

**TOWN OF EAST WINDSOR
INLAND WETLANDS AND WATERCOURSE AGENCY**

Regular Meeting

Wednesday, March 1, 2023

7:00 p.m.

John Daly, Jr. Meeting Room

Town Hall, 11 Rye Street,

Broad Brook, Connecticut

(In-person)

AND

Meeting held via ZOOM Teleconference

Meeting ID: 714 897 1799

Minutes Heading: MEETING MINUTES

********Minutes are not official until approved at a subsequent meeting********

- I. CALL TO ORDER:** Wetlands Agent Boudreau called the March 1, 2023 Regular Meeting of the East Windsor Inland Wetlands and Watercourse Agency to order at 7:00 p.m. in the John Daly, Jr. Meeting Room, Town Hall, 11 Rye Street, Broad Brook, CT. The Meeting is also available via remote access.

Present: Regular Members Rebecca Davis (Chairman), Alan Baker, Kurt Kebschull, Richard Osborn (Secretary), and Richard P. Pippin, Jr. (Vice Chairman).

Unable to Attend: Alternate Member Mike Sawka was unable to attend the meeting this evening.

Guests (In person): Inland Wetlands Agent/Zoning Enforcement Officer Danielle Boudreau hosted the meeting. **IWWA 02-2023/B. T. Properties:** Tim Coon, of J. R. Russo & Associates; **RIGHT-TO-FARM DETERMINATION/81 WINDSORVILLE ROAD:** Tim Coon, of J. R. Russo & Associates, and Herb Holden; Public: Kathy Pippin.

Remote Guests (as identified on meeting participation list): Commissioner Kurt Kebschull; Peg Hoffman, Recording Secretary.

II. ESTABLISHMENT OF QUORUM:

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Chairman Davis noted the establishment of a quorum with all Regular in attendance this evening.

III. PLEDGE OF ALLEGIANCE:

Everyone stood to recite the Pledge of Allegiance.

IV. AGENDA ADDITIONS: None

V. APPROVAL OF MINUTES/February 1, 2023 – Regular Meeting:

Chairman Davis called for a motion to approve the Minutes of the February 1, 2023 Regular Meeting.

MOTION: **So moved.**

Pippin moved/Osborn seconded/DISCUSSION: None.

VOTE **In Favor:** **Baker/Davis/Kebschull/Osborn/Pippin**
 (No one opposed/No abstentions)

VI. NEW APPLICATIONS TO BE RECEIVED: None

VII. PUBLIC HEARINGS: None

VIII. CONTINUED PUBLIC HEARINGS: None

IX, NEW BUSINESS: 1) Site Plan Modification – 102 Winkler Rd (at Newberry), B. T. Properties LLC – owner. Construction of a gravel surface storage yard partially located in the Upland Review Area). Map #104, Block #19, Lot # 015:

Chairman Davis read the description of this Agenda item.

Tim Coon, of J. R. Russo & Associates, LLC, representing the applicant, joined the Commission.

Mr. Coon reported the proposal is a small portion of their larger parcel at 102 Winkler Road and Newberry Road. Referencing a Site Plan he shared with the Commissioners Mr. Coon noted the area for this project is actually located on the northwest corner of Newberry Road across from Mourning Dove Trail. Mr. Coon noted a large pile of dirt, which they thought may have been deposited there

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when the sewer was run up Newberry Road, is located in the area of the project. Mr. Coon reported the wetlands delineation was done by Mike Granuloti, wetlands exist to the rear of the project area.

Mr. Coon reported they are proposing to create a gravel storage area for their seasonal equipment. A screening berm will be located along Newberry Road with a curb cut on the eastern end. Currently water flows from the road to the wetlands in the back; they're proposing an intercepting swale on the southeast corner of Newberry Road to direct the water into a stormwater management basin. Mr. Coon reported the basin has been designed in accordance with the Connecticut Stormwater Quality Management requirements to provide the appropriate detention.

