Zoning Commission

Implementation of PA 21-29 Subcommittee

August 11, 2022

5:00 p.m.

Main Level Meeting Room

ZONING COMMISSIONERS PRESENT: Mrs. Andersen, Mrs. Hill, Mr. Solley

HOUSING COMMISSIONERS PRESENT: Mrs. Gorra, Mr. Woodroofe

ALSO PRESENT ON ZOOM: Atty. Zizka, Members of the Public

Mr. Solley called the meeting to order at 5:04 p.m. and asked Atty. Zizka for a brief presentation re: the Zoning Commission's responsibility in terms of implementing PA 21-29.

Atty. Zizka spoke first about the work done by both the group, Desegregate CT, and the CT legislature from 2019 through 2021 to reorganize and revise CGS Section 8-2. He pointed out sections of PA 21-29 with which the Zoning Commission must comply and summarized specific sections of the act. Pertaining to Washington, the following sections were discussed in more detail:

8.1.B.b: This section addressed temporary health care structures. He noted the Town had previously opted out of this section, but said due to the new legislation, it might be wise to opt out again.

Section 4: Atty. Zizka explained that "character" could no longer be used as a reason for the denial of a zoning application because it was thought it was being used too often to deny multifamily projects throughout the state. The word, "character," was replaced with "physical site characteristics," of both the development and the area in which the development is proposed and may now instead be used as reasons for denial.

4(c)8: This section states the Commission may provide for floating zones, a provision that was added to make it clear that Zoning has this authority. Atty. Zizka described a floating zone as a zone having standards, but not having a specific location. If an application was approved to change a

parcel from its current zone to a floating zone, the floating zone standards would replace those of the old zone. To compare, Atty. Zizka said an overlay zone could be placed on top of or added to the existing zone without changing the existing zone except with the addition of additional standards. Mr. Solley asked if floating zones could be considered spot zoning. Atty. Zizka said spot zoning was illegal and that perhaps it could be considered spot zoning if the parcel approved was very small.

4(c)9: Atty. Zizka noted this section regarding the assessment of traffic concerns now required expert testimony and assessments re: issues such as number of trips, traffic impacts, etc. may no longer depend on the input of lay people.

Page 9, 4(d)(3): Zoning Commissions shall not deny mobile manufactured homes on lots where any other single family dwelling would be permitted. Discussion ensued as Mr. Solley pointed out that the Zoning Regulations Section 2.3.2 specifically prohibits mobile homes and mobile home parks and this had never been challenged. It was noted the Town may not opt out of this section. Atty. Zizka stated Zoning is also not allowed to prohibit child day care homes.

Page 10, 4(d)(6): This section covered "cottage food operations." Atty. Zizka said the Commission can't prohibit them, but may regulate them or approve applications with conditions. He said this revision would not require a substantial change to Washington's existing home occupation regulations.

4(d)(7): Minimum floor area: Atty. Zizka recommended the corresponding section of the Zoning Regulations be amended to refer to the minimum standards established in the Ct. Building Code. The current Zoning Regulations have a minimum ground floor area of 600 sq. ft.

4(d)(8): Atty. Zizka explained that although this section prohibits percentage caps on the total number of multifamily units permitted in a Town, it does not prevent the Town from defining the areas where this housing can exist and/or how many units may be built in these areas. He added, however, that a Zoning Commission can't use its regulations to prevent a developer from building a project with at least 30% affordable units per CGS 8-30g.

4(d)(10): In addition to no longer being permitted to deny land use applications on the basis of character, Atty. Zizka explained that the Town may not set aside areas of housing for people who fit into a specific demographic. He said federal law allows for senior housing and ADA units as the exceptions. He noted, too, that prohibiting children from housing units (except from senior units) would be a violation of the federal fair housing act.

Section 6 on Accessory Apartments: It was noted the Commission had already opted out of this section and was waiting for confirmation that the Board of Selectmen had also opted out as required per PA 21-29.

Section 4(b)(4): Atty. Zizka stressed this section states that Zoning shall provide for opportunities for multifamily dwellings and housing diversity and that this means that Washington's Zoning Regulations no longer comply with the state statute. Mr. Solley said the Commission's work would center on multifamily regulations and briefly explained why Washington's multifamily zone had been deleted only three years after it was first adopted.

Mrs. Hill had previously sent a list of questions dated 8/5/22 to Atty. Zizka regarding compliance with PA 21-29 in general and ideas for implementing specific housing diversity regulations for Washington. He had provided written responses. This document is attached as an addendum. These questions were read and Atty. Zizka provided brief answers to each.

