

## MEMORANDUM

To: Gary Goeschel, Director of Planning  
Town of East Lyme

From: John P. Casey, Esq.  
Christopher Y. Eddy, Esq.

Date: December 27, 2021

Subject: Application of Kristen Clarke, P.E., Applicant, Cold Spring Lot Management, LLC, Owner, for an 8-lot subdivision of property located at 121 Upper Pattagansett Road, East Lyme Assessor's Map 35.0, Lot 44

Review of East Lyme Planning Commission Regulations and Relevant Caselaw re:  
Applicant's Proposed Open Space Dedication

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### Background

English Harbour Asset Management LLC ("Applicant") filed an application to subdivide a 14.21-acre portion of the parcel located at 121 Upper Pattagansett Road in East Lyme as "Phase 5" of the Nottingham Hills subdivision. As part of this subdivision, the Applicant states that it is required to dedicate 4.26 acres of open space.<sup>1</sup> The Applicant has asserted that they do not need to dedicate open space for this subdivision because they previously dedicated more open space than was required for earlier phases of the Nottingham Hills subdivision and could "bank" that surplus open space for dedication to later phases of development.<sup>2</sup>

In order to better evaluate the Applicant's position, Robinson & Cole was asked to:

1. Review the East Lyme Subdivision Regulations and evaluate whether they allow an applicant to apply excess open space dedicated during a previous subdivision to a later subdivision of a different parcel.

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<sup>1</sup> See Letter from Paul M. Geraghty, Esq., to Gary Goeschel, Director of Planning, Town of East Lyme, Page 4 (November 5, 2021) ("Applicant Letter"). This calculation is based on the division of 14.21 acres into 8 building lots: 14.21 acres x 30% (percentage of open space required for a Conservation Design Development ("CDD") (Zon. Reg. § 26.3(B)) = 4.26 acres. However, the Applicant is not proposing a CDD subdivision, but a conventional subdivision, which only requires that 10% of the gross land area of the subdivision be dedicated to open space (Subdiv. Regs. § 7-2-1). It is unclear why the Applicant is proposing open space required for a CDD subdivision. Moreover, if the remaining 46-acre camp ground portion of the property to be subdivided is a part of the overall subdivision of 77+/- acres, and becomes a building lot (regardless of the use), there is an argument that open space should be provided based on the division of the whole parcel. In a conventional subdivision that requires 10% open space: ~7 acres; in a CDD that requires 30% open space: ~23 acres. While we wanted to point out this issue, for purposes of this memo, we do not address the required amount of open space, but whether open space dedicated in earlier phases of the Nottingham Hills subdivision can be applied to this subdivision.

<sup>2</sup> See Applicant Letter, Pages 3-4.

2. Conduct a search of Connecticut caselaw for situations similar to the one proposed by the Applicant.

### **East Lyme's Subdivision Regulations**

Section 7 of the East Lyme Subdivision Regulations ("Regulations") covers the dedication of open spaces and easements. The Regulations state that "[i]f a parcel, or abutting parcels under common ownership, is subdivided in stages, the open space dedication attributable to the subdivision of a portion of the entire tract may, at the Commission's discretion, be deferred to a later date when more or all of the land remaining in the entire tract is subdivided."<sup>3</sup> If the Commission approves this approach, the following language must be placed on the approved map:

The open space dedication attributable to the land depicted on this map is hereby deferred to a later date when some, or all of the remaining land is re-subdivided. At such later date, the open space attributable to this subdivision will be combined with the open space dedication(s) attributable to the remaining portion(s) of the entire tract in a size and at a location determined by the Commission in accordance with the requirements set forth in the Subdivision Regulations.<sup>4</sup>

The Regulations do not contain any reference to previously dedicated open space being applied to later subdivisions.

