

Ex "KKK"

Geraghty & Bonnano, LLC

Attorneys at Law

MICHAEL S. BONNANO
JOHANNA McCORMICK
PAUL M. GERAGHTY*
MARK A. DUBOIS†
WILLIAM J. RIORDAN

*Also Admitted in New York
† Board Certified, Trial Advocate

April 4, 2024

Hand Delivered
Anne Thurlow, Chairman
Town of East Lyme Zoning Commission
108 Pennsylvania Avenue
Niantic, CT 06357

Re: Conceptual Site Plan
8-30g Affordable Housing Application
91 Boston Post Road

Dear Chairman Thurlow,

I write to address the above referenced application submitted by my client Kristen Clarke P.E. and several matters of concern I have with the manner in which this application has been considered and administered:

1) The Legality of Holding a Public Hearing for this application

As we have set forth in the record of this application, enclosed as Ex. A, at no time did the East Lyme Zoning Commission vote to hold a Public Hearing on this application nor did it have the statutory or regulatory authority to do so. While the Commissions legal counsel attempted to address this matter in his February 23, 2024 email to Bill Mulholland, record Exhibit R, the email failed to address the substantive issues that I had set forth to you and Mr. Mulholland on February 21, 2024 wherein I addressed that the Commissions unauthorized and therefore legally deficient scheduling of a public hearing that was, in our view, an attempt "... to change the statutory burden of proof in 8-30g applications." In response to Attorney Carey's email to Mr. Mulholland February 23, 2024 I offer the following response for the record;

- **Nothing in the Carey email supports the proposition that a Public Hearing can be scheduled or held without an affirmative vote of the Commission.**
- **The referenced "Fuller 18.1, n12 and n.13" are not at all dispositive of my claim regarding the lack of an affirmative vote to schedule and hold this public hearing. Moreover, the case citation "*Gregory Belanger et al v. Planning and Zoning Commission of the Town of Guilford Case No. CV 980413230S* actually reflects the Commission in that case "voted to hold a public hearing" in direct contradiction to what occurred with my clients application.**

In the final analysis of this issue the statutory requirement for a conceptual site plan as stated in a Superior Court Case involving this very Commission (*Landmark Development et al v. East Lyme Zoning Commission* 2018 WL 6120204, (Berger, J. September 18, 2018, n.7) in which the Court described a conceptual plan as “a common sense land use tool providing for staged planning and early review and benefits all parties by allowing for a determination of whether a proposed project is feasible without the expenditure of time and money by town staff and town volunteers as well as residents interested in the review process. “ Instead, at this juncture, and despite an extension granted by the applicant to the 65 day decision dead line set forth in Conn. Gen. Statute 8.7 d (b) there has yet to be any collaboration by this commission with my client who has instead been subjected to addressing irrelevant, untimely, and false public comments concerning the title to the property, alleged claims regarding the will of the prior owner, matters outside of this commissions jurisdiction involving a settlement between the Town and parties unaffiliated with this transaction, legal opinions offered by the public amongst other premature issues including generalized concerns regarding environmental and traffic matters none of which are required to be addressed as part of a Conceptual Site Plan approval.

2) Legal Requirements for Conceptual Site Plan Approval

Contrary to claims that have been asserted to date, the governing statute, Conn. General Statute 8-30g, and case law undisputedly provide for approval of a conceptual site plan approval outside of the context of a Zone Change in contradiction to claims made by Commissioner Pivo and the Special Town Counsel. As you are aware a decision from the Appellate Court captioned *Jag Capital Drive v. Town of East Lyme Zoning Commission (2016) AC 37924*, which has been submitted to the record of this application rather conclusively demonstrates this fact;

“Section 8-30g is not part of the traditional land use statutory scheme. Traditional land use policies did not solve Connecticut’s affordable housing problem, and the legislature passed §8-30-g to effect a change”

“Section 8-30g does not allow a commission to use its traditional zoning regulations to justify a denial of an affordable housing application, but rather forces the commission to satisfy the statutory burden of proof.”

“In sum, zoning compliance is not mandatory prior to approval of an affordable housing subdivision application. The burden of proof in §8-30g(g) takes away some of the discretion that local commissions have under traditional land use law and allows the reviewing trial court to effect a zone change if the commission cannot satisfy the statutory requirements for its denial of an application.”

