



TOWN OF MIDDLEBURY

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

SPECIAL MEETING MINUTES Wednesday, May 10, 2023 7:00 P.M.

REGULAR MEMBERS PRESENT

Paul Bowler, Chairman
George Tzepos
Peggy Gibbons (Via Zoom)
Curtis Bosco

REGULAR MEMBERS ABSENT

Mary Barton, Vice Chairwoman
Brian Stroby
Joseph Martino

ALSO PRESENT

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

I. CALL TO ORDER

Chairman Bowler called the Special Meeting to order at 7:00 p.m. He asked that members of the public refrain from comment and be as quiet as possible. He stated the following for the record: I, Paul Bowler, have reviewed, watched and/or listened to the following: March 28, 2023; April 4, 2023; April 11, 2023, & April 18, 2023 meetings and public hearings; the regular meetings held on January 31, 2023 and February 28, 2023; and Special Meeting May 1, 2023. He then went on to state that Attorney Strub would clarify something from the meeting of May 1, 2023.

Attorney James Strub explained that at the meeting George Tzepos asked a question relative to burden of proof and that he had answered the question related to feasible and prudent alternatives and the standing relative to the intervenor's status. The burden of proof, proving the allegations (items a. through g.) in the petition, is where they made certain allegations. The burden of proof, proving the allegations in the petition is on the intervenor that the proceeding or action for judicial review involves conduct which has or which is reasonably likely to have the effect of unreasonably polluting, impairing or destroying a public trust in the air, water or other natural resources of the state. Therefore, that burden is on the intervenor based on the testimony that they had presented. He then added that when they get to the point where the members act, one way or another, on the intervenor stat petition, they will understand how it becomes relevant to the various outcomes.

II. OLD BUSINESS

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

Chairman Bowler announced that he was waiting to hear anything on the 22a-19 petition.

Curtis Bosco submitted his certificate from DEEP and his certificate as a Certified Zoning Enforcement Officer for the record and added that it speaks to special training and experience in the area of Wetlands and Watercourses. He stated that Attorney Strub provided the members with information at the May 1, 2023 Special Meeting regarding the case Dichello v. Inland Wetland Commission for Town of Hamden. He indicated that he did his own research in an attempt to find one more pertinent to this case. He provided the members of copies of casetext - Rykoski v. Middlebury Conservation Commission, and explained that it involves a wetland permit application to develop a parcel of land which it owns on the south side of Southford Road, between Christian Road and Benson Road in Middlebury, CT. He went on to recite the wording highlighted in yellow. He then asked the members if they had any comments or questions.

No comments or questions were posed.

Curtis Bosco continued to state that on April 18, 2023 during the final declaration by SLR, the commission was presented with a summary of prudent and feasible alternatives. He directed the members on where it could be found in their binders: in the foldout, a few pages in where the 11 X 17 pages fold out. The order is as follows: final proposal, alternate #1, alternate #2 and the final foldout, which replicates what he provided to members of the commission. He asked that they keep them out as he referred to the four (4) pages. He stated that he took the summary that was presented by the applicant and that what he did was take the five (5) items and created a document titled Summary of Prudent and Feasible Alternatives (revised 4/18/23) which includes Additional Considerations and reviewed with the commission. He added that he used bold red font for what he feels is the best feasible and prudent for comparison purposes.

George Tzepos questioned Curtis Bosco if he reviewed the intervenor's two (2) alternatives.

Curtis Bosco confirmed that he did and stated that he found it very difficult because the drawings were small. However, he declared that one alternative was not feasible or prudent because it involved putting an industrial building into a residential zone and you would have to assume that it needs to be properly zoned to do that.

George Tzepos added that they shifted it closer to Christian Road.

Curtis Bosco asked that they all review them.

Chairman Bowler asked Attorney Strub if it was up to the applicant to turn in what they think is a prudent alternate use.

Attorney Strub clarified that the commission on their own right can entertain other alternatives. It has to be reasonable in light of what has been proposed. At the last meeting, Curtis Bosco and Mary Barton discussed different alternatives that were possible, but did not get into details as Curtis Bosco did this evening. If the commission found, even on their own motion, that there was an alternative that they would like explored as more feasible and prudent, the commission could rest on that basis alone.

Chairman Bowler asked each member if they had any questions.

Curtis Bosco asked Attorney Strub if he was recommending that they go through a.-g. on the intervenor's report and address each item.

Attorney Strub replied that they need to continue to go through what they find important in the record.

Curtis Bosco declared that he had additional information.

Attorney Strub continued to state that he and Deborah Seavey, W.E.O. went through some items relative to previous conversations they heard the commission members have. He offered to provide them with the documentation he prepared regarding the intervenor's petition and the 10.2 criteria once the members were ready.

