

**INLAND WETLANDS COMMISSION
REGULAR MEETING – MINUTES
WEDNESDAY, OCTOBER 1, 2014 – 7:00PM
NEW HARTFORD TOWN HALL – 530 MAIN STREET**

PRESENT: Chairman James Hall, Nancy Schroeder Perez, Anne Hall, Troy LaMere, Wayne Ryznar, Inland Wetlands Enforcement Officer Steve Sadlowski.

ABSENT: James Chakulski, Lou Moscaritolo.

ALSO PRESENT: Caleb Hamel, Esquire.

Chairman James Hall called the meeting to order at 7:00PM. All regular members were seated for the meeting. The proceedings were recorded digitally, and copies are available in the Land Use Office in Town Hall.

1) PUBLIC HEARINGS:

A. Roger J. & Linda Schiffert – Map 30 Block 30 Lot 005-3 Town Hill Road – Driveway crossing watercourse for one single-family residential house, including installation of a culvert and placement of fill in wetlands. Area of wetlands disturbance less than 0.1 Acre. (continued from August 6, 2014 meeting)

David F. Whitney, PE, Consulting Engineers, LLC, addressed the commission on behalf of the applicants. Mr. Whitney presented a map showing the site and its location relative to downtown New Hartford, Steele Road, and Town Hill Road, located on the east side of Town Hill Road, with 26 acres, as one existing lot of record. He highlighted the location of Deet's Pond (to the south of the property) and out of Deet's Pond, highlighted the location of East Mountain Brook which flows down to the river. He also pointed out an unnamed water course that becomes a brook to the north of the site called Hallock Brook which also flows down to the river.

Mr. Whitney referenced a map submitted at the August 6, 2014 meeting of the Inland Wetlands Commission which is essentially the same as Sheet 1 of 4 of his present plan. A difference noted is that this map, even though it contained a scale of 1"=60', did not quite fit on a 24x36 sheet. His latest site plans submitted, he noted for the record, do not show the eastern most property line portion of the sheet. He therefore submitted for the record the overall site plan with the only difference being that it shows the entire site.

Mr. Whitney then explained the topography of the land to the commission and indicated that he does so they understand that he has worked to design the driveway so that it is the best it could be, to minimize the disturbance to the wetlands, to minimize the tree clearing and to minimize the grades of the drainage.

Mr. Whitney outlined that the applicants are seeking to build one house on the 26 acre parcel and that it will take quite a driveway (2,350 feet) to get to it. The driveway will be coming in the southern portion of the property line to stay away from an area of wetlands, then has reverse curves to minimize cuts and fills and to keep the driveway grade to a maximum slope of 10%. The total length of the driveway going through the upland review area is 1,055 feet.

Mr. Whitney noted that the proposed house is on the eastern portion of the site. The house, the septic system, the well and all the related grading for the house will be completely outside of the upland review area, according to Mr. Whitney. He also noted that the soil tests conducted on the site

reflect very well drained soils, which is very suitable for septic systems so that when the time comes, it will not be difficult to receive approval for the septic system from Farmington Valley Health District.

Mr. Whitney showed on the plans he presented some ditches on certain sides of the driveway, in three locations where plunge pools would be constructed to slow down the velocity of the water. He also referenced swales that were three feet wide and eighteen inches deep.

Mr. Whitney then directed commission members attention to Sheet #2 which was the detailed wetlands crossing. The total amount of wetlands disturbed with his plan is 3,015 square feet or .07 of an acre. The driveway will be ten feet wide along with the requisite areas for two cars to pass at every one hundred fifty foot interval. Mr. Whitney noted that the original plans submitted had the amount of wetlands disturbed as 3,370 feet. The original plans had included 300 cubic yards of fill to be placed in the wetlands while these revised plans now include 212 cubic yards of fill. Mr. Whitney highlighted that he has also added limits of clearing in the upland review areas to the revised plans. He pointed to a maximum thirty foot wide clearing to allow for the ten foot wide driveway along with appropriate shoulder allowance.

Mr. Whitney then continued with Sheet #3 of 4, the Cross-section. He again noted the fifty four foot of wetland crossing, followed by an island of non-wetlands, followed by a twenty-two foot wide crossing.

Mr. Whitney continued with discussion regarding drainage. He explained that at the beginning of the driveway, an existing eighteen inch culvert located under Town Hill Road, which discharges a two-hole drainage swale down to the wetlands. His plans call for an eighteen inch culvert under the driveway which will not be connected to the state's culvert. He indicated that in his professional opinion, the eighteen inch pipe is adequate for the fifty year design flow. About six hundred feet down from Town Hill Road is a second culvert, fifty feet of a fifteen inch pipe (Culvert #2). The wetland crossing has a proposal of three culverts (Culvert #3, #4, and #5), two with eighteen inch pipes and one with a fifteen inch pipe. He indicated that the reason for this design is that during most of the storms, storm water runoff will flow through the eighteen inch pipes. He explained that during the larger storm events, including a fifty year storm, some of the water in the area will flow through the fifteen inch pipe, mimicking what would occur with wetlands.

