



TOWN OF MIDDLEBURY

Conservation Commission
1212 Whittemore Road
Middlebury, Connecticut 06762
(203) 577-4162 ph
(203) 598-7640 fx

SPECIAL MEETING

MINUTES

Monday, May 1, 2023
7:00 P.M.

REGULAR MEMBERS PRESENT

Mary Barton, Vice Chairwoman
George Tzepos
Peggy Gibbons
Joseph Martino
Curtis Bosco

REGULAR MEMBERS ABSENT

Paul Bowler, Chairman
Brian Stroby

ALSO PRESENT

John Calabrese, P.E.
Deborah Seavey, W.E.O.
Attorney James Strub

I. CALL TO ORDER

Vice Chairwoman Barton called the Special Meeting to order at 7:00 p.m. She asked that all cell phones be turned off or put on vibrate. She explained that standing was not permitted and pointed out the fire exits which were to remain clear. Speaking was only allowed by the commission members and staff. No applicant, intervenor or public commentary would be allowed. She then initiated roll call. Members Barton, Tzepos, Gibbons, Martino and Bosco were present. Chairman Bowler and Brian Stroby were absent.

II. ACTION ON MINUTES:

1. March 28, 2023 Regular Meeting
2. March 28, 2023 Public Hearing
3. April 4, 2023 Special Meeting
4. April 4, 2023 Public Hearing
5. April 11, 2023 Public Hearing
6. April 18, 2023 Public Hearing

Motion: to approve the above referenced minutes as submitted. Made by George Tzepos, seconded by Joseph Martino. Unanimous Approval.

III. OLD BUSINESS

1. Application #490 – 555 Christian Road/764 Southford Road

Vice Chairwoman Barton explained that town counsel, Attorney James Strub, was present to guide the commission through the process.

Attorney James Strub explained the timing requirement which is controlled by both the Commission's Regulations, which is based on statutes 8-7d. The commission has 35 days from the date that the public hearing closed to make a decision, which must be done by May 23, 2023. The applicant provided an extension before a public hearing was established. They only have 65 days of extension, and have no extensions left. This item can be placed on the regular agenda or limitless special meeting agendas, provided the agenda is posted by the required time frame. The public is invited to attend any meeting and zoom availability is encouraged. He stressed that this is based on two (2) aspects. The first being the regulations and the need to examine the criteria for a decision set forth. He added that they are modeled regulations from DEEP and are based on the statutes. A public hearing was scheduled for two (2) purposes; public interest and that it may have an impact on the wetlands. A full feasible and prudent alternative analysis must be completed and those findings will go on the record also. The second part is the §22a-19 intervention application and he provided the members with information on said statute for their review. The one commission that has to deal with feasible and prudent alternatives is the Wetlands Commission. Intervention application findings have to deal with them as well and the definitions are the same. The members are driven by the regulations and need to make sure they make the findings for the intervention. The intervenor is a party as they put a verified petition in and it is their burden in the record to prove that the allegations that they made are true. In the case of a wetlands regulated activity application for direct impacts, it is not hard for them to prove that they qualify as an intervenor. He reminded the members that they must speak amongst themselves only at meetings and that they need to familiarize themselves with all of the materials that were submitted to the commission.

Vice Chairwoman Barton thanked Deborah Seavey, W.E.O. who put together a binder of reports for each of the members.

Deborah Seavey, W.E.O. clarified that it only contained the reports.

Vice Chairwoman Barton added that she has copies of maps but if others would like some, they should ask Deborah Seavey, W.E.O.

Attorney James Strub suggested that 11 X 17 copies of the most recent operative maps be provided.

Deborah Seavey, W.E.O. confirmed that some were in the binders.

George Tzepos questioned if there is a burden of proof such as preponderance of the evidence clear and convincing.