Curtis Bosco submitted and reviewed the Applicant's Summary which he presented in larger font with some highlights. Comments made in accordance with each item were as follows:

- 1) Curtis Bosco – Not highlighted because it was uncontested.

George Tzepos – George Logan filed a petition of wetlands, which the applicant adopted.

- 2) Curtis Bosco – Anthropogenic means-manmade. Obligate means that life cycle depends on said wetlands.
- 3) Curtis Bosco – During the evolution of the project, they have demonstrated that these wetlands are protected each step of the way.

- 4) Curtis Bosco – At least two (2) soil scientists and two (2) professional engineers testified accordingly.
- 5) Curtis Bosco – All part of nature and the ecosystem.
- 6) No comment
- 7) Curtis Bosco – The information was provided by a herpetologist and environmentalist.
- 8) Curtis Bosco – He could not recall any dispute.
- 9) No comment
- 10) Curtis Bosco – A reiteration of his report.
- 11) Curtis Bosco – Not highlighted because it was uncontested.
- 12) Curtis Bosco – Normally we do not get a third-party review, but in this case it was to their advantage making it easier to consider this project. A third-party professional was hired and paid for by the applicant. Mr. Logan, who represents REMA, is a solid and well respected professional.

Curtis Bosco went on to suggest that they go through the intervenor's petition, step by step. He also indicated that he had one more item after going through the petition.

Attorney Strub provided the members with documentation.

Curtis Bosco sent screenshots to Peggy Gibbons.

Attorney Strub explained that the documentation he provided starts the exercise that Curtis Bosco proposed. The content of said document includes wording in black font taken directly from the intervenor's petition and the red font represents Attorney Strub's commentary based on comments he heard from the commission refuting the allegations and it ties back to expert testimony. He welcomed the members to add or take anything they liked to.

Curtis Bosco stated that Peggy Gibbon confirmed receipt of the screenshots of the documentation provided by Attorney Strub. He then went on to explain that they were

going to take the intervenor's petition a.-g., and address each one. He proceed to read each accordingly and the following comments were provided:

- a. Curtis Bosco – referenced REMA report, dated March 27, 2023, page 4, paragraph 2 and the Calabrese Engineering report, dated March 24, 2023 which he believes substantiates that they along with Ryan McEvoy of SLR refute the allegation.

George Tzepos – acknowledged that when he initially he read Mr. Trinkaus' report and heard his testimony, he was concerned about the water quality and the site. However, when Mr. Trinkaus prepared his April report, he quoted certain people. Then Mr. Logan brought to their attention that certain things were omitted, which affected his opinion of Mr. Trinkaus' credibility with respect to that. George Logan said that he couldn't substantiate anything that was in the report. Mr. Trinkaus admitted that much of the information came from going to conferences and speaking with people outside, which also affected his opinion of Mr. Trinkaus' report. He reiterated that he was initially concerned because of the massive building and that it would affect water quality, but the testimony now has turned out that it will not, based on what was just discussed. He feels that Mr. Logan is more credible than Mr. Trinkaus.

- b. Curtis Bosco – referred to REMA report, dated March 27, 2023, page 7, paragraph 4 and that Mr. Logan questions whether it really should be considered wetland. For the record, he noted that the mention of 15,608 square feet in the petition should actually be 16,000+.

Chairman Bowler questioned if Peggy Gibbons had any questions

Peggy Gibbons declined.

- c. Curtis Bosco – expressed his belief that Mr. Logan made a comment about this as well. He then emphasized the comment he previously made about pollutant loading, which he believes addresses both a. and c.
- d. Curtis Bosco – pointed out typo of “basis” which should read “basins”.

George Tzepos – stressed the importance of the basins being properly maintained.

Chairman Bowler – stated that was part of the \$150,000 bond.

- e. George Tzepos – added that George Logan at the April 18, 2023 meeting also said the water that will be leaving the stormwater management systems of sufficient quality in order to not impact the existing wetlands.
- f. Curtis Bosco – declared that he previously quoted page 7, paragraph 4 of the REMA report, dated March 27, 2023. He reiterated that it is a small isolated wetland. He then questioned Attorney Strub if his comment was satisfactory.

Attorney Strub acknowledged that it struck him as a comment at the time to get the commission to act on having a public hearing, which they did.

- g. No comment.

Chairman Bowler asked Attorney Strub how to properly address the 22a-19 petition.

Attorney Strub supplied the members with a Draft 22a-19 Petition Agency Findings and Action. He explained that it goes through a number of whereas clauses, which speaks to when the commission met and the experts. If all were in agreement with the second page, which lists the petition a.-g, he proposed the commission append it.

