

**East Lyme Zoning Commission
Regular Meeting
November 19, 1998
Minutes**

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PM

The East Lyme Zoning Commission held a Public Hearing and Regular Meeting on November 19, 1998 at Town Hall, 108 Pennsylvania Avenue, Niantic, Connecticut 06357.

PRESENT: Paul Formica, Chairman, Norman Peck, Christopher Mullaney, Daniel Price, Shawn McLaughlin, Robert Bulmer, Alternate and William Dwyer, Alternate.
Also Present: William Mulholland, Zoning Officer. Rose Ann Hardy, ex-officio.

Absent: Athena Cone, Secretary, William Weber.

I. Public Delegation

None

II. Public Hearing

Application of Robert D. Tobin to amend Section 12.1.3 and Section 25.5 of the East Lyme Zoning Regulations to modify the Elderly Housing age minimum from 62 years of age to 55 years of age

Mr. Formica opened the Public Hearing at 7:31 PM. Mr. Dwyer and Mr. Bulmer will sit as voting members of the Commission. Mr. Peck will sit out on the Public Hearing regarding the application of Robert D. Tobin to amend Section 12.1.3 and Section 25.5 of the East Lyme Zoning Regulations to modify the Elderly Housing age minimum from 62 years of age to 55 years of age, due to a conflict. In the absence of Mrs. Cone, Mr. Price will serve as Secretary.

Mr. Formica read into the record

- A. A letter to William Mulholland, Zoning Enforcement Officer, dated September 30, 1998, from Mr. Robert D. Tobin, representative of Chapman Farms, LLC. The purpose of the letter is to clarify the applicant's request.

- B. A letter from the East Lyme Planning Commission to Mr. Formica and the East Lyme Zoning Commission regarding this application. The Planning Commission voted to approve the application of Robert D. Tobin at its October 6, 1998 meeting.
- C. The Legal Ad was placed in the New London Day November 6 and November 16, 1998.
- D. A Waller, Smith and Palmer, P.C. Internal Memo and attachments, dated July 3, 1998 from Atty. James F. Spallone to Atty. Edward O'Connell, Town Attorney, and Atty. Robert W. Marrion regarding the East Lyme Zoning Regulations concerning housing for older persons. Conclusion: "East Lyme's current regulation providing that housing units for older persons must have at least one occupant who is 62 years of age or older is not in compliance with 42 USCS Section 3607. In order to be in compliance the Town would either have to require that the housing units be set aside solely for occupancy by persons 62 years of age or older or adopt the change suggested by Attorney Tobin."
- E. Supplemental Internal Memo dated July 15, 1998 from Atty. James Spallone to Atty. Edward O'Connell, Town Attorney, and Atty. Robert W. Marrion. Comment: "The most likely target of a housing discrimination suit would be the developer or a future owners association. However, an entity managing a housing facility for older persons in East Lyme cannot comply with the Fair Housing Act and East Lyme Zoning Ordinances at the same time. If the facility is operated for persons 62 and over only as permitted by Section 3607 B(2)b of the Act, the operator would be in violation of the Zoning Ordinance because the Ordinance specifies that there only has to be one resident who is 62 years of age or older residing in each unit. If the operator exercises the option of operating the facility with 80% of the units occupied by at least one person who is 55 years of age or older as permitted under Section 3607 B (2)c, the operator will be in violation of the local ordinance because, again, East Lyme has a minimum age of 62. Unless the operator can show that one of the exceptions in Section 3607 applies and has been complied with it could be subject to claims of discrimination on the basis of familial status."

F. A letter from the James A. Rabbit, AICP, Senior Planner of the Southeastern Connecticut Council of Governments dated October 28, 1998 to Athena Cone, Secretary of the Zoning Commission. Conclusion: "The proposed change would not have any adverse inter-municipal impact."

G. A memo to East Lyme Zoning Commission from Bill Mulholland, Zoning Official regarding this proposed amendment, dated November 19, 1998. The Town Attorney's conclusion found in his July 3, 1998 memo leaves two options: (1) Change age restriction from one occupant, age 62 years or older to require all occupants age 62 or older or (2) Adopt change suggested by Attorney Tobin. A third option is for the Commission to form a subcommittee to thoroughly review the regulations and make its own recommendations.

