

TO: EAST LYME PLANNING COMMISSION
FROM: TOWN ATTORNEY'S OFFICE
DATE: MAY 15, 2025

RE: PROPOSED CHNAGES TO SEC. 4 OF THE REGULATIONS.

This memorandum is a follow up to advice concerning these proposed regulation amendments provided by the Town Attorney's Office on May 22, 2024, August 6, 2024, and January 31, 2025. Copies of the previous advice provided by the Town Attorney's Office are attached for the Commission's ease of reference. We are also attaching a copy of the proposed regulations provided to us on January 24, 2025, to ensure the Commission is looking at the same version of the draft when reviewing these comments.

Sec. 2

Draft definition of "Significant Effect" is incomplete but appears to be headed in the correct direction by identifying specific criteria by which it can be determined whether something qualifies as a "significant effect." Town Attorney's Office recommended adding a clear definition of "Significant Effect" in its August 6, 2024 memorandum to the Planning Commission.

Sec. 4-2-3 (k)

Adds Environmental Impact Statement ("EIS") to the list of required reports. No comments.

Sec. 4-14-1

Changes reference from Environmental Review Team Evaluation to EIS. No comments.

Section 4-14-2

This section is problematic:

- It appears to be redefining "significant effect," but the draft regulations indicate the Commission intends to define the term in Sec. 2 (see above). The Commission should choose one place in the regulations to define "significant effect" and thereby avoid internal conflict in the regulations.
- This section defines "significant effect" as a "major impact," which does not provide criteria or guidelines for what a "major impact" is. The terms

significant and major can both be subjective and it would be better to provide a more definite and objective definition by which significant or major can be measured. A comment on this issue was included in the Town Attorney's Office's memorandum dated August 6, 2024. (Copy Attached). We again recommend that "significant impact" be defined by a set of definite criteria to avoid disputes over the current vague language.

- This section provides an "including but not limited to" list of examples of actions that could "serve short term to the disadvantage of long-term environmental goals." The Commission should be aware that as drafted, this list of examples applies only to this category and does not further define "major impact".

Sec. 4-14-3

This section is problematic. It appears to set out another framework by which to determine "significant effect." It is also drafted in a manner that implies that the Planning Commission is making an initial determination of the significance before triggering some unidentified subsequent action or requirement. Does the Commission perform a pre-application review to decide if something is significant thereby triggering a requirement to produce the EIS and refer it to the Conservation Commission for review? The Commission should be aware that adding an additional layer of determinations like this could impair its ability to timely act on applications in accordance with mandatory statutory deadlines, which would cause applications to automatically be approved.

Sec. 4-14-4

This section is problematic. It appears to provide another definition or framework for determining "significant effect." This section also implies that an application or hearing has already occurred to gather evidence prior to an activity being determined to be a "significant effect" because it refers to "substantial evidence in the record." This suggests one of two things. Either (1) some kind of preliminary application is required for determining "significant effect" for which the Commission will gather evidence and make a determination thereby triggering an EIS requirement for the final application, OR (2) the Commission is envisioning that it will make the "significant effect" determination in the midst of considering an application and may direct the applicant to produce an EIS while the application is pending and, once received refer the application to the Conservation Commission. The problem with the first possibility is that it is not clear the Commission has the legal authority to require this process. If it is the second possibility, this presents a serious threat to the Commission's ability to act on applications in a timely manner and in compliance with statutory deadlines. The failure to meet statutory deadlines will result in applications being automatically approved.

Sec. 4-14-5

The purpose of this section is not clear. It refers to “such actions,” but it is not clear what the “actions” are that are being referenced.

Sec. 4-14-6

This section follows a recommendation previously made by the Town Attorney’s Offices memorandum of August 6, 2024, by removing the language at the end stating that the EIS must be submitted prior to the Commission approving the application. Should this section be removed entirely given that the Commission is proposing adding the EIS requirement to Sec. 4-2-3 (k)? The current version of 4-2-3 makes the reports listed in it mandatory unless waived by the Commission, so it may not be necessary to include a separate requirement in Sec. 4-14-6. Including the requirement in both places raises questions regarding whether the Commission can really waive the requirement as permitted in Sec. 4-2-3 if it is then required again by separate language in 4-14-6 without the authority for a waiver.

Numbering Issue “Sec. 14-14-5 to 14-14-7”

The draft appears to have a section numbering error beginning after Sec. 4-14-7. The last three sections are labeled “14-14-5, 14-14-6, and 14-14-7.”