In addition, the claims made by Attorney Roger Reynolds in his March 21, 2024 correspondence that “ ...there is no authority in the ...affordable housing statute to grant or deny such a site plan independently of a zone change application...” is also demonstrably incorrect involving , interestingly, the very same issue raised by Mr. Pivo and Special Town Counsel Carey and I would direct the Commission to the following case law that rebut these claims;

- **Landmark Development LLC et al v. East Lyme Zoning Commission**
Case No. LND CV 15606432S

*“*3 The intervenors argue that under the regulation the plaintiffs’ preliminary site plan is not a final appealable decision. The plaintiffs assert that they presented the zone change request with a preliminary site plan to establish the boundaries of the proposed development before spending “hundreds of thousands of dollars” on environmental, engineering and other development requirements.*

Section 32.9 is not determinative of this court’s jurisdiction. Under General Statutes 8-8g(f), “[a]ny person whose affordable housing application is denied, or is approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development or the degree of affordability...may appeal such decision” ... “[T]he right of appeal is purely statutory. It is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met.” Accordingly, the motion to dismiss is denied.

IT IS NOTEWORTHY TO POINT THAT THE INTERVENOR IN THIS CASE WAS NONE OTHER THAN CONNECTICUT FUND FOR THE ENVIRONMENT, WHOM WAS REPRESENTED BY ATTORNEY ROGER REYNOLDS.

- **John F. Carr Jr. v. Bridgewater Planning and Zoning Commission**
Case No. HHDC CV 196108140S

**5 As the court understands the defendant’s position on this issue, it is twofold. First, the defendant argues that the only place in our zoning law that a conceptual site plan is recognized is in 8-30g(e) and that exists only (a) if the defendant has enacted a regulation which authorizes it and (b) if the defendant requires that it be included in an affordable housing application. Accordingly, the defendant posits that because there is no such regulation, the conceptual site plan has no legal significance separate and apart from the statute. THE COURT DISAGREES.*

Second, the defendant asserts that a conceptual site plan does not exist under our land use statute scheme because the only forms of planning and zoning approvals recognized in Connecticut are applications for (1) zone change; (2) zoning amendments; (3) building permit/certificate of occupancy; (4) site plan; (5) special permit; (6) subdivision. On the contrary under our case law, an affordable housing application may take any form as long as it meets the definition of an affordable housing application as set forth in §8-30g (a) (2). Because an affordable housing application is sui generis as stated above, all that is required is that the application be in connection with an affordable housing development which applies to a specific piece of property and which meets the affordability requirements as assisted housing or set aside development as those terms are defined in the statute, Stefanoni v. Department of Economic and Community Development, 142 Conn.App.300,310 (2013). Therefore,

under Sec. 8-30g a zoning commission is authorized to accept and act upon a conceptual site plan whether or not its filed pursuant to subsection (c) of the statute.

- Kaufman v. Danbury Zoning Commission, supra, 232 Conn. 141

“8-30g does not independently require an affordable housing developer to submit to the commission, at the time of his initial application in connection with an affordable housing development any more detailed plans than an applicant who requests a zone change”

ACCORDINGLY, ATTACHED AS EX. B IS A COPY OF SECTION 28 OF THE EAST LYME ZONING REGULATIONS WHICH IDENTIFIES THE REQUIRED DOCUMENTS TO BE SUBMITTED WITH A ZONE CHANGE REQUEST.

In addition, I would note the requirements for obtaining conceptual approval were recently deleted from the East Lyme Zoning Regulations. See, Exhibit C hereto, which is the revised Town of East Lyme Zoning Regulations Section 32 amended through December 12, 2023.

The Conceptual Site Plan requirements of applicants, contrary to the claims of Special Town Counsel, can be found both within the 8-30g statute and case law arising from it. See; *Landmark Dev. Grp., LLC v. E. Lyme Zoning Comm'n*, No. HHBCV064016813S, 2011 WL 5842576, at *36 (Conn. Super. Ct. Oct. 31, 2011). Here the court held the Commission regulatory requirements for a conceptual plan were not necessary to protect the public interest at the conceptual stage so long as they were required for the final application. The Commission regulations for conceptual site plans were far more extensive than those required by C.G.S 8-30g.