### **Applicable Caselaw**

A review of Connecticut treatises and caselaw did not reveal any cases in which an applicant was allowed to "bank" previously dedicated open space and apply it to a later subdivision. In 1988, in the case of *Prokop v. Planning Commission of East Lyme*, the Superior Court ruled on an attempt to defer the dedication of open space to a later phase of a subdivision in East Lyme.<sup>5</sup> There, the Superior Court made clear that the Planning Commission is bound by its open space regulations and may not adopt procedures regarding the dedication of open space that are not permitted by the regulations.<sup>6</sup> Interestingly, § 7-2-2 of the current Regulations may have been enacted to provide the Commission the option to defer the dedication of open space in phased developments to later phases, which is what it attempted to do in the *Prokop* case, but without any specific regulations at the time that allowed it to do so.

### **Analysis of the Applicant's "Banking" Approach**

Section 7-2-2 of the Regulations shows that the Commission conceived of a situation in which an applicant would subdivide a parcel or abutting parcels under common ownership in phases and *defer to a later date* the dedication of open space for earlier phases until subsequent portions of the parcel were subdivided. There is no provision in

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<sup>3</sup> East Lyme Subdivision Regulations § 7-2-2.

<sup>4</sup> *Id.*

<sup>5</sup> See *Prokop v. Planning Commission of East Lyme*, 4 Conn.Super.Ct.Rpts. 41 (1988)

<sup>6</sup> See *id.* at 42.

that section that allows the Commission to determine that an applicant has complied with the requirements to provide open space for a new subdivision by looking back at open space previously dedicated to a prior subdivision(s) and assigning excess portions of that open space to the new subdivision.

Moreover, the Regulations condition the availability of this deferral on the Commission's formal approval.<sup>7</sup> If the Commission approved of a plan to defer the dedication of open space, the prescribed language from the Regulations must appear on the approved map.<sup>8</sup> It is our understanding that there is no such notation on the final approved maps for the prior phases of the Nottingham Hills subdivision. The lack of the prescribed notation on the previous maps supports a conclusion that the Commission has not approved the deferred dedication of open space.<sup>9</sup>

Although the Regulations allow for the deferral of open space dedication in phased subdivisions of a single parcel or abutting parcels under common ownership, they do not contemplate or allow an applicant to "bank" excess open space dedicated as part of a previous subdivision and then apply it to a future subdivision – especially without clear and uncontroverted evidence of such a decision by the Commission, evidence that is missing here.

Therefore, because the Commission is bound by the Regulations and may not adopt procedures that are unsupported by the plain meaning of the Regulations,<sup>10</sup> the Applicant's "banking" approach to open space dedication is not permitted.

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<sup>7</sup> See East Lyme Subdivision Regulations § 7-2-2 ("If a parcel, or abutting parcels under common ownership, is subdivided in stages, the open space dedication attributable to the subdivision of a portion of the entire tract may, at the Commission's discretion, be deferred to a later date when more or all of the land remaining in the entire tract is subdivided.") (emphasis added).

<sup>8</sup> *Id.* ("If approved by the Commission, the following notation *shall be placed* on the approved map") (emphasis added). References to minutes of past Commission meetings in the Applicant Letter are not sufficient proof that the Commission made a formal determination that open space dedicated in past phases of the Nottingham Hills subdivision was to be applied to the future subdivision of 121 Upper Pattagansett Road, when such property was not owned by the Applicant at the time and was never contemplated to be part of the Nottingham Hills subdivision. The required notation must appear on the subdivision map or, at a minimum, one would expect that such a decision would be included in the letter of approval or permit for the prior phases of the Nottingham Hills subdivision, but we have seen no evidence of either.

<sup>9</sup> See Applicant Letter at Exs. A, D, E, I, K.

<sup>10</sup> See *Prokop*, 4 Conn.Super.Ct.Rpts. at 41-42.

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procedural or substantive, however, is not the exclusive test as to whether its effect is to be applied retroactively or only prospectively. "Our test of whether a procedural statute is to be applied retroactively, absent any specific provision in the statute on the point, is not a purely mechanical one. Even if the statute is procedural, it will not be applied retroactively if considerations of good sense and justice dictate that it not be so applied." *Jones Destruction, Inc. v. Upjohn*, 161 Conn. 191, 196 (1971).