Attorney James Strub replied that it depends on what context he is asking. It was the intervenor's burden to prove that there was a direct impact, which there is. There needs to be substantial evidence in the record, not speculative, and provided by experts who support the position in the application. He supplied the members with a 4-page copy of Section 10 of the regulations and pointed out his notes in red. He also provided them with an excerpt from *Dichello v. Inland Wetland Commission for Town of Hamden*, a case involving feasible and prudent alternative in which the only way to access the upland to build a house was to include a 600 foot driveway that bisected a high functioning wetland. The commission ultimately denied the application without reasons. Judge Corradino reviewed the regulations and followed the process of how a decision would have to be made. He then referred to 10.2 of the regulations, which sets forth all of the criteria the members must go through and which was often quoted by the both the intervenor and the applicant throughout the process. He highlighted the importance of Section 10.2 b. and 10.3 and acknowledged that this commission can find that it is acceptable to impact some wetlands both directly and indirectly, but it must be based on the facts and circumstances of each particular property. A decisional memo needs to include a detailed consensus that this commission can come to and mitigation conditions can also be put on the application.

Peggy Gibbons requested clarification on how the excerpt from *Dichello v. Inland Wetland Commission for Town of Hamden* should be utilized and what the outcome of the case was.

Attorney James Strub replied that the case excerpt he provided walks through how one should look at feasible and prudent alternatives, how the judge walked through substantial evidence in the record and compared testimony between the various experts. It was returned to the commission for approval subject to whatever conditions they wanted included.

Curtis Bosco asked Attorney Strub to go over feasible and prudent.

Attorney Strub referred to their definitions on the 4th page of the copy of Section 10 of the regulations. In the case of Dichello v. Inland Wetland Commission for Town of Hamden, it was suggested that the applicant should build a suspension bridge to span the crossing. Constructing a million dollar bridge does qualify as being feasible, but it must also qualify as being prudent. He added that even if in that case, it was considered the most valuable wetland resource in the State of CT, the decision of prudent is where if the commission agrees that a certain use is really needed in this town, then the proposed impact on wetlands is acceptable.

Curtis Bosco questioned Attorney Strub as to why he used this case as an example.

Attorney Strub stated he used it because it is an extreme example and it just shows process. The application before this commission is much different and he felt would be a good analysis to show the members so they do not read the case and try to mimic it. He stressed the importance of the members basing their decision in this case based on the facts provided and the need to decide how they fit. He clarified that prudent means reasonable in light of the circumstances. He offered a scenario of one property with two applications; one to build a shed on the other side of a wetland crossing and the other for a juvenile diabetes health center. The outcomes might be different.

Curtis Bosco asked Attorney Strub to confirm that conditions could be added.

Attorney Strub verified that should this commission choose to approve the application, and feel there are steps necessary to protect the wetlands, reasonable conditions could be added.

Curtis Bosco acknowledged that the intervenor submitted much information and he would be inclined to consider them and attempt to see conditions placed because of said information.

Attorney Strub added that it is separate from the feasible and prudent alternatives. The commission is allowed to approve with conditions and depending on the scope of activity, the court may agree. It all relates to the facts.

George Tzezos asked Attorney Strub to elaborate on Section 10.4.

Attorney Strub stated that if the commission chooses to deny the application because there are other feasible and prudent alternatives, an outline of what they are or what they considered should be provided. This in turn sends a message to the applicant to return

with a new application based on the alternative that may be a feasible and prudent alternative. He proceeded to supply the members with a copy of §22a-219, §22:17, and an excerpt (G. Agency consideration) of a presentation given to people training to be commissioners. When it comes time to do a resolution, there will be separate findings for §22a-219.

Vice Chairwoman Barton requested that Deborah Seavey, W.E.O. email the petition to everyone.

Attorney Strub clarified that there is one application with two parties: the applicant and the intervenor. The intervenor had the burden to prove that the items they alleged in their petition were true. This commission must be sure it complies with §22a-219 when reaching its decision.

George Tzezos questioned if the members should research the Purnell case.

Attorney Strub replied that it would have been more relevant had a public hearing not taken place.

Vice Chairwoman Barton declared that the draft resolution is simply a template for the commission to go through the process.

Attorney Strub added that the way a resolution is written does not dictate the findings. He explained the various outcomes associated with how members might vote and should the time frame be exceeded.

Joseph Martino asked what the applicant plans to haul into the town. He acknowledged that it is not within the purview of this commission but voiced his concerns as a resident about the possibility of explosives or hazardous waste.

Attorney Strub validated his concerns but explained that jurisdictionally, there are different venues for different issues. The wetlands commission's jurisdiction is here while the DEEP has a much larger jurisdiction than wetlands. He added that they cannot ask the applicant because the public hearing is closed.