Curtis Bosco asked Peggy Gibbons if reading it aloud was acceptable.

Peggy Gibbons confirmed that she was.

Curtis Bosco he offered to send her pictures.

Peggy Gibbons responded that she was unable to read them when he sends them.

Curtis Bosco again asked her if reading it aloud was acceptable.

Peggy Gibbons replied that she would let him know.

Chairman Bowler pointed out that there were three (3) options attached to the draft.

Attorney Strub read the Draft 22a-19 Petition Agency Findings and Action for the record. He deferred to Chairman Bowler when he came to items a.-g.

Chairman Bowler confirmed that items a.-g. were previously addressed by Curtis Bosco and discussed and will be inserted.

Attorney Strub continued and noted that the following changes were needed: "Whereas, the 6 voting members of the Commission....." changed to "Whereas, the 4 voting members of the Commission, Paul J. Bowler, Curtis Bosco, George C. Tzepos and Margaret F. Gibbons".

Chairman Bowler stated for the record that he photographed all three (3) options on three (3) separate pages and sent them to Peggy Gibbons electronically to her cell phone. He then asked her to confirm receipt.

Peggy Gibbons responded that she would not be able to read them on her phone because they were too small.

Chairman Bowler then sent them to her via email and explained that he sent her the three (3) options. He then asked Attorney Strub to explain the bold print of each option.

Attorney Strub read through each option.

Chairman Bowler asked Attorney Strub if two (2) separate motions should be made or if it should be encompassed into one (1).

Attorney Strub clarified that if option #1 or option #2 were selected, the document he submitted and discussed this evening regarding items a.-g. of the intervenor's petition and Attorney Strub's commentary, should be attached. He suggested that before the 22a-19 petition be acted on, that the commission go through the other motion on the regulated activities permit and then take them one after the other.

Curtis Bosco stated that Peggy Gibbons asked for clarification on what was happening. He asked Attorney Strub to confirm that they first must find whether or not the intervenor's intervention is sustained or not by this commission.

Chairman Bowler acknowledged that that was what he was asking. He asked Attorney Strub to confirm that they need two (2) motions and if they need to act upon the 22a-19 petition per the intervenor and then if there is anything after that, to act on the application whether to approve or deny.

Attorney Strub verified that he was correct but suggested that the members talk through the other motion as they are tied together.

Curtis Bosco stated that he wanted to do them separately and that they should take them one step at a time.

Chairman Bowler asked him to make a motion.

Motion: to adopt Option 1 – NOT REASONABLY LIKELY TO CAUSE UNREASONABLE POLLUTION WITH REFERENCE TO F&P ANALYSIS of the Draft 22a-19 Petition Agency Finding and Action (Final attached). Made by Curtis Bosco.

Discussion:

Chairman Bowler asked Peggy Gibbons if she was able to view the picture of Option 1.

Peggy Gibbons replied that she was unable to view it.

Chairman Bowler offered to have Option 1 read again so that she could comprehend it.

Peggy Gibbons answered yes.

Chairman Bowler requested that Attorney Strub recite Option 1 in its entirety for Peggy Gibbons. He then explained to her that a motion had been made but not seconded and that he would wait and ask for a second after she hears the option again.

Peggy Gibbons thanked Chairman Bowler.

Attorney Strub recited Option 1.

Chairman Bowler declared that a motion was made for Option 1 and it was to address the intervenor's 22a-19 petition only.

The motion was seconded by George Tzezos. Chairman Bowler voted Aye.

Peggy Gibbons asked Curtis Bosco to again read the motion slowly.

Curtis Bosco explained that the motion was

Peggy Gibbons interjected and asked if it was what was just said.

Curtis Bosco confirmed that it was. In response to the petition that the commission received from the intervenors. He then clarified that the vote was not about whether to approve or deny the application, but rather to address the intervention and that what Attorney Strub recited was his motion.

Chairman Bowler added that it was Option 1 – NOT REASONABLY LIKELY TO CAUSE UNREASONABLE POLLUTION WITH REFERENCE TO F&P ANALYSIS. He then stated that the motion was made and voted for and that she had the option of a yes or no vote or to abstain.

Peggy Gibbons abstained.

The motion passed with 3 votes in favor, and 1 abstention.

Curtis Bosco read the draft resolution for the record and pointed out a typo for item (9) – (replace “should” with “shall”). Upon completion he declared it to be his resolution and that he was leaving it open to any comments, suggestions or additions from any of the commission members.

Chairman Bowler questioned if anyone would like to add anything to the draft resolution.

George Tzepos stated that he would like to see something on the maintenance of the stormwater, such as money, to protect and ensure the maintenance of the stormwater.

