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May 24, 2024

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Ms. Elizabeth Burdick, Director of Land Use and Planning
741 Colonel Ledyard Highway
Ledyard, CT 06339

Re: Application of Avery Brook Homes, LLC for resubdivision approval – 96, 98 and 100 Stoddards Wharf Road, Ledyard, Connecticut

Dear Attorney Avena and Ms. Burdick:

I am writing in response to correspondence received by each of you under date of May 17, 2024 from Stephen W. Studer, counsel to Groton Utilities. I preface this correspondence by stating the obvious; i.e. that Attorney Studer's May 17, 2024 correspondence is both factually incorrect in several instances and materially misleading.

While Attorney Studer notes that he has "supplied emphasis" in his recitation of the definition of a regulated activity as defined in Section 2 of the Inland Wetland and Water Courses Regulations of the Town of Ledyard (effective date: January 25, 2021), the emphasis which has been added impermissibly alters the interpretation of the definition. The bifurcation of the definition of regulated activity into three (3) subparts, which does not exist in the definition adopted by the Ledyard Wetlands Agency represents a perversion of the intent and meaning of the regulation that the Agency adopted.

As noted in our memorandum to Attorney Avena dated April 17, 2024, a wetland regulation is a local legislative enactment and in its interpretation the question is the intent of the legislative body as found from the words employed in the regulation itself. *Fox v Zoning Board of Appeals* 146 Conn. 70, 73 (1958) The words employed are to be interpreted in their natural and usual meaning. *Lawrence v. Zoning Board of Appeals* 158 Conn. 509, 511 (1969) It is a cardinal rule of statutory construction that a statute should be read in order to give full impact to each and every word of the statute. *Archibald v. Sullivan* 152 Conn. 663, 688 (1965) No clause in a statute should be considered superfluous absent compelling reasons to the contrary. *State v. Briggs* 161

Conn. 283, 287 (1971) The grammar used in the formulation of a regulation or statute is an integral component of the regulation itself.

With these principles in mind, we analyze the definition of regulated activity as contained in the Ledyard Inland Wetlands and Watercourses Regulations. First, it is noteworthy that the regulation contains no bifurcation as contained in Attorney Studer's letter of May 17, 2024. If the Ledyard Wetlands Agency, in its legislative capacity, intended that bifurcation, it would have included the delineation of the subsections inserted for "emphasis" by Attorney Studer. **IT DID NOT**.

The first sentence of the definition in pertinent part reads "…means any operation within or use of a wetland or water course involving removal or deposition of material, or any obstruction, construction, alteration or pollution of such wetlands or watercourses, or any other activity which may impact or effect the wetlands…" In reviewing the totality of the first sentence of the definition of regulated activity, it becomes clear that it is limited to "any operation within or use of a wetland or water course." The further language "involving removal of or deposition of material. or any obstruction, construction, alteration or pollution of such wetlands or water courses…" is nothing more than a prepositional phrase which enumerates certain types of activities within the wetland or water course which are regulated.

If Attorney Studer's interpretation of the definition was to be adopted, it would render superfluous the second sentence of the definition which grants regulatory authority to the Inland Wetlands Agency over certain activities occurring within 100 feet as measured horizontally from the boundary of any wetland or watercourse.

A second tenet of regulatory construction is that, under Connecticut's rules of statutory construction, the language of a statute must be interpreted in context with the statutory scheme of which it is a part. *Broadnax v. New Haven* 284 Conn. 237, 245 (2007) Connecticut has adopted the "plain meaning rule". The plain meaning rule essentially says that if a statute is on its face, clear and unambiguous, and interpreting in light of that clear and unambiguous language would not yield absurd or unworkable results, courts are not permitted to look beyond the language in the statute itself for purposes of determining what the legislative intent was in adopting that legislation. *Hummel v. Marten Transport* 282 Conn. 477, 500 (2007) Connecticut General Statutes §1-2z requires that a court, in interpreting a regulation, consider the text of the statute itself and its relationship to other statutes.

Considering the referenced rules of statutory construction, Attorney Studer's manipulated revision of the definition of a regulated activity as contained in the Ledyard Wetlands Regulations yields absurd and unworkable results and is internally inconsistent. If the definition is given the broad reach suggested, it renders superfluous the second sentence of the definition which allows

the municipal wetland agency to regulate activities occurring exterior to the wetland or watercourse boundary itself but within 100 feet measured horizontally from the boundary of the regulated resource. That provision is unnecessary if the Wetlands Agency has regulatory jurisdiction over any activity, wherever occurring, if it makes an administrative determination that such an activity is likely to adversely impact a wetland or watercourse. The plain language and construction of the definition of a regulated activity evidences no such legislative intent.