Soil based zoning was considered. Atty. Zizka explained that while in the 1980's it was generally thought that low density and sewer avoidance policies were appropriate ways to protect the quality of groundwater, this view has shifted in recent years. He said that modern engineering can design septic systems for poorer soil types and it should be state and local health departments, not zoning commissions, in charge of groundwater protection. However, he did not recommend the elimination of soil based zoning. He thought it was still valid in preventing erosion, protecting natural resources, etc.

Atty. Zizka confirmed the Zoning Commission has the authority to establish development flexibility with the goal of providing housing diversity by setting standards such as

limiting maximum dwelling size, requiring owners to reside in the units, etc. and also has the authority to increase the number of attached accessory apartments permitted and the conversion of larger homes built after 1950 with the condition that some of the units be affordable per 8-30g. He offered some language the Commission might adopt.

Mrs. Hill asked for advice on how to strengthen descriptions of character in the Zoning Regulations rather than delete them. Atty. Zizka noted the descriptions at the beginning of each zoning district section were not detailed enough; that specifications for architectural styles, dimensional parameters, etc. would be needed and would not be easy to draft. Mr. Solley stated that Roxbury had recently held a public hearing regarding the definition of rural character and suggested Washington could look into the results.

Mr. Solley suggested Washington draft s regulation to permit a multifamily housing floating zone with an approval process similar to that used by the Town of Morris for approval of Windvian; first approval of an application for a zone change and then approval of an application for the specific development. He did not think this floating zone would be appropriate for the entire Town; that the following districts should not be included: Lake Waramaug, New Preston, and The Green. Possible Town owned property in New Preston was considered, but it was thought this had been purchased mainly for conservation and future septic system purposes.

Mrs. Hill circulated sample multifamily regulations from various towns for the subcommittee to review prior to the next meeting. Copies were also submitted for the Land Use Office. Regulations for Kent, Sharon, Roxbury, and Bridgewater will also be reviewed in the future. Mr. Solley will consult with Mr. Adams, past Kent First Selectman.

The next subcommittee meeting was scheduled for Thursday, August 25 at 4:00 p.m. The meeting was adjourned at 6:52 p.m.

FILED SUBJECT TO APPROVAL

Respectfully submitted,

Janet M. Hill

Link to Meeting Recording:

https://townofwashingtongcc-my.sharepoint.com/:u:/g/personal/swhite_washingtonct_org/EUlYxJN2WEhHslB2KtSH6IMB9xkM3ZK52RJp69sKdEX57Q?e=8aKfec

Addendum

General Questions Re: the Provisions of PA 21-29

Section 4/8-2(b)(2)H:
I understand how Zoning can address disparities in housing needs, but address needs in "educational, occupational, and other opportunities?" How is this supposed to be accomplished by a Zoning Commission? Do 8-30g, our current section 13.15, and all of the uses permitted in each of the zoning districts count, at least partially, towards compliance with this requirement?

RESPONSE: As a general matter, there is much in this legislation that is vague and unexplained. Given its unusual history of hard promotion by a special-interest organization (which wrote most of the provisions) and its passage during the chaos of the pandemic, one cannot safely determine what the legislature might really have been thinking or how the courts might end up interpreting many of these provisions.

Having said that, however, it is clear that the principal goal of PA 21-29 was to expand the availability of lower-cost housing in Connecticut, with the presumption that multifamily housing tends to be the most affordable and that large-lot zoning for single-family dwellings tends to make housing unaffordable. So we believe that increasing the availability of multifamily dwellings and reducing required lot sizes (thus presumably creating opportunities for more affordable housing)would in itself be seen as being "designed to address significant disparities in housing needs and access to educational, occupational and other opportunities." In other words, by making housing more affordable in Washington, the Town would be making whatever "educational, occupational and other opportunities" might already in Town available to a wider range of people.

Section 4/8-2(b)(2)J: What are the provisions of the Federal Fair Housing Act that Washington must address? Is this a document that everyone on the subcommittee should review in its entirety? What is meant exactly when it states the Commission must 'affirmatively further its purposes?"

RESPONSE: The Fair Housing Act is largely designed to prevent discrimination, including discrimination against families with children. Arguments have been

made in some courts that failing to provide more affordable housing effectively discriminates against families with children. We don't think those arguments would generally be successful in the absence of overt "economic discrimination" or a showing that a town's housing policies have resulted in more invidious forms of discrimination (e.g., racial discrimination). So, again, making an effort to increase the opportunities for lower-cost housing would probably be deemed to satisfy this provision. It would also help to mention the Fair Housing Act in Section 1.3.

Section 4/8-2(b)(5): "…shall promote housing choice and economic diversity in housing and community development." What is the legal difference between "promote" and "provide for" or "permit?" Again, can't Washington argue it already complies in part due to the current regulations, the specific uses permitted in each district, 13.10, 13.11, and 13.13, for example?