Mr. Whitney indicated that when he originally started sizing the culvert, he had used a program from the USGS called "Stream Stats", a web-based GI system. He said he determined that there existed a watershed to this location of 28 acres and from using that program, he determined that in a fifty year design storm, the peak flow would be about 29 cfs. He had designed the driveway accordingly. However, the town engineer, Roger Hurlbut, indicated that in his opinion the "Stream Stats" program was good for larger watersheds but that for smaller watersheds, he preferred Mr. Whitney use a different method, the "Rational Method". When Mr. Whitney used the alternative method, he arrived at a peak flow of 34.3 cfs for a fifty year design storm. He indicated that he then used the Federal Highway Administration HY8 culvert design program, another standard program for culvert analysis. Mr. Whitney then determined that these three pipes in combination were adequate to handle the peak flow of 34.3 cfs for a fifty year storm. Mr. Whitney then directed the attention of commission members to the cross-section showing the maximum head water elevation at the inlet of the culverts at an elevation of 849.33 feet with the low point of the driveway at 849.5 feet. He explained that this represents how the applicants have minimized the height of the driveway and the amount of fill in the wetlands to the maximum extent possible.

Mr. Whitney reported that these drainage calculations have been submitted to Mr. Hurlbut. He further stated that in his opinion the five culverts on the site, including the three culverts at the crossing, have been designed in accordance with good engineering practice and meet the regulations.

Mr. Whitney then addressed the modifications of the plans. The original plans, created prior to Mr. Whitney's involvement, called for an eighteen foot wide driveway coming the whole way down to the rear of the site including eighteen feet across the wetlands for two home sites. The proposal has been scaled down to one single family residential house. The first plan's driveway called for a 15% grade with cuts in some places of eight to ten feet with an eighteen foot wide crossing at the wetlands.

Mr. Whitney pointed out that the Inland Wetlands Regulations requires alternatives to be diagrammed on a plan. He acknowledged submitting multiple plans. He submitted another plan at this meeting that shows a number of alternatives. He differentiated them by color with the original driveway shown in blue which had a maximum grade of 15% and the driveway in orange is the applicant's current proposed driveway with a maximum grade of 10%. He also submitted other alternatives with different paths through the wetlands which were shown in pink on this map.

Mr. Whitney referred to Clint Webb, an Environmental Planner and Wetland Ecologist with C Webb & Associates, LLC, to speak about the environmental impact of the proposal. He summarized the impacts are the same in terms of a wetland functionality but in the newer proposal, the footprint in the wetlands have been reduced. He spoke of the system of wetlands that contains an intermittent water course that comes off the adjacent site which exits on the northern part of the applicant's parcel with a twenty foot change in elevation from the south to the north. This gradual slope allows for a light flowing of water but not "ponddy" which allows water to flow during Spring high water or storm events.

Mr. Webb outlined the criteria in evaluating the functionality of the existing wetland: ground water discharge, conveyance of storm water and spring high water through the wetlands, ground water recharge, and leaf litter release of nutrients. Mr. Webb opined that all of those functions are maintained by the design as presented by Mr. Whitney. He also praised the new three pipe culvert design as he agreed that it mimics the actual function of the wetland during moderate and high flows.

Mr. Webb reported that he holds thirty-five (35) years analyzing wetlands for United States Environmental Protection Agency, for Connecticut Department of Transportation, and many state jurisdictions across the country for different turnpike authorities and different DOTs. He was the lead consultant on the wetland evaluation technique called Wet-2.

Attorney Ken Slater, of Halloran & Sage, LLP, then addressed the commission on behalf of the applicants. Attorney Slater spoke to the expertise of Mr. Webb and the weight that should be given to Mr. Webb's professional opinion as to whether a particular activity is actually going to harm a wetland. He addressed the feasible and prudent alternative test. He emphasized that the test is very discretionary. He referenced a case arising out of the City of West Haven wherein feasible is a matter of sound engineering and a prudent alternative is something that is economically reasonable in light of the social benefits derived from the activity. He explained that social benefit does not mean charitable purpose but instead the overall recognition of reasonable economic use of one's land versus wetland protection. The context of the application is what those two tests (feasibility and prudent alternative) are applied at, according to Mr. Slater.

Ms. Nancy Schroeder Perez opined that the applicant's presentation was cohesive and appears to be the best way to cross the wetlands and to take care of the wetlands functioning the way they are supposed to.

Mr. Wayne Ryznar asked Mr. Whitney how long the driveway is in total. Mr. Whitney responded that the proposed driveway is 2,350 feet from where the house is located to Town Hill Road. Mr. Ryznar expressed concerns about the potential of erosion and sediment with a driveway this long and that it could be directed towards the wetlands. His concern as he noted is with significant rain events and erosion controls. He stated that he also had a concern with that the limits of clearing are closely monitored because it is such a long project. He addressed Mr. Webb's report's last paragraph wherein storm water runoff is mitigated by the design of directing it off the driveway's surface. Mr. Ryznar inquired whether Mr. Webb agreed that monitoring the directing the water of the driveway is critical to making sure that a long term impact is not created.

Mr. Webb indicated that it was his idea to design at regular intervals lead off areas so that there are no long stretches of driveway carrying storm water. Mr. Webb explained that it isn't volume he gets concerned with but instead velocity. Velocity causes concern because of the speed of the running water has a cutting force.

Mr. Ryznar again asked how critical it is that the work performed actually follows the design. Mr. Webb indicated that this will fall on the town staff to perform inspections. He also mentioned that sometimes commissions require an environmental inspector to be present to inspect the adherence to the plans.

Mr. Whitney directed commission members to the maps again to view the contours he has indicated which reveal pitch at different segments along the drive and how they will direct the flow of water. He referenced a road he believes to be a great example of how well this idea can work, Camp Workcoeman Road. Along with Roger Hurlbut, they reconstructed this mile long gravel road. Mr. Whitney concurred with Mr. Ryznar saying to some degree, it needs to be "eyes in the field" to make sure the plan is followed.

