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Connecticut Planning

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Substantial Evidence: "Don't Approve or Deny Without It"

The recent Connecticut Supreme Court case, *River Bend v. Conservation Commission*, gives everyone involved in land use business specific guidance about what it means when we say that a commission's approval or denial of a permit needs to be based on "substantial evidence in the record."

A look back: reviewing the history of six decades of Connecticut state planning ***(see page 4)***

Editor's Note: Recently, the editors of this newsletter found, in a trash bin in downtown Hartford, what appeared to be a blank CD. However, the CD turned out to be a recording of an apparently confidential conversation between attorneys ***Tim Hollister*** *and* ***Chris Smith*** *of Shipman & Goodwin. After listening to the conversation, we prepared a transcript and reproduce it here, as a service to our readers:*

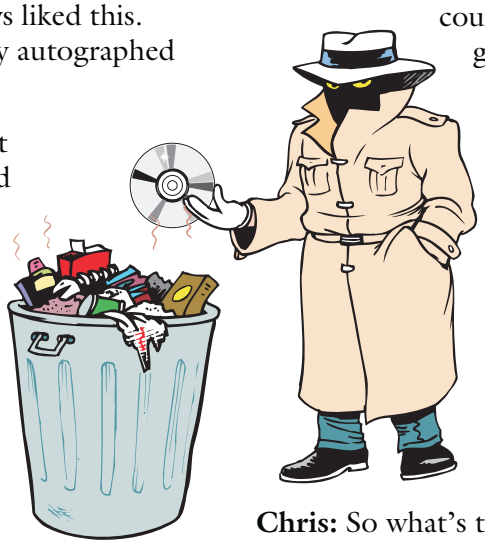
Tim: Hi Chris, come on in and have a seat.

Chris: What's up?

Tim: Could you please put down my Tom Seaver autographed baseball?

Chris: You know, I always liked this. How about a trade for my autographed Bucky Dent ball?

Tim: Let's talk about that later… The CCAPA called and they want an article for their newsletter on what "substantial evidence" means in land use cases. I agreed, but after thinking about it more, I think that that information is just too confidential and important to publish.



Chris: Whaddya mean?

Tim: Well, the recent Connecticut Supreme Court case, *River Bend v. Conservation Commission*, gives everyone involved in land use business specific guidance about what it means when we say that a commission's approval or denial of a permit needs to be based on "substantial evidence in the record." Even though *River Bend* was a wetlands case, what the Court said about substantial evidence affects all special permits and site plans, subdivisions and resubdivisions, and even variances. In other words, any land use commission that approves or denies a permit application may need to defend that action if there is an appeal to court, either by the disgruntled applicant or by an aggrieved property owner. So, when commissions formulate their resolutions of approval or denial, they need to pay attention to the substantial evidence in the record, to make sure their actions hold up on an appeal to court.

Chris: So what's the problem with educating commissions and their staffs about what substantial evidence means after the *River Bend* decision?

Tim: We sometimes represent applicants whose permits get denied.

Chris: You're kidding, right?

Tim: Yeah, I guess so, but still…

Chris: Well, let's go back to substantial evidence. The traditional understanding

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Save the Date for Inaugural Connecticut Olmsted Conference!

Please reserve the day of Wednesday, April 26th for the first annual **Frederick Law Olmsted Connecticut Conference**, co-sponsored by the Connecticut Chapter of the American Society of Landscape Architects (CTASLA) and the Connecticut Olmsted Heritage Alliance (COHA).

This full-day event — the inaugural observance of Frederick Law Olmsted Day, as established by legislation last year — will feature a program at the beautiful new Mark Twain House & Museum meeting facilities in Hartford, a guided bus tour of Olmsted's Hartford sites and much more!

Nationally known Olmsted speakers will include Charles Beveridge, historian, author and editor of the Olmsted Papers; and Tupper Thomas, Executive Director of Prospect Park Alliance.

You won't want to miss this day of comeraderie among landscape architects, planners, historic landscape advocates, educators, legislators, economic development professionals and others who will be on hand to learn more about — and gain inspiration from — Frederick Law Olmsted and the Connecticut landscape that inspired him. (And did we mention CPD credits for AICP members?…)

Register beginning the end of March at www.ctasla.org. For more information contact Norma Williams through www.ctolmsted.org. For NOW, please run to your calendar and secure the date!

