

ENVIRONMENTAL PROTECTION COMMISSION
GENERAL MEETING
MEETING MINUTES
JANUARY 4, 2006

Wednesday, January 4, 2006

7:30 p.m.

**Auditorium
Town Hall**

COMMISSION MEMBERS PRESENT: Chairman Peter Hillman, Pete Kenyon, Ned Lewis, Reese Hutchison and Craig Flaherty.

STAFF PRESENT: Director of Planning, Jeremy Ginsberg, Assistant Director, David Keating and Town Counsel, James D'Alton Murphy.

COURT RECORDER PRESENT: Syat

PUBLIC HEARING

Continuation of the Public Hearing regarding the Referral from the Planning and Zoning Commission about the proposed Nearwater Manor at 77 Nearwater Lane and discussion about the possible jurisdiction of the Environmental Protection Commission with respect to this project.

Mr. Hillman opened the meeting and explained that the staff had received earlier in the day a seven page memorandum from Ted O'Hanlan and others representing neighbors. The seven page memorandum was then followed by a series of appendices and exhibits. The Commission's environmental consultant, James MacBroom, has also prepared a report/letter dated January 4, 2006. Copies of these documents were distributed, and Mr. Hillman called for a brief recess so that everybody could read the documents before the discussion started.

The meeting was resumed at 7:55 p.m., and Mr. MacBroom submitted his Curriculum Vitae for both himself and William Root who had accompanied him to the site visits and assisted in the preparation of the report.

Mr. Hillman asked if there was a large map that could be displayed so that it could be referred to in the discussion. Joseph Risoli, P.E., volunteered one of his maps and explained that the map is different than the drawings previously submitted to the Commission because it has been revised to show added topographic information especially near the outfall of the 16 inch diameter pipe from Nearwater Lane and leading into the property of the Darien Land Trust. Mr. Risoli explained that late in the afternoon he had received an e-mail from Mr. Hammons (surveyor for the Stefanonis) showing a different drainage structure arrangement. Some of this information is reflected on the map to be displayed. Mr. Hammons explained that this is a working drawing showing changes to the drainage system in response to the Tighe & Bond engineering comments that had been submitted to the Planning & Zoning Commission. The changes are for underground drainage structures and do not affect the location of the proposed buildings. Mr. Hillman expressed concern that it is difficult for the Commission and the public to constantly review revised drawings that are being changed to reflect recent discussions. Mr. Hammons said that he would be glad to go back to the plan that was dated and/or submitted on December 14, 2005 because that is the last drawing that

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had been submitted to the Planning & Zoning Commission and the Environmental Protection Commission (EPC).

Mr. Hillman said that on page seven of Mr. O'Hanlan's memorandum, it says that the Planning & Zoning Commission record in this matter has been incorporated by reference. Mr. Hillman said that such a statement is incorrect. He made it very clear at the previous public hearing of the Environmental Protection Commission that the only material in the Environmental Protection Commission's record would be the material submitted directly to the Environmental Protection Commission. No other files or applications were or will be incorporated by reference.

James MacBroom, of Milone & MacBroom Engineering, explained that he is a Professional Engineer with more than twenty years experience working with wetlands and tidal wetlands. He was hired to perform an independent review of the issues involving Holly Pond and the adjacent wetland areas. He said that the first question posed to him was whether Holly Pond is a wetland as defined by Section 22a-29(2) of the Connecticut General Statutes. Mr. MacBroom said that Holly Pond is not a tidal wetland as defined by the Statutes due to the lack of tidal wetland plant species. Much of the land south of the Stefanoni property and north of Holly Pond is tidal wetland and there is a band of inland wetland located (at a higher elevation) above the tidal wetland and close to, within 50 feet of the Stefanoni property. Mr. MacBroom said that the shape of the landscape influences the local high tide levels and the local extreme high water which is used by the State of Connecticut to determine the maximum extent of tidal wetlands. He said that local extreme high water is the height of the water that would be reached on an annual basis and excludes hurricanes and storm events. He said that the edge of Holly Pond is at Elevation 4.4 feet above sea level Elevation 0.0 N.G.V.D. (National Geodetic Vertical Datum as established in 1929). He said that the edge of Holly Pond is about 500 feet south of the Stefanoni property. It was noted that there are some trenches located on the northern extent of the Land Trust property and within 500 feet of the Stefanoni property and some of those trenches are below Elevation 4.4. Mr. MacBroom said that those trenches are tidal wetlands and not part of the pond. He said that they appear to be old drainage ditches.

