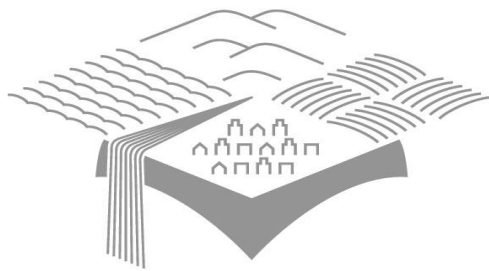


Running a Meeting and Making a Decision

Attorney Mark K. Branse

Halloran and Sage



Land Use Academy

Pre-application Conferences

- **Valuable procedure but, until recently, no case law or statute allowing it**
- **Should have a procedure in your regulations**
- **Be careful of appearing to make a judgment**

With the staff

- * **common, informal**
- * **non-binding and advisory**

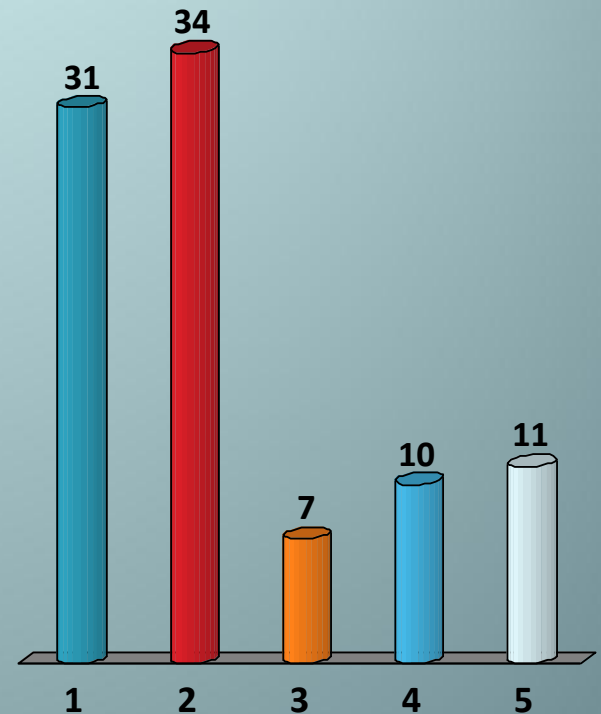
With the commission

- * **permitted by statute (CGS 7-159b)**
- * **non-binding**



When is a Public Hearing by a Commission Required?

1. When required by the statutes
2. When required by the regulations
3. When ordered by the City Council/Mayor
4. Settlement of Litigation
5. With the exception of IWWA, whenever the Commission wants



Zoning Board of Appeals

- **Must Hold a Public Hearing on Everything (except automotive locations, maybe)**
- **Can deny if a previously denied application is resubmitted as a new application with no changes**



Planning and Zoning Commissions

Public Hearings Required for:

- **Zone and Regulation Changes**
- **Adoption/amendment to Plan of Development**
- **Special Permit/Exception**
- **Resubdivision**
- **Subdivision if required by the regulations**
- **May be required for site plan review but won't extend your time limits for action**



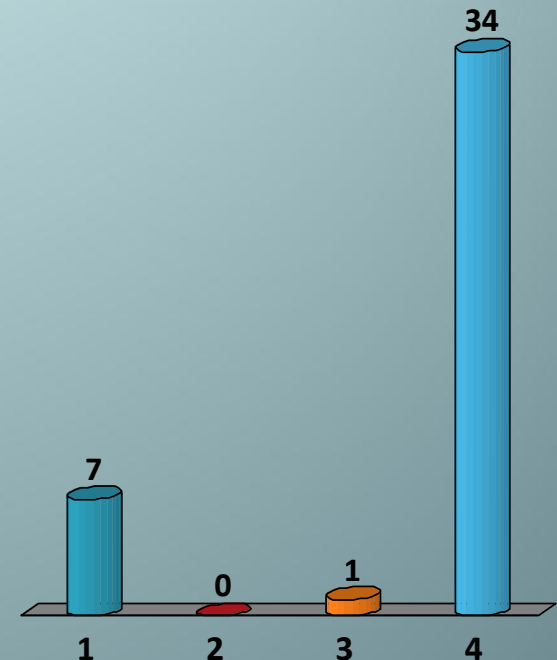
Inland Wetlands and Watercourses Agency

- For “**Significant Activity**” a public hearing is required.
- For other activities a hearing may be held when it is in the public interest
- Upon petition of **25 residents of the town** (within 14 days of the application date of receipt)



How is a “significant activity” defined?