The specifics items to provided to the Commission for Conceptual Site Plan approval consist of the following;

- 1) An Affordability Plan
- 2) The traffic circulation **WITHIN THE PROPERTY.**
- 3) The General Locations of sewer and water.
- 4) The general placement of proposed buildings on the property

I note for the record that each of these items have been provided to the Commission as part of its pending application.

While we have made clear no zone change is being requested nor is it legally required this Commission **DID** have, until December 12, 2023, a provision in its regulations allowing conceptual approval as part of a re-zone application under to an “Affordable Housing District”.

See Ex. C. We note for the record however that Section 32.9 of the East Lyme Zoning Regulations was intended to be site specific to the proposed Landmark Development/Oswegatchie Hills Affordable Housing project which encompasses over 200 acres of land. It does, however, provide insight into the scope of submissions that this commission requires to be presented for a conceptual site plan approval which were identified as follows:

- a) An A-2 Property Line Survey;
- b) Topographical Contours at 10 foot intervals;
- c) Locations of wetlands, water courses, and slopes in excess of 25%;
No D in the original { added by author }
- e) General Layout of all proposed buildings and structures;
- f) Areas proposed for Open Space and/or recreational purposes

Each of these items have also been provided to the Commission as part of my clients pending application. I further note that the letter d) was omitted from the prior Conceptual Site Plan requirements.

It appears to the applicant and the undersigned that at least some of these Commissions members are seeking to expand the requirements of what is required at this stage of the process. Mr. Pivo, by way of example and not limitation, is attempting to require the “concept” to be “feasible” (3/21/2024 minutes page 5) and requiring “..water quality, traffic protection, endangered species and stormwater management “...He thought that the concept should be fully demonstrated in order to prove that it was feasible”...”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 do not outweigh the contribution to affordable housing”. Settled case law holds that none of this information is required at this stage and would refer you to, importantly, the *Landmark Development et al v. East Lyme Zoning Commission* case docket number LND CV 156064232S which states in pertinent part;

“Pursuant to 8-30g(g), the appeal regarding the proposed zoning amendments is remanded to the commission to adopt amendments to the town’s zoning regulations consistent with this opinion and incorporating Landmark’s proposed amendments, WITH THE EXCEPTION OF REQUIRING, BEFORE A FINAL APPROVAL OF AN AFFORDABLE HOUSING APPLICATION, THAT AN AFFORDABLE HOUSING APPLICANT PROVIDE, IN THE CONCEPTUAL, PRELIMINARY OR FINAL SIE PLAN, ADEQUETE INFORMATION... THAT WOULD ALLOW THE COMMISSION TO ADEQUETLY EVALUATE THE PROPOSED DEVELOPMENT TO ENSURE ITS HARMONY WITH THE RELEVANT ENVIRONMENTAL, DEVELOPMENTAL, HEALTH AND SAFETY CONSIDERATIONS AND OTHER CONSIDERATIONS WHICH IT MAY CONSIDER.”

In short but in substance in a prior decision from the Superior Court involving the East Lyme Zoning Commission the Court ruled that this Commission was prohibited from asking for the very items that Mr. Pivo currently seeks as part of my clients Conceptual Site Plan Application.

For a conceptual approval the Commission may not consider matters such as these until the final approval. See, Landmark Dev. Group, LLC v East Lyme Zoning Commission 2011 WL 5842576 at 35, (Fazzini, J., October 31, 2011)

One definition of Conceptual is “to clarify concepts, organize ideas, and identify relationships with which to frame a study. In this application my client has provided much more than is legally required to obtain Conceptual Site Plan approval. This includes the following;

1. The proposed site plan showing the general locations of the existing and proposed buildings, parking areas, community septic systems and drainage facilities
2. An A-2 Topographic Survey (2-ft topo intervals) which also plots the location of Inland Wetlands and Watercourses, existing drainage and other easements, locations of flood zones amongst other data.
3. An affordability plan and an amended affordability plan for the proposed set aside development including pro forma rental calculations
4. A Design Report and an Amend Design Report that included a Site Context Plan, a National Diversity Database Report from the State of Connecticut DEEP, specific easement information on utilities and the State of Connecticut Department of Transportation.
5. Confirmation from the Towns Utility Engineer regarding the availability of Municipal Water Service.
6. A Traffic Report and Analysis which included trip generation data and crash history.
7. A Traffic Sight Line Plan.
8. A preliminary Storm Water Management Report.
9. A Wetlands Delineation Report and a Wetlands Function and Value and Impact Assessment Report
10. Proposed Open Space Areas.

