

April 8, 2010

SPECIAL MEETING

5:00 p.m. Land Use Meeting Room

MEMBERS PRESENT: Mr. Bedini, Mr. Bohan, Mrs. Hill, Mr. LaMuniere, Mr. Wadelton

STAFF PRESENT: Mr. Ajello, Mrs. J. Hill

ALSO PRESENT: Atty. Branse, Ms. Cheney, Mr. Martino, Mr. Papsin, Mr. Sonder

Mr. Bedini called the Special Meeting to order at 4:55 p.m. and introduced Atty. Branse.

Atty. Branse passed out copies of, "Public Hearing Procedures for Wetlands Agencies," by Mark K. Branse, which he used as the outline for his presentation. He noted this material was intended to comment on controversial hearings where an appeal was expected. He also noted the courts are not to substitute their judgment for a commission's and, therefore, most of the appeals that are lost are lost on procedural grounds.

Atty. Branse had been advised that the Commission was interested in reviewing public hearing procedure and agricultural exemptions. These subjects were discussed in detail using his above referenced paper as an outline. Some of the notable points raised were:

- * The public must understand that land use decisions are not majority rules; that property owners have the right to use their properties in a legal and reasonable manner.
- * The Inland Wetlands Commission must provide a report of its action to the Planning and/or Zoning Commission per state statute. The motion for the action taken does not legally constitute the required report unless the phrase that it serves as the report per Section 8-22 is specifically included in the motion.
- * In addition to the street address, Atty. Branse recommended that a description of the location of the subject property, such as 500 ft. south of the intersection of roads a and b, be included in the legal notice.
- * Atty. Branse recommended that the Regulations be amended to include the provision that either last year's grand list or the current tax collector's list be used to determine abutters for notice requirements.
- * Cross examination of public hearing speakers should be allowed. If not allowed by the Commission, opponents can use this as a basis for an appeal and win in court.
- * There should be no discussion at site inspections unless the entire proceeding is recorded.
- * Commissioners do not have to believe expert testimony presented at public hearings, but if they do not agree or if they question it, this must be stated on the record while the hearing is open. Also, commissioners must state their research and/or personal knowledge for the record at the public hearing; not after it has closed.
- * Atty. Branse informed the Commission that case law was recently expanded to rule that if there is the appearance of conflict of interest, the decision will be invalidated. He said opponents must object before the vote and state what the conflict is and that commissioners should disclose potential conflicts for the record and state they are prepared to make their decisions based solely on the application presented.

- * Interveners have the burden of proof to prove to the Commission what it is in the Commission's jurisdiction that will cause an impact and how it will impact the environment. The allegation must be specific and must be backed up with proof.
- * When there is an intervener, the Commission should 1) discuss whether he has met his burden to prove it is reasonably likely the proposed activity will create an unreasonable impact and 2) if so, decide whether there are feasible and prudent alternatives with no or lesser impact. If there are, the application must be denied.
- * Commissions should make sure their experts make statements like, "It is my professional opinion it is reasonably likely that..." A statement beginning, "I believe..." will not hold up in court.
- * If the Commission finds the proposed plans are deficient in some way, make sure it is stated on the record what the consequences of this inadequacy will be. This is the kind of information needed for court. Why something is likely to happen and/or why it is a bad thing will not always be obvious to a judge.
- * A tie vote on a motion to approve is a denial.
- * Monitoring to make sure a plan works as designed may be required as a condition of approval.
- * Regarding farmland issues, the Commission has the authority to determine its own jurisdiction. If the Commission determines the proposed activity is not exempt, the "farmer" may either appeal or apply for a permit. Also, the Commission has the authority to require a bond for the proposed farm work.

In addition to a general review of the information in his outline, Atty. Branse answered many questions from the commissioners. These included:

- * When should pre application advice be recommended?
Pre application advice must occur before the application is submitted.
- * How should incomplete applications be handled?
Atty. Branse recommended they be denied early in the review process as incomplete.
- * A public hearing may be held if it is in the public interest. What is meant by the public interest?
This term is deliberately broad and how it is interpreted is up to the discretion of the Commission.
- * When scheduling a public hearing, should the Commission wait until all of the information is in and should it limit the hearing to one or two sessions?
The Commission should make sure it gets all information to its consultant as soon as possible and that he can respond by the scheduled dates. The application may be denied without prejudice if all of the required information has not been submitted by the time the public hearing time limit has been reached.
- * Should the Commission ask for the credentials of those who speak at public hearings?
The commissioners can not base their decision about something that requires expertise on something said by someone with no expertise in that field. The Commission has the right to weigh the credibility of the speaker.
- * After the close of the public hearing can the Commission ask its consultant to comment on data/formulas/calculations submitted by the applicant?
Yes, the Commission may seek clarification of information already presented. The consultant may not introduce new information and may not review revised plans after the close of the hearing. However, the consultant may recommend conditions of approval after the close of the hearing.
- * Must the Commission find that an intervener has met the burden of proof for the specific allegations

in his filing?

Yes, the Commission should make this determination and then state in the motion that the intervener has sustained or has not sustained his burden.

* Unseated members and alternates may not participate in the deliberations once the public hearing has closed. Is this true for other matters such of revision of the regulations as well as for consideration of applications?

Yes, the unseated members/alternates may not participate in the deliberations.

This is just a summary of the issues covered. The complete document by Atty. Branse is on file in the Land Use Office.

Mr. Bedini adjourned the meeting at 8:55 p.m.

FILED SUBJECT TO APPROVAL

Respectfully submitted,
Janet M. Hill
Land Use Administrator