that function.

If things go crazy, stop the whole show and continue the public hearing to another night. And have more police on hand.

Keep Your Own Troops in Line

Chairmen: Your own colleagues may be your worst enemy if they are playing it up for the crowd, are bigoted people, or are just plain stupid. You have to keep *them* in line, too. If you don't think you can handle that role, have your town attorney present to do it for you. The town attorney doesn't have to run for office and (usually) doesn't live in your town. Let him/her be the lightning rod for misdirected energy. We're used to having people mad at us! We can handle it.

If you have a nut case on your commission, deal with it: A stern lecture from the First Selectman, Town Attorney, party chairman–whoever can reach the jerk. If nothing works, you have to force that person off if your local ordinance or charter provide a proceeding for doing so. Obviously, when their term expires, they shouldn't be reappointed but don't expect the chief executive to know that. The rest of you have a duty to tell the appointing authority that this nut has got to go. Be sure it's nonpartisan, nonpersonal. It's just that the nut is setting you up for trouble.

Keep the Applicant In Line

Some applicants are "trolling" for bigoted remarks just so that they can bring a civil rights claim later on. They may actually try to incite the crowd or goad you into saying something stupid. Make the rules just as clear to the applicant as to the crowd: Address the application and the regulations–nothing else. If they refuse to do so, table the item to the end of the meeting or the next meeting. I prefer the former because the applicant has to pay all their experts to wait around while you go through hours of routine applications, minutes approvals, staff reports, wedding/birth/death announcements, etc. Next time, they'll stick to the point.

Basic Rules

- All comments are directed to the commission. There is to be no argument among proponents and opponents, applicants and neighbors, etc. If someone demands a right of cross examination, deal with that in an orderly way, but otherwise, no communications except to and from the chair. Even cross examination is under the chair's control, like the way a judge controls it in the courtroom.

- **Never** allow *anyone* to interrupt a member of the commission, especially the chairman. This goes for applicants or the public. You are volunteering your time to sift through this stuff and you deserve to be treated with respect. *Demand* that you be treated with respect. This is especially true for professionals (lawyers, engineers, consultants, etc.) who should know better. It is *your* meeting and *you* are running it. Not them.

- No one speaks–including commission members–unless and until they are recognized by the chair.

- No applause, no booing, no heckling, no shouting out, no disruption. **No show of hands.** It's not a popularity contest!

- Keep people on the point. As soon as they wander off, bring them back or tell them they're finished for now ("compose your thoughts and you can speak again later.")

- Don't run too late at night. As people get tired, they get cranky and harder to control. Better to meet once a week from 7 pm to 9:30 pm than once every two weeks from 7 pm to midnight. It's the same number of hours, but a different dynamic.

- If it's likely to be bad, have your attorney there to assist you.

Conclusion

You run serious legal risks by allowing a free-for-all in a controversial application, especially where race, religion, ethnicity, or disability are involved. Run a tight ship, don't let yourself get blown off course, and have troops on deck.

Mark Branse is a partner with Branse, Willis, & Knapp, LLC; www.bransewillis.com.

Ensuring That Your Open Space Plan is an Important Part of the Plan of Conservation and Development

by Tom ODell and Ann Letendre

INTRODUCTION

Conservation commissions are key players in the process of preparing or updating the Plan of Conservation and Development (POCD) in their communities. As a research and advisory board, the conservation commission collects and maintains an inventory of natural resources, as well as an index of all open areas within the town. This information provides the baseline data needed for creation of your open space plan, a critical element of your POCD.

Data collected by conservation commissions also enable informed decisions and recommendations for the location of growth areas, potential open space areas, and conservation areas. To effectively prepare for this work, your commission can do some early groundwork to understand the basics of the POCD process, and ready your open space plan for inclusion in the POCD.

"The designation of 'conservation' by PA 95-335 as a major component of a community's land use plan amplified the importance of the conservation commission's advisory role."

To assist you, Part I of this article summarizes the legal basis for a conservation commission's important role in a POCD and describes the responsibilities of municipal boards and commissions in the POCD process. Part II, "Is Your Open Space Plan Ready for the POCD?" will appear in the Spring 2011 issue of *The Habitat*. It will describe the basic elements you will need to obtain or update that are essential to the open space plan and critical for town approval.

Part I - THE BASICS – WHAT YOU NEED TO KNOW

1. Know the legal authority for including the open space plan in the Plan of Conservation and Development (POCD).

In 1995, passage of **Public Act No. 95-335**, *An Act Concerning Greenways*, changed the designation of the municipal plan of development to the plan of conservation and development. Planning commissions are required to prepare and adopt (or amend) a "Plan of Conservation and Development" that establishes policies, goals and recommendations for the most desirable use of land within the community.

