

## Conditions and Modifications

Limits on use of conditions

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Variations



Payments in lieu



## Online Version

- **Please note that the answers to the question slides in the presentation are highlighted in light blue on the next slide. The graph on the slide indicates how participants at the training responded to the question.**
- **This presentation is for educational purposes and not intended to represent legal advice. Consult your town attorney in matters concerning your town.**



## Conditions

**Conditions are requirements added to an approval that either mandate particular action by the applicant or impose limitations or restrictions on approved use/ development**

**Examples-**

- **Condition that special permit use applicant must obtain DEEP approval of community wastewater system to serve multi-unit residential development**
- **Condition that sand and gravel removal operation authorized by special permit be limited to certain hours and days**



## Modifications

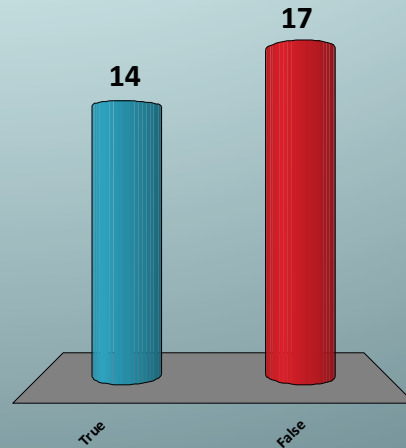
**Modifications are imposed to make the development proposal conform to the regulations**

- **Example- Subdivision application approved with the modification that portion of proposed road having an 18% grade be changed to 15% to comply with grade requirement of regulations**



Placing conditions on the approval of an application is a good way for the community to get something they ordinarily would not obtain under the regulations.

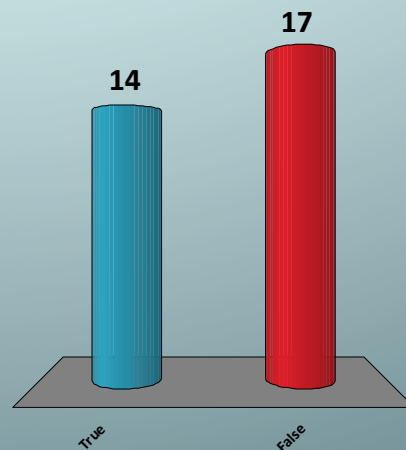
- A. True
- B. False



Placing conditions on the approval of an application is a good way for the community to get something they ordinarily would not obtain under the regulations.

- A. True
- B. False

Somewhat of a trick question. It really depends on the circumstances and what you have in your regulations



## General limits on use of conditions

- **If permissible for a particular type of application, conditions must be logically and reasonably related to the purposes of the governing statutes and regulations.**
- **Regardless of whether statutes may allow condition for type of application, the local regulations govern-**
  - **Example- If regulations specifically require Health Department Approval prior to approval of site plan, Commission cannot approve with the condition that it be obtained later**



## Limits on use of conditions

- **Commissions should not approve an application subject to “conditions to be named later.”**
- **Risk automatic approval of site plan or subdivision if condition deferring approval to another agency can be seen as failure to act.**
  - **River Bend Associates, Inc. v. Planning Commission, 271 Conn. 41 (2004)**



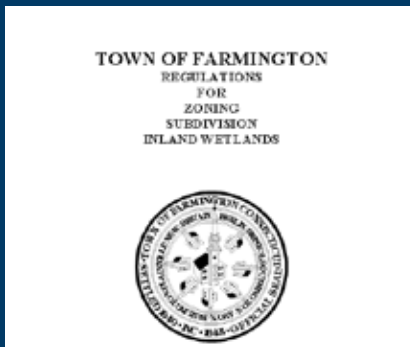
## Limits on use of conditions

- **Conditional approval dependent on action by other agencies is usually improper unless evidence on record demonstrates that approval is a probability**
- **Where permit allowing use will not become valid until favorable action by other agency, as with a special permit, evidence of probability isn't necessary**



## Limits on use of conditions

**The amount of discretion a commission has to modify or condition a development application depends on the type of permit sought**



## Site Plans

- **CGS specifically provide that the relevant commission may approve, modify and approve, or deny an application but “only if it fails to comply with requirements set forth in the zoning or inland wetland regulations.”**



## Site Plans

- **Only conditions specifically authorized by statutes are those requiring a bond to secure any modifications of a site plan.**
- **Better for commissions to issue modified approval or, if modifications are substantial, instructions on how site plans must be modified to achieve compliance with the regulations.**



## Site Plans

### Some conditions to site plans are generally permissible:

- **Examples:**

- Where site plan regulations specifically authorize particular kinds of conditions
- Conditions related to off-site improvements necessitated by development such as intersection improvements
- Administrative conditions such as notice to planning staff before commencement of work, requirements imposing order of improvements (S&E controls prior to other site work), inspection reports, etc.