RESPONSE: "Provide for" is probably closer to a command. "Promote" is slightly less mandatory but might not be interpreted much differently by a court; both terms would require a commission to explain what it has done to address the statutory provision. The provisions of Sections 13.10, 13.11 and 13.13 can certainly be cited as helping to achieve the statutory goals but because they tend to piggyback on existing structures, we think a court might want to see a greater effort to allow stand-alone multifamily dwellings in more areas of town.

Section 4/8-2(b)(6): What are the specific housing needs identified in the state consolidated plan for housing and community development that the Zoning Regulations are required to address? Is this a document that should be required reading by the subcommittee (or the entire Commission, for that matter?)

RESPONSE: We will send you a copy of the plan. It is lengthy but the main points are summarized in the first five pages. The primary goals are not much different than the statutory goals we described above.

Section 4/8-2(d)(3): What is the legal difference between a "mobile home" prohibited per Sect. 2.3.2 of the Zoning Regulations and "mobile manufactured home," which this section seems to say are not allowed to be prohibited or banned?

RESPONSE: The term "mobile home" in Section 2.3.2 of the Zoning Regulations would include a "mobile manufactured home." CGS Section

12-63a defines a “mobile manufactured home” as “a detached residential unit having three-dimensional components which are intrinsically mobile with or without a wheel chassis or a detached residential unit built on or after June 15, 1976, in accordance with federal manufactured home construction and safety standards, and, in either case, containing sleeping accommodations, a flush toilet, tub or shower bath, kitchen facilities and plumbing and electrical connections for attachment to outside systems, and designed for long-term occupancy and to be placed on rigid supports at the site where it is to be occupied as a residence, complete and ready for occupancy, except for minor and incidental unpacking and assembly operations and connection to utilities systems.”

Basically, what the statutory provision means is that you cannot prohibit the use of a mobile manufactured home in any situation in which a stick-built home would be allowed (e.g., same lot size, same setbacks, same utility requirements, etc.)

Section 4/8-2(d)(6): What is the state’s definition of “cottage food operation?” How does this operation compare with what is permitted per Section 12.6 of our Regulations? Does the state’s inclusion of the word, “any,” mean that Washington can’t even deny aspects of food operations that don’t comply with our current regulations and/or that we can’t set additional standards?

RESPONSE: CGS Section 21a-62b defines a “cottage food operation” as “any person who produces cottage food products only in the home kitchen of such person's private residential dwelling and only for sale directly to the consumer and who does not operate as a food service establishment pursuant to section 19a-36 or regulations adopted pursuant to section 21a-101, or a food retailer, distributor or manufacturer as defined in subsection (b) of section 21a-92 and section 21a-151.” “Cottage food products” are defined by CGS § 21a-62b as “nonpotentially hazardous baked goods, jams, jellies and other nonpotentially hazardous foods produced by a cottage food operation.” “Cottage food products” do not include maple syrup or honey. “Potentially hazardous food” means “a food that requires time and temperature control for safety to limit pathogenic microorganism growth or toxin formation, which controls shall be consistent with the United States Food and Drug Administration's Food Code definition for time and temperature control for safety food, as amended from time to time, and adopted by reference by the commissioner pursuant to section 19a-36h.”

Given these specific definitions and Washington's specific terms for home occupations, there would certainly be some overlap in any home-based food preparation and sale facility. Notably, Washington's regulations don't "prohibit" such uses. However, if any such use fit the statutory definition but didn't meet Washington's specific requirements, or was denied a special permit, the statute would presumably be deemed to supersede the regulations.

Hill's Specific Questions and Thoughts Pertaining to the Washington Zoning Regulations and How the Commission Might Proceed to Work on Compliance with PA 21-29:

Sections 11.2: Soil Based Zoning and 11.5: Maximum Lot Coverage: Washington is unique in that it has soil based zoning, no municipal sewerage disposal system, and only a few sections of Town with access to a public water supply. When considering implementation of multi family housing regulations, how limiting can these facts be? Can we retain soil based zoning and work within its confines? For class A soils, we currently permit 1 dwelling per 2 acres. If we triple that for the sake of increasing housing density, it sounds good, but it results in only 3 dwelling units per 2 acres. If we permit a 5 times increase, that would be 5 units per 2 acres, but could the 2 acres safely accommodate septic systems and wells with required distancing for 5 dwelling units? The question is more complicated when considering more restrictive soil types and how many dwelling units, septic systems, and wells they might safely accommodate. An alternate method, instead of mathematical increases, might we waive or lessen soil based zoning requirements only under specific conditions such as affordability under 8-30g (seems this would already be allowed under 8-20g) limiting the size of dwelling unit, location of dwelling unit if it contributes to vitality of village center? We could also consider specific districts or a floating zone to allow greater density, however, including such districts in or near the village centers, which on the

surface seems to make sense, leads to the problem of allowing greater density in areas of steep slopes, flood plains, and wetlands and watercourses. These are just some of the questions that will have to be considered. Do you have any advice on how to begin?