The POCD may serve numerous functions. It may include recommendations for land to be used for conservation purposes and may designate areas recommended for preservation as open space land, provided such designation is approved by a majority vote of the legislative body of the municipality. It may include recommended programs for the implementation of the plan, including plans for open space acquisition and greenways protection and development. Both are particularly important since open space designations in the POCD are necessary for the community to

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qualify for open space grants, per Connecticut General Statutes, Section 8-23.

PA 95-335 enables conservation commissions to propose greenway plans for inclusion in the POCD, and clarifies the importance of planning for conservation at the local level. It also emphasizes the need for planning commissions and conservation commissions to collaborate on the formulation of comprehensive conservation plans for their municipalities. The designation of "conservation" by PA 95-335 as a major component of a community's land use plan amplified the importance of the conservation commission's advisory role. Data gathered by a conservation commission in conducting research into the possible utilization of land areas of the municipality, formulating watershed and draught management plans, and indexing open space are of great value to both boards as they develop open space and greenway plans, and the POCD.

"The POCD...may include recommended programs for the implementation of the plan, including plans for open space acquisition and greenways protection and development."

Legal authority for a conservation commission's research and advisory role in land use planning is cited in the enabling legislation for conservation commissions, Connecticut General Statutes, Section 7-131a: "A commission *shall* conduct research into the utilization and *possible* utilization of land areas of the municipality…." - and - "A commission *shall* keep an index of all open areas, public or privately owned including wetlands, for the purpose of obtaining information on the proper use of such areas...". (Emphasis added).

2. Know the POCD decision-makers in your town
Recognize and contact those in the community who are responsible for revising and approving your municipal POCD. Contact should be made at an early stage to request and discuss integrating an approved open space plan in the POCD.

Planning Commission – Planning commissions are required to prepare and adopt (or amend) a POCD for the community. Request that a representative of the planning commission work with you on the open space plan. Keep the planning commission informed of your progress.

Town Planner - Generally, the town planner is given responsibility by the planning commission to lead a POCD steering committee (if one is established), and to work closely with planning consultants hired to assist with the POCD. Request assistance from the town planner in the update of your open space plan as it may relate to the POCD revisions.

Zoning Commission – A POCD may recommend changes to zoning regulations, including changes that are related to the open space plan. For example, a POCD may recommend enhanced open space requirements as part of Subdivision Regulations that include an increase in the minimum percent of the parcel be dedicated as open space. Keep the zoning commission informed and ask for their comment on the open space plan as it evolves.

Inland Wetlands and Watercourse Commission
Wetlands regulations, and their administrative officer, have a significant role in protecting open space. A POCD could recommend changes in wetlands regulations that will contribute to protection

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of the most important wetlands and watercourses identified in the open space plan in order to ensure that development in these areas will be reviewed. Examples include riparian corridors and other critical habitats associated with wetlands, watercourses and upland review areas.

Town Council, Board of Selectmen, Mayor – It is very important to determine the role and views of community leaders on open space protection and the POCD.

Town Residents – Ultimately, approval of the both an open space plan and the POCD requires a vote of the legislative body of the town. Engage town residents early in the process of revising or developing the town's open space plan, and keep them engaged throughout the process.

Political Landscape - Politics can influence how an open space plan is received by the community and whether or not it is accepted as an important part of the POCD. Make sure the economic benefits of protecting natural resources and town character become recognized outcomes of the open space plan. Provide all town boards, including those responsible for financial matters, with opportunity to comment on the Plan**.**

3. Ensure consistency of the open space plan with other POCD elements.
Open space plans should address how the plan relates to – or is consistent with – other POCD elements. Review key topics in the previous POCD, such as Natural Resource Protection, Community Character, Historic Resources, Utility and Transportation Infrastructure, and Housing Needs. The open space plan should also be consistent with regional and state land use plans.

4. Understand the POCD preparation process; where feasible, become a part of the process.
After the initial steps are taken (hiring consultants, establishing a steering committee, and setting a schedule), the process of obtaining input for the various sections of the POCD begins. Review the POCD schedule and outline. Identify the sections that are relevant to the open space plan. Workshops and community surveys are usually held to acquire public input. Take these opportunities to gain information on your community's open space priorities.

Steering Committee - Ask to be a member of the committee. If not appointed, request notification of meetings so that conservation commission members can attend. Review minutes of the steering committee, make minutes available to the commission, and discuss as appropriate.

Community survey - Ask to review the survey questions; make sure they seek opinions on protection of natural resources, community character and open space protection. Public opinion should also be sought on expenditure of tax monies for open space protection.

POCD Workshops – These types of meetings are held to gather public input on various POCD topics. Utilize these public meetings to create awareness of open space planning as it relates to the importance of protecting natural resources and town character.

