

EAST LYME ZONING COMMISSION

Regular Meeting, July 6, 2023. 7:30 PM
East Lyme Town Hall, main room

RECEIVED FOR RECORD
EAST LYME, CT

2023 JUL 10 A 8:18

Members Present: Chairman Anne Thurlow, Norm Peck, Dave Schmitt, John Manning, Terry Granatek, Jay Ginsberg, Alt. Marc Peterson Alt.

Members Absent: Debbie Jett-Harris, Denise Markovitz, Alt.,

Also Present: William Mulholland, Zoning Official, Sue Spang, Recording Secretary, BOS liaison, Anne Cicchiello

Call to Order: Chairman Thurlow called the meeting to order at 7:30
J. Ginsberg was seated.

William Mulholland
TOWN CLERK

I. PLEDGE OF ALLEGIANCE-recited

II. PUBLIC DELEGATION:

Mark Christensen, 66 Grassy Hill Rd., is opposed to the affordable housing plan in his neighborhood, as it goes against the POCD.

Nick Menapace, 38 Hope St., would like to see more bike racks in town and wanted to know which department to talk to.

III. PUBLIC HEARINGS:

1. Application of Ricky Au, for The Spice Club, for a Special Permit for Outdoor Dining at 239 Main Street, Niantic.

The legal notice was submitted and a memo from B. Mulholland (July 6, 2023) was read into the record.

R. Au said he would put up something to separate the outdoor dining from other areas. He said there is no outdoor music, and the area would close around 8:00.

Public Comment-none

MOTION: (Ginsberg/Schmitt) to close the public hearing. Vote: APPROVED unanimously. (7:37)

2. Application of Todd Donovan, for The Clubhouse, for a Special Permit for indoor Recreation at 36 Industrial Park Rd, Niantic, Assessor's Map 26.3 lot 61.

The legal notice was submitted and a memo from B. Mulholland (July 6, 2023) was read into the record.

Todd Donovan, 23 Sandpiper Lane, gave his personal history. He met with town officials before deciding on a final plan. He noted the location had plenty of parking and is located near ABC Gymnastics, the East Lyme Middle School, and baseball fields. Most of the activity will take place after school hours until approximately 9-10 at night.

The members had concerns about the safety of school children walking from the Middle School to the facility. T. Donovan said he would work with the town to enhance the safety.

Public Comment

Mark Christensen, 66 Grassy Hill Rd., is in favor of the application.

Nick Menapace, 38 Hope St., thought it would be a good idea for the town to put in some sidewalks for safety.

MOTION: (Ginsberg/Manning) to close the public hearing. Vote: APPROVED unanimously. (7:48)

3. **Application of Michael Frisbie, for Noble Gas Station, for a Special Permit for secondary signage at 51 Boston Post Road, East Lyme, Assessor's Map 36.0 lot 61.**
The application was withdrawn.

IV. REGULAR MEETING

1. **Approval of Minutes of June 15, 2023**

MOTION: (Ginsberg/Manning) to approve the June 15, 2023, minutes as presented. (typos noted)

Vote: APPROVED. In favor-Thurlow, Manning, Schmitt, Peck, Ginsberg. Opposed-none.

Abstaining-Granatek

2. **Application of Kristen Clarke P.E., for conceptual Site Plan review, for an affordable housing multi-family residential development pursuant to CGS §8-30g at property located on Holmes Rd, East Lyme, CT, Assessor's Map 55.0 Lot 30**

The applicant has asked for the application to be continued until a special meeting on July 20, 2023.

3. **Application of Ricky Au, for The Spice Club, for a Special Permit for Outdoor Dining at 239 Main Street, Niantic.**

MOTION: (Schmitt/Ginsberg) to approve Application of Ricky Au, for The Spice Club, for a Special Permit for Outdoor dining at 239 Main Street, Niantic with the condition that a two week window to coordinate a plan acceptable to the ZEO and applicant. Vote: APPROVED unanimously

4. **Application of Todd Donovan, for The Clubhouse, for a Special Permit for indoor Recreation at 36 Industrial Park Rd, Niantic, Assessor's Map 26.3 lot 61.**

The Commission wanted to make sure there were steps taken to make it safe for Middle School children to walk from school to the facility.

