

## MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY  
MIDDLETOWN, CONNECTICUT 06457

TO: Planning and Zoning Commission

DATE: March 12, 1986

RE: Jurisdiction of the Planning & Zoning Commission

### ISSUE

If an applicant to the Planning and Zoning Commission does not file a copy of that application, involving land regulated as an inland wetlands and watercourse, with the town agency responsible for administering the inland wetland and watercourse regulations, (in Middletown the Inland Wetlands and Water Course Agency), within ten days of making application to the Planning and Zoning Commission, does the Planning and Zoning Commission have jurisdiction to issue a favorable decision?

### LAW

Sec. 8-26.

"All plans for subdivisions and resubdivisions, including subdivisions and resubdivisions in existence but which were not submitted to the commission for required approval, whether or not shown on an existing map or plan or whether or not conveyances have been made of any of the property included in such subdivisions or resubdivisions, shall be submitted to the commission with an application in the form to be prescribed by it. . . The commission shall approve, modify and approve, or disapprove any subdivision or resubdivision application or maps and plans submitted therewith, including existing subdivisions or resubdivisions made in violation of this section, within the period of time permitted under section 8-26d. . . The failure of the commission to act thereon shall be considered as an approval, and a certificate to that effect shall be issued by the commission on demand. . . If an application involves land regulated as an inland wetland or watercourse under the provisions of chapter 440 and the agency responsible for administration of the inland wetland and watercourse regulations has not already reviewed the application, the applicant shall file a copy of the application with such agency within ten days after filing such application with the planning commission, and the commission shall give due consideration to any report filed with it by such agency prior to rendering a decision on such application."

Sec. 8-26d.

"(a) In all matters wherein a formal application, request or appeal is submitted to a planning commission under this chapter and a hearing is held on such application, request or appeal, such hearing shall commence within sixty-five days after receipt of such application, request or appeal and shall be completed within

thirty days after such hearing commences. All decisions on such matters shall be rendered within sixty-five days after completion of such hearing. The applicant may consent to one or more extensions of any period specified in this subsection, provided the total extension of any such period shall not be for longer than the original period as specified in this subsection, or may withdraw such application, request or appeal.

(b) A decision on an application for subdivision approval, on which no hearing is held, shall be rendered within sixty-five days after receipt of such application. The applicant may consent to one or more extensions of such period, provided the total period of any such extension or extensions shall not exceed sixty-five days."

## DISCUSSION

The fact that must be determined to answer the issue presented is whether the time limits in Section 8-26 are mandatory or directory. If mandatory, then they must be followed to the letter. Failure of the applicant to do so would deprive the Planning and Zoning Commission of jurisdiction to issue a favorable decision. If directory, then the failure to follow them specifically will not deprive the Planning and Zoning Commission of jurisdiction to issue a favorable decision.

The State Supreme Court has consistently stated that whether statutory time limitations should be construed as mandatory or simply directory depends upon "whether the prescribed mode of action is of the essence of the thing to be accomplished." Vartuli v. Sotire, 192 Conn. 353, 360 (1984); (See Beccia v. Waterbury, 185 Conn. 445, 460 (1981); Engle v. Personnel Appeal Board, 175 Conn. 127, 130 (1978); Donohue v. Zoning Board of Appeals, 155 Conn. 550, 554 (1967)).

In Finn v. Planning & Zoning Commission 156 Conn. 540, (1968), the court addressed the time limits that existed in Section 8-26 at that time. It was not until 1977 that the section dealing with the inland wetland and watercourse was added to the statute. However, the discussion in Finn is equally applicable to it. In Finn, at page 544, the court set forth that portion of then Section 8-26 which provided that the "commission shall approve, modify and approve, or disapprove any subdivision application or maps and plans submitted therewith within sixty days after the submission thereof . . . (and that the) failure of the commission to act thereon shall be considered as an approval, and a certificate to that effect shall be issued by the commission on demand, provided an extension of this period may be held with the consent of the applicant."

The court concluded that "The obvious intention of the legislature in using this language was to ensure prompt and expeditious action on subdivision applications for the protection of the subdivider. The language of the statute is mandatory." (Underlining added for emphasis) Finn at 544. (See Vartuli v. Sotire, 192 Conn. 353, 360 (1984); Merlo v. Planning and Zoning Com'n of Town of Wethersfield, 1 Conn.App. 621, 625 (1984), certification granted 193 Conn. 804; Leech v. Gaetz, 31 Conn.Sup. 81, 84 (1973)). "Failure by the commission to act within the time

parameters results in the approval of the subdivision application by operation of law." Caldrello v. Planning Board, 193 Conn. 387, 392 (1984); (See Gervasi v. Town Plan & Zoning Commission, 184 Conn. 450, 454 (1981); Viking Construction Co. v. Planning Commission, 181 Conn. 243, 246 (1980)).

