NO. LND CV-12-6027473-S	: SUPERIOR COURT
EAST WINDSOR INLAND WETLAND & WATERCOURSE AGENCY, ET AL.	: LAND USE LITIGATION DOCKET :
V.	: AT HARTFORD
STEVEN DEARBORN, ET AL.	: MAY 27, 2014

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MEMORANDUM OF DECISION

I

The plaintiff, the town of East Windsor, through its inland wetlands agency (agency) and its planning and zoning commission (commission), filed the current enforcement matters on December 7, 2011 against the defendant Newberry Road Enterprises, LLC (Newberry), and its sole member the codefendant, Steven Dearborn. Dearborn operates a contractor's storage yard and a volume reduction business producing wood chips on Newberry's property at 68 Newberry Road in East Windsor. Robin M. Newton, the plaintiff's assistant town planner and zoning and

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wetland enforcement officer, moved to be made a party in both actions, and the court, *Graham, J.*, granted both motions on April 2, 2012.[1]

By agreement of the parties, this court heard both actions together although the matter was addressed primarily in the context of the inland wetland action.[2] Among other things, the plaintiff alleges that Dearborn violated certain inland wetland and zoning regulations and did not comply with a July 6, 2011 inland wetland permit and a September 13, 2011 special use permit.[3] Specifically, the plaintiff asserts that Dearborn has illegally filled wetlands, clear cut trees, constructed a road, failed to file site plans, submit as-built drawings, and failed to post bonds.

The defendants argue that as the plaintiff approved changes to the parcel, including the construction of a farm pond, the actual wetlands area was reduced or eliminated thereby negating the need to perform certain remediation. Additionally,

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[1] Throughout this memorandum of decision, the court refers to the town as the plaintiff, which includes the commission, the agency, and Newton. Abutting landowners, Gerald Wilcox and Betty Wilcox, also moved to intervene in the actions, but the court, *Robaina, J.*, denied the motions on October 2, 2012.

[2] In the zoning action, the plaintiff alleges that Dearborn needs a special permit to run the business on the property. The plaintiff asserts that the terms of a March 13, 2007 special permit, as modified on April 10, 2007, were violated and that the defendants failed to respond or to appeal an October 10, 2008 notice of violation or cease and desist orders of July 24, 2009 and March 16, 2010. The plaintiff also maintains that Dearborn failed to comply with the requirements, including the filing of site plans and bonds, of a special use permit approved on September 13, 2011.

[3] After these actions were filed, the parties filed stipulations on August 27, 2012 in both cases concerning the placement of sedimentation and erosion controls with related bonds; the filing of applications to both the commission and the agency; the removal of certain material; the hiring of licenced contractors; the filing of certain reports; and significantly, the agreement that all required work would be performed in compliance with the appropriate regulations by November 21, 2012.

the defendants assert that all such claims were resolved in a prior action *Newberry Road Enterprises, LLC* v. *East Windsor Inland Wetland & Watercourse Agency*, Superior Court, judicial district of Hartford, Docket No. CV-10-6009202-S (January 10, 2011, *Peck, J.*).[4]

Hearings were held on December 5, 2012, December 6, 2012, January 3, 2013, and January 4, 2013. On December 31, 2012, the parties entered into a stipulated agreement, entitled "Stipulation for Judgment," in which Dearborn agreed to pay the plaintiff's legal fees, pay a small fine, post a bond, and perform certain wetlands remediation work. Additionally, paragraph thirteen of the stipulated agreement authorized the plaintiff to seek to close the defendants' mulch business on the property "until such time as all terms and conditions of this agreement are fully complied with."

As a result of the alleged failure to comply with the agreement, and upon motions of both the plaintiff and the defendants to enforce the agreement, hearings were again held on April 9, 2013 and August 6, 2013. On August 22, 2013, the parties entered into an amendment to the stipulated agreement agreeing that David Askew of the North Central Conservation District, Inc., would delineate the disputed wetland boundaries and that this court would order appropriate remediation based

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[4] In *Newberry Road Enterprises*, the court, *Peck, J.*, dismissed Dearborn's appeal of two enforcement orders concerning construction of both the farm road and the filling of wetlands north of the farm pond without an inland wetland permit. (Exhibits [exhs.] 17, 18, and 26.) Petition for certification was denied on June 28, 2011. The court disagrees with Dearborn's interpretation of this dismissal.

upon that delineation. The parties further agreed to waive any appeal as to the determination of boundaries and this court's remediation orders; hearings were to resume on penalty and related issues.