RESPONSE: Although the statutes still allow soil-based zoning, there has been a recognition that zoning commissions are not necessarily the best agencies to be worrying about the carrying capacity of soils for water-supply or septic-disposal purposes. Put another way, there is a great deal of skepticism that soil-based zoning can be used to justify large lot sizes when competent engineering or other environmental analysis would show that such lot sizes are not needed for to protect water supplies or enable septic disposal. Nothing in PA 21-29 (or any other zoning statutes) requires a zoning commission to approve housing that cannot meet public health code requirements for water supply or sewage disposal. The concern has been that housing that can meet those requirements is being rejected solely because of artificially large lot-size requirements that were supposedly created to protect water resources. That is not to say that large-lot sizes should never be used, especially where steep slopes or wetlands would create severe risks of erosion or environmental degradation, or where there is a particular desire to maintain a rural atmosphere or protect scenic views, but only that their use should not be deemed necessary to protect drinking water or allow for subsurface sewage disposal when local health authorities say that they aren't necessary. In short, the idea is to allow smaller lot sizes more generally as a matter of zoning regulation, with the understanding that the public health code will still provide adequate protection for water-supply and sewage-disposal purposes.

- The Washington Zoning Regulations already allow for several different housing types: attached and detached accessory apartments, conversion of older dwellings, mixed business and residential uses in the business districts, and smaller sized houses. However, most of these are not now designated as Affordable per 8-30g. In an attempt to provide housing diversity that is affordable (as opposed to Affordable per 8-30g) can the Commission consider regulations such as the following?

Section 11.9: We have this section on development flexibility with the goal of preserving open space. Might we also include a similar section on development flexibility with the goal of providing single family housing diversity? By including standards to permanently limit the size of the house to be built and requiring it be owner occupied, we could perhaps encourage these houses remain affordable (although not Affordable per 8-30g.) Currently, modest sized houses are either torn down and rebuilt much larger, added on to, or bought and rented out for profit all of which contribute to making them unaffordable for lower income people. Is Zoning authorized to set such standards with the goal of providing single family housing diversity? Could Zoning do this on single parcels located throughout Town rather than only in designated subdivisions?

RESPONSE: Those are all very interesting ideas and we see no reason why the Commission could not use them. Typically, zoning commissions are criticized for requiring unnecessarily large minimum floor areas for dwellings; having regulations that allow for greater density for houses that are permanently restricted to smaller sizes is creative and would seem to fit well within the statutory goals.

Section 13.10: This section already allows the conversion of houses predating 1950 to multiple, smaller residential units. Is Zoning allowed to require that any of these units be Affordable per 8-30g? My thinking is perhaps Zoning could permit the conversion of post 1950 houses as is recommended in the Town's Affordable Housing Plan if at least one (or more) of the units was designated Affordable per 8-30g.

RESPONSE: We think such a requirement would be lawful.

Section 13.11.2: This section already permits one attached accessory apartment per property (and a total of two apartments if one is detached.) Might the Commission consider permitting two attached accessory apartments rather than one attached and one detached in an attempt to make it more affordable to build/establish these apartments. (Attached accessory

apartments may use or add on to the septic system for the main dwelling, while detached apartments require the installation of expensive new septic systems.) Can the Commission require that at least one of the two attached apartments be designated as Affordable per 8-30g?

RESPONSE: If the regulations currently allow one attached and one detached accessory apartment, it might be better to simply allow two accessory apartments and state that only one of the two may be detached. Requiring one of them to be affordable would probably be legal, although PA 21-29 suggests that the legislature might not allow such a requirement in the future. The practical question, though, is how would the Commission enforce this requirement?

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Section 4/8-2(d)(10): Do the current introductory paragraphs to each district section (Sections 4.1, 5.1, 6.1, 7.1, 8.1, 9.1, and 10.1) and Sections such as 7.9 and 9.6 contribute to a start of specifically defining character rather than deleting all references to character? What further measures/additional ways can the Commission take to specifically define character so that it may be used as one of the underlying elements for approving or denying an application? Do you have any suggestions?

RESPONSE: PA 21-29's insistence on "clear and explicit physical standards" suggest that phrases such as "harmonious in style, size and proportion" might no longer be sufficient. It would be better if the Commission could specify a range of acceptable architectural styles (e.g., colonial or federal style) and establish specific physical parameters (e.g., the highest elevation of any new building cannot be more than five feet above the highest elevation of any existing building within 1000 feet).