

## Zoning Commission

### MINUTES

Public Hearings – Regular Meeting

April 24, 2017

7:30 p.m.

Upper Level Meeting Room

**MEMBERS PRESENT:** Mr. Solley, Mr. Reich, Mr. Werkhoven, Mr. Averill, Mr. Solomon

**ALTERNATES PRESENT:** Mr. Burnham

**ALTERNATES ABSENT:** Mr. Sivick

**STAFF PRESENT:** Mrs. Hill, Ms. Pennell

**ALSO PRESENT:** Atty. Zizka, Atty. Olson, Atty. Robert Fisher, Mr. Herzan, Mr. Talbot,  
Mr. Catlin, Mr. Charles, Mrs. Solomon

### **REGULAR MEETING:**

Mr. Solley called the meeting to order at 6:35 p.m. Seated were members Mr. Solley, Mr. Reich, Mr. Werkhoven, Mr. Averill, Mr. Solomon.

### **Revision of the Zoning Regulations/Section 17:**

Atty. Zizka and Atty. Olsen, counsel for the Commission, were present to review the draft revision of the Zoning Regulations, Section 17.

Mr. Solley stated he would like to have these revisions finalized by the next scheduled Zoning Commission meeting so that a Public Hearing can be set. Mr. Solley noted the focus will be on Sections 17.8 and 17.9, as these are the main areas of concern.

Mr. Solley referenced the last correspondence dated 04-07-17 from the Commission to Atty. Zizka regarding a few follow up questions the Commission had. The Commission had asked if it can use the term, relocated, instead of moved in Section 17.4.B. In this section it states, "Should such structure be moved for any reason for any distance whatsoever, it shall thereafter conform to the Regulations for the district in which it is located after it is moved." Mr. Solley stated that the word, moved, was not quite clear enough for some Commission members. Atty. Zizka stated that relocated is fine to use.

In Section 17.7.B, Mr. Solley stated that some members would like to have the word, manifestly, deleted or substituted. He read this section aloud and Atty. Zizka replied by stating that using the word, manifestly, seemed fine with him and if it is to be replaced, a word meaning something very similar to this must to be used. He explained that when dealing with nonconforming uses or nonconforming structures, there is a situation called abandonment. Atty. Zizka stated that now under state law, you can't determine that a nonconforming use was abandoned without giving some thought to what the intention of the landowner is. He noted the difficulty in knowing exactly what the landowner's intent was. He gave examples using other language and noted the problem this can cause. He stated when expanding a

nonconforming use, you want to have an objective person take a look at this situation and be able to see that this particular area was designed for this specific use. Atty. Zizka and members of the Commission discussed other possible options and decided to keep the word, manifest, in this section. The final decision was made to keep the word manifest in this section.

Mr. Solley read aloud proposed Section 17.9.B.2, noting that members had suggested the word, “full”, be added in the sentence so that it reads as, “The nonconforming structure must exist on the property throughout the application process and until a Special Permit for its removal and “full” replacement has been issued.” Atty. Zizka stated adding this word is not necessary, but it would help in conveying the notion that this is what the permit is for.

Mr. Solley read aloud Section 17.9.5. The commissioners had questioned the use of the word, “area”. Atty. Zizka suggested using “geographical area” or “locality”. Discussion took place amongst members and Atty. Zizka about other possible wording. Mr. Reich suggested using “property and its environment”, which Atty. Zizka stated was a good suggestion.

Mr. Solley read the question asked by members, “Does the Zoning Commission have the discretion to make a condition of approval that the rebuilding of a replacement of a structure is required to be historically accurate?” He questioned how the Commission can preserve the integrity of such an historic antique building. Atty. Olson stated she had reviewed the Historic District guidelines and suggested that if this was a concern, the Zoning Commission could put a referral in for the Commission’s input. Mr. Averill asked what right the Zoning Commission has to dictate to a homeowner (outside the historic district) the cosmetics of their home. Atty. Zizka stated that under state law, if you tear down a structure in a nonconforming location, there is no right that the structure can be rebuilt in the same location. He further stated that in a situation under state law, if they are taking advantage of a nonconformity then want to make a major change that under state law they do not have that right. If they want to make this type of change then the Zoning Commission does have a right to use discretion. With regard to this question, Atty. Zizka stated the Commission has to be specific to the restrictions of this rebuild/replacement.