Attorney Robert Tobin, representing Chapman Farms, LLC, made his presentation to the Commission. Mr. Tobin indicated that the only change is in the age from 62 years to 55 years. The units will continue and can only be occupied by two individuals. The Fair Housing Act states that you cannot discriminate against children. The Elderly Housing provisions are exceptions to that provision so that if you comply with one or both of the exceptions, then you can defeat a claim if a family wants to move in. The proposed amendment would comply with the Federal Fair Housing Act because it would be intended to be occupied by persons 55 years and older and would require as a provision of zoning that each unit be occupied by persons 55 years or older.

Joanne Carroll then testified regarding how other communities in New England are complying with the Federal Fair Housing Act while still providing senior housing. She noted that retirement communities are designed to meet the needs of a specific market whose children have grown and moved out. She added that this is a stage of life market, not an age specific market.

Mr. Tobin summarized by stating that this change in the regulation will change nothing except reducing the age from 62 to 55 years. It will not provide housing for families. It is designed to provide housing for two people, one of whom is at least age 55 years. To the extent that the regulation does not comply with the Fair Housing Act, if someone with children brought an action, perhaps they could win that action and obtain occupancy. The Town could comply with the Fair Housing Act by requiring everyone be over 62 years or by

changing the regulation by lowering the age from 62 years to 55 years. He hoped that the Commission would adopt the proposed amendment.

Mr. Formica then opened the floor to those wishing to speak in favor of the proposed amendment.

Mr. Robert Ostrow, 5 Apple Blossom Road presented a hypothetical situation in which the qualifying person (age 62) dies and his/her spouse remarries a person with a child and requested how such a situation would be handled. Mr. Mulholland deferred to Mr. Tobin who stated that the individual would be in violation of both Chapman Farms By-laws and East Lyme Zoning Regulations. The house would have to be sold or rented to someone who met the requirements if the Town or Chapman Farms sought to enforce the Regulations or By-laws. Mr. Mulholland concurred.

Mr. Bob Simpson objected to Mr. Tobin's responding to that hypothetical and indicated that Mr. Tobin has a conflict of interest in this situation. Mr. Formica noted Mr. Tobin could speak to the Chapman Farm's By-laws, which the Zoning Commission cannot due to their unfamiliarity with them.

Mr. Ostrow presented a hypothetical in which an individual under the age of 62 inherits the house. Mr. Formica indicated that the individual (s) would not be able to live in the property.

Mr. Ostrow noted that in the case of Chapman Farms, the Town gets 61 times the tax they would get from what it was when it was raw acreage. He also stated that if the provision in the East Lyme Zoning Regulation which states that one person in the unit must be 62 years or older does not qualify as an exemption from Fair Housing Act, then someone younger than 55 years could charge discrimination on the basis of age. He added that he did not object to raising the age to 62 years for both occupants or lowering it to 55 years as long as the project qualifies for the exemption.

There being no further speakers in favor of the proposed amendment, Mr. Formica opened the floor to those persons wishing to speak against the proposal.

Gary Patterson, 10 Acorn Drive, requested clarification of the three options. He stated his understanding of the summary from the Town Attorney to be (1) The age requirement

would be changed for all occupants to be age 62 or older, (2) The age would be changed to 55 years or older as proposed by Attorney Tobin. (3) The Zoning Commission form a subcommittee to thoroughly review the recommendations. Mr. Patterson inquired as to the 80% mentioned in the Act. Does this imply that 20% would not have to be 55 year of age or older?

Mr. Tobin noted that in order to comply with the Federal Fair Housing Act the housing has to be, first, intended for persons 55 years of age or older. Secondly, at least 80% of the occupants in the housing project have to be 55 years of age or older.

In the proposed amendment to Town of East Lyme Zoning Regulations, each unit must be occupied by at least one person 55 years of age or older. You could not, therefore, have 80% of the units occupied by 55 year olds and 20% of the units occupied by 20 year olds and be in compliance with East Lyme Zoning Regulations. One hundred percent (100%) of the units must have one occupant 55 years of age or older. Under the Federal Fair Housing Act, you could have 20% of the units occupied by persons under age 55, but you then would not be in compliance with East Lyme Zoning Regulations which currently require 100% of the units be occupied by a person at least 62 years of age or older. Mr. Mulholland noted that the proposed amendment, revised Subsection 6 reads "all units shall be occupied by no more than two persons on a permanent basis, at least one of whom shall be 55 years of age or older."

Mr. Patterson noted that some of the people present where also present several years ago and at that time opposed the zoning change. He stated that his belief was that the motive for initiating this change in the Zoning Regulation was based in economics, not the best interests of the Town and citizens of East Lyme.

