CRAMER & ANDERSON LLP
Attorneys at Law

30 Main Street
Suite 204
Danbury, CT 06810

(203) 744-1234
Fax (203) 730-2500

14 Old Barn Road
Kent, CT 06757

46 West Street
Litchfield, CT 06759

51 Main Street
New Milford, CT 06776

38C Grove Street, 1st Floor
Ridgefield, CT 06877

6 Bee Brook Road
Washington Depot, CT 06794

Daniel E. Casagrande, Esq.
*Also Admitted in New York
dcasagrande@crameranderson.com

February 12, 2025

Via Email: cpschaut@gmail.com

Mr. Christopher Schaut, Chair
Planning and Zoning Commission
Town of Norfolk
P.O. Box 592
Norfolk, CT 06058

Re: Manor House Inn – 69 Maple Avenue
Application for Modification to Special Permit

Dear Mr. Schaut:

Attached please find my revised Memorandum of Opinion. The revision corrects a few typos and expands on the Executive Summary.

Very truly yours,

CRAMER & ANDERSON

By: _____
Daniel E. Casagrande, Partner

DEC/smc
Enclosure
cc: Ms. Stacey Sefcik, Zoning Enforcement Officer

MEMORANDUM OF OPINION

(Revised February 12, 2025)

MANOR HOUSE INN
69 MAPLE AVENUE
APPLICATION FOR MODIFICATION TO SPECIAL PERMIT

Daniel E. Casagrande, Esq.
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
Telephone: (203) 744-1234
Facsimile: (203) 730-2500
dcasagrande@crameranderson.com

TABLE OF CONTENTS

PAGE

The Planning and Zoning Commission (Commission) has asked me to opine on the scope of its powers to review the application for a modified Special Permit (Modified Application) filed by Three Stewards Real Estate, LLC (Applicant). The Application seeks modifications to a 1996 special permit approving a Country Inn at 69 Maple Avenue known as Manor House Inn (Inn).

In preparing this memorandum I have reviewed the Application materials, correspondence in the record from the Applicant's counsel, the pertinent Planning and Zoning Department files, and the position statement and materials submitted by counsel for certain opponents on January 28, 2025. I also have consulted the pertinent statutes, regulations and case law.

This opinion is divided into six parts. Part I is an executive summary of my conclusions. Part II summarizes the relevant factual history as I understand it. Part III sets forth the pertinent Zoning Regulations. Part IV contains the reasons why the Commission has no power to revisit or relitigate whether the 1996 Special Permit was valid. Part V is my discussion of the scope of the Commission's powers to review the Modified Application. Part VI is my analysis of the Commission's jurisdiction and responsibilities regarding the Opponents' claims that the project involves regulated wetlands activities.

I. EXECUTIVE SUMMARY.

- The Commission has no power in this proceeding to revisit or reconsider the validity of the 1996 Special Permit. (Pages 6-7 below.)

- The Commission should focus on whether the proposed modifications to the 1996 Special Permit comply with the standards for special permit review as set forth in the Zoning Regulations. The Commission should ask, for each of the proposed modified uses and facilities, whether the use or facility was reasonably contemplated in the 1996 Special Permit, whether changes to the location or intensity of the use are now proposed, and whether those changes satisfy the general standards for issuance of a special permit in §§ 3.05 and 8.04G of the Zoning Regulations, as well as the technical standards for site plans. (Pages 7-11 below.)

- Prior to filing the Modified Application, the Applicant did not submit an application to the Inland Wetlands and Watercourses Agency (Wetlands Agency) for a permit to conduct a regulated wetlands activity or a request for a ruling that the project does not involve a regulated wetlands activity, as required by state statute. But the defect will be cured if the Wetlands Agency submits a report to this Commission before its deadline to act on the Modified Application expires.

- The Commission has not yet received the required report from the Wetlands Agency on whether the project involves a regulated wetlands activity. (Pages 11-15 below.)

- If the Commission receives a report from the Wetlands Agency before it is required to decide the Modified Application, it should give due consideration to that report. (Id.)

- If the Commission does not receive that Wetlands report before its deadline to act expires, it should deny the Modified Application. (Id.)

- The Commission has no jurisdiction to determine whether the project involves regulated wetlands activities; that is the sole province of the Wetlands Agency. (Pages 15-16 below.)

II. SUMMARY OF RELEVANT FACTS.

- In December 1995, Henry and Dianne Tremblay applied to the Commission for a special permit to operate the property as a Country Inn, pursuant to then § 180-54a of the Zoning Regulations, as a "building or group of buildings with not more than 25 guest rooms offering transient lodging at a daily rate to general public."

- The December 11, 1995 letter submitted in support of the application stated that "our request is for the uses enumerated in the new regulations, i.e., a restaurant, conference facilities, recreational facilities and similar uses contributing to the comfort, convenience or necessity of the guests of the Country Inn. It is our wish to offer these related uses to non-overnight as well as overnight guests. Considering that many attendees at weddings, special occasion events etc. may be staying at other establishments or with relatives or friends in town it is prudent to include them in the definition of guests of the Country Inn.... It is our desire to limit the size and scale of general public use at any one time to no more than 150 people ...."

- On January 9, 1996, the PZC held a public hearing on the application. The minutes of the meeting expressly refer to the December 11, 1995 letter and to "a site plan submitted" by the applicants. The PZC's current file, however, does not contain the site plan.

