

Minutes of East Lyme Zoning Commission March 21, 2024, Regular Meeting

---

Date and Time: 3/21/2024 7:30PM to 9:30PM

Present: Members: Anne Thurlow, Chairman, Nancy Kalal, Secretary, Norman Peck, Michael Foley, Gary Pivo, Denise Markovitz. Alternates: Cathy Yuhas, James Liska. Ex-Officio, Roseanne Hardy. Staff: William Mulholland. Recording Secretary: Jessica Laroco. Town Attorney: Michale Carey.

Absent: Alternate: Sarah Susco

Location: East Lyme Town Hall Upper Conf. Room, 108 Pennsylvania Avenue

---

1. **Call Meeting to Order and Pledge**

Ms. Thurlow called the Regular Meeting of the East Lyme Zoning Commission to order at 7:30PM and led the Pledge of Allegiance.

2. **Attendance**

Ms. Thurlow called the roll and noted that Alternate Sarah Susco was absent. Alternate Jim Liska entered after the roll had been taken.

3. **Public Delegations**

a. Lisa McGowan, 33 Spinnaker, again noted that Ms. Thurlow had previously lost the election.

4. **Public Hearing**

**4-a. Continuation of Application by Kristen Clarke P.E., “for Conceptual Site Plan approval per Conn. Gen. Stat. 8-30g (affordable housing)” of a 25-unit age-restricted single- and multi-family affordable residential housing development to be located on the northerly side of Boston Post Rd on a parcel identified as 91 Boston Post Road, Assessor Map 31.0 Lot 2.**

Ms. Thurlow noted that Attorney Carey was present to represent the Town and that staff memos had been read into the record, this is the third Public Hearing regarding this application.

Attorney Geraghty noted that he agreed, in writing, to the request made by Mr. Mulholland regarding the extension of the hearing and the decision date to April 4, 2024 (Exhibit DDD).

Mr. Foley read a letter to the Zoning Commission from Attorney Roger Reynolds into the record (Exhibit UU).

Attorney Geraghty responded to the letter making the following points:

- He was disturbed by the timing of the letter because Attorney Reynolds was not present for a cross examination as it was submitted 1 day prior to what would have been the final hearing. He also noted that Attorney Reynolds failed to acknowledge the Jag Capital Drive vs East Lyme Zoning Commission, regarding the need to seek a zone change prior to a conceptual plan being overturned by the Superior Court.
- Carr vs Bridgewater case: West Law 7859569 12/3/2019, in which the court reversed the Zoning Commission’s decision and quoted such. Application only needs to be in connection with an affordable housing development.
- 8-30g Zoning Commission authorized to accept and act upon site plan whether or not it is final.

- While he cites the Landmark case correctly, that's not what the law is in the state of Connecticut.

Attorney Geraghty also made the following points:

- Regarding his previous response to Mr. Mulholland's question about a Public Hearing being required on a final application. He noted that he had been incorrect, and it is not required but it can be requested by the Commission as a condition of final approval.
- Regarding the Peak Traffic Trips Report (Exhibit OO), documents are to be used as a comparison to the original traffic report which reflected the peak traffic of an age restricted project.
- Regarding the sod farm, there are agricultural uses allowed as a right in R zone. He had incorrectly stated the sod farm would require a Special Permit, it does not, it is an as-of-right use. He asked Mr. Mulholland to confirm such.
- Mr. Mulholland declined to answer prior to reviewing the Regulations.

Attorney Carey commented that he had not reviewed the letter (Exhibit UU). He stated that the principal use of the application was intended as a residential use and the sod farm would be an accessory use, but he was unsure what it would be an accessory to and that would be relevant as it would not be an accessory use to the principal use.

