

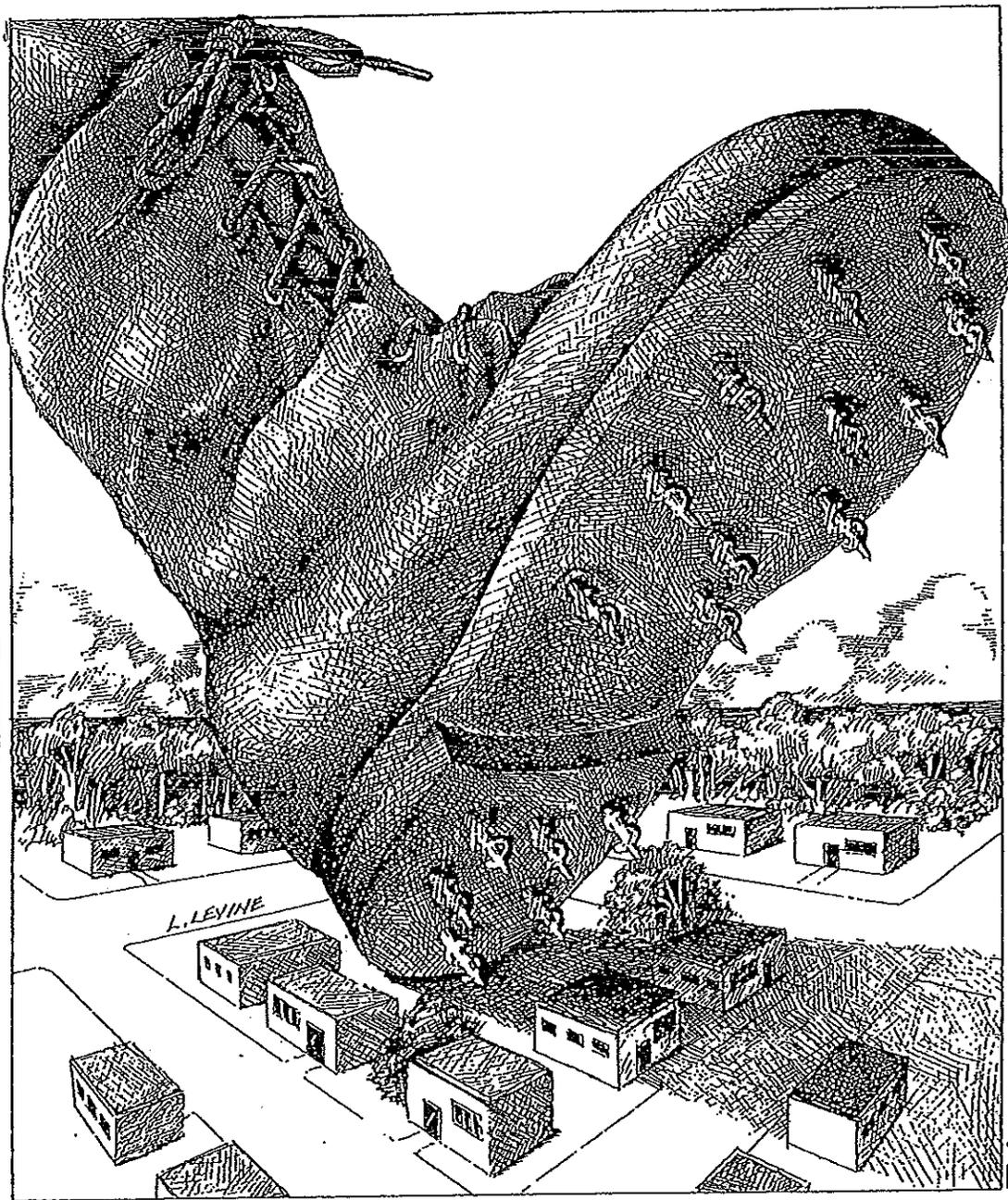
Outline of Testimony Given by Joseph P. Capossela, Esq. to the Planning and Development Committee on March 14, 2014 regarding Raised Bill No. 405

- I. Submission of an article published in the Connecticut Law Tribune in 1983 regarding Subdivision Public Hearings.
- II. Recap of the current language of Conn. Gen. Statutes Section 8-26(c) and existing practice of most municipalities regarding Public Hearings.
- III. Status of the case law holding that Subdivision Application MUST be approved if plans comply with regulations and CANNOT be approved if plans do not comply.
- IV. Review of differences between acting administratively and legislatively.
- V. Reasons why decisions regarding compliance should be left to the professionals employed by the municipality, who are best suited to determine compliance without the need for public input, and then place the matter on the Planning Commission Agenda for a vote to Approve or Deny.
- VI. The language of the draft bill is inadequate and I urge the adoption of Raised Bill No. 405 with the substitute language submitted by HBRA.

