

**EAST LYME WATER & SEWER COMMISSION  
REGULAR MEETING  
TUESDAY, SEPTEMBER 25th, 2018  
MINUTES**

The East Lyme Water & Sewer Commission held a Regular Meeting on Tuesday, September 25, 2018, at the East Lyme Town Hall, 108 Pennsylvania Avenue, Niantic, CT. Acting Chairman Seery called the Regular Meeting to order at 7 PM.

**PRESENT:** Kevin Seery, Acting Chairman, Dave Bond, Steve DiGiovanna, Dave Jacques, Dave Murphy, Joe Mingo, Carol Russell, Roger Spencer, Dave Zoller

**ALSO PRESENT:** Joe Bragaw, Public Works Director  
Brad Kargl, Municipal Utility Engineer  
Attorney Edward O'Connell, Town Counsel  
Attorney Mark Zamarka, Town Counsel  
Anna Johnson, Finance Director

**ABSENT:** Mark Nickerson, Chairman

**1. Call to Order / Pledge of Allegiance**

Acting Chairman Seery called the Regular Meeting of the East Lyme Water & Sewer Commission to order at 7 PM and led the assembly in the Pledge of Allegiance.

**2. Approval of Minutes**

▪ **Regular Meeting Minutes – August 28, 2018**

Mr. Seery called for a motion or any discussion or corrections to the Regular Meeting Minutes of August 28, 2018.

**\*\*MOTION (1)**

Mr. DiGiovanna moved to approve the Regular Meeting Minutes of August 28, 2018 as presented.

Mr. Murphy seconded the motion.

Vote: 7 – 0 – 2. Motion passed.

Abstained: Mr. Seery, Mr. Jacques

▪ **Special Meeting Minutes – September 18, 2018**

Mr. Seery called for a motion or any discussion or corrections to the Special Meeting Minutes of September 18, 2018.

Mr. Seery asked that he be added to those in attendance on Page 1.

**\*\*MOTION (2)**

Mr. DiGiovanna moved to approve the Special Meeting Minutes of September 18, 2018 as amended.

Mr. Murphy seconded the motion.

Vote: 8 – 0 – 1. Motion passed.

Abstained: Mr. Zoller

**3. Delegations**

Mr. Seery called for delegations.

FILED  
Oct 2 2018 AT 10:00 AM/PM  
(Signature)  
EAST LYME TOWN CLERK

Mr. & Mrs. Libby of 341 Boston Post Road approached the podium asking to be heard regarding their billing issue.

**\*\*MOTION (3)**

**Mr. Mingo moved to add to the agenda under Item 4. – Billing Adjustments – 341 Boston Post Road.**

**Mr. DiGiovanna seconded the motion.**

**Vote: 9 – 0 – 0. Motion passed.**

There were no delegations.

**4. Billing Adjustments**

**▪ 341 Boston Post Road**

Mr. Kargl noted that this is not an adjustment that needed approval by the Commission as it was done by the standard '1 in 10' formula. It was adjusted accordingly and does not and is not proposed to bring it back to what a normal bill would be. It shares the burden of the excess that was caused by the leak. He explained the process noting that they had looked at the May billing and the two previous May billings.

Mr. Mingo asked if there was any connection from the meter panel to the electric panel.

Mr. Libby said that as far as he knows there is none.

Mr. Kargl said that the leak was in the service line from the curb stop to the house; there is a meter pit.

Mr. Bond commented that was how it was captured. He asked if the pipe was plastic.

Mr. Libby said that it was plastic.

Mr. Mingo asked Attorney O'Connell if there were any legal remedies.

Attorney O'Connell said that that they have adopted a policy that saves a lot of the Commissions' time by having staff address the issues. They would have to change the policy.

Mr. DiGiovanna asked if the policy is on-line for people to see.

Mr. Kargl said yes.

Mr. DiGiovanna asked if everything was laid out and followed.

Mr. Bragaw and Mr. Kargl said yes.

Me. Seery asked is there was a motion here –

Hearing none –

He said that the Commission will let the decision of Staff stand.

**5. Approval of Bills – from Attachment B**

Mr. Seery called for a motion on the Well 1A/6 Treatment Project bills.

**\*\*MOTION (4)**

**Mr. Zoller moved to approve payment of the following Well 1A/6 Treatment Project bill: Tighe & Bond, Inv. #081890252-253 in the amount of \$48,716.24.**

**Mr. DiGiovanna seconded the motion.**

**Vote: 9 - 0 – 0. Motion passed.**

**\*\*MOTION (5)**

**Mr. Zoller moved to approve payment of the following Well 1A/6 Treatment Project bill: Robinson & Cole, Inv. #50253369 in the amount of \$6,100.00.**

**Mr. DiGiovanna seconded the motion.**

**Vote: 9 - 0 – 0. Motion passed.**

Mr. Seery called for a motion on the Pattagansett Bridge Water Main Relocation bill.