Mr. Troy LaMere praised the three pipe design as a better alternative than the plan presented in August. He expressed a concern with the narrow aspect of the driveway, going from sixteen or eighteen foot driveway down to a ten foot driveway. Mr. Whitney explained that while the travel way is ten feet, with the three foot shoulders, it actually is a sixteen foot driveway.

Ms. Anne Hall also praised the three pipe design. She questioned Mr. Webb as to why putting the house on the other side of the wetlands did not meet the reasonable and prudent alternative. Mr. Webb indicated that it does not have to go on the other side of the wetlands but putting it on the other side of the wetlands is a more prudent and feasible alternative. He continued by explaining that there were several factors of why it is being proposed to locate it where it is. One factor is the steep slope would necessitate the applicants to have to cut into the bank, would have to have a lot of cut and would need to bring in fill to allow some kind of yard. This would be true even with a walkout basement, according to Mr. Webb. He mentioned also that the septic system would be more substantial. He concluded by indicating that everything would work but at a greater expense and a less desirable location. He mentioned with a steep slope, they would have to put a little more thought into the grading to handle the water runoff. He said while it might be feasible, it is not as prudent.

Mr. Whitney also addressed Ms. Hall's question pointing out that the location discussed before the wetlands crossing would be located closer to existing houses. He also said that for aesthetic reasons the proposed house location is the most desirable area.

Mr. Sadlowski inquired to Mr. Webb and Mr. Whitney that even if house was put on the hill, is it likely that at some point there would be a crossing put in to access that back yard for firewood collection anyway. Mr. Webb indicated that this notion makes sense. He referenced that there was a historic crossing there which was the old style where people would drive through the wetlands.

Attorney John Starble, Starble & Harris, LLC, of 245 Steele Road, New Hartford, spoke on behalf of the three Steele Road abutters, **Ed Archacki** and **Sherryll Levix** of **271 Steele Road**, **Gail Emory** of **257 Steele Road** and his wife, **Jennifer Starble** of **245 Steele Road**. Attorney Starble distributed binders that contained exhibits he would reference in his address to the commission.

Attorney Starble opined that the application should be denied because the applicants failed to show that there is no feasible and prudent alternative to crossing the wetlands. The issue according to Attorney Starble is not whether it is the best crossing but instead whether they need to cross the wetlands at all.

He stated that in his opinion the applicant's own experts have been candid that the applicants do not need to cross the wetlands. Attorney Starble argued that Mr. Webb's own comment that everything would work in the alternative area, west of the wetlands supports this position. Attorney Starble asserted to commission members that according to Connecticut General Statutes Section 22a-41, once the commission has made a finding that there is significant activity associated with the application and is marked for a public hearing, a permit shall not be issued unless the commission finds on the record that no feasible and prudent alternative exists. He allowed that while alternatives have been presented at the hearing, they are not the type of alternatives the legislature was referring to. According to Attorney Starble, the legislature was not talking about alternatives to doing more impact on the wetlands but instead talking about alternatives that have less impact or no impact. In his presentation, he stated that the applicants have not made an attempt to show less impact or no impact at all. He opined that this was not because they forgot to do it, but because they know they could build in a different location.

Further, Attorney Starble disagreed that the commission has discretion once they find significant activity and have a public hearing. He maintained that the applicants have not shown the absence of feasible and prudent alternatives.

A second issue Attorney Starble addressed is the width of the proposed driveway. Among the original plans, Mr. Whitney's design included an eighteen (18) foot wide driveway in case the applicants wished to subdivide later. Attorney Starble maintained that commission members are not permitted to consider future development when considering the application. He asserted that members are only permitted to consider "as of right uses" that exist. Attorney Starble stated that should the crossing be approved at all, it should only be as wide as necessary.

In the package distribution Attorney Starble provided to the commission members, he directed their attention to communications from engineers he and his clients engaged, Meehan and Goodin. Attorney Starble indicated that this engineering firm reviewed the various iterations of the drawings. He noted that the drawings have changed quite a bit and noted that this is a different application from

the one that was submitted a couple of months ago with the addition of a longer driveway and more culverts. He noted further that one thing that hasn't changed is that the applicant never considered the alternative of not crossing the wetlands. He directed commission members' attention to Tab 7, containing three reports from Meehan and Goodin

Attorney Starble reported that Meehan and Goodin received various versions of the plans as they continued to be revised but have indicated in a letter of September 2, 2014, that from an engineering standpoint, there are feasible and prudent alternatives to filling and eliminating wetlands and as such, the application should be denied. Attorney Starble then referenced Item #5 statement of the applicants' application implies that the only alternative that exists is to cross the second wetlands where it is wider. Attorney Starble attested that this is not true. Attorney Starble reiterated that this section requires the applicants to provide alternatives with less impact not more impact

He pointed out that the whole application assumes that you have to build to the east of the wetlands and that's just not accurate, according to Attorney Starble. He continued quoting from the correspondence, saying, "The most obvious feasible and prudent alternative would be to build a house on the large westerly area that's closer to town hill road. Septic systems on such hills are not unusual throughout most of Connecticut and no negative impacts. That area certainly meets the zoning requirements and is suitable for a single family house." Attorney Starble opined that this is a non issue because Mr. Webb admits that this is "doable". Further, Attorney Starble opined that as far as additional expenses associates with locating the house to the east of the wetlands, the difference is length of the driveway (500-700 feet to the east versus 2300 feet with a house to the west of wetlands). He also discussed unexpected environmental impacts with a longer driveway due to runoff, the possibility that it is not maintained properly, the possibility of it not being built properly, or the possibility that the design doesn't work. Unexpected consequences of a driveway this length is a risk, according to Attorney Starble. According to Attorney Starble, the statute is interpreted to say if someone doesn't need to touch the wetlands, the permit should be denied unless they show you that they have to cross it.