B. Mulholland will work with the applicant on safety features.

MOTION: (Granatek/Ginsberg) to approve the application of Todd Donovan, for The Clubhouse, for a Special Permit for indoor Recreation at 36 Industrial Park Rd, Niantic, Assessor's Map 26.3 lot 61. Vote: APPROVED unanimously.

5. **Application of Michael Frisbie, for Noble Gas Station, for a Special Permit for secondary signage at 51 Boston Post Road, East Lyme, Assessor's Map 36.0 lot 61.**
Withdrawn

6. Pollinator Pathway Presentation

Marjorie Meekhoff, 6 Cedar Ridge Rd. is on the E.L. Conservation of Natural Resources. The Pollinator Pathway East Lyme, (PPEL) is a 501 (c)(3) nonprofit. The goal of PPEL is to restore land, remove invasives and non-native species, utilize native plants, and protect pollinator pathways. In August 2022, the Board of Selectman issued a Pollinator Pathway Proclamation, one of seven towns in Connecticut.

PPEL has several gardens in town which follow the guidelines of a pollinator pathway. They have a giving garden which donates food to homeless shelters. There are small gardens on town property such as the police station, road islands near the Industrial Park and public works sites.

M. Meekhoff said pollinators do not travel far, therefore the need for pathways.

She said that approximately 1/3 of fauna in New England is nonnative. She mentioned the red barberry which is very invasive and is home to the white footed mouse which is a host to deer ticks that carry Lyme Disease.

M. Meekhoff is looking forward to coming to the September meeting to further discuss the PPEL.

V. OLD BUSINESS-none

VI. NEW BUSINESS

1. Any Business on the floor, if any, by the majority vote of the Commission- none

2. Zoning Official-

- Soapy Noble is moving along.
- Travel center is opening in a few weeks.
- Dunkin Donuts landscaping is ongoing.

3. Comments from Ex-Officio:

A. Cicchiello reported that the Charter Revision Committee has finished its work and there will be eleven questions on the ballot in November for residents to vote on. A mailer will be sent out explaining the questions.

A Short-term Rental committee will be formed to discuss the issue.

She suggested calling the Park and Recreation Dept/Commission or Main St. Niantic, concerning bike racks.

4. Comments from Zoning Commission liaison to Planning Commission-no report.

5. Comments from the Chairman: none

VII. ADJOURNMENT

MOTION: (Ginsberg/Manning) to adjourn at 8:35. Vote: APPROVED unanimously

Respectfully Submitted
Sue Spang,
Recording Secretary

TCORS

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May 23, 2023

William Mulholland
Zoning Enforcement Officer
Town of East Lyme
108 Pennsylvania Avenue
Niantic, Connecticut 06357

Re: Landscaping Concerns
248 Flanders Road, East Lyme, Connecticut
Our File No. 259849

Dear Bill:

As you are aware, I represent L&L East Lyme, LLC in reference to its commercial shopping plaza located at 248 Flanders Road in East Lyme, Connecticut. At your request, I have investigated your concerns regarding the trimming of an evergreen buffer strip at the rear of the property and whether this work constitutes a violation of my client's approved Site Plan which was granted in 2005.

I would acknowledge that this issue has some history, prior to my representation of this client. A review of your files indicate letters sent to my client in 2013, 2016 and then 2020 regarding trimming of this evergreen buffer strip. In those letters you took the position that these plantings cannot be trimmed or altered in any way. While it appears there were discussions between your office and my client around those same times, no clear resolution of the matter is indicated in your files. My client has described to me a meeting held with former First Selectman Nickerson and yourself, likely around 2020, where a verbal resolution was reached that allowed periodic and limited trimming of this buffer strip, up to 18 inches at a time. My client continues asserts that it has a right to maintain this evergreen buffer strip and that regular trimming, pruning or cutting of these trees, provided they remain in excess of the required height per the approved Site Plan and the applicable Zoning Regulations, is permitted.