Sec. 14-14-5

Provides for referral of EIS to Conservation Commission for advisory report. The Commission should consider merging this section with the two sections that follow it.

Sec. 14-14-6

Provides parameters for Conservation Commission action in advisory capacity. Recommend either merging this section with Sec. 14-14-5 or changing the first few words of the section to make clear that “The report” being referenced is the advisory report from the Conservation Commission required by Sec. 14-14-5.

Sec. 14-14-7

Provides that the failure of the Conservation Commission to act on an EIS is understood to be a favorable report and will not have an impact on the Planning Commission’s ability to act. It appears there may be a typo omitting the word “not” from the second to last line as follows: “shall not be taken as favorable of such action nor shall it affect” Additionally, this section seems to provide for the Conservation Commission to submit an advisory opinion into the record after the close of a public hearing. While the Commission can receive input from Town staff after the close of a public hearing, it is

not clear that the Conservation Commission's advisory report is of the same nature as staff advice. Best practice would be to require the advisory report to be in the record before the close of the hearing to avoid any appeal claim that the Commission acted improperly and considered information outside the public hearing record.

Timothy Bleasdale

From: Timothy Bleasdale
Sent: Friday, January 31, 2025 4:50 PM
To: Gary Goeschel
Cc: Tracy M. Collins
Subject: Planning Commission draft regulations

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Gary,

I've been working my way through the draft regulations. I will provide you with more detailed comments, but I will not be able to do so today. I am still working through this. The major point that I think I need to convey for now is that the Commission appears to have overcorrected its direction in response to Mark Zamarka's August memo. He advised them to define what a "significant effect" is and try to use identifiable criteria or guidelines to do so. The draft I am looking at seems to keep redefining "significant effect" and restate different frameworks for making the determination in Sec. 2, 4-14-2, 4-14-3, 4-14-4, and possibly 4-14-5.

Additionally, I wanted to raise a question that I keep asking as I read the draft. What is the purpose of the EIS or what is the Commission trying to accomplish? You mentioned previously that a lot of the information required in an EIS is already provided elsewhere in an application, so that an EIS is just culling and restating information. Is that the purpose – a formatting rule to provide a single place to look for issues of environmental concern? The draft regulations do not authorize a denial of an application based on an EIS, and the Conservation Commission review is only advisory. A lot of the language in here suggests that the Commission is supposed to act on the EIS in some way, but these regulations never actually state what the Commission is supposed to (or allowed to) do. I might be able to provide better guidance if I understood what the Commission is trying to achieve.

I hope you have a good vacation next week.

Best regards,
Tim

Timothy D. Bleasdale, Attorney at Law
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PALMER**
Attorneys at Law

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Gary Goeschel

From: Mark S. Zamarka <mszamarka@wallersmithpalmer.com>
Sent: Wednesday, May 22, 2024 11:10 AM
To: Gary Goeschel
Cc: Timothy Bleasdale
Subject: 4-14 proposed amendments

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Gary

You have asked that we review proposed amendments to §4-14 of the East Lyme Subdivision Regulations. As background, the Planning Commission recently amended §4-14 to remove the Environmental Review Team provision, in light of the decision in the Lepkowski subdivision appeal.

The Commission now proposes changes to §4-14-3 regarding the Environmental Impact Assessment ("EIA"). Before addressing the changes, it should be noted that as currently written, the opening section is somewhat problematic. It requires an applicant responsible for actions which "may significantly impact the environment" to provide a "detailed written evaluation of its impact" to the Commission. However, the section does not define what constitutes a "significant impact" nor does it state who makes that determination - the applicant, the Town Planner or the Commission itself. If the Commission wishes to keep the EIA section, these ambiguities should be addressed.

The major changes are found in §4-14-4 – §4-14-6, and are summarized as follows:

1. §4-14-4 - the Commission shall refer the EIA to the East Lyme Conservation Commission at least 35 days prior to the public hearing.
2. §4-14-5 - the Conservation Commission report shall its findings, a statement of the vote, and other recommendations deemed relevant.
3. §4-14-6 - the failure of the Conservation Commission to provide a report shall be taken as "favorable of such action".

Comments:

1. If the public hearing referenced in §4-14-4 refers to the hearing on the subdivision application this should be specified.
2. The Commission must decide whether the Conservation Commission report is mandatory (that the Commission must consider and abide by the report's findings, etc.) or merely advisory, meaning that the Commission may in its discretion consider the report but is not bound to follow it. Our advice is that it be advisory only, as this is consistent with the Conservation Commission's statutory authority - General Statutes §7-131a(b) states in general that a Conservation Commission "may make recommendations to ... planning commissions" on

proposed land use changes. (Emphasis added). This is also consistent with §4-14-6 regarding the failure of the Conservation Commission to issue a report.

