



October-December 2006

Connecticut Planning

Newsletter of the Connecticut Chapter of the American Planning Association

Ditches and Drains and Sewers, Oh My!

The Supreme Court Grapples With Federal Regulation of "Tributaries"

by Tim Hollister, Shipman & Goodwin LLP, Hartford

Because Connecticut has a long-established and broadly-defined system of state and local regulation and permitting for wetlands and watercourses, we sometimes forget that in much of the nation, most of the regulation is federal, and the scope of that federal authority is a high stakes battle involving millions of acres of land. Viewing these disputes, we are folks on the sidewalk, our noses pressed to the bar-room window, watching the fight going on inside.

The view, however, is fascinating, and though federal wetlands regulation may be less important to us than elsewhere in the U.S., it is certainly pertinent. Thus, it is worth reviewing the June 2006 decisions of the U.S. Supreme Court in *Rapanos v. United States* and *Carabell v. Corps of Engineers*, in which the Court confronted the federal definition of "tributaries" to federally-regulated waterbodies.

As you will recall from civics class, the federal government only wields those powers delegated to it by the states, and thus its authority over most environmental matters derives from its power to oversee "interstate commerce." Historically,

Congress regulated only "waters of the United States" such as coastal harbors and major rivers running through two or more states. These waters were generally defined by the characteristic of being "navigable," meaning traversable by boat and thus capable of use for interstate travel.

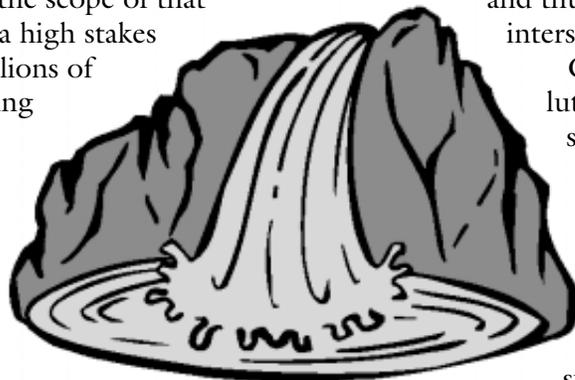
Controlling water pollution presented a new set of challenges to this power structure, because most sources of pollution are localized, but their physical impacts are difficult to measure and potentially

have a broad geographic effect.

Thus, when Congress passed the federal Clean Water Act in 1972, the Act's stated purpose was to "restore and maintain the chemical, physical and biological integrity of Nation's waters," but its geographic reach was problematic at best.

The Act prohibited the discharge without a permit of any pollutant to navigable waters from any "point source," but provided little additional guidance. In 1975, the Army Corps of Engineers, designated by Congress to administer federal permitting of pollutant discharge to federal water, issued regulations that

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See coverage of the Southern New England Planning Conference on pages 8-10.

2006 Planning Award winners announced — see page 11.

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PRESIDENT'S MESSAGE

On behalf of the Chapter membership and the Executive Committee I would like to welcome our new officers: Donald Poland, President-Elect; Matt Davis, Treasurer; and Laurie Whitten, Secretary. Mr. Davis and Ms. Whitten, new to the executive committee, will fill the vacancies left by Mike Piscitelli, the former secretary, and Bill Sweeney, the former treasurer. Donald Poland continues his rise through the organization moving from chair of the legislative committee to Vice-President and now the Chapter's first President-Elect.



In our efforts to improve communications with our members we will be instituting a members only email service beginning in October 2006. This new service will allow the officers and executive committee to make announcements on upcoming events and conferences, CCAPA legislative activities, and other news to our members. This email service will not be a listserv, but will allow us to notify members in a timely manner of is-

sues or events of interest. The messages will, if appropriate, provide a link or contact information to other sites. If any Chapter members would like to make announcements over the new e-news service they can do so by providing information by email either to me or to any of the Chapter's committee chairs. This is not intended to replace the planner's listserv, but to provide a way for the executive committee and officers to communicate more directly and more quickly with our members. The e-news service will only be available to CCAPA members.