- After closing the hearing on January 9, 1996, the Commission approved the special permit application, and stated that the conditions of approval are as set forth in the "[a]ttached letter of 12-11-95."

- In 1996 Tremblay put on an addition to the main building to be used as the owner's living space in running the Inn.

- In an October 25, 2021 email to then ZEO Halloran, Rachel Roth (a principal of the Applicant here) wrote that she and her husband, Adam Perlman, were considering purchasing the Inn, and that they wanted to open a restaurant and modest event

venue alongside the Inn, and to increase the number of guest rooms to 15-20.

- In a follow-up email to Halloran dated November 23, 2021, Roth sought clarification on the scope of the 1996 permit. She said that if it is "not possible to use the Inn as a restaurant and event venue, it will not be a viable business."

- In a November 23, 2021 email to Roth, Halloran responded that they might need to modify the special permit approval for an increase in rooms and other uses, and that the "record is not clear as to what Manor House was approved for in 1996."

- In another November 23, 2021 email to Halloran, Roth said that she and Perlman hoped to repurpose some of the spaces to add 6-8 guest rooms (in the existing building).

- In a February 11, 2022 email to Halloran, Perlman clarified that their objectives were as follows:

    - Total bedrooms – 10.
    - Dining room tables – 7.
    - Dining room chairs – 16.
    - Lunch and dinner occasionally served to guests.
    - Outside functions annually – 2 to 3 (3 to 5 indoor functions).

- In another email that same day, Perlman told Halloran that they "occasionally served breakfast to non-guests, usually local friends of guests."

- As noted in a February 15, 2022 chronology prepared by Halloran, the 1996 special permit was approved "based on the property's limitations – nine bedrooms and dining area for 15." The chronology points out that "at some point there was a parking plan sketch showing 16 spaces with an additional overflow 20 on the lawn. A 2006 building violation where the arbor was took some of the spaces."

- In his February 15, 2022 chronology, Halloran noted that the Inn was approved in 1996 "based on the [property's] conditions – 9 BRs and dining area for 15." He recommended to the Commission that it should consider the Inn as a "Country Inn approved for 9 rooms, with breakfast served, with occasional weddings."

- On February 16, 2022, Halloran signed off on the Inn's application to the Torrington Area Health District (TAHD) for a Class 3 food service, but added a note: "Zoning approval for 9 guest rooms and breakfast only."

- In a February 19, 2022 email to Halloran and others, Roth said that they do not intend to serve anything other than what is currently on the menu (breakfast items).

- In a March 30, 2022 email to Halloran, Roth wrote that the Inn can accommodate 22 seats in the existing dining area and can support nine double-occupancy rooms (18 guests total), plus four additional guests in suites that have additional cots/beds. She argued that offering dinner service for guests should not trigger changes to the special permit because they would continue to limit food to Class 3 at dinner service (per the current license), they would use the existing dining area, and they have adequate parking and restroom facilities for onsite guests.

- In a March 30, 2022 email to Roth, Halloran said that only nine guest rooms are currently allowed. The 1996 addition was for "owner residence" only. It appears "you could offer dinner to guests at the Inn."

- In a February 14, 2023 email to Halloran, Roth wrote that they have seats for 16 in the main dining room, and a table for 4-6 in the private dining area.

- On December 3, 2024, the Applicant filed the Modified Special Permit Application (Modified Application). The narrative summary submitted by the Applicant's counsel describes the proposed modifications:

> Three Stewards seeks to modernize and enhance the existing operations of the Inn by, among other things, relocating two guest rooms from inside the main building to two newly-constructed Nordic-style cabins on-site; removing an existing carport and shed, both of which are unsightly and unsafe in their current condition; constructing a new garage to store property maintenance equipment; reconstructing and expanding a parking area that previously existed on-site; and enriching existing recreational amenities by incorporating hydrothermal and other recreational facilities at the rear of the existing Inn building.

Applicant's counsel went on to claim that "*[t]hese improvements are within the scope of the 1996 Special Permit, pursuant to which the Inn currently operates*." (Italics in original.)

- On January 28, 2025, the Opponents submitted their Position Statement. They make three principal claims: 1) the 1996 Special Permit is null and void because of the alleged failure of the Applicant to submit and the Commission to consider a site plan in support of the Application, 2) the proposed modified uses go beyond what was contemplated in the 1996 Special Permit and deviate from the letter and intent of the Country Inn regulations, and 3) the Commission should deny the Modified Application because the project includes regulated wetlands activities and the Applicant failed to apply to the Wetlands Agency for a permit before it filed the Modified Application with the Commission.

III. APPLICABLE ZONING REGULATIONS.

A. Special Permit Standards.

The Zoning Regulations define a Country Inn as a "building or group of buildings with not more than 25 guest rooms offering transient lodging or related facilities to the general public for a fee."

Table 7.02-1.E.1 of the Zoning Regulations allows, as special permit uses in residential zones, "Country Inns of nine (9) or more guest rooms in accordance with the provisions of Section 3.05P."

Section 3.05P of the Zoning Regulations (formerly § 180-54A) sets forth detailed requirements for issuance of a special permit for a Country Inn. It is not necessary to recite all of the requirements in this opinion. The following provisions are especially pertinent to the issue at hand.

