Save the Sound®
Action for our region's environment.

TESTIMONY REGARDING APPLICATION OF LANDMARK FOR AMENDMENT TO EAST LYME ZONING REGULATIONS

Save the Sound is a nonprofit organization representing over 4,200 member households and 10,000 activists in Connecticut and New York. Our mission is to protect and improve the land, air, and water of the entire Long Island Sound region. We use legal and scientific expertise and bring citizens together to achieve results that benefit our environment for current and future generations.

September 30, 2020

Dear Chairman Walker and Commissioners of the East Lyme Zoning Commission:

I am writing on behalf of Save the Sound to oppose the Application of Landmark Development Group, et. al., for Amendment to the East Lyme Affordable Housing regulations. The Application should be denied because (1) the Applicant has already formally stipulated to the Existing AHD Regulations and cannot, after the fact, claim that they are now somehow inconsistent or discriminatory, (2) the Existing AHD Regulations closely track Judge Frazzini's opinion in the Applicant's case, (3) the Applicant's Proposed AHD Regulations are inconsistent with Judge Frazzini's opinion in that they would allow for effective approval before meaningful engineering and environmental information had been submitted and review had been completed, and (4) the Applicant fails to appreciate the very substantive differences between the Proposed AHD Regulations and the Gateway Planned Development District which serve very different purposes and involve very different environmental considerations.

Background

While the Application seeks to change the AHD Regulations for the entire town, it quite clearly addresses the Applicant's proposed development on Calkins Road in East Lyme as the sole basis to support the change. The property in question consists of 236 acres of steep-sloped, forested land adjacent to the Niantic River, which empties into Long Island Sound. The property is situated in the East Lyme portion of the Oswegatchie Hills area, an environmentally unique area where environmental agencies, the legislature, commissions, and towns are unanimous in their view that open space should be preserved and protected while dense development should be constrained.

The proposed development has a long history in the East Lyme Zoning Commission and in the Connecticut Courts. The applicant has made a number of highly inaccurate characterizations of this history, none of which are supported by any citations.

The Applicants have on three prior occasions sought the Commission's approval to develop dense housing on its property in some manner. All three applications were denied by the Commission primarily on environmental grounds, and all three decisions were subsequently appealed to the Superior Court.

In the first case, the court held that the Commission properly concluded that the substantial public interests in preserving the Oswegatchie Hills as open space outweighed the need for affordable housing. *Landmark I*, 2004 WL 2166353 at *1. Judge Quinn noted that the record reflected a long history of efforts to preserve the Oswegatchie Hills as open space including (1) the comprehensive plan for the town in 1967, (2) an open space acquisition plan in 1974, (3) a 1977 report recommending purchase of the property outright by the town for preservation, (4) East Lyme's 1987 revision to its plan of development, (5) the legislature's designation of the area as a "Conservation Zone," (5) and the establishment of the Niantic River Gateway Zone and Commission to preserve the character of the area. Id. at *8. In the second proceeding, Judge Prescott held that the Commission appropriately denied the Application for affordable housing due to open space and coastal management considerations. *Landmark II*, 2008 WL 544646 at *13, *16. The "lengthy history of preservation efforts alone make it apparent that the area has been under consideration for conservation due to its unique features for a long time. In addition, it is precisely some of the site's unique features, its fragile soils and rocky slopes as well as any development's impact upon the water resources which make it physically less suitable for dense development than other areas of the town." *Id., citing Landmark I.*

The third case was decided in 2011 by Judge Frazzini, and the instant regulations were passed directly as a result of that decision. In this proceeding, like the others, the Applicants sought to construct a high density affordable housing development in the Oswegatchie Hills. The proposed development would feature 840 units (408 one-bedroom apartments and 432 two-bedroom apartments), and 1,767 impervious parking spaces totaling 36 acres. The parking lot alone is 7 times the size of a Super Stop and Shop parking lot. *(*ROR PH 12 *Transcript of June 18, 2015 Public Hearing* at p. 87)**.** This proposal was initiated in 2005 when the Applicants applied to the Commission to request an AHD zone change for all 236 acres. The Commission denied that application, and the Applicants subsequently appealed the denial to the Superior Court.

As discussed more fully below, the Superior Court, Frazzini, J., found that (1) there was a substantial interest in preservation that outweighed the need for affordable housing, (2) there was insufficient information submitted by the Applicant to the Commission to make a final decision as to whether the AHD zone should be limited to the sewer service district or apply to the entire parcel and (3) on remand the Commission should create a preliminary and/or final site plan process to gather environmental information and upon consideration of all of the environmental information make a decision as to whether the AHD zone should remain limited to the sewer service district.

On remand the Applicants stipulated with the Commission to an AHD regulation ("Existing AHD Regulation") that would provide for process to effectuate Judge Frazzini's decision. Yet, in the proceedings on their application, the Applicants refused to provide the required environmental information in certain instances (Coastal Management Act information) and have provided incomplete or inadequate information in other instances (wetlands and stormwater). While Save the Sound and others urged the Commission to deny the preliminary application for failure to provide necessary information, the Zoning Commission, after a hearing, conditionally approved the application within the sewer district and deferred the consideration of the missing and deficient environmental information to later stages of the process.

