

INLAND WETLANDS AND WATERCOURSES COMMISSION

Town of Trumbull

CONNECTICUT

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TOWN HALL
Trumbull

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MINUTES

March 14, 2013

MEMBERS PRESENT: Richard Girouard, Chairman
Arlyne Fox, Vice Chairman
John Lauria, Secretary
Kevin Chamberlain
Carmine DeFeo

ABSENT: Jeffrey Wright

ALSO PRESENT: William Maurer, LS, Civil Engineer and Town Attorney Mario
Coppola

The Chair convened the special meeting at 7:01 p.m.

Town Attorney Update on Drainage Easement Maintenance:

Attorney Coppola reviewed the Memorandum of Law dated March 14, 2013 to the Town of Trumbull Inland Wetlands & Watercourses Commission re: Town's Duty to Maintain Drainage Easement & Involvement of IWWC (*Attached*).

Duty of Maintaining Easement:

- Attorney Coppola reviewed the definitions of "dominant estate" and "servient estate" with the commission as follows:
The Town of Trumbull is the owner of the easement because the easement is in favor of the Town and allows the Town to drain on a property. Therefore, the Town is referred to as the "dominant estate" and the owner of the land subject to the easement is referred to as the "servient estate". The duty of maintaining an easement rests on the owner of the easement, absent any contrary agreement. The only way this could be changed would be to include in future easements' language as follows: "The "servient estate" has the responsibility for the cost to maintain it". Unless the terms of the servitude, provide otherwise, the beneficiary of an easement has a duty to repair and maintain it. The Town's obligation is limited to maintaining the specific easement area and facilities of the drainage easement as it was originally designed. The fact that an existing drainage facility is inadequate does not impose a duty on the Town to modify or reconstruct it. Furthermore, such obligation does not impose upon the Town a duty to address any other drainage problems on the property which are not directly caused by a failure to maintain the Town's easement area.

- Resident complaints have precipitated the Town's effort to clean out drainage easements.
- Per C.G.S. §13a-138 the Town may make or clear any watercourse or place for draining off the water therefrom into or through any person's land so far as necessary to drain off such water and, when it is necessary to make any drain upon or through any person's land for the purpose names in this section, it shall be done in such a way as to do the least damage to such land. Section 13a-138 has been interpreted as a limited grant of immunity to a municipality responsible for the maintenance of highways to cause drainage onto a private property. (The Town has the right under different provisions under the CGS to address drainage issues.)

Drainage Easements Maintenance and IWWC Approval:

- *Is it necessary for the Public Works Department to go to the IWWC for approval before cleaning out a drainage issue?* There is no legal requirement that the Public Works Department apply to the commission to move forward in cleaning out a drainage easement. If a regulation were proposed or if the IWWC were to take that position it would be contrary to established law, the duty of maintaining an easement so it can perform its intended function rests on the dominant estate, absent any contrary agreement. Because the Town has a legal obligation to maintain a drainage easement area it would be legal improper to pass a regulation that this commission must first approve before the Town takes the action.

Drainage Easements & Wetlands:

- Attorney Coppola confirmed for Commissioner Chamberlain that there is a difference when wetlands are involved. Mr. Maurer indicated that most drainage easements lead to a place of water, drainage easements can create a wetland. The Town would be performing maintenance not creating something different.
- Commissioner Lauria reviewed a photograph of the activity at the corner of Lake Avenue and Main Street and explained that the ground is not stabilized; the silt fence would not have been installed if he had not taken issue with this activity. If the Town had come to the commission for approval it most likely would have granted with the condition that the trees would be removed from the area by hand. The work being done at this location did not involve cleaning out the drainage easement. Mr. Maurer indicated the drainage easement on the corner of Lake Avenue and Main Street is ¾ full of silt.
- Attorney Coppola stated there is a difference between improving wetlands & watercourses and maintaining them. There is a legal obligation to maintain a drainage easement; if they fail to maintain it and property damage occurs as a result there may be liability. The Town does usually notify the property owner, although it is not required. Mr. Maurer confirmed this. Over the last 3-4 years there has been effort by the Town to maintain drainage easements.