The first sentence of § 3.05P provides:

> "A country inn providing transient lodging and related facilities compatible in size, scale and appearance with the rural residential character of Norfolk may be permitted in a residential zone upon the granting of a Special Permit by the Commission subject to the following requirements.... "

This general provision is followed by 15 specific requirements (subsections 1 through 15). Subsections 1 and 2 are of particular note. They provide:

1. When approved by the Commission as part of the Special Permit, the country inn use may include:

    a. a restaurant,
    b. conference facilities,
    c. recreational facilities, and
    d. similar uses contributing to the comfort, convenience or necessity of the guests of the country inn.

2. When approved by the Commission as part of the Special Permit, such related uses may also be available on a limited basis to the general public provided that:
    a. the application clearly defines and limits the size and scale of general public use, and

    b. the Commission determines that the additional facilities and activity associated with the public use portion of the country inn meets all the other requirements of these Regulations.

The remaining 13 subsections contain requirements for lot area and slope, street frontage, access and traffic safety, building location, appearance and impact assessment, off-street parking, noise, lighting, signs, water and sewer, site plan, and conditions.

Subsection 15 explicitly allows the Commission to impose conditions on the approval of a special permit for a Country Inn that the Commission "determines necessary and appropriate to the proposed use in the proposed location.... Conditions may include, but are not limited to, a limitation on the number of rooms and the type and level of related uses as set forth herein." The general conditions for reviewing all special permit applications are set forth in § 8.04D(1) through (11). (A copy of these provisions is attached at Tab A.)

Section 8.04.G of the Zoning Regulations delineates the scope of a special permit approval and how to seek modifications to it. Subsection 2 says that a special permit "shall authorize only the particular use or uses specified in the Commission's approval." Subsection 4 says that a special permit "may be amended or modified in like manner as provided above for the granting of a Special Permit."

B. <u>Site Plan Standards</u>.

Both the current Zoning Regulations and those is effect when the 1996 Special Permit application was filed require site plans. Subsection 14 of current § 3.05P clearly contemplates the submission of a site plan with an application for a special permit for a Country Inn. It says that the "proposed site plan shall be reviewed" by the Building Official and Fire Marshal for code compliance. See also § 8.04.B.2 (requiring submission of site plan application with a special permit application "unless the ZEO finds that there are no physical changes proposed to the site or any building or structure and the submission of a Site Plan application is not necessary for the Commission to evaluate the proposal."). These site plan provisions and special permit standards essentially mirror the sections of the Zoning Regulations in place when the 1996 Special Permit was approved.[1]

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[1] The pertinent Zoning Regulations as to site plans in effect as of 1996 stated:

§ 180-8. Site Plan.
"A site plan prepared in accordance with Article VI shall be required for all special uses.... "

§ 180-37. Site Plan required.
"A site plan, as described in this Article, shall accompany the application for any special use permit...The site plan shall be approved by the Commission or its authorized agent prior to the issuance of the...special use permit."

§ 180-45 Procedure.
"Application for special use permit shall be made by filing a zoning application and a site plan prepared in accordance with Article VI to the Planning and Zoning Commission."

IV. THE COMMISSION HAS NO POWER TO DETERMINE WHETHER THE 1996 SPECIAL PERMIT WAS IMPROPERLY ISSUED BASED ON THE COMMISSION'S ALLEGED FAILURE TO REQUIRE OR CONSIDER A SITE PLAN.

The Opponents contend that the 1996 Special Permit was invalidly issued because of the purported lack of a site plan in support of the Application. (Position Statement, pp. 17-34) I find this claim unpersuasive for several reasons.

First, the Opponents concede that no court appeal was brought to challenge the 1996 Special Permit. General Statutes § 8-8(b) (a substantially identical version of which was in effect in 1996) provides that any appeal from a Commission's decision to grant a special permit must be commenced within fifteen days from the date the decision is published in a newspaper with substantial circulation in the town. The purpose of this limited appeal period is to ensure that a successful applicant for a special permit has vested rights to the permit if no timely appeal is taken. The Opponents offer no reason why they should be allowed to dust off a challenge to the 1996 Special Permit that should have been filed decades ago.

Second, even if such a challenge could be made today, this Commission is not the proper body to adjudicate it. The question the Opponents raise--the validity of the 1996 Special Permit in the alleged absence of a site plan--is a question of law that only a court has jurisdiction to decide. The Commission's sole duty as an administrative agency is to decide whether the current application to **modify** the 1996 Special Permit complies with the Special Permit standards in the Zoning Regulations.

Third, again assuming the Commission could properly consider the alleged invalidity of the 1996 Special Permit because it failed to include a site plan, the Commission may reasonably disagree with the Opponents' contention. The minutes of the Commission's January 9, 1996 meeting expressly refer to a "site plan submitted" by the applicants. (See page 3 above.) The fact that the site plan is not in the file today does not prove it was not there in 1996. In any event, it is well settled that municipal zoning agencies are presumed to act in accordance with law and in good faith in fulfilling their duties. See R. Fuller, 9 Connecticut Land Use & Administrative Law § 34:8 (4th ed. 2025). So while the record is not as clear as it could be, the Commission could reasonably conclude that the Opponents have not rebutted that presumption here--that is, that the Commission had before it a site plan and thus properly approved the 1996 Special Permit.[2]

In short, the purported absence from the file of a site plan from the 1996 Special Permit approval has no bearing on the Commission's decision whether the Modified

[2] The Opponents argue that there is no "substantial evidence" that the Commission approved a site plan as part of the 1996 Special Permit. (Position Statement, p. 23) The substantial evidence rule comes into play only when a court reviews the propriety of a land use decision in an administrative appeal. The Commission has no power to apply that legal judicial standard of review in this proceeding.