Vice Chairwoman Barton stated that she asked what the use was and the answer received was that it was an industrial use. She also mentioned that the application indicates that it is a distribution facility. The question of what will be distributed was not answered and based on the applicant, she believes they are not certain.

Peggy Gibbons added that she deems it pertinent to this discussion due to the possibility of a fire and pollutants.

Attorney Strub declared that is not within this commission's jurisdiction. While there is much within its jurisdiction, the record is such that many decisions could be supported. He confirmed that the answer could not be found out here. He appreciated their questions and concerns, but they lead to what the record would call speculative conclusions. Even if it was relevant, they would need to have concrete specific testimony as substantial evidence. He reminded them that this commission is powered by the State of CT, the legislature to act on wetlands applications in a very confined manner.

George Tzepos asked Attorney Strub to explain the appeals process.

Attorney Strub explained that both the applicant and intervenor do have the right to appeal the decision. If approved subject to numerous conditions that the applicant deems to be unreasonable, two appeals could happen simultaneously.

Curtis Bosco asked that the members begin discussion.

Vice Chairwoman Barton replied that they need to go through everything in the record and that they could start but that she was not prepared to make a decision.

Curtis Bosco stated that they could refer to counsel to help draft a resolution.

Attorney Strub expressed that he was pleased that Deborah Seavey, W.E.O. started the framework but that he has yet to weigh in because he needs to listen to the members deliberate.

George Tzepos stated that he preferred to wait until Chairman Bowler is present to have a discussion.

Vice Chairwoman Barton confirmed that Chairman Bowler did review all the record on zoom and sat and read them. She questioned Deborah Seavey, W.E.O. if Chairman Bowler intended to be present on May 10, 2023.

Deborah Seavey, W.E.O. replied that she believes so.

George Tzepos added that discussing it this evening without his input would be unwise.

Curtis Bosco responded that for those that took the time to attend in person, he would like to see the time put to good use. He then asked Vice Chairwoman Barton to suggest something to discuss first.

Vice Chairwoman Barton offered to discuss feasible and prudent alternatives.

Peggy Gibbons asked Attorney Strub to clarify if they would have to present him with alternatives if the application is turned down.

Attorney Strub responded that it could be turned down for various reasons, not only feasible and prudent alternative. He then explained the appeal process.

Peggy Gibbons excused herself to retrieve water at 8:03 p.m.

Vice Chairwoman Barton said that the application was for two (2) buildings. The latest revision involved one building of 539,500 sf while the other 130,000 sf with a direct wetland impact of 16,335 sf. The applicant's alternative #1 lists four (4) buildings and the direct wetland impact is 1,500 sf.

George Tzepos questioned her thoughts about the cornfield.

Vice Chairwoman Barton replied that it does not bother her because there is less wetland impact

George Tzepos mentioned protecting the corridor.

Vice Chairwoman Barton reiterated that it has less wetland impacts and that the herpetologist said the vernal pool is already in poor shape on the other side. The wildlife corridor allegedly along both Christian Road and Route 188 is questionable if it will come back. She is uncertain if it is a worthwhile wildlife corridor based on the testimony of the applicant's expert. They also removed the residential portion. Alternative #2 involves trailer parking in the front, a 720,000 sf building and parking on 764 Southford Road with a wetland impact of 10,375 sf. She believes the alternatives provided are feasible and prudent. She mentioned long-term impacts of the regulated activities on wetlands and watercourses maintenance and enhancements. The application does talk about a 10-year stormwater management provision. However, she believes it should be in perpetuity for maintenance and that whoever owns the property should be responsible to maintain the system and wildlife corridor. She acknowledged that there is more that she wants to look through. She clarified that this commission is not empowered to take a conservation easement and that it must go before the Board of Selectmen.

Should they decline the easement, it would return to this commission and she questioned if it would be enforceable. In addition, it could be quite costly to the property owner. In her personal and professional experience, she has never seen an invasive go away. She has seen them lessen but the maintenance goes on almost forever.

Peggy Gibbons returned at 8:06 p.m.

George Tzepos commented on mitigation and that this commission could require that they post a bond for possibly ten (10) years.

Vice Chairwoman Barton agreed and added that it would need to be a calculated number in the form of cash or a letter of credit.

Curtis Bosco shared that 16,335 sf is the starting point and the testimony provided by SLR and George Logan was that they are not productive soils. The plan is to replace the soils with a more productive wetland twice the size.