Chairman Bowler began to recite a portion of the following condition: A cash bond in the amount of \$50,000 for the stormwater basin plantings shall be in place and shall remain.

George Tzepos stated that said condition was for the plantings and he was referring to the maintenance of the stormwater because if they become clogged, it will create a problem. He wanted to ensure that the applicant or its successors do what they are supposed to do and make sure they are working properly.

Chairman Bowler asked if he wanted more of a cash bond for the stormwater or if he preferred to add it to the amount of the stormwater basins plantings and maintenance thereof.

George Tzepos initially responded either one. He then added that instead of increasing, just keep it there and then ten (10) years later if everything is working perfectly.

Chairman Bowler added until completed with the approved plan. He again asked him how he wants it to read.

Curtis Bosco asked Deborah Seavey, W.E.O. if it was her standard \$50,000 cash bond.

Deborah Seavey, W.E.O. clarified that George Tzepos was referring to the maintenance and that the existing \$50,000 cash bond is for the plantings.

Chairman Bowler asked if George Tzepos wanted to add a separate cash bond for the maintenance and to be handed back after ten (10) years as it cannot be held in perpetuity.

George Tzepos expressed his understanding that with the ten (10) years it should be working perfectly.

Curtis Bosco asked George Tzepos if he was referring specifically to the stormwater basins and not the restoration or recreation.

George Tzepos confirmed that was correct and mentioned of the language with respect to if it clogs, there would be a problem later on. A clog would be due to poor maintenance and that causes him concern.

Chairman Bowler asked if he wanted to attach money to it in the form of a cash bond.

George Tzepos agreed to \$50,000.

Chairman Bowler asked to add the following on the draft resolution as (20) - A \$50,000 cash bond good for ten (10) years specifically for the maintenance of the stormwater basins. He then asked Deborah Seavey, W.E.O. if she would write it in and if she got it.

Deborah Seavey, W.E.O. confirmed.

Chairman Bowler questioned Peggy Gibbons if she had any additions.

Peggy Gibbons declined any additions.

Attorney Strub stated that the last WHEREAS clause where there is mention of Section 10.2 factors and circumstances, in the regulations and under case law, the 10.2 considerations are supposed to be in writing on the record. If they are not, the judge will search the record. If they are in writing, a judge will not substitute their judgement for the commission's judgement. As he did for the commission for the 22a-19, he went through

10.2 based on the commentary heard from the commission prior and provided the members with documentation: Approval if NO feasible and prudent alternatives.

Chairman Bowler asked if it needed to be added to the draft resolution.

Attorney Strub confirmed that it did and that if they read through it, they could append it as a reference in the WHEREAS clause and state "See attached 10.2 analysis".

Curtis Bosco asked if it would be called (21).

Chairman Bowler replied no and that it would go under WHEREAS the commission finds on the basis of record; the last one.

Curtis Bosco announced that he was amending his motion to include under the..... He then questioned if it should go under the WHEREAS or the THEREFORE.

Chairman Bowler replied, the final WHEREAS where it references 10.2 and above the NOW THEREFORE.

Curtis Bosco continued his amendment....at the end 10.2, he amended his motion to adopt the resolution to include all of the information provided by Attorney Strub.

Attorney Strub chose not to read the first three (3) paragraphs, which are Sections 10.3, At 2.1 “Feasible” definition, and At 2.1 “Prudent” definition of the regulations. He stated that it would be considered the commission’s analysis should it be adopted and proceeded to read it for the record.

Curtis Bosco clarified that it would be inserted after the last WHEREAS and item (20) will be the additional \$50,000 bond. He then declared that to be his amended motion.

Chairman Bowler questioned if he made a motion or read the draft resolution and to please make the motion again.

Motion: that the resolution (Final attached) be adopted with the changes previously mentioned. Made by Curtis Bosco, seconded by George Tzepos. Chairman Bowler voted “aye”. Peggy Gibbons voted “no”. **The motion passed with 3 votes in favor, and 1 opposed.**

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

IV. ADJOURNMENT

Motion: to adjourn the special meeting at 8:25 p.m. Made by Curtis Bosco seconded by George Tzepos. 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

"By its plain terms, General Statutes section 22a-19(b) requires the consideration of alternative plans only where the commission first determines that it is reasonably likely that the project would cause unreasonable pollution, impairment or destruction of the public trust in the natural resource at issue."
Paige v. Town Plan and Zoning Com'n of Town of Fairfield, 235 Conn 448 (1995), citing *Red Hill Coalition, Inc. v. Town Plan & Zoning Commission*, 212 Conn at 734-35.