**\*\*MOTION (6)**

**Mr. Zoller moved to approve payment of the following Pattagansett Bridge Water Main Relocation bill: Lenard Engineering, Inc., #67726 in the amount of \$500.00.**

**Mr. DiGiovanna seconded the motion.  
Vote: 9 - 0 - 0. Motion passed.**

**6. Finance Director Report**

Ms. Johnson said that they had her report. She noted that the sewer balance increases as the debt has been paid and that it would continue to do so.

**7. Consideration and Possible Adoption of Interim Sewer Capacity Measures**

Mr. Seery asked Counsel to explain this.

Attorney Zamarka recapped the Landmark Development Group, LLC and Jarvis of Cheshire, known as the Applicant from June of 2012 where they requested 118,000 gallons per day ('gpd') of sewage disposal capacity. Public Hearings were held. The gpd that the Commission allotted (14,434) were appealed and the Judge remanded it back to the Commission to re-work the figures. They were re-worked and Landmark again appealed. In April 2015 the court allowed Landmark to conduct 'discovery' regarding Gateway. In 2016 the court ruled that they would have to grant more than the original number that they had come up with using Forest Walk factors but less than what was originally requested. We contended that the court erred in allowing discovery. In April 2018 briefs were filed and in August 2018 the Appellate Court upheld the Judge's decision. One of our issues has been that the trial and appellate courts equate capacity with a permit for capacity which is incorrect. On September 5, 2018 we filed for re-certification to the Supreme Court contending that the court improperly held 'capacity and a permit for capacity' as same.

They are here tonight as they know that there will be an expansion to Gateway (Phase II) and a Costco. Therefore to grant Gateway a connection without a ruling on capacity would fly in the face of the courts. They also recently received a letter from Attorney Hollister (copy attached) seeking the 118,000 gpd that they requested until a decision is reached.

Attorney Zamarka said that on Page 5 of the trial court opinion that they said that 14,434 gpd is insufficient but 118,000 gpd does not have to be granted. Taking this all into consideration, Gateway Phase II or any substantial development cannot be granted administratively. They are therefore recommending that a procedure for a certain amount units and/or gpd require a connection permit. The Commission will have to come up with a figure above which they would decide. This would be an interim procedure – only for the purposes of the Landmark appeal time frame. This also safeguards the 'not less than 14,000 gpd up to 118,000 gpd' until such case is decided.

The following was read and moved:

**\*\*MOTION (7)**

**Mr. DiGiovanna moved the following Resolution regarding Interim Sewer Connection Procedure: WHEREAS, on June 1, 2012, Landmark Development Group, LLC and Jarvis of Cheshire ("Applicant") filed with the East Lyme Water and Sewer Commission ("Commission"), acting as the East Lyme Water Pollution Control Authority, an application "pursuant to §7-246a(1) of the General Statutes, seeking confirmation of the availability of 237,090 gallons per day of sewage disposal capacity in the Town's sewer system to serve Landmark Development's proposed residential development adjacent to Caulkins road"; and**

**WHEREAS, at the public hearing on the application held on August 24, 2012, Landmark amended its application to request availability of 118,000 gallons per day of sewage disposal capacity in the Town of East Lyme's ("Town") sewer system; and**

**WHEREAS, the Commission held three public hearings on the application and listened to hours of testimony during those hearings. Numerous exhibits were submitted by Landmark, the Commission, and individuals for consideration during the hearing process. In making its decision the Commission is considering and taking into account all of the testimony and exhibits submitted at the three hearings; and**

**WHEREAS, the Commission has wide discretion in connection with the decision to supply sewer service to particular properties; and**

**WHEREAS, the Commission found that as of Landmark's application in 2012, the Town had between 130,000 and 225,000 gallons per day of remaining sewage treatment capacity; and**

**WHEREAS, Landmark appealed the Commission's capacity allocations to the Connecticut Superior Court; and**

**WHEREAS, The New Britain Superior Court (Cohn, J.) (the "Trial Court") allowed Landmark to conduct discovery regarding a sewer connection permit for a different development project, known as "Gateway," and allowed Landmark to supplement the record on appeal with documents related to the Gateway connection application; and**