Application meets the special permit standards and technical requirements currently in place.

V. THE COMMISSION'S RESPONSIBILITY IS TO DETERMINE IF THE MODIFICATIONS OF THE USES AND FACILIITES APPROVED IN THE 1996 SPECIAL PERMIT SATISFY THE ZONING REGULATIONS' SPECIAL PERMIT STANDARDS AND TECHNICAL REQUIREMENTS.

Section 8.04.G of the Regulations is clear that a special permit operates to approve only the uses specified in the Commission's approval, and that any modification or amendment to those approved uses requires the property owner to submit a modified special permit application. Applying those regulations here, the PZC conditioned its approval of the 1996 Special Permit on the statement in the Tremblay's December 11, 1995 letter that the uses would be as "enumerated in the new regulations, i.e., a restaurant, conference facilities, recreational facilities, recreational facilities and similar uses contributing to the conform, convenience or necessity of the guests of the Country Inn."

The Regulations and governing case law require that any modification of an approved special permit use requires the submission and approval of a new special permit application and site plan. See generally Barberino Realty & Dev. Corp. v. Planning & Zoning Comm'n, 222 Conn. 607, 614-15 (1992) (any application for revisions to a site plan approved as part of a special permit application must be evaluated in light of the conditions set forth in the special permit regulations).

The question thus becomes the scope of the Commission's review of the Modified Application. In its approval of the 1996 Special Permit, the Commission necessarily determined that the application satisfied all of the general considerations for special permits set forth in [now] § 3.05P and § 8.04.D. The Modified Application does not allow the Commission to revisit those initial findings. A special permit runs with the land and cannot be reconsidered in the absence of a material change in the applicable law or the factual circumstances present when the Special Permit was issued.

I have found no court decisions that precisely address the issue of the scope of a zoning commission's authority in reviewing modified special permit applications. But I find support for my opinion in the Connecticut Supreme Court's decision in Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission of Town of Newtown, 285 Conn. 381, 434 (2008). In that case the Court held that a commission may deny a special permit based on concerns over traffic congestion only if the specially permitted use "would have a **significantly** greater impact on traffic congestion than a use permitted as of right...." (Id.) (Emphasis added.) While not directly on point, the decision is analogous in that it suggests that when a use is already allowed (here by a previously issued special permit), a commission should not be permitted to deny a modification of the use unless the modification has a significantly greater impact on applicable zoning considerations than what was originally approved.

With these standards in mind, the Commission's task is made difficult because of the absence of a site plan in the file showing the precise uses approved in the 1996 Special Permit. But the absence of a site plan in the 1996 file does not change the Commission's responsibility to determine how the uses and locations proposed in the Modified Application go beyond those contemplated by the 1996 Special Permit.

In undertaking its review of the Modified Application, the Commission should probe the Applicant's assertion--and the Opponents' arguments to the contrary--that the proposed modifications are "within the scope of the 1996 special permit, pursuant to which the Inn currently operates." (Gomes December 3, 2024 letter, p. 1) The Commission's testing of that claim is complicated due to the current absence of a site plan showing precisely what was contemplated in the 1996 Special Permit, but the Commission may reasonably apply the following guidelines to the inquiry. For each of the uses, facilities and locations proposed in the Modified Application, the Commission should ask the Applicant and the Opponents the following questions:

1) Was the use contemplated in the 1996 Special Pemit?

2) Is the use to be expanded, altered or relocated?

3) Where is the location on the property of the modified use or facility?

4) Does the modified use, size or location satisfy the special permit standards and technical requirements of the Zoning Regulations?

Let's take an example: the number of proposed guest rooms and dining area seating. Although not entirely clear from the 1996 approval, the Commission may credit ZEO Halloran's February 15, 2022 chronology that states that the Inn was approved in 1996 "based on the [Property's] conditions--nine bedrooms and dining area for 15." The Commission should inquire into the total additional guest rooms and dining seats beyond those approved, whether they will be in locations different from those contemplated in the 1996 Special Permit (presumably in the main house only), and whether those additional rooms and locations satisfy the special permit and technical standards of the Zoning Regulations.

The Commission should conduct the same analysis for each proposed modification--the new parking area, the wedding event venue and location, the new lodging cabins, the new maintenance garage, new and "enriched" recreational facilities, proposed outdoor events (including proposed hours and frequency of operation). Each modification should be analyzed in turn as to whether it complies with the general special permit standards and technical zoning requirements.

It would not be proper for me to undertake these inquiries in this memorandum. The Commission should give the Applicant, Opponents and members of the public the opportunity to address each of the proposed modifications and why they do or do not meet the standards.

The Opponents make several arguments that warrant discussion. First, they contend that the uses allowed in the 1996 Special Permit should not be determined by what uses **could have been** permitted under the Country Inn regulations in effect in 1996. Rather, the Opponents posit, the Commission should focus on the uses which were actually contemplated in the 1996 Special Permit itself. (Position Statement, pp. 33-34) I agree. For instance, the Regulations then and now allow a special permit for "not more than 25 guest rooms." But that does not mean that the 1996 Special Permit allowed 25 guest rooms on the site. The Halloran chronology concludes that the 1996 Special Permit allowed only nine guest rooms. To the extent the Applicant now proposes a greater number or reconfiguration of rooms, it must meet the special permit and site plan criteria for the relocation or additional rooms.

