

From: Carrie Vibert March 2, 2012 11:20:30 AM  
Subject: Planning Commission Minutes 02/14/2012 ADOPTED  
To: SimsburyCT\_PlanMin  
Cc:

PLANNING COMMISSION MINUTES  
FEBRUARY 14, 2012  
REGULAR MEETING

I. CALL TO ORDER

Michael R. Paine, Chairman, called the meeting to order at 7:02 p.m. in the Main Meeting Room of the Simsbury Town Offices. The following members were present: Ferg Jansen, Kevin Prell, William Rice, Tina E. Hallenbeck, and Robert Kulakowski. Also in attendance were Hiram Peck, Director of Planning, Janis Prifti, Commission Clerk, and other interested parties.

II. SEATING OF ALTERNATES

Chairman Paine appointed Commissioner Kulakowski to serve for Commissioner Drake.

III. APPROVAL OF MINUTES of January 24, 2012

The minutes were amended on Line 30, to change "2011" to "2012"; and to change "pool barn" to "former pool barn". Commissioner Hallenbeck made a motion to approve the January 24, 2012, minutes, as amended. Commissioner Rice seconded the motion, and it was passed with Commissioners Hallenbeck and Prell abstaining.

IV. REFERRAL FROM BOARD OF SELECTMEN RE: PROPOSAL BY SIMSBURY LAND TRUST TO REROUTE TULMEADOW WOODLOT HIKING TRAIL

Chairman Paine stated for the record he is a member of the Coon Club and after discussion with Mr. Peck it appears will not have to recuse himself.

Donald Rieger of 9 Stodmore Road provided maps to the Commissioners of where the Land Trust proposes extending its trail through the Tulmeadow Woodlot across Town open space connecting to Town Forest Road. His first map showed the existing pathway through farm fields, the existing blazed trail through the Woodlot, and the long used informal path through Town open space; however, the path down to Town Forest Road is little used and

very informal traveling along the Coon Club property line. He said the Town Plan of Conservation and Development is very supportive of hiking trails and the proposed trail is in Town open space with very attractive vernal pools. He stated this is a very important corridor and connects to Town Forest Road which is also the Farmington River Greenway, a designated Connecticut greenway, which connects to various trails in Stratton Park and in Town Forest and the Ethel Walker property; it makes a nice woodland connection to the trailhead at 60 Westledge Road and into the Land Trust West Mountain Trail, also a designated Connecticut greenway.

Mr. Rieger stated the bottom 500 feet of trail currently travels along the property line with bright yellow no trespassing signs - it is a precept of trail design to not run along a property line because trail designers like to control what the walker sees. He said the Town Engineer prefers they stay about 50 feet parallel to the property line and is satisfied with the proposed route. He has been in touch with Leo Kane, in charge of property for the Coon Club, who has provided assurance that all shooting done at their facility is highly regulated, completely safe, and even though walkers would not be in danger he agreed it would be better to move walkers off the property line using a blazed trail guiding walkers straight through the open space which avoids Coon Club private property to the west and Town property to the east. He said the gradient in this area would also prevent walkers from wandering off the trail. He said it is about 1 1/4 miles from Town Forest Road through the woods to Westledge Road and requested a favorable recommendation to the Board of Selectmen.

Chairman Paine stated that over the years the path has wandered onto Coon Club property in order to avoid physical obstacles walkers encounter and moving it off the property is safer. Regarding fencing on Town property, Mr. Rieger did not know of any; the Town Engineers were satisfied with the relocation of the trail. Chairman Paine stated there are a number of other trails on Town property on the other side of Town Forest and the golf course. Mr. Rieger said there is a trail from North Saddle Ridge Drive, Land Trust bog, and segments on the West Mountain Trails cross Town open space. Regarding increased liability, Mr. Rieger said previously a private landowner who made his property accessible to the public and didn't charge people was shielded from liability from slips and falls and ordinary injuries, but a municipality was not. He said last year the legislature changed the law and the Town now has substantially that same shelter from liability for trails in the woods, although developed facilities like Simsbury Farms do not. He said the blue tapes on the trees now mark this proposed trail.