## Special Permits and Special Exceptions

- **Commission or board may deny application or approve it subject to “conditions necessary to protect the public health, safety, convenience and property values.”**
- **Conditions imposed must be authorized by the regulations and only in accordance with the standards set forth in the regulations**



## Special Permits and Special Exceptions

- **Courts have upheld use of fairly broad standards to deny a permit application but imposition of conditions are supposed to be based on more specific standards**
- **Conditions proscribing scope of use authorized only by special permit are usually enforceable**



## Variances

- **Although there is no express statutory right to impose a condition to a standard variance, the CT Supreme Court held that it is permissible**





## Variances

- Conditions are a means of minimizing conflict of variance with zoning regulations
- Conditions must relate to use being proposed

806 Mass Ave, Cambridge, Ma  
(Address)

Application is: Variance: Exterior rear addition of a Greek Revival Porch house found at the Historical Commission be enlarged and the front door

Action or Relief Sought is:  
art. 5.000, sec. 5.31

Copies of this application are on file at the City 795 Massachusetts Avenue, and at the Inspector Lombard Building



## Appeals from ZEO

- ZBA may reverse or affirm, wholly or partly, or modify the challenged order, requirement of decision of the ZEO
- Although titled an “appeal,” ZBA is actually making its own decision regarding compliance and has all the powers of the ZEO



## Appeals from ZEO

- **As with authority of the ZEO in issuing the initial enforcement decisions, ZBA decision on appeal can include reasonable conditions related to zoning compliance.**



## Subdivision Applications

**Subdivision statutes specifically allow commissions to modify applications**

**Courts are reluctant to approve conditions not directly related to requirements of regulations or assurances of compliance with regulations**

- **Such “conditions” may really be “modifications.” When a condition is needed to make the subdivision plan conform to the regulations, it is really a modification.**



## Subdivision Applications

- **Conditions that address issues outside the scope of the regulations are likely to be held illegal by the courts**



## Subdivision Applications

### Common conditions of subdivision approval:

- **Improvements to adjacent streets and drainage when necessitated by development**
- **Dedication of land for open space**
- **Payments in lieu of open space**
- **Bonds**
- **Sequencing of work- ex.- E&S controls installed prior to construction**



## Inland Wetlands and Watercourses Applications

- **IWWC may grant, deny or limit any permit application for a regulated activity**
- **May approve with whatever “terms, conditions, limitations or modifications” deemed necessary to carry out the policy of Inland Wetlands and Watercourses Act.**



## Inland Wetlands and Watercourses Applications

**Conditions may include reasonable measures to mitigate impacts of the regulated activity which would:**

- **Prevent, minimize pollution or other environmental damage**
- **Maintain or enhance existing environmental quality**
- **In following order of priority: restore, enhance, create productive wetland or watercourse resources**



## Inland Wetlands and Watercourses Applications

### Conditions may include:

- In some cases, offsite wetlands enhancements or mitigation
- Drainage modifications
- Buffers and conservation area signage
- Recording of conservation easement containing limitation on activities allow in conservation area



## Reports from IWWC

- If wetlands involved, application must be filed concurrently (or previously) with IWWC
- May extend time period to allow for IWWC review
- May not make final decision until receipt of IWWC "report"
- Must give "due consideration" to IWWC "report"



## Coastal Site Plans

- **May be approved, conditioned or denied in accordance with the broad policy considerations set forth in the Coastal Area Management Act (CAM)**



## Coastal Site Plans

- **CAM supplements other land use regulations and may increase authority of Planning Commission to impose conditions on Subdivision application.**
- **Conditions must be based on appropriate standards and criteria**



