



Connecticut Department of
**ENERGY &
ENVIRONMENTAL
PROTECTION**

Land and Water Resources Division

September 29, 2020, by email

East Lyme Zoning Commission
c/o Mathew Walker, Chairman
P.O. Box 519
Niantic, Connecticut 06357

Subject: Proposed Zone Regulation Amendment to Section 32, for the Application of Landmark Development Group, LLC and Jarvis of Cheshire LLC

Dear Commissioners:

Thank you for notifying the Land & Water Resources Division (LWRD) of the proposed zone regulation amendment referenced above and received on September on August 17, 2020. Acting as the Commissioner's staff, our office has reviewed the revised proposal for consistency with the policies and standards of the Connecticut Coastal Management Act (CCMA, Connecticut General Statutes (CGS) sections 22a-90 through 22a-112, inclusive) and offers the following comments.

As the Commission is aware, the Land & Water Resources Division (formerly OLISP) has commented many times on Coastal Site Plan Review and zone change applications related to Landmark Development Group's proposals at this site. Over the years we have provided detailed coastal management and environmental comments concerning potential adverse impacts associated with intense development on a resource sensitive, steep and rocky site adjacent to the Niantic River. While we might take issue with certain aspects of Mr. Hollister's introductory statement, we will confine our comments to the language of the zone change proposal that was submitted.

In that regard, we offer the following for the Commission's consideration.

- 1. 32.9, General Provisions:** There are three ways proposed to initiate designation as an Affordable Housing Development (AHD): conceptual site plan, Affordable Housing Master Development Plan (AHMDP), and Site Plan (SP). These are not necessarily concurrent, but may be, or stand alone, depending on what is chosen. It appears one can get both an AHMDP and then Site Plan approval. Or one can simply get a SP approval, which is confusing and the logic behind the various options is hard to clearly understand at face value.

2. **32.9.2.H, Master Plan Elements:** This section suggests that Coastal Site Plan review (CSPR) requirements and analysis as outlined in CGS Section 22a-105 thru 109 would not apply, *as statutorily required*. Rather, it would only apply “where residential development is proposed” specifically in contrast to the CCMA’s requirements, which require projects “partially or fully located in the coastal boundary” to be subject to CSPR and CCMA requirements.
3. **32.9.2.H, Master Plan Elements:** Also, this section notes the only coastal resource information is limited to a “description of resources” where actual “residential development occurs”. It has been our office’s long-term experience that all aspects of development, road building, blasting, land clearing, stormwater management measures that drain or discharge to coastal waterbodies and wetlands down hill, along with an analysis of such activities on coastal resources including wetlands, vernal ponds, water quality, are equally if not more important in the CSPR impact analysis process. Therefore, this requires more than a “description”, but an analysis of potential adverse impacts, and how to avoid and/or best minimize such impacts. (See Coastal Site Plan fact sheet attached for more info).
4. **32.9.4, Decisions on Site Plans:** While the initial AHMDP approval seems to discount the CCMA and CSPR process, the ultimate Site Plan approval after the AHMDP approval, (along with Section 24 info) would appear to force a Commission approval, without benefit of resource and water quality considerations and analysis. In fact this section requires the Commission “shall approve the SP.” This is contrary to the tenets of Planning and Zoning-to render a decision based on all required information, prior to a decision.
5. **32.9.2.H, Master Plan Elements:** This section would also limit coastal resource information to that depicted on DEEP’s “Coastal Resources Map dated 1979”, This map, which is only available in paper form, has never had any legal significance and is likely to be inaccurate and out of date. Coastal resource data should be presented and analyzed using the best available information and technology, and analysis and any resource impact should be based on what currently exists on the site, not a map over 40 years old.
6. **32.9.2.H, Master Plan Elements:** This section would “exclude driveways, which are exempt uses within the coastal zone.” However, driveways are not necessarily or always exempt from coastal site plan review. (Our comments in 2015 to the commission noted this previously on an earlier application). Section 22a-109(b) states that a commission “may” exempt certain minor uses from coastal site plan review. Indeed, smaller uses, such as driveways, garages, pools, accessory structures or clear cutting, can often create significant impacts, and should not be exempt from a master plan review of a large and significant development proposal. Not requiring coastal resource information for “driveways” or internal access roads, as proposed, would omit the exact analysis required for thorough analysis of potential adverse impacts to resources at this site, contrary to the fundamentals of the CCMA.