Final steps in the process include public hearings and approval of the new (or revised) POCD by the planning commission and by the town's legislative body. If the process has been sufficiently interactive and has provided ample opportunity for input from the public, town staff, and town decision-makers, then the final public hearings should proceed smoothly.

Tom ODell is Chairman of the Westbrook Conservation Commission, and is currently on the Westbrook POCD Steering Committee; he is editor of The Habitat*. Ann Letendre served on the Vernon Inland Wetlands - Conservation Commission, participated in four Vernon POCD processes, and is the Associate Editor of* The Habitat*.*

Resources

Jim Gibbons; "Putting Conservation into the Municipal Planning Process": The Habitat, Autumn 1995, Vol. IX No. 3.

Karl Wagener; "Greenway Law Puts New Tools into the Hands of Commissions": The Habitat, Autumn 1995, Vol. IX No. 3.

Michael A. Zizka; "What's Legally Required? A Guide to the Rules for making local land-use decisions in the State of Connecticut": DEP Bulletin 39, 2004.

Marjorie Shansky, Attorney; "The Conservation Commission: Your Town's Key to Natural Resource Protection": The Habitat, Spring 2005, Vol. XVII No. 2: http://caciwc.org/library/habitat/index.html.

John Mullaney and Michael O'Leary; "Hebron's Coordinated Approach to Riparian Area Protection": *The Habitat*, Winter 2008, Vol. XX No. 1: http://caciwc.org/library/habitat/index.html.

Open Space And Green Infrastructure Planning

The Westbrook Conservation Commission is working to strategically integrate protection and restoration of the community's natural green infrastructure into revisions to the Open Space Plan and Westbrook's Plan of Conservation and Development.

Green infrastructure has been defined as our natural life support system – an interconnected network of waterways, wetlands, woodlands, wildlife habitats and other natural areas; greenways, parks and other conservation lands; working farms and forests; and other open spaces that support native species, maintain natural ecological processes, sustain air and water resources and contribute to the health and quality of life for communities and people.

Green infrastructure provides a framework to help planners and developers minimize the adverse impacts that community development can have on ecosystem functions and services, such as the loss of vegetated buffers of streams and rivers, and other natural areas that slow and absorb storm water runoff and recharge ground water and surface water supplies.

Changing Perceptions

Open space is often viewed as something nice to have; green infrastructure implies something that we must have. Protecting and restoring our communities natural life support system is a necessity, not an amenity.

Open space is often thought of as isolated parks, recreation sites or natural areas. Green infrastructure emphasizes interconnected systems of green areas and other open spaces that are protected and managed for the ecological benefits they provide people and the environment.

Open space is often viewed as self-sustaining. The term 'green infrastructure' implies something that must be actively maintained and at times restored.

Westbrook CT's Green Infrastructure

Westbrook's green infrastructure, including the tidal shoreline of beaches, islands and salt marshes, the uplands of forests, wetlands, rocky ridges and agricultural fields, and the rivers and streams that link

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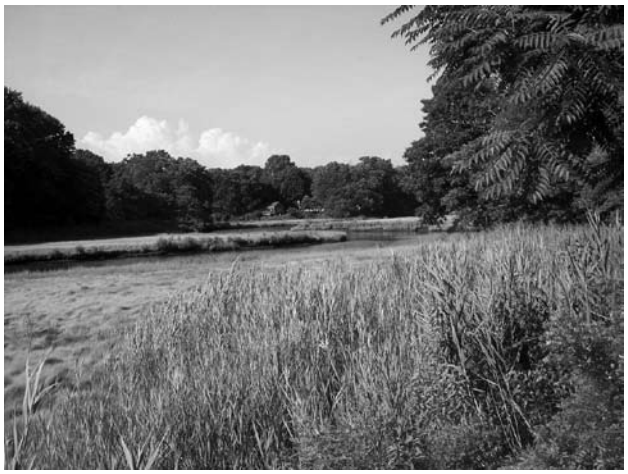
continued from page 11

these natural resources, provides strong historical and present influence on our environment, public health, sense of character, community physical structure and quality of life.



Tidal Marsh and Woodlands; Green Infrastructure along Patchogue River. photo credit: Tom ODell, Chairman, Westbrook Conservation Commission

These natural assets should be protected not only for aesthetic and natural resource protection reasons but also to pass on this natural green infrastructure to future generations for their enjoyment, for their clean water supply, and for the diversity of wildlife and marine life we enjoy today.