Mr. Coon reiterated the project is to provide storage for their seasonal equipment. Mowers and snow blowers will be stored in locked containers, while snow plows may be out in the open on this gravel surface. Mr. Coon noted they're proposing silt fence along the perimeter as well as an anti-tracking pad and standard erosion control measures. Mr. Coon indicated there's no direct wetlands impact, they're proposing a 25-foot setback from the wetlands to the back.

Mr. Coon reported they've received comments from Town Engineer Norton regarding the details for the outlet structure where they propose the pipe coming out of the side; they'll adjust the structure as requested.

Mr. Coon concluded his presentation.

Chairman Davis called for questions from the Commissioners.

Commissioner Osborn questioned that the proposal was just for storage? Mr. Coon replied affirmatively.

Commissioner Baker questioned that the back swale was to contain the flow; Mr. Coon indicated the swale is to intercept the runoff before it goes into the stormwater basin.

Noting that the area was wet in the back Chairman Davis requested clarification that the surface would be gravel? Mr. Coon replied affirmatively.

MOTION: To APPROVE construction of a gravel surface storage yard within the Upland Review Area, 102 Winkler Road, East Windsor, CT. Owner: B. T. Properties, LLC. Applicant:

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Beebe Landscaping Services, as shown on plan set prepared for B. T. Properties, LLC. 102 Winkler Road and Newberry Road, East Windsor, CT. Map 104, Block 19, Lot 015. Prepared by Jay Ussery, of J. R. Russo Associates, LLC., dated 1/31/2023, Page 1 – Boundary Survey, Page 2 – Site Plan, 3 of 3, with standard conditions.

Pippin moved/Osborn seconded/DISCUSSION: None

VOTE: **In Favor:** **Baker/Davis//Kebschull/Osborn/Pippin**
 (No one opposed/No abstentions)

X. OLD BUSINESS: None

XI. CONTINUED: As-of-Right Determination – 81 Windsorville Road. K & H Properties-owner (clearing and grading to expand cropland in the Upland Review Area):

Chairman Davis read the description of this Agenda item.

Joining the Commission for this continued discussion was Tim Coon, of J. R. Ruso & Associates, and Herb Holden, owner of K & H Properties.

Mr. Coon noted the site is at 81 Windsorville Road. Referencing a Site Plan, Mr. Coon cited the location at the intersection of Windsorville and Chamberlain Roads, he noted the proposal is to regrade the site to create an additional 8.2 acres of cropland. The area highlighted in yellow are the agricultural fields they are proposing to regrade, beginning at the toe of the property up to the road; the white areas are those which would prohibit farming activities. Mr. Coon noted the wetlands had been flagged by Rick Zulick; there is no direct wetlands impact, although there is minor work in the Upland Review Area. Mr. Coon noted the parcel contains 100 acres, the dark brown line represents their work limit line.

Mr. Coon noted they have presented this proposal as a Permitted As-of-Right activity as its related to the creation of farmland under Section 4.1.a. He noted the discussion was continued to seek a legal opinion. Mr. Coon referenced an e-mail to Ruth Calabrese, Director of Planning and Community Development, from Brian McCann, (Pullman and Comley) the Town Attorney, dated February 27th, which reads, in part – “...while it does appear that the preparation and clearing of land is included in the “farming” exemption the Commission is going to have to make the determination in your case involving a great deal of material. Ultimately, I believe their determination is going to have to turn on whether the

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activity proposed is essential for the preparation of the land to farm. That evidence should be produced by the applicant for the record. The Commission will have the opportunity to cross examine, request additional evidence/information, as well as collect evidence of their own – possibly through staff or expert hired.”

Mr. Coon suggested the evidence is noting the existing contours on the plan, which shows an existing strip in the regulated area which is an old pit face from an old gravel operation which can’t be farmed. Mr. Holden needs to regrade the area to be able to farm. Commissioner Osborn questioned if that was Boutin’s pit? Mr. Holden felt it was in the area of the bog. Commissioner Osborn recalled many years ago there were many pits, including one across from the Cemetery, where residents could go in and get material for filling in holes and such.

