

Striking a Balance in Connecticut Between Economic Growth and Environmental Protection: A Tale of Two Towns and the Yale Farm Golf Course

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I. INTRODUCTION

When deciding upon the location for a proposed project, a developer may speculate whether the plan would be more readily approved in one town versus another. For example, if a developer were looking to build a mall, he or she might look at various towns in the desired region and consider the resistance each town might give. In addition to existing zoning law, a developer might look to make use of relationships with those on various land use commissions, the needs of each town, and the probability that there would be an active community group to voice opposition. If all factors were equal, the developer would likely choose the path of least resistance. The proposed Yale Farm development illustrates the treatment of one project by two northwestern Connecticut towns (as the development would spread across parts of these two towns).

Yale Farm,¹ a 780-acre site where New York developer Rowland W. Betts plans to create an eighteen-hole championship-caliber golf course, consists of seventeen separate parcels of land with 535 acres in Norfolk and 245 in North Canaan. In 2002, Betts bought Yale Farm and announced plans to develop this golf course with private club amenities, along with an adjacent housing development. However, before Betts's plan for Yale Farm Golf Club could be implemented, he first had to obtain the necessary permits.

To date, Norfolk and North Canaan have treated Betts's proposal differently. While each town has approved the plans, each town's approval is contingent upon different conditions: Norfolk imposed more than 100, while North Canaan imposed only a handful. It is curious how one town could view the development as something that is in need of 100 restrictions, while the other sees it as nearly perfect²—especially since each

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¹ The land upon which Yale Farm sits came from a land grant from Yale University about a century ago. Before Betts acquired the land, Robin and Henny Mead owned the estate. Rinker Buck, *Land-Use Battle in North Canaan Turns Personal*, HARTFORD COURANT, Aug. 1, 2004, at A1.

² This disparate treatment could be due to many factors such as differences in the plan's implications for each town, public involvement in the permit process, current tax base, and town culture, among others.

commission approved the project almost unanimously. This disparate treatment raises several issues, including the discretion of local agencies, the possibility that special needs of a town might outweigh harm to wetlands, and the possible success of mobilized citizen groups.

II. WETLANDS

Of Yale Farm's 780 total acres, 113 are classified as wetlands.³ The development proposal calls for the destruction of 2.5 acres of wetlands and the alteration of 1.3 acres.⁴ However, the development plan calls for eight acres of wetlands to be created in different areas of the site.⁵

The value of wetlands is well-documented. Wetlands provide many important ecological and environmental functions such as "habitat and nutrients for many animal and plant species, natural resources such as fish, shellfish, and timber, protection against flooding and erosion, and a natural water purification system," as well as "recreational, educational, and research opportunities."⁶ Despite these benefits, wetland regulation is controversial because a "dichotomy exists between those promoting property rights and those advocating for environmental protection."⁷

Challenges to wetland regulation, as well as a history of neglecting our wetlands, may have led to the widespread loss of wetlands in the United States. In the 1980s and 1990s, the Department of the Interior issued a series of reports estimating that fifty percent of the wetlands in the contiguous United States was destroyed between the 1780s and 1983, an average annual loss of about 550,000 acres per year.⁸ Unfortunately, there is no reliable information on the amount of wetland losses in Connecticut.⁹ Although it is widely known that inland wetland losses continue to occur, the State of Connecticut has never established a baseline to which future

³ Buck, *supra* note 1 (while Betts is quoted as making this statement about wetlands acreage, Betts also mentions that his team has "revised every single hole that came up as a result of wetlands concerns during the hearing process").

⁴ *Gevers v. Inland Wetlands and Watercourses Comm'n*, 040092045S, 2004 Conn. Super. LEXIS 3053, at *5 (Oct. 5, 2004).

⁵ *Id.*

⁶ Michael J. Podolsky, Comment, *U.S. Wetlands Policy, Legislation, and Case Law as Applied to the Wise Use Concept of the Ramsar Convention*, 52 CASE W. RES. L. REV. 627, 627 (2001); see also Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607, 636-37 (2004).

⁷ Corey Elizabeth Burnham, *The Tulloch Rule: Its Rise, Demise & Resurrection. Will the New Version of the Rule Withstand Judicial Scrutiny?*, 33 CONN. L. REV. 1349, 1349 (2001).

⁸ Flournoy, *supra* note 6, at 641 (citing Thomas E. Dahl, *U.S. Dep't of the Interior, Status and Trends of Wetlands in the Coterminous United States, 1986 to 1997* (2000)). For other discussions on wetland loss, see William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537 (2004); see also Burnham, *supra* note 7.

⁹ Kenneth J. Metzler & Ralph W. Tiner, *WETLANDS OF CONNECTICUT*, at 84 (State Geological and Natural History Survey of Connecticut 1992).

losses could be compared.¹⁰ However, it is estimated that Connecticut has lost between one-third to one-half of its original wetlands.¹¹ Therefore, it is imperative that Connecticut protect its remaining 450,000 acres of inland wetlands.¹²

Because Connecticut's wetlands used to be considered wastelands, most people believed the best use of wetlands could only be attained through "reclamation projects."¹³ In 1972, however, the Inland Wetlands and Watercourses Act (IWWA) established the authority for the State Department of Environmental Protection (DEP) and for municipalities to adopt programs regulating all activities that affect inland wetlands and watercourses.¹⁴ Major amendments were made to this act in 1973, 1987, and 1996.¹⁵

To prohibit speculation, the Connecticut Legislature stated the purpose of the IWWA in Connecticut General Statutes Section 22a-36. It states that

the inland wetlands and watercourses of the state of Connecticut are an indispensable and irreplaceable but fragile natural resource with which the citizens of the state have been endowed The preservation and protection of the wetlands and watercourses from random, unnecessary, undesirable and unregulated uses, disturbance or destruction is in the public interest and is essential to health, welfare and safety of the citizens of the state.¹⁶

