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May 17, 2024

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Re: Application of Avery Brook Homes, LLC, for an 18-Lot Resubdivision/Affordable Housing Development on Stoddards Wharf Road.

The purpose of the Inland Wetland and Water Courses Act, C.G.S Section 22a – 36 *et. seq.* (the "Act") and of the Inland Wetlands and Watercourses Regulations of the Town of Ledyard (the "Wetlands Regulations") is "... to protect the citizens of the state by making provisions for the protection, preservation, maintenance and use of the inland wetlands and water courses by minimizing their ... pollution; maintaining and improving water quality in accordance with the highest standards set by federal, state or local authority; ... and protecting the state's portable freshwater supplies from the dangers of drought, overdraft, pollution, misuse and mismanagement ...." It is the responsibility of the Inland Wetlands and Water Courses Commission of the town of Ledyard (the "Wetlands Commission") to enforce the provisions of the Act and the Wetlands Regulations. Section 6.2 of the Wetlands Regulations provide that no person shall conduct or maintain a "regulated activity" in Ledyard without first obtaining a permit from the Wetlands Commission.

Ledyard's existing Wetlands Regulations define "regulated activity" in pertinent part as follows:

> "Regulated activity" means [i] *any* operation within or *use of* a wetland or water course involving removal or deposition of material, *or* [ii] *any* obstruction, construction, alteration or *pollution of* such wetlands or water courses, *or* [iii] *any* other activity which may impact or effect the wetlands.... Furthermore, any clearing, grubbing, filling, grading, paving, excavating, constructing, depositing or removing of material and discharging of stormwater on the land within 100 feet, measured horizontally from the boundary of any wetland or watercourse, is a regulated activity." (emphasis supplied)

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The Wetlands Commission clearly has jurisdiction to review the proposed 18 lot resubdivision based on, and because of, that definition. The Wetlands Commission does not require additional language in its regulations authorizing it to regulate activity occurring outside of an upland review area ("URA").

The definition of "regulated activity" in the Wetlands Regulations is essentially bifurcated. The first part of the definition is multifaceted and both refers to, and allows, the Wetlands Commission to regulate, *any* use of, *any* pollution of, or *any* other activity, without regard to, and without limitation by, physical location or proximity to a wetland or watercourse. The second part of the definition adds certain enumerated activities within 100 feet of the boundary of a wetland or watercourse as regulated activities.

To state that the Wetlands Commission is without jurisdiction to review activity which is likely to impact wetlands and watercourses simply because that activity occurs outside of a wetland, watercourse or URA is to ignore the unambiguous definition of "regulated activity" and to severely restrict the authority and ability of the agency to protect and regulate the wetlands and watercourses of Ledyard in a fashion consistent with the Act. This is especially relevant in light of the fact that the applicant intentionally gerrymandered lot lines and modified a previous development proposal for the express purpose of avoiding review of water quality impacts by the Wetlands Commission.

Multiple provisions of the current definition of "regulated activity" clearly authorize the Wetlands Commission to regulate the proposed subdivision of approximately 6.3 acres of land adjacent to the Avery-Billings Reservoir into 18 lots for the construction of 18 homes, each with on-site drinking water wells and on-site sanitary subsurface disposal systems. As briefly explained in Mr. Giggey's preliminary report dated May 8, 2024, the development as proposed is very likely to pollute the wetlands and water courses which, collectively, constitute the Avery-Billings Reservoir.

1. The proposed development is clearly a regulated activity since the Wetlands Regulations define "regulated activity" as "... *any* obstruction, construction, alteration or *pollution*" of a wetland or water course. There is no requirement that the pollution be direct or that it result only from activity within the wetland or water course or within an URA. "Pollution" is defined by the Wetlands Regulations as " ... the contamination or rendering unclean or impure of any waters of the state by reason of any *waste* or other *materials* discharged or deposited therein by any public or private sewer or otherwise so as to directly or indirectly come in contact with any waters."