The next question Mr. Solley read was “How should the Commission deal with special permit applications that do not propose to replace the structure in the exact location with the original dimensions and volume, but to replace it within the existing footprint, but overall with a smaller size structure although still being nonconforming?” Atty. Zizka noted that this would be allowed under the proposed regulations and the Commission will need to show that it satisfies the concerns expressed in subsection B5, as well as other special permit criteria.

Mr. Solley discussed the idea of a homeowner wishing to tear down an accessory structure two feet from the property line and rebuild it ten feet from property line, making it less nonconforming, but not conforming. He stated that if a tear down is allowed, the Zoning Commission requires it has to be built in a conforming location. Mr. Solley added that if the entire home needs to be replaced, then the homeowner would need to show evidence of this, i.e. supporting documents from an engineer or building official.

Atty. Zizka stated that when a town adopts its regulations, the court views them as what the town feels is necessary in order to protect the public interests in these various districts. With nonconforming uses in which the Commission states it is going to allow a nonconforming building be torn down and put back in the same place, state law would say you do not have to allow that because if the person is tearing it down, and doing so without a need to, the legal perspective is that they are starting from scratch just as someone would with respect to building on an undeveloped lot. Atty. Zizka stated they would have to go to ZBA and prove hardship. Atty. Zizka stated in giving this flexibility to the applicant, a good reason is necessary for this to happen and that is why a special permit is required, showing factors necessary to exercise this power. He stated that most other towns, probably a vast majority, have a section stating if the structure is deteriorating, towns do allow reconstruction as it's not the landowner's fault and they need to do this to solve the problem. Atty. Zizka felt that all nonconforming accessory structures should be looked at with the same rules as the primary structures.

Mr. Solley then discussed 17.8 and 17.9 differentiating between the two. He noted that 17.9 deals with the voluntary action of tearing down, moving a structure, or rebuilding the structure in the same location. Mr. Solley stated in 17.9.A.2, the applicant needs to prove that his structure was lawful and built either prior to Zoning or built with some approval from the town. Atty. Zizka stated the law now requires that the applicant must prove this, not the Land Use office. He noted this is only applicable in 17.9. Atty. Zizka referenced CGS 8-13A which states when a building is placed in a nonconforming location for three years without an enforcement proceeding, it is treated as legal. The applicant will have to prove that it was there for three years. Mr. Solley noted that the word, "may", in section 17.9.A.2 was replaced with "shall", which Atty. Zizka agreed was appropriate to do.

Mr. Solley referenced 17.9.A.3, which states an application must include the written opinion of the Building Official or a licensed engineer stating that it is required to repair or rehabilitate the existing structure and that complete replacement is recommended to allow the existing use reasonably to be continued

Mr. Solley stated he would like to have Mrs. Hill and Mr. Ajello review this draft document. It will then be cleaned up and distributed to the Commission members for review. He said his goal was to set a Public Hearing for July 2017.

Mr. Solley asked if there were any questions from members or the public. No questions were noted.

#### **Wykeham Rise, LLC/101 Wykeham road/Compliance with Settlement Agreement:**

Mr. Solley discussed going into an Executive Session regarding Wykeham Rise, LLC, 101 Wykeham Road. He explained that he would like counsel to let the Commission know what is currently happening with respect to the settlement agreement and to see what the applicant has put forth to date and whether or not it complies with the settlement agreement. Atty. Zizka stated that this Executive Session would be to discuss a pending claim or litigation as defined by Connecticut State Statutes and the case law that interprets it. Atty. Zizka stated that

the Commission's determination about whether the plans submitted comply with the settlement agreement should be made in an open meeting. He further noted that the purpose of the Executive Session would include to discuss if in fact the Commission should find that the plans submitted do not comply with the settlement agreement, what the legal ramifications of that would be and how would the Commission enforce the agreement. Atty. Zizka explained that the courts have found that the discussion of potential claims to enforce a legal right that the Commission has, which in this case is the settlement agreement, qualifies as a pending litigation under the statutes.

Upon questions from Mr. Solomon with regard to an email dated 04-24-17 submitted by Atty. Brian Smith, who represents Wykeham Rise, LLC, Atty. Zizka stated that if Atty. Smith, his clients or any other representatives believe that the reasons that were stated for holding this Executive Session were not valid, they would have a right to appeal. He stated they would have the right to appeal to the Freedom of Information Commission. Atty. Zizka stated he prefers to be able to discuss this fully with the Commission in an Executive Session, pointing out concerns Commission had on certain aspects of the settlement agreement and the substantial modifications made by the applicant. He noted that if the plans differ materially from the settlement agreement, the plans would have to be submitted to the Commission again for a modification of the Special Permit. Atty. Zizka stated there is a disagreement as to whether or not any modifications that have been made might lead to litigation. He stated that some of the questions that have arisen were due to the initial marketing by Wykeham Rise, LLC being inconsistent with the settlement agreement. Atty. Zizka explained that the plans have been submitted to the attorneys, but have not yet been submitted as an official part of application.