Chairman Davis opened discussion to Commissioner Baker, who had not been present at the previous meeting. Commissioner Baker noted he read the meeting minutes and familiarized himself with what occurred, and he also encountered these gentlemen at the Planning and Zoning Commission Meeting. Commissioner Baker indicated he’s been looking at the applicant’s request for an As-of-Right determination as opposed to doing an application for a regulated activity. Commissioner Baker noted the applicant has done everything required for a regular application; Mr. Coon concurred, noting Mr. Holden is conscious of the environment and wants to do the right thing so they’ll install erosion controls, etc. Mr. Coon reiterated their belief that the regulations don’t require a permit. Commissioner Baker felt the activity required a permit. He noted Mr. Coon had referenced section 4.1, if you go to section 4.2 it reads “...the following uses and operations shall be permitted as non-regulated uses in wetlands and watercourses provided they do not disturb the natural and indigenous character of the wetland or watercourse by removal or deposition of material, alteration or obstruction of waterflow...” Commissioner Baker suggested the applicant is definitely altering the waterflow. Commissioner Baker referenced Richard Zulik’s report, which suggested it’s an extensively flooded area and for such a small wetlands area it has an outsized watershed in it, which appears to be functioning ok right now. Commissioner Baker felt that changing that by filling in the area where it drains water into that wetlands you’re changing the waterflow of the wetland. Commissioner Baker suggested he isn’t against the project but felt that it requires a permit because of the scale of the project creates a need for the Town to have safety against uncontrolled construction type activities. During the anticipated 5 year timeframe for the project if anything happened and the erosion controls failed within one of the phases without a permit it would be just private land that

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no one could do anything about. Commissioner Baker reiterated he wasn't opposed to the proposal but it's too large and too dangerous to be As-of-Right.

Mr. Coon disagreed they were changing the flow of the watercourse, right now, everything sheet flows down from the road to the wetlands and will continue to sheet flow into the wetlands; it's sloped that way now and will continue to slope that way. Mr. Coon didn't feel that changed the flow into the wetlands at all. Commissioner Baker suggested they were changing the speed. He suggested the smaller area at the top was probably insignificant but Phase 4 appears that it could have significant alterations; maybe that area requires a permit and the rest of it could be As-of-Right. Mr. Coon suggested that based on Commissioner Baker's argument any work in an Upland Review Area that exceeds a certain amount and is anywhere near or goes into a wetlands it requires a permit. Noting his concern was with Phase 4, Commissioner Baker referenced language within the regulations regarding "...provided it does not disturb the natural or indigenous character of the wetlands or watercourse by removal or deposition between alteration or obstruction of waterflow..." Commissioner Baker suggested maybe the remainder could be As-of-Right.

Chairman Davis suggested her hesitation is with Phase 4 as well. She suggested perhaps the Commission could consider Phases 1 to 3 for an As-of-Right Determination, but she felt Phase 4 required a full permit.

Mr. Coon wanted to address the As-of-Right Determination allowed under Section 4.1 which provides an exemption for farming. Commissioner Baker and Chairman Davis questioned that Mr. Holden was farming the area now; Mr. Holden contended he was. Commissioner Baker suggested if it was allowable then there wouldn't be this reference in the regulations and the attorney would have agreed that it's a farming activity, but because it's site-based and specific to the proposal then there are decisions to be made. Commissioner Baker reiterated he didn't feel the proposed activity was an As-of-Right Determination.

Mr. Coon cited Commissioner Baker's reference to the attorney, who has suggested the Commission will have to decide if the activity is essential to farming, and preparation of the land is essential to them to do the grading to find the land. Mr. Coon concurred that everyone understood this is a large project, and there is a desire to have some type of oversight. Mr. Coon contended the permitted use As-of-Right doesn't have a distinction on the size of an agricultural project. Commissioner Baker agreed but noted the size of the project and the amount of water being moved around is referenced in section 4.2., the

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Commission has the ability to make that determination; at this point he's leaning toward this being a permitted activity. Commissioner Baker noted Mr. Holden has done everything required for a permitted activity, and you intend for the Town to have some control over the maintenance of the work, he suggested if the Commission doesn't have a permit no one can go onto the property; if Mr. Holden doesn't like Staff's review he can say she's trespassing. Commissioner Pippin agreed. Commissioner Baker noted Mr. Holden has done everything that others acquiring permits over the years have done, and this is a bigger job than many of those applications; Commissioner Baker felt the proposal was a regulated activity.