1. Judgment call of the IWWA
2. When more than 5% of a watercourse or wetland is destroyed
3. When more than 20% of a watercourse or wetland is destroyed
4. One that meets the definition contained in your wetlands regulations.



Application Fees

Incomplete applications or failure to pay application fees is NOT grounds for not acting on an application. Treat the application as a live bomb and act on it to avoid automatic approval.



Conducting the hearing-what does the law require?

- **Procedural Due Process vs. Substantive Due Process**
- **Review the application against the regulations as they are written**
- **Conduct hearings so that no one is intimidated, harassed or disadvantaged, regardless of their position**

Crowd Control-How important is it?

- **Decisions are subject to appeal if an “atmosphere of hostility” is allowed to pervade the proceedings**
- **Even jokes can be viewed as hostile toward an applicant**
- **Potential for a civil lawsuit**



Rules for running a meeting

- **All comments are directed to the commission**
- **Never allow *anyone* to interrupt a member of the commission, especially the chairman**
- **No one speaks—including commission members—unless and until they are recognized by the chair.**



Rules for running a meeting

- **Keep people on the point**
- **Don't run too late at night**
- **If it's likely to be bad, have your attorney there to assist you.**



Let Everyone Know the Rules

Set out the rules of the game before the applicant ever stands up:

- **We will hear from the applicant**
- **Then questions from the Commission and staff**
- **Then those in favor**
- **Then those opposed**
- **Then those who don't wish to be categorized as in favor or opposed**



Let Everyone Know the Rules

Set out the rules of the game before the applicant ever stands up:

- **There will be no shouting, applause, booing, heckling, or other disturbance**
- **Those who break these rules will be ejected from the meeting.**
- **There will be no exceptions**



Rules for running a meeting

- **Keep the applicant in line- don't let the applicant incite the crowd or goad the commission into saying something stupid**
- **Keep your own troops in line- your fellow commission members may be your worst enemy**



Rules for running a meeting

- **Avoid the mob mentality. Have the police on hand if necessary**



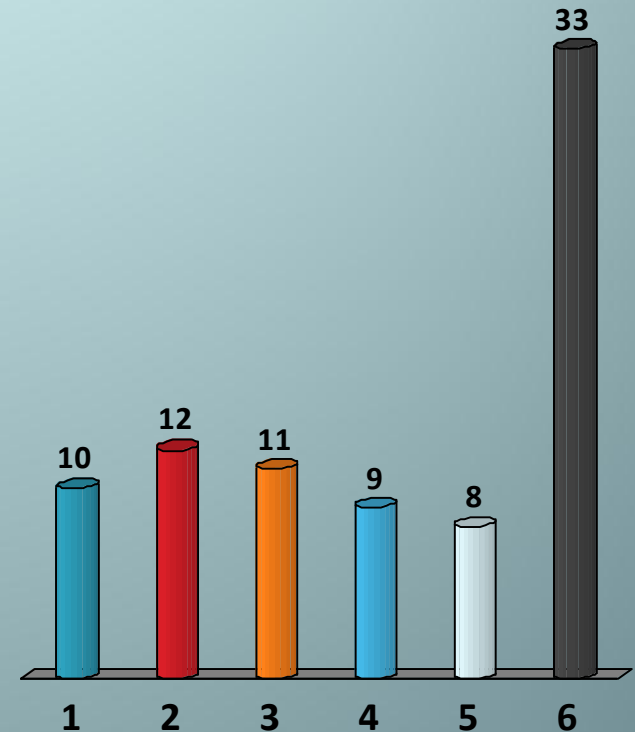
Rules for running a meeting-Logistics

- **Have a large room—oversized, in fact. Packing people together contributes to their anonymity and encourages heckling or shouting out (the “voice from the crowd.”)**
- **Have a board or other way to display plans, etc.**
- **Have an AV system. People will sit in the back row and then shout, “I can’t hear.”**



Which of the following individuals may speak at a public hearing?

1. The Applicant
2. Neighbors opposed to an application
3. Residents of another town
4. Representatives of trade associations
5. Convicted felons
6. All of the above