22a-19 Petition
Agency Findings and Action

Whereas, the Middlebury Conservation Commission for the Town of Middlebury (the "Commission"), which Commission serves as the Inland Wetland Agency, received an application on November 29, 2022, from Drubner Equities, LLC (the "Applicant") seeking approval to conduct regulated activities at properties known as 555 Christian Road and 764 Southford Road both located in Middlebury.

Whereas, the Middlebury Small Town Alliance, LLC (the "Intervenor") filed a Verified Petition To Intervene pursuant to Section 22a-19 of the Connecticut General Statutes (the "Petition"), which Petition was dated January 20, 2023 and stamped received by the Middlebury Land Use Office January 23, 2023.

Whereas, at its January 31, 2023, Regular Meeting, the Commission the Applicant granted the Commission a 65-day extension.

Whereas, at its February 28, 2023, Regular Meeting, the Commission decided to hold a public hearing based on a determination that the proposed activity may have a significant impact on wetlands or watercourses and that a public hearing would be in the public interest.

Whereas, the Commission opened the public hearing on March 28, 2023, which public hearing was continued and held on April 4, 2023, April 11, 2023 and concluded on April 18, 2023.

Whereas, at the public hearing the Commission received testimony and reports from the Applicant's professionals: Matt Sanford, RSS, PWS of SLR International Corporation, Ryan McEvoy, PE of SLR International Corporation, John Milone, PE of SLR International Corporation, and Dennis Quinn, MA Ecology & Environmental Science of Quinn Ecological, LLC; the Intervenor's professionals: Steven Danzer, Ph.D of RSS, PWS CT Licensed Arborist of Steven Danzer, PHD & Associates LLC, Steven D. Trinkaus, PE of Trinkaus Engineering, LLC; the Commission's engineer, John N. Calabrese PE of Calabrese Engineering and an outside consultant hire to review the Application and the reports submitted by the Applicant's professionals and the Intervenor's professionals: George T. Logan, MS, PWS, CSE of REMA Ecological Services, LLC; and the Commission received written and in person comments from the public.

Whereas, consistent with past practice, and given the property owner's failure to provide permission to the general public to enter its property, the Commissioners conducted independent site inspections of the subject property and the locations of the proposed improvements.

Whereas, all reports and written correspondence, including emails, submitted prior to the start of the public hearing were incorporated into the public hearing record.

Whereas, the Petition sets forth the following allegations about "conduct which has or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water and other natural resources of the state":

- a. The activities proposed involve site alteration which are reasonably likely to discharge storm water runoff pollutants from the roof area. This will be a source of increased nutrient loading, both nitrogen and phosphorous to the on-site wetlands. It is well documented in professional literature that 40% of the annual nutrient loads from industrial development comes from atmospheric deposition on impervious surfaces. As proposed, the stormwater being discharged upstream of delineated inland wetlands will increase the nutrient loading to the wetlands and watercourse which has the potential to cause premature eutrophication.
- b. The filling of 15,608 square feet of wetlands and attempted replacement by man-made wetlands is itself a significant activity and will likely lead to a net loss in ecological wetlands functions.
- c. The proposed activity constitutes a High Pollutant Load Site by the CT DEP 2004 Storm Water Quality Manual "2004 Manual" (Table 7-5, page 7-8) under several criteria. As such a use, these uses generate higher pollutant loads from the proposed impervious surfaces.
- d. The proposed stormwater basins are dry detention basins which do not serve to minimize water quality impacts as indicated by the CT DEP 2004 Storm Water Quality Manual.
- e. None of the proposed stormwater basins have forebays which are required per CT DEP 2004 Storm Water Quality Manual thus creating the reasonable likelihood of downstream nutrient loading to receiving waters and wetlands including the Kissawaug Swamp.
- f. The filling of wetlands for the building and/or parking areas result in the destruction of wetlands which is the very definition of an adverse physical impact and Significant Activity requiring a public hearing under the Inland Wetlands & Watercourses Act and the consideration of feasible and prudent alternatives pursuant to Conn. Gen. Stat. section IWWA section 22a-41.
- g. The proposed wetlands mitigation will not serve to mitigate the filling and loss of functional wetlands and is not a feasible and prudent alternative.

Whereas, on even date herewith the Commission is acting on the Wetlands Regulated Activity Permit Application submitted by the Applicant, which permit application covers the same proposed improvements as reviewed and acted on in this 22a-19 Agency Findings and Action motion.

Whereas, the 4 voting members of the Commission, Paul J. Bowler, Curtis Bosco, George C. Tzepos and Margaret F. Gibbons, have either attended the Public Hearing sessions, listened to them live on Zoom, watched either the Zoom recording or listened to the tapes of the Public Hearings, which includes the March 28, 2023 opening of the public hearing that was continued and held on April 4, 2023, April 11, 2023 and concluded on April 18, 2023.