On the national level, APA is promoting October as National Planning Month and has asked all chapters to promote this event. CCAPA intends to promote our 2007 Planning Award recipients in media throughout the State. We are also looking for opportunities to highlight the great Connecticut towns, cities or neighborhoods, and highlight how professional planners and sound planning have contributed to these successes. If members have any suggestions for stories on great communities and places in Connecticut, past, present, or future, please contact me or Marcia Banach, Chair of the Publicity and Communications Committee. Even though you are getting this newsletter in October, we would very much like to have an inventory of story ideas. ■

— Mark Pellegrini, President

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APA Connecticut Planning

is published quarterly by the Connecticut Chapter of the American Planning Association. Contributions are encouraged. Submissions should be typewritten and submitted via email or CD-ROM/diskette, and must include the name and telephone number of the contributor. Material may be edited to conform to space or style requirements. Please address submissions to Executive Editor Marcia Banach at the addresses below.

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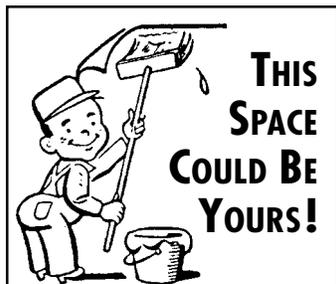
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When Congress passed the federal Clean Water Act in 1972, the Act's stated purpose was to "restore and maintain the chemical, physical and biological integrity of Nation's waters," but its geographic reach was problematic at best.

Ditches and Drains, (cont'd from page 1)

attempted to throw a regulatory net over all potential sources of pollution of waters under the federal government's control. The Corps extended the Clean Water Act permitting to waters "susceptible" to use in interstate commerce; "tributaries" to those waters; and "wetlands adjacent" to those tributaries. These regulations set in motion jurisdictional disputes that now span three decades.

In 1985, the U.S. Supreme Court upheld the Corps' authority to require a permit for activities in wetlands "adjacent to" navigable waters, but without defining that term; the Court deferred to the Corps' belief that it needed a broad jurisdictional definition in order to regulate all potential pollution sources. In 2001, however, the pendulum swung the other way, as the Supreme Court held that the Corps could *not* regulate waters that were truly intra-state and hydrologically isolated from interstate waters. That case involved an area in Illinois where holes resulting from excavation had since filled with water,

but the water was not hydrologically connected to other wetlands or interstate navigable waters. The Corps had asserted jurisdiction over these ponds on the theory that migratory birds, traveling interstate routes, would use them as a habitat. (This theory was known among wags as the "reasonable bird rule.") The Supreme Court found bird habitat too tenuous a connection to interstate commerce to support federal regulatory authority.

The *Rapanos* and *Carabell* cases brought to the forefront the issue of "tributaries" to navigable waters. Rapanos filled wetlands in Michigan that were between 11 and 20 miles from a navigable waterway, but had connections to navigable waters through a series of storm drains, sewers, and ditches. Rapanos was criminally convicted for ignoring federal permitting requirements, but he defended a separate civil enforcement suit by arguing that the Corps did not have jurisdiction over the wetlands that he filled. The *Carabell* case involved a 20-acre parcel, also in Michigan, which is a forested wetland but separated by a

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berm from a ditch that eventually flows to a lake. In all but the wettest conditions, the berm prevents water from reaching the ditch. The Corps denied a permit because the 20 acres provided water storage functions that “if destroyed could result in an increased risk of erosion” to downstream waterways.

The U.S. Supreme Court issued five opinions. Five Justices (Scalia, Thomas, Alito, Roberts, and Kennedy) agreed that the federal appeals court in Michigan had been too deferential to the Corps by upholding its broad view of its jurisdiction. These five Justices agreed to send the case back to the lower court for further consideration. However, among these five Justices, there was no agreement on the standard to be applied. Four (excluding Kennedy) wrote that the Corps’ jurisdiction should only encompass areas with a continuous surface-water connection to a permanent body of water. Justice Kennedy stated, however, that the jurisdictional reach of the Clean Water Act should be determined by a functional analysis, as stated in the statute. Using

the term “significant nexus,” he defined the necessary connection as follows:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region significantly affect a chemical, physical, and biological integrity of other covered [regulated] waters while readily understood as “navigable.” When, in contrast, wetlands effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable water.”