Attorney Starble continued that another issue that was raised with the Meehan and Goodin report is the concern with all the runoff from the proposed driveway includes part of it going into ditch. They reported that the ditch stops but that it still would have slopes with no level spreading occurring. According to Mr. Starble, if it were designed in accordance with DEP standards, specifically erosion control and sedimentation control guidelines of Connecticut, you'd have to go down to an area where there would be less than 5% slope. At that point, according to Attorney Starble, you'd have a level spread among them and then there'd be sheet flow that would dissipate there. Indicating on the map at the proposed location of the applicant, he reported that they are not going to reach that there because there is more of a slope at that location. He noted the plunge pool there but asked what happens with a ditch running into a plunge pool. He concluded that the low point is the wetlands so if dissipated the runoff the right way, you'd be going into the wetlands. Attorney Starble maintained that this is still going to have erosion and sedimentation problems.

Attorney Starble continued that from a legal standpoint, those alternatives are not alternatives at least not the alternatives that the legislatures were talking about. He asserted that the applicants have not shown alternatives with lesser impact. Further, he asserted that the applicants recognize that one exists and that it is to build on the location before the wetlands crossing.

Attorney Starble then detailed a history of the property. He asserted that in an application from 1987 wherein approval was granted for three building lots, these same applicants had sought and been granted a permit for the location of a home precisely where Attorney Starble is presently asserting to be a feasible and prudent alternative, one not necessitating a wetlands crossing.

Attorney Starble then referenced a recent example of an application very close to the site of the subject property of the current application that was denied based on the feasible and prudent standard. The example cited was 430 Town Hill Road which centered around applicants seeking to locate a barn in an area that was in the wetlands. As Attorney Starble described it, the commission sought to clarify whether the applicant had needed to locate the barn in the wetlands, the applicants has responded that they did not but that they'd like to and that the commission rejected the application because the applicants had not met their burden of proving the lack of a feasible and prudent alternative.

Attorney Starble then provided examples of wetlands crossings with other area driveways designed by Mr. Whitney. He noted that originally Mr. Whitney had said on the record that the applicants want a bigger driveway because it's better way of doing it. Attorney Starble noted that unless it was a shared driveway, single family residences typically included a ten foot wide driveway. Only shared driveways were designed at eighteen foot in width, according to Attorney Starble. He then opined that if commission members find there should be a crossing, it should be kept to only ten feet.

Mr. Hall then asked Attorney Starble to indicate the location of the properties on the map of the clients he is representing. As the properties were not reflected on the maps, Attorney Starble indicated their general location.

Mr. Hall then offered a clarification regarding the 1987 and 2007 hearings on the subject property that Attorney Starble had previously referenced. Mr. Hall reported that he was a commission member during these hearings. As Mr. Hall recalls, the concern of the commission at that time was the driveway crossing for the property immediately to the north of the property, which had been created but had no feasible way of accessing it.

Attorney Starble then requested to put into the record, Notices of Intervention, by the five abutters pursuant to the statute. He identified the five abutters as: Ed Archacki and Sherryll Levix of 271 Steele Road, Gail Emory of 257 Steele Road and John and Jennifer Starble of 245 Steele Road.

Attorney Caleb Hamel asked Attorney Starble if he had copies for the applicants. He indicated that he could provide copies. Attorney Hamel then inquired as to whether a representative of Meehan and Goodin was present at the meeting. Attorney Starble responded that one could not be presented but that the firm requested the reports be submitted. The commission granted the applicant a chance to review the documents.

Mr. Whitney responded to points raised by Attorney Starble. Mr. Whitney indicated that he would never design a driveway without shoulders. He referenced a copy of the site plan he prepared for Guy LaPlante, owner of 81 Winchester Road, reflecting a driveway with a ten foot wide travel-way with two foot shoulders. Mr. Whitney commented the slope at this location is flatter than the slope present at the site of the subject application. He further commented that it is a critical component of a driveway to have shoulders.

Mr. Whitney then requested to read a letter from Town Engineer, Roger Hurlbut, dated today:

“Memorandum Roger Hurlbut, Town Engineer

RE: Schiffert driveway

I have reviewed the plans (4 Sheets Prepared for Roger J. and Linda Schiffert, Lot 005-3, Culvert Analysis Report Prepared by David Whitney and Revised Through September 25, 2014)

- It appears Mr. Whitney has addressed my written and verbal concerns related to the wetlands crossings for the proposed driveway.
- The hydrology and hydraulic calculations submitted appear correct and reasonable.
- The erosion sediment controls appear to be sufficient for the work proposed.
- The applicant should have some additional hay bales on site to be placed across the road in the event of heavy precipitation.
- The orange safety fence or flagging limits of clearing should be established and checked by the wetlands enforcement officer prior to tree cutting be undertaken.
- The applicant should consider paving at least within the regulated area the 10% slope driveway west of the wetlands area where the three culverts are proposed to reduce the potential for erosion and sediment tracking towards the woods.”