Mr. Bob Simpson, 30 Sleepy Hollow Road, agreed with Mr. Patterson. He stated that he believed the proposed amendment was also based in economics and profit for the developer. He added his concerns and opinions: (1) Persons 55 years and older are living in a higher density. (2) The land left for Special Use could be converted to older persons housing. (3) The likelihood of the Town being sued, in Mr. Simpson's view, was low. (4) A situation in which each year or so the developer or another developer returns to the Town for another proposed change in the Regulations. (5) The Fair Housing Act does not allow 100% age 55 or over.

Mrs. Susan Swetland 25 Oak Hill Drive, suggested that the Commission establish a subcommittee to investigate and make its recommendation. She stated that the Commission needs to take control and not leave proposed changes in Regulations up to developers. Mrs. Swetland added that her concern is that the applicant or a person under age 55 would in the future request another change, for example, that 80% of the units be occupied by persons age 55 or older (as stated in the Federal Fair Housing Act), instead of the current 100% required by the East Lyme Zoning Regulations, arguing that the Federal Fair Housing Act allows for 80% of the units be occupied by persons age 55 years or older and, thus, 20% could be occupied by persons younger than age 55 years and the East Lyme Zoning Regulations need to come into alignment with the Federal Fair Housing Act.

Joe Kwasniewski, 67 Walnut Hill Rd., stated his belief that the basis on which the proposed amendment was made is economics.

Mr. Tobin reiterated that to comply with the Federal Fair Housing Act:

1. The housing must be intended and operated for occupancy by persons 55 years of age or older.
2. At least 80% of the occupied units must be occupied by at least one person who is 55 years of age or older.

Mr. Mullaney commented on his understanding of the opposition argument. He noted that the Town Attorney indicated that the Town is not in compliance with the Federal Fair Housing Act because the housing development must be:

- a. Intended solely for occupancy by 62 year olds or older or
- b. Intended and operated for occupancy by 55 year olds or older and at least 80% of the occupied units are occupied by at least one person who is age 55 years or older.

The opposition interprets this to mean that 20% of the units don't need to have persons 55 year old persons or older and if someone less than 55 years wanted a house in the development they could argue that the developer or homeowners association do not meet the Fair Housing Act because 20% of the units can be occupied by persons under age 55 years and the Town and development by-laws discriminate against under age 55 persons by requiring 100% of the units must be occupied by persons age 55 years and older.

Mr. Formica stated that it is his understanding that the 80% indicates a trigger for an exemption from the Federal Fair Housing Act and allows discrimination in housing on the

basis of age by establishing a level to qualify for elderly housing exemption. He stated that he did not believe it was a requirement that 20% of the people will be under age 55 years of age and 80% will be over 55 years of age.

Mr. Price noted that when the percent of occupants who are 55 years of age or older reaches 80% of the occupants, the association can deny persons under the age of 55 years occupancy in a home in an qualified elderly housing development. The Town of East Lyme cannot call it elderly housing and discriminate based on age unless at least 80% of the occupants are 55 years or older. By the Town Zoning Regulations stating that at least one member of each unit must be age 55 or older, it is complying with the Act.

Mr. Patterson noted that the spirit of the original zoning change was for the elderly housing to be based on age 62 years.

Joe Kwasniewski, 67 Walnut Hill Rd., inquired why, if the Zoning Regulation is not in compliance, it took several years for this issue to be raised.

Mr. Tobin noted that this provision 3607 of the Federal Fair Housing Act is an exemption. For an exemption, you must qualify for the exemption. You qualify by having a project that is intended for persons over age 55 years and if at least 80% of the units are occupied by persons 55 years of age or older. This does not create a right in a person age 35, for example, to live in the project. The provision allows you to tell the person age 35 years that he/she does not have a right because at least 80% (100% E.L. Zoning Regulation) of the units are occupied by persons 55 years or older and the project qualifies for the exemption. It is not a set-aside for younger persons.

Mr. Formica polled the Commissions as to any questions they might have or additional information they may require.

Mr. Mullaney stated that he needed time to clarify some issues.

Mr. McLaughlin inquired how the Fair Housing Act applies to a private development that is not federally funded.

Mr. Bulmer indicated that he had questions and would need time to review the evidence.

Mr. Price and Mr. Formica indicated that they had no other questions.

Mr. Formica closed the public hearing at 9:13 PM.