Four Justices (Souter, Ginsburg, Breyer, and Stevens) would have upheld the Corps’ view of its own jurisdiction, giving broad deference to it as an administrative agency. Finally, two Justices stated expressly that they now expect the Corps to help solve this problem by issuing comprehensive regulations defining

(continued next page)

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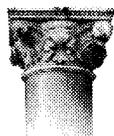
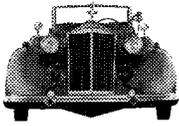
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It appears that a federal rulemaking is likely in the near future. The process of soliciting input and publishing draft and final rules promises to attract many stake-holders with divergent views — and additional court cases.

Ditches and Drains, (cont'd from page 5)

its jurisdictional reach. As of the date of this article, the Corps has announced its intention to do just that.

What can we here in Connecticut learn from these decisions? First, the consensus of commentators has been that there should be little immediate change in the scope of Corps wetlands permitting, because these two cases did not establish a new standard. Also, Justice Kennedy's focus on a "significant nexus" and "chemical, physical and biological impact" is closer to the expansive view of federal jurisdiction stated by the four dissenting Justices.

Here in Connecticut, these two decisions will make little difference between what does and does not get built because, as noted earlier, we already have in place a comprehensive permitting system with broad definitions for wetlands regulation. Here, the question is (and has been) whether a particular project will need a Clean Water Act permit *in addition to* a state wetlands permit. Also, with the scope of federal

jurisdiction still unclear, the prudent course is still to obtain a federal permit.

However, there is one significant parallel between *Rapanos* and *Carabell* and Connecticut law that merits mention: these decisions are remarkably similar to our Supreme Court's 2004 decision in *River Bend Associates, Inc. v. Conservation Commission*. In *River Bend*, our Supreme Court held that a wetlands permit may not be denied under our state wetlands law without "substantial evidence" of an actual, physical, adverse impact on a wetland or watercourse, and conversely that a denial could not be based on speculation or potential. Justice Kennedy said much the same thing: federal wetlands jurisdiction may not be based on speculation about hydrology, but only on evidence of a physical impact of proposed construction on a navigable water.

As noted above, it appears that a federal rulemaking is likely in the near future. The process of soliciting input and publishing draft and final rules promises to attract many stakeholders with divergent views — and additional court cases. ■

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Professional Development News

by John D. Pagini AICP, Professional Development Officer

AICP Certification

CCAPA Members Receive Certification

Congratulations to Kevin Kennedy, AICP and Michelle Frye, AICP who passed the May 2006 AICP Certification Exam!

November, 2006 AICP Exam

The deadline for applications for the November AICP Exam was September 1, 2006, and the testing window for the Exam will be November 6-20, 2006. Any candidates for the Fall, 2006 or Spring, 2007 Exams who have not previously contacted PDO John Pagini should do so at pagini@charter.net.

Continuing Professional Development CCAPA Planners Awarded Continuing Professional Development Certificate

Congratulations also go to the following CCAPA planners who received their AICP Continuing Professional Development Certificates in June, 2006:

Francis G. Armentano, AICP

Martin J. Connor, AICP
Susan C. Cullen, AICP
Dennis I. Elpern, AICP
Michael K. O'Leary, AICP
Lauren Patricia Whitten, AICP

Programs with Continuing Professional Development Credits Posted

A list of 30 programs approved for Continuing Professional Development Credits since November, 2005 is posted as a PDF on the CCAPA website at www.ccapa.org/member_services/continuing_education.htm.

Planners who are aware of other programs potentially eligible for CPD credit are asked to contact PDO John Pagini.