Mr. Whitney opined that Mr. Hurlbut’s hay bale request seemed reasonable. Mr. Whitney responded that with regards to the fifth bullet point as outlined in Mr. Hurlbut’s memorandum, he put a note on the plans that there would be orange safety fence typical, showing it on the outside of the wetlands crossing. Mr. Whitney indicated that he had amended this to not requiring orange safety fence but instead allowing stakes with orange flagging or hang orange flagging on trees. He described the intent was to clearly delineate, before any construction started, what the limits of clearing were to be at the wetlands crossing.

Mr. Whitney indicated that regards to the paving requirement as outlined in Mr. Hurlbut’s memorandum, the applicant would consider it but would not make a commitment at this point. Mr. Whitney explained that the goal was to try to get the slope of the driveway below the grade where pavement was mandatory and that this has been accomplished in his design. In regard to the letters from Meehan and Goodin, Mr. Whitney commented that engineers can in good faith disagree with details of design but in his opinion, his design meets good engineering practice. Mr. Whitney continued that if this project goes forward and the commission does decide to approve it, a condition that might be included in addition with Mr. Sadlowski monitoring the construction, is that the design engineer, himself, be involved. Mr. Whitney concurred with Mr. Ryznar’s point that it is important that things get constructed properly. Mr. Whitney commented that he would certainly be willing to undertake that task if it was a requirement.

Mr. Sadlowski clarified that Mr. Whitney mentioned it was important for driveways to have a two to three foot 2-3 foot shoulder. He asked Mr. Whitney to explain why this is so important. Mr. Whitney explained several factors why the shoulders were vital: snow storage and safety reasons. Mr. Whitney indicated he considered it unsafe to drive at an edge of a driveway without some shoulder.

Attorney Slater then indicated that he has an opportunity to take a look at the verified Notice of Intervention that had been submitted under the Connecticut Environmental Protection Act, CGS 22A-19. He opined that the closest to a substantive sentence is in Paragraph 4, “...in particular, the

subject application seeks to disturb Hallock Brook and surrounding wetlands and water courses with a proposed driveway even though there are more than one feasible and more prudent alternatives for the driveway location that involve no impact to the wetland courses.” Attorney Slater deemed this as important because it relates to one of the most important questions asked by Mr. Sadlowski, concerning the credentials of Mr. Webb. Attorney Slater attested that there was no other wetlands officer present at the public hearing. Further, Attorney Slater indicated there is no testimony of a wetlands expert in the submissions from Attorney Starble.

Attorney Slater pointed out that Mr. Webb has evaluated the plans proposed under this application. Attorney Slater acknowledged that the wetlands are protected under the Wetlands Act and that the act provides protection for the functions of the wetlands. He pointed out that Mr. Webb has opined that the design proposed in the application protects the functions of the wetlands on the subject site. While there is some filling of the wetlands, Attorney Slater reminded the commission that Mr. Webb has provided testimony that the wetland serves purposes that he has evaluated and identified and that even after filling and construction is done, those purposes will not be impaired at all.

Attorney Slater even though a public hearing has been held, there are instances that an applicant does not have to show a feasible and prudent alternative. He referenced *Unistar v. Putnam Inland and Wetlands and Water Courses Commission*, an instance where there was a public hearing involving a 33 lot subdivision, along with hotly contested experts on both sides. According to Attorney Slater, ultimately what the court concluded was that even though it went to a public hearing and the statute does say the commission is supposed to review feasible and prudent alternatives, that there was no substantive evidence that the commission in that case could have relied on to find that there were any adverse impacts because of the way it was designed. If there are not any adverse impacts, then there are none to reduce, according to Attorney Slater.

Attorney Slater reminded commission members that Mr. Webb has indicated from a functional standpoint, there are no adverse impacts. Attorney Slater again pointed out that there was no other expert present at the public hearing to contradict Mr. Webb’s testimony.

He advised commission members that as lay people, they have to rely on those technical findings that Mr. Webb has submitted into the record. Attorney Slater continued that the Supreme Court has stated in reviewing its case law, specifically the *Sam Perry* case. In that case, there were alternatives that would have reduced the impact: fewer lots, fewer crossings. That needed to be evaluated under the feasible and prudent alternative test, Attorney Slater explained. He pointed to the *Inland Wetlands Regulations* and the “alternative test” as one that examines “economically reasonable in light of the social benefits of the activity”. Attorney Slater provided an example to the commission that if a hypothetical property with one hundred acres wanted to put in houses necessitating a crossing of wetlands but that across the wetlands, it was still possible to develop in a much smaller area without that crossing, a commission has a discretion to find that the crossing: 1. In light of the fact that it’s not going to have any impact on the function of the wetlands, as the undisputed expert testimony states; and 2. In light of the reasonable use of the land, reaching a determination that you cannot have that crossing because you could put a house in that other area is not true to the “feasible and prudent alternative test” according to the court in the *Sam Perry* case. According to Attorney Slater, commission members get to consider all of the factors in making an evaluation. The question he posed to them is it economically prudent, that in light of the facts with the way this is designed and the testimony of Mr. Webb, that someone should have to put their house on a steep slope?

Attorney Slater stressed that these cases are approved or denied on a case by case basis and that because approval was denied in one situation, the commission must now deny approval in this application. Different facts, different properties, and different fill amounts are the characteristics that account for why the commission is vested with the discretion to decide after all of the evidence is considered as to whether there is an adverse impact, according to Attorney Slater.

Ms. Schroeder Perez Nancy asked Mr. Webb whether building a house to the west of the wetlands a feasible and prudent alternative. Mr. Webb responded that anything is feasible from an engineering standpoint but that he did not think it was prudent. He reiterated that the slopes are so steep that it would require having a massive cut in the front yard, 15-20 feet, and it would need to be stabilized in some way. He further stated that in order to stabilize that, would want a minimum of 2:1 slope which would result in an even larger cut.