Commissioner Jansen made a motion to approve the proposal and amended the motion to add that the reason for the recommendation for approval is

because it is also covered in the Plan of Conservation and Development. Commissioner Prell seconded the amended motion, and it was passed with Chairman Paine abstaining.

V. DISCUSSION WITH TOWN ATTORNEY: PRESENTATION ON PLANNING AND LAND USE LAW

Chairman Paine explained the document provided breaks out the roles of the Zoning Commission and Planning Commission.

Robert M. DeCrescenzo, Town Attorney, stated the presentation is kept informal and will generate questions. He described the four areas of responsibility for the Planning Commission. He stated the role of the Planning Commission under General Statutes is distinctly set out with a primary responsibility of adopting the non-regulatory Plan of Conservation and Development. He said actions regarding the Plan of Conservation and Development and Subdivision Regulations are legislative. He said a quasi-judicial action regards only the Zoning Board of Appeals for relief from the application of Zoning Regulations for specific property; parts of Subdivision Regulations can be waived by the Planning Commission, but the Planning Commission cannot vary or waive any part of the Zoning Regulations. He said legislative actions are the adoption of Subdivision Regulations and the adoption of the Plan of Conservation and Development. He explained an Administrative Action is the application of Subdivision Regulations to a specific Subdivision proposal and the Planning Commission has far greater discretion in legislative than administrative actions. He said the third obligation of the Planning Commission is to consider proposals under 8-24. He added the fourth obligation is to provide comment on changes to the Zoning Regulations.

He said the Planning Commission, as an administrative body, may not disapprove a Subdivision application on the basis of standards not contained in existing Subdivision Regulations; the Commission's discretion is very limited. He said for conflicts between Subdivision and Zoning Regulations, the Zoning Regulations control - all Subdivisions have to be consistent with Zoning.

Regarding actions by the Planning Commission, he said it is important in considering an application to have firmly in mind whether it is the legislative or administrative hat. He said courts generally uphold legislative actions, as long as they are within the statutory powers and there are no procedural defects to the process that brought the application forward; administrative actions are more restrictive - the basic function is to determine if the application conforms to existing regulations. He

said there is very, very broad discretion in legislative action, such as adopting Subdivision Regulations, so long as the action does not include anything in it contrary to law. He stated short of that, judgment calls and anything Title 8 is silent about within the Commission's purview as a legislative body, you can fashion your own set of regulations. He stated this comes from Title 8 of the General Statutes of Connecticut, primarily 8-23, 8-24 and 8-25; this is important because of the authority provided by the General Statutes to regulate the use of private property. He said the authority dates back to 1920 with the Village of Euclid vs. Ambler where the U.S. Supreme Court said states through their municipalities have the legal authority to create Zoning Regulations and control the use of property; there is no such thing as a common law of zoning - it must be authorized by statute. He said the counterbalance is that courts give great discretion to local zoning authorities to apply their regulations. He said the general rule is you do not have authority to regulate unless it is found in the statutes counterbalanced by the fact that courts generally do not place their judgment ahead of your judgment in applying regulations,

He said another big issue is zoning and the regulation of land through the Zoning and Planning Commissions have constitutional dimensions found in the due process clause of the Constitution that says you can't take people's property without due process of law, a substantive right; and equal protection considerations where you can't treat one property owner differently from another, meaning you cannot apply your subjective discretion differently from one property to another - this is why care must be taken to draft objective subdivision standards to protect people's constitutional rights. He said there is also procedural due process that if the statute set up a certain procedural scheme for a land use board, that procedural scheme must be followed to protect the procedural due process rights of the public, e.g. the statute says you have to receive the application, open the public hearing within 65 days and close it within 30 days and put 2 notices in the paper - if those procedures are violated, it negates the actions of the Commission. He said those are mandatory requirements, but the Commission may have additional requirements which if violated are not mandatory and are discretionary to the Commission. He said discretion given by the courts for substantive decisions does not apply to procedural errors, although for applicants most things are correctable by redoing the previous action. Mr. Peck said it does not usually happen. Mr. DeCrescenzo said most applications require public hearings and mandatory jurisdictional proper legal notice - the legal notice grants the Commission the authority to take an action and without it, you cannot take action. He said it is 65 days to open a public hearing, 30 days to conduct it, and 65 days to act; there is a statute that provides up to 65 days of extension that can be applied to any one of the 3 periods and the applicant must consent to the extension - for certain administrative actions, if you go beyond the 30 days, it is considered to

be approved.