Vice Chairwoman Barton stated that the statute does not distinguish between manmade or occurring wetlands. She acknowledged that she prefers alternative #1 because it has less direct impact on the wetlands.

Curtis Bosco replied that it involves two (2) more curb cuts.

Vice Chairwoman Barton stated that it does not matter to her but is worried about the impact on the wetlands as it the primary charge of this commission. If approved and they go to another commission and they do not like it, it is a different issue.

Curtis Bosco questioned Vice Chairwoman Barton if she believes the remedy available to a developer to create a wetland twice the size is within her jurisdiction.

Vice Chairwoman Barton replied that there are other alternatives but she is going by the regulations. Just because they are manmade, it does not mean that they are not protected wetlands. She understands functionality and wetland creation, but not all created wetlands survive.

George Tzepos stated that the intervenor provided two (2) alternatives.

Vice Chairwoman Barton believes that they did but would like to review them further. She is focusing on the impact upon the wetlands in relation to the application submitted

and the alternatives. It is not up to this commission to determine if it is an application that the applicant wants if there is less impact. If there is a feasible and prudent alternative, you cannot approve it based on the regulations. Regardless of who the applicant is, she is looking at the clear confines of the regulations. She is certain she will have more questions to discuss after going through the entire record. She added that she did listen to Mr. Trinkaus and Mr. Logan. She does not agree with everything that Mr. Trinkaus said but believes Mr. Logan did a good job going through and quoting Mr. Trinkaus' references. Other alternatives cannot be ignored.

George Tzezos mentioned Mr. Trinkaus' alternative that involves going from the industrial zone to the residential zone and suspected that it is not a valid alternative if it is not zoned properly.

Vice Chairwoman Barton agreed.

Curtis Bosco stated that he is unsure whether the alternatives showing four (4) buildings or extra curb cuts are things he would like to see. He would prefer to see one (1) building, the smaller building removed, and put everything in one (1) confined area and not have sprawl. He would like to have more of the land preserved and wishes to see the land put into a conservation easement but understands that is up to the Board of Selectmen. He ultimately wants less cuts on the property. He believes this property will be developed as it is in an LI-200 zone. It consists of 4.4 million square feet that will be developed and if this commission has an opportunity to ensure less of an impact, he thinks this commission should take that opportunity.

Peggy Gibbons requested clarification of what exactly Curtis Bosco would like to see.

Curtis Bosco reiterated what he would like to see.

Peggy Gibbons questioned if the property could be rezoned.

Vice Chairwoman Barton replied that someone would need to submit an application to the Zoning Commission as it is a zoning issue. Zoning is not within the purview of this commission. She added that the elimination of one building is an alternative that was not discussed.

Joseph Martino questioned what the smaller building would be used for.

Curtis Bosco replied that it is for an industrial use and what is allowed by the zoning regulations.

Vice Chairwoman Barton added that at one hearing Mr. Milone said that it was an industrial use and that the application states warehouse/distribution. She questioned Mr. Milone at a later time and he confirmed that what is on the application is what they are proposing. Even if distribution is not in the zoning regulations, she said it is not their concern.

Curtis Bosco added that warehousing involves distribution.

Peggy Gibbons questioned if there was anything proposed for the smaller building.

Vice Chairwoman Barton reiterated that the application is for a warehouse/distribution facility and that is what both buildings are proposed for.

George Tzepos asked Curtis Bosco what could be put in the space.

Curtis Bosco replied executive office buildings.

George Tzepos questioned if they could have a chemical facility.

Curtis Bosco responded that they could assemble products, are currently limited to a 35' height limit and it has been zoned LI-200 for forty-seven years.

Vice Chairwoman Barton acknowledged that the property will be developed at some point in the future and stressed that this commission's job is to look at the proposed development with the application and the impact of the wetlands.

Curtis Bosco added that invasive species have taken over. As a wetlands' commissioner, he's looking at the opportunity to breathe new life into this.

Vice Chairwoman Barton expressed her understanding and added that the wetland act was created in 1972 and the regulations came about in 1974, so there is much catching up. She agreed that many wetlands have been impacted all throughout the state but emphasized that this commission's charge is to look at what is remaining to try and protect what is remaining.