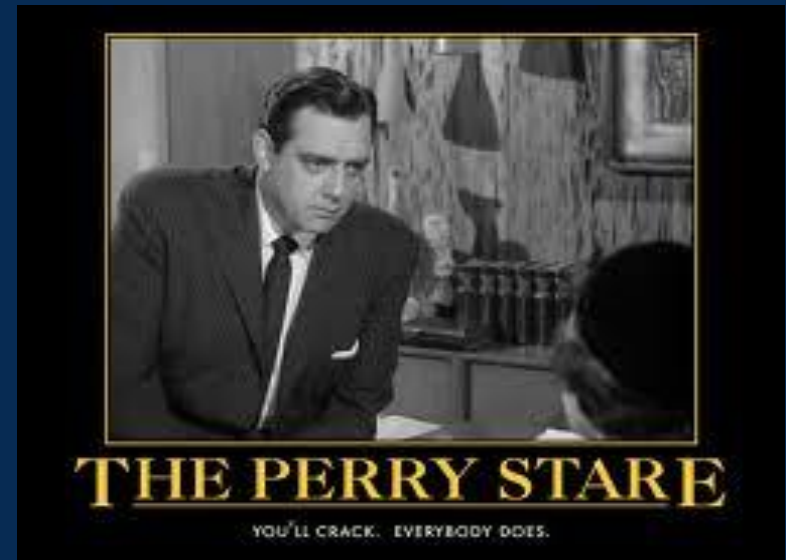


Who gets to speak?

- **Typically, applicant speaks first to present application**
- **Can have proponents, then opponents, or take turns**
- **Intervenors under CGS 22a-19 can speak even if no public hearing**
- **Can allow people to speak if no public hearing at the discretion of the chair**

Cross examination

- Explain to the public/applicant why cross examination and questions must be permitted, despite formality.
- Refusal of witness to be cross-examined is grounds for “motion to strike”





Site Walks

- **Must be noticed**
- **No comments or questions, take notes**
- **Public and applicants may attend**
- **Stay together**
- **What happens if a commissioner doesn't go on the site walk?**



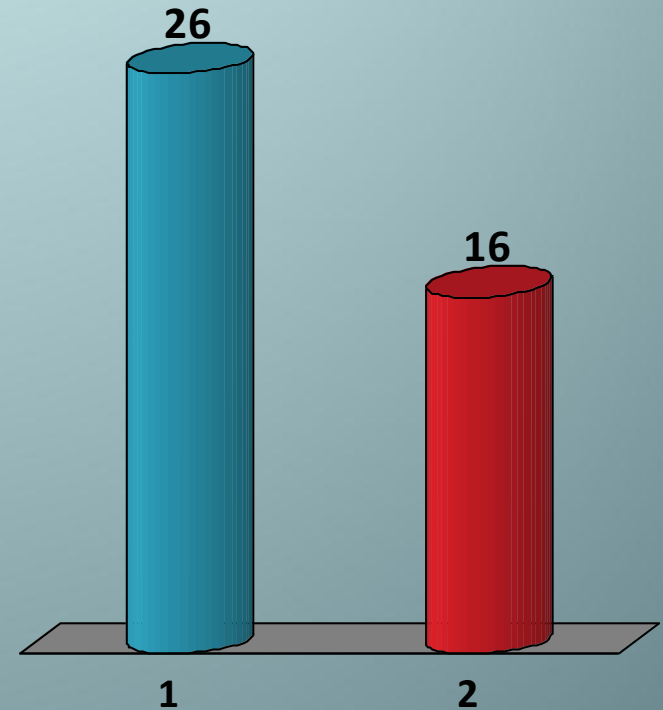
Subpoenas

- Only one case, brand new and only Superior Court, says that an attorney can subpoena parties to appear, with documents (“*duces tecum*”), before a ZBA
- Municipal agencies alone (without an attorney) can’t issue or enforce subpoenas

SUBPOENA/CIVIL JD-CL-43 Rev. 3-09 C.G.S. § 52-143, 52-144 Pr. Bk. Secs. 7-19, 24-22		STATE OF CONNECTICUT SUPERIOR COURT www.jud.ct.gov				
Instructions: 1. Do Not use this subpoena if the witness is being summoned by the state or by the attorney general or an assistant attorney general or by any public defender or assistant public defender acting in his/her official capacity.		2. The person being subpoenaed and the items they are ordered to bring as listed below must be identical to the names and items as ordered on the Application for Issuance of Subpoena, form JD-CV-62.		<table border="1"> <tr><td>Court Use Only</td></tr> <tr><td>SUBISSU</td></tr> </table> 	Court Use Only	SUBISSU
Court Use Only						
SUBISSU						
Name of Case _____			Docket Number _____			
<input type="checkbox"/> Judicial District	<input type="checkbox"/> Housing Session	<input type="checkbox"/> Geographical Area Number _____	<input type="checkbox"/> Small Claims Area	Address of Court (Number, street and town) _____		
To: (Name and address) _____						
Date and time you are to appear _____		Time _____	Report to <input type="checkbox"/> Clerk's office	<input type="checkbox"/> Courtroom number _____		

Continuation of a public hearing requires an additional published notice stating the time and location of the meeting