Regarding appeal rights for applicants or abutters, he said it is 15 days from the date of publication. He said there are two types of appeals: 1) the 15-day appeal within the date of publication challenging the action of the Commission, and 2) a procedural one-year constructive notice appeal due to lack of proper notice.

Regarding improper actions or participation by Commission members, he said the first issue is insufficient participation in the application to decide it fairly - a member must be sufficiently acquainted with the issues, evidence and arguments presented at a public hearing and evidence before the agency so as to make an informed judgment. He said if a Commissioner misses a meeting or session, they must listen to the tape and become sufficiently acquainted with the proceedings in order to fairly vote with informed judgment. Chairman Paine clarified that the Planning Commission meetings are recorded for Simsbury TV and could watch the recording of the proceedings to become sufficiently acquainted. Mr. DeCrescenzo stated the member must affirmatively state what they did to become acquainted with the proceeding to make an informed judgment because the applicant has a due process right to have each member voting on the application be sufficiently acquainted with the issues and the evidence to make an informed judgment, e.g. I have listened to the tape, watched the cable TV tape of the proceedings, read the minutes, and read all of the materials in the files submitted at the public hearing, so that after the fact the court will see the member did all they could to become familiar with the proceeding.

He said a second issue relates to pre-determination where there is a presumption members are unbiased with a heavy burden on the claimant to overcome that presumption. He added that while Planning Commission members are not required to be empty vessels with no thoughts and opinions, you cannot base judgments solely on personal opinions. He said someone claiming predetermination can present evidence regarding remarks made by a Commissioner prior to a hearing and it is important to be responsible to the public and not make public remarks or comments of judgment about pending applications in order to protect the applicant's constitutional right. He said court's look at what is on the record.

If no application has been submitted, he said the Commissioners still cannot comment and must avoid bias. He stated the three improper actions by Commission members are: insufficient participation, predetermination, and conflict of interest defined in Statute 8-21 which has also been incorporated into the Town Code of Ethics. He said 8-21 says no member of any Planning Commission and no member of any municipal agency exercising the powers of the Planning Commission shall appear for or represent any person, firm or corporation or other entity in any matter pending before the Planning or Zoning Commission or Zoning Board of Appeals

Exercising the powers of such Commission. He added no member shall participate in a hearing or decision of the Commission of which he is a member upon any matter of which he is directly or indirectly interested in a personal or financial sense. He said it is a very, very high standard and is even higher in the Code of Ethics which has an appearance of impropriety standard; if a subdivision application backs up against your backyard, do you have a personal or financial interest - geographically does it impact you. He said you must make a judgment of whether it impacts you and if you should sit in on the application. He added another consideration is whether you are related to the applicant. He stated Commissioners can go to the Board of Ethics and get their opinion. He stated personal interest is defined as an interest in a subject matter or relationship with a party that impairs impartiality and is not a subjective standard, but an objective standard of whether a reasonable person would believe it impairs your impartiality. He said a lot of investigation and thought is required and it is a good idea to bring it to the Board of Ethics. He said actual conflict is not needed, it is the appearance of impropriety that undermines public confidence requires disqualification. He said the test is whether personal interest reasonably might conflict with your objective ability to act on an application . He stated not only are you disqualified from voting, but you must leave the room and not participate in any way, and the record must reflect that. Commissioner Rice asked what if the member of the Commission is the applicant, can you participate in the public hearing. He said you probably can participate in the public hearing, but would probably be best to have someone else do it. Mr. Peck said sometimes Commissioners sit through an application and prior to impaneling for the vote disqualify themselves, and it would probably be better to disqualify ahead of time. Mr. DeCrescenzo said it is okay if there is a public hearing where new information is learned and a Commissioner realizes they should be recused and then leaves the room.

