

**MINUTES OF THE 3/14/2008  
HVCEO MEETING  
HELD AT BROOKFIELD, CT TOWN HALL**

**MEMBERS AND ALTERNATES IN ATTENDANCE**

Bethel.....First Selectman Robert Burke  
Bridgewater.....Alternate Robert Brown  
Brookfield.....First Selectman Robert Silvaggi  
Danbury.....Alternate Chief of Staff Michael McLachlan, Alternate Dennis Elpern  
New Fairfield.....First Selectman John Hodge  
New Milford.....Mayor Patricia Murphy, Vice Chairman  
Newtown.....First Selectman Joseph Borst  
Redding.....Absent  
Ridgefield.....First Selectman Rudy Marconi, Secretary - Treasurer  
Sherman.....First Selectman Andrea O'Connor, Chairman

**OTHERS IN ATTENDANCE**

Newtown Selectman Herb Rosenthal, Attorneys Ted Backer and Dan Casagrande of Pinney Payne, from FirstLight Power Resources Robert Gates, Brian Wood and Attorney Diane McGuinness, Candlewood Lake Authority Director Larry Marsicano, Lynn Waller of Danbury, River Trail Manager Peg Daley, Danbury Assistant Corporation Counsel Robin Edwards, News Times reporter Robert Miller, and from the HVCEO staff Camille Acquanita, George Blake and Jonathan Chew.

**CALL TO ORDER / PUBLIC COMMENT**

The meeting was called to order by Chairman Andrea O'Connor at 12:35 PM, after which attendees recited the Pledge of Allegiance. Public comment was then offered by River Trail Manager Peg Daley who provided an update on Housatonic Valley River Trail activities.

**CT SUPREME RULING IN HACKETT V. JLG PROPERTIES CASE**

Attorney Ted Backer of Pinney Payne provided an overview of the Hackett case. He reviewed a summary of the dispute, in which the New Milford zoning enforcement officer ordered a commercial marina owner to remove a deck and lighthouse constructed without a zoning or building permit as they were not in conformance with setback standards.

The owner did not comply and the case reached the Connecticut Supreme Court, the owner arguing federal preemption over local zoning, as the lakeside property hosting his structures was below the 440 foot elevation contour line and thus owned by FirstLight Power Resources. The power company is federally licensed thru FERC under the Federal Power Act and had issued a permit, thus the claim to preemption.

Attorney Backer stated that the ruling had very broad impacts for several areas of governmental regulation involving Lakes Candlewood and Lillinonah, well beyond the building and zoning issues originally contested. He distributed a series of handouts that were then used to trace the logic of the CT Supreme Court in making its ruling, a decision with which he disagrees.

Bob Gates of FirstLight stated that it is his company's intent to work cooperatively with municipalities to find a solution to this newly created regulatory dilemma. He offered that FirstLight is willing to allow local enforcement personnel on to its property for inspections below the 440 and to insure them against liability, but that actual enforcement power may need to remain with FirstLight as local staff will lack jurisdiction for enforcement orders.

He stated that FirstLight had not researched a draft agreement that would address the issues at hand. But that the concept of extending adjacent municipal regulation on to its property is clearly his company's intent. Also, that the agreement eventually negotiated will be between FirstLight and ten affected municipalities, only five of which surround Candlewood Lake.

The technical points then reviewed during the presentation and following discussion are summarized as follows:

*--- The power company's property boundary extends up to the 440 foot contour as mapped in 1928. Due to landscaping and other grading changes since, while a modern property survey may accurately map that contour line as it is today, a current determination of 440 may not accurately represent the original 1928 property line and thus the boundary of today's federal jurisdiction.*

*--- Experience with lakeside properties shows that some wells and septic systems are also below the 440 contour. However, it was clear from this case that health related inspections and approvals will remain under local jurisdiction.*

*--- FirstLight will continue past practice whereby it only issues permits that clearly condition the approval such that "in addition the applicant must follow all local codes." However with land beneath the 440 now excluded from municipal enforcement actions, FirstLight will need to assume a new role as enforcement agent when seeking court compliance against violators, etc.*

*Or is there a procedure whereby FirstLight's enforcement responsibilities can be successfully delegated back to municipalities? Caution is needed as a regulated owner might claim that the municipal staff person had no authority, was thus "ultra vires" or acting beyond their power, even if the delegation of authority had been approved by First Light.*

*--- If local enforcement staff was invited by FirstLight to act on its behalf an ultra vires argument might also cloud the immunity and indemnification held by local staff and local commission members to whom some report. This could impact electrical, plumbing, structural inspections, etc. There was consensus that any agreement with FirstLight would need to include indemnification of municipal regulatory staff.*

*But will FirstLight retain a veto power over the local decision if it so desired?*

*--- The question was raised regarding the past practice whereby the power company's permits state to the effect that the applicant must follow all local codes. If this was the procedure for the Hackett case, why was JLG properties able to ignore New Milford's codes?*

*Bob Gates of FirstLight stated that in hindsight it is clear that in issuing the permit to JLG, his company had made a different interpretation of codes than did the municipal official, but that at the time it was believed by the power company that the local code was being complied with fully.*

*--- The CT Supreme Court's preemption for the Federal Power Act on FirstLight property was particularly broad. It appears from the ruling that it was not just aimed at municipal law formerly applying there. Outside of law enforcement, state laws such as administered by CT DEP on Candlewood are also brought into question.*

*Jurisdiction of local wetland and watercourse regulations below the 440 are brought into question as well. As these controls derive from CT DEP and state law, and that body of state law is in turn based upon federal law, it must be determined if local wetlands jurisdiction might be classified as "federal" and thus subject to the Army Corps of Engineers.*

After review of the issues above the discussion turned to what steps to take next. Attorney Backer suggested that the Council write letters to the state building official and the Attorney General concerning wetlands issues, to request their interpretation as to what authority local staffs retain below the 440 given the Supreme Court's Hackett ruling. Upon receipt of responses, municipal leaders as a group would then negotiate a model agreement with FirstLight.

It was agreed that Ted Backer would be requested to provide a fee for preparing the letters from HVCEO to the state and when responses were received to report on the impact of their content. Mike McLachlan recommended that the participants plan a conference call whereby members and their municipal attorneys receive and discuss Attorney Backer's report.

It was also agreed that as HVCEO has no legal services budget line, if the proposal for services was approved the five municipalities fronting on Candlewood Lake would pay equal 20% shares.

Further, that any payments from municipalities would be direct to Pinney Payne from municipal legal services line items. This is preferable to amending the HVCEO line item in local budgets, a particular problem for New Milford.

Mike McLachlan urged members to remain united in their approach or risk being at a competitive disadvantage in negotiating with FirstLight. Jon Chew will forward Ted Backer's proposal to the five lakeside members to request their commitment to a 20% cost share and then report their responses back to Chairman Andrea O'Connor.

## **ADJOURNMENT**

Then on a motion duly made and seconded it was voted unanimously to adjourn the meeting at 2:25 P.M.