- 1. True
- 2. False



Extensions

- **Always get them in writing, even handwritten at the table.**
- **Specify how many days, not just "extension".**
- **Make sure the applicant understands: if you don't extend, the Commission will make its decision on what it has in front of it or call special meeting within the time limit**

Testimony

- **Everyone must identify themselves**
- **During deliberations-no new evidence and no direct input from applicants or opposition**
- **Commissioners should take care not to “testify”**
- **If you start to testify to facts or “special expertise” the applicant or his attorney may be able to question you**
- **Your job is to listen, question and consider what you hear**

Decorum

- Demand to be treated with respect
- Refer to each other and speakers with some formality
- Treat staff with respect



Reports, Exhibits, Letters

- **Note at the opening of the hearing exhibits that have been received**
- **Time to evaluate and examine material-open question**
- **Reading reports and letters out loud**
- **What to do with reports from other agencies, experts, staff, etc.**
- **Electronic presentations**

Staff Input

- **Normal rule is that your staff and other objective advisors, such as State or other government agencies, can comment even after the public hearing closes but not totally new material**
- **You are not bound by staff opinion**
- **Note special case for ZBA appeal of ZEO: contrary to the normal situation, the ZEO cannot speak after the close of the public hearing when his/her decision is subject of the appeal.**

Evidence

- **Numbering and logging**
- **Substantial Evidence**
- **Burden is on the applicant to provide evidence to support approval**



Expert Input

- **Don't be afraid to challenge an expert**
- **Get opinions on both sides of technical issue**
- **Who gets the "last word"?**



CEPA/22a-19a Interventions

- **Opportunity for intervenor to speak, with or without public hearing**
- **Can raise environmental issues but also procedural issues**
- **Intervenors must allege specific adverse impacts of the proposed activity.**

CEPA/22a-19a Interventions

- **Impacts must be within the commission's jurisdiction.**
- **Impacts must be proven by substantial evidence.**
- **If allegations proven, then the commission must deny the application if there are "feasible and prudent alternatives" with no or less adverse impacts**

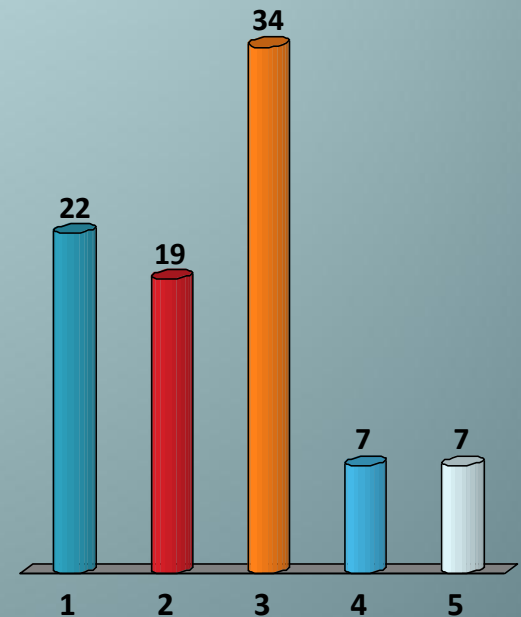


Keeping the record

- **Tape everything, even if it is not a formally advertised public hearing**
- **Lack of a transcript could result in a remand for new hearing or sustaining of the appeal**
- **Be specific when you speak so it's clear in the transcript**
- **FOIA allows taping or filming of meeting by others**

Which of the following statements are generally true?

1. An alternate who has not been seated should not participate in deliberations
2. A commissioner who was elected or appointed after the public hearing began is not eligible to vote
3. A commissioner should not vote on an application in which he has a pecuniary or other personal interest
4. The chairman may not vote except in case of a tie
5. A tie vote means that a motion carries



Making the Decision-Who Votes?

- **If you were absent, must listen to the tapes, review all of the documents submitted**
- **Alternates can participate during the public hearing phase of proceeding, but once deliberations begin, alternate not seated cannot vote or participate in deliberations.**
- **Once deliberations begin, voting alternate remains so, even if full member returns mid-process**
- **Chairman votes – not just if a tie**
- **Tie vote – motion does not carry – so work for a majority vote**



Making the Decision-Counting the votes

- **What constitutes a quorum**
- **ZBA is always four out of five**
- **Tie vote=defeat of the motion**
- **Abstentions**
- **Extraordinary Majority---zone change; negative recommendation from Planning Commission; 20% petition for map amendment; ZBA 4 out of 5**
- **Ex Officio Members**

Decision on the record

- **Must make your decision based on *what you heard at the public hearing***
- **You cannot ignore uncontradicted expert testimony if you do not question it. If you have doubts, question the expert on the record**
- **If you have special expertise upon which you will rely, say so on the record (while hearing is open).**

