

**THE GLASTONBURY TOWN PLAN AND ZONING COMMISSION
REGULAR MEETING MINUTES OF TUESDAY, FEBRUARY 18, 2020**

The Glastonbury Town Plan and Zoning Commission with Khara Dodds, AICP, Director of Planning and Land Use Services, and Jonathan Mullen, AICP, Planner, in attendance held a Regular Meeting in Council Chambers of the Town Hall at 2155 Main Street, Glastonbury, Connecticut.

ROLL CALL

Commission Members Present

Mr. Robert Zanolungo, Jr., Chairman
Ms. Sharon Purtil, Vice Chairman
Mr. Michael Botelho, Secretary
Mr. Keith S. Shaw
Mr. Christopher Griffin
Ms. Alice Sexton, Alternate (Assigned as voting member)
Mr. Matthew Saunig, Alternate
Mr. Scott Miller, Alternate

Commission Members Absent

Mr. Raymond Hassett

Chairman Zanolungo called the meeting to order at 7:03 P.M. He seated Commissioner Sexton as a voting member, in Commissioner Hassett's absence.

PUBLIC HEARING

1. Continued application of William M. Dufford for final subdivision approval for the 6-lot River Road Subdivision, Phase 3 involving an easterly extension of Dufford's Landing – Assessor's Lots S-4 Dug Road & S-3A Dufford's Landing – Rural Residence Zone & Groundwater Protection Zone 1 – Alter & Pearson, LLC

Town Attorney Matt Ranelli from the firm, Shipman & Goodwin LLP, stated that he went back to explore the terms that section 6.2 focused on, especially with regard to the two clauses "within the actual rights of way" and "within the streets or roads," within subsection (a). He does not think that it alters the guidance he provided on February 4, 2020. He looked at what "within" means because there is no definition of "within" in their regulations. It is used as a prepositional phrase a number of times outside of this regulation (e.g. "within the Town Center Zone.") In those instances, the meaning is clear that it applies to parcels that are specifically located within the zoning designation. He also looked at the dictionary definition of "within" which varies, but when used as a preposition, it includes a definition of bounded by a quantity or geographical description and to mean "to the inside of."

He stated that it is the Commission's job to interpret their regulations, and these are places where they could look—they are certainly places where a court would look. In terms of subsection (a), the Commission needs to look at those clauses, and decide whether the plain

meaning of that limits them to the geographical boundary of the rights of way or the road, and if it does, then they cannot examine their past interpretation of what that section has meant, like previously-approved subdivisions. The Court will not weigh that historic use if the language is clear in its meaning. But if they find ambiguity, looking at past approvals is not dispositive. The Court would have to appeal that there is ambiguity and also agree that the interpretation is reasonable. He summarized that those are the steps that the Commission should walk through.

Commissioner Shaw expressed confusion about the procedure. He stated that the logic here is circuitous because even if they interpret the narrow definition of “within,” how do they get to quantum leap to consider subsection (b)? They are not being asked to consider whether or not to deny a special permit. Mr. Ranelli stated that, as part of the regulations, the Commission is looking for compliance with building zoning regulations and this is one aspect of that. Commissioners Purtill and Shaw both discussed the option of conditioning the approval. Mr. Ranelli acknowledged that this body has the ability to administer a condition of approval, so long as it is reasonable that the applicant could obtain a special permit. And, in that case, it would require distinguishing why the current proposal is different from the activities at issue in the prior denial.

Secretary Botelho stated that he is struggling with the idea that they almost have to put themselves in the mind of the Town Building Official. He asked if they should call the Town Official here to ask him questions. Attorney Ranelli stated that the excavations shown are exempt, either under subsection (a) or (b). Vice Chairman Purtill stated that, assuming they determine that the applicant could only excavate within the right of way, the normal safeguards are that if the developer stops its development, the Town could not finish the road because it cannot finish until every lot is constructed and the grading occurs. Mr. Ranelli agreed that it could be problematic, as a practical matter. If section 6.2.4(c) determines that they fall under exemption (b) as a bona fide construction operation, in theory, the applicant could pull building permits as they go through the excavation of the roadway.

Vice Chairman Purtill asked if, without going to that extreme, the Commission could regulate the manner and the hours of when that hauling could occur. Mr. Ranelli replied, there is nothing in the subdivision regulations that gives the Commission that authority expressly, to regulate the excavation, but if the applicant were amenable to it and consented to it, they could. In short, the Commission does not have the authority to impose all of the conditions that they would impose if it were a special permit. Commissioner Miller stated that, in addition to section 6.2.4, they also need to consider section 6.2.7 on the required standards for a special excavation permit, in order to determine whether or not they are applicable in the subdivision context or not.