Commissioner Pippin referenced language within Section 4.1.a that says "...shall not be construed to include road construction..." and all of that. He agreed with Commissioner Baker, noting there will be a few trucks going out of there, when you start to remove the kind of yardage you're proposing it strongly resembles a gravel pit, whether it has a screening plant there or not. Commissioner Pippin questioned why you're not asking to put a screening plant there temporarily. You've got to grade the material out to get the best money back for your expenses. Commissioner Pippin felt it was more than a farming operation. Commissioner Pippin suggested that normally, when you reclaim the soil, it takes a couple of years before the soil is useable; he suggested you're not going to get a good crop the year you put the topsoil back.

Herb Holden joined the discussion, citing confusion as he felt this Commission was arguing Planning and Zoning issues, he also felt the Commission was making assumptions as to where the water is going to go. Mr. Holden noted Mr. Coon has engineered the plan to take the water where it's going today, and you can argue that it will change at the rate of speed, but in this Wetlands review, Mr. Holden's understanding was that he's a farm, the Commission has to tell him he isn't a farm, and, according to your Town Attorney, you have to determine whether or not what's being proposed to regrade the land is a Permitted Use or an As-of-Right use. Mr. Holden suggested that according to the Agricultural Regulations he's allowed to regrade. Mr. Holden felt the arguments about the size and volume were Planning and Zoning issues, they have nothing to do with Wetlands issues. Mr. Holden suggested this Commission's job is to acknowledge he's a farm, he's regrading to increase the size of the area he can farm; he felt the issues being discussed are related to his gravel business which isn't related to this project. Mr. Holden indicated he doesn't want a screening operation, or a gravel pit, or the bonding or insurance related to this property. Mr. Holden indicated he wants to raise corn, and cows. The Wetlands Commission needs to decide if he's a farm, he's showing the need to do the regrading because of the 14-foot wall left from a previous mining operation that isn't allowing access to several acres, and

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he's dealing with this "knob" of material left from a previous farmer, and he's trying to remove all of that to expand his agricultural operation. Mr. Holden reiterated his confusion that the Commission of going on and on about a gravel operation. He noted they'll be doing the removal in 7-acre phases in which they'll open the phase, regrade it, close it, and move on to the next phase. He'll be farming the rest of the property, except for the phase he's working in. At some point he'll have to deforest phase 4, which is landlocking another field. Mr. Holden cited his confusion, suggesting there's nothing in the regulation that says the operation must be 10 acres or 10,000 acres, he's allowed to regrade to expand his farming operation, and he's putting in erosion controls to not impact the wetlands.

Commissioner Baker noted as long as Mr. Holden doesn't have a permit you can come in and say whatever you want. Mr. Holden suggested he needs this project to be recognized as a farming operation and not a gravel pit. Commissioner Baker agreed that the issue of the gravel pit is a Planning and Zoning issue, but, it's the same type of work while this operation is going on. Commissioner Baker suggested when he's trying to make a decision on any application he tries to envision what will happen during the work. Citing section 4.4 Commissioner Baker noted "... to carry out the purposes of this section any person proposing or permitting for a non-regulated activity shall, prior to commencement of this use shall notify the agency..." Commissioner Baker suggested Mr. Holden has come in to receive the As-of-Right determination, and he recognized that Mr. Holden has done that. But Commissioner Baker suggested that personally, as a member of the Wetlands Commission, that it's significant activity and you're changing the water flow, and that worries him. Commissioner Baker questioned if there was a possibility to reach a middle ground regarding this proposal?

Chairman Davis suggested if phases 1, 2, and 3 were a separate project then the Commission might agree to an As-of-Right Determination, but she also felt Phase 4 needs to be a permit because of its proximity to the wetlands, the amount of material, how much is going to be touching the Upland Review Area, and the steep slope will change how the water flows.