Mr. DeCrescenzo stated another topic is consideration of evidence after closing a public hearing. He said everything you consider for the application has to be submitted to you at the public hearing while the public hearing is open so that people opposed to the application have the same right as the applicant to present evidence in opposition to the application; they have to know about it, hear it, and have the opportunity to rebut it. He said it gets tricky when you are down to the final days of the 30-day window and the applicant finally brings in the report you've been asking for; opponents have the right to rebut that - in this situation an extension must be given if possible, or you can deny accepting the report. Mr. Peck said he would tell the applicant and the Commissioners the report must arrive at least 5 days before the 30 days expire. Mr. DeCrescenzo said the Commission is the gatekeeper of opponent's right to rebut; both sides must have a balanced opportunity to speak. He said after the public hearing closes anything outside the public hearing cannot be

considered or the decision could be invalidated on appeal, except for Town staff reports that may be needed for analysis of what was received. He said if it seems unfair, it probably violates due process which calls for fairness to all parties, a level playing field, and objective decision-making. However, the audience does not run the Commission and the Commission has every right to set rules and standards to conduct the Commission's business. Chairman Paine asked if the Commission stopped taking feedback from the applicant and public at the public hearing, then the Commission can talk among themselves including the alternate members, then the public hearing is closed and the seated members can have a discussion. Mr. DeCrescenzo said that is correct and the discussion does not have to occur that same evening given the 65-day period, but you cannot bring in additional material to consider outside the public hearing. He said you also cannot go online and discuss the public hearing through emails, tweets, or new technology. He said if you get emails from the public, you have to bring them in, print them, and give them to Mr. Peck; your only response should be "thank you for your email". He said people have a right to address their government, but it must be done in a way that protects everyone's rights. He said the Commissioners sole role is to give a fair hearing and make your best judgment based on the regulation and what you've heard as reflected by the record. He said it is presumed the Commissioners are not experts in planning, but know the regulations and apply them to the applications.

He said the role of counsel is to work with staff to answer any application questions beforehand to address any substantive and procedural issues; generally, their opinions are part of the public records with no attorney-client privilege claimed. He said they generally do not offer opinions on decisions. Chairman Paine stated if the Commission has a question, he or Tina would contact Mr. Peck or you.

He said it is important that everything the Commission does is captured on the Record, in order to be able to defend the Commission on appeal. He wants to be sure the record supports the decisions made; typically, the Record consists of the application and documents filed, legal notices filed, copies of all maps, transcripts of public hearings, and sometimes they draft proposed findings for both sides. He said the court function basic review is to review the record made in the agency proceedings with the appealing party required to prove the action taken by the Commission is not supported by the Record and the Commission acted improperly. He said the court looks at whether the evidence of the Record supports the conclusion reached, unless it is for affordable housing where the burden flips to the Commission proving its decision is adequately supported. He said the standard of judicial review of legislative action is whether the decision is reasonably supported by the record; if you state reasons to support it, as long as you have one the court will support it or the court

will search the record to determine an adequate reason. He said if the Commission discusses the application and a motion is made in a thoughtful process, as a citizen commission you do not have to be "legalistic" about it. Regarding adoption of Subdivision Regulations, Mr. Peck maintains records of the revisions with minutes of the meetings.

Mr. DeCrescenzo stated the standard for review of administrative actions is not too different with the court looking at whether a decision is reasonably supported by the record and consistent with regulations and not in violation of Zoning regulations. He said the standard is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in an issue can be reasonably inferred.

Regarding Subdivisions, he said it is defined in the statutes as the division of a tract or parcel of land into three or more parts and must be for the purpose of sale or development which must be made subsequent to the adoption of subdivision regulations by the town and the first cut does not require approval. He said the date for adopting subdivision regulations is October 6, 1941. He stated a subdivision is any division of land into 3 or more parts subsequent to 1941; so any parcel of land undivided since 1941 and you want to cut off 1 lot, that is not a subdivision, that is the free cut; any division of that original parcel of land subsequent to that is a subdivision. He said it can be confusing because they have to determine the state of the parcel prior to 1941; applicants are supposed to tell them if it is a subdivision and they determine whether it is or not. He said the important words are "for the sale or development"; if in 2012 they want to split it off for agricultural purposes, it is important that the map filed states clearly why it is not a subdivision. He said for a family transfer with 5 lots and in 2012 they want to sell outside the family, the Commission has to be properly guided.