After hearings on October 10, 2013 and October 15, 2013, the parties entered into a fourth stipulation on January 14, 2014 agreeing that Dearborn had paid the town $47,000 in attorneys' fees and fines albeit not on the agreed upon dates set forth in December 31, 2012 stipulation. The parties also agreed that a $10,500 performance bond due on June 30, 2013 was never posted. On January 29, 2014, the plaintiff filed a motion for order seeking closure of Dearborn's business and an order for payment of fees in the sum of $24,965.50; $350,000.00 in fines; and statutory penalties in the amount of $1,936,000.00.[5] On January 30, 2014, the plaintiff filed a

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[5] As set forth in the plaintiff's affidavit attached to the motion for order, it is seeking fines, penalties, and costs pursuant to both statutory and municipal laws. General Statutes § 22a-44 (b), in relevant part, provides: "Any person who commits, takes part in, or assists in any violation of any provision of sections 22a-36 to 22a-45, inclusive, including regulations adopted by the commissioner and ordinances and regulations promulgated by municipalities or districts pursuant to the grant of authority herein contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense. Each violation of said sections shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense. The Superior Court, in an action brought by the commissioner, municipality, district or any person, shall have jurisdiction to restrain a continuing violation of said sections, to issue orders directing that the violation be corrected or removed and to assess civil penalties pursuant to this section. All costs, fees and expenses in connection with such action shall be assessed as damages against the violator together with reasonable attorney's fees which may be allowed, all of which shall be awarded to the commissioner, municipality, district or person which brought such action. . . ." The East Windsor inland wetland and watercourse regulations reflect this statutory scheme. (Exh. 51,p. 18, § 14.4.)

General Statutes § 22a-44 (c) provides: "Any person who wilfully or

motion to enforce the stipulations and for judgment and a hearing was held on the same day during which a fifth stipulation was filed. In the stipulation, the parties agreed to the delineation of the wetlands, as defined by Askew, and that the wetlands restoration had been performed satisfactorily. The hearing continued to March 18, 2014, and concluded on March 19, 2014.[6] The parties filed post-trial briefs on April 2, 2014, and the court heard argument on April 4, 2014. Additional memoranda of law were filed on April 9, 2014 and April 11, 2014.

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knowingly violates any provision of sections 22a-36 to 22a-45, inclusive, shall be fined not more than one thousand dollars for each day during which such violation continues or be imprisoned not more than six months or both. For a subsequent violation, such person shall be fined not more than two thousand dollars for each day during which such violation continues or be imprisoned not more than one year or both. For the purposes of this subsection, 'person' shall be construed to include any responsible corporate officer."

The plaintiff has adopted a municipal citation process pursuant to General Statutes § 8-12. Section 8-12, in relevant part, provides: "The owner or agent of any building or premises where a violation of any provision of such regulations has been committed or exists, or the lessee or tenant of an entire building or entire premises where such violation has been committed or exists, or the owner, agent, lessee or tenant of any part of the building or premises in which such violation has been committed or exists, or the agent, architect, builder, contractor or any other person who commits, takes part or assists in any such violation or who maintains any building or premises in which any such violation exists, shall be fined not less than ten dollars or more than one hundred dollars for each day that such violation continues; but, if the offense is wilful, the person convicted thereof shall be fined not less than one hundred dollars or more than two hundred fifty dollars for each day that such violation continues, or imprisoned not more than ten days for each day such violation continues not to exceed a maximum of thirty days for such violation, or both . . . ." (See also exh. 57 and exh. 79, p. 109, § 902.2.)

[6] The court also held status conferences on multiple dates and conducted a site visit on August 16, 2013.

