

Land Use Enforcement and the Use of Conditions and Modifications in the Approval Process

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- Variances
- Special Permits/Exceptions
- Off-site improvements
- Construction of public improvements
- Bonding
- Parking (reductions, waivers, shared)
- Open space requirements
- Payments in lieu



Land Use Enforcement



Zoning Enforcement



Zoning Enforcement

Zoning Enforcement Officer or Agency

- **officer, official or authority designated by regulations**
 - Dual enforcement by official and zoning commission authorized

Zoning Board of Appeals

- Must be established
- “de novo” enforcement authority if ZEO decision is appealed

Zoning Enforcement Tools

Enforcement officer/ agency can institute civil action

- **Court can order correction of violation**
- **Impose civil fines of \$10 to \$100 per day**
- **If willful, criminal penalties**
 - \$100 to \$250 per day and/or
 - imprisonment of 10 to 30 days (criminal prosecution)

Enforcement order by officer

- \$2,500 civil penalty can be awarded town if not corrected in 10 days or immediately if involving grading, earth removal or E&S

Appeals from ZEO

- **ZBA may reverse or affirm, wholly or partly, or modify the challenged order, requirement of decision of the ZEO**
- **Although titled an “appeal,” ZBA is actually making its own decision regarding compliance and has all the powers of the ZEO**

Appeals from ZEO

- **As with authority of the ZEO in issuing the initial enforcement decisions, ZBA decision on appeal can include reasonable conditions related to zoning compliance.**

Subdivision Enforcement



Subdivision enforcement

Principal enforcement tool is bonding

- **Obligation to call bond upon expiration of final subdivision to serve lots that have been sold**
- **No subdivision enforcement officer**
- **Limited rights of subdivision enforcement actions are becoming recognized by courts**

Conditional/final subdivision approval

**Regulations can provide for conditional subdivision
(as distinct from subdivision approval with
conditions imposed)**

Conditional subdivision approval

Subdivider is not required to post security for public improvements-

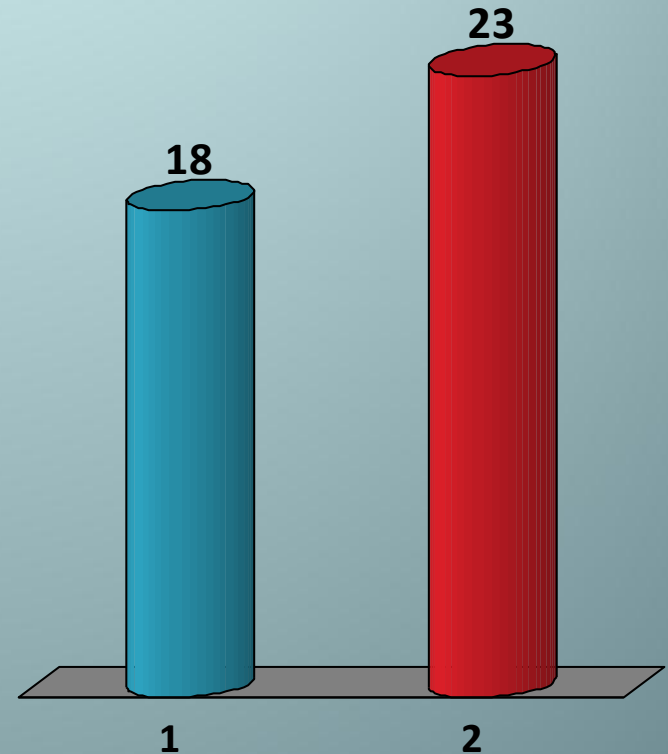
Final subdivision approval issued when:

- 1) work is completed and approved; or,**
- 2) security is provided**



Lots can be sold following the recording of a commission endorsed conditional subdivision approval.

1. True
2. False



Sale of lots in subdivision plans

NO

Lots in conditionally approved subdivisions cannot be sold.

Final subdivision approval, after bonding or public improvement completion, is required before lots can be sold.