FAICP — Planners who have an interest in nominating their colleagues to FAICP should look for notices soon concerning AICP's anticipated late Fall, 2006 round of nominations for award in 2008. Planners are reminded that AICP accepts nominations only once every two years. ■

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Challenges & Changes: Southern New England APA Fall Conference

by Marcia Banach, Connecticut Planning editor

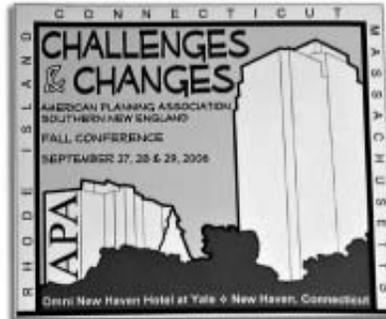
Well, we're back...and the Planning Committee for "Challenges & Changes" (Sept. 27-29) outdid themselves for this year's regional conference at the Omni New Haven Hotel at Yale. Everything about the conference was superbly planned and executed, from the smooth registration process (**Michele Lipe** made it look SO easy, but months of behind-the-scenes work was involved); to the high-profile lunch speakers on both Thursday and Friday; to the timely and informative workshop sessions themselves. The Omni Hotel was very comfortable and did a fine job of servicing the conference, including very good conference meals (well, okay, the construction noises did make some of the sessions a tad more entertaining than they otherwise would have been).

Thursday's high-profile lunch speaker was renowned

architect **Cesar Pelli, FAIA**, a former dean of the Yale University School of Architecture, where he continues to lecture. His work has been widely published and exhibited, with nine books and several issues of professional journals dedicated to his designs and theories. Mr. Pelli has received 11 honorary degrees and over 150 awards for design excellence. He is most recently recognized for his architecture in the design of

the Petronas Towers, Kuala Lumpur, Malaysia. Mr. Pelli presented a slide show of some of his most stunning designs from around the world, including many buildings in New Haven. He concluded his presentation with an overview of the new Connecticut Science Center at Adriaen's Landing in Hartford.

Friday's lunch included two high-profile speakers: New Haven Mayor **John DeStefano** and APA President **David Siegel, AICP**. Mayor DeStefano has been New Haven's Mayor since 1994. During his tenure the City has twice been awarded



Michele Lipe tirelessly working the registration table.



Left: The diverse sessions presented good information on the latest hot topics. Above: Backstage at the Shubert Theater.

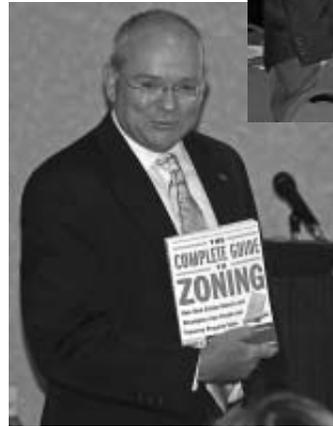
“All-America City” recognition. Mayor DeStefano spoke eloquently about several issues that he thinks need to be addressed in Connecticut, including:

- Health care: There are 400,000 people in Connecticut without adequate health insurance; the hospital emergency rooms are their primary source of care, at great expense to state taxpayers.
- Property tax system and its resultant sprawl: Car tax repeal is not the right form of property tax relief, since it benefits primarily the wealthy. Mayor DeStefano noted the need for real reform if we are ever going to move beyond 169 individual towns each soliciting economic development to improve their tax bases to pay for education costs.
- Affordable housing: Connecticut is not building starter housing anymore because of the concern that starter housing will result in more school children, thus higher taxes. Instead, towns are constructing “active adult” housing for the 55+ age group, and McMansions.

David Siegel, who spoke following Mayor DeStefano, is the energetic and humorous President of the American Planning Association. Mr. Siegel’s “Secret Agent” approach to addressing our members generated a lot of laughs as he spoke about APA National’s goals and plans for the future. David noted that APA membership has been growing; we are now almost 40,000 members strong and APA hopes that milestone will be met by the 2007 National Conference in Philadelphia.

The sessions themselves were relevant and well-presented. Sessions ranged in topic from sustainable development and

Below: Dwight Merriam suggests required reading for workshop participants.



green design; through hazard planning and preparation; from affordable housing to dealing with McMansionization; and state planning issues.

The Connecticut Chapter’s Annual Meeting, held this year as a breakfast meeting at 8:00 a.m. Friday morning (ouch!!), featured our annual Awards Program (see page 11) plus a timely video presentation by **David Fink** of HomeConnecticut (an initiative of the Partnership for Strong Communities). Among the disturbing facts presented by Mr. Fink were:

- Housing costs have outstripped wage increases by 3.5 times over the last five years.
- (continued next page)*



Above: Tom Condon, Chris Wood, Don Poland and David Fink talking at the Connecticut Chapter’s annual meeting.



