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Clifford S. Thier, Chairman
Town of Avon Inland Wetlands Commission
Town Hall, 60 West Main Street
Avon, Connecticut 06001

Dear Chairman Thier and Members of the Avon Inland Wetlands Commission:

At the last public hearing the Chairman invited all counsel to submit memos setting forth how an environmental intervention affects the duties and decision-making of the Commission. This is the submission on behalf of the petitioners Blue Fox Run Golf Course, LLC, Nod Road Properties, LLC, and Cornor Properties, LLC. For your convenience I have included the language of the intervention statute, General Statutes § 22a-19, in Appendix A.

When the Commission receives an environmental intervention petition there are a number of initial determinations to be made:

- Is the petition "verified"? "Verified" is defined in Black's Law Dictionary as "[t]o confirm or substantiate by oath or affidavit; to swear to the truth of." *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 162-63 (2002).

- Does the petition state facts to allow the agency to determine if it has jurisdiction over the environmental issue? *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 165 (2002) ("[t]he facts contained therein should be sufficient to allow the agency to determine from the face of the petition whether the intervention implicates an issue within the agency's jurisdiction.") In the case of your Commission, does it address inland wetlands and/or watercourses?

- Does the petition use more than the statutory language to describe the effect? For instance, the statutory language which follows does not describe whether the unreasonable effect is to a wetland or a watercourse nor does it allege the nature of the unreasonable effect. This statutory language is not sufficient: This application "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."

- Is the Commission "approving" conduct in the proceeding? Yes, if it involves a license or an order.

Any one of the four bullet points above can end up being a fatal defect for an intervenor. I have set forth my legal position on the lack of "conduct" in a map amendment proceeding in two prior

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letters. For the Commission's convenience I am attaching my prior letters as Appendix B (letter dated 10/6/2020) and Appendix C (letter dated 10/15/20) to this letter.

It is at this point that the Commission must determine whether a valid intervention petition has been filed in a proceeding in which the Commission will be approving conduct which will likely cause unreasonable pollution, impairment or destruction of the public trust in a natural resource within the Commission's jurisdiction. That is the preliminary issue you will vote on. For the sake of argument and to complete this letter on the responsibilities of both the intervenor and the Commission, let's continue with the responsibilities of both the intervenor and the Commission when a valid intervention petition has been filed and recognized by a vote of the Commission.

Once admitted as a party, the intervenor has the burden of proving the allegations in its petition, which are a variation on the following statutory language:

> 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.

Why does the intervenor have the burden of proof? Any party who wants something has the burden of proving that circumstance. *Leonetti v. MacDermid, Inc.,* 310 Conn. 195, 214–15, 76 A.3d 168, 181 (2013):

> In *Zhang v. Omnipoint Communications Enterprises, Inc.,* 272 Conn. 627, 645–46, 866 A.2d 588 (2005), we explained that '[i]t is an elementary rule that whenever the existence of any fact necessary in order that a party may make out his case or establish his defense, the burden is on such party to show the existence of such fact.' ... *Nikitiuk v. Pishtey,* 153 Conn. 545, 552, 219 A.2d 225 (1966); see C. Tait, Connecticut Evidence (3d Ed.2001) § 3 3.1, p. 136 ('[w]hoever asks the court to give judgment as to any legal right or liability has the burden of proving the existence of the facts essential to his or her claim or defense').

The intervenor, in general, wants the commission to determine that the application causes unreasonable pollution, impairment or destruction of a wetland and/or watercourse and wants the commission to deny the application. The intervenor will largely need to offer experts' testimony to establish the facts. Pollution control is a technically sophisticated and complex subject. *Feinson v. Conservation Commission,* 180 Conn. 421, 429 (1980). "A lay commission acts without substantial evidence, and arbitrarily, when it relies on its own knowledge and experience concerning technically complex issues . . ." *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 80 (2004).

In the case of an application receiving a public hearing, at the hearing's close, the commission has a 2-step inquiry related to the intervention petition. The commission shall "consider the alleged unreasonable pollution, impairment or destruction . . ."; General Statutes § 22a-19 (b); presented by the intervenor. The commission considers the evidence in the record. Not all evidence may properly be the basis for concluding there will be unreasonable conduct from the application.

The courts have provided guidance in this area. "Evidence of general environmental impacts, mere speculation or general concerns do not qualify as substantial evidence. *Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn. 247, 250, 470 A.2d 1214 (1984)." *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 71 (2004). Speculation occurs when words and phrases are used, such as, but not limited to: "potential harm/risk," "may/might harm," "increases the risk that potential harm occurs," "I'm concerned about", "I'm worried that, "may result in adverse impact," "could harm the wetlands," "can't swear that it won't increase the run off." "The sine qua non of review of inland wetlands applications is a determination whether the proposed activity will cause an *adverse impact* to a wetland or watercourse." (Emphasis in original.) *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 74 (2004).