3. §4-14-6 should be clarified to specify that the failure of the Conservation Commission to issue a report does not affect the pending subdivision application. Again this is also consistent with the report being advisory only. Moreover, if the Commission requires a public hearing on a subdivision application, it is then bound by the timelines set forth in General Statutes §8-7d. If the Conservation report is deemed mandatory but not provided in a timely manner, the Commission could risk going beyond the §8-7d timelines, which in turn could risk inferred approval of a pending application.
4. Finally, the Commission may want to consider whether an EIA is necessary in light of the other information already required by §4-2-3. According to that section, and by way of example only, an applicant is required to submit (1) a detailed Natural and Cultural Resources Plan, (2) Archaeology Survey, (3) Soil Scientist Report, (4) Biological Survey (5) Pesticide Report and (6) Open Space Report. Given the scope of the Conservation Commission, much of that information may already be contained in the required reports above.

If you have any other questions please let me know.

Mark



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TO: East Lyme Planning Commission
FROM: Waller, Smith & Palmer, P.C.
RE: Proposed changes to §4-14-3
DATE: August 6, 2024

We have been asked to review proposed amendments to §4-14-3 of the East Lyme Subdivision Regulations ("Regulations"). The Commission recently amended §4-14 to remove the Environmental Review Team ("ERT") requirement, in light of (1) the recent decision in the Lepkowski appeal, and (2) that such reviews are no longer being conducted.

The Commission is considering changes to §4-14-3, which addresses an Environmental Impact Assessment ("EIA"). Based on our review of the draft amendment and discussions with Mr. Goeschel, our findings are as follows:

Current §4-14-3

1. Section 4-14-3 as written has issues which should be addressed, whether it is amended or not. Currently if an applicant is "responsible for the initiations which may significantly affect the environment" that applicant shall make a detailed written evaluation of that impact before the Commission decides on the application. This presents multiple questions.
 - a. What constitutes a "significant affect" on the environment? Currently the regulation has no clear definition. §4-14-3 refers to actions which "may significantly impact the environment". §4-14-2 attempts to define that phrase as activities which "could have a major impact" on Town resources such as air, water, landmarks, etc. However, neither section sets out criteria or guidelines to be followed in determining a "major" impact. Section 4-14-2 also states that it does not apply to activities in which the Commission has no discretion, which again is vague. An applicant to a municipal land use agency is entitled to reasonable certainty regarding what the regulations require.
 - b. When does the applicant submit the EIA? Is it a preliminary step, before a formal submission, or is it required along with the other items set forth in §4-2? If it is a preliminary matter, to be filed before a formal application, that should be specified. Currently §4-14-3 states that it must be submitted "before the Commission decides whether to approve such action" but does not specify at what stage in the process it is required. The Commission must be mindful that once an application is filed, it is controlled by the timeframes set forth in General Statutes §8-7d, and that failure to decide within those timeframes can result in the application being approved by operation of law, i.e. inferred approval.

Proposed Changes

1. The major changes are found in §4-14-4 – §4-14-6, and are summarized as follows:
 - a. §4-14-4 - the Commission shall refer the EIA to the East Lyme Conservation Commission at least 35 days prior to the public hearing.
 - b. §4-14-5 - the Conservation Commission report shall its findings, a statement of the vote, and other recommendations deemed relevant.
 - c. §4-14-6 - the failure of the Conservation Commission to provide a report shall be taken as “favorable of such action”.

2. Comments:
 - a. If the public hearing referenced in §4-14-4 refers to the hearing on the subdivision application this should be specified.
 - b. Is the Conservation Commission report mandatory (that the Commission must consider and abide by the report’s findings, etc.) or merely advisory, meaning that the Commission may in its discretion consider the report but is not obligated to follow it. Our advice is that it be advisory only, as this is consistent with the Conservation Commission’s statutory authority - General Statutes §7-131a(b) states in general that a Conservation Commission “may make recommendations to ... planning commissions” on proposed land use changes. (Emphasis added). This is also consistent with §4-14-6 regarding the failure of the Conservation Commission to issue a report.
 - c. §4-14-6 should be clarified to specify that the failure of the Conservation Commission to issue a report does not affect the pending subdivision application. Again this is also consistent with the report being advisory only. Moreover, if the Commission requires a public hearing on a subdivision application, it is then bound by the timelines set forth in General Statutes §8-7d. If the Conservation report is deemed mandatory but not provided in a timely manner, the Commission could risk going beyond the §8-7d timelines, which in turn could risk inferred approval of a pending application.