After some difficulty, I was able to locate a copy of the approved Site Plan for the project within Town Hall. Sheet LL-1 of the approved Site Plan, entitled "Landscape Plan", shows all proposed landscaping related to the project with details on both the type and size of the required plantings. The plans depict a proposed row of White Pine interspersed with Eastern Red Cedar to the rear of the shopping plaza along the interstate. The height of both species of trees is specified to be 6 feet to 8 feet tall. Landscaping Note #9 on the same sheet provides that for proposed trees and shrubs, "their sizes shall conform to the measurement specified on the drawings." Furthermore, Landscaping Note #2 defines maintenance responsibilities for the new landscaping to include cultivating, spraying, weeding, watering, tightening guys, *pruning* (emphasis added), fertilizing, mulching and any other operations necessary to maintain plant viability" for at least one year after installation. Based on my review of the final approved Site Plan, I could find no other requirements regarding the care or maintenance of installed landscaping.

The landscaping depicted on the approved Site Plan is also consistent with the applicable provisions of the Zoning Regulations. Section 24.6(E)(3) requires evergreen buffer strips along the exterior perimeter of a parcel to "shield abutting properties from headlight glare and visual intrusion and

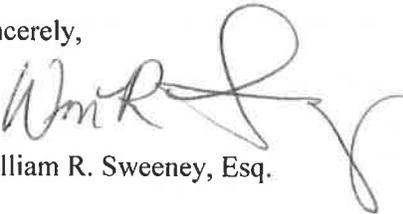
to reduce noise” and “at a minimum, the planting will consist of one row of trees 6 feet in height planted at intervals of 10 feet on center.” Furthermore, Section 24.6(F) makes clear that “all structures and areas contained within an approved Site Plan will be maintained” and that “replacement of dead trees or shrubs is required within the next planting season.” Taken together, these sections of the Zoning Regulations make clear that evergreen buffer strips, as required on a Site Plan, must be at least 6 feet high, must be maintained and must be replaced as necessary. I can find nothing in the Zoning Regulations that prohibits the regular maintenance of trees within such buffer strips, including pruning and trimming, provided the tree height remains greater than 6 feet.

Over the nearly two decades that have passed since the initial approval of the shopping plaza, the evergreen buffer strip to its rear has grown significantly. In some areas, the height of these trees approach 15 feet. Recently, my client trimmed a portion of this evergreen buffer strip to approximately 12 feet in height. This was done to clean up the appearance of the trees, which had become overgrown and unsightly, but admittedly also to maintain a reasonable sight line to the signage on the rear of the shopping center. This rear signage was approved by variance in 2006 because of obstructed views along Flanders Road. I think my client has a fair, if not also persuasive, argument that a required evergreen buffer strip should not obstruct signage that was approved due to a hardship based on visibility. It is also important to note that the height of the trimmed evergreen trees remains twice the required height as specified in the approved Site Plan and the Zoning Regulations. Moreover, the existing trimmed evergreen buffer strip continues to provide more than adequate protection against headlight glare, visual intrusion and noise and is in substantial excess of what was provided when it was installed in nearly 20 years ago.

While I can find nothing in the final approved Site Plan or the Zoning Regulations to support the position that evergreen buffer strips cannot be regularly maintained and/or trimmed, my client is sympathetic to the community’s desire to protect the appearance of its commercial districts, especially with the scale and disturbance of the DOT project that is now underway at the adjacent interstate exit. I’d like to work with your office to develop and document a workable procedure for future landscape maintenance on the property. Regular and routine maintenance of plantings, including trimming and replacement, should be permitted by qualified professionals at reasonable intervals with limited oversight. I am hopeful we can reach an accord on this issue.

I look forward to hearing from you. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Wm R. Sweeney', written in a cursive style.