Attorney Hamel then addressed the Notice of Intervention submitted by Attorney Starble. He explained that every party to a proceeding owes to each other as well as one of the obligations that are owed to the general public, is the obligation of due process. He explained that this includes the right to cross examine witnesses, right to hear and weigh the evidence on any side. In this case, Attorney Hamel explained, that while you have letters from Meehan and Goodin, they were not present to answer questions from commission members, the applicants, or the general public. He indicated that case law is very clear that a basic requirement of filing a verified Notice of Intervention is that it must be supported by expert testimony at the time of filing and that means more than just having letters there. If an expert provides written testimony but is not present to answer questions about that testimony or be cross examined then that evidence must be stricken from the record, according to Attorney Hamel. He concluded that in this instance, these letters from Meehan and Goodin and the other testimony that's in this binder needs to be removed from the record and can't be part of commissioner's consideration.

Attorney Starble attested that he and his clients have not opposed as members of the public, but instead as abutters. He indicated that it is there as an additional "basis for standing" under the statutes to protect the wetlands. He continued that he disagrees with regards to the standing issue, if the commission makes that determination and advise them not to have the letters as part of the record that it does not affect the key legal issue of this case which is: the issue of feasible and prudent alternatives. Attorney Starble requested that the commission deny the application.

Mr. Whitney stated that in his opinion the party who would be most potentially adversely impacted by a presentation of a report by an opponent of the project without presenting the witnesses is obviously the applicant. Mr. Whitney indicated that the applicant has a right to demand that they're here and that he thinks the commission should not consider that evidence. But in this particular case, he continued, he has no concern with the commission reviewing those reports because it is simply an engineer making comments regarding another engineer's plans. Mr. Whitney also commented that there is no report in the binder submitted by Attorney Starble from an environmental consultant that reaches any conclusion with respect to environmental impacts. Mr. Whitney opined that while the issue might be a good one to raise as a point of law, it is not an important one in this case. Further, Mr. Whitney requested that the hearing not be kept open for the purpose of getting these experts in because the applicants do not need to question them on anything submitted in those reports.

Mr. Hamel indicated that if the applicant has no objections then the question is whether the public has any objections. He indicated that he is hesitant to advise the commission to exclude evidence from the record if the applicant and the public have no problem with it being included. Mr. Hall opined that he believes the commission has heard what they are likely to hear with regarding the substance of this application.

Mr. Whitney submitted the plans showing alternatives to his design for the record.

MOTION: Mr. LaMere, Ms. Hall, **close the public hearing in the application of Roger J. & Linda Schiffert – Map 30 Block 30 Lot 005-3 Town Hill Road – Driveway crossing watercourse for one single-family residential house, including installation of a culvert and placement of fill in wetlands. Area of wetlands disturbance less than 0.1 Acre; unanimously approved.**

B. Michael Bernstein – 698 West Hill Road – Removal of collapsed and collapsing lake-front retaining wall with loose rock and rip-rap to prevent erosion. Clean up of crumbled concrete sections of wall that have fallen into lakebed.

Mr. Tom Grimaldi, Hiltbrand Engineers and Surveying, addressed the commission on the application and distributed some plans and photos that were taken on the subject property.

He reported that Dufour Surveying prepared an A2 survey as well as a T2 survey, a field topographic survey. He explained that the applicants would like to replace the entire retaining wall. Mr. Grimaldi directed commission members to Photograph 1, reflecting a portion of the wall that has caved in just to the left of the existing stairs. He then directed their attention to Photograph 2, reflecting various vertical and horizontal cracks. He pointed out for them where the toe of this wall is starting to fail.

Ms. Schroeder Perez inquired as to whether the stones she was viewing in the photograph were from the wall. Mr. Grimaldi responded that those stones were put there when it was built and that the wall is behind there. Mr. Grimaldi then directed commission members to Photograph 3, which he identified as the staging area of is being looked at for construction purposes. He indicated that Paragraph 4 is what the wall will look like once completed. Mr. Grimaldi identified Mr. Gomez as the contractor and indicated that he has done several of these walls in this lake area. Mr. Grimaldi stated to the board that the wall has been in its present location a long time but that the footing is now failing. He directed commission members to Photograph 5, which is a representation of the wall in a vertical form, looking down where the wall is failing. Photograph 6 revealed for members the crack in side of wall as well as the wall leaning into the lake, indicating danger of it falling in. Photograph 7 provided an entire perspective from the stairs.

Mr. Grimaldi reported that the applicants are seeking to do is 100' of frontage and replace the entire wall. He stated that the stairs will remain. He reported that the applicants would like to put a proper footing, necessitating the use of a backhoe and hand work. There would be a temporary stock pile area for debris as well as a temporary stock pile area because to get the stone in behind the wall they have to pull some back and for ease of work to have a slope. The reinforced concrete footing will rise above the water elevation of the lake. The stone wall will start from there and run up, according to Mr. Grimaldi. He also said the footing is twenty (20") inches wide and approximately two (2') feet into the lake bed and it will rise above the water elevation by a few inches. He said this way will have a steady, solid footing so as water beats up against it, the applicants won't have to worry about erosion around the rocks.

