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March 6, 2009

To: Senator Eric Coleman, Co-Chairman
Representative Brendan Sharkey, Co-Chairman
Members of the Planning & Development Committee

From: Bill Ethier, CAE, Chief Executive Officer

Re: Raised Bill 6590, AAC Standards of Review by Inland Wetlands Agencies

The HBA of Connecticut is a professional trade association with almost one thousand, three hundred (1,300) member firms statewide, employing tens of thousands of Connecticut citizens. Our members are residential and commercial builders, land developers, remodelers, general contractors, subcontractors, suppliers and those businesses and professionals that provide services to this diverse industry. We also created and administer the Connecticut Developers Council, a professional forum for the land development industry in the state.

The HBA of Connecticut has long been deeply involved in wetlands issues and our members have filed countless applications for permits before local inland wetland and watercourses agencies (IWWA).

We are very concerned that the language of RB 6590, in attempting to address an important issue, disrupts long standing law on “feasible and prudent alternatives” in the wetlands context, is overly broad in its reach and will have unintended consequences. If we understand the underlying issue correctly, we offer a simpler solution that will have much less consequence to the law.

As background, the inland wetlands and watercourses act requires that for an application that received a public hearing and is determined by the local IWWA to have a significant impact on wetlands or watercourses, the IWWA must find that a feasible and prudent alternative to the application does not exist in order to issue a permit. Also, if a permit is denied by an IWWA on the basis that there may be a feasible and prudent alternative to the application that has less adverse impact the IWWA must disclose those alternatives the applicant may investigate. See sec. 22a-41(b)(1) and (2). The seminal case that interprets these requirements is Samperi, et. al. v. IWWA of West Haven, 226 Conn. 579 (1993).

We understand the issue RB 6590 intends to address is that a local IWWA denied an application, which was followed by the denial of a subsequent second application. The denial of the second application was on the basis that the first application was a feasible and prudent alternative to the second application. Given that the alternative suggested by the IWWA had already been denied, this presents an applicant with a Catch-22 choice to pursue a fruitless investigation or give up. If this is the situation, we agree it needs to be corrected.

However, RB 6590 requires everyone to somehow ignore what has been done, when in reality the first application is often very important to the overall deliberations on regulating a proposed activity. RB 6590 requires, where an application on the same

property has previously been denied, that a second or subsequent application be considered de novo and the previously denied application(s) shall not be considered feasible and prudent alternatives to the subsequent application. This is contrary to reality in that it throws out previous plans that may have been worked and reworked over a span of years.

Samperi, 226 Conn. at 593, states that an applicant “must demonstrate to the local inland wetlands agency that its proposed development plan ... is the only alternative that is both feasible and prudent.” Applicants often use previously denied applications to force IWWA to identify, pursuant to 22a-41(b)(2), other alternatives that may be both feasible and prudent. **Forcing an IWWA to consider a new application de novo might disrupt this approach and the case law that states prior denials can satisfy an applicant’s feasible and prudent alternatives analysis.**

Additionally, the new language added by RB 6590 states that an application that proposes a “regulated activity” shall be considered de novo and prior applications for a “regulated activity” shall not be considered. **However, the issue of whether an activity is a “regulated activity” is itself often a contested issue.** Does the new language in RB 6590 make the agency’s finding on the first application conclusive, even if reversed on appeal? **The language of RB 6590 unnecessarily complicates this issue.**

The de novo language may have other unintended consequences. Often, applications to IWWA contain multiple proposed “regulated activities.” How would the new language in RB 6590 work if several of the proposed activities in the first application are approved but one or more are denied on the ground that there is a feasible and prudent alternative? Should not the approvals be entitled to consideration in the second or subsequent applications? **The language of RB 6590 seems to prohibit the segregation of discrete regulated activities that should be treated separately because the new language lumps them all together into an “application,” possibly undercutting an applicant’s ability to use an approval of a discrete activity in the next application.**

Finally, often IWWAs will allow modifications to a permit application and don’t require whole new applications. **The new language could empower or encourage IWWA to require new applications instead of modifications.**

To directly address the issue that needs to be corrected, rather than add a new 22a-41(b)(3), we propose a more limited but directly applicable amendment to the statute:

At the end of line 21, add “For the purposes of this paragraph, a previously denied application for a regulated activity on the same property may not be used by the commissioner or inland wetlands agency as a basis to deny an application.” Then, delete lines 22 to 28.

Thank you for the opportunity to comment on this important legislation.