Left: Mike Piscitelli, New Haven city planner, introduced luncheon speaker Mayor John DeStefano.



New Haven Mayor John DeStefano addresses the conference about property tax, affordable housing, health care, and other issues of concern in Connecticut.

Challenges & Changes (cont'd)



Conference chair, CCAPA past president Dan Tuba.

- In 2004, a family making median income couldn't qualify for the median sales price home in 102 of CT's 169 municipalities. By 2005, that number had risen to 157 towns.
- Connecticut has lost more 20-34 year old population than any other state since 1990.
- Connecticut was 48th among the states in construction of units per capita between 2000 and 2004.

Last, but certainly not least, was the Thursday night reception at the Shubert Theater. Guests were treated to backstage tours, where we saw the not-so-glamorous "stars" dressing rooms and the underside of the oft-patched stage floor. The "posters" painted on the walls for every production, each autographed by the production's cast, were fascinating (*Cats* has the biggest, with returning cast members updating their previous signatures). The Shubert's smaller stage does limit their ability to bring in some of the larger Broadway shows, but the small audience size guarantees everyone an amazing seat.

Thanks to all of the Connecticut Planning Committee members for their hard work — it paid off handsomely:

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Mark your calendars now and plan to attend next year's Southern New England Fall conference, to be held on October 11-12 at the Four Points by Sheraton Hyannis Resort on Cape Cod. ■

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Proposed CCAPA Budget

(Oct. 1, 2006 – Sept. 30, 2007)

Submitted by William R. Sweeney, Treasurer

<u>REVENUES</u>	<u>Proposed</u>
AICP Rebate	\$ 300
APA Chapter Rebate	21,000
Chapter Meetings	2,000
Directory Advertising	0
Mailing List Sales	100
Newsletter Advertising	10,000
Regional Conference	3,000
Transfer from Reserves	0

TOTAL **\$36,400**

<u>EXPENDITURES</u>	<u>Proposed</u>
Advertising Commission	\$ 4,000
AICP/Professional Development	800
Annual Awards	500
Bank Service Charge	50
Chapter Meetings	2,000
Chapter Directory	0
Internet Services	4,500
Legislative Committee	4,500
Membership Committee	100
Executive Committee Misc.	100
Office/Printing/Postage	50
Newsletter	11,000
President's Expenses	4,500
Professional Services	2,500
Regional Conference	300
Scholarships	1,000
Strategic Plan Implementation	500

TOTAL **\$36,400**

CCAPA 2006 Planning Awards

Once again a number of outstanding planning efforts have been recognized through our annual Chapter Awards. As in previous years, the nominations received reflect diverse aspects of planning in Connecticut.

The Awards Committee, consisting of **Fran Armentano, Marty Connor, Linda Farmer, Val Ferro** and **Bruce Hoben**, selected five nominations. The Awards were presented by Val, who served as the Committee's Chairperson, and **Mark Pellegrini**, CCAPA President, during the Southern New England Planning Conference on September 29th at the Omni Hotel in New Haven. National President Dave Siegel was also on hand to congratulate the recipients.

- The **City of Shelton** was the recipient of the **Public Service Award** for its proactive role in engaging public interest in the planning process. Prior to adopting the Plan of Conservation and Development, a full-color Executive Summary, including maps, goals and policies was distributed to all 15,000 households in the City. This level of dissemination to the general public encouraged informed decision making based on the intended land use goals prior to Plan adoption, and raised awareness of the benefits of planning.

- The **2006 Implementation Award** was presented to the **City of Torrington**. Without any assistance from consultants, the Architectural Review Committee prepared Design Review Guidelines to protect historic properties

in the downtown area. With large scale redevelopment on the horizon, the Committee recognized the need to put its planning policies into action and thus drafted guidelines to communicate the key contributing elements of the historic character of the area and desired treatments to potential developers.