In the case at hand, the plaintiffs complied with the statutory requirements as they existed as of the date of service and return of the appeal. At that point, on June 25, 1987, Public Act 87-338 had not been published nor was it in effect. Under the circumstances of this case, "good sense and justice" dictate that Public Act 87-338 not be applied retroactively.

For the reasons stated above, the defendants' motion to dismiss is denied. ■

**Harry Prokop v.  
Planning Commission of the Town  
of East Lyme, et al.**

**ZONING, SUBDIVISIONS - AGGRIEVEMENT**

Appeal of granting of subdivision on grounds that the zoning commission failed to follow its regulations which require dedication of open spaces in subdivisions of more than 10 acres. Held, sustained. Although the plan approved was for only 3.79 acres, the commission required the developer to show the future development of the entire parcel, which is over 10 acres. The application states that future submissions will provide for open spaces, but the regulations do not provide for deferral.

**COURT:** New London, at New London  
**DATE:** November 22, 1988  
**DOCKET NO.:** 507020  
**JUDGE:** Leuba

This is an appeal by the plaintiff, Harry Prokop, from the decision of the Planning Commission of the Town of East Lyme (Commission) approving a resubdivision application filed by John Bialowans, Jr. (defendant), pursuant to the provisions of §8-28 of the Connecticut General Statutes.

After the pleadings were closed and an appropriate briefing schedule, the hearing was held before the Court at New London on November 15, 1988.

The threshold issue is aggrievement. In this case, both statutory aggrievement and classical aggrievement are involved. Section 8-28 of the General Statutes gives standing to appeal to persons owning land which abuts or is within one hundred feet of any portion of land involved in the subdivision approval. Otherwise, mere proximity to a subdivision does not, without more, constitute aggrievement. *Walls v. Planning and Zoning Commission*, 176 Conn. 475, 477. Aggrievement is a jurisdictional issue and cannot be conferred by agreement of the parties. *Hughes v. Town Planning and Zoning Commission*, 156 Conn. 505. The plaintiff's complaint must allege specific facts and not mere generalizations with regard to the alleged aggrievement. *Joyce v. Zoning Board of Appeals*, 150 Conn. 696, 698. To be aggrieved in the classical sense, one must meet a two-part test: (1) The appellant/plaintiff must be affected directly or in relation to a specific, personal interest, as distinguished from a general interest in the subject matter such as is the concern of all members of the community; and (2) the appellant/plaintiff must be specially and injuriously affected as to property or other legal rights. *Sheridan v. Planning Board*, 159 Conn. 1, 13.

In this case, the plaintiff has specifically alleged both statutory and classical aggrievement in paragraph 4 of the complaint which has been put in issue by the denials of the Commission and the defendant.

The plaintiff testified with regard to his alleged aggrievement. The plaintiff has indicated and the Court finds that he is the owner of property adjoining property owned by the defendant John Bialowans, Jr., which was involved in the subdivision. (See Return Item Exhibit No. 1 - Subdivision Plan.)

While the subdivision plan itself does not reflect the actual distance between the plaintiff's land and the specific lots approved on April 5, 1988, the plaintiff did testify at the hearing using Exhibit No. 1 and pointed out the claimed boundary line of his property. Without making a determination of the boundary line controversy which the Court understands exists between the plaintiff and the defendant John Bialowans, Jr., the Court does find from the testimony of the plaintiff and his indication at that time (by pointing to the subdivision plan to show location which he claims to be his boundary line) that for these purposes, his property is within 100 feet of the property to be affected by the grant of the resubdivision approval on April 5, 1988; and for that reason, the plaintiff is found to be aggrieved.

Moreover, under the classical aggrievement theory, the plaintiff is also found to be aggrieved by virtue of being an owner of real property in the immediate vicinity of the property subject to the resubdivision approval and by virtue of such approval, he is specifically and injuriously affected in his property interests in a manner distinct from that of the general property owners in the area, and specifically that the plaintiff will be injuriously affected in his private enjoyment of his property, including a shed in the area and the cemetery which the plaintiff has maintained in the vicinity of a proposed road for his pets over a period of some forty-three years and because of increased traffic and activity in this quiet rural neighborhood.

