

**EAST LYME WATER & SEWER COMMISSION  
PUBLIC HEARING  
Tuesday, JANUARY 8th, 2019  
MINUTES**

The East Lyme Water & Sewer Commission held a Public Hearing on January 8, 2019 at Town Hall, 108 Pennsylvania Avenue, Niantic, Connecticut on the Proposed Regulation Regarding Applications for Determination of Adequacy of Sewer capacity Pursuant to General Statutes 7-246a(1). Chairman Nickerson called the Public Hearing to order at 7:03 PM.

**PRESENT:** Mark Nickerson, Chairman, Steve DiGiovanna, Dave Jacques, Dave Murphy, Joe Mingo, Carol Russell, Roger Spencer, Dave Zoller

**ALSO PRESENT:** Attorney Mark Zamarka, Town Counsel  
Joe Bragaw, Public Works Director  
Brad Kargl, Municipal Utility Engineer

**FILED**

Jan 15 2019 AT 10:25 AM/PM

**ABSENT:** Dave Bond

*Carroll Mullen*  
EAST LYME TOWN CLERK

**Public Hearing**

◆ **Proposed Regulation Regarding Applications for Determination of Adequacy of Sewer Capacity Pursuant to General Statutes 7-246a(1)**

Chairman Nickerson called the Public Hearing to order at 7:03 PM and led the assembly in the Pledge of Allegiance.

Attorney Zamarka provided a synopsis of this event recalling that they had discussed a draft at their Special meeting on December 14, 2018. The legal basis comes from CGS 7-246a(1) with regard to how the application would be filed and the timeline of the 35 and 65 days as well as an extension of time. He noted that failure to make a decision on an application within the statutory time frame is potentially seen as 'deferred approval' so they would want to adhere to the statutory time frames.

He reviewed the regulation (copy attached) stating that under the first section - Application that he would recommend adding that applications for consideration would be looking for over 5,000 gpd or have over 20 residential units – something that they had previously utilized. Under section two – Duration, he noted that there is a 15-day appeal period after the decision. Regarding the non-refundable reservation fee, he recommended that they should not include this as it places an undue burden on staff to figure what it would be while also having to act on other items with regard to the application. The 25% of the sewer benefit assessment further could be problematic. Also, with regard to the applications that are currently in the pipeline, he suggested that it would be prudent to request an extension of time upfront if they intend to hold a Public Hearing on them. Lastly, under Item v. – Criteria, he said that it is a starting point on what they may consider.

Mr. Nickerson then called upon the public for comments.

Attorney Harry Heller, place of business 736 Rte. 32 Uncasville, CT said that he represents Pazz construction who is one of the 'ticket holders' and that he has some proposed revisions to the proposed regulation. He passed out copies to the Commissioners (see copy attached) and proceeded to review the suggestions that he had for changes (see underlined items throughout). Under Duration - Item 3 he suggested that they separate the various scenarios as that would dictate how the time is calculated. Under Item 5 he said that he added language for clarity as the intent of the regulation is to make sure that development occurs and that they start substantial construction. He also added a proposed Item 6 allowing for the capacity to remain for the duration of the project - For example – 200 units may have a five to seven year construction process – so as long as the application is progressing they would want to make sure that the capacity allotment remains. Also, with regard to a Reservation Fee, he suggested that

if the application is approved that the fee be refunded. He said that if they do an application fee instead that they should note how it would be applied.

Mr. Nickerson noted that it seems a good point that they apply phasing to larger projects however a balance would have to be found as some projects start and just never finish.

Mr. Mingo said that regarding the reservation fee that he feels that having staff put in the hours necessary to process the applications that someone has to pay for that time that is spent.

Attorney Heller said that while he has not researched it that he feels that it is contingent on how the other land use agencies act on an application.

Attorney Matthew Ranelli, Shipman & Goodwin, place of business 1 Constitution Plaza, Hartford, CT said that he was standing in for Attorney Hollister who could not attend this evening. He submitted their comments on the proposed regulation (see copy attached) noting that they feel that the current proposal should be called a 'guideline'. Further, the sewer system is a public utility which was not mentioned. He noted and read their general comments with regard to the proposed regulations and then said that they had made comments on the individual sections in outline form and asked that they review them and utilize them during their discussion.