As another example, the Country Inn regulations then and now allow a special permit to include "recreational facilities" and "similar uses contributing to the comfort, convenience or necessity of the guests of the country inn." (See page 5-6 above.) But nowhere in the 1996 Special Permit does it specifically authorize the spa and related facilities proposed in the Modified Application. The Commission thus must determine whether the nature and location of those new facilities satisfy the criteria to justify a modified special permit.

The Opponents next assert that the 1996 Special Permit was a "radical departure" from the "transient lodging core function of a country inn" specified in the Country Inn regulations. They claim that the intent of the Country Inn regulations was to limit the meaning of the term "guest" to overnight lodgers at the Inn, but that the 1996 Special Permit impermissibly exceeded that purpose by allowing restaurant, conference and recreational facilities to be available to non-overnight as well as overnight guests, with a limit on general public use for weddings and similar events at one time to no more than 150 people. (Position Statement, pp. 35 - 41)

The Commission reasonably may reject this argument for several reasons. First, the Opponents are essentially asking the Commission to relitigate the validity of the 1996 Special Permit to the extent that it contemplates the use of the Inn by guests (the public) other than overnight lodgers. As discussed, the time to appeal the 1996 Special Permit on that or any other ground has long since elapsed, and the Modified Application is not the proper forum to rehash that determination.

Second, the Opponents' position that the Commission violated the letter or spirit of the Country Inn regulations by allowing members of the public to utilize the Inn's facilities should fail on the merits. Nothing in the Country Inn regulations expressly prohibits members of the public from enjoying the recreational facilities offered by a Country Inn. To the contrary, the Country Inn regulations then and now permit use of a Country Inn by the public on a limited basis. The Commission reasonably could have interpreted the regulations to allow such public use. It is settled Connecticut zoning law that a land use commission has the power to interpret its regulations and how they should apply in a giving factual circumstance. Fuller, § 34:13 (citing cases). When more than

one interpretation of a regulation is permissible, a restriction on the use of land is not to be extended by implication, and doubtful language will be construed against rather than in favor of a restrictive interpretation. (Id.) In other words, in my opinion, when the Commission approved the use of the Inn in 1996 to allow members of the public to avail themselves of the Inn's facilities and not limit it to overnight guests, it acted well within its statutory discretion.

In the same vein, the Opponents argue that the Country Inn regulations in effect now and in 1996 do not allow weddings or other events with up to 150 people involving non-overnight guests of the Country Inn, and that the 1996 Special Permit invalidly permitted such functions. The Opponents claim that weddings do not contribute to the "comfort, convenience and necessity" of overnight guests of a Country Inn as contemplated by the Country Inn regulation. (Position Statement, pp. 41-42) The Commission may reasonably reject this argument for the reasons discussed above. That is, no court appeal was ever taken challenging the 1996 Special Permit on that ground. And the Commission acted within its discretion in approving weddings and other related events up to 150 guests at a time, as contributing to the comfort, care, and necessity of overnight guests.

Here again, however, in the absence of a site plan on file designating the location for holding such events, the Commission, in considering the Modified Application, may examine issues such as the location of the event venue, its frequency and hours of operation, and the noise from such events, to determine whether to impose conditions on any approval of a modified special permit to minimize any adverse impacts on neighboring property owners.

Lastly, the Opponents argue that the day spa proposed in the Modified Application is not allowed by the Country Inn regulations or included in the purview of the 1996 Special Permit. (Position Statement, p. 42) There seems to be no dispute that the proposed spa facilities were not specifically requested or allowed by the 1996 Special Permit. Accordingly, the Commission should consider whether the new spa facilities meet the special permit and technical criteria of the Zoning Regulations. The Applicant is incorrect in claiming that the day spa use is inherent to the uses allowed by the 1996 Special Permit, for the simple reason that such specific use was not in the 1996 Special Permit. But the Commission nevertheless reasonably may determine that the day spa facility falls within the uses contemplated by the Country Inn regulations, and that it is therefore allowed in a modified special permit as among the "related facilities" contemplated by the Country Inn regulations. The Commission also reasonably may determine whether the recreational facilities related to the Country Inn use are "available on a limited basis to the general public." (Regulation § 3.05P)

VI. THE OPPONENTS' CLAIM THAT THE MODIFIED APPLICATION MUST BE DENIED BECAUSE IT INVOLVES REGULATED WETLANDS ACTIVITIES IS WITHOUT MERIT.

The Opponents argue that the project involves "regulated activities" within the meaning of the Town's Inland Wetlands and Watercourses Regulations (Wetlands Regulations). They criticize the plans submitted by Allied Engineering on behalf of the Applicant for purportedly failing to adequately identify the wetlands and watercourses on the site. They assert that the Commission has no power to act on the Modified Application until the Applicant has received a permit from the Wetlands Agency and the Commission gives due consideration to the decision and report of the Wetlands Agency. For the following reasons, I respectfully disagree.

A. Applicable Wetlands Laws and Regulations.

General Statutes § 8-3c(a) states:

> "(a) If an application for a special permit or a special exception involves an activity regulated pursuant to sections 22a-36 to 22a-45, inclusive, the applicant shall submit an application to the agency responsible for administration of inland wetlands regulations no later than the day the application is filed for a special permit or a special exception."