Substantial Evidence (cont'd from page 1)

of substantial evidence is that there needs to be some basis in fact in the administrative record to support the commission's findings of fact, inferences, and conclusions. It's not ironclad proof, such as beyond a reasonable doubt — more like a "reasonable basis."

Tim: That's right, but *River Bend* clarifies several aspects of the law, for both wetlands cases and other land use cases.

Chris: Refresh my memory, what was *River Bend* all about?

Tim: In *River Bend*, a residential developer applied for a permit to remediate five acres of soils that contained residual amounts of pesticides (chlordane) located within a 75-foot upland review area of a wetland. The applicant's expert said that the pesticides were immobile within the soil and the best way to deal with them was to mix the soils in place, putting them at a lower depth where there would be no exposure to humans. However, the wetlands commission's consultant said that the soil mixing "may" increase the mobility of the pesticides in the soil and "could" spread the contamination to greater depths and "possibly into wetlands or watercourses." But the expert (according to the Court opinion) made "no specific finding of any actual adverse impact to any wetland or watercourse."

Chris: Then what happened?

Tim: The Connecticut Supreme Court ruled that the commission's expert's testimony was not substantial evidence that would support the denial of the permit. Because the expert only said that there was *potential* for migration and pollution, he had not provided the commission with a substantial basis in fact from which to conclude that there was going to be an *actual* adverse impact on a wetland or watercourse. There was simply no evidence that this particular pesticide, if mixed in place to a lower depth, would migrate across the upland review area, in the direction of the wetland, in a sufficient concentration to cause an adverse, actual impact. The expert's report and testimony used only the words "potential" and "possible."

Chris: What other guidance do we get from *River Bend*?

Tim: Put the ball down.

Chris: Sorry…

Tim: A couple of things. First is the familiar rule that no land use commission is required to believe the opinion of any expert, if they don't believe that he or she has sufficient credentials or that his or her work has been thorough or documented enough. However, on technical matters requiring expert testimony — such as impacts to wetlands — if the hearing record does not contain evidence of an actual, adverse impact, then the commission does not have a factual basis — substantial evidence — to deny the permit. Also, if the applicant's expert and the commission's expert agree on a technical matter, then non-experts on the commission cannot overrule or reject that expert agreement.

Chris: What constitutes expert opinion?

Tim: It's a judgment call. In general, matters involving science, engineering, or specialized training require expert opinion. To use a simple example, traffic volume and congestion is something that non-expert members of the commission can evaluate using their own knowledge, but traffic safety might well be a matter for experts.

Chris: Anything else important about *River Bend*?

Tim: The Supreme Court reminded us that expert testimony about impacts needs to be within the commission's jurisdiction. Wetlands commissions can only deal with wetland impacts, not other environmental matters.

Chris: So what's the bottom line of *River Bend* for other land use matters?

Tim: The key thing is that decisions should not be based on speculation. The words "potential" and "possible" are problematic at best. *River Bend* implies that courts don't want to see land use de-

cisions made on the basis of "maybe" or "possibly."

Chris: What should land use commissions and their staffs do?

Tim: Make sure to ask questions during the hearing about causation and relationships and actual impacts, and pay attention to the answers when drafting resolutions. In other words, if an expert, either for or against the application, speaks in generalities or uses words that imply only speculation or potential, try to pin that person down and get to the bottom of what he or she is saying, or whether the "opinion" is only a guesstimate or a surmise.

Chris: Does this mean the commissions have the burden of proof in appeals?

Tim: No. *River Bend* did not change the rules about who has the burden of proof. It just pointed out that the words "potential" and "possible" connote speculation. It re-emphasized that matters requiring expert testimony require special handling. It's also important to remember that drafting a denial or approval resolution that is based on speculation undermines the credibility of other portions of the commission's resolution.

Chris: So, tell me again, why do you not want to publish this in the CCAPA newsletter?

Tim: If we keep this knowledge to ourselves, then we will have an advantage at hearings.

Chris: I think we need to do the right thing.

Tim: Okay, here's my idea: why don't we record this conversation on a CD and drop it in the trash bin where the CCAPA editors will find it. Then, we'll get the information out there, but not, like, voluntarily.

Chris: Sounds like a plan. Now, about the baseball…

Chris: What other guidance do we get from *River Bend*?

Tim: Put the ball down.

Chris: Sorry…