Mr. MacBroom explained that a tidal epoch is a study conducted on a 19 year cycle and those studies have indicated that sea level is rising 2 or 3 millimeters per year. During the last century, the sea level has risen in this area approximately 9 inches. His letter dated January 4, 2006 discusses the necessary adjustment to incorporate the latest information from the National Oceanic and Atmospheric Administration (NOAA). The previous references to the high tide line being at Elevation 5.8 should now be referenced at Elevation 6.0 as the local extreme high water. He said that he and Mr. Root measured the high water conditions on December 29, 2005 and it was approximately 40 feet south of the driveway (which is south of the Stefanoni property). He said that based on the adjustment of rising sea level and the local tidal conditions, the local extreme high water would be at Elevation 6.2 feet above sea level. Using the state's definition that the maximum extent of tidal wetlands can be no more than one foot higher than the local extreme high water level, this would mean that the maximum extent of tidal wetlands would not exceed Elevation 7.2 feet above sea level. There are some wetlands at the north end of the drainage ditches that are at Elevation 7.4 and above and therefore, those wetlands are not tidal wetlands. They are inland or upland wetlands. In response to a question, Mr. MacBroom said that the accuracy of the vertical survey is 0.01 feet. That is an accuracy of 1/100th of a foot.

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Mr. MacBroom said that he had reviewed the wetlands reports in the file and that he concurs with the Kenny report as mapped by Mr. Risoli in December of 2005 with respect to the extent and characterization of the inland wetlands on the northern fringe of the tidal wetlands. He said that he had looked all around Holly Pond and notes that the edge of the actual tidal wetlands around the pond does vary, but the open waters of Holly Pond are not a tidal wetland as defined by the State. He said that Connecticut distinguishes tidal waters in a slightly different way than other jurisdictions. He said that Connecticut tidal waters are not defined by salinity, but by plant species.

Margaret Stefanoni questioned the source of the quote on page two of Mr. MacBroom's letter with respect to defining the edge of tidal wetlands. Mr. MacBroom said that quotes come from Regulations that the State uses regarding tidal dredging and tidal structures. Mrs. Stefanoni asked Mr. MacBroom about the characteristics of Long Island Sound and how the geography of the Sound affects high tides as one goes west (towards New York City). Mr. MacBroom said that as Long Island Sound gets narrower (going west toward New York City) there is a higher tide range and a higher extreme of the tides. This is true as you travel west towards New York City.

Mrs. Stefanoni asked Mr. MacBroom to clarify the wetlands' lines as shown on the Risoli map. Mr. MacBroom noted that he concurs with the wetland boundary line label as it was established by Mr. Kenny out in the field. This is different than the wetland line marked on the map as being produced from a sketch provided by Mr. Pietras.

At 9:10 P.M., Mrs. Stefanoni submitted a booklet with Tabs A through I. Mr. Hillman said that there would be a brief recess so that people could read through new materials submitted by Mrs. Stefanoni. The meeting was resumed at 9:25 p.m.

Mrs. Stefanoni said that the State of Connecticut Department of Environmental Protection (DEP) has exclusive jurisdiction over tidal wetlands and that the wetland areas to the south of her property are tidal wetlands. She said that the Mill Pond situation in Westport is similar to the Holly Pond situation in Darien. There was a dispute about the location of the high tide line or local extreme high water. The State of Connecticut ruled that they would regulate up to the higher elevation that was being established rather than the lower elevation proposed by the applicant. She said that in the Holly Pond situation, she has documented on two recent occasions where the high tide line has reached up to the base of the Connecticut Light and Power utility pole which is at Elevation 6.8 or 6.9. She said if the one foot is added to this elevation, it would make all of the wetlands cited by Mr. Kenny as being tidal wetlands as defined by the state statutes (within one foot above local extreme high water). She said that she accepts Mr. Kenny's flagging of the soil types as being wetlands but said that they are, by statutory definition, tidal wetlands, not inland wetlands.

In response to questions from Mr. Hillman, Mr. Hammons said that the proposed trenches for the footings of the proposed building would be about 60 feet from the wetland line as established by Mr. Kenny and mapped by Mr. Risoli. There would be no activity between 50 and 60 feet from the wetlands.