Although making clear that Connecticut's wetlands play a crucial role in its ecosystem, the legislature designed the act so wetland preservation could not be carried out at any costs. The Connecticut Supreme Court said the act provided "an orderly process to balance the need for economic growth of the state and the use of its land with the need to protect its environment and ecology."¹⁷ When interpreting the legislature's purpose,

¹⁰ *Id.*

¹¹ *Id.*

¹² Connecticut Department of Environmental Protection, INLAND WETLANDS MANAGEMENT, available at http://dep.state.ct.us/wtr/wetlands/inland_wetlands.htm; see also Metzler & Tiner, *supra* note 9, at 67. In Connecticut specifically, wetlands were used for hunting, trapping, fishing, native cranberry and blueberry harvest, timber and salt hay production, and livestock grazing. Although these wetland uses tend to preserve the integrity of the wetlands, the wetlands were compromised qualitatively.

¹³ Metzler & Tiner, *supra* note 9, at 67.

¹⁴ Connecticut Department of Environmental Protection, INLAND WETLANDS AND WATERCOURSES, available at <http://dep.state.ct/wtr/wetlands/inland/htm> (June 30, 2003).

¹⁵ *Id.*

¹⁶ Branhaven Plaza, L.L.C., v. Inland Wetlands Comm'n of the Town of Branford, 740 A.2d 847, 852-53 (Conn. 1999) (quoting CONN. GEN. STAT. § 22a-36).

¹⁷ Samperi v. Inland Wetlands Agency, 628 A.2d 1286, 1294 (Conn. 1993) (interpreting CONN. GEN. STAT. § 22a-36).

the court noted that “[i]nstead of banning all economic activities on wetlands, the legislature realized that a balance had to be struck between the economic activities and the preservation of the wetlands.”¹⁸ Even the Connecticut DEP has said that “in a perfectly ordered world, the use of land to serve the human community would not encroach upon valuable wetlands. In reality, however, human activities . . . do encroach on wetlands.”¹⁹

III. YALE FARM’S JOURNEY (SO FAR) THROUGH THE PERMIT PROCESS IN TWO TOWNS

In Connecticut, wetlands are defined in Connecticut General Statutes Section 22a-38(15) as “land, including submerged land, . . . which consists of any of the soil types designated as poorly drained, alluvial, and floodplain.”²⁰ Typically, a hired consultant makes this detailed determination. It has been determined that portions of the Yale Farm area, in both Norfolk and North Canaan, meet this statutory definition of wetlands.²¹

A parcel containing wetlands is subject to the IWWA²² which “delegates broad discretion to the municipalities.”²³ Each municipality must “establish a commission and promulgate regulations governing wetlands and watercourses.”²⁴ This local commission, or municipal inland wetlands agency, has the sole authority to license and regulate wetlands.²⁵

¹⁸ *Id.* (citing *Brecciaroli v. Comm’r of Env’tl. Prot.*, 362 A.2d 948, 951 (Conn. 1975)).

¹⁹ Keane Callahan et al., *An Inland Wetland Commissioner’s Guide to Site Plan Review*, at 4 (Connecticut Department of Environmental Protection 1992).

²⁰ CONN. GEN. STAT. § 22a-38 (2005).

²¹ In Norfolk’s Conservation Commission and Wetlands Agency’s approval of Yale Farm’s permit on November 19, 2003, the agency found that “the property contains an inter-related system of wetlands and watercourses, many of them high quality.” In *Gevers*, the court stated that “Yale’s plan in North Canaan is to destroy 2.24 acres of wetlands [and] alter 2.26 acres of wetlands.” The court also dismissed the appellants’ claim that the wetlands audit supplied by Yale included misidentified and improperly marked wetlands. *Gevers v. Inland Wetlands and Watercourses Comm’n*, 040092045S, 2004 Conn. Super. LEXIS 3053, at *5 (Oct. 5, 2004).

²² The IWWA is contained in CONN. GEN. STAT. §§ 22a-28 through 22a-45 (2003).

²³ *Great Atl. & Pac. Tea Co. v. Branford Inland Wetlands Comm’n*, 445428, 2002 Conn. Super. LEXIS 189, at *7 (Jan 17, 2002); *see also* CONN. GEN. STAT. § 22a-42 (2005).

²⁴ *Pac. Tea Co.*, 2002 Conn. Super. LEXIS 189, at *7 (citing *Branhaven Plaza, L.L.C. v. Inland Wetlands Comm’n of the Town of Branford*, 740 A.2d 847 (Conn. 1999)); *see also*, CONN. GEN. STAT. § 22a-42 (2003); *Samperi v. Inland Wetlands Agency*, 628 A.2d 1286, 1294 (Conn. 1993) (stating that the legislature’s scheme requires each municipality to carry out the act’s provisions by either establishing its own inland wetlands agency or by giving an existing commission or board the authority to act).