Bonding Requirements

Authorization to require bonds must be included in regulations



CITY OF GROTON SUBDIVISION REGULATIONS

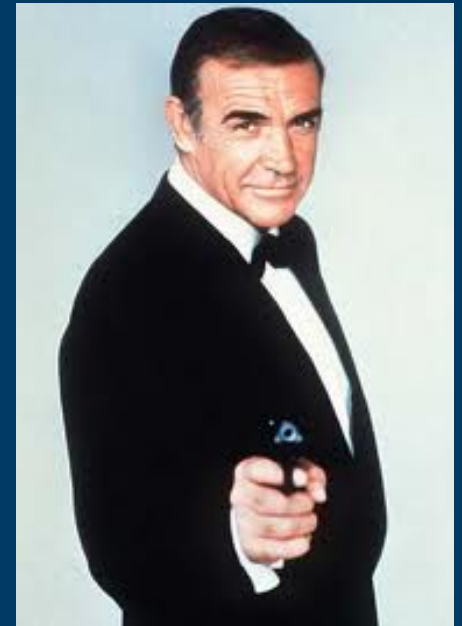
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Bonding

Applies to site plan and subdivision approvals:

- Limits form of security
- Limits types and amount of permissible bonding
- Imposes deadlines for release



Bond, Performance Bond

Financial Security

“Financial Guarantee” CGS 8-3 and 8-25

- **may accept surety bonds**
- **must accept cash bonds, passbook or statement savings accounts or other financial guarantees including letters of credit**

Bonding/financial guarantee agreements are advisable

- **Contractual agreement to maintain financial guarantee**
- **Authorizes collection on security prior to expiration of subdivision if initial security is for a shorter term and subdivider doesn't provide substitute security**



Calling and Extending Bonds

- **Although statutory deadline exists for “automatic” expiration of subdivision, notice by commission must be filed on land records**
- **must accept cash bonds, passbook or statement savings accounts or other financial guarantees including letters of credit**

Release of Bonds

On request for bond release or reduction, Commission must within 65 days either:

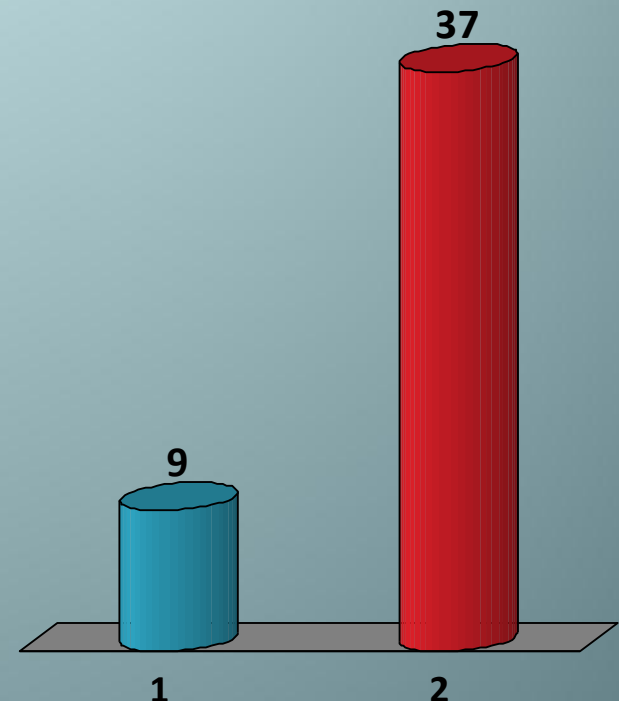
- **release/reduce the bond;**
- **or provide a written explanation of uncompleted work**



When a plan includes drainage facilities, the municipality can require the formation of a homeowners' association to assure maintenance as a condition of approval.

1. True

2. False



Conditioning approval on formation of homeowners' association

NO

Statutory amendments to C.G.S. 8-25 (d) pertaining to bonds expressly provides that deed restrictions , easements , burdens on land of formation of homeowners association to guarantee maintenance are not permitted

Easement can be required to provide municipal access.