## Amendments to Regulations

- **Generally inappropriate for a commission to place conditions on an amendment to regulations**
- **Regulations must be for general applicability and are not suited for individual conditions**
- **Modifications may be permissible- key is whether public is on notice of substantive change in proposed regulation**



## Conditional/final subdivision approval

**Regulations can provide for conditional subdivision  
(as distinct from subdivision approval with  
conditions imposed)**



## Conditional subdivision approval

**Subdivider is not required to post security for public improvements-**

**Final subdivision approval issued when:**

- 1) work is completed and approved; or,**
- 2) security is provided**



## Bonding Requirements

**Authorization to require bonds must be included in regulations**

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## PA 11-79: Bonding requirements

### Applies to site plan and subdivision approvals:

- Limits form of security
- Limits types and amount of permissible bonding

--Post-acceptance maintenance bonds are impermissible

- Imposes deadlines for release



Bond, Performance Bond



## PA 11-79: Bonding requirements

### Form of bond:

**“the commission shall accept surety bonds, cash bonds, passbook or statement savings accounts and other surety including, but not limited to, letters of credit, provided such bond or surety is in a form acceptable to the commission and the financial institution or other entity issuing any letter of credit is acceptable to the commission”**



## PA 11-79: Bonding requirements

### Posting bonds:

- Can be posted anytime prior to completion of construction, except commission can require posting prior to commencement E&S
- Lot can't be sold unless all security posted
- Each phase of subdivision must be treated as separate subdivision for purposes of bonding



## PA 11-79: Bonding requirements

### Release of bonds:

On request for bond release or reduction, Commission must within 65 days either:

- release/reduce the bond;
- or provide a written explanation of uncompleted work



## PA 11-5 – permit expiration

### Site plan, Subdivision and Wetlands approvals

- **If approved prior to July 1, 2011 and not expired:**
  - **Site plan, standard subdivision plans and wetlands permits-**
    - Effective for 9 years after date of approval
    - Extensions up to 14 years after approval
  - **Subdivisions over 400 units**
    - Effective for 14 years after date of approval



## Subdivision enforcement

### Principal enforcement tool is bonding

- **Obligation to call bond upon expiration of final subdivision to serve lots that have been sold**
- **No subdivision enforcement officer**
- **Limited rights of subdivision enforcement actions are becoming recognized by courts**



## Waivers

- **When are they appropriate?**
  - **Function of specific standards of regulations**
  - **No authority to waive unless specific standards are followed**
  - **Precedent- need sound factual/legal basis to treat applications differently in issuing waivers**



## Practical Consideration

### Does it hurt to ask?

**Unless directly prohibited by public policy, if applicant agrees to condition or doesn't appeal the condition, the condition is enforceable even if arguably beyond what could be mandated by commission**

**Upjohn Co. v. Zoning Bd. of Appeals, 224 Conn. 96 (1992)**



## Practical considerations

### Is the condition “integral” to approval?

If found to be impermissible on appeal, court may:

- Strike it and order approval or,
- If a condition is integrally related to approval and commission had discretion to deny, court should remand to commission to consider denial or another proper condition

**Your decision could make clear that condition is essential to approval**

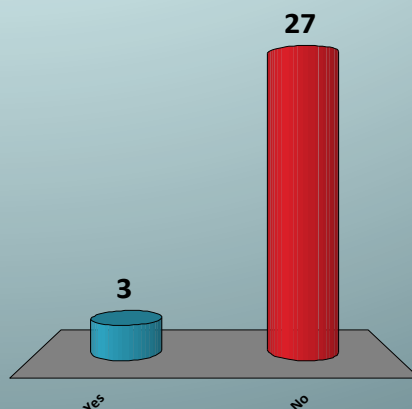


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Is it appropriate: Condition a variance to allow year-round use to an owner for her life?