Section 8.04.E.4 of the Zoning Regulations incorporates the statutory requirement, and provides:

> For a Special Permit application involving an activity regulated pursuant to C.G.S. Section 22a-36 to 22a-45, inclusive, the Commission shall:
>
> a. wait to render a decision until the Inland Wetlands Agency has submitted a report with its final decision; and
>
> b. give due consideration to any report of the Inland Wetlands Agency when making its decision.

Section 160-51 of the Wetlands Regulations also incorporates § 8-3c(a). It says:

> If an activity authorized by an inland wetland permit also involves an activity which requires a zoning or subdivision approval, special zoning permit, or variance or special exception, under C.G.S. § 8-3(g), 8-3c, or 8-26, the Agency shall file a copy of the decision and report on the application with the Town of Norfolk, Connecticut Planning, Zoning or Planning and Zoning Commission within 15 days of date of the decision thereon.

Section 160-13 of the Wetlands Regulations is particularly on point here. It states:

> To carry out the purposes of this section, any person proposing to carry out a permitted or nonregulated operation or use of a wetland or watercourse that may disturb the natural and indigenous character of the wetland or watercourse shall, prior to commencement of such operation or use, notify the Agency on a form provided by it and provide the Agency with sufficient information to enable it to properly determine that the proposed operation and use is a permitted or nonregulated use of the wetland or watercourse. The Agency or its designated agent shall rule that the proposed operation or use is permitted or a nonregulated use or operation or that a permit is required. Such ruling shall be in writing and shall be made no later than the next regularly scheduled meeting of the Agency following the meeting at which the request was received. The designated agent for the Agency may make such ruling on behalf of the Agency at any time.

B. <u>The Applicant did not comply with the requirements of Wetlands Regulations § 160-12, but the defect is curable</u>.

The initial question is whether the Applicant violated the above laws and regulations by failing to file with the Wetlands Agency an application for permission to conduct a regulated wetlands activity or for a declaration that no regulated activity is involved before it filed its Modified Application. In my judgment the answer is yes, but the defect is curable.

The following record facts are relevant to this discussion.

- Prior to submitting the Modified Application to this Commission on December 3, 2024, the Applicant did not submit an application to the Wetlands Agency seeking either a regulated activities permit or a declaratory ruling that no regulated activities are involved in the Project.

- On December 9, 2024, the Conservation Commission wrote a letter to this Commission and the Wetlands Agency questioning whether the proposed improvements to the site require approval from the Wetlands Agency.

- On December 16, 2024, the Applicant submitted to this Commission a package of materials, including a memo from Attorney Gomes, a memo from Allied Engineering, and a copy of the stormwater management report, all of which the Applicant claims demonstrates that no wetlands application is require.

- On December 31, 2024, the Applicant submitted revised materials, that included additional soil erosion and sediment control measures along the uplands review area (URA) adjacent to the wetlands and removed plantings out of the URA. The Applicant argued that these revisions will result in zero disturbance within the URA.

- According to Ms. Sefcik, the minutes of a recent meeting of the Wetland Agency include a statement by the Chair that no regulated activities are involved in the project.

- On January 14, 2025, Ms. Sefcik issued a staff memo confirming that, in her professional opinion, no wetlands application is necessary. That decision, however, was never published in a local newspaper.

- On January 28, 2025, the Opponents filed their Position Statement which argues that the Modified Application is defective because the Applicant did not file any formal application with the Wetlands Agency before submitting the Modified Application to the Commission.

The Commission must consider whether Ms. Sefcik's staff report stating that no wetlands permit is required constitutes the requisite wetlands report to this Commission that enables it to decide the Special Permit Application. Section 160-56 of the Wetlands Regulations provides guidance:

> The Agency may delegate to its duly authorized agent the authority to approve or extend an activity that is not located in a wetland or watercourse when such agent finds that the conduct of such activity would result in no greater than a minimal impact on any wetlands or watercourses, provided that such agent has completed the comprehensive training program developed by the Commissioner of Environmental Protection pursuant to C.G.S. § 22a-39. Requests for such approval shall be made on a form provided by the Agency and shall contain the information listed under § 160-24 of these regulations and any other information the Agency may reasonably require. Notwithstanding the provisions for receipt and processing applications prescribe in Articles VIII, IX and XI of these regulations, such agent may approve or extend such an activity at any time.

It is my understanding that the Wetlands Agency has appointed Ms. Sefcik as its "duly appointed agent" under this provision, and that she has completed the comprehensive training program mandated by C.G.S. § 22a-39. But this does not end the analysis. To begin with, my understanding is that the Applicant did not submit to Ms. Sefcik the form required to seek her approval under § 160-56. Second, Ms. Sefcik's report was not published in accordance with General Statutes § 22a-42a, thus depriving aggrieved persons the right to appeal her decision to court. My concern is that a reviewing court would reject the claim that the staff report satisfies the requirement for a formal report from the Wetlands Agency, and would conclude instead that the report is merely an advisory opinion that has no legal effect. For these reasons, it is my opinion that the Commission should not rely on the staff report as the required report of the Wetlands Agency that must be received before this Commission can decide the Modified Application.[3]

[3] This is not intended as a criticism of the Applicant. As its counsel points out, its engineers have concluded that the project will not involve activities that will adversely impact wetlands or watercourses, and Ms. Sefcik's staff report

We next turn to whether and how the Applicant's failure to comply with § 160-56 and the lack of publication of the staff report affects this Commission's ability to move forward. With this in mind it is my understanding that the Wetlands Agency is scheduled to meet this month, for the purpose of issuing a report to this Commission on whether the project involves a regulated wetlands activity. There are two possible outcomes to this upcoming meeting. On the one hand, the Wetlands Agency might decide that a regulated activity is involved and report to this Commission the nature of the activity and its potential adverse impact to wetlands and watercourses. This Commission would then be required to give "due consideration" to that report in deciding the Special Permit Application. On the other hand, the Wetlands Agency might conclude that no regulated activity is involved. As discussed below, this Commission would be bound by that decision.