Mr. Hall asked Mr. Grimaldi whether he thought in his professional opinion that there is any point in extending this footing further down, and extending this drainage material further down, to reduce possible stress on this wall when the lake is in full draw down. Mr. Grimaldi explained that there were two things he looked at: definitely bringing the stone down to the lake body and the footing will be below the lake body. Mr. Grimaldi said the big question is the lake going to be drawn down enough this year for them to actually get the work done that they need to do. Mr. Grimaldi reported that he did instruct the applicant that in the event that when they are digging the footing, they hit ground water, they really need to stop and that this project would then need to take place during the larger draw down period of the lake.

Discussion ensued about how much draw down is this year.

Ms. Hall asked Mr. Grimaldi if aside from the footings if the applicants were changing anything about the length of the wall or the height of the wall or whether this is just a repair. Mr. Grimaldi responded that the applicants are not seeking to change the height or width. He reported that the width presently is eighteen (18") inches, that the height is five (5') feet and that the length will remain the same. He mentioned that the top of the wall, as shown on the detail, will have a small three (3") inch batter to it as well as a little bit of a slope so that as surface water runs over it and it won't sit on the wall.

Ms. Schroeder Perez clarified that the backhoe will be up in the yard and not in the lake bed. Mr. Grimaldi described the access as being down the driveway, just between retaining wall as shown on map. Mr. Ryznar commented that the project sounds great but that its success depends on sufficient draw down. Mr. Hall reminded the commission members and the applicants that if the commission grants a permit and the work could not be done this year, Inland Wetland permits last for five years.

The chairman noted into the record the legal notice for the public hearing which was published a local newspaper appropriately. Zoning Enforcement Officer Steve Sadlowski confirmed to the commission that the applicant did send notice of public hearing to the abutters of said property.

MOTION: Mr. LaMere, Ms. Hall second **to close the public hearing in the matter of Michael Bernstein – 698 West Hill Road – Removal of collapsed and collapsing lake-front retaining wall with loose rock and rip-rap to prevent erosion. Clean up of crumbled concrete sections of wall that have fallen into lakebed; unanimously approved.**

MOTION: Ms. Schroeder Perez, Mr. LaMere second **to amend the agenda to examine the application of Colin Fitzgerald as a Determination of Permit Need; unanimously approved.**

2) New APPLICATIONS:

A. Colin Fitzgerald, Determination of Permit Need

Mr. Colin Fitzgerald, of Troop #319, a boy scout troop in New Hartford, is seeking to attain Eagle Scout status. To that end, he is seeking to undertake an Eagle Scout project, which as he explained it must benefit a religious organization, a school, or some type of organization other than his troop. He indicated that he has chosen to do a project at Trinita, a retreat center located at 595 Town Hill Road, which is in need of some foot bridges on one of their trails. Currently, the first trail is about fourteen feet long. It does have a creek but only has water running through it after a storm and is

presently dry. Mr. Fitzgerald provided some rough sketches for commission members. The second foot bridge on the subject property appears to be about ten feet long and the creek underfoot also is presently dry. Ms. Schroeder Perez inquired as to what the current foot bridge is composed of. Mr. Fitzgerald indicated that his plan is to compose them of pressure treated wood.

Ms. Hall clarified that this is an existing trail system, formerly used as a Stations of the Cross, but now functions more or less as a hiking trail. Ms. Hall asked whether these bridges would have any footings.

MOTION: Ms. Schroeder Perez, Ms. Hall second, that **the commission declares this as a non-regulated use under Section 4.2(b) of the Inland Wetlands Regulations; unanimously approved.**

MOTION: Mr. LaMere, Mr. Ryznar second, **to modify the agenda to alternate the order of the Pending Applications; unanimously approved.**

3) PENDING APPLICATIONS:

A. Michael Bernstein – 698 West Hill Road – Removal of collapsed and collapsing lake-front retaining wall with loose rock and rip-rap to prevent erosion. Clean up of crumbled concrete sections of wall that have fallen into lakebed.

Ms. Perez indicated that if the applicant could get the project done this year before the wall falls into the lake, it would be most ideal. Ms. Hall suggested that if the applicants hit water, they may need to reconsider how deep their footings are going. Mr. Hall reiterated his position that if the applicant could get the footings deeper, he ought to.

MOTION: Ms. Schroeder Perez, Mr. Ryznar second, **to approve the application for 698 West Hill Road, of Michael Bernstein, to remove collapsed and collapsing lake-front retaining wall with loose rock and rip-rap to prevent erosion with the usual conditions; unanimously approved.**

B. Roger J. & Linda Schiffert – Map 30 Block 30 Lot 005-3 Town Hill Road – Driveway crossing watercourse for one single-family residential house, including installation of a culvert and placement of fill in wetlands Area of Wetlands disturbance less than 0.1 Acre.

Mr. Hall invited Attorney Hamel to educate the commission on the feasible and prudent alternative test. Attorney Hamel indicated that in general, the feasible and prudent alternative test is to make sure whatever it is that an applicant is proposing is, in short, the least impactful version. He opined that it is certainly not a requirement that there be proof that there is no feasible and prudent alternative. Attorney Hamel indicated that commission members must arrive at a finding by weighing the alternatives that have been presented. He indicated that in being presented with the different layouts, one of the things commission members will have to do during deliberation sessions is look at each of those driveway layouts and determine whether they see them as feasible and whether they're prudent and ultimately if they'll produce less of a wetland impact. When it comes to the issue of what was presented by Attorney Starble, Attorney Hamel highlighted one of the statements of Meehan and Goodin. In the report of September 7, 2014, Mr. Goodin says on page 5, "the applicants have failed to prove that no such alternative exists and consequently the application should be denied." The standard that would need to apply to concur with Mr. Goodin, according to Attorney Hamel, is that the applicants would have to prove a negative.