William R. Sweeney, Esq.

cc: Mario DiLoreto (by email)



**WALLER
SMITH &
PALMER^{PC}**
Attorneys at Law

July 5, 2023

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Re: Zoning Approval, ZDM mixed use project on Main Street

Dear Mr. Mulholland:

You have requested our advice regarding the above matter, specifically whether the approvals issued by the East Lyme Zoning Commission ("Commission") can be rescinded. For the reasons stated below, it is our advice that the approvals issued here cannot be rescinded or revoked.

The facts as we understand them are as follows. The Applicant ZDM applied for site plan and Special Permit approval for a mixed commercial and residential development at 338-348 Main Street, in East Lyme's CB Zoning District. The architectural drawings provided to us show that the proposed development will have commercial units on the first level and 9 residential units on each of the upper two floors. On April 20, 2023, following extensive public hearings, the Zoning Commission unanimously approved the site plan and Special Permit applications. The Notice of Decision was published on April 27, and on May 10 ZDM recorded the Special Permit on the East Lyme land records. The 15-day appeal period expired on May 12, 2023.

Shortly after the appeal period expired, you received a letter from a Town resident claiming that the application violates §9.3.1 of the Zoning Regulation regarding the minimum lot size requirement for mixed use developments in the CB zone. The letter also asks you to rescind the approval. Aside from the drawings referenced above, our office has not reviewed the application, nor did we attend the public hearing. Thus, this letter addresses only the question of whether the approvals can be rescinded, and takes no position on the allegations regarding the lot size violation.

Site Plan. In Connecticut, an approved site plan may be revoked when revocation is provided for in the zoning regulations, and only after a public hearing is held. Fuller, *Land Use Law and Practice*, §50:3; see also *Voll v. City of Milford*, 54 Conn. L. Rptr. 569, 2012 WL 4040255 (Conn. Super. Ct. 2012). However, the East Lyme Zoning Regulations do not contain a provision authorizing either the Commission or the Zoning Official to revoke an approved site plan.

Special Permit. It is well established in Connecticut that an approved Special Permit creates a vested right that runs with the land. "There can be no vested rights unless and until the special permit becomes effective by recording in the land records." 848, LLC v. Zoning Bd. of Appeals of W. Haven, No. NNHCV156055150S, 2016 WL 3452145, at *5 (Conn. Super. Ct. June 6, 2016). Here, when ZDM recorded the Special Permit on the land records, that act created a vested right that cannot be revoked. "Special Permits run with the land and are not subject to time limits or expiration dates as conditions of approval." Fuller, *Land Use Law and Practice*, §50:1. Moreover, enforcement options are limited. If the conditions of a special permit are violated, the remedy is not revocation but rather a zoning enforcement proceeding since there is no statutory provision allowing revocation or expiration of special permits. Fuller at §50:1. (Emphasis added).¹ Here, when ZDM recorded the Special Permit, it created a vested, indefeasible right that the Commission has no authority to revoke.

Finally, the doctrine of municipal estoppel also prohibits rescinding or revoking the approvals in this case. Municipal estoppel prevents an agency from reversing course after taking an action (i.e. granting an approval) which is then relied upon by an applicant, and where the applicant would be harmed if the agency were allowed to reverse its decision. Here, the Commission approved the site plan and Special Permit, published a Notice of Decision, and issued a Special Permit to ZDM that was then recorded on the land records. ZDM subsequently moved forward with their application for a building permit, and has also advised that complying with the lot size regulation would make the entire project economically unviable.

Although the approval may have been issued in error, the Commission did so in its official capacity. ZDM then acted in reliance on that approval, and would suffer a substantial loss if that action was negated. Under these circumstances municipal estoppel would prevent the Commission from revoking the approval.

Based on the foregoing, it is our advice that the approved site plan and Special Permit issued in this matter cannot be rescinded or revoked.

If you have any other questions we will be pleased to respond.

Very truly yours,

Mark S. Zamarka, of
Waller, Smith & Palmer, P.C.

¹As with site plans, the East Lyme Zoning Regulations do not provide for revocation of Special Permits.