

**.EAST LYME ZONING BOARD OF APPEALS
REGULAR MEETING
MONDAY, FEBRUARY 3rd, 2020
MINUTES**

A Regular Meeting of the East Lyme Zoning Board of Appeals was held on Monday, February 3, 2020 at 7 PM at the East Lyme Town Hall, 108 Pennsylvania Avenue, Niantic, CT.

PRESENT: Steve Carpenteri, Chairman, John Smith, Secretary, Mike Foley,
Debbie Jett-Harris, Kevin Mace

ALSO PRESENT: Attorney William Sweeney, TCORS, representing the Zoning
Board of Appeals
Attorney Thomas J Londregan, Conway, Londregan, Sheehan &
Monaco PC, representing Marker Seven Marina LLC, Timothy 'TJ'
Londregan III
David Schmidt, Alternate
Wayne Blair, Alternate

FILED

ABSENT: No One

Feb 12 2020 AT 11:56 AM PM
William Mulholland
EAST LYME TOWN CLERK

1. Call Meeting to Order

Chairman Carpenteri called the Regular Meeting to order at: 7 PM. He introduced the members of the Board and Attorney Sweeney who is representing them. He noted that they would not be taking any comments this evening and that the sole purpose was to make a decision on Case #1-2020 which is before them.

East Lyme Zoning Board of Appeals Case 1-2020 Application of Marker Seven Marina LLC, Applicant, Niantic River Marina LLC, Owner, appeal of the Cease and Desist order of the East Lyme Zoning Official dated October 7, 2019 regarding a parcel known as 109-111 Main Street and appears on the East Lyme Assessor's Map 12.1, Lot 56, and Map 12.2, Lot 1.

Attorney Sweeney said that he is serving as Special Counsel to assist the ZBA in this case. He said that the Public Hearing is closed and that no further testimony is allowed from anyone. He explained that with regard to the ZEO Cease & Desist Letter of October 7, 2019 that the Statute CGS 8-7 allows them to Affirm the Order; Overturn or Reverse the Order; or Modify the Order per that Statute. To overturn it, they would have to have a vote to the affirmative of four (4) out of five (5) votes. They would also have to state on the record the reason for their decision. He said that there were a lot of things mentioned during the Public Hearing that were not relative to the case. There were positive and negative things mentioned about Attorney Londregan and Mr. Mulholland that are not relevant to this decision. Also, the neighbors' opinions on noise, smells and the like are not germane to the decision. The only item before them is the Cease & Desist Order of October 7, 2019. He suggested that Mr. Carpenteri open discussion to the Board members on the issue and said that the only person that they could ask questions of was him.

Mr. Carpenteri started with Mr. Foley -

Mr. Foley said that he has been convinced that Mr. Londregan's activity is in fact aquaculture and that as such it is exempt from the CAM review. He said that he finds that the Cease & Desist order has no basis and should be overturned. He said that he found that the definition of 'Marina' - for pleasure boats only is ridiculous and not relevant either.

Mr. Smith said that he thinks that the purpose of zoning is to protect the areas and the purposes for which it is designated. He said that in Section C. 10 Commercial zone that it states that shell fish processing should not be done so he upholds Mr. Mulholland's Cease & Desist order. They have some 600 boaters and several marinas and a lot of people's livelihoods; not that we want to prohibit Mr. Londregan's livelihood but he thinks there are other areas where he would do very well.