Commissioner Baker questioned why Mr. Holden didn't want to get a permit? He suggested you've done everything as if this were a permit, you've testified that you're going to do this the way it's supposed to be done. Mr. Holden declined to answer. Mr. Coon suggested he would argue that section 4.2 doesn't apply to this activity, it's an agricultural use allowed under section 4.1; he didn't feel Commissioner Baker's contention is correct.

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Commissioner Osborn cited the amount of material being removed from the site; Mr. Holden suggested that was a Zoning concern. Commissioner Osborn noted it will affect the whole neighborhood; Mr. Holden reiterated that was a Zoning issue. Commissioner Osborn questioned if Mr. Holden was taking out a Zoning Permit; Mr. Holden indicated they are working with the Planning Commission on a Text Amendment under the Farming Regulations. Commissioner Pippin questioned if this Commission declares the activity As-of-Right does Zoning even become involved in a review? Discussion continued regarding separation of Zoning versus Wetlands issues. Mr. Coon reiterated his contention that the proposed activity is an As-of-Right activity under the Wetlands Regulations Section 4.1 which references harvesting and raising of crops.

Commissioner Baker read section 4.3, "...all activities in wetlands or watercourses involving filling, dredging, excavating, clear cutting, clearing, grubbing, or grading, or any other alteration or use of a wetlands or watercourse not specifically permitted by this section and otherwise defined as a regulated activity by these regulations requires a permit." Mr. Coon contended the work isn't occurring in a wetlands or watercourse. Commissioner Baker reiterated the scale of the operation concerns him, there could be a gravel operation here for 5 years, and to have that uncontrolled causes the Wetlands Commission to not be doing it's job as stewards of the wetlands.

Commissioner Baker cited one of the Commission's jobs is to consider reasonable and feasible alternatives, he questioned if any alternatives to mitigate the risk to the wetlands have been offered. Commissioner Baker reiterated that without a permit Wetlands Agent Boudreau had limited ability to visit the site to check erosion controls; he felt that was unacceptable. Mr. Coon suggested that was a problem with the regulation. Commissioner Baker concurred, but suggested if the ability for the Commission to make an As-of-Right determination wasn't a part of the regulations it wouldn't be in the regulations. Commissioner Baker cited he wasn't comfortable voting on the As-of-Right Determination this evening; if there's no possibility of a compromise then he isn't comfortable voting yes tonight on what's been presented to the Commission. Mr. Coon questioned what they could give as a compromise? Commissioner Baker recalled the Commission offering phases 1, 2, and 3 could be considered for an As-of-Right Determination, while phase 4 could require a full application/permit.

Commissioner Osborn suggested the Commission think about the proposal until next month. Mr. Holden opposed continuation as he wanted to get the activity started. Commissioner Baker cited they hadn't provided an application for a Text Amendment to the Planning and Zoning Commission so a month's delay for the

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Wetlands Commission shouldn't be a problem.

Commissioner Osborn questioned if there's been any comment from the DEEP, Mr. Coon referenced the DEEP correspondence, noting DEEP cited no jurisdiction on a stormwater permit, if its grading associated with farming it's exempt from their jurisdiction. Commissioner Baker noted DEEP hadn't seen a plan specific to this activity. Commissioner Baker suggested that the DEEP has an open permit for the things they directly want to claim responsibility for, everything else they defer to the local Commission. Discussion continued regarding interpretation of the language within the Wetlands Regulations. Commissioner Osborn suggested it may be that the DEEP feels the local board will look into a proposal as they know the area, so they leave a lot of this open for the local Commission to determine.

Mr. Holden questioned what additional information they could provide? He noted the Town Attorney said the issue was determining if this grading was essential for us to expand our farming operation, and the Commission has to determine whether or not it is. The Town Attorney didn't say anything about volume or changing the watercourses, the question is - is this proposal essential to expanding the farming operation. Mr. Holden suggested he didn't know how to explain to the Commission that it is. He understands the suggestion to consider phase 4 differently but it's all one farm. Chairman Davis noted it's not just a one-year project. Mr. Holden continued with his contention the farming exemption is an As-of-Right Determination. Commissioner Osborn questioned what Mr. Holden would do if the Commission voted tonight and denied the proposal? Mr. Holden suggested he'd have to confer with his engineer. Commissioner Osborn indicated he can't understand the opposition when you've done all the work for a permit already.