Section 8-26 has since been amended with different time limits now contained in Section 8-26d but incorporated by reference in Section 8-26. The penalty for the Planning and Zoning Commission to act within the statutory mandated time frame remains the same. "The failure of the commission to act thereon shall be considered as an approval, and a certificate to that effect shall be issued by the commission on demand." Also, as noted, the section dealing with inland wetland and watercourse was added to the statute in 1977.

The legislative history behind the addition of the inland wetland and watercourse language to section 8-26 has been carefully reviewed. Without question, the proponents of this language intended that the developer would file his application with the agency enforcing the inland wetlands and watercourses within ten days of filing with the planning commission. On the floor of the House of Representatives, Congresswoman Polinsky, one of the sponsors of the bill stated: "The...change is designed to keep a developer from, to quote an expression, dangling in the winds between a wetlands agency and a planning commission. If the proposed subdivision site is located on land regulated under the inland wetlands statutes, the applicants would file a copy of his application with the agency enforcing the inland wetlands and water course regulations within ten days of filing with the planning commission unless the wetland agency had already reviewed this application. This way the applicant would not, as some have, go all through the subdivision procedure, get his approval and then find he could not get a building permit because he failed to get approval from the wetlands agency." Congresswoman McCluskey, a co-sponsor of the bill also addressed the process of the submission of the applications. "I believe this provides an important protection that planning and zoning commissions already have under the zoning regulations and in regards to the inland wetlands provisions. I have served on both the planning and zoning commission and an inland wetland commission and have found that where the applications are submitted to both at the same time as has been practiced in North Branford, it coordinates the procedure and makes it a much less lengthy and difficult procedure for developers...."

From the legislative history, it seems quite evident that two purposes were in the mind of the legislature in the passage of the inland wetland and watercourses amendment to section 8-26. First, there was a consideration of fairness to the developers as discussed by Congresswomen Polinsky and McCluskey. Second, and equally as important, the legislature was concerned about inland wetland and watercourses and wanted the Planning and Zoning Commissions to have the input of an agency experienced in those matters prior to acting upon an application for a subdivision or resubdivision before it. By requiring the developer to file his

application with the agency responsible for administration of the inland wetland and watercourse regulations within ten days after filing such application with the planning commission, the legislature obviously intended that the planning commission would have the benefit of the expertise of this agency prior to acting upon the application for subdivision or resubdivision.

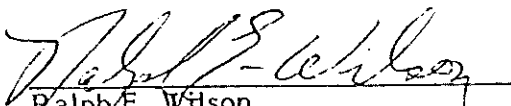
Having carefully reviewed this issue, it is my legal opinion that the ten day time frame in section 8-26 must be construed as mandatory since the other time limits in the statute have been construed as mandatory by the State Supreme Court and to hold otherwise would thwart the legislative desire that a Planning and Zoning Commission should receive input from the agency which handles the inland wetland and watercourse regulations prior to reaching a decision on any application before it. The required action of filing within ten days helps to accomplish the very aim of section 8-26, which is to ensure prompt and expeditious action on subdivision applications with the full facts before a Planning and Zoning Commission. Accordingly, failure to comply with the ten day limit deprives the Planning and Zoning Commission of jurisdiction to render a favorable decision on an application before it. This opinion is further supported by an opinion from the Attorney General of the State, and an expert in the planning and zoning field, Thomas P. Byrne.

The Attorney General has issued an opinion specifically addressing the issue at hand. The issue presented was: "If an applicant to the Planning and Zoning Commission of a town does not file a copy of that application, involving land regulated as an Inland Wetlands and Watercourse, with the town agency responsible for administering the Inland Wetlands and Watercourses within ten days of making application to the Planning and Zoning Commission and the Planning and Zoning Commission then approves the subdivision plan, is that subdivision approval invalid?" The Attorney General held that such a subdivision approval would be invalid referring to the language which requires an applicant to "file a copy of the application with such agency within ten days after filing such application with the planning commission . . ." The Attorney General opinion also stated that approval of an application without receipt of a report from the wetlands agency would be invalid. Opinion of A Gen Ajello, Conn. L. Tribune, 9-18-78, p. 20.

In his book entitled: PLANNING AND ZONING IN CONNECTICUT, Third Edition, Thomas P. Byrne has written that "Failure by the applicant to file a copy of the application with the inland wetlands agency within ten days, . . . would deprive the planning commission of jurisdiction to render a favorable decision." Page 177.

In conclusion, if an applicant to the Planning and Zoning Commission does not file a copy of that application involving land regulated as an Inland Wetlands and Watercourse, with the agency responsible for administration of the inland wetland and watercourse regulations within ten days of making application to the Planning and Zoning Commission, then the Planning and Zoning Commission DOES NOT have

jurisdiction to issue a favorable decision. It must deny the application within the period of time permitted under section 8-26d.

  
Ralph E. Wilson  
City Attorney

REW/es