

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.