For those two separate and distinct reasons, the Court finds the plaintiff to be aggrieved as contemplated by the provisions of 8-28 of the Connecticut General Statutes.

The plaintiff withdrew the claim of defective notice at oral argument.

Among his other claims, which need not be reviewed because of the decision herein, the plaintiff claims that the defendant Commission failed to follow its regulations as amended on October 20, 1987, and effective as of October 25, 1987, specifically as it relates to §10-2, which provides in pertinent part as follows:

For subdivisions not utilizing the provisions of the zoning regulations pertaining to open space/cluster development, the Planning Commission . . . shall, with applications involving 10 acres or more, require dedication of open space in locations and with public access deemed proper and adequate by the Commission.

One of the basic tests in a subdivision appeal is whether or not the application and approval conform to the regulations. Of course, if the plan meets the regulations, the Commission must approve it. *R. K. Development Corp. v. Norwalk*, 156 Conn. 369, 376. On the other hand, if the subdivision approval does not comply with the regulations, it must be disapproved. *Southeast Property Owners and Residents Association v. City Plan Commission*, 156 Conn. 587, 591; *Forest Construction Co. v. Planning and Zoning Commission*, 155 Conn. 669, 675. The Court cannot properly substitute its judgment in areas of discretion (*Westport v. Norwalk*, 167 Conn. 151, 161). On the other hand, our Supreme Court has said "in passing upon subdivision plans, the Commission is to be controlled by the regulations which it has adopted." *J & M Realty Co. v. Norwalk*, 156 Conn. 185, 191.

It is clear from the plan submitted as Return Item Exhibit No. 1 that the entire property of the defendant/applicant consists of more than 10 acres, and while Note No. 13 on page 2 of said plan suggests that the open spaces will be provided when Section II is submitted for approval, no provision for that deferral is found in the regulations themselves. Moreover, the Commission did not comply

with the waiver procedures contained in §4-14 of the East Lyme Subdivision Regulations (see Return Item Exhibit No. 13).

While the brief of the Town of East Lyme, which was adopted at oral argument by the defendant Bialowans, suggests that the subdivision was limited to the 3.79 acres of area set forth in the actual lots under consideration, that argument is somewhat diminished by the fact that the Planning Commission seems to have required the developer to set forth information with regard to the future road, including angles and curves and also had required the developer to show the entire tract of land on sheet 1 of his subdivision map approved April 5, 1988. If the Court were to adopt the procedures apparently suggested by the Commission with regard to its open space regulations, it would be conceivable that a subdivider could circumvent the regulations by appearing with applications for three lots at a time (containing less than 10 acres)

and thereby develop the entire tract of over 10 acres without ever having had an individual application which required compliance with §10-2 of the regulations. Certainly the drafters of the regulations could not have contemplated such a procedure.

At very least, if it is contemplated that the remaining land of the applicant should be burdened by the open space provisions at some later date, the Planning Commission by its regulations (and the general public which is the beneficiary of those regulations) is both entitled and required to have in mind exactly which portions of the remaining land are to be dedicated to open space and what relationship that open space bears to the three lots considered for approval in the current application.

For the reason that the Planning Commission has not complied with its open space regulations, the plaintiff's appeal is sustained. ■

**Planning & Zoning Commission of  
the Town of Wallingford v.  
George Niles**

**ZONING, CEASE AND DESIST - STORAGE - INJUNCTIONS - PROCESS, DEFECTS - OATHS - PROCEDURES, MOTION TO DISMISS**

Town's action to enjoin violation of zoning regulations. Held, application for temporary injunction granted. Defendant is violating regulations with regard to storage of commercial vehicles. Defendant's claim that the complaint was not properly verified was not raised before trial.

**COURT:** New Haven  
**DATE:** November 17, 1988  
**DOCKET NO.:** CV88-0275695  
**JUDGE:** Meadow

The plaintiff, Town of Wallingford, seeks to enjoin the defendant from violating its zoning ordinances, specifically Sections 4.1.F.5<sup>1</sup> and 6.12.C.1<sup>2</sup>.

