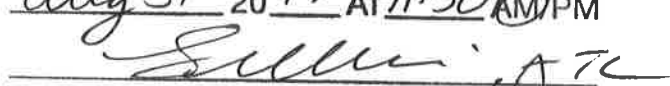


**East Lyme Inland Wetlands Agency
Special Meeting Minutes
Wednesday, August 23, 2017
East Lyme Town Hall – Upper Meeting Room – 6:00 P.M.**

FILED

Present: Cheryl Lozanov, Chairperson
Phyllis Berger, Secretary
Harold Clarke
Kim Kalajainen
Jack Chomicz

Aug 31 20 17 AT 11:30 AM/PM

EAST LYME TOWN CLERK

Absent: Jesse Baldwin
David Pazzaglia

Also Present: Gary Goeschel II, Director of Planning/Inland Wetlands Agent
Selectman Paul Dagle, Ex-Officio
Town Attorney Mark Zamarca

CALL TO ORDER

Chairperson Lozanov called the Inland Wetlands Agency Special Meeting of Wednesday, August 23, 2017 to order at 6:08 p.m. and introduced the members of the Commission, Staff, and Recording Secretary.

PLEDGE OF ALLEGIANCE

I. PENDING APPLICATIONS

- A. Twin Valley 25-Lot CDD Re-subdivision at Green Valley Lakes Road & Spring Rock Road; Frank & Rajko Maric, Owners, Real Estate Service of CT, Inc., c/o Bob Fusari, Jr., Applicant. Application to conduct regulated activities within the 100-foot upland review area from wetlands and watercourses associated with the construction of a proposed subdivision road. (*Date of Receipt: 4/17/17; Public Hearing Closed 7/24/17; Decision by 8/29/17*)

Chairperson Lozanov stated, for the record, that tonight's proceeding is not a public hearing. As such, no comments or questions will be permitted.

Director of Planning/Inland Wetlands Agent Gary Goeschel reviewed the changes that were made to the Conditional Approval and Denial Resolutions, as discussed at their last meeting. Discussion regarding the revised Conditional Approval Resolution included:

- the addition of a \$2,500.00 Planting Performance Bond for the stormwater basin plantings, which shall achieve an 80% survival rate after two (2) full growing seasons
- In response to Chairperson Lozanov, Director/Agent Goeschel felt that the bond amount would be sufficient to cover the costs and maintenance of the plantings that

would be installed at the bottom of the detention basins. The proposed conservation easements are already vegetated and there are no plans at this time to conduct any additional regulated activities on the conservation easement. The following revision was proposed:

Said bond shall be released upon the planting plan achieving an 80% survival rate after ~~two (2) full growing seasons~~ *five (5) years*.

- the addition of the approval by the Town Engineer for the sediment forebays, which must be designed to hold 10-percent (10%) of the water quality volume

In response to Chairperson Lozanov who questioned the percentage of the water quality volume, Director/Agent Goeschel stated that the sediment forebays are a precautionary measure, primarily, during construction as the basin would trap the sediment and debris in the water prior to flowing into a larger basin and deposited into the wetlands. Any changes or modifications to the proposed detention basin(s) would require additional review and approval by the Commission.

Discussion ensued regarding the revised Denial Resolution, including the addition of a sentence regarding the removal of lots 10 and 13, which Director Goeschel understood as being comprised of soils that contain a reduced or increased percolation rate, a relatively shallow depth to the restrictive layer, and the need for a further review of the additional soil types in the area.

He reviewed Attorney Harris' Memorandum of Law, referring to two cases: *Serdechny, Et Al v. Griswold Inland Wetlands, Watercourses & Conservation Commission, Et Al*, 2014 WL 5288249 (Berger, J., August 29, 2014), in which the court noted that any future development involving a regulated activity would "require a future permit from the commission." and *Cornachia v. Environmental Protection Commission of the Town of Darien*, 109 Conn. App. 346, 351, 951 A.2d 704 (2008), in which the court noted that "In considering an application to engage in a regulated activity, it is the impact on the regulated area that is pertinent, not the environmental impact in general." and that "In order for the commission to deny the plaintiff's an application for a permit to conduct regulated activity in the upland review area, it must determine that the proposed activity will have a likely adverse impact on a wetland or watercourse, and such a determination must be supported by substantial evidence in the record." To this end, a report submitted by Soil Scientist/Environmental Scientist Robert Russo, CSS, dated April 28, 2017, states that the proposed plans minimize and mitigate the potential for secondary and indirect impacts and that impacts due to the work proposed in the upland review zone "will not have any negative wetland impacts". A brief discussion ensued regarding the relevance of these two cases to the proposed application. Attorney Zamarca believed that these two cases are relevant in terms of the Black Letter Law, which refers to the basic standard elements or principles of law.