Maintenance Bonds

Maintenance

Permissible except:

- Not more than 1 year financial guarantee
- Can't mandate homeowners association or deed restriction



Permit expiration

Site plan and Subdivision

- Five years
- If approved prior to July 1, 2011 and not expired:
 - Effective for 9 years after date of approval
 - Extensions up to 14 years after approval
 - Subdivisions over 400 units 14 years after approval

Wetlands

- If related to zoning or subdivision plan valid until that approval expires
- If unrelated to approved zoning or subdivision approval – 2 to 5 years
- If approved prior to July 1, 2011, same as above

Wetlands Enforcement



Wetlands Enforcement

Agency or enforcement officer

- **Cease and desist or correct order**
- **Show cause hearing within 10 days**

Court

- **Same type of civil and criminal proceedings as zoning**
- **Penalties and fines more aggressive-\$1,000 per day- 6 mos. prison**
- **Penalties paid to DEEP**

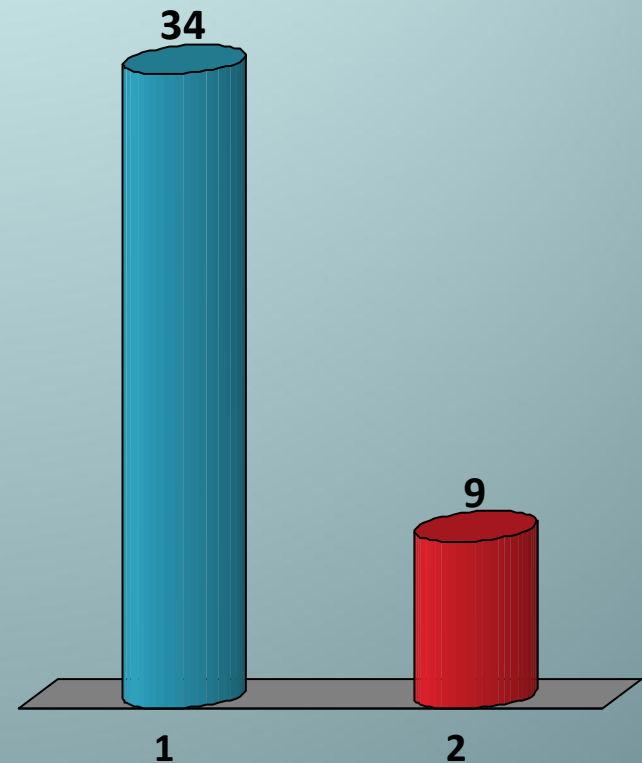
Attorney general/DEEP enforcement

Private citizen enforcement action- Section 22a-16



A zoning enforcement officer is authorized to impose fines under statutory authority granted ZEOs.

1. True
2. False



Imposition of zoning fines

NO

A court, not the ZEO, imposes fines under the zoning statutes.

Citation officials under a municipal citation ordinance can impose fines.

Citation Statute- C.G.S. 7-152c

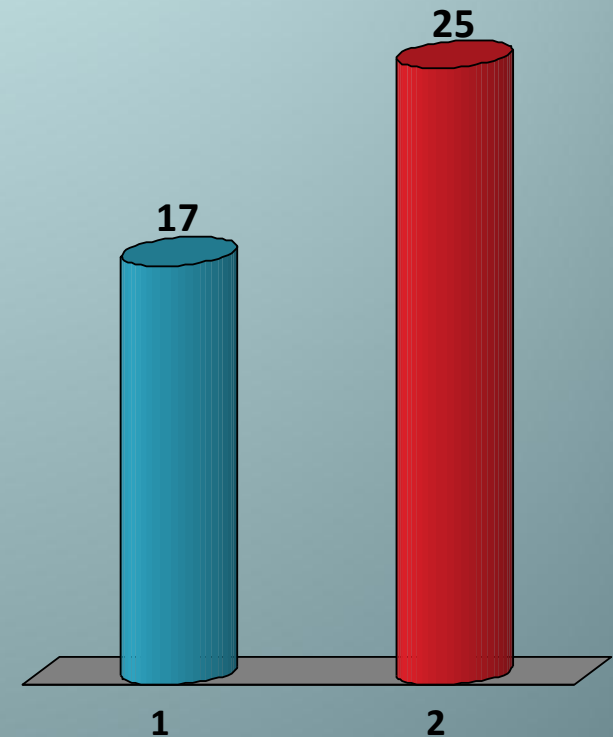
By ordinance-zoning or wetlands enforcement

Citation officer appointed

- **First notice and uncontested payment period**
 - **\$10 - \$100 per day**
 - **If uncontested and paid, inadmissible in other proceedings**
- **Second notice with right to hearing**
 - **If appeal, hearing officer appointed to hold hearing**
 - **If not appealed, default**
- **Assessment entered**
 - **If unpaid, notice can be filed with court and judgment entered**
 - **Appeal to court can be filed from assessment within 30 days**

In issuing the second notice for a prior citation, the notice can include a requirement for the payment of daily fines for the continuation of the violation since the first notice.