Mr. Nickerson asked if there were other comments. Hearing none, he called for a motion -

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

**Mr. Mingo moved to close the Public Hearing.**

**Mr. DiGiovanna seconded the motion.**

**Vote: 8 – 0 – 0. Motion passed.**

Mr. Nickerson closed this Public Hearing at 7:42 PM and said that they would take a very brief break prior to the commencement of the Special Meeting.

Respectfully submitted,

Karen Zmitruk,

Recording Secretary

(Items 1 - W & S Proposed, 2 - Attorney Heller comments & 3 - Attorney Ranelli comments attached)

APPLICATIONS FOR DETERMINATION OF ADEQUACY OF  
SEWER CAPACITY PURSUANT TO GENERAL STATUTES §7-246a(1)

Sewage treatment for the Town of East Lyme is limited. Pursuant to an agreement with the City of New London and Town of Waterford, East Lyme is currently entitled to a maximum of 1.5 million gallons per day of sewer treatment capacity at the New London Regional Water Pollution Control Facility. In order to ensure that there is adequate capacity for all customers, the Commission adopts the following regulation for applications for sewer treatment capacity pursuant to General Statutes §7-246a(1).

- I. Application. An application, pursuant to General Statutes §7-246a(1), for determination of adequacy of sewer capacity related to a proposed use of land, shall be submitted to the East Lyme Water and Sewer Commission ("Commission") and shall include all of the following:
  1. A class A-2 survey of the property to be developed, showing the general layout of the proposed use of land;
  2. Proof that the applicant owns the property to be developed, or has the right to develop the property, and
  3. Documentation supporting the amount of capacity being requested.
    - a. Documentation related to a proposed residential development shall include the number of residential units, the numbers of bedrooms per unit, and the methodology used in calculating the amount of capacity being requested.
    - b. Documentation related to a proposed non-residential or commercial development shall include the methodology used in calculating the amount of capacity being requested, and any special circumstances (i.e. the type of sewage being treated, design specifications, etc.) that would affect the amount of capacity being requested.
    - c. The Commission reserves the right to request from an applicant such other information that it deems necessary.

## II. Duration.

1. The initial duration of an allocation of sewer capacity shall be 12 months from the expiration of the appeal period of such allocation (the "Initial Allocation Period").
2. Before the expiration of the Initial Allocation Period, the applicant shall (1) apply for all necessary land use approvals for the proposed use of land, and (2) provide proof of all such applications to the Commission.
3. When the Commission receives proof that the applicant has applied for all necessary land use approvals, as set forth above, the Initial Allocation Period shall be extended for a period not to exceed 18 months from the expiration of the appeal period of the applicant's last land use approval; provided, however, that such period shall be not more than 4 years from the date of the initial allocation. The Commission may extend an allocation of sewer capacity beyond 4 years if it determines, in its sole discretion, that good cause exists.
4. If the amount of sewer treatment capacity needed by an applicant decreases during the land use approval process, the applicant shall notify the Commission immediately.
5. If an applicant fails to apply for all necessary land use approvals as required herein, or fails to provide proof of such applications to the Commission before the expiration of the Initial Allocation Period, the sewer capacity allocated to the applicant shall lapse and be considered null and void. The Commission will notify an applicant in writing when an allocation has lapsed. The failure of the Commission to provide written notice in a timely manner shall not constitute or be construed as a waiver of the Commission's right to declare the lapsed allocation null and void.

III. Reservation fee. A non-refundable reservation fee shall be paid to the Commission when an allocation of capacity is made. The fee shall be in the amount of 25% of the sewer benefit assessment of the property for which capacity has been granted, and shall be applied to the sewer benefit assessment.

IV. Public Hearing. The Commission may, in its sole discretion, hold a public hearing on any application. Any such public hearing shall be in accordance with the provisions of General Statutes 8-7d.

V. Criteria. In making a decision on an application the Commission may consider, without limitation, the following:

Need for service in the proposed development area

Other pending applications and areas in town designated for sewer service

Pollution abatement and public health

Limitations and policies for sewer service

Local and state Plans of Conservation and Development

Effect of inflow and infiltration on available capacity

Whether the proposed development area can be serviced by other means

Whether the proposed development area is within the East Lyme Sewer Service District

Size of property proposed to be developed

Remaining sewerred and unsewerred land area of town

Effect of the allocation on remaining capacity

Safe design standards of the East Lyme sewer system

APPLICATIONS FOR DETERMINATION OF ADEQUACY OF  
SEWER CAPACITY PURSUANT TO GENERAL STATUTES §7-246a(1)

Sewage treatment for the Town of East Lyme is limited. Pursuant to an agreement with the City of New London and Town of Waterford, East Lyme is currently entitled to a maximum of 1.5 million gallons per day of sewer treatment capacity at the New London Regional Water Pollution Control Facility. In order to ensure that there is adequate capacity for all customers, the Commission adopts the following regulation for applications for sewer treatment capacity pursuant to General Statutes §7-246a(1).