He said a resubdivision means a change in a map of an approved or recorded subdivision or resubdivision if such change a) affects any street layout shown on such map, b) affects any area reserved for public use, or c) mentions the size of any lot therein creates an additional building lot; resubdivisions require a public hearing and public notice. He said there are resubdivisions, modifications of subdivisions, and lot line adjustments which many people want to make into resubdivisions; the critical issue is if you can do something in the subdivision you couldn't do before, it's a resubdivision; if you are changing a lot line, it may just be a modification. He said public hearings are optional for subdivisions but mandatory for resubdivisions, but the Commission can require hearings for subdivisions - it is a notice issue. He said the public hearing can coincide with a regularly scheduled Commission hearing, but the notice is critical and necessary. Mr. Peck said it is critical to get the applicant's cooperation or to determine the correct course well in advance.



Mr. DeCrescenzo said it can be very complicated in determining whether it is a subdivision or resubdivision, but should be worked out before getting to the Commission, although the Commission can disagree. He said another factor is subdivisions filed 60 years ago and the maps are dated and the Deed must be read.

Regarding affordable housing, he said it is of a level of complexity that if an application is received would require a separate meeting, as would environmental intervention.

Regarding the freedom of information act, he said it applies to documents and public meetings. He said as a multi-member agency, you have an obligation to speak to each other about matters before you at regular meetings, special meetings, and emergency meetings if there are any. He said anytime 2 or more members convene to discuss the work of this Commission it should be at a special or regular meeting; it excludes party caucuses at which greater than a quorum can meet to discuss the political implications of an action before you, or social gatherings, or chance meeting is not a public meeting. He added an exchange of electronic information can be a meeting; this does not include invitations to meetings - anything beyond that should be avoided. He suggested Commissioners use their Town email account which is easily accessed for record purposes; all documents relating to public business are available to the public, including notes made at the meetings. He said someone can ask for cell phone records that pertain to Commission business and this applies more to the Chairman; the document is what is available to the public and discoverable, not your computer; you maintain a right of privacy. Regarding site walks, those are special meetings - ask questions, but refrain from expressing opinions; site walks and your personal knowledge of the property are different things - you are allowed to have personal knowledge.

He said the most important comment is that this is an ongoing dialog with discussion and regular communication between him and Mr. Peck.

## VI. DISCUSSION

### A. Town Attorney comments on Subdivision Regulations with input from Town Attorney

Mr. DeCrescenzo said he is comfortable with the draft and suggested scheduling a public hearing in a month; he will put together his comments and discuss with Mr. Peck. Mr. Peck said he will get the document in shape and check with the rest of staff to be sure everything is covered and tentatively schedule for about 1 1/2 months; the document is frozen 2 weeks prior. Regarding public acceptance of the revised regulations format

change, Mr. Peck said he believes the comments will be positive. Mr. DeCrescenzo stated the appendices are terrific and he likes the language about open space and characterized it as a refinement of the current structure. Chairman Paine suggested the 4/10/12 meeting with Commission comments provided by the 4/13/12 meeting. Mr. DeCrescenzo said substantive changes can be made if they keep the public hearing open. Mr. Peck will provide members revised regulations in a few days and use the 2/14/12 date.

Commissioner Kulakowski made a motion to finish Commission Subdivision Regulation revisions by the March 13, 2012, Planning Commission meeting and to hold an open transparent public hearing for all to see the changes. Commissioner Hallenbeck seconded the motion, and it was passed unanimously.

#### B. Budget Discussion/Presentation Schedule

Mr. Peck said the discussion is schedule for 2/27/12 and invited Commissioners attendance; he will advise the exact time and location.

#### C. CRCOG Representative Status

Chairman Paine delayed discussion to the next meeting.

#### VII. STAFF REPORT(s)

None.

#### VIII. COMMUNICATIONS AND ADMINISTRATIVE BUSINESS

Mr. Peck will set up a meeting to discuss the Town Center outline which will be back about March 9th and he will inform the Commissioners of the exact dates.

#### IX. ADJOURNMENT

Commissioner Jansen made a motion to adjourn the meeting at 9:00 p.m. Commissioner Kulakowski seconded the motion, and it was passed unanimously.

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Tina Hallenbeck, Secretary