The Applicant Has Already Stipulated to the Existing AHD Regulations That It Is Now Seeking To Challenge

It is critical to note that the AHD regulation was not unilaterally passed by the Commission, but it was negotiated between the Commission and the Applicants and fully agreed to**, indeed formally stipulated to,** by the Applicant acting through its attorney. In its most recent appeal filed with the Superior Court, the Applicant's attorney represents, "in April 2013, **by Stipulated Judgment**, the Zoning Commission adopted a zoning regulation text amendment, which established the AHD, Section 32 of the Regulations." *Landmark Development v East Lyme Zoning Commission Appeal from Zoning Commission,* September 9, 2015. At the zoning hearing before the appeal, attorney Hollister for the Applicants explained,

> Now, in April 2013, Landmark and this Commission **reached a settlement, which was approved by another Superior Court judge**, its (inaudible) Section 32, revised form and that is at tab 3 of your March 4, 2015 materials. So that's the affordable housing district regulation. That is the regulation upon which we're going to proceed in tonight's proceeding.

(Emphasis added). (ROR PH 11, *Transcript of June 4, 2015 Public Hearing* p. 20).

Despite this, in the filing with this Commission, the Applicants inaccurately (or at very least misleadingly) state that they had "objected" to a part of the provision without disclosing that they had, in fact, formally stipulated to the Existing AHD Regulation in their entirety. The Applicant has always had very sophisticated and highly qualified counsel throughout this process and cannot now claim to be unaware of, or somehow not responsible, for what it has agreed to. To allow this would violate principles of res judicata, considerations of judicial economy and basic principles of justice and fairness.

Indeed, there was good reason for the Applicants to make this Stipulation. As will be shown below, the stipulated regulations closely track, and fully implement, Judge Frazzini's decision.

The Existing AHD Regulations Are Consistent With, and Closely Track, the Court's Decision

The Applicants seek to remove the requirement for coastal zone information and for an adequate preliminary stormwater management plan. Yet this is precisely the environmental information that was required by Judge Frazzini to be submitted by the Applicant and considered by the Commission.

The Applicant inaccurately claims that Judge Frazzini's decision held that the Commission could not limit the proposed change to the sewer service district. In fact, Judge Frazzini's 2011 decision held that more detailed environmental information would be needed to make such a decision. The court stated:

> [**t]here was sufficient evidence in the record . . . to support the commission's reasons to deny a zone change for the entire [Applicants'] property based on preserving open space and preventing adverse impact on environmental and coastal resources. Both of these are matters of substantial public interest that the commission could consider and clearly outweigh the need for affordable housing.**
>
> Without the types of information sought by the DE[E]P . . . the court cannot find that the substantial public interest in avoiding damage to coastal resources or the environment could have been protected by expanding the change of zone from that approved by the commission—the area inside the town's sewer service district—to the entire area covered by the site plan drawings. The substantial public interest in avoiding excessive environmental harm and damage to coastal resources can be protected, however, by a remand for the commission to amend its zoning regulations as specified above, for Landmark then to submit **a preliminary or final site plan that provides the information necessary for the commission to assess those matters,** and for the commission then to determine whether the substantial public interest in avoiding damage to coastal resources or the environment can be protected by expanding the change of zone from that approved by the commission—the area inside the town's sewer service district—to the entire area covered by the site plan drawings.

Landmark Dev. Grp., LLC v. E. Lyme Zoning Comm'n, 2011 WL 5842576, at *41, *42 (Conn. Super. Ct. Oct. 31, 2011) (*Landmark III*).

Coastal Resources

Consistently with Judge Frazzini's decision, the Director of the Office of Long Island Sound Programs of DEEP submitted a letter in the zoning proceedings stating that coastal information was (1) required by the CCMA and (2) not provided by the Applicant. He stated that the Applicants' proposed development was located partially within a coastal boundary that includes inland wetlands and therefore **the entire project** was subject to coastal review under Conn. Gen. Stat. § 22a-105(b). (ROR, Exh 10 *CT DEEP Referral Response* at 5). The Director explained that the proximity of the Applicants' proposed development to these on-site wetlands and coastal resources would create "almost certain impacts . . . on the wetlands, habitat and water quality." However, the Applicants' failure to submit coastal resource information and a coastal site plan review application pursuant to Conn. Gen. Stat. § 22a-105(b) would make the calculation of "precise harm . . . to [coastal] resources at this site . . . not comprehensively possible at this time."

The Director further stated that the Applicants' proposed design is characterized by shallow depth-to-bedrock and steep slopes that would necessitate significant alterations of the site to prepare the land for road access and community septic. These alterations "would create significant stormwater runoff that would adversely impact coastal resources and water quality." In addition, the alterations would "cause potential sedimentation and erosion, nitrogen loading, and impacts on . . . finfish, shellfish, and wildlife on the site, along Latimer, Brook, the Niantic River, and ultimately Long Island Sound." For these reasons, the Director recommended the

denial of the Applicants' proposed zone change and the Preliminary Site Plan. The Applicants failed to rebut, respond to or address this evidence in any manner.