²⁵ *United Jewish Ctr. v. Inland Wetlands Comm’n of the Town of Brookfield*, 000340351S, 2001 Conn. Super. LEXIS 2269, at *4–*5 (Aug. 9, 2001) (citing *Tanner v. Conservation Comm’n*, 544 A.2d 258, 259 (Conn. App. Ct. 1998)). Specifically, the commissioner

is charged with the responsibility of protecting inland wetlands and watercourses by regulating activity which might have an adverse environmental impact on such natural resources. CONN. GEN. STAT. §§ 22a-42 and 22a-42a require that any municipality, acting through its legislative body, may authorize or create a board of commission to regulate

Although the local agency has the decision-making authority, the entity's wetland regulations must be consistent with the state's objectives.²⁶

When faced with a permit application, the local wetlands agency must decide whether to grant the permit (provided that the applicant's proposed activity is not allowed as of right).²⁷ First, the agency must decide if the proposed activity would have a significant impact on a wetland: "Whether the proposed regulated activities create an adverse impact on the wetlands poses a technically complex question, one that requires that the commission rely on expert opinions and testimony if members of the commission lack their own experience or knowledge."²⁸ In addition, "[a] mere possibility or potential for harm, without more, cannot provide an adequate basis to deny a wetlands permit application. 'An activity that merely impacts or affects wetlands is not a significant activity; the effect must be major or the impact must be significant.'"²⁹ If the commission determines the proposed regulated activity does not present an unreasonable, significant risk to the wetlands, it may grant the application.

When considering Yale Farm's permit application, both the Town of Norfolk and the Town of North Canaan decided "[t]he proposed activity [would] not have a significant adverse impact on wetlands [and] watercourses," that "[t]he short-term and long-term impacts on wetlands or watercourses . . . [would] be minimal," and that there would not be an "adverse impact on wetlands or watercourses beyond the property boundaries."³⁰

After the wetlands agency decides that the proposed activity would not have a significant impact, it then must decide whether a feasible prudent alternative exists. Section 10.2(g) of the Connecticut Regulations requires the agency to consider "measures which would mitigate the impact to any

activities affecting the wetlands and watercourses located within its territorial limits and any such board of commission is authorized to grant, deny or limit any permit for a regulated activity.

Conn. Fund for the Env't v. Stamford, 470 A.2d 1214, 1215 (Conn. 1984).

²⁶ See CONN. GEN. STAT. § 22a-41 (2003) (requiring that the local agency regulate its wetlands consistent with stated factors).

²⁷ CONN. GEN. STAT. § 22a-40 (2003) (listing permitted operations and uses as of right). An applicant would be allowed to proceed with his or her activity as of right if he or she were proposing a project that had to be approved by the legislature to proceed in areas designated as wetlands.

²⁸ *United Jewish Ctr.*, 2001 Conn. Super. LEXIS 2269, at *15 (quoting *Avalon Bay Cmty's, Inc. v. Inland Wetlands and Water Courses Comm'n*, 980492660, 1999 Conn. Super. LEXIS 3463, at *29 (Aug. 13, 1999)).

²⁹ *Id.* at *20 (quoting *Avalon Bay Cmty's*, 1999 Conn. Super. LEXIS 3463, at *27).

³⁰ See Decision, Report, Permit and Recommendations of the Conservation Commission and Wetlands Agency of the Town of Norfolk, CT 3, available at http://www.limestoneroad.com/limestone_road/Decision,%20Report,%20Permit%20of%20Norfolk%201W.pdf (approval of Yale Farm application) (Nov. 19, 2003) [hereinafter *Norfolk Decision*]; Minutes from the July 13, 2003 North Canaan Inland Wetlands and Conservation Commission, available at http://www.limestoneroadcomlim_esteroad/canaan_minutes-7-17-03.pdf (approving Yale Farm's permit application and imposing conditions) (July 17, 2003) [hereinafter *North Canaan Wetlands Agency Approval*].

aspect of the proposed regulated activity.”³¹ When deciding if there are any mitigating measures, the agency may consider “the applicant’s purpose for, and any feasible and prudent alternatives to, the proposed regulated activity which alternatives would cause less or no environmental impact to the wetlands or watercourses.”³²

The North Canaan Inland Wetlands Agency (IWA) defined the applicant’s purpose as “construct[ing] a championship golf course,” and based on enumerated expert submissions, found no feasible and prudent alternatives.³³ Similarly, the Norfolk Conservation Commission and Wetlands Agency (CCWA) defined the applicant’s purpose as a “‘world class’ golf course” and found no feasible and prudent alternatives to the project based on named expert submissions.³⁴

Finally, if no feasible and prudent alternatives exist, the wetlands agency may either approve the application outright or approve the permit with conditions. “In granting a permit to conduct regulated activities, the commission may attach conditions to the permit.”³⁵ Under Connecticut General Statutes Section 22a-42a(d)(1), “an inland wetlands commission may grant a wetlands permit subject to conditions that carry out the policy of the inland wetlands statute: ‘to preserve and protect the wetlands and watercourses.’”³⁶ Such conditions may include “any reasonable measures which would mitigate the impacts of the regulated activity and which would (A) prevent or minimize pollution or other environmental damage, (B) maintain or enhance existing environmental quality, or (C) in the following order of priority: Restore, enhance and create productive wetland or watercourse resources.”³⁷

When reviewing the Yale Farm permit application, both towns reasoned that with the addition of certain conditions, the proposal would not have a significant adverse impact. In both approvals, the agencies specifically noted that the attached conditions were a necessary part of the issuance. Although both towns agreed that the proposal needed attached conditions to be approved, the conditions differed in quantity and subject matter.

³¹ *Gevers v. Inland Wetlands and Watercourses Comm’n*, 040092045S, 2004 Conn. Super. LEXIS 3053, at *5 (Oct. 5, 2004).

³² *Id.*; CONN. GEN. STAT. § 22a-41 (2005) (listing factors that are considered when deciding if a prudent alternative exists).

³³ North Canaan Wetlands Agency Approval, *supra* note 30; *see also Gevers*, 2004 Conn. Super. LEXIS 3053, at *5–*6.

³⁴ Norfolk Decision, *supra* note 30, at 5–6.