III. Regular Meeting

Mr. Formica called the Regular Meeting to order at 9:14 PM

A. Approval of Minutes

Motion (1): Mr. Price made a motion to accept the Minutes of the November 5, 1998 Regular Meeting and Public Hearing as amended.
Mr. Dwyer seconded the motion.

Discussion: Referring to the Minutes on November 5, 1998, Mr. Dwyer noted under the Regular Meeting, Paragraph B, Paragraph 4, Sentence 3 should read: "He added that he did not believe wintering the RVs, would be consistent with the neighborhood and expressed concern regarding the effect on property values in the area."

Mr. Dwyer also noted in the Public Hearing I, Paragraph 1 should read "Mr. Dwyer and Mr. Price stated that they had reviewed the previous Minutes and thus were qualified to be seated".

Mr. Dwyer also noted that in the Public Hearing I, Paragraph 6 a typographical error. The third sentence should read: "This is one of the main reasons for needing the amendment."

Mr. Dwyer also noted that in the Public Hearing I, Page 6 of 7, Paragraph 3, the last sentence should read: "He stated that it is his intention not to allow such structures at this Park."

Mr. Mullancy noted that he was absent for the November 5, 1998. Mr. Price was present for the November 5, 1998 Public Hearing and Regular Meeting.

Also noted by Mr. Mullaney was a correction in the Regular Meeting, Page 3 of 4, Paragraph 3, Sentence 4 should read, "It is .13 (point one three) acres, which currently has two cabanas on it."

Vote to accept as amended: (5-0). Mr. Bulmer and Mr. Mullaney abstained.

B. Application of Robert D. Tobin to amend Section 12.1.3 and Section 25.5 of the East Lyme Zoning Regulations to modify the Elderly Housing age minimum from 62 years of age to 55 years of age.

Mr. Mullaney stated that he needed time to review the Federal Fair Housing Act, obtain clarification on how the Federal Fair Housing Act applies to the Town of East Lyme Zoning Regulations and privately funded homes and to review the options available.

Mr. Dwyer added that he had a question as to whether the Act applied to privately funded homes and federally funded homes or just to federally funded homes.

Mr. Formica referred to Mr. Spallone's Internal Memo to Edward O'Connell, Town Attorney dated July 15, 1998. In this memo he addressed two matters. (1) Does the FHA apply to all housing in the US or only to federally supported housing? (2) Is there any case law regarding the issue in hand? Mr. Formica continued by reading from this memo. "Subsection A, subdivision 2 provides that after December 31, 1968 the Act will apply to all dwellings covered by paragraph I and to all other dwellings except as exempted by Subsection B. Therefore, the Act covers all housing in the country with the exception of the exemption in Section 3603 (B)."

It was the consensus of the Commission that more time was needed to review the evidence presented at the Public Hearing. The Commission will continue discussion at the next regular meeting on December 3, 1998.

Mr. Formica indicated that review and deliberation must be focused on the material and evidence presented at the Public Hearing and that the Commissioners cannot seek additional evidence. The Commission has 65 days to make a decision.

IV. Old Business None

V. New Business

A. Correspondence.

1. Mr. Formica read a letter dated November 9, 1998 to Harold Kaplan, Chairman of the Planning Commission from Walter Prochorena, Mary and Bob Gadbois, Lucille Romanich requesting a subcommittee be formed to draft an ordinance requiring the testing of soil on agricultural land prior to the commencement of any activity requiring a permit from the Town.
2. Mr. Formica read a memorandum dated November 16, 1998 from Town Clerk Esther Williams regarding the filing of schedules of Regular Meetings for the Year 1999, agendas and minutes of Commission meetings.
3. Mr. Formica read a memorandum dated November 16, 1998 from Town Clerk Esther Williams regarding the appointment and resignation of Town officials.

B. Zoning Official Nothing

C. Planning Representative

Mrs. Kathleen Jones informed the Zoning Commission that the Planning Commission had questions regarding the proposed amendments Zoning referred to Planning on the Motor Vehicle Repairers Stations in Light Industrial Districts and the Community Bulletin Boards. She added that the Commission would be forwarding a letter to the Zoning Commission.

Motion (2): Mr. Price made a motion to adjourn the Meeting at 10:12 PM.
Mr. Bulmer seconded the motion.

Vote in favor: (7-0), Unanimous.

Respectfully submitted,



Anita M. Bennett

ording Secretary