After significant expert evidence on both sides, the commission in *River Bend* found that the soil mixing plan *may* increase pesticide mobility and result in greater pesticide transport into wetlands and watercourses. "The [commission] may have inferred from the expert testimony that the [applicants'] proposed actions would adversely impact the wetlands and watercourses. Such an inference, however, would be improper in this case." *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 78, n.27 (2004). An expert is required to establish the adverse impact on the wetland or watercourse.

In *Toll Brothers, Inc. v. Inland Wetlands Commission*, the commission had a duty to evaluate the plan based on evidence, "but the commission appears instead merely to have assumed that any proposed alterations to wetlands A and B justified a denial of that application. That assumption was improper." *Toll Brothers, Inc. v. Inland Wetlands Commission*, 101 Conn. App. 597, 601 (2007). The commission also "improperly relied on evidence of general environmental impacts such as a statement by Sean Hayden, a soil scientist, who indicated that excessive development harms wetlands."

In *Lord Family of Windsor, LLC v. Inland Wetlands & Watercourses Commission*, one readily sees how flimsy a basis is for denial based on concerns: One commission member was "concerned that consolidating all of the traffic onto one road might contaminate the [brook]." *Lord Family of Windsor, LLC v. Inland Wetlands & Watercourses Commission*, 103 Conn. App. 354, 363 (2007), aff'd per curiam, 228 Conn. 669 (2008); another "stated that there might be other pollutants, besides runoff water, created by the increased traffic." Id., 363. And finally, a third commission member stated she was not in support of the application **"**because it doesn't take a rocket scientist to figure out that sometimes cars drop oil, and salts get into the wetlands and all kinds of things happen." Id., 363. Quoting the *RiverBend* case, the Court concluded "evidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence.**"** Id., 363-64. The member's "conclusion that passing traffic might drop pollutants into the wetlands fails to satisfy the substantial evidence test." Id., 364. "A mere worry is not substantial evidence." Id., 365.

These cases are examples where a wetlands commission denied an application in which the courts subsequently said the commission did not have substantial evidence in the record to rely on. Applying this to your duties when an intervenor has been admitted, (last paragraph of p.2), you must consider:

- Did the intervenor provide evidence of a reasonable likelihood of unreasonable pollution, impairment or destruction of a wetland or watercourse – or did it just raise concerns, worries, fears?

- Did the intervenor establish the increased likelihood of a pollutant, for instance, but fail to connect-the-dots which establish the effect that the increased level of the pollutant has on the wetland or watercourse?

These are the missteps made by other commissions which you will want to avoid if order for your decision to be legally upheld.

If the intervenor has offered substantial evidence to support the reasonable likelihood of alleged conduct, you will have to determine if that pollution, impairment or destruction is "unreasonable." An early court decision set the standard: "The question of what is reasonable is one of fact." *Mystic Marinelife Aquarium, Inc. v. Gill*, 175 Conn. 483, 503 (1979). Each intervenor's inquiry is fact-specific. A finding of pollution is necessary, but not sufficient. Whether the pollution/impairment/destruction is "unreasonable" is a matter for the commission to decide and articulate.

If you determine that the conduct alleged by the intervenor is reasonably likely to occur and is unreasonable, then and only then do you move on to a determination about feasible and prudent alternatives, in the context of the intervention petition. Of course, the commission has a duty to examine feasible and prudent alternatives as a factor for consideration for granting a permit. Here is the language to be applied when an intervenor is involved:

> In any administrative, licensing or other proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect as long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

General Statutes § 22a-19 (b). If the commission makes no finding of unreasonable pollution, impairment or destruction, the commission does not proceed to determine feasible and prudent alternatives pursuant to the environmental intervention statute. The Connecticut Supreme Court so concluded in *Paige v. Town Plan & Zoning Commission*, 235 Conn. 448, 462-63 (1995); it has been followed in *Quarry Knoll II Corp. v. Planning & Zoning Commission*, 256 Conn. 674 736 n.33 (2001) and *Evans v. Plan & Zoning Commission*, 73 Conn. App. 647, 657 (2002).

In conclusion, the intervenor has the burden of filing an intervention which meets the requirements of the statutes. Thereafter the intervenor has the burden of proving that its allegations of a reasonable likelihood of unreasonable pollution/impairment or destruction of a wetland or watercourse are likely to occur. Then the commission has the task of determining if the intervenor has established the reasonable likelihood of the unreasonable pollution. If the commission so concludes, the commission moves on the alternatives analysis under the intervention statute.

I hope this letter is of assistance to the commission in carrying out its duties.

Sincerely,

Janet P. Brooks

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Attorney Brian Smith