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MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Linda Bowers, Environmental Planner

DATE: January 30, 1997

RE: Request for Legal Advice

FACTUAL BACKGROUND

On December 20, 1996 an application was submitted to the Inland Wetlands and Watercourses Agency.

At its meeting on January 2, 1997 the Agency voted to approve the application .

Notice of the Agency's decision was published in The Middletown Press on January 9, 1997.

On January 1, 1997 an amendment to C.G.S. Sec. 22a-42a became effective which provides as follows:

The inland wetlands agency shall not hold a public hearing on such application unless the inland wetlands agency determines that the proposed activity may have a significant impact on wetlands, watercourses or a petition signed by at least twenty-five persons requesting a hearing is filed with the agency not later than thirty days after the submission of such application or the agency finds that a public hearing regarding such application would be in the public interest. Such hearing shall be held no later than sixty-five days after the receipt of such application.

C.G.S. Sec. 22a-42a(c)(1), as amended by P. A. 96-157, Sec. 4.

On January 15, 1997 a petition was filed with the Agency.

ISSUE:

Whether the Agency must schedule a public hearing in response to the petition.

ANSWER:

The Agency has already rendered a final decision in this matter and, therefore, is precluded from holding a public hearing.

ANALYSIS:

C.G.S. Sec. 22a-42a provides that the Agency's review of an application is concluded when it votes on the matter, notifies the applicant of its decision and publishes the decision in the newspaper C.G.S. Sec. 22a-42a, (d), as amended.

Once the foregoing is accomplished, the matter is a final decision and the right of appeal pursuant to C.G.S. Sec. 22a-43 vests in aggrieved parties.

The Inland Wetlands and Watercourses Act does not authorize the Agency to reconsider an application once a decision has been rendered. C.G.S. Sec. 22a-36 to 22a-45, inclusive, as amended.

Similarly, neither the Agency's regulations, by-laws nor enabling ordinance purport to authorize further Agency action after a final decision is made. See Regulations of the Inland Wetlands and Watercourses Agency at 8.4 -8.6 and 9.1; By-laws of the Inland Wetlands and Watercourses Agency, at Art. IX, Sec. 2; and Middletown Code of Ordinances Sec. 26-6, as amended.

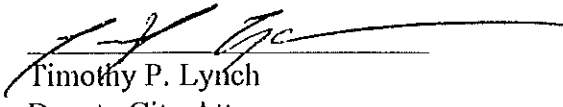
Commentators have noted the importance of the finality of decisions made by land use agencies. Judge Fuller notes that "[a]fter the land use agency acts on an application, any modification of an approval usually requires a new application, particularly if the decision was published and recorded." Fuller, Land Use Law and Practice, Connecticut Practice Book Vol. 9, at Sec. 24.11 (1993, 1996 Supp.). Professor Tondro notes that publication of the decision results in its finality. Tondro, Connecticut Land Use Regulation, Ch. 7 at 485 (2d Ed 1992). See also Byrne, Planning and Zoning in Connecticut, Ch. 25 at 193 (3d Ed 1982).

Further, assuming arguendo, that the Agency's vote on January 2, 1997 was not a final decision and it could schedule a public hearing, an issue of predetermination would be presented. The Connecticut Supreme Court has held that predetermination is, essentially, that Agency members "actually had made up their minds prior to the public hearing, regardless of any arguments that might be advanced at the hearing." Cioffoletti v. Planning & Zoning Commission, 209 Conn. 544, 555 (1989) (citation omitted).

While the Cioffoletti Court also held that predetermination is a question of fact to be determined in individual cases, in the present situation the Agency had actually voted to approve the application. However, this issue is academic at this point as the Agency is without authority to schedule a public hearing.

As a final note, it is recommended that the Agency immediately take steps to implement

the amendment to C.G.S. Sec. 22a-42a in its decision making process and to revise its regulations to reflect the amendment's requirements.



Timothy P. Lynch
Deputy City Attorney

TPL/es

cc: Mayor Maria Madsen Holzberg
Trina A. Solecki, City Attorney