Attorney Geraghty also spoke on several points:

- He submitted an Executors Deed (Exhibit VV) and a Quit Claim Deed (Exhibit WW) to show the title to the subject property.
- He noted that a previous public commentor, Andrew Davis, is the son of the owner of the abutting property who had attempted to bid on the subject property. He noted that in February 2024, abutting Mr. Davis had made a Wetlands Application to do work on his property, on which there is an easement over the subject property, however, the Wetlands Application was for work on the subject property. Mr. Davis did not have consent to make such an application. Attorney Geraghty wrote to G. Goeschel (Exhibit XX) regarding this. He noted that the public commentor, Mr. Davis, had not disclosed during the comments that his father's attorney is the current First Selectman (D. Cunningham).
- He introduced a letter from A. Carlson, (Exhibit YY) regarding the Henry Davis comments.
- He noted that the Applicant had requested a response from G. Goeschel regarding the January 2024 Wetlands Application for soils testing (Exhibit AAA).
- He responded to the public comments and submitted his response in writing (Exhibit BBB).
- He noted that the Applicant does not intend to include a sod farm on the final application.

Timothy May, Applicant's Engineer, showed the Commissioners an enlarged revised site plan and pointed out various points (Exhibit CCC) and indicated that no sod farm was on the site plan.

Ms. Kalal asked after the nursery on the application.

Attorney Geraghty indicated that there was no sod farm and no nursery on the revised site plan.

Mr. May indicated that the design parameters went above and beyond the requirements for a conceptual site plan.

Mr. Foley asked about the traffic and access to the property. He noted that because the exit is shown to be a right only turn, the Applicant must recognize that a left turn would be dangerous. He wondered, if

someone wanted to go left, where would they turn around as there is no U-turn at the nearest intersection.

Mr. May noted that the traffic report indicated that is not an overly dangerous section of road and suggested that traffic could turn left at the intersection, continue toward Costco, and turn left onto I-95.

Mr. Foley then wondered, if that were true, why would there need to be a right only exit.

Mr. May responded that the sight lines were the reason.

Mr. Foley asked if a left turn into the drive would cause a problem as it is not yet two lanes.

Mr. May responded that even at a peak time it would not be a large amount of traffic in and out of the project.

Mr. Foley asked if Mr. May knew of any other multi-family development in town or in New London County that had a one-way exit.

Mr. May did not know.

Mr. Foley noted that perhaps this is a uniquely bad spot.

Attorney Geraghty stated that the design is looking to avoid creating a dangerous exit situation.

Ms. Markovitz asked if the CT DOT would have to sign off on this project.

Mr. May and Attorney Geraghty both responded "Yes".

Mr. May stated that the design was made in accordance with what they perceived would be approved.

Mr. Mulholland asked if the Applicant had been in contact with the CT DOT.

Mr. May responded "No".

Mr. Pivo asked if the CT DOT had approved of other "porkchop" exits.

Mr. May responded that the nearby Tri-Town Plaza had that type of exit.

Ms. Kalal wondered that the Traffic Study had not happened on a weekend in the summer when traffic is particularly heavy.

Mr. May stated that weekends would be lighter on a normal traffic study, but that perhaps it should be included.

Mr. Pivo questioned the site distance for stopping, and what the design speed for stopping was, not the speed limit, but the actual field observation of the speed, specifically the 85<sup>th</sup> percentile for speed which is the CT DOT Highway Design Standard. He noted that his observation in the field was that people exceed the speed limit as they approach. He wondered if a longer stopping distance and a longer site distance should be considered.

Mr. May answered the posted speed limit is 35 MPH and that was what his design accounted for, additionally, he noted that using an average could give skewed numbers in the other direction as stopped or extremely slow-moving traffic would give much lower numbers to be factored in. Mr. May indicated he used the established speed limit for his design.

Mr. Pivo stated that he believed Mr. May was misquoting what the CT DOT Highway Design Manual stated as to how to establish what the proper design speed should be. He wondered if there was a feasible solution should it be determined that the site line design used is wrong.

Mr. May answered that he would have to look at physical obstacles and heights for headlights, specifically for nighttime as that is typically the hardest time judging distances. He explained how to determine that.

Attorney Geraghty stated that he believed they were getting ahead of themselves as the CT DOT would have to be contacted for approval and that had not been done yet, and that could change a site line.