Commissioner Kalajainen stated that the July 10, 2017 Memorandum submitted by the Intervenor, which provides a counter argument to the Applicant's legal interpretation of case law, should also be considered. She also felt that the Commissioners should be aware that both attorneys are providing their interpretations of segments of the case law. Director/Agent Goeschel reviewed the Memorandums submitted by Atty. Wescott and Mr. Russo regarding any discharges, the septic system, and the environmental impact of the proposed activity(ies) in addition to a report submitted by the Ledge Light Health District Sanitarian stating that the proposed septic systems should be sufficient and the lots, themselves, are suitable and able to support the septic system for a four-bedroom single-family residence.

Discussion ensued regarding the verbiage contained in Sections 10.3 and 10.4 of the East Lyme Inland Wetlands Regulations in relation to the proposed application. Atty. Zamarca reminded the Commission that their task is to determine whether the proposed activity in the upland review zone would be likely to have an adverse impact to the wetlands and watercourses as determined by the evidence provided and that a "permit shall not be issued unless the Agency finds on the basis of the record that a feasible and prudent alternative does not exist."

In reference to the case involving the Griswold Inland Wetlands, Watercourses & Conservation Commission, Commissioner Clarke recited the issue regarding the segmentation of property and that "Commissions cannot speculate as to what the impacts may be from non-specific future development". In response, Atty. Zamarca noted that the issue is clearly addressed in both draft resolutions, which states that "the Agency, to the extent that it is able, to consider any future activities associated with, or reasonably related to the proposed regulated activity which are made inevitable by the proposed regulated activity and which may have an impact on wetlands and watercourses;..." The approval of the application, as submitted, does not constitute the approval or denial of the development of these particular lots as it is not under the purview of this Agency to do so, unless the proposal includes a regulated activity(ies). Discussion ensued regarding the possibility of requiring a reduction in the number of proposed lots in an effort to minimize the impact to the wetlands and eliminate the need for the emergency access road, which is located entirely in the upland review area of the eastern-bound wetlands. Commissioner Kalajainen felt that a number of strengthening points can be added to the Resolution, including the design of the stormwater basins, which was questioned by Mr. Trinkaus in his report.

Discussion ensued regarding Mr. Russo's report concerning the current wetlands conditions, the potential impacts due to the proposed activity(ies), and the proposed measures, which, if followed, he claimed, would have no negative impacts to the wetlands. To the contrary, Chairperson Lozanov expressed her concerns regarding the likelihood of an adverse impact(s) in relation to the proposed activity on the overall site to the aquatic

the basins, the north side of the cul-de-sac, and the driveway to lot 13 — all of which are wooded and would require the significant removal of vegetation, resulting in increased sunlight, higher temperatures, and the evaporation of any existing pools of water in the area. The vegetative buffers surrounding the vernal pool and wetlands would remain, thereby addressing the issue of thermal pollution. Detention basins would be installed in those areas in which the canopies are removed, which may or may not regulate the temperature in a similar manner.

The addition of the following verbiage to the first whereas indicated on page three of the Denial Resolution was proposed:

“...roadway development is a significant land area *which drains entirely into the wetlands* which is being disturbed and the proposed activity...”

Commissioner Kalajainen expressed her concern regarding the third ‘whereas’ on page three, which states that “the Applicant has not definitively identified the location of a vernal pool existing on site...” Director/Agent Goeschel clarified that, to the best of his recollection, it was Mr. Russo’s opinion that there were no vernal pools on the site and that the existence of egg masses did not necessarily indicate the existence of a vernal pool. In contrast, Dr. Danzer’s memo, dated June 26, 2017, states that both the Applicant’s expert and he agree that the primary vernal pool area, located north of the proposed cul-de-sac, is located within the boundary of the flagged wetlands. Dr. Danzer also noted the location of a number of areas within the eastern wetlands complex and the resulting fragmentation that would be introduced by the construction of the cul-de-sac. As such, it was his opinion that the elimination of the cul-de-sac and lots 10 to 13 would prevent the resulting fragmentation between the existing vernal pool complexes. It was noted that Mr. Russo did indicate that the type of curbing that would be installed would allow for the migration of any existing living beings of the vernal pool.

With regards to the statement included in the same ‘whereas’, that “...the Agency is unable to determine the effects of the proposed activity on said watercourse...”, Commissioner Kalajainen felt that, based on Dr. Danzer’s report, such a conclusion is sound, but, in reviewing the Regulations, she questioned the possibility of deeming the application incomplete because they would be unable to *conclusively* make a determination based upon the submitted information. Director/Agent Goeschel, to the contrary, felt that, based upon the information that was submitted and the testimony that was provided during the Public Hearings, the application was complete. However, the question is whether the Commission feels that they have sufficient information to determine whether the proposed activity would have an impact on the wetlands and watercourses. Commissioner Kalajainen was of the opinion that the application can be rendered incomplete based on the fact that the application has not fulfilled the requirements as stated in Sections 7.6, items d and e of the Inland Wetlands Regulations. In response, Director/Agent Goeschel stated that Mr. Russo has supplied the necessary information regarding “a description of the ecological communities

supplied the necessary information regarding “a description of the ecological communities and functions of the wetlands or watercourses...” (Section 7.6(d)) and “a description of how the applicant will change, diminish, or enhance the ecological communities and functions of the wetlands or watercourses” (Section 7.6(e)) in his report and during their discussions. Whether the alternatives he provided are feasible and prudent is at the discretion of the Agency. The following revision to the ‘whereas’ in question was suggested:

WHEREAS, demonstrated by Exhibit “BB” and “TT” reports from Steven Danzer of Steven Danzer, Ph.D. & Associates, LLC, *and the Applicant’s testimony and submitted plans are in conflict in regards to the location of the vernal pools and fragmentation of habitat; the Applicant has not definitively...removal of vegetation*); and”

Ex-Officio Selectman Dagle questioned whether it was acceptable or appropriate to state that there is a conflict between the two professionals’ findings can be considered as a justification of the denial (third ‘whereas’ on page 3).

Commissioner Clarke recited a draft of his findings, which he proposed incorporating into the fifth ‘whereas’ indicated on page 3 regarding the quality of the soil and its capabilities located on lots 10 to 13 and the resulting impacts of the new road allowing for the 24 building lots. The draft includes the following issues with the proposed Application:

- the soil type and its capabilities/limitations and the potential for groundwater pollution;
- the completeness of the Ledge Light Health District’s review regarding the technical standards for septic systems, which does not note or address the fact that the area meets two of the eight criteria for an area of special concern, as identified by the CT Public Health Code and indicated by Mr. Trinkaus (Exhibit HHH, item 4c);
- the examination of the wastewater treatment system performance that was conducted for only nitrogen dilution and only on lot 3 – an area containing different septic effluent receiving soil types from the area in question, i.e., lots 10 to 13
- the possible reduction of remediation capabilities as the result of the naturally occurring groundwater and additional stormwater runoff that would be infiltrated into the septic effluent receiving soils located in lots 10 to 13 (Exhibit ZZ);
- the test report conducted by the MASSTC (Massachusetts Alternative Septic System Test Center) (Exhibit AAA) of the performance of the selected septic leaching product and, while comparable to the standard pipe and stone system, the lack of additional performance data indicating that it will remediate nutrients or other pollutants in the subject area of soils of special concern or the adjacent downstream wetlands;
- the Applicant has repeatedly relied on the fact that the layout meets regulatory setbacks that the Ledge Light Health District has stated was suitable, but no evidence of a detailed review has been submitted.

As such, due to the limited potential of the existing soil conditions to remediate the septic leaching field effluent, the likelihood of its rapid flow through the soils, its close proximity

the Applicant's claim of pollutant removal and remediation, he felt that there would be a likely adverse impact due to the introduction of unremediated septic effluent to the wetlands for lots 10 to 13 and that those lots would, likely, not be approved based on the submitted data. As such, he suggested that the revision, removal, or, possibly, reduction of the roadway serving those lots may constitute a feasible and prudent alternative.

In such case, Commissioner Kalajainen felt that a prudent and feasible alternative would be the removal of the proposed lots 10-13, as supported by both Dr. Danzer and Commissioner Clarke's findings. Director/Agent Goeschel suggested rephrasing the final sentence in the final whereas and incorporating Commissioner Clarke's findings and introduced the possibility of approving the application with a condition to eliminate the lots, thereby eliminating the cul-de-sac and emergency access road; deeming the application incomplete, or; denying the application due to the lack of any feasible or prudent alternatives. As stated in Commissioner Clarke's findings, the application can be denied due to the soils and the proposed construction in the area, resulting in a likely impact to the wetlands and watercourses and the fragmentation of the habitat(s), which are not capable of remediation; a feasible or prudent alternative would be to revise, remove, or, possibly, reduce the roadway, eliminating lots 10 to 13 – the area of special concern based on the CT Public Health Code and due to the limited potential of the soils to remediate effluent, resulting in a likely adverse impact to the wetlands and watercourse in the area of special concern. The elimination of the lots would also eliminate the emergency access drive and shorten the cul-de-sac such that it does not interrupt the vernal pool complexes.

Atty. Zamarca stated that any finding that is stated in the Resolution must be supported by substantial evidence. Due to the number of revisions and the Commission's extensive discussions, he recommended moving forward with the denial based on a feasible and prudent alternative and directing the staff to amend the Denial Resolution to be reviewed by the Agency prior to voting upon the Application.

MOTION (1): Motion made by Commissioner Berger, seconded by Commissioner Chomicz, to continue the meeting to Monday, August 28, 2017 at 7:00 p.m. Discussion: None. Voice vote, 5-0, all in favor. Motion carried.

ADJOURNMENT

MOTION (2): Motion made by Commissioner Berger, seconded by Commissioner Kalajainen, to adjourn the meeting at 8:41 p.m. Discussion: None. Voice vote, 5-0, all in favor. Meeting adjourned.

Respectfully Submitted by:

Agnes Miyuki, Acting Recording Secretary for the Town of East Lyme