A. Yes

B. No



**Condition to variance allowing year-round use to owner for her life**

**NO**

**Zoning applies to conditions of land and can't be unique to owner the property.**

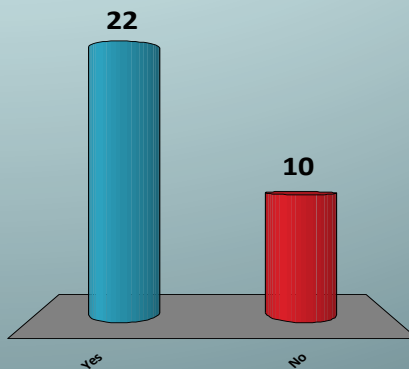
**Reid v. Zoning Bd. of Appeals, 235 Conn. 850, 858 (1996)**



**Is it appropriate: A condition attached to a wetland permit requiring the applicant to perform offsite remediation**

**A.Yes**

**B.No**



**Condition attached to wetland permit requiring applicant to perform offsite remediation**

**YES**

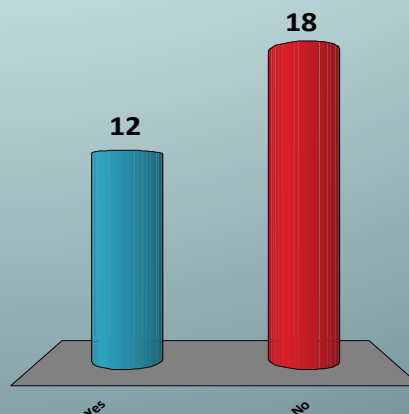
**Red Hill Coalition, Inc. v. Conservation Commission,  
212 Conn. 710 (1989)**



**Is it appropriate: Attach a condition to a wetlands permit requiring the payment of money to offset the wetlands impacts**

**A. Yes**

**B. No**



### Condition attached to wetland permit requiring payment of money to offset wetlands impacts

**NO**

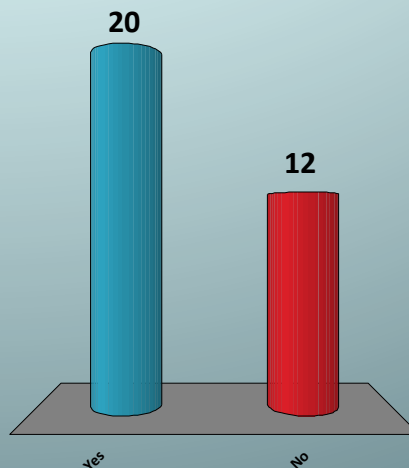
**Branhaven Plaza v. Inland Wetlands Commission of Branford, 251 Conn. 269 (1999)**



**Is it appropriate: A condition imposed to require an applicant to provide public access to the waterfront on a coastal site plan?**

**A.Yes**

**B.No**





**Condition imposed to require applicant to provide public access to waterfront on coastal site plan**

**NO** Conditions must be related to protection against impacts to coastal resources – 22a-106

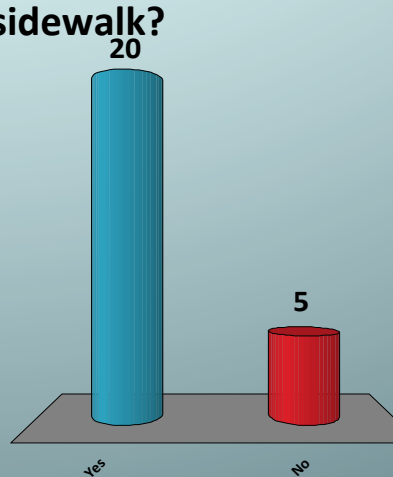
**DeBeradinis v. Zoning Comm'n, 228 Conn. 187 (1994)**



**Is it appropriate: A subdivision approval conditioned on the developer constructing an off-site sidewalk to connect the subdivision to an existing off-site sidewalk?**

**A.Yes**

**B.No**



**Subdivision approval conditioned on the developer constructing off-site sidewalk to connect subdivision to existing off-site sidewalk**

**NO**

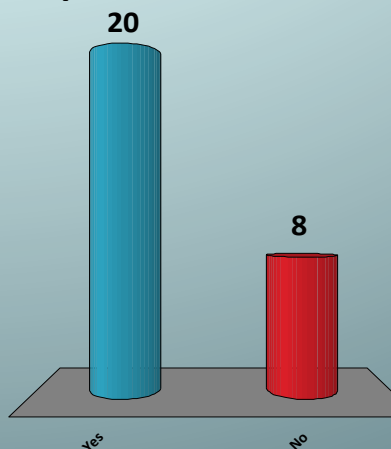
**Buttermilk Farms, LLC v. Planning & Zoning Commission,  
292 Conn. 317 (2009)**