- Since 2004, the **Connecticut Land Use Leadership Alliance** has trained hundreds of land use and zoning commissioners, municipal staff, elected officials and citizens in land use law, consensus building and community decision making. No training in land use



The Hartford Courant's Tom Condon (center) accepts the 2006 Communication Award from CCAPA President Mark Pellegrini (left) and David Siegel, APA President.

law or planning process is required of our volunteer, appointed or elected decision-makers. The LULA program provides effective and much needed training, offering participants the opportunity to improve their leadership skills and gain a deeper understanding of the scope of their authority. The Chapter rec-

ognized LULA as the recipient of the **2006 Public Program Award**.

- *The Hartford Courant* is this year's recipient of the Chapter's **2006 Communication Award**. Back in 2003, the *Courant* began a section within its editorial pages entitled "PLACE — Commentary About Where We Live" to raise the public's awareness of land use issues, growth implications and preservation hurdles. The two-page section appearing in every Sunday edition features a column by PLACE Editor Tom Condon as well as guest editorials from several of the 20-member board

of contributors. PLACE has evolved into a state-wide forum for planning discussions and has actually resulted in affecting the outcome of a number of notable projects.

- The **Distinguished Service Award** recognizes a Chapter member who has made sustained contributions to the planning profession. Only a handful of recipients have been recognized with this honor. This year, **Bert Sacco**, Chairman of TPA Design Group, was recognized for his five decades of commitment to creating livable and sustainable communities. As

a Certified Planner, Professional Engineer and a Licensed Landscape Architect, Bert continues to advise communities and clients throughout the State and is tackling substantial urban revitalization projects. He also devotes his spare time to numerous community organizations. ■

— Val Ferro, Awards Chair



Building on our efforts of the past few sessions, CCAPA intends to continue promoting improved and better supported state planning, adequate resources for regional and local planning, and better coordination of planning at all levels of government.

Legislative Report — Planning for the 2007 Session

by Christopher S. Wood, AICP, Chairman, CCAPA Government Relations Committee

With some expected turnover in the General Assembly, including at least one new chair for the Planning and Development Committee, the outlook for legislation affecting planning and planners in Connecticut is somewhat unpredictable.

Building on our efforts of the past few sessions, CCAPA intends to continue promoting improved and better supported state planning, adequate resources for regional and local planning, and better coordination of planning at all levels of government. Our approach will look to work within the existing framework of State government while continuing to advocate for legislation to provide resources and administrative improvements.

We also expect to continue efforts to address statutory provisions, such as the treble damages clause, that inhibit effective and efficient land use regulation. Chapter members are urged to communicate concerns about specific statutes so that the Government Relations Committee may be prepared when and if opportunities arise to address them.

The Chapter and municipalities generally will need to watch out for new mandates affecting municipal land use and planning responsibilities, continued

attempts to revise eminent domain procedures, and new ethics standards.

Another goal for the Government Relations Committee this year is to strengthen and build new partnerships with the many organizations and agencies that are promoting sound land use policies, smart growth planning and implementation, and good government generally. There is clearly an opportunity for synergy and economy by sharing ideas and resources as we attempt to influence legislative and governmental decisions. Chapter members are encouraged to offer ideas, contacts, and other information that may assist the Government Relations Committee in this important task.

And as always, please remain alert to legislative developments and pass on discoveries through the listserv or directly to the Committee. Our volunteers have only so much time to commit and the volume of material that comes out of the legislature is daunting. Your help is essential. ■