II

The current disagreement between the parties stems in large part over the delineation of wetlands and concomitant restoration work on the parcel.[7] George Logan, a soil scientist hired by Dearborn, testified that a 2006 delineation, on which the parties initially relied, was inaccurate under current standards. Logan delineated the wetland boundaries in 2010, but Dearborn never sought to amend the official wetlands map as required by General Statutes § 22a- 42a (b).[8] Thus, the Logan

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[7] The parties have different understandings of paragraph two of the December 31, 2012 stipulation that, in relevant part, stated: "The parties anticipate a reduction in the amount of the wetlands remediation area required based upon pond expansion that has taken place." The plaintiff argues that when this language was inserted the parties failed to recall that the recalculation was already completed and in fact made part of a September, 2012 permit from the commission. Dearborn asserts that the language was unambiguous and anticipated a reduction in the remediation area. The dispute concerning this paragraph caused some delay in completing the project.

[8] Section 22a-42a (b) provides: "No regulations of an inland wetlands agency including boundaries of inland wetland and watercourse areas shall become effective or be established until after a public hearing in relation thereto is held by the inland wetlands agency. Any such hearing shall be held in accordance with the provisions of section 8-7d. A copy of such proposed regulation or boundary shall be filed in the office of the town, city or borough clerk as the case may be, in such municipality, for public inspection at least ten days before such hearing, and may be published in full in such paper. A copy of the notice and the proposed regulations or amendments thereto, except determinations of boundaries, shall be provided to the commissioner at least thirty-five days before such hearing. Such regulations and inland wetland and watercourse boundaries may be from time to time amended, changed or repealed, by majority vote of the inland wetlands agency, after a public hearing in relation thereto is held by the inland wetlands agency, in accordance with the provisions of section 8-7d. Regulations or boundaries or changes therein shall become effective at such time as is fixed by the inland wetlands agency, provided a copy of such regulation, boundary or change shall be filed in the office of the town, city or borough clerk, as the case may be. Whenever an inland wetlands agency makes a change in regulations or boundaries it shall state upon its records the reason why the change was made and shall provide a copy of such regulation, boundary or change to

boundaries were never adopted by the agency, but there was, as noted by Logan, a "humongous difference" between the two delineations. Additionally, Dearborn had received approval for and constructed a drainage basin that Logan and Dearborn maintained changed the hydrology of the area and had a further impact on the wetlands line. Nevertheless, the wetlands demarcation used for the permits and approvals remained the official wetlands delineation for East Windsor. Further testing, observed by Askew at the request of the plaintiff, continued in 2011 based upon the Logan delineation. In 2012, Dearborn sought and received approval to expand a farm pond although he was still required by the permit to perform certain restoration work; it was never accomplished as Dearborn continued to disagree on the extent of the restoration area based in large part on the Logan delineation. Dearborn also failed to submit the backup data to support the Logan delineation and this became an issue that continually caused problems for the parties.

In addition to Logan, the court heard testimony from witnesses including, but not limited to, Dearborn; Newton; Ronald Sevaria, the chairman of the agency;

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the Commissioner of Energy and Environmental Protection no later than ten days after its adoption provided failure to submit such regulation, boundary or change shall not impair the validity of such regulation, boundary or change. All petitions submitted in writing and in a form prescribed by the inland wetlands agency, requesting a change in the regulations or the boundaries of an inland wetland and watercourse area shall be considered at a public hearing held in accordance with the provisions of section 8-7d. The failure of the inland wetlands agency to act within any time period specified in this subsection, or any extension thereof, shall not be deemed to constitute approval of the petition."

Catherine Roloff, an agency member; and Laurie Whitten, the town planner. Most of the factual issues concerning the violations were resolved by the stipulations. Nevertheless, payments were not timely made[9]; bonds were not posted; material was not removed; work was not performed; and as-built drawings were never submitted. Moreover, despite the town officials' willingness to work with Dearborn,[10] the animus between the parties–both between Dearborn, the agency, and the commission and between Dearborn, Whitten, and Newton personally–has clearly contributed to the length of this dispute. While Dearborn performed work, it was only done so grudgingly and piecemeal.

The evidence and the stipulations prove that Dearborn has violated East Windsor's inland wetlands and watercourses regulations and zoning regulations.[11]

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[9] For instance, the January 14, 2014 stipulation indicates that on March 22, 2013, $15,000 was paid; on May 23, 2013, $8000 was paid; on July 12, 2013, $7000 was paid; on August 15, 2013, $6000 was paid; on October 23, 2013, $7000 was paid; and finally on December 18, 2013, $4000 was paid. These payments failed to comply with the payment schedule in paragraph one of the December 31, 2012 stipulation.