NOW THEREFORE, BE IT RESOLVED that the Middlebury Conservation Commission makes the following findings and takes the following actions:

The Resolution to Approve acted on by the Commission on even date herewith, which Resolution covers the same proposed improvements is hereby incorporated into this 22a-19 resolution.

NOT REASONABLY LIKELY TO CAUSE UNREASONABLE POLLUTION WITH REFERENCE TO F&P ANALYSIS:

Based on the testimony received by the various professionals and specifically based on the testimony of Matt Sanford, RSS, PWS of SLR International Corporation, Ryan McEvoy, PE of SLR International Corporation, Dennis Quinn, MA Ecology & Environmental Science of Quinn Ecological, LLC, George T. Logan, MS, PWS, CSE of REMA Ecological Services, LLC and John N. Calabrese PE of Calabrese Engineering and Town of Middlebury Engineer and the facts related to the proposed activities and the condition of the underlying parcel as presented during the public hearing the Commission finds that it is **NOT** reasonably likely that the project would cause unreasonable pollution, impairment or destruction of the public trust in the natural resource, including the direct impact to the identified on-site wetlands and the proposed development in the upland review area on the site, and based on the foregoing professionals' testimony the Commission believes that the off-site wetlands will not be impacted by the proposed development. Notwithstanding the foregoing conclusion, as part of the regulated activities permit before the Commission the Commission did conduct a feasible and prudent alternatives analysis and the Commission found that the development as proposed is the most feasible and prudent alternative for these parcels.

CEPA intervenor has the burden of proving the allegations in the petition: "that the proceeding or action for judicial review involves conduct which has or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."

- a. The activities proposed involve site alteration which are reasonably likely to discharge storm water runoff pollutants from the roof area. This will be a source of increased nutrient loading, both nitrogen and phosphorous to the on-site wetlands. It is well documented in professional literature that 40% of the annual nutrient loads from industrial development comes from atmospheric deposition on impervious surfaces. As proposed, the stormwater being discharged upstream of delineated inland wetlands will increase the nutrient loading to the wetlands and watercourse which has the potential to cause premature eutrophication. *The plans were updated and resubmitted to address these concerns as confirmed by the testimony of Ryan McEvoy and George Logan (refer to page 4 of 3/27/23 report) and John Calabrese (refer to 3/24/23 report).*
- b. The filling of 15,608 square feet of wetlands and attempted replacement by man-made wetlands is itself a significant activity and will likely lead to a net loss in ecological wetlands functions. *Based on the completed feasible and prudent alternative analysis undertaken by the Commission, this direct impact is acceptable as the most feasible and prudent alternative, which is supported by the functions and values analysis undertaken by Matt Sanford (refer to Mr. Sanford's report) and confirmed by George Logan (refer to page 7 of 3/27/23).*
- c. The proposed activity constitutes a High Pollutant Load Site by the CT DEP 2004 Storm Water Quality Manual "2004 Manual" (Table 7-5, page 7-8) under several criteria. As such a use, these uses generate higher pollutant loads from the proposed impervious surfaces. *This conclusory statement was addressed by Ryan McEvoy to the Commission's satisfaction. (refer to above)*
- d. The proposed stormwater basins are dry detention basins which do not serve to minimize water quality impacts as indicated by the CT DEP 2004 Storm Water Quality Manual. *The plans were updated in response to this expressed concern. The updated plans presented by Ryan McEvoy and reviewed by George Logan and John Calabrese are acceptable to the commission and in part include bio-retention basins, which are a form of wet detention basin.*
- e. None of the proposed stormwater basins have forebays which are required per CT DEP 2004 Storm Water Quality Manual thus creating the reasonable likelihood of downstream nutrient

loading to receiving waters and wetlands including the Kissawaug Swamp. *All stormwater basins now include forebays. This is confirmed by updated plans submitted by SLR and confirmed by testimony of Ryan McEvoy and reviews by George Logan and John Calabrese.*

- f. The filling of wetlands for the building and/or parking areas result in the destruction of wetlands which is the very definition of an adverse physical impact and Significant Activity requiring a public hearing under the Inland Wetlands & Watercourses Act and the consideration of feasible and prudent alternatives pursuant to Conn. Gen. Stat. section IWWA section 22a-41. *The Commission found that the proposed activity may cause a significant impact and a Public Hearing was held.*
- g. The proposed wetlands mitigation will not serve to mitigate the filling and loss of functional wetlands and is not a feasible and prudent alternative. *The Commission reviewed the mitigation plan which included both the proposed wetland creation as well as the invasive management plan and the Commission based on the information submitted by Matt Sanford and reviewed by George Logan accepts the proposed mitigation. Also, the Commission undertook a feasible and prudent alternative analysis.*