Attorney Peter Alter of Alter & Pearson, LLC representing Mr. Dufford, explained that his applicant is out of state but his daughter, Bethanne Couture Dufford, is here as his representative. Mr. Alter explained that he provided staff with a letter for extension of continuing the public hearing this evening, and they received letters from Attorneys Landolina and Slater on behalf of their clients. Mr. Alter agreed with Commissioner Sexton’s statement,

that the Commission should really only be considering the second part of section 6.4.2(a). He stated that the applicant's plan of development represents exactly what this Commission has done time and time again, where they approved excavations and removal of materials similar to this proposal. The idea that the restriction is limited to within the 50-foot right of way leads to the bizarre situation that Vice Chairman Purtill raised. If the subdivision regulations require that the roadway meets the Town standards, and the plan of development complements that, then both of those matters comply with each other.

He explained that Mr. Dufford acquired an excavation permit before but when he rebuilt Dufford's Landing and Tryon Street, he did not get an excavation permit. If the Commission believes it might be ambiguous, then they could look to their historical activities, which indicate that it is not just the 50-foot right of way. He explained that at the last public hearing, they presented the Commission with four examples of previous examples that showed an established practice in Glastonbury. Vice Chairman Purtill inquired about temporary slope rights. Mr. Alter stated that temporary slope rights are not on the maps at this point. She then asked, if the Town had to call a bond and build a road, it could build outside the 50-foot right of way and the applicant would have already posted the activity for that to occur. Mr. Alter stated that is correct.

Commissioner Shaw asked what Attorney Alter's interpretation is of "excavation operations," and whether there is a certain threshold for removal of any earth product. Mr. Alter stated that his understanding is that it is either the removal or filling of earth material on a site, either for commercial purposes or to prepare the site for development. Therefore, there is no dispute that this is an excavation operation under the Commission's regulations. Chairman Zanolungo asked, in the beginning part of the development on Dufford's Landing, outside of those 2 lots that had special permits, how much material was removed off those lots to make it viable. Mr. Alter stated that it was not as much as what is proposed in this application.

Mr. Alter explained that he takes exception to some of the conclusions and arguments made by Attorneys Slater and Landolina. The clear language of the first part of section 6.4.2(a) demonstrates that a road that meets the Town standards is to be built. The Town Building Official would otherwise render without meaning that portion of the subdivision regulations that require the roadway to meet Town specifications. He also does not agree with Attorney Ranelli's assessment of section 6.4.2(b). He believes that it is the Town Building Official's responsibility and authority to decide whether or not a special excavation permit is required. He stated that Attorney Landolina's letter makes the same arguments as Attorney Slater's letter, which concludes that he does not believe that the houses will ever be built. Mr. Alter categorized that as speculation because there is no evidence of that. Mr. Dufford has posted a \$1.2 million bail, and the only way to make his money back is to develop the lots and get them sold. He also noted that when they came before the Commission for a straightforward excavation permit, this Commission denied it.

Attorney Alter also made the point that he and Attorney Landolina are looking at the same things and interpreting them differently. What they argue is that it is a restriction on the use of Mr. Dufford's property, which is based on interpretation of the language of that regulation that

they do not agree with. His final point is, if the Commission requires an excavation permit before a subdivision permit, then they should be prepared to get an excavation permit before every subdivision application that comes before them. If they require this, then the Commission is setting a precedent that is contrary to their previous applications of their regulations thus far.

Vice Chairman Purtill stated that she is concerned with the trucks coming through with the neighbors on Dug Road. Mr. Alter stated that they would accept the same conditions that the Commission might propose for an excavation permit. They do not have a problem with hours of operation. Commissioner Sexton asked why there is a different plan of development referred to in the subdivision regulations. Attorney Alter noted that that does not speak to a plan of development for any particular property.

Chairman Zanolungo opened the floor for public comment.

Attorney Ken Slater of Halloran Sage, representing Michael Blair and neighbors, stated that Attorney Alter's point about previous history is irrelevant if the Commission interprets the language unambiguously because they would have to look at the plain language of the regulations. Mr. Slater stated that the Carpenter case, which was the control case that Attorney Ranelli referred to, argued against the idea of the Commission deferring to the Town Building Official for subsection (b). Attorney Slater also argued that subsection (c) is being overlooked. He stated that this Commission does not have any discretion to interpret the regulation any differently than it is written. Because there are no building permits issued today, those lots are not zoning compliant, but they can be by making the applicant file for a special excavation permit; then, the Commission can issue the subdivision.