[10] For example, Dearborn frustrated the agreement to have Askew delineate the boundaries by planting a corn crop in the area. Nevertheless, the plaintiff agreed to extend the time for that work until after the harvest and the plaintiff agreed to pay for the cost of the mapping. Both Whitten and Newton testified that they and the agency worked with Dearborn to try to facilitate the granting of permits. Their testimony was specific and credible.

[11] Dearborn had a difference of opinion with the town concerning his interpretation of whether a permit was required for farming related activities under the inland wetlands statutes and the town's regulations. On March 19, 2014, Dearborn testified that this disagreement led to the communication breakdown with, and his mistrust of, the town representatives. The regulatory process regarding farm ponds and farm roads has resulted in an extensive body of law on the subject. See *Taylor* v. *Conservation Commission*, 302 Conn. 60, 67, 24 A.3d 1199 (2011) ("even if road construction directly related to the farming operation is permitted as of right, such

For instance, paragraph three of the December 31, 2012 stipulation provided for the posting of a wetlands restoration bond or waived the bond if Dearborn hired Logan to do the work and if town representatives were present during the work. Nevertheless, the town was never notified when the work was performed nor was the required bond posted. On October 10, 2013, the parties stipulated that no changes had occurred on the property since the court's August 16, 2013 site visit. At that time, this court

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road construction is not permitted as of right if it involves the filling of wetlands, because the filling of wetlands is not permitted as of right"); *Red 11, LLC* v. *Conservation Commission*, 117 Conn. App. 630, 651, 980 A.2d 917 ("[a] farm pond falls within the [General Statutes] § 22a-40 (a) (1) exemption only if the commission made the determination that it was essential to the farming activity"), cert. denied, 294 Conn. 918, 984 A.2d 67 (2009); *Canterbury* v. *Deojay*, 114 Conn. App. 695, 709-10, 971 A.2d 70 (2009) ("The defendants appear to have been under the mistaken assumption that because . . . the regulations and § 22a-40 provide that farming is a permitted activity in a wetlands area as of right, they needed no specific determination that their activities constituted farming. This determination, however, is a necessary step, and the court correctly concluded that 'the defendant[s'] use of the property, whether or not it was agricultural, was not permitted because the defendant[s] did not comply with . . . the regulations.'"); *Wilkinson* v. *Inland Wetlands & Watercourses Commission*, 24 Conn. App. 163, 167-68, 586 A.2d 631 (1991) ("[T]he [agency] . . . must be given the first opportunity to determine its jurisdiction. Requiring the plaintiffs to apply for a permit is neither futile nor inadequate. If the [agency] finds that the plaintiffs' proposed use is exempt from regulation under General Statutes § 22a-40 (a) (1), the plaintiffs will be allowed to conduct their activities without a permit. If the commission determines that the plaintiffs' proposed use is not exempt, it must then decide whether to issue a permit."). Much of this body of law was cited by the court, *Peck, J.*, in *Newberry Road Enterprises, LLC* v. *East Windsor Inland Wetland & Watercourse Agency*, supra, Superior Court, Docket No. CV-10-6009202-S.

It is also noted that Dearborn takes issue with conditions in his various permits. His failure to contest them upon issuance precludes a collateral attack at this time. See *Spectrum of Connecticut, Inc.* v. *Planning & Zoning Commission*, 13 Conn. App. 159, 162, 535 A.2d 382 (" a party may not challenge on appeal the validity of a preexisting condition to a special permit which it seeks to renew"), cert. denied, 207 Conn. 804, 540 A.2d 373 (1988).

