

From: [Michael Carey](#)
To: [Gary Goeschel](#)
Cc: [Jessica Laroco](#)
Subject: FW: CATBIRD LANE
Date: Tuesday, June 3, 2025 9:33:39 AM

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Mr. Goeschel,

You reported to the Planning Commission (PC) at its meeting on December 9, 2024 that a parcel of land known as Assessor's Map 36.0 Lot 31 on or near Catbird Lane (the "Parcel") was set aside as "open space" in a subdivision approved by the PC in 1988, but that no formal conveyance of the Parcel to the Town or another designated entity to maintain the Parcel as open space had occurred, and that you would be writing to the owner of the Parcel, presumably to advise it of the obligation to make the conveyance. In response, counsel for the owner of the Parcel, Hathaway Farms LLC, in letters to you dated January 13 and March 25, 2025, has taken issue with your report and demanded that it be retracted. Based on the information available to me, which does not include copies of the zoning and subdivision regulations in effect in 1988, I do not think your report was in error or that it needs to be retracted. Nor do I think that any decision to change the characterization of the Parcel on the plans may be made at an administrative level.

Upon information and belief, the Parcel is depicted, in among other parts of the approved plan set, on "SHEET 10 OF 130, HERITAGE AT EAST LYME SUBDIVISION, THE HERITAGE DEVELOPMENT GROUP, INC., SOUTHBURY CONNECTICUT, J. ROBERT PFANNER P.C., SURVEYING & ENGINEERING ... FEBRUARY 1, 1988." That sheet shows an area most of which is quite narrow surrounding the building lots approved along Catbird Lane. The area surrounding the lots is marked "open space" multiple times, including on what I understand is the part of the Parcel being proposed for construction of a single-family residence. These markings would seem to negate the implication at paragraph 4 of counsel's March 25 letter that the plans for the subdivision, or at least one particular sheet upon which the letter claimed you were basing your position, "do not indicate" that the Parcel was to be open space.

Hathaway's counsel makes several arguments in support of the claim and/or implication that the Parcel is not now open space and is in fact a legal building lot, the same as all of the numbered lots approved as part of the subdivision. The first is that

CGS section 47-5 requires all conveyances of land to be in writing in order to be effective, and that because no such written conveyance of the Parcel has occurred, at some unspecified time it lost any status it had as “open space” and became a buildable lot.

While section 47-5 does require conveyances to be in writing and meet other formal requirements, it does not say anything about what happens if a conveyance of open space on a subdivision plan is not made. Nor has Hathaway’s counsel cited to a statute or local regulation that requires that a parcel designated as open space on a subdivision plan be deeded out as open space *within a particular time*, or that such a lot changes from open space to a building lot for which construction approval might be granted by way of an administrative zoning permit, as opposed to approval by the PC of a resubdivision application, if that conveyance does not occur.

Hathaway relies upon an opinion of the Connecticut Appellate Court in which the East Lyme ZBA was the defendant, *Maluccio v. East Lyme Zoning Board of Appeals*, 174 Conn. App. 750 (2017), for its assertion that the Parcel is not limited to use as open space because of the absence of a formal conveyance for open space purposes. However, I think the facts of that case are distinguishable from this situation, and its holding does not compel the outcome Hathaway claims it does in this case.

For one thing, *Maluccio* involved a subdivision approved in 1970, subject to subdivision regulations for open space dedications that do not appear to have been in effect in 1988. The case involved a lot that was marked “recreation area” on the approved plan. After a long passage of time, Maluccio purchased the lot at a tax sale, and applied to the ZEO for a zoning permit to build a house on it. The ZEO denied the permit, finding that the marking on the plan required him to do so. The ZBA denied Maluccio’s appeal from the decision, and the court proceedings ensued.

The trial court sustained the appeal and, on appeal by the ZBA, the Appellate Court upheld that decision. Key components of the Appellate Court’s decision were that the 1970 regulations by their terms compelled the Planning Commission to have declared on the record that it was accepting the lot for recreational use, but that it did not do so. Perhaps more importantly, the regulations in 1970 did not require an offer of land for “recreational purposes,” as opposed to allowing the PC to mandate that an applicant provide land to the Town for “open space for parks and playgrounds.” *Id.*, at 758. The Appellate Court held that the PC therefore did not have authority to ask for a set aside for a “recreation area,” that is, that the demarcation was essentially *void ab initio*, and then held that it “follows that the zoning enforcement officer and the

defendant could not deny the plaintiff a building permit ... on the basis of its ...” having been designated as a “recreational area” on the plan. Id.

I am assuming but do not know that the regulations applied in *Maluccio* had been amended by 1988. However, even if they were not, I would argue that *Maluccio* does not compel the result sought by Hathaway, because: 1) it appears that the designation of the Parcel as open space on the approved plans was within the PC’s authority to have required at that time (Hathaway does not appear to argue otherwise), and 2) it does not necessarily “follow” that an erroneous designation of land as open space, or its loss of such designation, inevitably and without more converts it into a building lot. The Appellate Court in *Maluccio* assumed but did not demonstrate that such a transformation was required or allowed by the statutes and regulations, and it did not consider how lots obtain buildable status through the subdivision process.

Hathaway also cites a February 1, 2010 legal opinion regarding “Open Space Dedication-Heritage at East Lyme Resubdivision” in support of its claims. However, that opinion is irrelevant to the status of the Parcel. The opinion addressed the question whether “the Planning Commission could require a dedication of *additional* open space as a part of the approval of a” pending application for resubdivision. (Emphasis added.) The answer in the opinion was no, but that answer was to a different question than is presented in this case, which is whether land designated open space on a subdivision approved in 1988 somehow loses that designation and becomes a building lot at some unspecified point in time if the open space is not formally conveyed. The Parcel is not “additional” open space; it is open space set aside as part of the application approved in 1988.

In that regard, Hathaway’s counsel also seems to argue that the developer of the Hathaway Subdivision has already conveyed more than the amount of open space required by the Regulations in 1988 and so cannot be compelled to set the Parcel aside as additional open space. See, paragraphs 2-4 of the March 25 letter. But again that claim ignores the fact that the set aside *was made* in 1988 by the submission and approval of the plan and is not being required now for the first time as part of a new project or the completion of the old one. If the developer wanted to challenge the set asides as excessive, it could and had to have done so in 1988.

I make no comment here about Hathaway’s demand that the assessor delete the notation “open space” from her records for the parcel. I would be glad to speak with her about this if she wishes.

Finally, for what it might be worth, note current Subdivision Regulations section 7-2-9.

P.S. It appears that a portion of the open space area at issue has been carved out from the rest, without PC action, on the contention that the split was not a resubdivision, because it was made for conservation purposes. Even if that transaction was not a resubdivision, as is being claimed, or was exempt from resubdivision requirements, one wonders how that same piece of land could now be conveyed for use as a building lot without it being subject to action by the PC either as a resubdivision or by way of a determination that the transactions were not a resubdivision.