Attorney Hamel stated that by simple logic, one cannot prove a negative. He continued that one of the basic requirements of the statute is that you weigh the character of the injury to the wetlands and you weigh the character of the injury to the property. Attorney Hamel said that one of the things for the commission to consider is the issue of the west versus the east portion of the property.

Attorney Hamel quoted from Connecticut General Statutes Section 22A-41(5), which serves to define reasonable use, "the character or degree of injury to or interference with safety, health, or the reasonable use of property which is caused or threatened by the proposed regulated activity."

Commission members were advised that if they have additional questions, they could continue the meeting, submit the questions to Attorney Hamel who would then in turn write an opinion letter. Mr. Ryznar indicated that this is the approach he would like to take to allow more time to really weigh components of what he characterized as a complicated application. Mr. Sadlowski advised that commission members should review the application that evening together so that Attorney Hamel could take the comments and concerns, leaving with some direction as to which way to continue.

Mr. Hall suggested each member share their impressions but to refrain from indicating which way they would lean in a vote on the application. Ms. Schroder Perez asked what would putting a house on the west side do as opposed to putting it on the east side. She opined that what has been presented does provide for a really good plan to get across the wetlands but was unsure as to what the steep cuts that would be part of putting the house on the east side. She is unsure what the impact be to the wetlands or the property. Mr. Sadlowski indicated that he is unsure what the record will reveal beyond a huge cut and a huge fill. Ms. Schroder Perez reiterated as to what the impact of this would be. Mr. Hall reminded commission members that Mr. Webb that the soil conditions on the eastern portion of the property are considerable more favorable for a septic system.

Ms. Hall recalled that there was more information from the August, 2014 minutes regarding this issue. Mr. LaMere concurred.

Ms. Hall articulated her question for lawyers as to when commissioners are looking at feasible and prudent alternative issue, should consideration be limited to the impact on the wetlands or should consideration as to whether it is feasible and prudent for the entire site. Attorney Hamel indicated that commissioners are not just looking at the issue from a wetlands impact. He said there are a lot of other considerations to take into, such as the character of the injury to the property. One of the basic points in the prudent aspect of their considerations is the cost, according to Attorney Hamel. An example Attorney Hamel presented is the applicants could build a wetlands crossing that cost \$10M, such as a super high bridge. Attorney Hamel explained that this would have absolutely no impact to the wetlands but it would definitely not be prudent.

Attorney Hamel reported that there is also the feasible aspect to the issue as well. This translates into whether or not it is sound engineering to build on the western portion of the property. Septic considerations and cut and fill considerations come into their deliberations in this aspect.

Mr. Ryznar stated that as a commission member he has always thought his role to be that of protector of wetlands because they are very valuable and that they are what keep the water clean. He repeated his concern about the sedimentation and erosion directed towards the wetlands. He also commented that he believes Dave Whitney to be an excellent engineer and believes Clint Webb to be an expert in his field but do not believe that either one of them could make a statement with one

hundred percent certainty that a design on paper and put in practice can achieve a one hundred percent guarantee. He continued that the only way to have a one hundred percent guarantee is to never touch the wetlands in the first place. He also questioned whether the commission would be setting a precedent allowing applicants to cross wetlands just for the purpose of putting a house in a certain location.

Mr. LaMere indicated that it is for this reason that he chose to visit this particular property. His concern is with protecting the wetlands and he said he wanted to see firsthand whether there was an alternative to this location. He reiterated his extensive career in construction, both residential and commercial for 22+ years. As a contractor doing the excavation on this location, Mr. LaMere opined that if it were done on this hill prior to the wetlands crossing, he envisions much more potential for problems in that area, west of the wetlands. The location of the proposed site by the applicant appears to have less potential for harm to the wetlands, according to Mr. LaMere. He addressed the opposing neighbor, understanding his possible reluctance to potentially have a home in his view but does not think this should be a reason to not protect the rights of the applicants to locate their house wherever prudent to do so. The notion of having only one house on the site, as opposed to a subdivision, is also an appealing feature of the application.

Ms. Hall indicated that she would like an opportunity to see the minutes from August, 2014 just because there was some pertinent information in them.

Mr. Hall said that he would like to see Attorney Hamel further study the whole issue. Mr. Hall said he thinks that the technical issues as far as construction have been addressed. Mr. Hall said the question of exactly what besides the technical factors the commission may consider and what exactly is involved in a determination of feasible and prudent alternative are the items that need to be addressed in greater detail.

The commission continued the application to the next meeting.

4) MEETING MINUTES:

A. September 3, 2014 regular meeting.

MOTION: Mr. LaMere, Ms. Hall second, **to accept the September 3, 2014 minutes; Ms. Schroder Perez abstained, Mr. LaMere, Ms. Hall, Mr. Ryznar, and Mr. Hall in favor, motion approved.**

5) INLAND WETLANDS OFFICER'S ENFORCEMENT REPORT.

Mr. Hall reported that Connecticut Association of Conservation and Inland Wetlands Commission (CACIWC) has a convention on November 15, 2014 in Wallingford and offered details for any commission member who might be interested in attending.

6) CORRESPONDENCE:

Mr. Hall reviewed members and the duration of their terms in order to respond to a questionnaire.

7) OTHER BUSINESS PROPER TO COME BEFORE THE COMMISSION:

None.

MOTION: Mr. LaMere, Ms. Hall second, to adjourn at 9:40PM; unanimously approved.

Respectfully submitted,

Pam Colombie
Recording Secretary

DRAFT