**Is it appropriate: A subdivision approval conditioned on the developer deeding a portion of land adjoining a highway to permit town to widen road to town specifications**

**A.Yes**

**B.No**



**Subdivision approval conditioned on the developer deed portion of land adjoining highway to permit town to widen road to town specifications**

**YES**

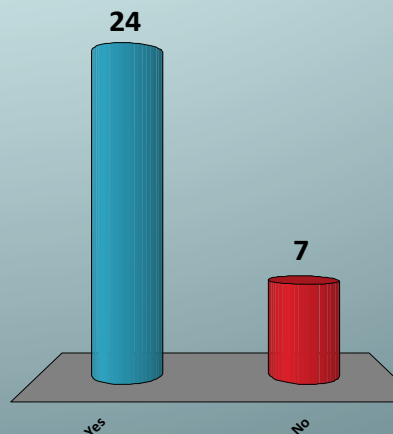
**Weatherly v. Town Plan & Zoning Commission, 23 Conn. App. 115 (1990).**



**Is it appropriate: A condition attached to a wetlands permit requiring an environmental consultant to be present to oversee construction of S&E controls**

**A.Yes**

**B.No**



**Condition attached to wetland permit requiring environmental consultant to be present to oversee construction of S&E controls**

**YES**

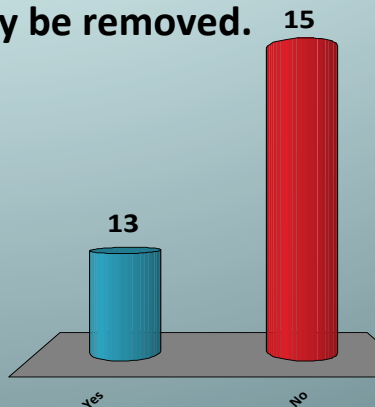
**Keiser v. Conservation Commission, 41 Conn. App. 39 (1996)**



**Is it appropriate: A condition added to the approval of special permit application seeking the expansion of a nonconforming use of unoccupied floor space that a free standing sign located on the property be removed.**

**A. Yes**

**B. No**



**Condition added to approval of special permit application seeking expansion of nonconforming use of unoccupied floor space that a free standing sign located on the property be removed.**

**NO**

**There was no relationship between sign and the proposed application**

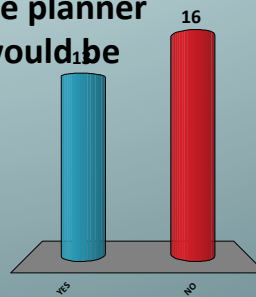
**Beckish v. Planning & Zoning Com., 162 Conn. 11, 16 (1971)**



**Is It Appropriate: A site plan was approved upon the condition that the developer connect two nearby private roads to afford access to the rear of the site. The police department indicated that the connection would be ideal for the site but later acknowledged that it may be impractical to build. The applicant obtained an easement through a private industrial park to provide additional access, but the planner testified that access through that park would be dangerous.**

**A. YES**

**B. NO**



**A site plan was approved upon the condition that the developer connect two nearby private roads**

**Answer: No**

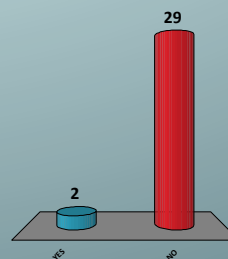
**Ninety Heenan Drive, LLC v. Milford PZC, No. CV106006860S,  
2011 WL 4031174 (Conn. Super. Ct. Aug. 11, 2011)**



**Was the condition upheld: A nearby property owner challenged the approval of a subdivision on the basis that a 1.86 acre portion of the land being subdivided, which parcel will contain a detention system serving the subdivision, must be deeded to the owner of an adjoining road located outside of the subdivision**

**A. YES**

**B. NO**



**A 1.86 acre portion of the land being subdivided, must be deeded to the owner of an adjoining road located outside of the subdivision**

**Answer : Yes**

**Laydon v. Woodbridge PZC, No. CV094036345, 2011  
WL 6004469 (Conn. Super. Ct. Nov. 10, 2011)**



**Questions????**

