

MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Inland Wetlands and Watercourses Agency

DATE: February 2, 2005

RE: Legal Opinion Request - Upland Review Areas

QUESTION PRESENTED: Is the Agency empowered to regulate activity that is not within the wetlands or within the fifty (50) feet setback area?

ANSWER: Not as the regulations are presently written.

ANALYSIS:

The Connecticut Appellate Court recently considered this question and held that an Inland Wetlands Agency may only exercise authority over upland review areas if it has a regulation governing such areas. *Prestige Builders, LLC. v. Inland Wetlands Commission of Ansonia*, 79 Conn. App. 710, 721 (2003).

The Ansonia regulations in the *Prestige Builders* case defined a "regulated activity" only as work performed within the wetlands. *Id.* at 713. The application before the agency was denied due to concerns that work outside of the wetlands would impact them ("because the plaintiff's property contained wetlands and watercourses, any activity in and around those areas constituted a regulated activity"). *Id.* at 714.

The Appellate Court engaged in a two stage analysis of the question. First the Court considered whether the agency had the statutory authority to regulate activities in upland review areas in the absence of a regulation and second whether case law provided such authority. (The Court used the definition of "upland review areas" that is utilized by the Department of Environmental Protection's "Guidelines for Upland Review Area Regulations Under Connecticut's Inland Wetlands & Watercourses Act", which provides as

follows: "An upland review area is a nonwetland or nonwatercourse area in which an inland wetland commission may regulate activities that are likely to affect or impact wetlands or watercourses. These also are known as buffer zones or setback areas.") *Id.* at 712, fn 3.

Connecticut General Statutes section 22a-42a(f) provides as follows: "If a municipal inland wetlands agency regulates activities within areas around wetlands or watercourses, such regulation shall (1) be in accordance with the regulations adopted by such agency related to application for, and approval of, activities to be conducted in wetlands or watercourses and (2) apply only to those activities which are likely to impact or affect wetlands or watercourses." The Appellate Court held that "[t]he word 'if' connotes that discretion is given to a commission to enact regulations governing upland review areas if the commission finds that such regulations are necessary to protect wetlands and watercourses. If a commission does not enact such regulations, then it may not exercise its statutory authority to govern activities outside of wetlands and watercourses." *Id.* at 716-717.

The Court next considered whether various landmark wetlands cases provided authority for the regulation of activity in upland review areas absent a properly adopted agency regulation governing such areas. The Court analyzed *Aaron v. Conservation Commission*, 183 Conn. 532 (1981); *Cioffoletti v. Planning & Zoning Commission*, 209 Conn. 544 (1989); *Lizotte v. Conservation Commission*, 216 Conn. 320 (1990); *Mario v. Fairfield*, 217 Conn. 164 (1991); and *Queach Corp. v. Inland Wetlands Commission*, 258 Conn. 178 (2001).

The Court held that "[a]n analysis of those cases reveals two important facts. First, a local inland wetlands commission possesses the authority to enact regulations governing upland review areas. Second, the commission *must first enact* a regulation over upland review areas before it can regulate activities within those areas. In each of those cases, appellate review was based on a regulation *that the commission had enacted*. We have never held that a commission may exercise its authority over upland review areas absent a regulation governing such areas." *Prestige Builders, supra*, at 721 (italics in original, bold type added).

Middletown's Inland Wetlands Regulations regulate activity both within a wetland or watercourse and all areas within fifty feet thereof. In order for the Middletown Inland Wetlands Agency to regulate activity beyond the fifty feet setback it must first enact a regulation that gives it authority over those areas. The Appellate Court cites the DEP's Guidelines with approval and notes that "'[a]n upland activity which is likely to impact or affect wetlands or watercourses is a regulated activity and should be identified as such within the regulations.'... 'To be enforceable, the upland review areas must be adopted in the town's inland wetlands and watercourses

regulations.... Clearly, the guidelines demonstrate that a commission must first enact a regulation that gives it authority over upland review areas before it may, in fact, regulate within those areas." *Prestige Builders, supra*, at 722 (emphasis in original).

The Court emphasized its holding that a further regulation is required with its interpretation of the following portion of the DEP guidelines: "[t]he defendant commissioner of the department of environmental protection in his brief cites the following passage from guidelines to support his argument that that no enabling regulation is necessary: 'While requiring a permit for specified activities within defined upland review area boundaries, these wetland agencies still maintain their authority to regulate proposed activities located in more distant upland review areas if they find that the activities are likely to impact or affect a wetland or watercourse.'... That passage does nothing more than restate our case law and the statutory language governing upland review areas. A commission may enact regulations over more distant land if activity is likely to affect wetlands and watercourses." *Id.* at 722 fn 13 (emphasis added).



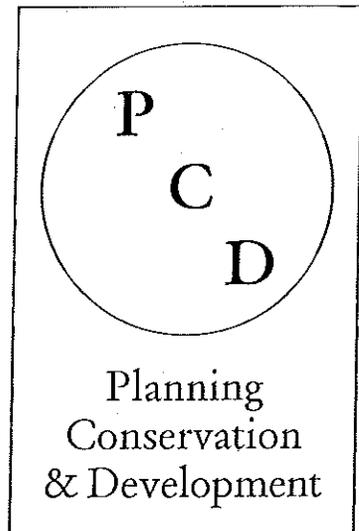
Timothy P. Lynch
Deputy City Attorney

cc: Trina A. Solecki, City Attorney
Brian Robinson, Zoning/Wetlands Enforcement Officer

Memorandum

To: Timothy Lynch, City Attorney
CC: William Warner; Planning, Conservation & Devel.

From: Brian Robinson; Zoning and Wetlands Officer
Date: 1/13/2005
Re: Legal Opinion



At the IWWA Meeting on January 5, 2004, the commission approved a motion to accept the application of Newfield Street of Middletown LLC/Glenn Russo to construct multi-family housing located at 530-534 Newfield Street. However, the motion also requested that an opinion be obtained from the City Attorney to determine if a permit is indeed required for the project. According to the applicant's attorney, Attorney Mike Ziska, the proposed site improvements are not within the wetland or 50' regulated area specified in the City's Inland Wetland and Watercourses Agency, and therefore, is outside the jurisdiction of the commission and should not require a permit from the commission. Improvements to the site include 8 buildings with related parking and drainage structures. The commission believes that stormwater runoff from the impervious surfaces of the site has the potential to impact the wetlands and the regulated area. Please provide a legal opinion stating whether a wetland permit is required for the proposed project. The plans submitted by the applicant are attached for your review.

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