RESOLUTION

Application #490 - 555 Christian Rd/764 Southford Rd

- WHEREAS:** The Middlebury Conservation Commission for the Town of Middlebury has received an application on November 29, 2022 from Drubner Equities, LLC map entitled "Southford Park 555 Christian Road & 764 Southford Road (Route 188) Middlebury, Connecticut" dated November 28, 2022 with revision date of April 10, 2023;
- WHEREAS:** The Commission has conducted a public hearing to receive comments from the public on March 28, 2023, April 4, 2023, April 11, 2023 and again on April 18, 2023;
- WHEREAS:** The Commission has considered the proposed activity, application and all documents and reports submitted by or on behalf of the applicant;
- WHEREAS:** The Commission has considered comments by Herpetologist and Environmental Scientist, Dennis Quinn;
- WHEREAS:** The application was referred to Town Engineer, John Calabrese whose comments have been considered by the Commission;
- WHEREAS:** A peer review has been completed by REMA Ecological Services, whose comments have been considered by the Commission;
- WHEREAS:** Field inspections were conducted by Commission members;
- WHEREAS:** On or about January 20, 2023, Middlebury Small Town Alliance, LLC filed a Petition to Intervene;
- WHEREAS:** The Commission has considered all documents and reports submitted by or on behalf of the Intervener;
- WHEREAS:** The Commission considered comments by Steven Danzer, PhD & Associates LLC Wetlands & Environmental Consulting;
- WHEREAS:** The Commission considered comments from Trinkaus Engineering, LLC;
- WHEREAS:** The Commission finds based on evidence received that the proposed activity conforms to the purposes and requirements of the Inland Wetlands Commission;
- WHEREAS:** The Commission finds on the basis of the record that a feasible and prudent alternative does not exist. In making this finding, the commission considered factors and circumstances as set forth in Section 10.2; (refer to attached analysis – Attachment #1)

NOW THEREFORE, BE IT RESOLVED That the Middlebury Conservation Commission approves the above application with the following conditions:

- (1) The proposed activity that consists of construction of commercial/industrial buildings, parking facilities, drainage facilities, wetland filling, wetland mitigation and upland review area restorations will not have a substantial impact on the regulated area.
- (2) Prior to permit issuance the following shall be met:(all revisions must be reviewed and acceptable by town staff)

- All final plan sheets shall be signed and sealed.
 - Staked hay bale detail shall be added to the plan.
 - The permanent maintenance schedule for all stormwater basins and drainage facilities shall include annual reports be submitted to the commission.
 - Comments from Town Engineer, John Calabrese shall be reflected on plans.
 - Comments from REMA Ecological Services shall be reflected on the plans.
 - A snow removal program which shall also include a de-icing program.
 - A turf management plan.
 - A detailed narrative of invasive species with a plan on how to address removal of each specified species. Said plan shall be completed by a qualified professional.
 - A stand-alone plant maintenance plan.
 - Conservation Easement for 35.5+- acres which shall be acceptable with Town Counsel.
 - A cash bond in the amount of \$100,000 for the wetland creation and restoration in the form of a declining balance bond, pro rata shall be in place and shall remain in place until a final inspection report is received from the wetland consultant.
 - A cash bond in the amount of \$50,000 for the stormwater basin plantings shall be in place and shall remain in place until a final report is received from the wetland consultant stating all plantings have been completed within the approved plans.
- (3) A wetland consultant shall be on site during the wetland creation.
 - (4) A final report from the wetland consultant shall be submitted after a ten-year monitoring period stating the creation has been completed in accordance with the approved plans.
 - (5) Weekly inspection reports shall be submitted with regards to soil erosion control and current site conditions until such time that town staff deems inspections are no longer required.
 - (6) The engineer shall certify all site work has been completed in accordance with the approved plans.
 - (7) As-builts of all stormwater basin berms shall be submitted.
 - (8) Compaction and sieve tests for the basins shall be submitted.
 - (9) Post construction monitoring reports for the wetland creation shall be provided to the commission.
 - (10) There shall be no future plan for on-site salt storage.
 - (11) There shall be no future plan for on-site fueling station.
 - (12) There shall be no future plan for warehousing of any Volatile Organic Compounds or explosives.
 - (13) The applicant shall notify the enforcement officer forty-eight (48) hours prior to the commencement of work and upon its completion.