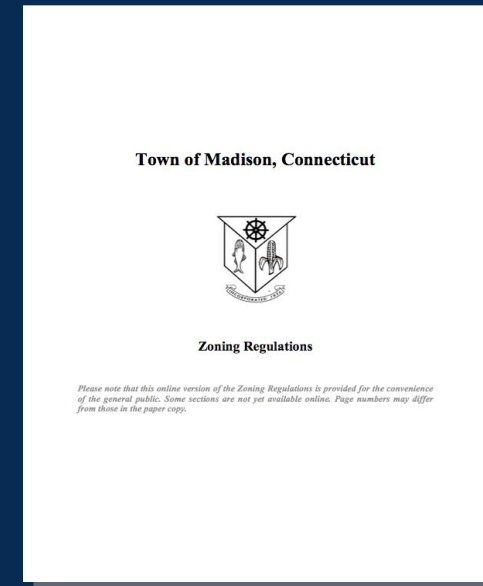
"Commissioner" Expertise

May rely on own knowledge and expertise

- * OK for general subjects such as traffic
- * otherwise, need to establish expertise
- * may be subject to cross-examination
- State the information for the record during hearing
 - * don't introduce new facts or opinions later
 - * due process/"surprise" concerns

Decision Based on Regulations

- **Must make your decision based on the criteria in your regulations; or, if variance, what is stated in the case law. Be sure to use regulatory standards to focus your discussion**
- **Interpretation of regulations**
- **No "waiver" of zoning regulations, per the McKenzie case, but requirement could be triggered or not triggered by particular circumstances, per the Santarsiero case**



Three questions to ask

- 1) What evidence did we hear about this criteria?
- 2) What do we conclude based on that evidence?
- 3) Were the criteria met?



HAVE SOME DISCUSSION to demonstrate that you thought about it

The Decision

- **Denial "Without Prejudice"**
- **Statement of reasons for the decision**
- **Reconsideration**
- **Precedent**
- **Post decision notice**



The Decision

- **Time limits**
- **Effective date--- set it in the appropriate motion**
- **Conditions and modifications**
- **Stating the motion**
- **Restate complicated motions**

The Decision

- **Be specific with stipulations and comments**
- **Integral conditions**
- **Approval of the application, not the applicant**
- **Defeating motion to deny does not automatically equal approval**

Interagency Overlapping Jurisdiction

- **Local Overlaps in General--Erosion and Sedimentation**
- **Zoning/Wetlands/Subdivision**
- **Zoning/Subdivision Regulations--Zoning Contracts**
- **Planning and Zoning Commission/Zoning Board of Appeals**
 - **ZBA only grants variances**
- **State/Federal Overlaps--ADA/FHA, RLUIPA, Telecommunications Act**
- **Agency/Administrative --Public Health Code vs. Inland Wetlands**
- **Inland Wetlands and Watercourses Jurisdiction--Dams, water company projects, farming, wells**

Jurisdiction to hear/decide the application

Agency must have jurisdiction to hear the application and/or to impose its regulations, and jurisdiction must be established before the merits of the issue will be reached

- **Wetlands – exemptions**
- **Ownership Interest**
- **Pre-emption by State or Federal law**
- **Statutory limits – zoning, mobile manufactured housing, family day care**
- **Inland Wetlands – Dams, water company projects, farming, wells**



Most Important

Be prepared

- **review the materials before the meeting starts**
- **have access to the regulations**
- **view the subject property**
- **Have good regs that say what you want them to say**



Legal and Procedural Considerations-Special Mention

When in doubt, call the town attorney



Group exercise

- **Town of NIMBY Planning Commission**
- **Discuss in groups of any size you choose**

Town of NIMBY Planning Commission Issues and Problems

- 1.
2. Fair hearing: atmosphere of hostility, failure of Neighbor and Patriot to disqualify for conflict of interest and Jerko for predetermination.
3. Improper announcement of continuation (no time, date, place)
4. Displacement of Found for Lost after deliberations have started
5. Participation of unseated alternates in deliberations that influence the outcome.
6. Introduction of new information after close of PH by the Town Planner.
7. Introduction of new evidence after close of PH by Jerko.
8. Failure to vote on a motion for approval. Failure of the denial motion to carry is not an approval.
9. Chairman could not state the collective reasons for the commission members; it had to be in the motion or otherwise reflect consensus.
10. The reason is not a zoning reason, but a personal reason.

Town of NIMBY Planning & Zoning Commission Issues and Problems

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8. Neither of the studies presented specific to Connecticut (new and bad case law)
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