7. Further, and to reiterate, a coastal site plan review application is required for any proposed development pursuant to CGS 22a-105(b), which requires “coastal site plan reviews” for certain site plans, plans and applications for activities or projects ***located fully or partially*** within the coastal boundary. The large access road (previously referred to as a “boulevard” in prior site plans) goes directly across the coastal boundary areas, over rocky and steep terrain, posing direct and potential impacts to coastal resource and water quality , and is therefore not eligible for exemption as a minor activity under CGS 22a-109(b).
8. Coastal “zone” is not a legal definition per the CCMA. The correct terminology is “coastal boundary” which is statutorily defined per CGS 22a-94(b).
9. In summary, it is unclear at what point the statutorily-required CSPR would be triggered if this zone change proposal were adopted. Would it be at the “preliminary”, AHMDP or Site Plan stage, or just ignored or minimized? The AHMDP would seem to undermine the tenets of the CCMA by restricting Coastal Site Plan review to “where residential development occurs.” Also, the proposal appears to strictly tie the Commission’s hand to the original AHMDP, requiring they “shall” approve, if basic information required, and ignoring the long-standing documented environmental, policy and plan concerns with development at this 236 acre site. Without a full coastal site plan application, with all information and analysis, and the ability to make a decision based on that, the CCMA appears to be “written out” of this proposal. We recommend revisions to this zone regulation amendment to address the insufficiencies above, with clear specification as to when a Coastal Site Plan is required, for the entire development site, as statutorily consistent and required pursuant to CGS 22a-105 thru 109 of the CCMA.

These comments are made in response to the review requirement contained in C.G.S. Section 22a-104(e) which requires that any zoning regulations or changes thereto affecting the area within the coastal boundary, shall be consistent with the policies of C.G.S. Section 22a-92 and the criteria of subsection (b) of Section 22a-102 of the CCMA. Further, this section requires that notification be sent to the Commissioner of Energy and Environmental Protection at least 35 days prior to the commencement of the public hearing. Once notified, our Office is responsible for reviewing the proposal’s consistency with the policies of Section 22a-92 and the criteria of Section 22a-102(b) of the CCMA.

Should you have any questions regarding this letter or any other coastal management matter, please feel free to contact me at 860-424-3034.

Sincerely,

Marcy L. Balint, Sr. Coastal Planner
Land and Water Resources Division

CC: Tim Hollister, Landmark Development Group, LLC And Jarvis of Cheshire, LLC.
Bill Mulholland, ZEO



Connecticut Coastal Management Program Fact Sheet for ***COASTAL SITE PLAN REVIEW***

What are Coastal Site Plans?

The Connecticut Coastal Management Act [CCMA, Connecticut General Statutes (CGS) Sections 22a-90 through 22a-112, inclusive] requires “coastal site plan reviews” for certain site plans, plans and applications for activities or projects located fully or partially within the coastal boundary. Coastal site plan reviews must be conducted for the following applications if the proposed activity or use is located landward of the mean high water mark¹:

- site plans submitted to a zoning commission in accordance with CGS Section 22a-109;
- plans submitted to a planning commission for subdivision or resubdivision;
- applications for special exceptions or special permits submitted to a planning commission, zoning commission or zoning board of appeals;
- applications for variances submitted to a zoning board of appeals; and
- referrals of proposed municipal projects to a planning commission pursuant to CGS Section 8-24 [CGS Section 22a-105(b)].

In accordance with CGS Section 22a-109(b), certain minor uses and activities may be exempted from coastal site plan review by municipal zoning regulations. Check your municipality’s zoning regulations for exemptions.

What must be included in a coastal site plan?

The CCMA identifies the minimum level of information that must be included in a coastal site plan application. A complete application must contain the following:

- ✓ a plan showing the location and spatial relationship of coastal resources on and contiguous to the subject site;
- ✓ a description of the entire project with appropriate plans, indicating project location, design, timing, and methods of construction;
- ✓ an assessment of the capability of the resources to accommodate the proposed use;
- ✓ an assessment of the suitability of the project for the proposed location, especially if the project site is waterfront or abuts tidal wetlands;
- ✓ an evaluation of the potential beneficial and adverse impacts of the project on coastal

- resources and future water-dependent development activities;
- ✓ a description of proposed methods to mitigate (minimize, not compensate) adverse effects on coastal resources and future water-dependent development activities; and
 - ✓ any other requirements specified by municipal regulation [CGS Section 22a-105(c)].

For more information regarding what constitutes a complete application, please see the [Coastal Site Plan Review Application Checklist](#).

What must the commission or board consider when acting upon a coastal site plan?

The appropriate commission or board must determine: 1) whether or not the proposed activity is consistent with all applicable coastal policies and standards in the CCMA; and 2) whether or not the potential adverse impacts of the proposed activity on both coastal resources and future water-dependent development activities are acceptable. In making this determination the municipal authority must look at the following aspects of the proposal:

- consider the characteristics of the site including the location and condition of coastal resources on-site;
- consider the potential effects, both beneficial and adverse, of the proposed activity on coastal resources and future water-dependent development opportunities;
- follow all applicable goals and policies stated in CGS Section 22a-92 and identify conflicts between the proposed activity and any goal or policy;
- determine whether any remaining adverse impacts have been adequately minimized (see the [Adverse Impacts](#) fact sheet for more information); and
- determine that the proposed activity satisfies other lawful criteria including, specifically, the municipal zoning or subdivision regulations or other applicable municipal regulations or ordinances [CGS Sections 22a-106(a) and (b)].

Must a coastal site plan application be referred to the DEEP for review?