³⁵ *Lorenz v. Inland Wetlands and Watercourses Comm’n*, 000092863, 2004 Conn. Super. LEXIS 1243, at *18 (May 12, 2004) (citing CONN. GEN. STAT. §22a-42a (2003)); *see also* TERRY J. TONDRO, CONNECTICUT LAND USE REGULATIONS 465 (Univ. of Conn. Sch. of Law Press, 2d ed. 1992).

³⁶ *Lorenz*, 2004 Conn. Super. LEXIS 1243, at *20–*21.

³⁷ CONN. GEN. STAT. § 22a-42a(d)(1) (2005).

A. *The Conditional Approvals by the Norfolk and North Canaan Inland Wetlands Agencies*

Planning and Zoning Commissions' restrictions aside, there are many differences in the restrictions imposed by the Norfolk Conservation and Wetlands Agency (Norfolk CWA) and the Inland Wetland Conservation Commission of North Canaan (North Canaan IWCC). The first difference, as mentioned above, is the number of restrictions imposed. While the Norfolk CWA imposed sixty-three restrictions,³⁸ the North Canaan IWCC imposed only eight³⁹ conditions.⁴⁰ For example, while listing Norfolk's restrictions would consume several pages of paper,⁴¹ North Canaan's conditions could be summarized as follows: Yale Farm will provide a mitigation plan approved by the DEP and the U.S. Army Corps of Engineers (Corps), test all water in accordance with specific testing procedures, take soil samples and submit them to the IWCC, conduct and submit a report on nesting sites for the Cooper's hawk, and abide by a fertilizer plan it (Yale Farm) would annually submit.

Although the two towns did not impose the same number of conditions, both conditioned approval on some of the same aspects of the plan. But even these same conditions were imposed differently by each town. For instance, each town conditioned approval on Yale Farm's maintenance of the course, requiring that Yale Farm report its maintenance efforts to the towns and that the land use agencies oversee the entire project. However, the degree of maintenance required, the reporting requirements, and the required oversight varied between the towns. North Canaan only required a yearly report of fertilizers used⁴² while Norfolk required maintenance reports, wetlands reports, and had specified eleven post-construction maintenance operations that must be continued throughout the life of the project.⁴³

Similarly, while each town approved Yale's proposal conditioned upon each town's respective plan for wetland mitigation, the two did so in

³⁸ Norfolk Decision, *supra* note 30.

³⁹ North Canaan Wetlands Agency Approval, *supra* note 30.

⁴⁰ However, although North Canaan IWC enumerates eight conditions, only five of the enumerations are actually conditions. Similarly, the first three or so "conditions" in Norfolk's approval are not really conditions; they are guidelines for reading the conditions.

⁴¹ In Norfolk's Inland Wetlands Approval of Yale Farm's permit, Norfolk even goes into detail about the layout of each golf hole. Norfolk Decision, *supra* note 30, at Exhibit A.

⁴² Approval requires that Yale Farm keep a fertilizer log to be submitted to the agency once a year. Any difference in fertilizer use will result in enforcement action by the Wetlands Commission. Norfolk Decision, *supra* note 30, at Exhibit C at 5.

⁴³ Norfolk's approval required that maintenance operations be conducted, documented, and reported for three years following the initial plant growth and stabilization of the created wetlands. In addition to this maintenance report, a yearly report of the status of the wetlands must also be filed with the agency. Finally, even though the yearly maintenance reports will not need to be filed after three years, the agency enumerated the eleven post-construction operations. Norfolk Decision, *supra* note 30, at Exhibit B.

different ways. “Development project approvals in wetland areas typically require some form of ‘mitigation’ to restore or replace wetland values that will be adversely impacted by the proposed activity.”⁴⁴ In Connecticut, wetlands mitigation is authorized by the wetlands statute. In fact, Connecticut General Statutes Section 22a-41(a)(4) “provides a hierarchy of considerations for reviewing issues of mitigation: measures to (A) prevent or minimize pollution or other environmental damage, (B) maintain or enhance existing environmental quality, or (C) in the following order of priority: Restore, enhance and create productive wetland or watercourse resources.”⁴⁵ Despite allowing wetlands mitigation, the hierarchical structure indicates that mitigation in general, and specifically the creation or restoration of wetlands, is certainly not preferred.⁴⁶

Both towns approved Yale Farm’s mitigation plan to create new on-site wetlands to compensate for the wetlands that would be destroyed in the building process. The agencies presumably balanced the interests of development and preservation, determined that no prudent and feasible alternative existed to the proposed action, and approved the plan. But Norfolk (unlike North Canaan) placed additional conditions on Yale Farm’s mitigation plan: Norfolk required that the applicant post a \$100,000 cash bond to ensure compliance with the permit and the creation of the wetlands.

The location of the approved wetlands mitigation sites has been opposed by a number of affluent citizens opposing the course. One such opponent, Catherine Gevers of North Canaan (a former artistic director of Carnegie Hall in New York), has led a group of abutting neighbors from North Canaan in filing four lawsuits against Betts and local land use commissions. Gevers and her neighbors argued that they had a private action for nuisance because of their close proximity to the planned wetlands mitigation ponds.⁴⁷ In response, the court found there was “no realistic way” for them “to challenge the revised mitigation plan.”⁴⁸ What Gevers and her neighbors might not have realized is that if their argument had prevailed, the wetlands mitigation site could have been moved to

⁴⁴ MARK S. DENNISON, WETLAND MITIGATION 89 (Government Institutes 1997).

⁴⁵ *Branhaven Plaza, L.L.C. v. Inland Wetlands Comm’n of the Town of Branford*, 740 A.2d 847, 854 (Conn. 1999); CONN. GEN. STAT. § 22a-41 (2003).