Mr. Mace asked Mr. Sweeney's opinion on Rapoport and the other court case that was cited. Mr. Sweeney said that the cases are one of jurisdiction – there is a question of if the zoning officer has any jurisdiction over this type of activity. If you do not have jurisdiction then you really cannot enforce anything. For example – can the zoning officer enforce below the mean high water – the general rule is that zoning gets the land and the DEEP gets the water. There is an exception if a Town has a Harbor Management Commission and a Harbor Management Plan and courts have found that there is some over-lapping jurisdiction – but there are not a lot of cases on this and there are none that talk about shell fishing operations. As there are few cases on this, all attorneys cite the same ones. There are DiPietro and Rapoport. In DiPietro there was a private dock facility where they originally docked six boats and then went and docked 12 boats. The ZBA upheld the decision of the ZEO and the court sustained the decision of the ZEO as it was something that the Harbor Management Plan had considered with the issue of berthing and the use of the dock. In the Rapoport (2011) Supreme Court case there was a private dock facility and a neighbor complained. There was no Harbor Management Plan and the Supreme Court found that it was just a dock and that there was no jurisdiction. He said that he thinks that what you take from this is that when you have a Harbor Management Commission and Plan that the ZEO has some jurisdiction but you cannot regulate outside of the Plan jurisdiction. Attorney Bleasdale is stating that DiPietro dealt with berthing and the use of the dock and that it is consistent with some of the regulations. Attorney Londregan is taking the position that this is shell fish harvesting and that it is outside of the scope of the Harbor Management Plan. He said that he would agree that it is WELSCO that regulates the harvesting. He said that they would have to decide if the Harbor Management Plan has jurisdiction. He said that he could not tell them the right answer on it – only what case law has stated.

Mr. Mace said he thinks that the Harbor Management was put in place so there is some jurisdiction there but he does feel that it falls under some of the exemptions where processing is concerned and that based on it meeting the exemptions for aquaculture he would reverse the order.

Mr. Foley asked if they have the Harbor Management Plan as a part of the record. Mr. Sweeney said yes, adding that it is from the 1980's and that they have a newer plan that is a work in progress.

Mr. Carpenteri said that he thinks that the Harbor Management Plan has jurisdiction over the marina and that TJ should go for the CAM site plan if he wants to berth there. He said that he also thinks that it does change the oyster and therefore does believe that it is processing. He also feels that a processing plant can be any size. He said that as a small business himself, he feels that TJ has to apply for the proper permits.

Ms. Jett-Harris said that she supports TJ's ability and knowledge but will uphold the decision of the ZEO. She said that she feels that there are a lot of blurred lines in zoning between what they can and cannot do. She said that she has a problem with the word processing and that is what made her come up with the decision that she has. The other two cases that were brought up are just not the same as what is being discussed here. TJ would have to get the proper permits. The tumbler is processing and it changes the oyster.

Mr. Sweeney said that there are differences of opinion here and that when they decide, it is important for them to state the reasons on the record. He said that Mr. Mace raised some interesting issues over jurisdiction over the activities in the complaint and he feels that this may weigh heavily in court review. He asked that they state if they feel there is jurisdiction or not and why –

Mr. Mace said that he thinks that there is jurisdiction as that is why the harbor management plan was put in place.

Ms. Jett-Harris said that she feels that this is untimely as they do not have everything. She asked what the modification part of the decision would be –

Mr. Sweeney gave for example that they could take it partly rather than all or nothing for processing. He asked if she feels that they have jurisdiction as she did not answer that part.

Ms. Jett-Harris said that with what they have before them that she feels that they do.

Mr. Carpenteri said that he feels that they do have jurisdiction and that he would need to go before zoning to do what he needs to do – to be allowed to do it or to be exempted.

Mr. Smith asked why the tumbler can't be moved back out into the harbor.

Mr. Sweeney said that he thought there was testimony that the piles were destroyed by a storm and it no longer exists.

Mr. Smith said that he gets the fact of the jurisdiction and that the ZEO does have it says no processing of shell fish. If he can get the authorization to do it – then so be it.

Mr. Foley said that he feels that it is aquaculture and that he is stating from the opinion letter from the State Department of Agriculture where he also cites the tumbling, sorting and drying of oysters as all part of the process so he does not feel that they have jurisdiction as aquaculture is exempt. Also, the existence of the harbor management is a bit vague.

Mr. Sweeney said that there is obviously a difference of opinion with regard to the mean high water and activities that the ZEO would enforce.

Mr. Foley said that he does not see that – and does not see any upland activity that is in violation as he seems to be concerned with the tumbling of oysters.