1. True
2. False



Continuing violations under citation notice

NO

To obtain an assessment, two notices must be issued for each citation.

Subsequent days of violations must be the subject of another citation notice and second notice (although multiple days of continuing violations could be the subject of a single new citation).

Conditions

Conditions are requirements added to an approval that either mandate particular action by the applicant or impose limitations or restrictions on approved use/development

Examples-

- **Condition that special permit use applicant must obtain DEEP approval of community wastewater system to serve multi-unit residential development**
- **Condition that sand and gravel removal operation authorized by special permit be limited to certain hours and days**



Modifications

Modifications are imposed to make the development proposal conform to the regulations

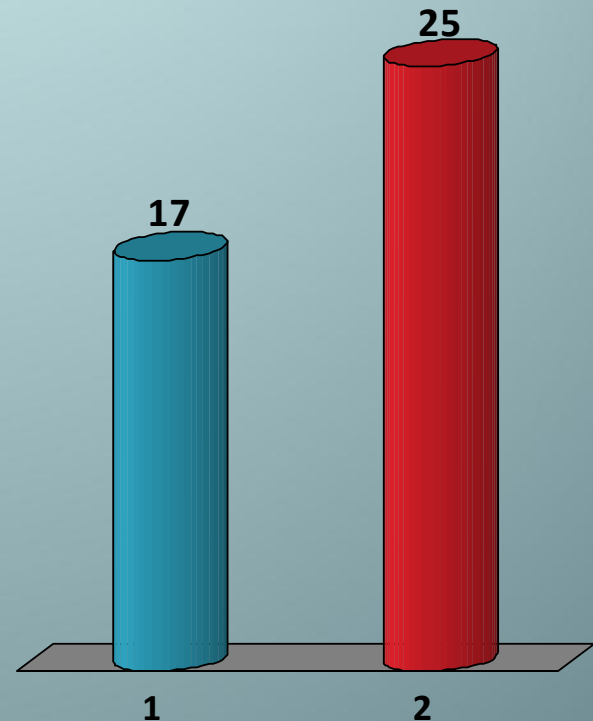
- **Example- Subdivision application approved with the modification that portion of proposed road having an 18% grade be changed to 15% to comply with grade requirement of regulations**



Placing conditions on the approval of an application is a good way for the community to get something they ordinarily would not obtain under the regulations.

1. True

2. False



General limits on use of conditions

- **If permissible for a particular type of application, conditions must be logically and reasonably related to the purposes of the governing statutes and regulations.**
- **Regardless of whether statutes may allow condition for type of application, the local regulations govern-**
 - **Example- If regulations specifically require Health Department Approval prior to approval of site plan, Commission cannot approve with the condition that it be obtained later**

Limits on use of conditions

- **Commissions should not approve an application subject to “conditions to be named later.”**
- **Risk automatic approval of site plan or subdivision if condition deferring approval to another agency can be seen as failure to act.**
 - **River Bend Associates, Inc. v. Planning Commission, 271 Conn. 41 (2004)**



Limits on use of conditions

- **Conditional approval dependent on action by other agencies is usually improper unless evidence on record demonstrates that approval is a probability**
- **Where permit allowing use will not become valid until favorable action by other agency, as with a special permit, evidence of probability isn't necessary**



Limits on use of conditions

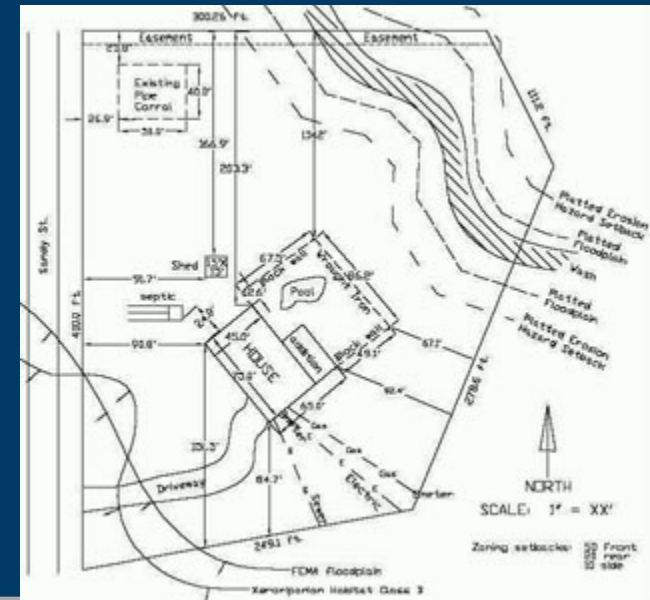
The amount of discretion a commission has to modify or condition a development application depends on the type of permit sought

