

TOWN OF EAST LYME

ZONING COMMISSION

JULY 23, 2015

SPECIAL MEETING MINUTES

Members Present:

Matthew Walker, Chairman
William Dwyer
Norm Peck
Terence Donovan
George McPherson

Members Absent:

Matthew Kane
James Liska, Alternate
Shawn Singer, Alternate
Peter Lukas, Alternate

Also Present:

Bill Mulholland, Zoning Officer
Holly Cheeseman, Ex-Officio
Mark Zamarka, Town Attorney

CALL TO ORDER

Mr. Walker called the meeting to order at 6:05 p.m.

PLEDGE OF ALLEGIANCE

Mr. Walker led the assembly in the Pledge of Allegiance.

PUBLIC DELEGATIONS

There were no public delegations.

1. PETITION OF TIMOTHY S. HOLLISTER FOR LANDMARK DEVELOPMENT GROUP, LLC AND JARVIS OF CHESHIRE, LLC UNDER CONNECTICUT GENERAL STATUTES SECTION 8-30G TO REZONE 123.02 ACRES FROM RU-120, ITS EXISTING ZONING DESIGNATION, TO AFFORDABLE HOUSING DISTRICT (SECTION 32 OF THE EAST LYME ZONING REGULATIONS) AND FOR APPROVAL OF A PRELIMINARY SITE PLAN (SECTION 32.9 OF THE EAST LYME ZONING REGULATIONS) WHICH PROPOSES OPEN SPACE OF 87 ACRES FOR PROPERTY IDENTIFIED IN THE APPLICATION AS CALKINS ROAD, EAST LYME, AND FURTHER IDENTIFIED IN SECTION 9 OF SAID PETITION AS BOSTON POST ROAD, (EAST LYME ASSESSOR'S MAP 31.0, LOT 4), 23 CALKINS ROAD, (EAST LYME ASSESSOR'S MAP 32.0, LOT 1) AND QUARRY DOCK ROAD (EAST LYME ASSESSOR'S MAP 27.0, LOT 14).

Attorney Zamarka handed out a memo regarding this Item (Attached).

Attorney Zamarka discussed the application and then he reviewed the memo that he provided to members. He stated there is a lot of information in the memo and it was to help guide them through the decision making process. He recommended everyone read the memo. Any questions they have they can discuss at the next meeting. He suggested they make their decision by August 20th. As a way to help, if he is directed by the Zoning Commission, he will draw up resolutions with three different options. It is the Zoning Commission's obligations to make the findings, but the resolutions can serve as a framework. He suggested they review the memo and the exhibits and they can start their discussion next week. There is a big record; the entire record is available electronically. The Inland Wetlands Agency report is anticipated to be received by next week.

Motion (1) Mr. McPherson moved to adjourn at 6:45 p.m.

Seconded by Mr. Donovan.

Motion Passed 5-0.

Respectfully Submitted,



**Karen Miller Galbo
Recording Secretary**

FROM: WALLER, SMITH & PALMER, P.C.
TO: EAST LYME ZONING COMMISSION
RE: LANDMARK AFFORDABLE HOUSING APPLICATION

The Zoning Commission ("Commission") has closed the public hearing and will soon receive the Inland Wetlands Agency's ("IWA") referral report. The next step is for the Commission to render its decision on Landmark's Application for approval of a Preliminary Site Plan and Zone Change ("PSP" or "Application"). This decision must be based on a thorough review and evaluation of the Application and all evidence in the record. The purpose of this memorandum is to provide guidance to the Commission regarding the decision-making process.

OVERVIEW OF THE COMMISSION DECISION MAKING PROCESS

The processing of affordable housing applications follows the same procedural statutory provisions as zone changes, site plans and subdivisions as conventional applications. The Commission can either **approve, approve with conditions, or deny** the Application.

If the Application is **approved**, it is **filed in the same manner as any other** zoning application, together with the declaration of deed restrictions which must be part of any affordable housing application.

If the Application is **denied or approved with conditions**, the applicant, i.e. Landmark, has a choice – (1) it can file an affordable housing appeal to the Superior Court, or (2) it can resubmit to the Commission an amended or modified application responding to some or all of the conditions or restrictions stated by the Commission

An appeal or resubmission must be filed within fifteen days after publication of the Commission's decision.

JUDGE FRAZZINI'S RULINGS

This Application is filed pursuant to the remand order contained in Judge Frazzini's October 31, 2011 Memorandum of Decision ("Decision"). The Commission should focus on the **Zone Change** and **Site Plan** portions of the Decision, as Judge Frazzini's rulings regarding the text amendments to the §32 of the East Lyme Zoning Regulations have already been implemented.

Regarding the proposed ZONE CHANGE, the Court found that:

1. There was **insufficient evidence to support the denial of a zone change for the entire property based on lack of public sewers**. There was also insufficient evidence to use the lack of sewers as a basis for rejecting Landmark's suggestion that only the site plan area be rezoned.