A Green Infrastructure Plan

The continual attraction to the amenities of Long Island Sound communities has increased development pressure on Westbrook's remaining undeveloped land. It is imperative that we continually strive to identify and preserve those green infrastructure elements that contribute to Westbrook's rural character and protect natural resources that are so important to this shoreline community. Restoration and preservation of the town's green infrastructure must be a first consideration when talking about development and integrating smart growth principals into community structure - the overall physical organization of Westbrook.

Protecting and restoring a town's natural green infrastructure in Plans of Conservation and Development ensures that existing unprotected open space such as river and stream vegetated buffers and farms and forests, are seen as part of the communities essential assets and not left vulnerable to development pressures that would leave green infrastructure further reduced and fragmented.

journey, continued from page 1
ceed at the next level. Lawyers refer to them as "cert." petitions. The petitioning party must persuade two judges on the Appellate Court that the lower decision was wrongly decided based on existing Supreme Court case law or that the issue hasn't been reached by the Supreme Court but is likely not how the Supreme Court would rule or the matter is of great public importance. Once "cert." has been granted, the matter proceeds with the filing of papers. Oral argument is the first time that the parties are in open court. While the Appellate Court comprises ten judges, appeals are heard in panels of three. The focus of the Appellate Court panel is whether the Superior Court properly ruled. (When I began practicing law, the focus was on whether the Superior Court "erred"; now the expression is more genteel.) The written decision of the Appellate Court is binding on all parties *and* is precedent on the law. There's the rub. Exactly what the legal holding is, may be crystal clear . . . or a matter of opinion.

To continue with the court overview, again, the right to further review from an Appellate Court decision is not absolute. A party must petition for "cert." to the Supreme Court. The same procedure is set in play, except that the would-be appellant must persuade three justices of the Supreme Court to grant certification. Beginning in September 2009, the Supreme Court voted to consider appeals en banc, that is, with all seven justices participating (where there are no disqualifications.) Previously, a panel of five justices was the custom, with seven justices participating in extraordinary appeals. The Supreme Court's focus is whether the Appellate Court properly decided the case.

What this means for wetlands agencies

In 2003 the Appellate Court ruled that prior to a wetlands agency regulating activities outside of wetlands and watercourse, it must first adopt a regulation establishing an upland review area. *Prestige Builders v. Inland Wetlands Commission,* 79 Conn. App. 710 (2003), cert. denied, 269 Conn. 909 (2004). The Supreme Court had not ruled on that specific issue and declined to grant certification in that case. Thus, the Appellate Court's decision is the highest court decision and is binding on all wetlands agencies.

In 2010 the Appellate Court ruled that the Old Saybrook wetlands agency properly exercised jurisdiction over activities outside of the established upland review area because the majority of the activities were proposed within the upland review area. *River Sound Development, LLC v. Inland Wetlands and Watercourses Commission*, 122 Conn. App. 644, cert. denied, 298 Conn. 920 (2010). Again, the Supreme Court declined to certify the appeal.

Thus, we are left with one case which requires an agency to have adopted an upland review area in order to exercise its jurisdiction and another case which concluded that an agency may regulate activities outside the upland review area. Until the Supreme Court grants certification in an appeal presenting this issue, wetlands agencies can't know with any certainty how their actions regarding activities outside the upland review area will be adjudicated by the courts.

What's an agency to do until the Supreme Court definitively resolves the issue? Shortly after the decision in the *Prestige Builders* case was released, the Attorney General's Office and the DEP included recommendations in their training of wetlands commission members. The advice: to protect the agency's maximum authority to regulate activities outside of wetlands and watercourses, they recommend the adoption of the following sentence in addition to the definition of "regulated activity": "The Agency may rule that any other activity located within such upland review area or in any other non-wetland or non-watercourse area is likely to impact or affect wetlands or watercourses and is a regulated activity." This language had already been widely broadcast by DEP in its 1997 Guidance Document, Upland Review Area Regulations Connecticut's Inland Wetlands & Watercourses Act, page 3. If the holding in the *Prestige Builders* case is eventually reversed, the additional language in an officially adopted regulation may be unnecessary, but the regulation still serves two salutary purposes. The agency will be certain of the scope of its jurisdiction and can refer back to the language in its own definition. The public will also be able to find written support for the agency's assertion of jurisdiction. For both the regulating agency and the public, more information is a benefit.

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i The decisions of the Appellate Court are cited in the following way: 1 Conn. App. 1 (1983). Decoded: 1 [number of the volume in which the decision is printed] Conn. App. [Appellate Court decision] 1 [page number on which the decision begins] (1983)[year in which the decision is published]. The Appellate Court decisions are printed in separate volumes from the Supreme Court decisions. The Supreme Court decisions are cited: 196 Conn. 218 (1985). Decoded: 196 [volume in which the decision is published] Conn. [Supreme Court decision] 21[page number on which the decision begins] (1985) [year in which the decision is published]

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