TOWN OF FARMINGTON
REGULATIONS
FOR
ZONING
SUBDIVISION
INLAND WETLANDS



Site Plans

- **CGS specifically provide that the relevant commission may approve, modify and approve, or deny an application but “only if it fails to comply with requirements set forth in the zoning or inland wetland regulations.”**



Site Plans

- **Only conditions specifically authorized by statutes are those requiring a bond to secure any modifications of a site plan.**
- **Better for commissions to issue modified approval or, if modifications are substantial, instructions on how site plans must be modified to achieve compliance with the regulations.**

Site Plans

Some conditions to site plans are generally permissible:

- **Examples:**

- **Where site plan regulations specifically authorize particular kinds of conditions**
- **Conditions related to off-site improvements necessitated by development such as intersection improvements**
- **Administrative conditions such as notice to planning staff before commencement of work, requirements imposing order of improvements (S&E controls prior to other site work), inspection reports, etc.**



Special Permits and Special Exceptions

- **Commission or board may deny application or approve it subject to “conditions necessary to protect the public health, safety, convenience and property values.”**
- **Conditions imposed must be authorized by the regulations and only in accordance with the standards set forth in the regulations**

Special Permits and Special Exceptions

- **Despite broad standards to deny a permit, conditions should be based on more specific standards**
- **Conditions limiting scope of use authorized only by special permit are usually enforceable**
- **Regulations allowing waiver or reduction in substantive standards may be invalid- MacKenzie v. P&Z, 146 Conn. App. 406 (2013)**

Variances

- **Although there is no express statutory right to impose a condition to a standard variance, the CT Supreme Court held that it is permissible**



Variances

- **Conditions are a means of minimizing conflict of variance with zoning regulations**
- **Conditions must relate to use being proposed**
- **Usually wise to tie variance to specific plan**

806 Mass Ave, Cambridge, Ma
(Address)

Application is: Variance: Exterior rear addition of a Greek Revival porch house found at the Historical Commission be enlarged and the front door

Action or Relief Sought is:
art. 5.000, sec. 5.51

Copies of this application are on file at the City
795 Massachusetts Avenue, and at the Inspection
Lombard Building, 201 St.

Subdivision Applications

Subdivision statutes specifically allow commissions to modify applications

Courts are reluctant to approve conditions not directly related to requirements of regulations or assurances of compliance with regulations

- **Such “conditions” may really be “modifications.” When a condition is needed to make the subdivision plan conform to the regulations, it is really a modification.**

Subdivision Applications

- **Conditions that address issues outside the scope of the regulations are likely to be held illegal by the courts**



Subdivision Applications

Common conditions of subdivision approval:

- Improvements to adjacent streets and drainage when necessitated by development
- Dedication of land for open space
- Payments in lieu of open space
- Bonds
- Sequencing of work- ex.- E&S controls installed prior to construction



Inland Wetlands and Watercourses Applications

- **IWWC may grant, deny or limit any permit application for a regulated activity**
- **May approve with whatever “terms, conditions, limitations or modifications” deemed necessary to carry out the policy of Inland Wetlands and Watercourses Act.**



Inland Wetlands and Watercourses Applications

Conditions may include reasonable measures to mitigate impacts of the regulated activity which would:

- **Prevent, minimize pollution or other environmental damage**
- **Maintain or enhance existing environmental quality**
- **In following order of priority: restore, enhance, create productive wetland or watercourse resources**

Inland Wetlands and Watercourses Applications

Conditions may include:

- In some cases, offsite wetlands enhancements or mitigation
- Drainage modifications
- Buffers and conservation area signage
- Recording of conservation easement containing limitation on activities allow in conservation area