Conclusion:

- The IWWC discussed the possibility of a memo to the Town departments involved. Attorney Coppola stated the memorandum could serve to dissuade the Town and suggested that Mr. Maurer speak to the applicable departments. Attorney Coppola reiterated that the Town does have a duty to maintain the drainage easements, it would be improper for the commission to regulate the maintenance thereof unless it impacts a wetland. Practically speaking the Town should follow the best practices for erosion and sedimentation control although technically they do not have to and concluded that there has to be a balance. If a wetland is going to be disturbed the Town should come to the IWWC for approval, but if

there is no wetland disturbance involved by virtue of the work that the Town performs, the Town would not need to come to the commission for the approval. Attorney Coppola cautioned that overregulating could negatively impact the residents by the failure of properly maintaining the drainage easements. Mr. Maurer will notify the applicable departments that they are to notify him before the Town cleans out a drainage easement area to make sure proper practices are maintained and that there is not an improper disturbance of a wetland and/or watercourse. If for some reason there needs to be an impact to a wetland or watercourse the Town would need to file an IWWC application. Commissioner Lauria indicated if it is an emergency situation the application could be approved by the duly appointed Inland Wetlands & Watercourses Commission Agent.

The Chair extended his gratitude to Attorney Coppola for his input on this matter.

Planning and Zoning Commission's Updated Plan of Conservation and Development

Commissioner Lauria explained a Planning & Zoning (P&Z) meeting is scheduled for March 26, 2013. The purpose of that meeting is to discuss the P&Z's Plan for Conservation and Development, (POCD). P&Z asked the land use boards as well as the Historical Society to provide input.

Commissioner Lauria reviewed input he had drafted with the commission. Attorney Coppola suggested that this draft be reviewed by the Director of Planning before submission and to refer to literature to define the descriptions and include the proper descriptions, (i.e. tree box filters & bio-swales). This is a plan that should be consulted when the P&Z Commission or this commission is considering certain projects or regulations; both should comply with the POCD. One of the requirements for granting a variance is that it cannot be in conflict with the POCD and suggested the following language be included in the IWWC document to P&Z:

- ❖ “How can we promote development while still preserving our natural resources in Town”.
- ❖ To give guidance to an applicant with regard to mitigation.
- ❖ To include language that would include the IWWC's recommendation to the P&Z for when a proposed application has an impact on a wetland and/or watercourse outside the upland review area that is beyond the IWWC's jurisdiction.
- ❖ The commission agreed the input should include language that would read as, “Avoid subsurface detention basins whenever possible”.

Attorney Coppola suggested the commission review other Town's POCD's. Attorney Coppola stated language describing what practices are expected by the IWWC and under what circumstances exceptions would be made should be included in the POCD. Commissioner Chamberlain stated that the commission reviews each application on a case by case basis.

The Chair called a recess at 8:02 p.m. - The Chair called the meeting to order at 8:23 p.m.

Attorney Coppola suggested the commission designate two (2) commissioners to act as the commission's agents to draft the language for the POCD. All commissioners were in agreement in concept of what Commissioner Lauria had previously drafted and reviewed at this meeting.

After discussion and review and by unanimous consent the Inland Wetlands & Watercourses Commission agreed Commissioners Chamberlain and Lauria would prepare the Inland Wetlands & Watercourses Commission's feedback for the goals and strategies of the P&Z's POCD.

Attorney Coppola confirmed for Commissioner Fox that the commission is allowed to fine for violations and further explained that the commission in the last 3-4 years has been filing cease and desist orders on the land records, previous to that they had not. The commission has been doing a significantly better job at enforcing its regulations. Mr. Maurer explained for Commissioner Fox that there could be wetlands on a property but one would not know if there had been no testing on the soil, therefore sometimes the real estate agents do not have the information to give to the prospective buyers. Attorney Coppola stated that he had drafted a memo to the commission and the previous Town Engineer a few years ago with regard to material to new property owners explaining that there may be wetlands on their property and a separate memo with regard Inland Wetlands Enforcement and outlining steps and the authority of the commission, Attorney Coppola will forward the information.

There being no further business to discuss the Inland Wetlands and Watercourse Commission adjourned by unanimous consent at 8:32 p.m.