Maybe. If a coastal site plan review application includes a shoreline flood and erosion control structure or includes a change in the zoning map or regulations, referral to DEEP is required by statute (see the [Mandatory Municipal Referrals](#) and [Shoreline Flood and Erosion Control Structures](#) fact sheets). **However, even if the project does not require mandatory referral, we strongly recommend consultation with DEEP's Land and Water Resources Division (LWRD) regarding coastal site plans for major development proposals, all waterfront proposals including those that are characterized as living shorelines, and proposals where wetlands, beaches and dunes, coastal bluffs and escarpments, or coastal waters could be affected.** In these cases, referral to LWRD for technical review assistance may be appropriate.

Are there additional statutory considerations when acting upon a coastal site plan application?

Yes. These include:

DECISION

A municipal commission or board may approve, modify, condition, or deny a coastal site plan based upon the review criteria listed above. The commission or board must state in writing the findings and reasons for its action (i.e., the action to approve, modify, condition, or deny the coastal site plan review application) [CGS Section 22a-106(d)].

DECISIONS REGARDING SHORELINE FLOOD AND EROSION CONTROL STRUCTURES

A municipal commission or board must approve a coastal site plan application for a shoreline flood and erosion structure if the record demonstrates and the commission makes specific written findings that the structure is:

(1) necessary and unavoidable for the protection of

- water-dependent uses,
- infrastructural facilities,
- commercial and residential structures and substantial appurtenances attached or integral thereto constructed as of January 1, 1995;
- a cemetery or burial grounds; **AND**

(2) there is no feasible, less environmentally damaging alternative; **AND**

(3) all reasonable mitigation measures and techniques are implemented to minimize adverse environmental impacts.

In the case of any application for a shoreline flood and erosion control structure that is denied on the basis of a finding that there may be feasible, less environmentally damaging alternatives to such structure, or a finding that reasonable mitigation measures and techniques have not been provided, the commission must propose on the record, in writing, the types of feasible alternatives or mitigation measures and techniques that the applicant may investigate. However, this requirement does not shift the burden from the applicant to prove that he/she is entitled to approval of the proposed shoreline flood and erosion control structure or to present alternatives to such structure (see the [Shoreline Flood and Erosion Control Structures](#) fact sheet and the [Shoreline Flood and Erosion Control Structures Consistency Checklist](#)).

WRITTEN FINDINGS

When a coastal site plan review decision is made, the commission or board must state in writing the findings and reasons for its actions. These are commonly termed "written findings" and should document and support the commission's decision. For example, when an application is approved, with or without conditions or modifications, the written findings should detail why the commission found that the project:

- is consistent with all applicable goals and conditions contained in CGS Section 22a-92; and
- incorporates as conditions or modifications, if applicable, all reasonable measures to mitigate (or lessen) the adverse impacts of the proposed activity on both coastal resources and future water-dependent development activities [CGS Section 22a-106(e)].

If a coastal site plan review application for a shoreline flood and erosion control structure is denied, the written findings must detail in writing

- the types of feasible, less environmentally damaging alternatives to such structure, or
- which reasonable mitigation measures and techniques have not been provided that the applicant should investigate.

See the [*Shoreline Flood and Erosion Control Structures*](#) fact sheet and the [*Shoreline Flood and Erosion Control Structures Consistency Checklist*](#).

AUTHORITY TO REQUIRE A FINANCIAL ASSURANCE

The commission or board may also require a bond, escrow account, or other surety or financial security arrangement to secure compliance with any modifications, conditions and other terms stated in its approval of a coastal site plan [CGS Section 22a-107].

LACK OF TIMELY DECISION

If the commission or board fails to render a decision within the time period provided for by the General Statutes (or by any special act for such decision), the coastal site plan is deemed rejected [CGS Section 22a-105(f)].

VIOLATIONS

Any activity within the coastal boundary that is not exempt from coastal site plan review that occurs without receiving a lawful approval from a municipal board or commission or that violates the terms or conditions of such approval is a public nuisance [CGS Section 22a-108].

Municipalities have the authority to exercise all enforcement remedies legally available to them for the abatement of such nuisances. The Commissioner of Energy and Environmental Protection may also order that such a public nuisance be halted, abated, removed, or modified

and that the site of the violation be restored as nearly as reasonably possible to its condition prior to the violation [CGS Section 22a-108].

Upon receipt of a petition signed by at least twenty-five residents of the municipality in which an activity is located, the commissioner of environmental protection shall investigate to determine whether or not an activity described in the petition constitutes a public nuisance [CGS Section 22a-108].

Does the DEEP have authority over coastal site plan reviews?

Not directly. The authority for coastal site plan review lies with the municipal board or commission responsible for the decision on the underlying application. However, the DEEP exercises an oversight role in municipal coastal management activities and, in accordance with CGS Section 22a-110, has “party status” in all coastal site plan reviews and can appeal a municipal decision.

¹ The mean high water mark is the average of all high tide elevations based on 19-year series of tide observations by the National Ocean Survey. The mean high water mark delineates the seaward extent of private ownership of upland property as well as the limits of municipal jurisdiction for regulating upland development projects; the State of Connecticut holds title as trustee to the lands waterward of mean high water.