In other words, the Applicant's failure to apply for a wetlands permit before filing the Modified Application with the Commission is a curable defect, as long as the Wetlands Agency submits its report to this Commission before it decides the Modified Application. It is important to note here the failure to file a wetlands application before filing a special permit application should not invalidate the special permit approval "as long as the inland wetlands agency does submit its report to the zoning commission prior to the decision on the special permit application. See Fuller § 11:6 (citing cases).

C. <u>This Commission has no jurisdiction to itself determine whether the Modified Application involves regulated activities</u>.

"It is well established that an administrative agency possesses no inherent power. Its authority is formal in a legislative grant, beyond the terms and necessary implications of which it cannot function." Nizzardo v. State Traffic Comm'n, 259 Conn. 131, 155 (2002). In order to determine whether an agency has the power to act, a court should not search for a statutory prohibition; instead, there must be statutory authority. Avonside, Inc. v. Planning & Zoning Comm'n, 153 Conn. 232, 236 (1965).

Because a municipal agency has no inherent power, a planning and zoning commission has jurisdiction only to address issues it is authorized to address. Nothing in our zoning statutes suggests that a planning and zoning commission has authority to decide if a proposed development will involve a regulated activity pursuant to the wetlands statutes. Indeed, if this Commission were to address claims that the Modified Application involves a "regulated activity" as defined in the Wetlands Regulations, it necessarily would be interpreting those regulations. This Commission has no power to do so. "Again, that is the function of the [Wetlands Agency] as the agency that promulgated those regulations and, therefore, is in the best position to interpret them." Sound Trefoil, LLC v. Old Mine Associates, LLC, 2005 WL 3370086, *6 (Conn. Super.), citing Vivian v. Zoning Board of Appeals, 340 344 (2003).

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reaches the same conclusion. Not until the Opponents' submission of January 28, 2025, was there any indication that regulated wetlands activities may be involved. Nevertheless, the issue has been raised and the Commission must address it.

In sum, General Statutes § 8-3c does not give this Commission statutory authority to determine whether the Modified Application involves a regulated activity. Section 8-3c(b) requires only that the Commission hold off on its decision until it receives a report from the Inland Wetlands Agency, as discussed. The Commission must give "due consideration" to the wetlands report in deciding the Modified Application, but it is not the Commission's responsibility to question or relitigate the findings of the Wetlands Agency.

Accordingly, the Commission should not accept the Opponents' invitation to become a quasi-wetlands agency and parse all of their claims about whether wetlands or watercourses exist on the site, whether they are accurately mapped, whether the maps designating wetlands are adequately certified, or whether activities are in or out of the URA. These issues are within the sole province of the Wetlands Agency.

I should add one caveat. Let's assume that the Wetlands Agency's report concludes that the Project involves regulated wetlands activities, and describes the locations of such activities. This Commission, in giving due consideration to that report, may consider whether such activities will have an impact on concerns over which the Commission has jurisdiction. For instance, if a wetlands activity (if any) may affect the Applicant's stormwater management plan, the Commission may address that in its deliberations on the Modified Application. But keep in mind that the Commission in that event should not use its "due consideration" powers to simply deny the Special Permit Application. That would essentially give the Wetlands Agency the power to veto any decision by the Commission to approve the application. And if the Wetlands Agency's report discloses no regulated activity, the Commission cannot overturn or reconsider that finding.

To conclude, at this point in the proceedings, the Commission should reject the Opponents' arguments that it "has no alternative but to deny the [Modified] Application for failure to comply with C.G.S. § 8-3c(a)." (Position Statement, p. 16) The Commission will have timely complied with the statute if it receives a report from the Wetlands Agency before it makes its decision. Conversely, if the Commission does not receive the wetlands report in time for it to decide, that would be grounds for denial of the Modified Application.[4] The Commission has no jurisdiction to consider the merits of the Opponents' claims that regulated activities are involved.

* * *

I will be happy to discuss this opinion at the next public hearing session. I reserve the right to modify this opinion based on further developments during the public hearing.

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[4] General Statutes § 8-7d(e) allows for a thirty-five day extension for a decision on a special permit application that involves a regulated activity. In my opinion, if no report is received from the Wetlands Agency within such thirty-five day extension, the Commission should deny the Modified Application before the end of that period in order to avoid any claim of automatic approval for failure to adhere to the statutory deadlines.

TAB A

Section 8.04 Special Permit Application (PZC)

A. Applicability

1. A Special Permit application shall be submitted for any activity designated in the Regulations as requiring Special Permit approval.
2. Notwithstanding the above, a Special Permit shall not be required for interior renovations and modifications for space within a structure previously approved by the Commission as a Site Plan under Section 8.03, or as a Special Permit under Section 8.04 of these Regulations, provided that:
   a. The use is allowed within the zone;
   b. There are no exterior alterations to the structure or the site;
   c. There is no additional requirement for parking under Section 6.02 of the Zoning Regulations.