Ms. Kalal noted that, assuming there are 8 buildings as indicated on the site map, there would be 8 septic systems and wondered how a truck would get in to pump them out.

Mr. May showed the Commission on the map where they would be located and how a truck would get to them.

Ms. Thurlow asked for Public Comment.

Deb Moshier-Dunn, of Save the River Save the Trees, asked that the Town Attorney speak to the Commissioners.

Town Attorney Carey stated that he is neither for nor against the application and made the following points:

- He anticipated being able to respond to the legal arguments at the next meeting.
- He had researched the foreclosure of the property and had discovered several pleadings in the case and wanted to share some findings he had found; 1. A memorandum EL Land Trust in support to reopen the judgement and extend the sale date of the property (Exhibit EEE) 5/4/2023, the desire to “preserve this environmentally sensitive property that has significant frontage on Latimer Brook which discharges into the Niantic River less than ½ mile from the property” and 2. On 12/13/2022 EL Land Trust memorandum responding to motion of strict foreclosure (Exhibit FFF)“seeking to preserve the parcel due to its important environmental attributes including several hundred feet of frontage on Latimer Brook (spawning ground for certain engendered fish species)...”

Mr. Foley asked if the information was relevant to the title and Attorney Carey responded that it was not, however he found it interesting that the EL Land Trust was arguing recently in court over the environmental importance of the parcel and its intention to preserve and maintain it going forward.

Mr. Foley asked if the Court had ruled and Attorney Carey noted they were denied though the Court was not ruling on the environmental value of the property, it was dealing with the foreclosure and the motions sought to extend the time before which the foreclosure would become final and before which a sale would occur so that the EL Land Trust could gather the necessary funds to over the outstanding mortgage.

Attorney Carey’s only question regarding title was that at his last check, the previous day, the Assessor Filed Card still indicated the parcel title to be held by Tytla.

Mr. Pivo wished to understand Commission’s the decision criteria, specifically, it was to determine if the project was feasible (capable of being executed).

Attorney Carey responded yes, however, he cautioned that because this application had been brought in under the 8-30g, the substantial burden of proof on a denial would be on the Commission and the likelihood of adverse impacts on interest of the State that can be considered to be more important than affordable housing. He noted that environmental is one of those issues that in a proper case with proper evidence can be grounds for a denial, and traffic is another. He gave a case example of a denial in North Stonington that was successful in the denial on appeal because of traffic and safety. Additionally, Attorney Carey stated he was unsure why the Applicant chose to put this application in under 8-30g when the EL Zoning Regulations had a Section to deal with conceptual site plans. He noted that the Commission's decision criteria they need to approach it as: if the application is denied or approved with modifications that the Applicant does not agree with, and they file an appeal, the Commission must be prepared to defend the appeal based on the previously described criteria.

Mr. Pivo took feasible to mean that the concepts presented were capable of preventing harm to the substantial public interests that the Commission may legally address so they don't outweigh the contribution made to affordable housing. Additionally, he wondered if there was not sufficient evidence to make a decision regarding the traffic site line issue, how could they?

Attorney Carey agreed with Attorney Geraghty that the Applicant did not have to apply for a zone change to apply under 8-30g and because they are not applying for a zone change, the conceptual site plan is not required, but that there would in effect be a zone change should the final application be approved.

Mr. Pivo stated that he remembered Attorney Geraghty saying that certain things are not required to be provided with a conceptual site plan which implies there is a list of things that are required and wondered what those things were. He thought it should contain water quality, traffic protection, endangered species, or stormwater management for example, and if these things were not provided then how could the Commission determine if the concept was feasible. He noted that he was bothered by the idea of approving something based on getting information down the road because it was not required at this point. He thought the concept should be fully demonstrated in order to prove that it was feasible. He questioned if there was a limit to the types of information the Commission could require when reviewing the material for a decision and is that information clear.