Coastal Site Plans

- **May be approved, conditioned or denied in accordance with the broad policy considerations set forth in the Coastal Area Management Act (CAM)**

CONNECTICUT COASTAL MANAGEMENT MANUAL

SECTION 1

COASTAL MANAGEMENT PROCESS

Municipal Coastal Management Review Process Flowchart

Coastal Site Plan Review Application Checklist

Coastal Site Plan Review Comments Checklist Sample

Coastal Site Plan Review Fact Sheet

Coastal Site Plan Review Exemptions Fact Sheet

Mandatory Referrals Fact Sheet

Shoreline Flood and Erosion Control Structures Consistency Checklist

State and Municipal Regulatory Jurisdictions Fact Sheet

Watershed Management Planning Fact Sheet

Coastal Site Plans

- **CAM supplements other land use regulations and may increase authority of Planning Commission to impose conditions on Subdivision application.**
- **Conditions must be based on appropriate standards and criteria**



Amendments to Regulations

- **Generally inappropriate for a commission to place conditions on an amendment to regulations**
- **Regulations must be for general applicability and are not suited for individual conditions**
- **Modifications may be permissible- key is whether public is on notice of substantive change in proposed regulation**

Practical Consideration

Does it hurt to ask?

Unless directly prohibited by public policy, if applicant agrees to condition or doesn't appeal the condition, the condition is enforceable even if arguably beyond what could be mandated by commission

Upjohn Co. v. Zoning Bd. of Appeals, 224 Conn. 96 (1992)



Practical considerations

Is the condition “integral” to approval?

If found to be impermissible on appeal, court may:

- **Strike it and order approval or,**
- **If a condition is integrally related to approval and commission had discretion to deny, court should remand to commission to consider denial or another proper condition**

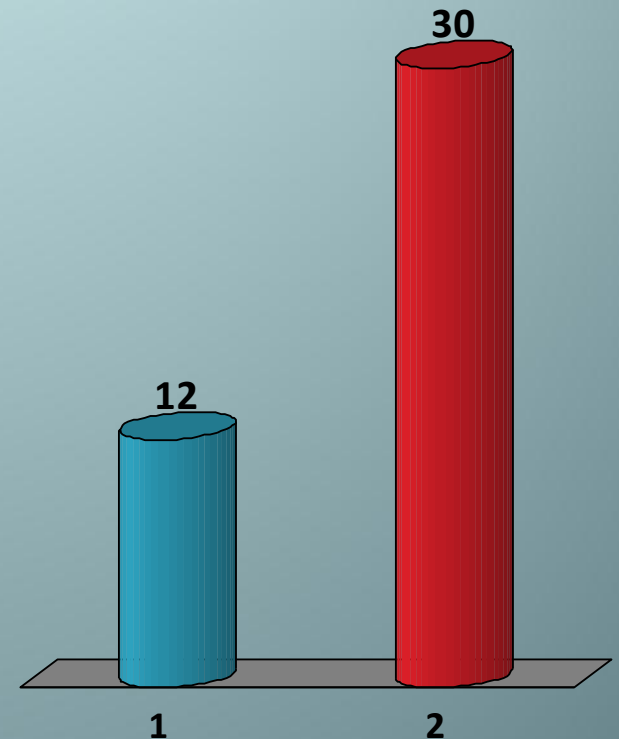
Your decision could make clear that condition is essential to approval



Is it appropriate: Condition a variance to allow year-round use to an owner for her life?