B. Submission Requirements

1. A Special Permit application, in accordance with the requirements as specified in the Appendix of these Regulations, shall be submitted to the Commission or agent and shall include a completed application form and the appropriate fee.
2. Each application for a Special Permit shall be accompanied by a Site Plan application unless the ZEO finds that there are no physical changes proposed to the site or any building or structure and the submission of a Site Plan application is not necessary for the Commission to evaluate the proposal.
3. Each application for a Special Permit shall be accompanied by a written statement describing the proposed use in sufficient detail to permit the Commission to determine whether the proposed use complies with these Regulations.
4. The Commission shall not be required to hear an application relating to the same request or substantially the same request, more than twice in a twelve-month period.

C. Proceedings

As Amended– Effective 10-07-22

1. The date of receipt of the Special Permit application shall be determined in accordance with Section 8.09.B.
2. An incomplete Special Permit application may be denied in accordance with Section 8.09.C.
3. If a Special Permit application involves an activity regulated pursuant to CGS Section 22a-36 to 22a-45, inclusive, the applicant shall submit an application for a permit to the Inland Wetlands Agency not later than the day such application is filed with the Commission.
4. The Commission shall hold a public hearing on the Special Permit application and:
   a. publish a legal notice in accordance with the requirements of Section 8.09.F of these Regulations, and
   b. require that the applicant give notice to property owners in accordance with the requirements of Section 8.09.G of these Regulations.
5. Notification to adjoining municipalities may be required in accordance with the requirements of Section 8.09.I.
6. Notification to water companies may be required in accordance with the requirements of Section 8.09.J.
7. Notification to the Department of Energy and Environmental Protection (DEEP) may be required in accordance with the requirements of Section 8.09.K.

8. The Commission shall process the Special Permit application within the period of time provided under CGS Section 8-7d:
   a. the public hearing shall commence within sixty-five (65) days after receipt of the application,
   b. the public hearing shall be completed within thirty-five (35) days after such hearing commences,
   c. all decisions shall be rendered within sixty-five (65) days after completion of such hearing, and
   d. the applicant may consent to one or more extensions of any period specified herein provided the total extension of all such periods shall not be for longer than sixty-five (65) days.
9. Notwithstanding the provisions of this Section, if an application involves an activity regulated pursuant to CGS Section 22a-36 to 22a-45, inclusive, and the time for a decision by the Commission would elapse prior to the thirty-fifth day after a decision by the Inland Wetlands Agency, the time period for a decision shall be extended to thirty-five (35) days after the decision of such agency.
10. The applicant may, at any time prior to action by the Commission, withdraw such application.

D. Special Permit Criteria

As Amended– Effective 10-07-22

In considering an application for a Special Permit, the Commission shall evaluate the application with respect to the following factors, except that the Commission may determine that some factors may not be applicable to certain types of applications:

1. **Zoning Purposes**

   Whether the proposed use or activity conflicts with the purposes of the Regulations.

2. **Environmental Protection and Conservation**

   Whether appropriate consideration has been given to the protection, preservation, and/or enhancement of natural, scenic, historic, or unique resources including, where appropriate, the use of conservation restrictions to protect and permanently preserve natural, scenic, historic, or unique features which enhance the characteristics and environment of the area.

3. **Overall Neighborhood Compatibility**

   Whether the proposed use will have a detrimental effect on neighboring properties or the development of the district.

4. **Suitable Location For Use**

   Whether the nature and intensity of the operations involved with the use or resulting from the proposed use and the location of the site are such that the use will be in harmony with the appropriate and orderly development in the district in which it is located.

5. **Appropriate Improvements**

   Whether the design elements of the proposed development (such as building, parking, access, landscaping, screening, lighting, signage, etc.) will be attractive and suitable in relation to the site characteristics, the style of other buildings in the immediate area, and the existing and desirable future characteristics of the neighborhood in which the use is located.

6. **Suitable Transportation Conditions**

   Whether the streets and other rights-of-way are or will be of such size, condition and capacity (width, grade, alignment and visibility) to adequately accommodate the traffic to be generated by the particular proposed use and not create traffic problems.

7. **Adequate Public Utilities and Services**

   Whether the provisions for water supply, sewage disposal, storm water drainage, and emergency access conform to accepted engineering practices, comply with all standards of the appropriate regulatory authorities, and will not unduly burden the capacity of such facilities.

8. **Long Term Viability**

   Whether adequate provision has been made for the sustained maintenance of the proposed development (structures, streets, and other improvements).

9. **Nuisance Avoidance**

   Whether the use, configuration, design and/or hours of operation are appropriate in order to control noise, light, odors, parking visibility, unsightly appearance, erosion, water contamination and storm-water runoff on the site and in relation to the surrounding area.

10. **Plan of Conservation and Development**

    Whether the proposed use or activity is in accordance with or facilitates achievement of one or more of the goals, objectives, policies, and recommendations of the Plan of Conservation and Development, as amended.

11. **Mitigation**

    Whether adequate provisions have been made to moderate or mitigate neighborhood impacts by limiting the intensity of use of the property (including, without limitation, such considerations as the area devoted to the use, the number of people involved in the use, the number of events or activities proposed, the hours of operation, etc.) or by modifying the location or configuration of the proposed use.