Atty. Zizka noted there were many aspects of Wykeham Rise, LLC's plans for the property, which must be reviewed for compliance with the Settlement Agreement. Some of the activities proposed, he said, were not specifically detailed in the Settlement Agreement. In these cases, he advised the commissioners they would first have to determine whether an activity was in compliance, and if it was not, whether or not they considered the noncompliance to be significant and whether such incompliance mattered to the Zoning Commission. The review of each proposed activity would include consideration of the Zoning Regulations, the record at the time of the Settlement Agreement was presented to the Commission, and the language of the Settlement Agreement itself. He thought most questions about whether proposed activities comply with the Settlement Agreement would involve aspects not addressed in the Agreement.

Mr. Solley noted for the record that Mr. Solomon recused himself at 8:05 p.m. and seated Alt. Mr. Burnham to discuss the decision as to whether or not Commission would go into Executive Session. Atty. Zizka clarified that there are certain aspects of the discussion that would involve what he believes would be legal strategy, which is inappropriate for public discussion.

Mr. Solley asked if there were any further questions regarding the possibility of going into Executive Session. No questions were noted.

**MOTION:** To hold an Executive Session to discuss pending claims or litigation related to the Wykeham Rise, LLC Settlement Agreement. By Mr. Averill, seconded by Mr. Solley, passed 5-0 vote.

**Discussion:**

Mr. Solley stated that Atty. Zizka clearly stated his belief that he and Atty. Olson feel there is case law that protects the Commission from litigation if it holds an Executive Session. No further discussion was raised.

Mr. Solley asked Commission members those in favor of going into Executive Session for the purpose of discussing 101 Wykeham Road and connection with the settlement agreement signify by saying, "Aye". All in favor, no abstentions. Passed 5-0.

The Commission then went into an Executive Session at 8:10 p.m.

**MOTION:** To end Executive Session at 9:40 p.m. By Mr. Averill, seconded by Mr. Burnham, and passed 5-0 vote.

Mr. Solley reconvened the meeting at 9:45 p.m. Seated were Mr. Solley, Mr. Averill, Mr. Reich, Mr. Werkhoven and Mr. Burnham.

**Consideration of the Minutes:**

**MOTION:** To accept the Regular Meeting Minutes of the March 27, 2017 as submitted. By Mr. Werkhoven, seconded by Mr. Solley, passed 5-0 vote.

**OTHER BUSINESS:**

Shepaug Valley Properties/27 Mt. Tom Road/Request to Revise Special Permit: Section 17.9/Expansion of Non-conforming Use/Day Camp: Construct Additional Buildings, Increase Enrollment to 200:

Mr. Solley stated that the camp has come to the Zoning Commission to apply for an amendment of its Special Permit to increase enrollment of the day camp to 200.

**MOTION:** To schedule a Public Hearing on May 22, 2017 at 7:30 p.m. in the Main Level Meeting Room at Bryan Memorial Town Hall to consider the application for Shepaug Valley Properties/27 Mt. Tom Road/Request to Revise Special Permit: Section 17.9/Expansion of Non-conforming Use/Day Camp: Construct Additional Buildings, Increase Enrollment to 200. By Mr. Solley, Seconded by Mr. Werkhoven, passed 5-0 vote.

**ENFORCEMENT REPORT:**

The Enforcement Report dated April 24, 2017 by Zoning Enforcement Officer Mike Ajello was distributed to Commission members.

**COMMUNICATIONS:**

A referral from Northwest Hills Council of Governments (NHCOG) was received dated 03-08-17. Ms. Hill stated this is a referral for the draft for the Litchfield Plan of Conservation and Development that is 58 pages long. She stated if any members would like a copy of this to let her know and she will get that to them. Ms. Hill stated they will be holding a public hearing on May 1, 2017 and Commission members are invited to attend.

**ADJOURNMENT:**

**MOTION:** To adjourn the meeting at 9:50 p.m. By Mr. Werkhoven, Seconded by Mr. Averill, passed 5-0 vote.

Submitted subject to approval

By: \_\_\_\_\_  
Donna Pennell, Land Use Clerk  
May 9, 2017