**WHEREAS, ON July 6, 2016, the Trial Court issued a Memorandum of Decision holding in part that:**

- 1. The Commission "... is not required to grant the plaintiffs their request for 118,000 gallons per day ..."**
- 2. The Commission "... must provide the plaintiffs with sufficient capacity to further development of their project, and ... may not settle on a figure that would completely foreclose the development of the plaintiffs' project."**
- 3. The Commission "... was obligated to consider capacity when it approved the connection application for Gateway."**

**WHEREAS, the Commission appealed the Memorandum of Decision to the Connecticut Appellate Court; and**

**WHEREAS, on August 21, 2018, the Appellate Court issued its decision ("Decision") on the Commission's appeal, which upheld the Trial Court Memorandum of Decision, and held that the Commission is required to perform a sewer capacity analysis when considering applications to connect to the East Lyme sewer system; and**

**WHEREAS, the Commission disagrees with the Decision and has filed a petition for certification to the Connecticut Supreme Court, which is currently pending; and**

**WHEREAS, by a letter dated September 17, 2018, Landmark requested that the Commission approve an allocation for its full 118,000 gpd sewer capacity request, pending final resolution of its appeal; and**

**WHEREAS, neither the Trial Court nor the Appellate Court held that Landmark was entitled to the full amount of its capacity request, and the proceedings are stayed until the Supreme Court acts on the Commission's petition for certification. While reserving all of its rights set forth during the appeal process, the Commission nevertheless does not want to ignore the Trial Court and Appellate Court holdings that require a sewer capacity analysis be done in conjunction with a sewer connection permit application.**

**BE IT THEREFORE RESOLVED, that the East Lyme Water and Sewer Commission, acting as the Town's Water Pollution control Authority, hereby enacts the following interim procedure:**

- 1. An application to connect to the East Lyme sewer system for a project that either (a) requests a connection for more than \_\_\_\_\_ residential units or (b) requires more than \_\_\_\_\_ gallons per day of sewage treatment capacity, shall also require an application for determination of sewer capacity pursuant to General Statutes §7-246a;**
- 2. Said application for determination of sewer capacity shall be submitted wither prior to or contemporaneously with a sewer connection application;**

3. An application to connect to the East Lyme sewer system may not be granted if the commission determines that there is not adequate sewer capacity for the proposed use of land.

**BE IT FURTHER RESOLVED** that the above procedure does not reflect official policy or procedure of the Commission of the Town of East Lyme. Rather, it is adopted on an interim basis only in direct response to the Appellate Court Decision, and shall be in place only during the pendency of the Landmark sewer capacity appeal process. In enacting this interim procedure, the commission does not agree with the holdings of the Trial Court Memorandum of Decision or the Appellate Court Decision. Any findings made pursuant to this interim procedure (i.e. available sewer capacity, etc.) shall be for the purposes of that sewer capacity application only, and shall not be adopted, incorporated or made part of the record in the pending Landmark sewer appeal.

Mr. Murphy seconded the motion.

Mr. Mingo said that he would be agreeable to moving to give a caveat with more gpd and a two year development time

Attorney Zamarka said that would be out of scope of this as they are beyond that point now.

Mr. Seery asked Mr. Kargl how many units or gpd he would suggest for anyone applying.

Mr. Kargl said that he would suggest not more than 20 residential units or exceeding 5,000 gpd.

Attorney O'Connell said that this is only pertaining to this interim procedure.

Mr. Bond said for clarification and understanding that it would mean that anyone who exceeds 20 residential units and/or exceeds 5,000 gpd must come before the Commission for capacity.

Attorney Zamarka said that was correct.

The commissioners were in agreement with the figures.

Mr. DiGiovanna moved to amend the following section of the MOTION (7) to read:

1. An application to connect to the East Lyme sewer system for a project that either (a) requests a connection for more than 20 residential units or (b) requires more than 5,000 gallons per day of sewage treatment capacity, shall also require an application for determination of sewer capacity pursuant to General Statutes §7-246a;

Mr. Murphy seconded the amended section of MOTION (7).

Vote on Motion (7) with amended section: 9 – 0 – 0. Motion passed.

#### **8. Water & Sewer Operating Budget Status Reports**

Mr. Bragaw said that it was still early in the new fiscal year.

#### **9. Sewer Project Updates**

Mr. Kargl said that he did not have anything new here. He has the Weston & Sampson final billing to review.

Mr. Murphy asked if they are still pursuing vendor delay issues and compensation.

Mr. Kargl said that he has not had a chance to review the final bill yet to see if it is there.

#### **10. Water Project Updates**

##### **▪ Well 1A and 6 Treatment Plant Modifications and Upgrades**

Mr. Kargl said that the design is complete and they saw the final invoices this evening. He is in the process of completing with the State to start paying on the loan. It came in significantly under.