As we have noted for the record the record the Public’s Interest in health, safety or other matters is protected by the fact that the following will need to occur prior to a Final Site Plan Approval application can be filed;

- 1) Community Septic System Approval is obtained from the Ledge Light Health District and State of Connecticut Department of Health.
- 2) The East Lyme Inland Wetlands Agency provides a permit for work in any upland review area.

3) The Town Engineer approves the erosion and sedimentation control plan and the stormwater management plan.

4) The State of Connecticut Department of Transportation approves the updated curb cut/traffic plan.

Respectfully Submitted,

Paul M. Geraghty, Esq.

EXHIBIT A

**Geraghty &
Bonnano, LLC**
Attorneys at Law

MICHAEL S. BONNANO
JOHANNA McCORMICK
PAUL M. GERAGHTY*
MARK A. DUBOIS*
WILLIAM J. RIORDAN

*Also Admitted in New York
† Board Certified, Trial Advocate

February 21, 2024

Via Regular Mail
Anne Thurlow, Chairman
Town of East Lyme Zoning Commission
108 Pennsylvania Avenue
Niantic, CT 06357

Via email to billm@eltownhall.com
William Mulholland, Zoning Official
Town of East Lyme
108 Pennsylvania Avenue
Niantic, CT 06357

Re: 91 Boston Post Road
Conceptual Site Plan Application

Dear Chairman Thurlow and Mr. Mulholland,

As you each are aware I represent Kristen Clarke P.E. who is the applicant on the above referenced application.

I write to address the following concerns I have discovered with regard to the above referenced application submitted on January 17, 2024, and accepted by the East Lyme Zoning Commission ("the Commission") at its January 18, 2024 regularly scheduled meeting pursuant to Conn. Gen Statute 8-7 (d) subsection (c):

- 1) A) The Commission has scheduled a Public Hearing, (Ex. A), for my client's application despite, as is well known by the Commission and Mr. Mulholland, that there is no statutory authority under Conn. Gen. Statute 8-30g ("8-30g") to hold a Public Hearing on a conceptual site plan approval nor are there any rights to do so under this Commission's own regulations. In this regard I would direct you to Section 32.9 of your regulations, (Ex. B), which provides the discretion for the Commission to hold a Public Hearing for a *Preliminary Site Plan or a Final Site Plan Application* but not a *Conceptual Site Plan* a fact that clearly defers to and is consistent with 8-30g. In addition, I would note that the Commission at neither its January 18, 2024, nor subsequent meetings on February 1, 2024, and February 15, 2024, did the Commission vote, as is legally required, to hold a Public Hearing on my client's application. It would appear therefore that the Commission is attempting to change the statutory burden of proof in 8-30g applications.

38 GRANITE STREET, PO BOX 231, NEW LONDON, CT 06320

WWW.GERAGHTYBONNANO.COM TELEPHONE (860) 447-8077 / FAX (860) 447-9833

B) The review standard for a conceptual site plan is substantially less rigorous than for a preliminary and or final site plan. By conducting a public hearing, the Commission is allowing an element not contemplated by C.G.S. 8-30g, which is intended to allow the applicant to present the concept of what is proposed for approval by the Commission without the level of detail otherwise required in the final approval process. Nothing in the conceptual process eliminates the requirements otherwise required for a final approval.

Accordingly, I am requesting the Commission place my clients on the regular agenda of the Commission's March 7, 2024, meeting and withdraw/cancel the Public Hearing notice. Alternatively, given the factual background referenced herein I am respectfully insisting you provide immediately to me in writing and for the record of this matter the statutory authority you are relying upon to ignore 8-30g and the Commission's own regulations.

2) Despite the passage of nearly five (5) weeks my client nor I have yet to see a single staff comment on our submissions.

3) I am still waiting for Mr. Mulholland to schedule the meeting requested with Town Staff reviewing the application submission that was requested on both January 17, 2024 and January 31, 2024.

As a matter of due process and fundamental fairness to the applicant I am requesting your immediate attention to these matters.

Please make this correspondence a part of the record of my client's pending application.

Sincerely,



Paul M. Geraghty

Cc Kristen Clarke P.E.

Jessica Laroco via e-mail jlaroco@eltownhall.com