observed violations, including the failure to place millings (ground up pavement) and the storage of trailers within the 100 foot buffer zone. Still, on January 30, 2014, Dearborn testified that although the millings were in place now, twenty-five feet of fill was still in the buffer zone because he ran out of time to remove it. As to the trailers, Dearborn averred on March 19, 2014, that he could park his trailers in the buffer area because the stipulation or September 13, 2011 permit; (exh. 62); did not specifically prohibit it. The town's zoning regulations are, however, permissive rather than prohibitive. Specifically, § 200.1 states that "[u]se of land, buildings or structures not clearly permitted in the various zoning districts is prohibited. Activities not clearly permitted in the [r]egulations are prohibited." (Exh. 79, p. 12.) Permissive zoning regulations require that "[t]he uses which are permitted in each type of zone are spelled out. Any use that is not permitted is automatically excluded." *Gordon* v. *Zoning Board*, 145 Conn. 597, 604, 145 A.2d 746 (1958); see also R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (3d Ed. 2007) § 4.10, p. 81 ("a use is automatically excluded unless it is expressly permitted in the zoning regulations").

Additionally, while not part of the December 31, 2012 stipulation, the plaintiff has stressed that Dearborn has failed annually to renew his special use permit as required in condition twelve of his September 13, 2011 permit. (Exh. 62.) Despite the August 22, 2013 stipulation concerning Askew's intervention, Dearborn also frustrated the agreement to have the site inspected by planting a corn crop that kept

Askew from digging test pits in the disputed area. Nevertheless, the plaintiff agreed to allow Askew to inspect at a much later date.

Furthermore, Newton testified on October 10, 2013, that the required performance bonds for the permitted work, including the zoning special permit, were never posted. Dearborn testified that he did not have the money to pay the bonds and that he intended to use the $7500 bond from the water basin together with additional funds for the performance bond.[12] Nevertheless, as indicated by Newton, that $7500 bond was for sedimentation and erosion control for the retention pond. The work for which that bond was posted remains unfinished and was unilaterally modified by Dearborn by the placement of stone rather than vegetation to handle water run off. Moreover, paragraph 3 (a) of the December 31, 2012 stipulation simply requires the posting of a $10,500 performance bond; the utilization or substitution of funds from another bond is not discussed. Therefore, the court concludes that Dearborn has failed to perform all the terms and conditions of the December 31, 2012 stipulation.

III

The plaintiff seeks penalties, attorneys' fees, and costs under General Statutes § 22a-44b and an order that Dearborn's business be closed until he is in compliance

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[12] Dearborn argued that the storm of October, 2012 not only increased the amount of debris for the mulch business but also caused a commensurate decrease in the price of mulch which severely impacted his business. The storm occurred, however, before the stipulation was signed. He also indicated that he has almost no money in the bank and that the proceeds from a 2013 sale of another parcel of property in East Windsor were used to pay back taxes, mortgage interest, and principal payments leaving him with a small, but unknown balance.

with all the terms and conditions of the December 31, 2012 stipulation. Section 22a-44b was apparently the authority for the initial penalties and fees set forth in paragraph one of the December 31, 2012 stipulation.

The last sentence of paragraph twelve of the stipulation states, "[t]his agreement is intended to resolve all claims raised in said matters including, but not limited to, all claims for costs, attorney's fees, fines and penalties." Paragraph thirteen states: "In the event the Defendant fails to perform all of the terms and conditions of this agreement the Plaintiff may file a motion to enforce this agreement as a judgment and may file a motion seeking entry of a judgment in accordance herewith, the only defense to which Defendant may raise shall be a claim of substantial compliance herewith. Plaintiff may, at its option, seek closure of Defendants mulch making business on the property as part of its order until such time as all terms and conditions of this agreement are fully complied with. *Plaintiff shall be entitled to attorney's fees and costs in enforcing this agreement.*" (Emphasis added.)

The parties agree that the December 31, 2012 stipulation is the operative document to be enforced. "[A] trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811, 626 A.2d 729 (1993). While there may have initially been a dispute about the interpretation of the first sentence of paragraph two regarding the reduction in the wetlands remediation area based upon pond

expansion, that disagreement was resolved in the August 22, 2013 amendment to the stipulation. Indeed, paragraph six of the August 22, 2013 amendment indicates that its terms are to be incorporated into paragraph two of the December 31, 2012 stipulation and that they may be enforced as provided for in paragraph thirteen as set forth previously.