Respectfully submitted,

Joseph P. Capossela

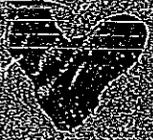




The Confounding Subdivision

By Joseph P. Capossela

THE CONNECTICUT LAW TRIBUNE



Over the years, we've made a seemingly simple process much too cumbersome. It's time for towns to modify their subdivision regulations to make them conform to the original intent of the enabling legislation.

After more than two decades of representing landowners and applicants in their dealings with local land use agencies, I remain confused over the right to subdivide residentially zoned property into parcels or lots to be used for residential purposes. I have read the statutes and case law so many times that my head is spinning and I think that, possibly, I have lost my sense of logic and objectivity. For, just when I feel I have figured it all out, I find myself representing an applicant at a public hearing before the planning commission and all hell breaks loose. If any reader of this article has sorted out the process, please call or write. Otherwise, I suspect we will meet in some mental institution, or on Cloud Blackacre, and one of us will be trying to subdivide the institution's grounds or that Cloud Blackacre into building lots.

Absolute Right?

My problem starts with a reading of Chapter 126 of C.G.S. §8-18 *et. seq.* To begin with, C.G.S. §8-18 defines subdivision as "the division of a tract or parcel of land into three or more parts or lots made subsequent to the adoption of subdivision regulations by the commission. . . ." C.G.S. §8-19 states: "Any municipality may create by ordinance a Planning Commission. . . ." It seems reasonably clear that the creation of a planning commission is optional and if no planning commission is created, then there is no subdivision in that municipality. A

Joseph P. Capossela is a partner with the Vernon firm of Kahan, Kerensky & Capossela practicing extensively in the areas of real estate, zoning and land use matters.

landowner in a town which has not created a planning commission seems free to divide his land anyway he sees fit. Therefore, without regulations, the division of land into smaller parcels seems to be a matter of right in Connecticut.

Most towns, however, have created planning commissions. Therefore, a division of land into three or more parts will usually require subdivision approval. C.G.S. §8-25 authorizes the planning commission to adopt regulations and sets forth the types of provisions that may be included in those regulations. Our courts have held that towns may not adopt regulations which exceed the authority provided in this enabling act. At this point, the process appears reasonably simple and straightforward. A town adopts regulations which include, among other things, provisions for water, drainage, sewerage, proposed streets, open spaces, etc., and the process of subdivision is born.

The case law tells us that the planning commission acts legislatively (with discretion) when adopting regulations under §8-25. A town may decide that streets should be 24-, 26-, 28- or 30-foot wide. It may require the provision of open spaces, or the payment of a fee in lieu of open spaces. Assuming the planning commission properly adopts regulations, we now have a rule book by which all applicants are guided. Thereafter, the planning commission acts administratively (without discretion) in determining whether or not a particular application conforms to those regulations. We have all read the cases: IF THE APPLICATION CONFORMS, IT MUST BE APPROVED. IF IT DOES NOT CONFORM, IT CANNOT BE APPROVED.

Public Hearings

Onward to C.G.S. §8-26, which states, in part: "The commission may hold a public hearing regarding any subdivision proposal if, in its judgment, the specific circumstances require such action."

When the subdivision statutes were initially adopted in 1947, it would appear that the legislature determined that there might be "specific circumstances" which would require the holding of a public hearing. Have we progressed or regressed since 1947? I believe that every application I have pursued has had those "specific circumstances." In fact, many towns now require public hearings for all subdivision applications. It seems to me that someone has lost sight of the clear language of §8-26 that public hearings ought to be required only when "the specific circumstances require such action." In the 1990s, not only do we have public hearings with every application, but we now require the applicant to send written notice of the public hearing to landowners within a stated distance of the subject property: Sort of like mailing invitations for a wedding or Bar Mitzvah.