⁴⁶ See *Branhaven Plaza*, 740 A.2d at 855. In fact, the Connecticut Supreme Court has held that “the creation of wetlands is preferentially lower than all other types of mitigating measures, perhaps, in part, because of the uncertainty associated with the creation and restoration of wetlands.” *Id.*

⁴⁷ Despite their legal argument, Gevers and her neighbors seem motivated by personal reasons. For example, Gevers seems to miss walking her dogs on Betts’s land and may even miss her friends, the Meads, who used to own the estate. Buck, *supra* note 1 (“Gevers enjoyed nothing more than rounding up her basset hounds, climbing the long, white-graveled drive up on neighboring Yale Farm, and taking in the spectacular views of Canaan Valley . . .”).

⁴⁸ *Gevers v. Inland Wetlands and Watercourses Comm’n*, 040092045S, 2004 Conn. Super. LEXIS 3053, at *6 (Oct. 5, 2004).

another part of the state.

In addition to allowing the creation and restoration of new wetlands on-site, the Connecticut Supreme Court, in *Red Hill Coalition, Inc. v. Conservation Commission*, authorized the use of off-site wetlands.⁴⁹ Therefore, if Gevers and her neighbors had continued to challenge the location of the wetlands mitigation sites,⁵⁰ Betts could simply have given up trying to compensate for the wetlands in the immediate area. Instead he could mitigate in another area of the state—an area that would reap the benefits that wetlands provide.⁵¹

IV. WHICH APPROACH IS BETTER?

While both towns conditioned approval on post-construction actions and wetland mitigation, the similarities seem to end there. Both towns took very different approaches toward this land use issue. When determining which approach is preferable, the legislative purpose should be remembered: the economic growth of the state needs to be balanced with the need to protect its environment and ecology.⁵² In striving to strike this balance in an “orderly process,”⁵³ both towns have faced difficulties. And while there are negative consequences to the actions of both towns, Norfolk’s treatment is more consistent with the legislative intent of wetland regulation.

A. *The Problems With Placing Many Conditions on a Permit Application: A Study of Norfolk*

Currently, Norfolk has attached more than 100 restrictions and conditions on the approval of the Yale Farm development. In addition to the conditions placed on the wetlands, there are numerous conditions addressing issues such as traffic and the number of golfers allowed. For example, by insisting that the 535 acres of the development be treated as

⁴⁹ *Red Hill Coalition, Inc. v. Conservation Comm’n*, 563 A.2d 1339, 1345 (Conn. 1989). The Court held that there was

nothing in the statutes or regulations . . . [that] prevent[ed] a local wetlands commission from securing an agreement to provide off-site compensation for the loss of wetlands so long as the commission has considered the impact of the application on the subject property in accord with the policies outlined in §§ 22a-36 through 22a-45 of the General Statutes and the local regulations.

Id.

⁵⁰ Although the court did not find that Gevers and her neighbors had an action, whether they can again challenge the location of the wetlands mitigation in another way or whether they can appeal this decision is beyond the scope of this article.

⁵¹ No cases could be found that indicated if there were any limits on the town’s power to mitigate. It is possible that the town can allow the mitigation to take place anywhere in the state.

⁵² *Samperi v. Inland Wetlands Agency*, 628 A.2d 1286, 1294 (Conn. 1993) (interpreting CONN. GEN. STAT. § 22a-36).

⁵³ *Id.*

“one lot,” Norfolk has forced Betts to reapply to the town whenever he wants to sell a house lot neighboring the course. While this continuing oversight allows Norfolk to retain control over the project, such restrictions invite challenges in the form of lawsuits and appeals which could cost the town, the agencies, the applicant, and the community time and money.

Although Betts wrote that the lawsuits “constitute a considerable waste of time, money and goodwill, strain already strained relationships, and benefit only the lawyers who bring them,” he now has brought a lawsuit as well.⁵⁴ “Betts’ appeal seeks relief from a number of conditions imposed by the [Norfolk Planning and Zoning Commission], including the ‘one lot’ provision potentially restricting his housing plans.”⁵⁵ It is not surprising that Betts would challenge the “one lot” condition. This one-lot provision is probably the condition imposing the heaviest burden on him. Now that the nine once-separate lots⁵⁶ are treated as one, Norfolk PZC maintains continual control over Betts’s plan. Thus, Norfolk cannot only cost Betts time, but also retains the power ultimately to deny him a permit to sell the land in the future.

Moreover, the housing portion of the golf course development may be Betts’s best chance for making a profit. With some financial analysts recommending that “no new golf courses should open in the next five to seven years to allow demand to catch up with the existing facilities,” Betts’s profit plan may entirely depend on the sale of the homes.⁵⁷ Like Betts, many golf course developers are now integrating real estate developments into golf courses to subsidize the building of such courses. In fact, in the country, forty percent of the estimated 175 new courses due to open in 2004 are selling houses in surrounding real estate developments.⁵⁸ The treatment of hundreds of acres as one lot thus presents a great risk to Betts, who has no guarantees that Norfolk will approve his plan to make the “real money” from this development through the sale of houses. It is understandable that he would fight this condition.

In addition to Betts’s suit, Gevers and her neighbors have sued the Norfolk PZC and the Norfolk CWA. These suits have been costly and have resulted in delays. The Yale Farm proposal and the challenges to it have virtually clogged the zoning and wetlands agencies of two towns as well as the Litchfield Superior Court. In fact, when requesting copies of unpublished decisions from the court clerk, she replied, “Which decision? These people have been in here every day for years.”