The defendant in his brief calls to this court's attention that at the start of trial the complaint was not verified through its Town Planner and, accordingly, that the complaint should be dismissed. The defendant cites *Gerdis v. Bloethe*, 39 Conn. Sup. 53, 55 (1983) in his support, which states:

"the difference between a temporary and permanent injunction may explain the requirement of an oath for each. The purpose of a preliminary injunction is to maintain the status quo, pending a final determination on the merits. (Citation omitted).

It would seem to follow therefore that the court would require the plaintiff to attest by oath to the truth of his claim, before it issues a temporary injunction, or *heard the case on its merits.*" (Emphasis added).

The defendant failed to raise by motion prior to trial the claim for dismissal now being suggested. The court heard testimony on the merits in the instant case and makes the following finding: The defendant's claim for dismissal is denied.

The defendant is the owner of 9-13 Hill Avenue in Yalesville, Wallingford (Exhibits A and B). The two separate pieces of property are located in a residential zone with a common driveway (Exhibit I).

In late November of 1987, Thomas Talbot, Assistant Town Planner in charge of zoning enforcement, made an inspection of the defendant's property, where he found two commercial vehicles in excess of one ton. Based upon that inspection, Mr. Talbot, by letter, notified the defendant to cease and desist from storing all commercial vehicles over one ton and all commercial vehicles under one ton with the exception of one on his property (Exhibit H). This order was dated January 11, 1988. On December 7, 1987 (Exhibit G), Mr. Talbot, by letter, notified the defendant specifically the zoning regulations which were being violated by the defendant. The defendant never responded to either notice.

Although the zoning enforcement officer failed to maintain a log of inspections of the property, he testified that he inspected the property on the average of about once every two weeks after the cease and desist order to the present time, when he found commercial vehicles on the property a majority of times.\*As late

as September and October, 1988, the defendant violated the zoning regulations of the Town of Wallingford (Exhibits I, J, L and M).

The court may grant a temporary injunction if it finds that the defendant is in violation of the zoning regulations at the time of trial. *Water Resources Commission v. Connecticut Sand and Stone Corp.*, 364 A.2d 208, 211, 170 Conn. 27 (1975), citing *Jones v. Foote*, 165 Conn. 516, 521, 338 A.2d 467 (1973). The violation must exist at the time of trial before injunctive relief may be granted.

The defendant's argument that the defendant's ownership of two separate properties allows him to have more than one commercial vehicle in excess of one ton on his property is rejected. The commercial vehicles shared the common driveway (Exhibits L and M).

Connecticut General Statutes §8-12 permits the plaintiff to seek injunctive relief to prevent the continued violation of its zoning regulations. "It is the Court's duty to carry out the intention of the legislature as expressed in the Statute it has enacted and to make the remedy it has provided an effective and efficient means of dealing with violations of the act and regulations properly promulgated under its authority." *Conservation Commission of Simsbury v. Price*, 479 A.2d 187, 194, 193 Conn. 414 (1984).

In determining whether to grant injunctive relief, the court must consider the equities of the case. *Johnson v. Murzyn*, 469 A.2d 1227, 1231, 1 Conn. App. 176 (1984). The defendant's property is in a residential zone. Commercial vehicles owned by the defendant create hazards to the residents. The defendant offered no evidence of hardship or inequity which would result from the granting of a temporary injunction. The defendant testified that he has a place on South Main Street in Wallingford to store the vehicles.

The plaintiff does not have to prove irreparable harm or that it has no adequate remedy at law. *Town of Greenwich v. Kristoff*, 2 Conn. App. 515, 521 (1984); *Johnson v. Murzyn*, 469 A.2d 1227, 1230, 1 Conn. App. 176 (1984). When a statute authorizes a municipality to seek an injunction to enforce its law, it is only required to show a violation of the statute. *Johnson*, supra, 469 A.2d at 1230. The rationale for this rule is that the enactment of the statute by implication assumes that there is an irreparable injury and that there is no adequate remedy. *Ibid. Conservation Commission v. Price*, 193 Conn. 414, 429 (1984).

The court finds that the defendant is violating the zoning