- I. Application. An application, pursuant to General Statutes §7-246a(1), for determination of adequacy of sewer capacity related to a proposed use of land, shall be submitted to the East Lyme Water and Sewer Commission ("Commission") and shall include all of the following:
  1. A class A-2 survey of the property to be developed, showing the general layout of the proposed use of land;
  2. Proof that the applicant owns the property to be developed, or has the right to develop the property, and
  3. Documentation supporting the amount of capacity being requested.
    - a. Documentation related to a proposed residential development shall include the number of residential units, the numbers of bedrooms per unit, and the methodology used in calculating the amount of capacity being requested.
    - b. Documentation related to a proposed non-residential or commercial development shall include the methodology used in calculating the amount of capacity being requested, and any special circumstances (i.e. the type of sewage being treated, design specifications, etc.) that would affect the amount of capacity being requested.
    - c. The Commission reserves the right to request from an applicant such other information that it deems necessary.

*Item  
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*Submitted by Atty Idellen W&S PH 1/8/19*

## II. Duration.

1. The initial duration of an allocation of sewer capacity shall be 12 months from the expiration of the appeal period of such allocation (the "Initial Allocation Period").
2. Before the expiration of the Initial Allocation Period, the applicant shall (1) apply for all necessary land use approvals for the proposed use of land, and (2) provide proof of all such applications to the Commission.
3. When the Commission receives proof that the applicant has applied for all necessary land use approvals, as set forth above, the Initial Allocation Period shall be extended for a period not to exceed 18 months from (i) the expiration of the appeal period of the applicant's last land use approval with no appeal having been taken therefrom or (ii) an unappealed decision of a court of competent jurisdiction adjudicating any such land use appeal; provided, however, that such period shall be not more than 4 years from the date of the initial allocation. The Commission may extend an allocation of sewer capacity beyond 4 years if it determines, in its sole discretion, that good cause exists.
4. If the amount of sewer treatment capacity needed by an applicant decreases during the land use approval process, the applicant shall notify the Commission immediately.
5. If (i) an applicant fails to apply for all necessary land use approvals as required herein, or fails to provide proof of such applications to the Commission before the expiration of the Initial Allocation Period (ii) or if the applicant fails to obtain all land use approvals required to enable the project for which sewer capacity has been allocated to proceed to construction, the sewer capacity allocated to the applicant shall lapse and be considered null and void. The Commission will notify an applicant in writing when an allocation has lapsed. The failure of the Commission to provide written notice in a timely manner shall not constitute or be construed as a waiver of the Commission's right to declare the lapsed allocation null and void.
6. Once a proposed use of land has received all land use approvals required for construction, the sewer allocation shall be in effect for a period of twelve (12) months subsequent to the date that such approvals became final; provided that, within said period the applicant commences substantial construction of the project, and shall thereafter remain in full force and effect unless the applicant ceases substantial construction of the project for any continuous twelve (12) month period.

## III. Reservation fee. A non-refundable reservation fee shall be paid to the

Commission when an allocation of capacity is made. The fee shall be in the amount of 25% of the sewer benefit assessment of the property for which capacity has been granted, and shall be applied to the sewer benefit assessment. The reservation fee shall be rebated to the applicant in the event that the applicant is unable to obtain all land use approvals required to enable the use of land after making good faith efforts to obtain the same.

IV. Public Hearing. The Commission may, in its sole discretion, hold a public hearing on any application. Any such public hearing shall be in accordance with the provisions of General Statutes 8-7d.



V. Criteria. In making a decision on an application the Commission may consider, without limitation, the following:

Need for service in the proposed development area

Other pending applications and areas in town designated for sewer service

Pollution abatement and public health

Limitations and policies for sewer service

Local and state Plans of Conservation and Development

Effect of inflow and infiltration on available capacity

Whether the proposed development area can be serviced by other means

Whether the proposed development area is within the East Lyme Sewer Service District

Size of property proposed to be developed

Remaining sewered and unsewered land area of town

Effect of the allocation on remaining capacity

Safe design standards of the East Lyme sewer system



Timothy S. Hollister  
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January 8, 2019

VIA HAND DELIVERY

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

Re: Proposed Guidelines for § 7-246a Applications

Dear Chair Nickerson and Commission Members:

As you know, we represent Landmark Development. This letter comments on the proposed guidelines for processing applications filed under General Statutes § 7-246a. We have commented on several sections and objected to several others.