Attorney Carey stated that under 8-30g it is not clear, there is no description as to what must be required, and in the cases that Attorney Geraghty had cited, which were difficult to interpret, the judges use the terms preliminary and conceptual site plans interchangeably when they are in fact different. He will try to get a better outline for the Commissioners for the deliberations. He noted that a denial doesn't stop the Applicant from coming back for a final site plan but that an approval doesn't mean the Applicant has to include all the requests or suggestions the Commission puts forth in the approval. Getting approval of a Special Permit and a Site Plan defines a project upon approval, that is not the case in this conceptual application, and because the burden of proof is so steep on the Commission to prove that a denial is appropriate, it makes it hard to answer the question.

Mr. Pivo noted that he had done his own research and made his own findings, separate from the Public Hearing, which he believed would answer those questions. He wished to introduce them into the record as evidence now as he could not do so once the public hearing closed. He asked if he could submit, and the Commissioners could view on their own.

Attorney Carey indicated that the Applicant would need to know exactly what Mr. Pivo would opine as an expert and submit as evidence so that they could respond to it.

Mr. Foley wondered, as he had previously, what the value of the application is, as it would not matter whether they were approved or denied as neither decision would stop the Applicant from submitting a final site plan for consideration. He indicated that aside from giving the property a temporary boost in value, he saw no value in making a decision either way.

Attorney Carey noted that there was value in an approval or a denial that does not have insurmountable negative basis in terms of going forward with a final site plan. Did not know if the Applicant could argue that the preliminary site plan was approved if the Commission wanted to change some design aspects on a final site plan. He thought the value would lie in if there was some large problem in the application of the conceptual plan, the Applicant would know that before spending large amounts of money on a final site plan.

Mr. Peck suggested that Mr. Pivo's documents be given to the Commission and the Applicant and that the Commission go on a site visit to the property. He thought because of the environmental and traffic issues involved the Commission should see the site and the layout, see the slope, to experience the traffic.

Attorney Carey recommended doing it as a Site Walk, having it open as a meeting so that the public could attend, prior to the closing of the hearing, would be appropriate.

Ms. Thurlow asked if this was something the Applicant would entertain.

Attorney Geraghty consented as a Site Walk, for the full commission and the public, with an agenda, he preferred it be on a weekend.

There was discussion about details of the site walk. The following was decided:

- Markers would be put out indicating placement of buildings, roads, etc.
- No discussion by Applicant, Commission, or Public until the next Public Hearing
- Site Walk scheduled for Friday, March 29, 2024, 10:00AM, all present Commissioners (except Ms. Markovitz), Applicant Representative, and Mr. Mulholland agree to attend. Mr. Mulholland will email confirmation of date and time.

Ms. Thurlow asked the following procedural question: At the previous 3/14/2024 meeting, during the break, Mr. Pivo approached the Applicant's Engineer, Mr. May, and had a private discussion, should that discussion be entered into the record as part of the hearing to protect the integrity of the hearing?

Mr. May stated that Mr. Pivo had asked about the rainfall data, Mr. Pivo was referencing numbers regarding the range of rainfall data to extrapolate out and there is a certain set of numbers Mr. May is required to use but that there is a range and he wondered why Mr. May was not using the upper end of the range. Mr. May's answer was that it was not required and that it would influence the outcome but there was a prescriptive design methodology associated with using the NOA data. He had explained this to Mr. Pivo and his use of modeling used for CT.

Ms. Thurlow asked Mr. Pivo to confirm.

Mr. Pivo confirmed and added that he had also pointed out that the CT Stormwater Quality Manual stated that at the discretion of the local jurisdiction, the higher number can be used in order to anticipate climate change and that the 90<sup>th</sup> percentile was typical rather than the median proposed.

Ms. Thurlow asked if that was the information Mr. Pivo wanted to submit to the record.