Commissioner Shaw stated that it seems like subsections (a) and (b) are talking about 2 different jobs: (a) meaning excavation within the road and (b) meaning excavation within the entire lot. It seems that it is still the Town Building Official's job to supervise and administer. Attorney Slater countered that (b) does not apply because no building permit has been issued by the Town Building Official. Subsection (c) does apply because the applicant does not need a building permit for a construction operation. The Town Building Official's job is not to manage the excavation. Secretary Botelho countered that it is, as per their regulations. He stated that Attorney Slater is not giving the benefit to the applicant. The sum level of fairness in terms of (b) is in furtherance of operations for which a building permit will be issued. Commissioner Shaw added that the question of whether the applicant could do an excavation with or without a permit is not under the Commission's discretion. Attorney Slater argued that they cannot approve a subdivision that does not comply with zoning. They all require a building permit, and here, none is issued. The noted that the Commission should also ensure that the proposed grades are reasonable because if the Town Building Official rejects it, then the Commission will be skirting the excavation regulations all together.

Chairman Zanolungo stated that a bond is needed for a roadway. The applicant has to deliver a roadway that conforms to the Town standards, in order to get his money back. He asked Mr. Slater how he marries that with not being able to deliver a road without the proper excavations

and setbacks. Attorney Slater replied that, in order to accomplish the grades, because the work is not all within the 50-foot right of way, the applicant needs an excavation permit. If he does not do that, then this Commission is permitting him to do excavation outside of part a (meaning outside the roadway), even though the Commission's regulations say that that is not allowed. The applicant can accomplish that by getting an exemption.

Commissioner Shaw asked if the applicant would consider the condition that no excavation would be done outside of the right of way until building permits were issued. Mr. Alter stated yes, that is their expectation. He added, one of the reasons why the excavation permit was turned down was that Mr. Slater and Mr. Branse pointed out to the Commission that the access roadway did not comply with the regulation. Herein lies the trap of applying for an excavation permit, which the neighbors think they should do. Under section 6.2.7a2, the permitted area of excavation shall be located within 50 feet of the property line/street/road right of way, but they cannot excavate this area in for 50 feet. So, when they apply for the excavation permit, inevitably, someone will point out that they do not meet that regulation, and therefore, cannot receive an excavation permit. They also cannot get a variance because it is a self-created hardship.

Commissioner Miller asked the Town Attorney to give his thoughts on Mr. Slater's presentation on sections 6.2.4(b) and (c). Mr. Ranelli disagreed with Attorney Slater's statement that the building permit has to have been issued before they can act. He does not see how the regulation could be read that way. This commission is reading into the building zone regulations, so they have to look prospectively. It is a legal impossibility that the applicant would have a building permit at this point. There is nothing in the text that clearly spells this out, but he is stuck with this conclusion. Before the applicant conducts the operations, they need a building permit, but not before coming to the Commission. Subsection (c) also contains language as directed and approved by the Town Building Official. There is no building permit here under which the Town Building Official would conduct that guidance. This commission would have to see if the excavation issued is the type that would fit under subsection (b), a bona fide construction operation, prior to the conduct of that operation having a building permit, and subsection (c), projects that are small in scale, below 600 cubic yards, that would not require getting a permit.

Commissioner Miller asked if the Town Building Official is in charge of monitoring compliance with the grading plans that get approved. Ms. Dodds replied yes, but there is also a team that goes along with that process, too.

Mr. Skip Kamis of 152 Dug Road, explained that his main reason for speaking was that he wanted to be certain that Attorney Landolina's letter was submitted to the record. He thanked the Commission for how engaged they remain in sorting through the details of this application. He clarified that their energy, as residents in South Glastonbury, has never been directed to Mr. Dufford and his family, but on the zoning to ensure that one person's use of property does not conflict with another resident's use of their property.

Ms. Jane DeMaio of 148 Dug Road, appreciated the Town's attention to detail, but stated that it is important to remind everybody that the quality of their lives changed with that first excavation. She explained that they built their home on Dug Road for the bucolic ambiance. In 2008, when the first excavation started, they were assaulted by the operations, which were heard inside of their house. Her opposition is aimed at unsafe truck traffic on Dug Road and the nuisance of an operation over 10 years. The excavation permit affords certain protections for them. This application has a duration of 5 years with an option to renew for 10 years, which is most bothersome to her. The previous 10 years of her family's lives were affected. Based on current market conditions, this could extend another 10 years. She asked the Commission for protection from another protracted period of nuisance and the safety issues on Dug Road.

Mr. Scott Bissell of 156 Dug Road, reiterated neighbors' safety regarding truck traffic on Dug Road. He encouraged the Commission to have a discussion regarding safety.