Despite all of this, the Applicants boldly state that "[c]oastal resources information [from DEEP] was not required because none of the 36 acre residential development area was within the coastal zone, and the driveway was already designated as exempt." The Applicants requested amendment seeks to limit the coastal zone resource consideration to the area strictly within the zone. This violates Frazzini's decision, DEEP's recommendation of denial based upon coastal zone considerations and the CT Coastal Management Act itself.

Wetlands

The Applicants also claim that they submitted the location of wetlands. Yet, Soil Scientist John Ianni established that the Applicants had failed to properly identify and delineate at least one significant vernal pool containing wetland that was on their property. (See ROR PH 12 *Transcript of June 18, 2015 Public Hearing* pp. 73-74, and ROR Exh. 48. *Friends of Oswegatchie Hills Presentation*)**.** The Applicants did not seek to rebut, contradict, or respond in any manner to this evidence. The requirement to provide wetland information necessarily includes the requirement to provide ACCURATE wetlands information. They failed to do so.

Stormwater

The Applicants also neglect to mention all of the problems identified with its preliminary stormwater plan. The plan was found to be deficient by Engineer Steven Trinkaus in a manner that would lead to channelization and negatively impact the environment. This information was neither contested nor responded to by the Applicant.

Instead of seeking to correct these problems, the Applicant has sought to amend the regulation to limit what kind of stormwater information could be required by the zoning commission. It should be noted that the GPDD Gateway Planned Development District actually requires not only an adequate preliminary stormwater plan, but a full stormwater plan. Section 11A.8.1.

Thus, the uncontested record shows that the Applicants have failed altogether to submit the required coastal information and have submitted inadequate and inaccurate information regarding both stormwater and wetlands. Instead of seeking to submit complete and accurate information, Landmark now seeks to amend the regulations themselves to eliminate the need for this information. Yet this is precisely the information that Frazzini required before a final decision as to whether to increase the size of the zone beyond the sewer service district could be made.

Judge Frazzini's Decision Explicitly Required the Applicant to Submit Substantive Information on Impact to the Environment and for the Commission to Consider it Through a Preliminary or Final Site Plan Process

The Applicant's main substantive contention is that Judge Frazzini's decision prohibits the current preliminary and final site plan process, but instead requires the alternative master plan

process set out by the Applicant. There was, of course, no reference to a "master plan" in Judge Frazzini's decision quoted above and certainly no requirement for one. Instead the two ways that the judge provided environmental information could be provided was **either** through a preliminary **or** a final site plan. That is precisely what the Existing AHD Regulation implements. The idea that it was required to be a "master plan" originates wholly within the mind of the Applicant, has no basis in any prior judicial decisions. In fact the decision made clear that unless and until the Applicants submitted the actual environmental information, a final decision could not be made on the size and extent of the AHD zone.

What the Applicant actually seeks is entitlement to an approval that becomes binding upon the Commission in a later stage without having submitted engineering, environmental or other information. This is what the Applicant unsuccessfully sought from Judge Frazzini and continues to seek now. This not only defies common sense and the most basic principles of good government, but it defies Judge Frazzini's decision, applicable law, and the Applicants' own Stipulation.

The GPDDD Gateway Planned Development District Served a Different Purpose in that it Applied to a Multi-Use, Multi-Parcel Property That Was (1) Located Wholly Within the Sewer District, (2) Consistent with the Plan of Conservation and Development, and (3) Entirely Outside of the Coastal Zone

The Applicants essentially argue that this Commission should now disregard Judge Frazzini's decision and their prior Stipulation and instead adopt a new process that includes the parts of a separate Master Plan regulation that would be most advantageous to the Applicants while excluding those aspects of the Master Plan process that would prohibit the Applicants' development. The Master Plan process was created for a very different purpose from the AHD regulations. The Master Plan purpose is to "[c]oordinate development of properties under separate ownership and provide safeguards that one or another early development does not jeopardize maximum build-out." Section 11A. The purpose of the AHD Regulations is to "provide for, encourage and accommodate affordable Housing." Section 32.1 There are also very significant differences between the Applicant's proposal and the Gateway development. First, the entire Gateway parcel is within the sewer service district and was required to be pursuant to Section 11A.5.2 which only allows discharges to the sewer system. Yet the Applicants object to being confined to the sewer service district and are seeking to expand the zone beyond that. Second, the Master Plan requires a showing of consistency with the Plan of Conservation and Development. Section The Applicants' development, as set forth above, would not meet such a threshold. Finally, the entire Gateway parcel is located outside of the coastal zone. Thus, DEEP did not submit comments and did not recommend rejection of that master plan on environmental grounds as they have in the Applicants' case.

Conclusion
For the foregoing reasons, Save the Sound hereby urges the Commission to reject Landmark's Application for a Regulation change.

Respectfully Submitted,

SAVE THE SOUND

By: Roger F. Reynolds, Esq.
Save the Sound
900 Chapel Street, UM Level
Suite 2200
New Haven, CT 06510
Ph: (203) 787–0646 x105
rreynolds@savethesound.org