Ms. Russell asked if there was any research on reverse osmosis.

Mr. Kargl said yes; noting that they would still have to do what they are doing here. It would be a lot more expensive – by approximately \$10M.

▪ **Route 156 Valve Replacement**

Mr. Kargl recalled that he had asked for \$53,000 to replace the broken valve. The next day they found that some telephone banks ran over the valve and they were able to find someone who could repair the valve in place. It all came together well and they were able in the end to save some \$15,000 between parts and labor.

**11. Correspondence Log**

There were no comments.

**12. Chairman's Report**

Mr. Seery reported that Gary Orefice, a former State Representative had passed on Sunday. The Bike n' BBQ event at the Smith Harris House is this weekend. The Oyster Fest to benefit Miracle League will be held on October 6, 2018.

**13. Assistant Utility Engineer Update**

Mr. Bragaw said that he is trying to get interviews set up for the third week in October. He noted that Mr. DiGiovanna would be on the panel.

**14. Staff Updates**

**a. Water Department Monthly Report**

Mr. Murphy asked if we are far behind taking back water from New London.

Mr. Kargl said yes, we are behind as it has been a wet season. He added that we can use the water for flushing the north end of Town.

**b. Sewer Department Monthly Report**

There were no comments.

**15. Future Agenda Items**

Ms. Russell said that she had asked about a discussion on the water quality report and that she had spoken with Mr. Kargl during the summer about contaminants by well.

Mr. Seery said that possibly they could discuss it in November.

**16. ADJOURNMENT**

Mr. Seery called for a motion to adjourn.

**\*\*MOTION (8)**

**Mr. Spencer moved to adjourn this Regular Meeting of the East Lyme Water & Sewer Commission at 8:09 PM.**

**Mr. DiGiovanna seconded the motion.**

**Vote: 9 – 0 – 0. Motion passed.**

Respectfully submitted,

Karen Zmitruk,  
Recording Secretary



Timothy S. Hollister  
Phone: (860) 251-5601  
Fax: (860) 251-5318  
thollister@goodwin.com

September 17, 2018

VIA PDF TO ATTORNEY ZAMARKA

Mr. Mark Nickerson, Chair,  
and Commission Members  
Water and Sewer Commission  
Town of East Lyme  
108 Pennsylvania Avenue  
P. O. Box 519  
Niantic, CT 06357-0519

Mr. Bradford C. Kargl  
Municipal Utility Engineer  
Water and Sewer Utilities  
Town of East Lyme  
108 Pennsylvania Avenue  
P. O. Box 519  
Niantic, CT 06357-0519

Re: *Landmark Development Group, LLC, et al. v. East Lyme Water and Sewer Commission*

Dear Chair Nickerson, Commission Members, and Mr. Kargl:

It has come to our attention that the Commission will be meeting in executive session on September 18, 2018 to consider Landmark's sewer capacity allocation application, and will conduct its regular meeting on September 25, 2018.

The purpose of this letter is to request that the Commission, at its next regular meeting, approve an allocation of sewer capacity to Landmark of 118,000 gpd, until such time as the parties obtain a final and unappealable decision regarding Landmark's sewer capacity application.

At this time, a trial court judgment, affirmed by the Appellate Court, requires the Commission to grant Landmark "sufficient capacity to further the development of [Landmark's] project," and "may not settle on a figure for capacity that would completely foreclose the development of [Landmark's] project." Moreover, in its court filings, the Commission has conceded that it must grant Landmark's application.

6981881

Attachment

WCS

9/25/18

Zpp.

September 17, 2018  
Page 2

Landmark has a right to ensure that the Town of East Lyme does not undercut Landmark's judgment by allocating sewer capacity to others, especially those whose applications or administrative requests were filed after 2012. Meanwhile, Landmark has become aware of applications made to Mr. Kargl or the Commission that will require sewer allocations or commitments. The Town cannot defeat Landmark's rights to sewer capacity by allocating capacity to others, or at some future time deny Landmark's application due to third-party allocations that occurred while Landmark's court case was pending. Landmark is prepared to seek a court order to enforce its rights, but hopes that the Commission will at least recognize Landmark's right to an interim protection of its position, as well as avoid Town expense of opposition to this request.

We request an answer to this request no later than the Commission's regular meeting of September 25, 2018, with implementation subject to counsel drafting a mutually acceptable resolution.

Thank you for your attention.

Very truly yours,



Timothy S. Hollister

TSH:ekf

c: Mark S. Zamarka, Esq. (w/ att.)  
Glenn Russo (w/ att.)