The plaintiff argues that penalties should be imposed for violations of the statute and municipal ordinances. Nevertheless, the terms of paragraphs twelve and thirteen of the December 31, 2012 stipulation and paragraph six of the August 22, 2013 amendment, read together, are clear and unambiguous. Hence, other than the initial penalties imposed in paragraph one of the December 31, 2012 stipulation, no further statutory or municipal penalty may be imposed as "[t]his agreement is intended to resolve all claims raised in said matters, including but not limited to, all claims for . . . fines and penalties."

Paragraph thirteen clearly provides for the sanctions for failure to comply with the agreement: "Plaintiff may, at its option, seek closure of Defendants mulch making business on the property as part of its order until such time as all terms and conditions of this agreement are fully complied with." Dearborn has been aware of this demand, reflected in the prayer for relief, since these actions were commenced in December, 2011. Activities had been conducted in wetlands without a permit for many years.[13] The penalties were agreed upon as set forth in paragraph one of the

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[13] For instance, exhibit five indicates that notices of violation began at least as early as 2008.

December 31, 2012 stipulation, but Dearborn continually disregarded the zoning and inland wetland regulations and the requirements of his permits. As of the final argument date of April 4, 2014, he was still not in compliance.

Dearborn has argued the one valid defense under the stipulation, i.e., that he has substantially complied with the stipulation. For the reasons previously discussed, this court rejects this defense. Any effort of Dearborn to comply with the conditions of his permits or even the stipulations appears to be only a result of being prodded by counsel.[14] Moreover, and importantly, it is only because of the lengthy passage of time that he has finally complied with such terms as set those forth in paragraph one of the stipulation. Hence, in light of his failure to comply fully, this court agrees that he should be enjoined from operating his mulching business until the town verifies to this court that he is in compliance with the stipulation's terms.

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[14] Dearborn testified on January 30, 2014, that he has not communicated with town officials for years because he believed no matter what was said or what the regulations said that his requests would be rejected. He felt he was not treated fairly; that other people in town were treated differently. Town officials felt differently. Newton and Whitten both testified that they believed that they went above and beyond to help Dearborn. For instance, both discussed the issuance of his zoning permit without a bond based upon his representations. Indeed, the town agreed to allow him to post a surety bond rather than the normal cash bond. Sevaria and Roloff both testified that Dearborn would agree to take action and then fail to follow through. Roloff also averred that Dearborn would lose his temper and was at times, including July, 2011, angry, unruly, and bullying. Sevaria and Roloff both testified that Dearborn had stated that he would fight the town and try to drag the matter out. Dearborn admitted to making this general statement, but said it was in jest, and acknowledged that he speaks loudly and loses his temper sometimes. Dearborn testified that he was elected to his community's board of selectmen in the fall of 2013.

Paragraph thirteen also provides for attorneys' fees and costs in connection with enforcing the agreement. The plaintiff submitted an affidavit seeking $44,393.50 in legal fees incurred since January 1, 2013–the day after the stipulation was signed. A review of the affidavit and accompanying bills indicates that the plaintiff's attorneys have significantly reduced the rate charged to the plaintiff from their usual billing rate to $275 to $285 per hour for approximately 173 hours of time. The court recognizes counsels' familiarity with the particular field of law and the number of hours and days spent on these cases on hearings and meetings and finds that the requested fees are reasonable and appropriate. See *Conservation Commission* v. *Red 11, LLC*, 135 Conn. App. 765, 786-87, 43 A.3d 244 (2012) ("[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. . . . The courts may then adjust this lodestar calculation by other factors. . . . The . . . factors [include] . . . (9) the experience, reputation and ability of the attorneys. . . and (12) awards in similar cases." [Internal quotation marks omitted.]).

The genesis of this case stems from Dearborn's beliefs about the applicability and utility of land use regulation. An improper interpretation or disagreement with police power enactments does not justify a disregard for state and municipal law. Whether these orders will serve to deter him from ignoring his community's land use regulations in the future is unknown. The court notes, however, that these enforcement matters would not have been filed and that this result could have been

avoided if minimal effort was made to comply and to work with the town which has been exceedingly patient and generous with second chances.

Accordingly, pursuant to paragraph 13 of the stipulated agreement dated December 31, 2012, stipulated judgment is entered for the plaintiff, the defendants' mulching business is ordered closed until further order of the court and plaintiff is awarded attorneys' fees in the amount of $44,393.50 with costs to be determined.

Berger

Berger, J.