- (14) Timely implementation and maintenance of sediment and erosion control measures are a condition of this approval. All sediment and erosion control measures must be maintained until all disturbed areas are stabilized.
- (15) No equipment or material including without limitation, fill, construction materials, or debris, shall be deposited, placed or stored in any wetland or watercourse on or off site unless specifically authorized by this approval.
- (16) All work and all regulated activities conducted pursuant to this approval shall be consistent with the terms and conditions of the wetland permit. Any structures, excavation, fill, obstructions, encroachments or regulated activities not specifically identified and authorized shall constitute a violation of this approval and may result in its modification, suspension, or revocation.
- (17) It is the applicant's responsibility to give notification to the Army Corps of Engineers and the Department of Environmental Protection if necessary.
- (18) The Commission recommends the Planning and Zoning Commission give due consideration to hours of operation of the proposed use.
- (19) The Commission recommends the Planning and Zoning Commission give due consideration to compliance with state-of-the-art lighting standards in order to protect wetlands plants and wildlife.
- (20) A cash bond in the amount of \$50,000 for the maintenance of all stormwater basins shall be in place and shall remain in place for a period of ten(10)years from the basin completions.

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10.3 In the case of an application which received a public hearing pursuant to or a finding by the Agency that the proposed activity MAY have a significant impact on wetlands or watercourses, **a permit shall not be issued unless** the Agency finds on the basis of the record that a feasible and prudent alternative does not exist. In making this finding the Agency shall consider the facts and circumstances set forth in subsection 10.2 of this Section. The finding and the reasons therefore SHALL be stated on the record in writing.

At 2.1 "Feasible" means able to be constructed or implemented consistent with sound engineering principles.

At 2.1 "Prudent" means economically and otherwise reasonable in light of the social benefits to be derived from the proposed regulated activity provided cost MAY be considered in deciding what is prudent and further provided a mere showing of expense will not necessarily mean an alternate is imprudent.

10.2 a. It is acknowledged by the Commission that certain onsite wetlands will be filled in under this plan. But, as set forth below, the Commission believes this is acceptable under the facts and circumstances presented. The Commission does not believe that the offsite wetlands will be negatively impacted.

10.2 b. The Applicant's plan is the most feasible and prudent alternative. Based on the record and the review of the alternatives submitted by John Milone of SLR on behalf of the Applicant and the alternatives submitted by Steve Trinkaus on behalf of the Intervenor, as well as alternatives considered by the Commission, the Commission is not convinced that those alternatives were feasible and prudent. The current plan calls for the protection of a wildlife corridor along both Christian Road and Southford Road. This helps with the protection of the larger wetlands systems shown by Matt Sanford as Federal Wetlands A, B and C, which wetlands are connected to offsite wetlands systems. Additionally, the wetlands directly impacted by the Application are isolated wetland pockets that do not have hydrological connection to other onsite or offsite wetlands, which has been confirmed by Matt Sanford and George Logan. Further, the directly impacted wetlands have limited functions and values as shown in Matt Sanford's report, which was confirmed by the testimony of George Logan.

10.2 c. The Regulated Activity will include the filling in of low functioning isolated wetlands. The long-term impacts including the mitigation described below will benefit the existing wetlands that are connected to offsite wetlands systems. This is supported by the testimony of Matt Sanford and Ryan McEvoy, which testimony was reviewed and endorsed by George Logan and John Calabrese.

10.2 d. Certain low functioning isolated wetlands will be filled in under this Application. This is offset by the mitigation offered by the Applicant in the form of wetland creation as well as an invasive management plan are consistent with the Commission's past approach to direct wetland impacts. And, given a rigorous and bonded implementation and maintenance plan the proposed newly created wetland will have greater functions and values as compared to those wetlands

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being directly impacted by the approved plan. Additionally, the invasive species management plan will serve to enhance the existing on-site wetlands, which should also enhance their functions and values. The mitigation plans were submitted and described by Matt Sanford and reviewed and endorsed by George Logan.

10.2 e. As to the Regulated Activity and as to this Commission's limited and defined jurisdiction the Commission does not believe that there will be any injury to, or interference with, safety, health or the reasonable use of property based on this Application.

10.2 f. Based on the testimony of Ryan McEvoy, Matt Sanford, George Logan and John Calabrese, the Commission does not believe that either the remaining onsite wetlands or the nearby offsite wetlands will be negatively impacted by this Application.

10.2 g. Based on the testimony of Dennis Quinn, George Logan and Matt Sanford extensive testimony was received relative to wetlands and watercourses that includes aquatic, plant or animal life and habitats means areas or environments in which an organism or biological population normally lives or occurs. The Commission believes that the inclusion of the wildlife corridor along Christian Road and Southford Road provides necessary protection for aquatic, plant or animal life and habitats.

In conclusion, the Agency finds that the permit is approved on the basis of the record and the above analysis of Regulation Section 10.2 criteria, as the Agency finds that a feasible and prudent alternative does not exist.