I have this mental image of John and Alice Smith (and 50 or 100 other neighbors) receiving a formal notice from my office, the applicant or the town planning office inviting them to come out to a public hearing at the town hall two weeks from Monday. John gets the mail that day (he is home watching the kids and baking bread) and leaves it out on the dinner table for Alice to read when she gets home from work. Alice picks it up at the dinner table and says: "What's this!" John responds: "I don't know but it seems somebody wants to take



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farmer Brown's land next door and create building lots and bring us more neighbors." "Oh really," Alice says. "And where will the kids play? What will happen to the deer that we frequently see out our back window? We won't be able to take our long walks on farmer Brown's property any longer. This is awful." "So you think we should go to the hearing?" John asks. "You bet," says Alice.

During the next two weeks, John and Alice communicate with their neighbors, who all agree to attend the festivities. And when they get there, you or I have to explain to them how the planning commission is acting administratively and has no choice but to approve our application since it conforms to the regulations. Of course, they all understand. The application is approved without comment or controversy and on to the next case—NOT!!

If this is one of my applications, the hearing will go on for two or three hours and be continued to the next meeting. At the next meeting it will go on for another two or three hours and may be concluded or continued again. During the course of the hearing, we may learn that the roads in the neighborhood are inadequate to handle the existing traffic and the proposed new homes will only aggravate a bad situation. We may hear that farmer Brown's property has some special natural features that ought to be preserved for all mankind. We may learn that there is an airport in the area and airplanes fly overhead so that farmer Brown's property should not be subdivided for fear that future homeowners may be disturbed by aircraft noise, etc. Or maybe there is a gravel pit or jail or some other unwanted land use in the neighborhood and the planning

commission ought to protect the potential buyers of our proposed lots from these offensive activities. One thing is for certain; the neighbors feel that the subdivision of farmer Brown's land (which would allow others to be afforded the same opportunity which the neighbors received when they moved to town a few years ago), is wrong and not in the best interest of this neighborhood and this town.

While we explain to the planning commission their role, the commission members are bombarded with criticism from their neighbors and friends. I still await the day when neighbors rise to speak in favor of my client's well-conceived subdivision plan. If there are any such neighbors, they must live in the towns where you practice. Remember, if you will, someone invited all of these hostile people out to the festivities.

Possibly, we have a commission chairperson and members who understand the rules of the game and keep the crowd in order. More likely, our applicant is from out of town and the commission members are concerned about being re-elected or re-appointed for another term. Even if the commission members know the rules of the game, they are somewhat reluctant to explain it to the mob.

Please remember, that we are speaking about an application to subdivide residential land for use as residential single-family building lots. This is what the property is zoned for and the applicant now seeks to put the property to its proper use. We are not seeking a zone change, special permit, variance or any extreme relief. We are only asking to do what the zoning and subdivision regulations allow us to do.

At some point in the proceedings, I will have to recite to the commission the case law which states that the commission's action is controlled by the regulations and it has no discretion but to approve the subdivision, so long as it conforms to the regulations. I may even cite specific cases. Of late, I recite a passage from *Sowin v. Planning & Zoning Commission*, 23 Conn. App. 370, 375 (1990) which states: "... we must conclude that because the plaintiff's land is located in a residential zone and its plan was to use the property for residential purposes, the commission could not weigh off-site traffic concerns, municipal services required by the development, property values or the general harmony of the district when deciding whether to approve the plaintiff's subdivision application." This is a very powerful statement. The problem is that the neighbors that have come to the public hearing (because we have invited them) want to speak specifically about those items which the commission cannot take into account when deciding the application. They want to talk about traffic, municipal services, property values or what's going on in the neighborhood (general harmony).

To invite neighbors to a meeting and then tell them that their concerns are irrelevant does not go over very well. This situation is also embarrassing and frustrating to the commission members who sit at the head table of this gala affair. So, for much of the public hearing, the neighbors say what's on their mind. Knowledgeable commissioners apologetically explain to the neighbors the legal restrictions on the scope of the hearing and render a decision based on those restrictions. On the other hand, a commission which wants to show it is responsive to the neighbors may deny the application for some illegal reason and require the applicant to go to court. Why not deny it! It's easier for the commission. The neighbors are satisfied. And if the appeal process takes long enough, the applicant may lose interest or go broke in the process.