First, the reference to the General Statutes in the draft is wrong. We assume the Commission intends to address General Statutes § 7-246a(a)(1), not § 7-246a(1).

➤ We object to the Commission's proposal *per se* for two reasons: (a) § 7-246a(a)(1) is a state statute, which the Commission is not authorized to rewrite or revise with provisions contrary to court decisions; and (b) the Commission has a set of existing Regulations, but does not state any intent whether this § 7-246a(a)(1) proposal will repeal or supersede parts of those Regulations. Thus, at most, the current proposal should be called a "guideline."

➤ Second, the opening paragraph states the intent as being "to ensure that there is adequate capacity for all customers." In fact and in law, the purpose of allocating sewer capacity is to ensure that available capacity is allocated in compliance with priority categories and established procedures, or similar wording. All sewer "customers" do not have equal rights to sewer

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Submitted by Atty. Ravello for Atty. Hollister  
Wes PH 1/8/19  
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capacity. For example, an owner whose land is within the mapped district, who can connect to an installed line or approved extension, and who seeks capacity that is not currently used by or committed to others, has a right to capacity upon application, and a superior right to others who do not meet these criteria. Thus, if the Commission intends its proposal to be binding, it is proceeding illegally and should withdraw its proposal.

If the Commission intends to proceed, there are critical questions. First, does the Commission intend that all applications for any amount of sewer capacity will be required to follow these guidelines? Will the type of "administrative approval" of the Gateway sewer capacity that the Superior Court criticized as inequitable be permitted?

Next, there is no recognition in the proposal that the town sewer system is a public utility, or that capacity allocations will be handled with recognition of this status.

What methodology will the Commission and staff use to determine the town's overall "available" capacity? This is a critical foundation step. For example, average daily flow, not peak flow, should be used, and capacity available should not be calculated on a case-by-case basis.

Next, does the Commission intend to consider the entire 468,000 GPD allocated to the State almost 30 years ago, a substantial part of which has never been used and never will be, to be off-limits to applicants?

With these preliminaries, comments on / objections to individual sections are stated below:

Guidelines / Regulations	Comments / Objections
<b>I. <u>Application.</u></b> An application, pursuant to General Statutes § 7-246a(1), for determination of adequacy of sewer capacity related to a proposed use of land, shall be submitted to the East Lyme Water and Sewer Commission ("Commission") and shall include all of the following:	No comment.
1. A class A-2 survey of the property to be developed, showing the general layout of the proposed use of land;	Why is an A-2 boundary survey needed for a sewer capacity application?

Guidelines / Regulations	Comments / Objections
2. Proof that the applicant owns the property to be developed, or has the right to develop the property, and	No comment.
3. Documentation supporting the amount of capacity being requested.	No comment.
a. Documentation related to a proposed residential development shall include the number of residential units, the numbers of bedrooms per unit, and the methodology used in calculating the amount of capacity being requested.	No comment.
b. Documentation related to a proposed non-residential or commercial development shall include the methodology used in calculating the amount of capacity being requested, and any special circumstances (i.e. the type of sewage being treated, design specifications, etc.) that would affect the amount of capacity being requested.	No comment.
c. The Commission reserves the right to request from an applicant such other information that it deems necessary.	Objection to the open-ended "as necessary."
<b>II. <u>Duration.</u></b>	
1. The initial duration of an allocation of sewer capacity shall be 12 months from the expiration of the appeal period of such allocation (the "Initial Allocation Period").	A 12 month duration is untenable. Allocations should be valid for 10 years total, to be consistent with state law on the validity of site plans, <i>see</i> General Statutes § 8-3(i), unless the project does not go forward. It is understood that a sewer applicant must in good faith apply for other necessary land use approvals.