Mr. Sweeney said an issue that was raised is if Mr. Londregan has the authority to berth his vessel there – because there is a marina there and this would go to the definition of a marina. Mr. Londregan has made the argument that it expands beyond boats to commercial.

Mr. Smith said that he brings his oysters up and tumbles them and that is the big point – if he was out in the harbor then there would not be a problem.

Mr. Sweeney noted that it was brought up that it refers to a shell fishing processing plant.

Mr. Mace said that it is too vague of a description of a plan as no one talked about a definition of a plant.

Mr. Sweeney said that is a problem as there are no definitions for a lot of the items here.

Mr. Foley said that he does not believe that he is processing so it is not a processing plant at all.

Mr. Sweeney noted the Section 14 exemption – of shell fishing. ZEO exhibit Section 14 – 14.2 – exemptions from the CAM are listed as items A thru H. They made the argument that the harvesting of shell fish is the harvesting of a crop. The question is if they fall into those categories and they had two different interpretations. It is something that they may want to consider. He said that the Department of Agriculture is clear in that oysters are crops – but you have to decide where that ends and what harvesting is.

Mr. Foley said that he feels that the letter from the Department of Agriculture is very clear and he thinks that it is exempt.

Ms. Jett-Harris said that she feels that the lines are very blurred; she asked if he has done the CAM.

Mr. Sweeney said no, and that is the reason for the cease & desist.

Mr. Sweeney continued that if those uses were continuously in place and have been operated prior to 1990 and from 1954 that they would have to show that.

Mr. Foley said that he feels that it would be impossible to provide as that area has always been commercial. Also, they keep referring to this as shell fishing but what he is doing is farming.

Ms. Jett-Harris said that the difference is that TJ is using the tumbler.

Mr. Mace asked what it would be if you found him exempt but also processing.

Mr. Sweeney said that would be a tough call.

Mr. Carpenteri asked if anyone would like to make a motion.

Ms. Jett-Harris said that she would like to change her 'vote' and go against the ZEO as Section 14 is very clear that he is exempt -- however the lines still are very blurred.

****MOTION (1)**

Mr. Foley moved that based upon the evidence to Overtun the Cease & Desist of the Zoning Official (dated October 7, 2019) in Case 1-2020 Application of Marker Seven Marina LLC, Applicant, Niantic River Marina LLC, Owner, appeal of the Cease and Desist order of the East Lyme Zoning Official dated October 7, 2019 regarding a parcel known as 109-111 Main Street and appears on the East Lyme Assessor's Map 12.1, Lot 56, and Map 12.2, Lot 1.

Reason – Lack of jurisdiction of the ZEO; Section 14 of the regulations cites the activity as exempt – harvesting of crops.

Mr. Mace seconded the motion.

Mr. Carpenteri said that he still feels that the harbor management has jurisdiction and that he needs to go for a CAM review.

Ms. Jett-Harris asked if he would have to do the CAM or has it taken place.

Mr. Sweeney said that if she votes in favor of Mr. Foley's motion then she is overturning the ZEO.

Ms. Jett-Harris said that it was not clear and that she would stand with the ZEO.

Mr. Mace said that he thinks that there is jurisdiction but that it is exempt.

Mr. Foley noted that this is only on the issue of this order as the Town does have other remedies.

Vote: 3 – 2 – 0. Motion failed as it did not receive the necessary 4 votes to pass.

For: Mr. Foley, Mr. Mace, Mr. Smith

Against: Mr. Carpenteri, Ms. Jett-Harris

Mr. Sweeney noted that the order stands as the four vote threshold was not met.

ADJOURNMENT

****MOTION (2)**

Ms. Jett-Harris moved to adjourn this meeting of the East Lyme Zoning Board of Appeals at 8:10 PM.

Mr. Foley seconded the motion.

Vote: 5 – 0 – 0. Motion passed.

Respectfully submitted,

Karen Zmitruk,
Recording Secretary