Unnecessarily Convolved
Haven't we made this seemingly

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simple process much too cumbersome? I recognize the fact that many developers in the 1950s carved up lots in cookie-cutter fashion with total disregard for topography, wetlands and other natural features. But in the 1990s there are town planners, town engineers and numerous other staff members, as well as reasonably sophisticated commission members to public. The days of a developer appearing on one night before a friendly planning commission and receiving a quick approval and signed mylars are long gone. To satisfy the town staff and the planning commission that you are in compliance with the regulations is no easy task. It takes many months or even years of planning, hiring of engineers and other technical professionals, soil testing, etc., followed by multiple sessions with town staff. Tens of thousand of dollars are spent on the design and development of sophisticated plans and specifications. When

the application has been refined and reaches a point where the plans appear to be in total compliance with the regulations, it makes little sense to then invite all the neighbors to come out to try to find some irrelevant reason why these additional homes should not be built.

This writer does not suggest that the subdivision approval process should be a rubber stamp. Every parcel of land probably has some inland wetlands and will require a review and approval by the inland-wetlands agency. (The major expansion of the Inland Wetlands Act over the past twenty years is a separate matter not discussed here but worthy of another article.) If any proposed activity is significant, which is most likely, a public hearing will be held at the inland wetlands agency. Let us assume that the applicant has designed the subdivision in a way that is sensitive to the inland wetlands, and the inland wetlands agency has given its approval.

The subdivision process then should involve only an approval of a lot layout which is in harmony with the plan of development, has a proper configuration of internal streets and conforms to the town regulations with regard to open space requirements, engineering specifications, etc.

I believe that the legislature knew what it was doing when it stated that the commission "may hold a public hearing regarding any subdivision proposal if, in its judgment, the specific circumstances requires such action." I read that sentence to mean that there may be specific circumstances when public input may be required or helpful. But to have a public hearing to demonstrate to the neighbors that the town believes in open government and then tell the attendees that their comments are irrelevant, makes no sense. When you specifically invite someone to come to a hearing, you have made them feel as though their presence is required. Deciding not to respond to the invitation seems almost rude or unAmerican.

Consider also the fact that rarely does the town formally invite select

sidents to a public hearing. If the town council, selectmen or board of representatives are proposing a school, a dump or a baseball diamond on town-owned land, residents of the neighborhood would probably have much to say about the proposal. Does the town send letters or invitations to landowners within a stated distance of the proposed site? How about the budgetary process? Do we send written notice to all the residents in town of the date and time of the meeting or do we rely on the legal notice requirements and general newspaper reporting? It appears that not only land use applications, submitted by private citizens, are worthy of this invitation process.

It should be noted that resubdivisions are separately defined in C.G.S. 8-18 and a public hearing is required under C.G.S. §8-26. I believe the legislature understood the difference when it made this distinction. A resubdivision is a change

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in the: 1) road pattern; 2) area previously reserved for public use; or 3) lot configuration of a previously approved subdivision. Lots may have been sold and roads built in accordance with the original subdivision plan. Purchasers of those lots probably reviewed the subdivision plan and road pattern when they selected their lot from the maps in the realtor's office, or when they drove through the neighborhood. A subsequent attempt to change the road pattern or lot configuration may reasonably warrant a public hearing so that the lot owners, or possibly the retired

commission members who approved the original plan, will have an opportunity to review and comment on the changes. However, for the reasons previously stated, special invitations seem inappropriate even in resubdivisions.

Most subdivisions do not have "specific circumstances" and can be reviewed, modified where necessary and approved by the planning commission, with town staff assistance, without a public hearing and confrontation with the neighborhood. Additionally, formal written notice to neighborhood property owners is overkill and only invites confusion. I submit that towns should strive to modify their existing subdivision regulations to make them conform to the original intent of the enabling legislation. This might save applicants, the public and commissioners those late-night meetings and the frustrations that have become the rule rather than the exception. ■