⁵⁴ Buck, *supra* note 1 (quoting a personal letter Betts wrote to his opponents on the Canaan Conservation Coalition attempting to encourage them to drop their lawsuits).

⁵⁵ *Id.*

⁵⁶ See Yale Farm Site Map Existing Conditions, available at http://www.limestoneroad.com/limestoneroad/YFGC_Existing_Map.pdf (Sept. 29, 2005) (showing the acreage and separate lots in Norfolk).

⁵⁷ James P. Sterba, *Winning Back the Frustrated Golfer*, WALL ST. J., Apr. 19, 2004, at R1.

⁵⁸ *Id.*

In addition to legal challenges, the numerous post-construction conditions ensure that the town of Norfolk must continually oversee the project for years to come. And as mentioned, several conditions require that Yale Farm file various reports documenting course operation. This constant oversight, while enabling the town to keep a constant eye (and leverage) on Yale Farm, may end up creating more work for the town than initially intended. Such oversight does not seem to be what the court meant when it said the purpose of the IWWA was to create an orderly process. While Norfolk's oversight may be systemic, the seemingly never-ending nature of this oversight does not appear to promote organization or economy.

B. *Problems With Too Few Conditions: A Delegation of Power (North Canaan)*

If Norfolk's conditions could be characterized as "too much," North Canaan's conditions could be characterized as "too little." In both instances, the same problems result—the filing of lawsuits and appeals. Unlike the challenges to Norfolk's decisions, the challenges to North Canaan's decisions stem from the town's under-treatment of the applications.

In the summer of 2003, the North Canaan IWCC approved Yale's special permit application with eight listed conditions. Condition number three stated that "prior to construction, [the] applicant will provide the commission with the mitigation plan finalized and as approved by both the DEP and the Army Corps of Engineers. The mitigation plan must be in accordance with those revised plans."⁵⁹ This condition is one that caused Gevers and her neighbors to bring suit against the North Canaan's IWCC, challenging (amongst other things) that this procedure improperly delegates the final location of this mitigation area to an outside agency and without public input.⁶⁰

When reviewing this claim, the court agreed with Gevers and held it improper to delegate the task of reviewing and approving the revised mitigation plan to the DEP and the Army Corps.⁶¹ "It was the responsibility of the [inland wetlands] Agency to require a completed application which shows in sufficient detail the location and proper functioning of a large, significant mitigation area which is designed to offset the loss of the wetlands."⁶² The court inferred from the wetlands

⁵⁹ North Canaan Wetlands Agency Approval, *supra* note 30; Gevers v. Inland Wetlands and Watercourses Comm'n, 040092045S, 2004 Conn. Super. LEXIS 3053, at *12 (Oct. 5, 2004).

⁶⁰ Gevers, 2004 Conn. Super. LEXIS 3053, at *12–*13.

⁶¹ *Id.* ("[T]he general rule is that the land use agency may not delegate a non-ministerial decision to another official, board or agency unless the decision appears to be a probability.")

⁶² *Id.* at *14–*15.

agency's discussion that the "members felt that the DEP and Army Corps of Engineers had more expertise and would be better able to understand" the issues created by the mitigation area.⁶³

While the *Gevers* court agreed that the members of the North Canaan Wetlands Agency might indeed lack the expertise of the federal agencies, it did not agree with the agency's decision. The court noted that the agency "clearly knew they were stepping onto legal thin ice" in response to one member's remark, "now can we get away with this?"⁶⁴ During this discussion one member even said: "I just feel that they have a job to do and they know more about it than we do. That's their job."⁶⁵ It was North Canaan's IWCC, however, that had a job to do—a responsibility it tried to shirk.

V. WHY DO THESE DIFFERENCES EXIST?

The two main differences between the towns' conditions are content and detail. Norfolk's conditions address more aspects of the development, from observation platforms to bonds. Furthermore, when addressing the same type of condition, such as reports to be submitted to the towns, Norfolk requires more monitoring (such as specific maintenance activities). The remaining question is if Norfolk conditioned more aspects of the project and conditioned them in more detail, why did North Canaan not do the same? While the precise reasons and motivations for the decisions of Norfolk and North Canaan never can truly be known, there are several indicators that shed light on this disparity.

A. *Personal Differences Between the Members of the Inland Wetlands Commission in Norfolk and the Members in North Canaan*

One reason why the towns might have treated the permit applications differently—and the most probable—is that there are different individuals on each town's board, each with his or her own values, ideas, biases, personal goals, experience, knowledge, and education. In addition, there may be connections between the applicants or the people representing (or presenting evidence for them) and the members of the commissions. It would be naïve to assume all of these internal individual differences do not play a role in the decision-making process.⁶⁶

An example of how personal ideology might affect whether a

⁶³ *Id.* at *14.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See generally JOHN T. NOONAN, PERSONS AND MASKS OF THE LAW (Univ. of Cal. Press, 2002) (discussing the legal system's dependence on people and the misconception that the law is simply a set of legal principles).

condition is imposed is evident in the towns' treatment of the wetlands mitigation plan. For example, while both towns approved the plan, only Norfolk required that Yale Farm post a bond. While there might be several reasons why Norfolk decided to require this bond, there also are several reasons why North Canaan might have opted to forgo the bond requirement.

There are two possible explanations for the differing positions on the mitigation bond. The first (which might be present in all of the conditions imposed) is that the people on the Norfolk CWA simply did not want the project to proceed. Under this hypothesis, the agency—finding no feasible, prudent alternatives to this “first class” golf course—could try only to prevent the development by imposing conditions strict enough to force abandonment of the plan. Another possible reason for the imposition of the bond is that the Norfolk commissioners had genuine concern for the wetland mitigation project and wanted to eliminate some of the inherent risks. This way, even if the development were abandoned, the mitigation project could be funded to completion.