Attorney Geraghty stated the following:

- Reconfirmed his acceptance of the public hearing and decision being extended to April 4, 2024.
- He objected to the submission of documents from Mr. Pivo, noting that it was not permitted. The evidence to be submitted to the record should come from Staff, the Applicant and the Public. He stated that Commissioners should not be going out on their own and making determinations. He pointed to the possibility of Commissioners “facing off against one another” over the submission.
- Regarding conceptual site plan requirements; affordability plan, general schematic, water/sewer availability
- The point of a conceptual site plan? Cost. It’s cheaper to submit less, find out if it could work and then spend a bunch of money figuring out how rather than spending all the money up front to find out a simple no could have saved the applicant. The Applicant must come back with a site plan that must resemble the conceptual plan and must address the concerns presented by the Commission to the extent they are allowed to consider under 8-30g. He noted that though the Commission may not like the pork chop design but that does not mean the project is not feasible. There is still safe access to the exit, even if it is only a right turn.

Ms. Thurlow asked Attorney Carey to speak regarding Mr. Pivo submitting expert evidence as a commissioner.

Attorney Carey stated that it wasn’t necessarily a conflict of interest but that in his 43 years he had never seen it done. He said that if a commissioner had a particular expertise, he had to make it known and he could use that to make his own decision, and that it would be more problematic than not to have a commissioner introducing evidence on their own. He noted that, if allowed, Attorney Geraghty would then be entitled to cross examine the commissioner. Mr. Pivo could recuse himself as a commissioner, relinquish his vote and ability to deliberate, and submit evidence as a member of the public. He suggested erring on the side of caution and not allowing Mr. Pivo to submit evidence.

#### **DECISION MOTION 1**

Ms. Kalal moved to continue the public hearing and decision to April 4, 2024 at 7:30PM, and to hold the Site Walk visit to 91 Boston Post Road on March 29, 2024, at 10:00AM.

Mr. Foley seconded the motion.

Motion passed 6-0-0.

#### **5. Regular Meeting**

##### **5-a. Approval of Minutes of March 14, 2024, Special Meeting.**

#### **DECISION MOTION 2**

Ms. Kalal moved to approve the minutes of March 14, 2024; Special Meeting as presented.

Ms. Markovitz seconded the motion.

Mr. Peck abstained.

Motion passed 5-0-1.

#### **6. Old Business**

##### **6-a, 6-b.**

The subcommittees have not met but the discussion with Mr. Mulholland began, and these will meet.

Mr. Peck noted that the previous motion to pursue the word change in the EL Zoning Regulations from shall to may has been tabled.

**6-c. Affordable Housing Update**

Attorney Bleasdale is currently out with Covid.

**6-d. Meeting Start Time Discussion**

There was discussion about the start time being changed to 7:00PM as with other commissions and whether commissioners could get there earlier.

**DECISION MOTION 3**

Ms. Markovitz moved to change the start times of the East Lyme Zoning Commissions meeting to 7:00PM from 7:30PM.

There was no second.

Mr. Peck, Mr. Foley, Ms. Kalal, and Ms. Thurlow were against the motion. Mr. Pivo abstained.

Motion did not pass 1-4-1.

**7. New Business**

**7-a. Application of Heather Gardner, buyer, for Coastal Area Management (CAM) Review for property located at 7 North Dr OGBA, for Site Plan for Zoning Compliance and General Development.**

**TASK** Mr. Mulholland will schedule.

**7-b. Application of Thomas Gardner, buyer, for Coastal Area Management (CAM) Review for property located at 11-13 North Dr OGBA, for Site Plan for Zoning Compliance and General Development.**

**TASK** Mr. Mulholland will schedule.

**7-c. Any business on the floor, if any, by the majority vote of the Commission**

None

**7-d. Zoning Official**

None

**7-e. Comments from Ex-Officio**

None

**7-f. Comments from Zoning Board Liaison to the Planning Commission**

Ms. Kalal will attend the April 9, 2024, meeting.

**7-g. Correspondence**

None



**7-h. Comments from the Chairman**

Ms. Thurlow noted that the STR committee will have a status report to BOS and will get copies to the Zoning Commission.

**8. Adjournment**

**DECISION MOTION 4**

Ms. Markovitz moved to adjourn the East Lyme Zoning Commission Regular Meeting at 9:30PM.

Mr. Foley seconded the motion.

Motion passed 6-0-0.

Respectfully submitted,

Jessica Laroco

Recording Secretary