Guidelines / Regulations	Comments / Objections
<p>2. Before the expiration of the Initial Allocation Period, the applicant shall (1) apply for all necessary land use approvals for the proposed use of land, and (2) provide proof of all such applications to the Commission.</p>	<p>A 12 month duration is untenable. Allocations should be valid for 10 years total, to be consistent with state law on the validity of site plans, <i>see</i> General Statutes § 8-3(i), unless the project does not go forward. It is understood that a sewer applicant must in good faith apply for other necessary land use approvals.</p>
<p>3. When the Commission receives proof that the applicant has applied for all necessary land use approvals, as set forth above, the Initial Allocation Period shall be extended for a period not to exceed 18 months from the expiration of the appeal period of the applicant's last land use approval; provided, however, that such period shall be not more than 4 years from the date of the initial allocation. The Commission may extend an allocation of sewer capacity beyond 4 years if it determines, in its sole discretion, that good cause exists.</p>	<p>A 12 month duration is untenable. Allocations should be valid for ten years total, to be consistent with state law on the validity of site plans, <i>see</i> General Statutes § 8-3(i), unless the project does not go forward. It is understood that a sewer applicant must in good faith apply for other necessary land use approvals.</p>
<p>4. If the amount of sewer treatment capacity needed by an applicant decreases during the land use approval process, the applicant shall notify the Commission immediately.</p>	<p>Objection. Should say "shall promptly reduce the allocation received."</p>

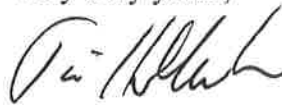
Guidelines / Regulations	Comments / Objections
<p>5. If an applicant fails to apply for all necessary land use approvals as required herein, or fails to provide proof of such applications to the Commission before the expiration of the Initial Allocation Period, the sewer capacity allocated to the applicant shall lapse and be considered null and void. The Commission will notify an applicant in writing when an allocation has lapsed. The failure of the Commission to provide written notice in a timely manner shall not constitute or be construed as a waiver of the Commission's right to declare the lapsed allocation null and void.</p>	<p>Objection. A lapse procedure should only be specified if the 10 year minimum time line is adopted. Also, when does an allocation become "vested"? At preliminary site plan approval?</p>
<p><b>III. Reservation fee.</b> A non-refundable reservation fee shall be paid to the Commission when an allocation of capacity is made. The fee shall be in the amount of 25% of the sewer benefit assessment of the property for which capacity has been granted, and shall be applied to the sewer benefit assessment.</p>	<p>Objection. No statutory authority for such a fee. Also excessive. In general, fees may only be charged to cover administrative costs incurred by the town.</p>
<p><b>IV. Public Hearing.</b> The Commission may, in its sole discretion, hold a public hearing on any application. Any such public hearing shall be in accordance with the provisions of General Statutes 8-7d.</p>	<p>Objection to open-ended.</p>
<p><b>V. Criteria.</b> In making a decision on an application the Commission may consider, without limitation, the following:</p>	<p>Objection to "without limitation." See other preliminary objections.</p>

Guidelines / Regulations	Comments / Objections
Need for service in the proposed development area	Objection. An applicant determines what sewer capacity it needs. The WSC determines eligibility for capacity based on objective factors such as engineering.
Other pending applications and areas in town designated for sewer service	Objection. Future un-named, unquantified, speculative future needs should not be a factor; only documented allocations.
Pollution abatement and public health	Objection. Covered in detail by existing Regulations, and beyond General Statutes 7-246a(a)(1).
Limitations and policies for sewer service	Objection. Covered in detail by existing Regulations, and beyond General Statutes 7-246a(a)(1).
Local and state Plans of Conservation and Development	Objection. Sewer may not be used to control land use.
Effect of inflow and infiltration on available capacity	No comment.
Whether the proposed development area can be serviced by other means	Objection. Does this mean septic? Alternative treatment? The Sewer Commission governs sewers, not septic systems or ATMs.
Whether the proposed development area is within the East Lyme Sewer Service District	Objection. What does "within the East Lyme Sewer Service District" mean? Can Commission move a line to approve or deny an application?
Size of property proposed to be developed	Objection. Acreage is not relevant.
Remaining sewerred and unsewered land area of town	Objection. Irrelevant consideration.
Effect of the allocation on remaining capacity	Objection. <i>See</i> preliminary objections.

Mr. Mark Nickerson, Chair,  
and Commission Members  
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<b>Guidelines / Regulations</b>	<b>Comments / Objections</b>
Safe design standards of the East Lyme sewer system	Covered by existing Regulations.

Very truly yours,



Timothy S. Hollister

TSH:ekf

c: Bradford C. Kargl  
Mark S. Zamarka, Esq.  
Glenn Russo