Respectfully Submitted,

Margaret D. Mastroni, Clerk

Attachment #1



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MEMORANDUM OF LAW

TO: Trumbull Inland Wetlands & Watercourses Commission
Cc: Bill Mauer, IWWC Agent
John Marsillio, Public Works Director
Jamie Bratt, Director of Planning & Zoning
Hon. Timothy Herbst, First Selectman
FROM: Mario F. Coppola, Town Attorney
RE: **Town's Duty To Maintain Drainage Easements & Involvement of IWWC**
DATE: March 14, 2013

ISSUE

You requested that I opine as to whether the Town has a legal right and/or obligation to maintain drainage swales where the easement is in favor of the Town. You have also requested that I determine whether the Town Public Works Department has a legal obligation to apply to

the Town Inland Wetlands and Watercourses Commission (“IWWC”) for approval in order to maintain any such drainage swales.

LEGAL ANALYSIS

In these cases, the Town of Trumbull is the owner of the easement because the easement is in favor of the Town. Therefore, the Town is referred to as the “dominant estate” and the owner of the land subject to the easement is referred to as the “servient estate”.

“The duty of maintaining an easement so that it can perform its intended function rests on the owner of the easement absent any contrary agreement.” *Powers v. Grenier Constr., Inc.*, 10 Conn. App. 556, 560 (1987); *Center Drive-In Theater, Inc. v. City of Derby*, 166 Conn. 460, 464 (1974); *Schwartz v. Murphy*, 74 Conn. App. 286, 297 fn. 7, (2002)(also citing 1 Restatement (Third), Property, Servitudes §4.13, p. 631, which provides that “[u]nless the terms of the servitude...provide otherwise...[t]he beneficiary of an easement has a duty...to repair and maintain the portions of the servient estate....that are under the beneficiary’s control”.)” *Hatheway Farms Assoc., Inc. v. Hatheway Farms of Suffield, LLC*, 123010 CTSUP (2010). It is important to note that the Town’s obligation is limited to properly maintaining the specific area and facilities of the drainage easement as it was originally designed. The fact that an existing drainage facility is inadequate does not impose a duty on the Town to modify or reconstruct it. Furthermore, such obligation does not impose upon the Town a duty to address any other drainage problems on the property which are not directly caused by a failure to maintain the Town’s easement area.

The law is settled that the obligation of the owner of the servient estate, as regards an easement, is not to maintain it, but to refrain from doing or suffering something to be done which results in an impairment of it. (Internal citations omitted.) *Carrig v. Andrews*, 127 Conn. 403,

407-08 (1941). “Ordinarily the owner of a servient estate is under no obligation to make repairs; the duty is upon one who enjoys the easement to keep it in proper condition, and if he fails to do so and injury to third persons results, he alone is liable...”. (Internal citation omitted.) *Fabi v. Firm, LLC*, Docket No. CV 106003437, 012811 CTSUP (January 28, 2011).

Finally, it should be noted that C.G.S. §13a-138 provides, in part, that the Town may “...make or clear any watercourse or place for draining off the water therefrom into or through any person’s land so far as necessary to drain off such water and, when it is necessary to make any drain upon or through any person’s land for the purpose names in this section, it shall be done in such a way as to do the least damage to such land.” Section 13a-138 has been interpreted as a limited grant of immunity to a municipality responsible for the maintenance of highways to cause drainage onto private property. *Postemski v. Watrous*, 151 Conn. 183, 188 (1963).

CONCLUSION

Where the easement is in favor of the Town, the Town does have a duty to maintain the easement unless the language of the drainage easement specifically provides to the contrary. Please note that I have reviewed a sampling of the various different drainage easements which exist in favor of the Town and none of them provide any language which states that the servient estate has agreed to maintain the drainage easement.

There is no legal requirement for the Town Public Works Department to apply to the IWWC for an approval to maintain a drainage easement area. Quite frankly, any proposed regulation that would require that the Town obtain approval from the IWWC before it is permitted to maintain a drainage easement area would directly conflict with the well established law that the duty of maintaining an easement so that it can perform its intended function rests on

the owner of the easement absent any contrary agreement. Therefore, any such proposed regulation would be improper and illegal.