Commissioner Pippin reiterated that once the Commission goes with the As-of-Right Determination the applicant has carte blanche as to what he can do; if there's no permit to review there are no set standards. Commissioner Baker concurred, noting once the Commission rules on the As-of-Right Determination the applicant doesn't have to put in the erosion controls, you can just do what you want to because the Commission has allowed that. Commissioner Baker suggested it's great that you came to the Commission, that shows responsibility, but he finds it odd that you go through all of this and don't want to do an application. Mr. Coon suggested it's the right way to do it under the regulations. Commissioner Baker suggested people disagree over these issues because there are interpretations and judgements to be made. Chairman Davis suggested the Commission knows Mr. Holden's reputation and that you want to farm, but if

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someone else came in for a similar As-of-Right for farming and within a week change their mind and put something out there. Commissioner Pippin concurred, he cited concern that once the Commission gives the As-of-Right Determination a person doesn't even have to acknowledge letters regarding their activities.

Chairman Davis suggested the Commission's options are to wait a month to continue to think about the proposal, or vote on this and whatever the decision is so be it, or consider submitting a permit. Commissioner Baker suggested if he votes tonight he's going to vote on the side of caution to protect the wetlands which he feels is his duty as a Wetlands Commissioner. The consensus of the Commissioners was to continue the discussion to the next meeting. Mr. Holden agreed to wait a month to give the Commission time to do more research and consider how this project will positively impact the community. Commissioner Baker suggested he believed Mr. Holden's intentions, and that it will be a positive activity long-term.

Chairman Davis called for a motion to continue the discussion until next month.

MOTION: To CONTINUE the As-of-Right Determination for 81 Windsorville Road, K & H Properties – owner, for clearing and grading to expand cropland in the Upland Review Area.

Baker moved/Osborn seconded/DISCUSSION: None

**VOTE: In Favor: Baker/Davis/Kebschull/Osborn/Pippin
(No one opposed/No abstentions)**

XII. MISCELLANEOUS: None

XIII. AGENT REVIEW AND DECISIONS: None

XIV. VIOLATIONS: None

XV. CONFERENCES/SEMINARS/TRAINING: None

XVI. CORRESPONDENCE: None

XVII. GENERAL BOARD DISCUSSION:

- Commissioner Kebschull questioned the status of the solar facility? Wetlands Agent Boudreau indicated she and Jay Ussery had met with people regarding concerns that the erosion controls were failing, she understands the solar company

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has someone checking routinely. Commissioner Baker suggested they're putting in their roads and a significant amount of silt fence has been installed. Commissioner Pippin suggested if they started at the Markowski property on Plantation Road access would be better to set up the panels. Commissioner Pippin cited the need to connect to the transmission lines, which he felt were located on the Charbonneau property.

Commissioner Pippin cited the continued ATV activity from multiple access points.

- Commissioner Pippin also requested the Commission review the Wetlands Regulations to clarify an amount of material for excavation which would require a permit.

XVIII. PUBLIC PARTICIPATION (Discussion on non-Agenda items only):

Chairman Davis offered an opportunity for the in-person audience to comment; no one requested to speak. Chairman Davis then offered the remote participants an opportunity to comment as well; no one requested to be recognized.

XIX. EXECUTIVE SESSION – Pursuant to C.G.S. Section 1-200 (6)(b) – pending claims/litigation – Action possible:

No **EXECUTIVE SESSION** this evening.

XX. ADJOURNMENT:

MOTION: To ADJOURN this Meeting at 8:03 p.m.

Pippin moved/Osborn seconded/DISCUSSION: None

**VOTE: In Favor: Baker/Davis/Kebschull/Osborn/Pippin
(No one opposed/No abstentions)**

Respectfully submitted:

Peg Hoffman, Recording Secretary, Inland Wetlands and Watercourse Commission