When asked to comment about Mrs. Stefanoni's measurements about the high water conditions, Mr. MacBroom said the measurements might be accurate for the days when the photographs were taken, but there are many factors that need to be checked to see if it accurately reflects local extreme high water. He said that he measured the wrack line at Elevation 6.85, but this could have been influenced by storm surges, wind or other conditions. He said that to properly measure the local

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extreme high water, you need to take into account many factors and have very localized measurements. Mrs. Stefanoni said that the only weather occurrences to avoid are high winds due to hurricane and other intense storms. She said that there are three data points of Elevation 6.85 or above for the high water at this particular location. She said that the Connecticut DEP used the higher number when the issue was debated and decided in Westport. She said that the tides closer to New York City are higher than other portions of Long Island Sound.

Christopher Stefanoni said that he has lived on the property for several years and has observed the high tide conditions. He said that it reaches the utility pole 25 times or more per year. He said that it often reaches higher than that. He said that Mr. MacBroom's conservative approach is way off.

Barry Hammons said that he was very familiar with the Westport site conditions and noted that in that particular case, the property was very flat. In such cases, an inch of vertical difference could mean a 20 foot horizontal difference and that would make quite a difference in the value of the property. Mr. Hammons said that the green line up to the driveway as referred to by Mr. MacBroom is digitized from the sketch prepared by Mr. Pietras (the soil scientist) out in the field. It is not a surveyed line. Mr. Hammons said that as a surveyor, he has checked and double checked the elevations using federal government information. He has discovered that the Town bench mark is two inches too low. He said that as a result of this, he and Mr. Risoli sometimes differ by two inches of vertical difference.

Attorney John Cannavino, of Cummings & Lockwood, asked Mr. MacBroom some questions about Mrs. Stefanoni's measurement taken on January 3, 2006. Mr. MacBroom confirmed that there was a storm on that day and that there were coastal flood warnings and coastal flood watches due to the storm. Mr. MacBroom said that the weather would affect the measurement of local high water of Holly Pond. In response to other questions, Mr. MacBroom said that there is an overlap in the definition of tidal waters and the definition of inland watercourses with respect to some terms such as bog, swamp, marsh, ponds. Mr. MacBroom said that it is sometimes a legal issue as to whether something is an inland watercourse or a tidal watercourse. Mr. Hillman noted that the Darien schools had been closed that day because of the storm.

Mr. Flaherty asked how Mrs. Stefanoni came upon the correspondence regarding the Westport situation. Mrs. Stefanoni said that Mr. Hammons knew of the Westport situation because he had been involved. Mrs. Stefanoni followed up with the DEP and then met with Susan Jacobson last week. Mrs. Stefanoni said that some of the materials deal with docks in rivers and some of the materials deal with activity landward of the river edge. Mr. Flaherty said that the May 9, 2001 letter seems to be a working draft that was later revised on June 7, 2001. He said that the June letter is clear that if the local wetland commission exerts jurisdiction, it will need to do so consistently. Mrs. Stefanoni claimed that for the EPC to exert jurisdiction would not be consistent with the past practice of the EPC. Mr. Hutchison said that the letter is clear that if the Commission decides to exert jurisdiction, and therefore changes its past practice, then it will need to do so consistently in the future. He said that it does not say that because the Commission has not exerted jurisdiction in the past, that it cannot do so in the future.

Mrs. Stefanoni said that some of the letters deal with docks in the water and she noted that both the Planning & Zoning Commission and Environmental Protection Commission both seem to regulate what happens within 100 feet of Holly Pond. She also said that part of the correspondences regarding the municipality indicate that the Town cannot regulate any activity in or affecting the

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tidal wetlands. She said that such activity affecting tidal wetlands is regulated by the State. Mrs. Stefanoni said that Nancy Sarner's letters should be given great weight as the representative of the Commission. Mr. Hillman asked if there were any comments regarding Mr. O'Hanlan's memorandum. Mrs. Stefanoni said that asking for a continuation means potential statutory problems for the Planning & Zoning Commission. There was a brief recess to discuss scheduling.

The meeting was resumed at 10:45 P.M. It was decided that the Commission will hold a Special Meeting on January 11, 2006 at 7:30 p.m. in Room 206 of the Darien Town Hall to continue the public hearing. All interested parties are to submit any written materials to the Planning & Zoning office by Monday, January 9, 2006 at 4:30 P.M. This way the materials can be available for the Commission members and other interested persons to review. The public hearing will be continued on January 11, 2006 at 7:30 p.m. in Room 206 of the Darien Town Hall.

The meeting was then adjourned at 10:47 P.M.

Respectfully Submitted,

David J. Keating

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