2. There was **sufficient evidence to support the denial of the zone change for the entire Landmark property based on open space and environmental and coastal concerns.** However, the public interest in protecting the environment and coastal areas **can be protected by remanding the zone change issue** to the commission. The court set out a **3 step process:**
 - a. First, the court **instructed the commission to amend the regulations** “as specified above,” presumably referring to the environmental information discussed in the Amendments section above. **THIS HAS ALREADY BEEN DONE AS REFLECTED IN AMENDED §32.**
 - b. Second, following adoption of those amendments, **Landmark is to submit a preliminary or final site plan that provides the information necessary to assess “those” (environmental and coastal) matters. THIS IS THE STAGE WE ARE AT NOW.**
 - c. The commission then determines whether the public interest can be protected by expanding the zone change from the portion within the sewer district (i.e. what was already approved) or to the entire site plan area.
3. The decision to grant a limited zone change to the area within the sewer district, without simultaneously approving a conceptual site plan for the rezoned area, was not a reasonable modification to the application. That order was remanded to rescind the rezoning unless the commission subsequently approves a site plan submitted by Landmark. **Landmark has filed a new zone change application as part of its application.**

Regarding the proposed SITE PLAN, the Court found that:

1. The requirement in the current regulations for public sewers in Affordable Housing districts is not supported by sufficient evidence and is not necessary to protect a substantial public interest.
2. There was **insufficient evidence to support the lack of public sewers as a basis for denying** the conceptual site plan.
3. There was **insufficient evidence to support the decision to deny the conceptual site plan because it was not accompanied by a special permit** and “information required thereunder” by the zoning regulations.
4. There was **sufficient evidence to support the denial** of the conceptual site plan **because Landmark had not yet shown that adequate potable water was available.** However, the public interest in adequate waste

disposal and potable **water could have been protected by a conditional approval**. The conditional approval should have required that Landmark show, in a preliminary or final site plan under the amended regulations, that public water and sewers can be provided to all or part of the development, or to the extent that relevant state agencies have approved community septic or water for the portions of the development not served by public water or sewer. **AMENDED §32 NOW REQUIRES THIS AS PART OF A FINAL SITE PLAN APPLICATION.**

5. There was **insufficient evidence to deny the conceptual site plan based on open space considerations**. The proposal shows more than 200 acres as either designated or potential open space, which is more than the amount designated by the most recent town plan.
6. There was **insufficient evidence to deny the site plan based on traffic issues**. The commission could have **approved conditioned on Landmark obtaining DOT approval of its traffic expert's recommendations and then implementing the improvements at Landmark cost**.
7. There was **insufficient evidence to deny the site plan based on harm to coastal resources** caused by the road and traffic thereon. This issue **can be revisited when Landmark provides the information required by the DEP and for a preliminary site plan**.
8. There was **sufficient evidence to deny a preliminary site plan based on the proposed draft regulations**, because as drafted they would have allowed approval of an application before a developer would have provided sufficient information to allow the commission to assess potential environmental harm. However, the public interest could have been protected by a reasonable change to the application – treating and approving it as a conceptual site plan, and **requiring Landmark to submit “information pertinent to environmental or coastal harm” in subsequent applications** for preliminary or final site plan under the amended regulations.
9. The application for preliminary site plan is remanded. The Commission is instructed to approve a conceptual site plan conditioned on Landmark subsequently demonstrating, in its preliminary or final site plan application under the amended regulations, that (a) public water and sewers can be provided to the entire development, (b) the relevant state agencies have approved community water and septic, or that a combination of public and onsite water and waste disposal can serve the entire development, and (c) that the state DOT approve the improvements recommended by Landmarks traffic engineers and that Landmark bear the full cost of those

improvements. **WE ARE NOW AT THIS STAGE AS LANDMARK HAS FILED A PSP.**

ISSUES THE COMMISSION MUST CONSIDER

Need for Affordable Housing. In rendering its decision, the Commission must make a finding regarding the need for affordable housing in East Lyme.

Environmental and Coastal Issues. As noted previously, the interventions by CFE and the Friends require the Commission to make appropriate findings under the Connecticut Environmental Protection Act ("CEPA"). Judge Frazzini's decision also keeps open the issue of environmental impacts related to the Application, and further held that the Commission can revisit coastal resources issue based on the proposed road which goes through the Coastal Area Management Zone.

ISSUES THE COMMISSION MAY PROPERLY CONSIDER

Traffic. The Decision notes that the Commission could have approved the application conditioned on Landmark obtaining Department of Transportation approval of the recommendations of its traffic expert, and then implementing those improvements at Landmark's cost. However, as part of its Application, Landmark included an updated traffic report which makes specific findings regarding whether information from Landmark's original traffic report, which was done in 2005 and is now 10 years old, are still valid, and whether or not the original report conforms to current engineering standards. While the Commission is still bound by the findings of the Decision regarding traffic, it may properly analyze the updated information.

Compliance with ELZR 32.9.1. Does the Application comply with, and include all information required for a PSP, as set forth in §32.9.1 of the Regulations?

Other issues related to public health and safety.