1. Yes

2. No



Condition to variance allowing year-round use to owner for her life

NO

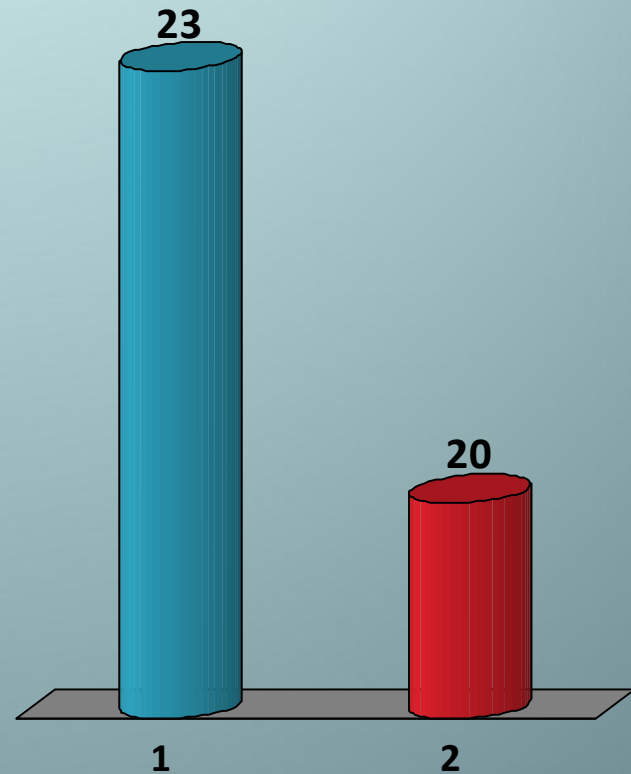
**Zoning applies to conditions of land and can't be unique to
owner the property.**

Reid v. Zoning Bd. of Appeals, 235 Conn. 850, 858 (1996)

Is it appropriate: A condition attached to a wetland permit requiring the applicant to perform offsite remediation

1. Yes

2. No



Condition attached to wetland permit requiring applicant to perform offsite remediation

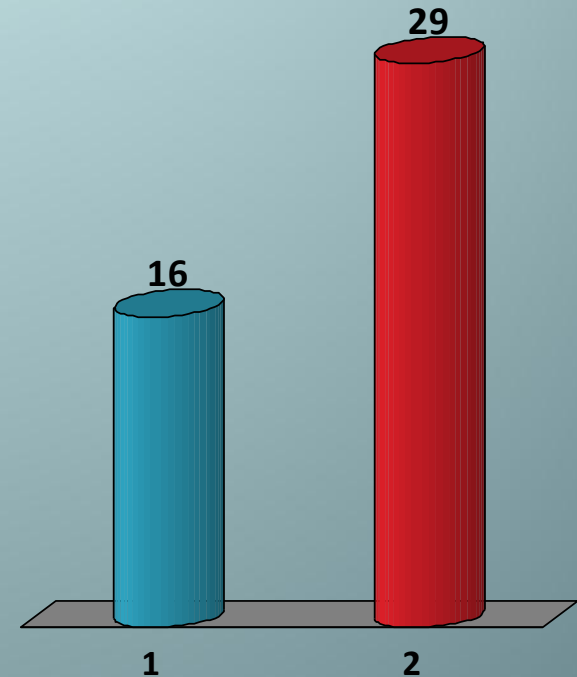
YES

**Red Hill Coalition, Inc. v. Conservation Commission,
212 Conn. 710 (1989)**



Is it appropriate: Attach a condition to a wetlands permit requiring the payment of money to offset the wetlands impacts

- 1. Yes
- 2. No



Condition attached to wetland permit requiring payment of money to offset wetlands impacts