Mr. Ranelli responded to some of the concerns that were raised during the comment session. He explained how the applicant could get an access road into the site. The regulations were amended recently to include a permitted area definition, which is an area where the applicant is requesting excavation, not the entire premises. That permitted area has to be accessed by an access road, which is required to have a 50-foot setback, as per section 6.2.7. The access road itself is not part of the excavation operation. Commissioner Miller asked if the Commission feels that they have enough information on what those excavation operations will be. Vice Chairman Purtill inquired on whether a screener will be placed there.

Attorney Alter replied, they had a screener in the old permit, but this is an excavation operation and material will be removed, so a screener is not permitted. He clarified that the access road issue is not the issue that he was raising. He explained that they can never comply with that minimum setback requirement, as detailed in section 6.2.7a.2 of the regulations, in order to acquire an excavation permit. Mr. Ranelli did not disagree, adding that while the permitted area cannot be within 50 feet, the access road can. A future application would have to define the permitted area as 50 feet away.

Ms. Dodds gave a refresher on what can happen after the public hearing closes: either the Commission could make a decision tonight or within 65 days of today, as the state statute stipulates. The Commission cannot ask for any new information, and any interpretation would be based on what is already in the record. Commissioner Miller added that unseated alternates cannot be involved once the public hearing is over.

Commissioner Miller expressed that this is the most difficult application that he has ever seen brought before him. He is bothered by the precedent issues on both sides and concluded that this is a very conflicting issue. Commissioner Saunig agreed, stating that there are flaws on each side of the argument, and he does not know where he would come down on this issue at this point in time. Secretary Botelho stated that he is not prepared to make a decision today. He needs to look at section 6.2.7 and section 6.2.4(a), (b), and (c) again, and the Commission may need further clarification(s) from Attorney Ranelli.

With no further comments, Chairman Zanolungo closed the public hearing at 9:24 P.M.

Commissioners Griffin and Purtill stated that no one should be rushed in their decision tonight. Vice Chairman Purtill expressed that, in terms of the option of approval with conditions, she would like to go over the details with staff to make sure that they do not miss any safeguards for the neighbors. Commissioners Shaw and Sexton concurred. Town Staff agreed to add this on to the next agenda for discussion.

REGULAR MEETING

1. Informal session for the purpose of hearing from citizens on Regular Meeting agenda or non-agenda items *None*

2. Acceptance of Amended Minutes of the February 4, 2020 Regular Meeting

Motion by: Commissioner Shaw

Seconded by: Vice Chairman Purtill

Result: The amended minutes were unanimously accepted as presented (6-0-0).

3. Referral from Zoning Board of Appeals – Request of Asana Organics, LLC for a use variance from Section 4.15.1 of the Glastonbury Building-Zone Regulations to allow a skin and beauty business within the Planned Commerce Zone at 730 Hebron Avenue

Mr. Alter, representing Asana Organics, LLC, explained that his client is endeavoring to open their business at 730 Hebron Avenue, which was originally built as a strip center building. The Planned Commerce Zone’s design is not set out to allow the use that they suggest, and the site is not susceptible to a zone change. He explained that this building is a much less expensive retail opportunity than downtown. Mr. Alter then passed out a roster of all of the tenants and their square footages, for the parking. He concluded that his applicant is a good fit for the space.

Commissioner Shaw noted that there is already a hair salon there. He asked if it were an approved use variance. Mr. Alter replied yes, his client offers a different set of services, but it is not too dissimilar. Ms. Dodds added that, in terms of their regulations, they view them to be the same use. Vice Chairman Purtill stated that she has no problem with the use variance because it is what is keeping these places alive. Commissioner Miller added that he would rather see these uses than a typical planned commerce use. Mr. Alter also pointed out that the Conservation Commission would like them to eliminate 3 parking spaces.

Motion by: Secretary Botelho

Seconded by: Vice Chairman Purtill

MOVED, that the Glastonbury Town Plan and Zoning Commission provides a favorable referral to the Zoning Board of Appeals regarding the request of Asana Organics, LLC for a variance from section 4.15.1 permitted uses in the Planned Commerce Zone to allow a beauty salon at 730 Hebron Avenue.

Result: Motion passed unanimously (6-0-0).

4. CONSENT CALENDAR

- a. **Scheduling of Public Hearings for Regular Meeting of March 3, 2020: to be determined**

5. Chairman's Report *None*

6. Report from Community Development Staff

Ms. Dodds stated that they have no public hearings, but some applications are working their way through the process.

There being no further business to discuss, Chairman Zanolungo adjourned the meeting at 9:40 P.M.

Respectfully Submitted,

Lilly Torosyan
Lilly Torosyan
Recording Clerk