IF THE PSP APPLICATION IS APPROVED

As noted previously, if the Commission approves the PSP Application as is, without imposing conditions, it is **filed in the same manner as any other** zoning application, together with the declaration of deed restrictions which must be part of any affordable housing application.

IF THE PSP APPLICATION IS APPROVED WITH CONDITIONS OR DENIED

If the Commission approves with conditions, or denies the PSP Application, its decision is subject to analysis under C.G.S. §8-30g(g) if Landmark appeals to the superior court. The §8-30g(g) analysis applies to a zoning authority's **decisions, not only denials; a**

conditioned approval can still be appealed and that decision is subject to same analysis as if the application was denied.

When an agency (1) approves an application with conditions, or (2) denies an application, "it **must state its reasons on the record and that statement must take the form of a formal, official, collective statement of reasons for its actions.**" The reasons must be cited by the zoning agency at the time it takes its formal vote on the application. The formal decision should take the form of a detailed resolution. Unlike standard zoning appeals, the court does not search the record for reasons which might be culled later from the administrative record.

The Commission must make findings regarding the need for affordable housing in town and balance that need against identified interest in public health and/or safety. The Commission cannot deny an affordable housing application unless there is **some quantifiable probability of harm from the defect or problem with the application, and not only the mere possibility of harm** to the public interest, and reasonable changes cannot be made in the application to address the problem.

FINDINGS THE COMMISSION MUST MAKE

The following analysis to all reasons listed by the Commission in support of its decision. The Commission should refer to evidence in the record that it relied upon in support of each finding or reason.

1. **Under the Affordable Housing Statute §8-30g(g):** For each and every stated reason in support of a decision to approve with conditions or deny, that reason

Must be supported by **sufficient evidence** in the record

Must be **related to a substantial public interest** in health, safety (Commission must also specifically what public interest is being protected)

The **need to protect that public interest must clearly outweigh the need for affordable housing** (Commission must make a finding re the town's need for AH)

Must be shown that **reasonable changes to the application cannot protect the substantial public interest**

2. **Under The Connecticut Environmental Protection Act (CEPA):** The intervention of Connecticut Fund for the Environment and The Friends of Oswegatchie Hills requires the Commission to make additional findings under CEPA:

- a. Whether **activity resulting from approval of application is reasonably likely to unreasonably adversely affect** public trust in land, air water or other natural resource, and if so
- b. Whether **feasible and prudent alternatives** exist.

As applied here, the findings under CEPA can be stated as follows:

1. Would approving the PSP or zone change result in activity that is reasonably likely to unreasonably adversely affect the public trust in land, water, air, or other natural resources?
2. If so, do feasible and prudent alternatives exist?

The Connecticut Supreme Court held that in an affordable housing application, a zoning agency **has the burden of proof** on proposing and determining **if there are feasible and prudent alternatives**, and the statute does not shift that burden to the applicant; this is **equivalent to having the agency make all reasonable changes to an application before it can deny it based on environmental factors**. Quarry Knoll II Corp. v. Planning and Zoning Commission of Town of Greenwich, 256 Conn. 674, 732, 735–737, 780 A.2d 1, 38, 39–40 (2001).

CONDITIONAL APPROVALS

In its presentations, Landmark stated that the Commission must conditionally approve its Application. To that end Landmark included in its final submission excerpts from two Connecticut cases – CMB Capital Appreciation, LLC v. North Haven PZC and Kaufman v. Danbury Zoning Commission – in support of this proposition.

Both cases deal with conditional approvals in the context of affordable housing. Based on the specific facts and records on those cases, the Courts ordered that the developer's site plan (CMB) and zone change (Kaufman) be conditionally approved. Both cases also recognized the importance of conditional approvals in affordable housing cases. However, neither decision absolutely requires conditional approvals in all cases. The Kaufman court held that “[F]or the commission to demonstrate that its denial of the plaintiff's affordable housing application had been necessary to protect substantial public interests ... the commission was required to show that on the basis of the evidence in the record, it reasonably could have concluded that it could not grant the zone change and protect the public interest.”

Put another way, if the Commission finds, based on the evidence in the record, that the public interests in public health, safety, the environment, etc. **can** be adequately protected by imposing reasonable conditions, then it must approve the PSP and/or zone change subject to those conditions. However, if the Commission finds that it **cannot** grant the PSP or zone change and simultaneously protect the public interests, the Application must be denied.

CONCLUSION

The Commission has three options regarding Landmark's Application for PSP and zone change: it can (1) approve, (2) approve with conditions or (3) deny. If the Application is approved, it is processed and filed the same as any other approved land use application.

If the Commission chooses to approve with conditions or deny, the Commission is required to make detailed findings on the record in support of its decision. The Commission's decisions should take the form of a **detailed resolution that fully sets forth the reasons for its decision and makes reference to evidence in the record that it believes supports those reasons.** .

The Commission cannot deny the Application unless there is **some quantifiable probability of harm to the public interest from the defect or problem with the Application, and not simply the mere possibility of harm** to the public interest, and that reasonable changes cannot be made in the application to address the problem. However, if reasonable changes or conditions can adequately protect the public interest, it is required to approve the Application subject to those conditions.