Similarly, the individuals on North Canaan's IWCC might have had several reasons for not requiring the bond. First (although highly unlikely), the IWCC simply might not have thought about requiring a bond as a condition. Second, the IWCC's objective might have been to impose very few conditions, either to encourage the project to proceed or to avoid the related monitoring that would have been involved. Or perhaps the North Canaan board members might have been skeptical whether the requirement would have any real effect on the project. Terry Tondro, an often-quoted expert on Connecticut land use law, says bonds “tend to be castles in the sand,” reasoning that bonding companies fight requests to call the bond, resulting in time-consuming court battles.⁶⁷ Knowing and sharing this belief, the IWCC might not have required the bond as a condition simply because it deemed this strategy ineffective in practice.

B. *Differences Between the Towns: Objectives and Demographics*

One possible reason that North Canaan chose not to impose numerous conditions on Yale Farm is that it welcomed the idea of an upscale golf course in its community. In fact, “golf courses are a permitted use under existing North Canaan zoning regulations and actually have been identified as an encouraged use in a recent North Canaan Town Plan.”⁶⁸ Currently, there is one golf course in Norfolk (the Norfolk Country Club, a private

⁶⁷ Interview with Terry J. Tondro, Professor of Law, University of Connecticut School of Law, in Hartford, Conn. (Dec. 2004).

⁶⁸ Press Release, Yale Farm Golf Club, *available at* <http://www.limestoneroad.com/limestoneroadpressrelease.htm> (Feb. 27, 2003), at 1 (last visited Sept. 29, 2005) [hereinafter Press Release].

course), and there are no golf courses in North Canaan.⁶⁹

Another reason for the disparate treatment is that 535 of Yale Farm's 780 acres (about two-thirds of the entire project) are located in Norfolk. Norfolk might be concerned with the development and imposed more conditions because more of the project would be in its town. However, this factor is mitigated by the fact that Norfolk is geographically larger: Norfolk has 2¼ times more total land than North Canaan, so the location of two-thirds of the Yale Farm project within its larger borders should not matter as much.⁷⁰

The two towns also have very different amounts of currently open land. The amount of open land in a community can greatly affect a town's attitudes towards building. Norfolk, whose actions seem to indicate it is against the development of the golf course, has 86.7% of its land categorized as "open land." In contrast, North Canaan has less than the state's average of percent open land (68.7%) with only 63.8% of its land left as open.⁷¹

If North Canaan's goal is to preserve and possibly increase open land, Yale Farm's plan is wise—as this is a good way to ensure the land is not maintained as separate parcels (possibly for strictly residential use or for some other purpose). In fact, Yale Farm's original plan stated that

[o]nly 32 acres [of the total 780 acres] will be maintained as tees, greens and fairways [while most] of the course will either be native grass and rough or conservation restricted land. In total almost 75% of the total 780 acre Yale Farm will remain as conservation restricted land in its current natural state as open pastures and forested land.⁷²

Based on this plan, it appears there may be no better option to keep this estate as open space, a goal that North Canaan might desire more than Norfolk.⁷³

Yet another possibility for Norfolk's discouraging treatment of the

⁶⁹ See New England Tee Times, available at <http://www.neteetimes.com/final/courses/conn/private/ctpri.html> (Sept. 30, 2005) (private); see also New England Tee Times, <http://www.neteetimes.com/final/courses/conn/public/ctpub.html> (Sept. 30, 2005) (public). In addition to the course listings on this website, other golf courses in Connecticut omitted the Norfolk Country Club altogether.

⁷⁰ See CONN. ECON. RES. CTR. (CERC), NORFOLK, CONNECTICUT TOWN PROFILE 1, <http://products.cerc.com/pdf/tp/norfolk.pdf> (2005) [hereinafter NORFOLK TOWN PROFILE]; see also CONN. ECON. RES. CTR. (CERC), NORTH CANAAN, CONNECTICUT TOWN PROFILE 1, <http://products.cerc.com/pdf/tp/northcanaan.pdf> (2005) [hereinafter NORTH CANAAN TOWN PROFILE]. Norfolk's land area is forty-five square miles, while North Canaan is only nineteen square miles.

⁷¹ See NORFOLK TOWN PROFILE, *supra* note 70, at 2; see also NORTH CANAAN TOWN PROFILE, *supra* note 70, at 2 (statistic is based on 1990 data).

⁷² Press Release, *supra* note 68, at *3.

⁷³ However, Norfolk's abundance of open land could also be a reflection of the town's dedication to keeping the land open, supported by opposing the course, as its development would include at least partial destruction of the current open land in the estate.

proposal might lie in Betts's long-term plan to build more houses surrounding the golf course in Norfolk. In a 2003 press release, Yale Farm Golf Club announced it planned to build "20 new homes in North Canaan and 35 new homes in Norfolk."⁷⁴ While the plan has presently been dropped for the purposes of the wetlands permit,⁷⁵ there is no indication the homes have been dropped from the overall plan.

The existing housing options in both towns are also fairly different which might affect how each would view Betts's proposed homes. Norfolk might dislike newly built homes as they break with the town's character of mostly "older" or historic homes.⁷⁶ North Canaan might welcome the additional homes, as Betts's homes most definitely would be priced above North Canaan's median-priced home of \$149,775. (In Norfolk, the median price for homes is \$210,000).⁷⁷

One area of similarity between the two towns was the number of new permits each authorized in 2001.⁷⁸ When calculated as a percentage of existing units, North Canaan and Norfolk issued a nearly identical number of permits (as the percentage is .35% and .34% respectively). While this number may indicate Norfolk and North Canaan held similar views of new development and change, it also may reflect the number of permits sought.