Additional Consideration

The Commission should also consider whether an EIA is necessary in light of the other information already required by §4-2-3. Pursuant to §4-2-3, an applicant must submit (1) a detailed Natural and Cultural Resources Plan, which must address 12 separate items, (2) Archaeology Survey, (3) Soil Scientist Report, (4) Biological Survey (5) Pesticide Report (6) Traffic Report, (7) Sanitation Report, (8) Water Supply Report, (9) Stormwater Management Plan and (10) an Open Space Report.

Given the scope of §4-2-3, much of the information in an EIA may already be contained in the required reports above.

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SECTION 2 – DEFINITIONS

Add Significant Effect: Significant effects means adverse effects that an has identified as significant based on the criteria in

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SECTION 4 – APPLICATION SUBMISSION PROCEDURE

4-2-3 Design Reports - All applications for subdivision or re-subdivisions shall be accompanied by the following reports and maps unless individually waived by the Planning Commission:

Add subsection (K) Environmental Impact Statement in accordance with Section 4-14 of these Regulations.

SECTION 4-14 – ENVIRONMENTAL REVIEW AND EVALUATION

14-14 ENVIRONMENTAL REVIEW AND EVALUATION

4-14-1 Review and Evaluation - Subdivisions where the land to be subdivided consist of environmentally sensitive resources such as but not limited to wetlands, steep slopes (>25%), watercourses, flood hazard areas, ridge lines, endangered or species of special concern shall be subject to an environmental review and evaluation by the East Lyme Planning Commission and the East Lyme Commission for the Conservation of Natural Resources. This requirement does not preclude the Commission from requesting an Environmental Impact Statement Environmental Review Team (ERT) Evaluation for applications which do not meet the above parameters, but for which concerns about environmental impacts of the development and their proper mitigation exist.

4-14-2 Actions which may Significantly Effect the Environment - "Actions which may significantly effect the environment" means individual activities or a sequence of planned activities proposed to be undertaken which could have a major impact on the Town's land, water, air, historic structures, landmarks, existing housing, or other environmental resources, or could serve short term to the disadvantage of long-term environmental goals including but not limited to the following activities:

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- A. Any activity involving deposition or removal of material which will or may have a substantial effect on the wetland or watercourse or on wetlands or watercourses outside the area for which the activity is proposed.
- B. Any activity which substantially changes the natural channel or may inhibit the natural dynamics of a watercourse system.
- C. Any activity which substantially diminishes the natural capacity of land, an inland wetland or watercourse, coastal resource to support aquatic, plant or animal life and habitats; prevent flooding; supply water; assimilate waste; facilitate drainage; provide recreation or open space; or perform other functions.
- D. Any activity which is likely to cause or has the potential to cause substantial turbidity, siltation or sedimentation.
- E. Any activity which causes substantial diminution of flow of a natural watercourse or groundwater levels.
- F. Any activity which is likely to cause or has the potential to cause pollution of the land, air, surface waters or groundwater.
- G. Any activity which damages or destroys unique habitats areas or such areas having demonstrable scientific or educational value.

4-14-3. Determination of Significance - In considering whether an adverse effect of the proposed action is significant, the Commission shall examine both the context of the action and the intensity of the effect. In assessing context and intensity, the Commission should consider the duration of the effect. East Lyme Planning Commission may also consider the extent to which an effect is adverse at some points in time and beneficial in others (for example, in assessing the significance of a habitat restoration action's effect on a species, an agency may consider both any short-term harm to the species during implementation of the action and any benefit to the same species once the action is complete). However, East Lyme Planning Commission shall not offset an action's adverse effects with other beneficial effects to determine significance (for example, an agency may not offset an action's adverse effect on one species with its beneficial effect on another species).

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A. East Lyme Planning Commission shall analyze the significance of an action in several contexts. East Lyme Planning Commission should consider the characteristics of the geographic area, such as proximity to unique or sensitive resources or communities with environmental justice concerns. Depending on the scope of the action, East Lyme Planning Commission should consider the potential global, national, regional, and local contexts as well as the duration, including short-and long-term effects.

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B. East Lyme Planning Commission shall analyze the intensity of effects considering the following factors, as applicable to the proposed action and in relationship to one another:

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i. The degree to which the action may adversely affect public health and safety.