2. The proposed development is clearly a regulated activity since the Wetlands Regulations define "regulated activity" as " ... *any* other activity which may

impact or affect the wetlands ...." As noted above, the activities associated with the proposed development (which are situated approximately 105 feet from the Avery-Billings Reservoir and just outside the URA) are very likely to have a significant adverse impact upon the public drinking water supply.

3. The proposed development is clearly a regulated activity since the Wetlands Regulations define "regulated activity" as " ...*any* use of a wetland or water course involving removal or *deposition* of material". Deposition may or may not involve a direct discharge. It is uncertain whether stormwater from the proposed 18 lot project will constitute a direct or an indirect discharge to the Avery-Billings Reservoir, but it is certain that the effluent from the proposed18 subsurface sanitary disposal systems will constitute an indirect discharge to the reservoir through the groundwater underlying the development site. The Wetlands Regulations define the verb "deposit" to include, without limitation, "discharge or emit"; and also define "discharge" to mean the "... emission of any water, *substance*, or *material* into waters of the state ...." Furthermore, the Wetlands Regulations define "material" as " ... any substance, solid or liquid, organic or inorganic including, but not limited to, ... refuse or waste."

The Wetlands Regulations also define "significant activity" as "[A]ny activity which is likely to cause or has the potential to cause pollution of a wetland or watercourse" and "[A]ny activity which substantially diminishes the natural capacity of an inland wetland or water course to ... supply water ...."

As stated by the Connecticut Supreme Court the " ...*sina qua non* of review of inland wetlands applications is a determination whether the proposed activity will cause an adverse impact to a wetland or watercourse." Riverbend Associates Inc. v. Conservation and Inland Wetlands Commission, 269 Conn. 57, 74 (2004). The Act grants inland wetland agencies the authority to regulate activity occurring outside wetlands and water courses if such activity is likely to have an adverse impact on the wetland or water course. Aaron v. Conservation Commission of Redding, 183 Conn. 532, 542 (1981).

The case of Prestige Builders v. Inland Wetlands Commission of Derby, 79 Conn App 710, 723 (2003) is limited in its holding to upland review areas; i.e. defined areas around a wetland or watercourse within which activity likely to impact a wetland or watercourse is defined as a regulated activity *per se*. Specifically, the holding in Prestige Builders is that since the agency's regulations did not address upland review areas, it could not deny an application because of proposed activities within an URA. The second part of the definition of "regulated activity" contained in the Ledyard Wetlands Regulations is just such a regulation (i.e. it defines specific activities within a defined URA be to regulated activities). As stated by Judge Berger in the case of Saddle Ridge Developers v. Easton Conservation

Commission, 2016 WL 720247 (2016, at Page 13) the conclusion of Prestige Builders that an agency must adopt regulations in order to exercise authority over an upland review area is "fundamentally different" than the agency's authority and obligation to review the environmental impact of proposed activities occurring outside a wetland or watercourse, regardless of where located; particularly where, as in Ledyard, the definition of "regulated activity" is broad enough to encompass activity outside the URA.

Some inland wetland agencies have adopted regulations addressing this issue; e.g. revising their definitions of regulated activity to include activity in a non-wetland or non-watercourse area outside the URA. However, such additional language is not required by Prestige Builders, and is unnecessary since, the basic definition of "regulated activity" in Ledyard's Wetlands Regulations endows the Wetlands Commission with the necessary authority (and, indeed, the obligation) to regulate the proposed activity in the above-referenced application. Such an interpretation is especially important in the context of the fundamental and important public purpose of the Act in protecting fragile and often irreplaceable resources for both current and future generations. As noted by Judge Berger in Saddle Ridge, " ... an upland review regulation is a useful regulatory mechanism; it does not supplant a substantive review of an activity that may use or impact a down gradient wetland or watercourse." (Id at p13)

As discussed above, it is the opinion of the intervenor, City of Groton, that both the Act and the Wetlands Regulations require an application to, and review by, the Wetlands Commission in this instance.

Very truly yours,

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