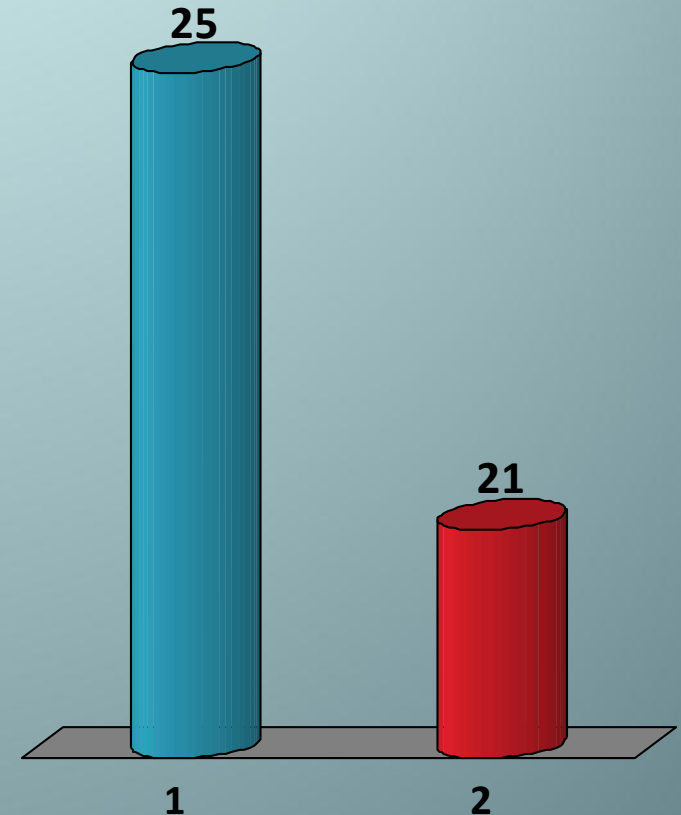
NO

**Branhaven Plaza v. Inland Wetlands Commission of
Branford, 251 Conn. 269 (1999)**



Is it appropriate: A subdivision approval conditioned on the developer constructing an off-site sidewalk to connect the subdivision to an existing off-site sidewalk?

1. Yes
2. No



Subdivision approval conditioned on the developer constructing off-site sidewalk to connect subdivision to existing off-site sidewalk

NO

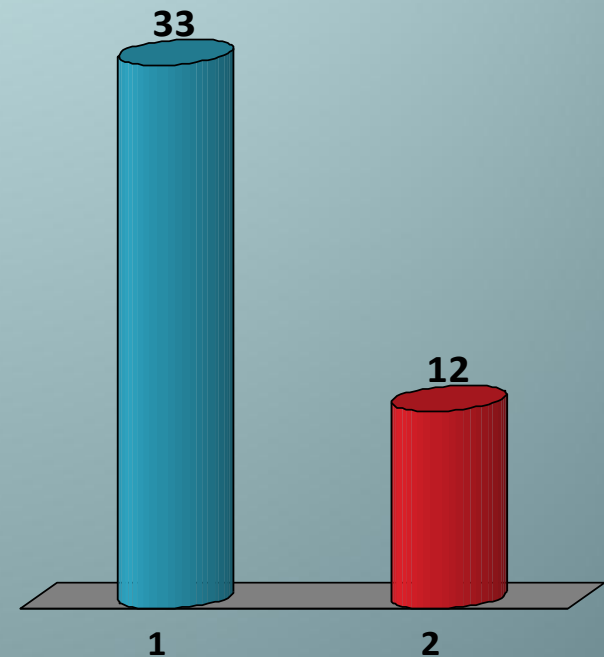
**Buttermilk Farms, LLC v. Planning & Zoning Commission,
292 Conn. 317 (2009)**



Is it appropriate: A subdivision approval conditioned on the developer deeding a portion of land adjoining a highway to permit town to widen road to town specifications

1. Yes

2. No



Subdivision approval conditioned on the developer deed portion of land adjoining highway to permit town to widen road to town specifications

YES

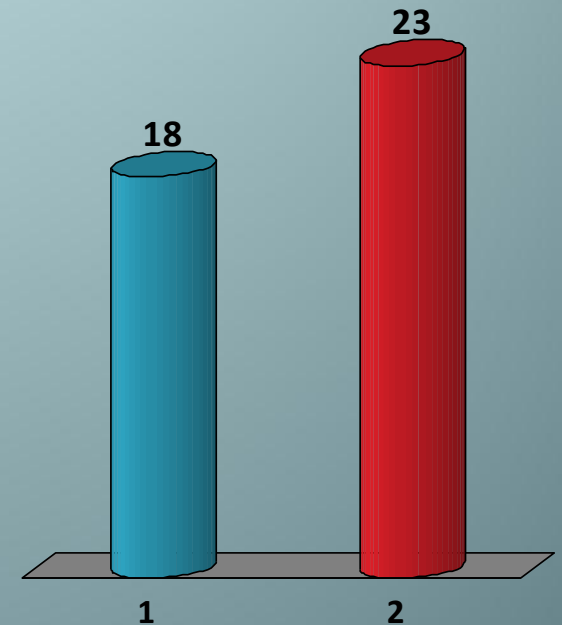
Weatherly v. Town Plan & Zoning Commission, 23 Conn. App. 115 (1990).



Is it appropriate: A condition added to the approval of special permit application seeking the expansion of a nonconforming use of unoccupied floor space that a free standing sign located on the property be removed.

1. Yes

2. No



Condition added to approval of special permit application seeking expansion of nonconforming use of unoccupied floor space that a free standing sign located on the property be removed.

NO

There was no relationship between sign and the proposed application

Beckish v. Planning & Zoning Com., 162 Conn. 11, 16 (1971)



Questions????