Journey to the Legal Horizon

Motions to approve or deny wetlands application:
what to include and why

The editor of *The Habitat*, Tom ODell, has passed on a question from a reader for guidance on what wetlands and watercourses agencies should include in their motions to approve or deny applications. As members of wetlands agencies, you want to create strong decisions that will survive attack on appeal. Strong decisions result from proper procedure and robust deliberations. The motion is one step in the process.

I. State the reason(s) for your decision

You might think this is the obvious thing to do. The statute, in fact, directs you to do it: "In granting, denying or limiting any permit for a regulated activity the inland wetlands agency, or its agent[i], shall consider the factors set forth in section 22a-41, and such agency, or its agent, shall state upon the record the reason for its decision." Conn. General Statutes § 22a-42a (d) (1).

There are some municipal attorneys who disagree. There is case law that on appeal a judge may search the record of the agency proceedings to find evidence which supports the agency's action, denial, approval or imposition of conditions. The case law furthers limits the judge to considering the reasons *stated* by the agency.[ii] I have heard some of these attorneys claim that they would rather have no stated reasons, so the judge is free to search in every nook and cranny of the transcripts of the public hearing and the deliberations to scrounge up evidence to support the agency's decision.

I don't want to stand between you and your municipal attorney, who is, after all, your only representative in court defending your action, but when you fail to state your reasons, you

ignore the plain meaning of the statute to "state upon the record the reason for [your] decision." For example, if after a spirited evening of questions and answers about the effectiveness of the proposed sedimentation and erosion controls by the applicant and concerns raised by experts for the neighbors, the agency entertains a motion to approve the application as proposed (no reasons disclosed.) Let's suppose there is no or very limited discussion. The agency votes to grant the application. The applicant leaves confident it was the strength of its application and supporting materials. The public is bewildered. Which was it – the strength of the applicant's expert or the weakness of the neighbor's expert or both? An appeal is taken and the judge, having searched the record, manages to find enough to support the agency action. A D- grade is still a passing grade, but should you strive so low? With each application you have the opportunity to increase the confidence applicants and the public alike have in your efforts. You do this with transparency – by stating your reasons on the record. Consider the statement of your reasons a summary of your action.

II. Start with the relevant factors for consideration

A boilerplate list of the factors for consideration in your regulations or the state statute is not called for. Not every application will call into question the environmental impact on a watercourse *plus* alternatives *plus* irreversible loss of the watercourse *plus* mitigation plus interference with safety or health *plus* future activities made inevitable by the application. There is no need to repeat verbatim lengthy factors for consideration where your conclusion is: "That is not presented by this application." Focus on the factors which agency members or members of the public questioned. In fact, if your agency relies on a factor which was not voiced by anyone during the proceeding, you may have deprived the applicant of fundamental fairness – the opportunity to know the basis of your decision and a timely opportunity to respond.

It's my impression that agencies do not consider alternatives enough, that is, chew them over, articulate them and ask the applicants of the process they engaged in before settling on the design presented in the application. Often I hear from agency members that alternatives are not part of their analysis because a public hearing wasn't held or the reason for holding a public hearing was that it was in the "public interest." Let's clarify the law on alternatives. Succinctly put, alternatives are to be considered in each application. Why? It is the second stated factor for consideration[iii], right after the environmental impact of the proposed activity on wetlands and/or watercourses. Consideration of impacts and alternatives should be among your most frequently undertaken considerations, common to all applications.

Members are correct that there are <u>additional</u> findings that must be made if a public hearing was held based on a finding that the proposed activity may have a significant impact on wetlands or watercourses[iv]. In that event, a permit may not be issued unless the agency finds that a feasible and prudent alternative does not exist.

III. State which expert(s) you found credible

On appeal a judge will defer to your decisions on who was credible. The law is a bit tricky on experts. When there are multiple experts, the agency is free to believe one and disbelieve another. On the other hand, if there is only *one* expert, a lay agency (with no expert members) acts without substantial evidence, i.e. illegally, in disregarding the sole expert evidence before it. Are you required to state which experts you found credible? No. It will be inferred from your action. But you can guide the quality of future experts by signaling the importance you placed on (fill in the blank): the expert's years of experience designing similar systems, the expert's lack of specific knowledge of on-site conditions, the expert's

evasiveness/thoroughness when answering questions, the expert's reliance on generalized concerns and not specific ones etc.

IV. Specific findings in specific situations

Feasible and prudent alternative: As mentioned in Section II above, your agency is required to make a specific finding that there is no feasible or prudent alternative *if* you conducted a public hearing because you voted that the activities may have a significant impact. Conversely, if your agency is voting to deny an application because a feasible and prudent alternative *may* exist – which is a proper basis for denial – you "shall propose on the record in writing the types of alternatives which the applicant may investigate."[v]

Environmental intervenor(s): if an environmental intervenor participated in the proceeding, whether a public hearing was held or not, the agency has one or two additional findings to make. Step 1: The initial finding is to determine whether the intervenor has established that the proposed activity is reasonably likely to unreasonably pollute, impair or destroy wetlands or watercourses. If the answer is no, the agency's job under the Connecticut Environmental Protection Act (CEPA) is done. If the answer is yes, proceed to Step 2: If there is "a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare"[vi] the permit must be denied. It is not necessary to have a separate motion to make the CEPA findings, but there's nothing wrong with that procedure. However, the state Supreme Court has ruled that if an agency is denying a permit based on CEPA considerations and findings, those findings *must* be referred to in the general motion which denied the permit and not solely in a motion about CEPA findings.[vii]

Denial of activity in upland review area based on impact to plants or animals: In response to the state Supreme Court's 2003 ruling holding wildlife not within the jurisdiction of wetlands agencies, the legislature amended the wetlands act to allow denial or conditions for impact to plants or animal for activities conducted in upland review areas. In § 22a-41 (d) an agency is not authorized to deny or condition a permit for such impact "unless such activity will likely impact or affect the physical characteristics of such wetlands or watercourses." Strictly speaking, this needn't be a formal "finding." However, putting it on your list of findings to be incorporated in a motion will encourage you to discuss this on the record and question all experts about this, which, in turn, increases the likelihood of a judge finding there is substantial evidence to support your decision.

Denial of permit based on actual adverse impact: There have been numerous permit denials that have been overturned by the Appellate Court and the Supreme Court. Is the problem that agencies are failing to make the finding in their motions to disapprove in an otherwise strong record which supports their decision? No. The record is inadequate to support the finding. The word "actual" is not my invention. It comes from a Supreme Court decision: The wetlands agency "made no specific finding of any actual adverse impact to any wetlands or watercourses."[viii] By putting this finding on your to-do list for denials, including the word "actual," it will prompt your agency to engage in the questioning of experts and applicants to support your deliberations and denials.

Having a list of topics for findings to be inserted in your motions will assist you in framing the questions, the discussions and your deliberations. At the same time everyone, the applicant, the public and all agency members, will have a clear picture of how your agency acted.

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[i] The "agent" refers to those activities approved by an agent when the activity does not occur in a wetland or watercourse and would result in no greater than a minimal impact on any wetland or watercourse as set out in C.G.S. § 22a-42a (c) (2).
[ii] *Gibbons v. Historic District Commission*, 285 Conn. 755, 767 -72 (2008)
[iii] C.G.S. § 22a-41 (a) (2)
[iv] C.G.S. § 22a-41 (b)
[v] C.G.S. § 22a-41 (b) (2)
[vi] C.G.S. § 22a-19 (b)
[vii] *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 83-85 (2004)
[viii] *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 77 (2004)