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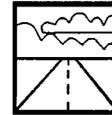
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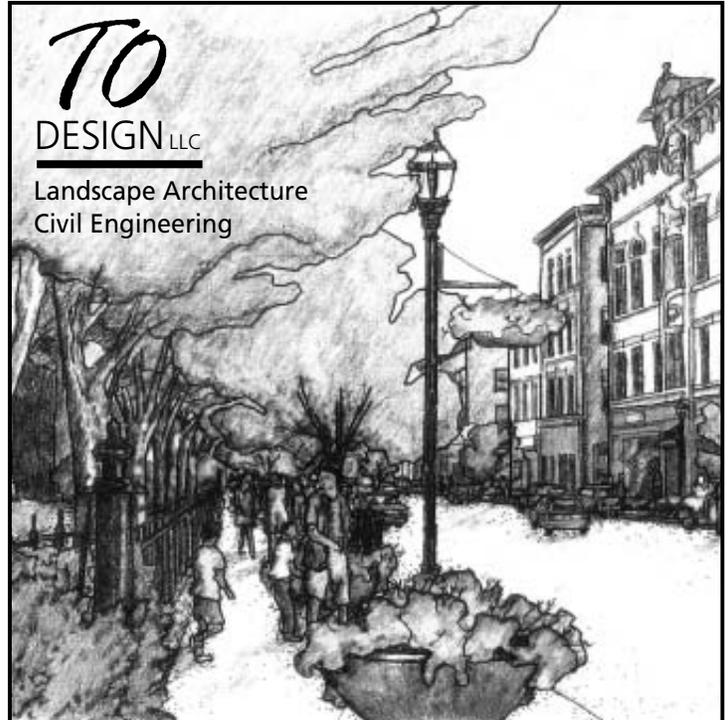
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Changing Addresses?

Please advise both APA and CCAPA of any changes to your APA contact information. Report changes to APA as follows:

American Planning Association
Member Records Department
122 South Michigan Avenue
Suite 1600, Chicago, IL 60603
Tel: (312) 431-9100
addresschange@planning.org

Report changes to CCAPA as follows:

Alan L. Weiner
9 High Street
Collinsville, CT 06019-3125
Tel: (860) 584-6225 (weekdays)
ccapamembership@sbcglobal.net

CCAPA Membership News

Alan L. Weiner, AICP, Membership Chairman

■ Current CCAPA Membership

CCAPA had a total enrollment of 523 members as of July 31, 2006 (the latest date for which such information is available).

■ Welcome to Our Newest Members!

The following are the newest members of CCAPA (through 7/31/06):

Beth Cavagna, Bethel
William Colehower, New Haven
Conrad Gardner, Stonington
Keith Gove, Granby
Aimee Hoben, Hartford
Richard Jacobs, Fairfield
Randy Kamberbeek, Manchester
Kelly Kennedy, West Hartford
Kimberly Lewis, Fairfield
Edward O'Hanlan, Stamford
Terry Ogawa, Hartford
Neil Olinski, East Haven
Keith Rodgeron, Bridgeport

■ Members in the News

Sharon B. Calitro, AICP, reports that after 5½ years with AvalonBay Communities, Inc., she has returned to work for the City of Danbury as Deputy Planning Director. Her new address: City Hall, 155 Deer Hill Ave., Danbury 06810. Tel: (203) 797-4525. Fax: (203) 797-4586. Email: s.calitro@ci.danbury.ct.us.

Philip S. Chester, AICP, is now the Town Planner for the Town of Lebanon. He can be reached at 579 Exeter Rd., Lebanon 06249. Tel: (860) 642-2006. Email: pchester@lebanontownhall.org.

Phil was formerly Town Planner for the Town of Suffield.

Matthew J. Davis AICP, has left the Town of Ellington as its Town Planner and now serves as Senior Planner for the Southeastern Connecticut Council of Governments. His new address: 5 Connecticut Ave., Norwich 06360. Tel: (860) 889-2324, Ext. 15. Fax: (860) 889-1222. Email: mjdavis.seccog@snet.net. Matt tells us that he will be providing planning services for member towns under contract, and assisting with the regional plan update, transportation planning and other matters.

David W. Woods, AICP, is now Commissioner of the Department of Planning, Environment & Land Management for the Town of Brookhaven on Long Island. He can be reached at One Independence Hill, Farmingville, NY 11738. Tel: (631) 451-6370. Fax: (631) 451-6419. Email: dwoods@brookhaven.org. David was formerly Vice President/Director of Planning of Green/Woods Associates of New York City. David also serves as Region 1 Director on the APA Board.

■ Changing Jobs?

Share the big news about your latest career move! Provide me with the particulars — including new job title/address/phone and fax numbers/email address — and we'll announce it in the next issue of *Connecticut Planning*. ■

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