We also call your attention to the first sentence of Section 7.1 of the municipal Wetland Regulations which provides "Any person intending to conduct a regulated activity, including work within the 100' upland review area, or to renew or modify a permit to conduct such activity, shall apply for a permit on the proper form provided by the IWWC." Adopting Attorney Studer's suggested interpretation of the definition of a regulated activity would render the language "including work within the 100' upland review area" superfluous as the Wetland Agency would have regulatory jurisdiction to regulate any activity which may have an adverse impact on wetlands and watercourses.

As evidenced by this firm's correspondence to Attorney Avena dated April 17, 2024, a municipal wetland agency acts in both a legislative and administrative capacity. It is void of regulatory authority to regulate activities without first adopting regulations defining the scope of that regulatory authority. A review of various regulatory schemes adopted by municipal wetland agencies in southeastern Connecticut (as attached to that correspondence) evidences the fact that different municipal wetland agencies have adopted differing scopes of regulatory authority. Under the enabling legislation for the regulation of activities in inland wetlands and watercourses, municipal wetland agencies are statutorily required to regulate activities occurring within wetlands or watercourses. Ledyard's regulations establish a regulatory scheme to fulfil that obligation contained in the enabling legislation.

On the other hand, there is no legislative mandate for municipal wetland agencies to regulate activities occurring exterior to the defined boundaries of inland wetlands and watercourses. The Ledyard Wetlands Commission, in its legislative capacity, has made a determination that it should review; and, if required, regulate activities occurring within 100 feet of the boundaries of regulated wetlands and watercourses. The definition of regulated activity defines the geographic scope of what the Commission has legislatively deemed is necessary in order to fulfill its statutory duty to protect the State's inland wetlands and watercourses. Wetland agencies in other municipalities have taken a more expansive view of the regulatory scheme necessary to protect these resources. Others, including North Stonington, Preston and Ledyard, have not.

Attorney Studer's interpretation of *Prestige Builders* lacks depth of analysis. The Appellate Court, in that matter, was reviewing agency regulation exterior to the wetland or watercourse

boundary. Derby's municipal wetland agency had not adopted upland review area regulations. Notwithstanding that fact, the concept is identical. An agency cannot regulate without first adopting regulations defining the scope of that regulatory authority. In the Derby instance, the activity was occurring in an area which jurisdictionally would likely have fallen within an upland review area if the agency had adopted upland review area regulations. In the instant situation, the activities complained of are even exterior to a defined upland review area; thus, more remote from the regulated resource than the factual situation extant in *Prestige Builders*.

In *Fusco v. Trumbull Planning & Zoning Commission et al* 2021WL 761796 (2021), the Trumbull wetland agency had adopted regulations establishing a 100 foot upland review or buffer area. In *Fusco,* no activity was occurring in either a regulated wetland or watercourse resource or in the 100 foot upland review area. In evaluating the scope of regulatory authority of the wetland agency, and the need to submit an application for review, the court held as follows:

> "Here, the record reveals that no activity will occur within the one hundred (100') foot buffer area. Therefore, the Trumbull Inland Wetlands and Watercourses Commission does not have jurisdiction concerning the site plan, as proposed and approved."

We therefore reiterate the decision maintained in our April 17, 2024 correspondence that, based on the facts and circumstances of the Avery Brook Homes application, the Town of Ledyard Inland Wetlands and Watercourses Commission has no authority to review and no regulatory authority over activities proposed on a parcel of land which contains no inland wetlands and watercourses and which contains no upland review areas adjacent to wetlands and/or watercourses located on adjacent property.

Although extraneous to the jurisdictional issues discussed herein, we also note the following factual errors in Attorney Studer's May 17, 2024 correspondence:

1. No activity is proposed within 105' feet of the Billings/Avery Brook Reservoir. In fact, the most proximate activity is removed more than 300' from the reservoir edge.

2. The characterization of Avery Brook Homes boundary lines as "gerrymandering" is inaccurate and inflammatory. Ledyard has an administrative process to review boundary line adjustments. That process was followed, reviewed and approved by the former Director of Planning.

3. The Applicant's reconfiguration of its lot lines, as expressly permitted by the land use regulations of the Town of Ledyard, was accomplished for the express purpose of attaining regulatory compliance of the resubdivision regulations with the permitting

requirements of the Ledyard Land Use Regulations, a right afforded to every property owner.

Very truly yours,

Harry B. Heller

HBH/rmb

Cc: Mr. Peter C. Gardner
Mr. Conrad C. Gardner
Mr. Anthony Bonafine
Mark Branse, Esquire
Stephen Studer, Esquire