When the Yale Farm proposal was first made,⁷⁹ Norfolk residents may have had better access to the channels of political power. Better access, and therefore more control over the decisions made, is commonly associated with wealth education. If this is true, Norfolk citizens should have better access because they are more educated than their North Canaan neighbors.⁸⁰ Moreover, when I asked a long-time resident of Norfolk why she thought there was such a disparity between the towns, she attributed

⁷⁴ Press Release, *supra* note 68 (announcing Yale Farm's plan and its application to the North Canaan Inland Wetlands Conservation Commission on this date).

⁷⁵ *Gevers v. Planning & Zoning Comm'n*, No. 030091222S, 2004 Conn. Super. LEXIS 2912, at *7-*8 (Oct. 5, 2004).

⁷⁶ See NORFOLK TOWN PROFILE, *supra* note 70, at 2; NORTH CANAAN TOWN PROFILE, *supra* note 70, at 2. Norfolk also has more homes that are older (62.5% of the homes were built before 1950) than North Canaan (there, only 46.1% of the houses were built prior to 1950).

⁷⁷ See NORFOLK TOWN PROFILE, *supra* note 70, at 2; NORTH CANAAN TOWN PROFILE, *supra* note 70, at 2. Of the houses sold in 2005, North Canaan sold three times as many homes for under \$100,000 (twenty-one) than did Norfolk (seven), almost three times as many homes between \$100,000 and \$200,000 in North Canaan (forty-six) than Norfolk (sixteen), while Norfolk sold more houses over \$200,000 (twenty-six) than North Canaan (twenty-one), despite more total sales in North Canaan.

⁷⁸ See NORFOLK TOWN PROFILE, *supra* note 71, at 1; NORTH CANAAN TOWN PROFILE, *supra* note 70, at 1.

⁷⁹ As opposed to the lawsuits and challenges that have been brought after the agencies made their decisions.

⁸⁰ See NORFOLK TOWN PROFILE, *supra* note 70, at 1; NORTH CANAAN TOWN PROFILE, *supra* note 70, at 1. Sixty-seven percent of Norfolk residents over the age of twenty-five had at least some college or more, compared with only forty-six percent of North Canaan residents. Thirty-six percent of Norfolk residents over age twenty-five had at least completed their bachelors degree, compared with twenty-one percent in North Canaan.

the disparity to Norfolk women who function as stay-at-home activists and fight for certain civic causes because it is a “very elite thing to do.”

VI. CONCLUSION

Regardless of the possible reasons for treating the Yale Farm project differently, it is apparent that Norfolk and North Canaan had different views of Betts’s proposal. This disparity is concerning, as the two towns share the project, share a border, and share their region.⁸¹ The decision of each will have an impact on the other and on the state as whole. For example, it may only take one town’s denial of a permit (or an imposition of so many restrictions that the project loses all economic viability) to halt the entire project. In effect, each town may have veto power over the project.

Conditions imposed by one town surely will have an impact on its neighbor. For example, if Betts’s plan is financially dependent on the sale of the proposed luxury homes, then Norfolk’s one-lot requirement may cost North Canaan the opportunity to get a golf course. Even though North Canaan specifies in the wetland permit that the approval does not constitute an “approval of plans for any housing, dwellings, or any structures,” this does not mean North Canaan will not approve a permit to authorize such structures in a future application.⁸² Similarly, Norfolk’s planning and zoning restrictions on traffic, hours, and events also may have a huge impact on North Canaan.⁸³ Traffic might be diverted to North Canaan’s roads, and if the homes are built, North Canaan residents would be restricted from playing golf or attending events at their course.

Lack of coordination also can affect Yale Farm’s ability to meet its maintenance requirements. Both towns have required Yale Farm to use different maintenance methods (including fertilizer requirements) and to submit special reports to the towns on various schedules. While Yale Farm may chose to carry out the most environmentally friendly (or stricter) requirements in both towns (which in effect would impose Norfolk’s requirements on North Canaan as well), it may also decide to treat the two portions of the course differently.

In the Yale Farm dispute we see the towns of Norfolk and North Canaan having the attitude of “every town for itself.” This attitude can be

⁸¹ See NORFOLK TOWN PROFILE, *supra* note 70, at 1; NORTH CANAAN TOWN PROFILE, *supra* note 70, at 1. Both towns depend on the other to employ some of its residents—eighty-eight Norfolk residents work in North Canaan and twenty-nine North Canaan residents commute to Norfolk.

⁸² *Gevers v. Inland Wetlands and Watercourses Comm’n*, 040092045S, 2004 Conn. Super. LEXIS 3053, at *11 (Oct. 5, 2004).

⁸³ *Gevers v. Planning & Zoning Comm’n*, 030091222S, 2004 Conn. Super. LEXIS 2912, at *6–*7 (Oct. 5, 2004) (rejecting the appellants’ argument that the proposed project causes undue traffic congestion, or unduly impairs pedestrian safety).

seen in their lack of cooperation and coordination. The different ways in which the towns handled the Yale Farm's permit applications may convey the distance between the views of each town, the members on the land use commissions, or the sections of the project that would be in the respective towns. While this failure to work together may aid one town at the other's expense, this separatist mentality seems common in Connecticut, where there is no system of regional government.

The Connecticut Legislature knew what it was asking for when it directed that local agencies create an orderly process to strike a balance between economic growth and environmental protection. It is incumbent upon towns to conscientiously review proposed projects with these overall goals in mind. And certainly, if there is one thing that can be learned from Yale Farm's case, it is that when a project crosses town lines, there should be more coordination between the land use commissions of the various towns.