Curtis Bosco stated that he believes their charge is to protect and improve.

Joseph Martino questioned what would be accomplished by eliminating the smaller building.

Curtis Bosco responded that it would lessen the impact on the surrounding area and would be a nicer plan as opposed to destroying the cornfield and sprawling buildings on 119 acres of land.

Vice Chairwoman Barton pointed out that they moved the smaller building further away from the vernal pool. However, by their own experts' testimony, the vernal pools are already impacted. The elimination of the building would leave a 539,500 sf building and less impervious surface area which would ultimately have a lesser impact on the wetlands. She did note that such an alternative was not provided by the applicant.

Curtis Bosco clarified that the definition of a wetland is an area of land that has poorly drained soil, very poorly drained soil or alluvial soil, which is a collection of land from a watercourse (stream, lake, and pond). He added that they are not impacting watercourses but rather 16,000 sf of wetland soil that experts have stated are nonproductive pockets which will be improved by doubling the size to be productive wetlands.

Peggy Gibbons questioned if the wetlands were looked at by the experts at the appropriate time of year when they were looking for frogs.

Vice Chairwoman Barton replied that looking at wetland soils is different as they can be occur at any time of the year. Wetlands are not standing water in CT but can be. CT Wetland Statute is much more restrictive than anywhere else because it is soil type.

Peggy Gibbons asked for a definition of a nonproductive wetland.

Curtis Bosco answered that a nonproductive wetland means it is not obligate. Obligate means that some sort of plant, animal or bacteria relies on this particular soil for its lifecycle for reproduction. He believes it to be more prudent to see a more productive wetland created rather than try to save something that is not productive.

Peggy Gibbons asked for examples of successful wetland creation.

Vice Chairwoman Barton stated that Mr. Logan said the wetland that is created depends upon the supervision of when it is installed and the importance of ongoing maintenance which requires an ongoing cost. Some have survived but she believes a soil scientist should check the site yearly.

Curtis Bosco added that Timex did a poor job of protecting the wetlands.

Vice Chairwoman Barton used I84 as an example of poorly created wetlands. Mr. Sanford and Mr. Logan both said that they can be successful but it depends upon the execution, the commitment by the person creating the wetland and ultimately the property owner. As a commission, they can bond it but there must be a clear schedule in the permit of what is required. It also needs to follow the land record.

Curtis Bosco reiterated his desire to avoid sprawling.

Vice Chairwoman Barton expressed her understanding but stressed that sprawl does not relate to wetlands and that it relates to zoning. She confirmed that she has not made an informed decision one way or the other. She asked that the members review the record as well as the regulations and return on May 10, 2023 with their regulations and possibly work towards a consensus. She asked Attorney Strub if the response to the intervenor should be within the motion or a separate document.

Attorney Strub instructed the commission to work through the regulations first.

Peggy Gibbons stated she would not be able to attend the May 10, 2023 in person.

Vice Chairwoman Barton assured her that she could join via zoom or cell phone and that perhaps another meeting would be needed.

Curtis Bosco asked if two (2) draft resolutions could be proposed.

Attorney James Strub replied that he thinks they are going to need all the information that was discussed at the next meeting. He will check into the legalities of participation.

Vice Chairwoman Barton expressed her belief that a member participating via phone is legal and confirmed with Curtis Bosco that Peggy Gibbons would be able to speak via zoom if need be. She confirmed with the remaining members that they will be available for Wednesday, May 10, 2023 at 7:00 p.m. for a special meeting. She then asked Deborah Seavey, W.E.O. to email the intervenor's pleading to the members.

Deborah Seavey, W.E.O. agreed to do so.

Curtis Bosco confirmed that zoom does offer meeting transcription.

***All documentation is available for public inspection in the Land Use Office.**

IV. ADJOURNMENT

Motion: to adjourn the meeting at 8:47 p.m. Made by George Tzepos seconded by Joseph Martino. Unanimous Approval.

Filed Subject to Approval,

Respectfully Submitted,

Rachelle Behuniak, Clerk

Original to Brigitte Bessette, Town Clerk
cc: Conservation Commission Members
Debbie Seavey, W.E.O.
Mark Lubus, Building Official
John Calabrese, P.E.
Terry Smith, P&Z Chairman
Curtis Bosco, Z.E.O.
Attorney Robert Smith, WPCA