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ii. The degree to which the action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, parks, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

iii. Whether the action may violate relevant Federal, State, Tribal, or local laws or other requirements or be inconsistent with Federal, State, Tribal, or local policies designed for the protection of the environment.

iv. The degree to which the potential effects on the human environment are highly uncertain.

v. The degree to which the action may adversely affect resources listed or eligible for listing in the National Register of Historic Places.

vi. The degree to which the action may adversely affect an endangered or threatened species or its habitat, including habitat that has been determined to be critical under the Endangered Species Act of 1973.

vii. The degree to which the action may adversely affect communities with environmental justice concerns.

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viii. The degree to which the action may adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders.

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4-14-4 A project would have a significant effect on the environment where there is substantial evidence, in record, that any of the following conditions may occur:

A. The project has the potential to substantially degrade the quality of the environment; substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species; or eliminate important examples of the major periods of East Lyme's history or prehistory.

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B. The project has the potential to achieve short-term environmental goals to the disadvantage of long-term environmental goals.

C. The project has possible environmental effects that are individually limited but, cumulatively considerable. ("Cumulatively Considerable" would mean the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects).

D. The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.

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4-14-5 Such actions shall include but not be limited to new projects and programs and any new projects supported by state contracts and grants but, shall not include (1) emergency measures undertaken in response to an immediate threat to public health or safety; or (2) activities in which Planning Commission's participation is administrative in nature, involving no exercise of discretion on the part of the Town, department, institution or agency.

4-14-6 Environmental Impact Assessment - Any business, corporation, entity, or individual responsible for the initiation of actions which may significantly affect the environment shall in the case of each proposed action ~~make~~ provide a detailed

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written evaluation of its environmental impact, ~~before the East Lyme Planning Commission decides whether to approve such action.~~

~~4-14-24-14-7~~ **Environmental Impact Statement** - All such **Environmental Impact** ~~evaluations~~**Statements (EIS)** shall be detailed statements setting forth the following:

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- (A) A description of the proposed action which shall include, but not be limited to, a description of the purpose and need of the proposed action, and, in the case of a proposed facility, a description of the infrastructure needs of such facility, including, but not limited to, parking, water supply, wastewater treatment and the square footage of the facility;
- (B) the environmental consequences of the proposed action, including cumulative, direct and indirect effects which might result during and subsequent to the proposed action;
- (C) any adverse environmental effects which cannot be avoided and irreversible and irretrievable commitments of resources should the proposal be implemented;
- (D) alternatives to the proposed action, including the alternative of not proceeding with the proposed action and, in the case of a proposed facility,
- (E) an evaluation of the proposed action's consistency and each alternative's consistency with East Lyme's Plan of Conservation and Development, an evaluation of each alternative including, to the extent practicable, whether it avoids, minimizes or mitigates environmental impacts, and, where appropriate, a description of detailed mitigation measures proposed to minimize environmental impacts, including, but not limited to, where appropriate, a site plan;
- (F) an analysis of the short term and long term economic, social and environmental costs and benefits of the proposed action;
- (G) the effect of the proposed action on the use and conservation of energy resources; and
- (H) a description of the effects of the proposed action on sacred sites or archaeological sites of municipal, state, or national importance. In the case

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of an action which affects existing housing, the evaluation shall also contain a detailed statement analyzing

- (1) housing consequences of the proposed action, including direct and indirect effects which might result during and subsequent to the proposed action by income group as defined in section 8-37aa and by race; and
- (2) the consistency of the housing consequences with the East Lyme's Plan of Conservation and Development and Affordable Housing Plan for housing and community development prepared pursuant to Section 8-37t of the Connecticut General Statutes (CGS). As used in this section, "sacred sites" and "archaeological sites" have the same meanings as provided in Section 10-381 of the Connecticut General Statutes.

14-14-5 The East Lyme Planning Commission shall refer the EIA to the Commission for the Conservation of Natural Resources for an advisory report at least 35-days prior to the date assigned for a public hearing to be held on said Subdivision Application; or in the case no public hearing is held, the date of decision.

14-14-6 The report shall contain the findings of the Commission for the Conservation of Natural Resources, a statement of the vote, and any other recommendations the Conservation of Natural Resources commission deems relevant.

14-14-7 The failure of the East Lyme Commission for the Conservation of Natural Resources to issue a report prior to, at the public hearing, or prior to any decision shall be taken as favorable of such actions nor shall it affect the Planning Commission's decision on any pending subdivision application.

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