

**THE GLASTONBURY TOWN PLAN AND ZONING COMMISSION
AMENDED 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 what he found altered the guidance he provided on February 4, 2020. He looked at what the term "within" means because there is no definition of "within" in the regulations. The term is used as a prepositional phrase a number of times outside of Section 6.2 (e.g. "within the Town Center Zone.") In those instances, the meaning is clear that the term "within" applies to parcels that are specifically located within the zone boundaries. 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 the Building-Zone Regulations, and the examples mentioned are places where they could look for guidance — they are certainly

places where the court would look. In terms of subsection (a), the Commission needs to look at those aforementioned clauses, and decide whether their plain meaning limits the exempt excavation activity to the geographical boundary of the rights-of-way of the road. If it does, this new interpretation does not allow the Commission to rely on past practices, including previous subdivision approvals, when considering the current proposal. The court will not weigh historic interpretation if it is decided the language is plain in its meaning. Alternatively, the court could weigh historic interpretation if it decides there is ambiguity and agrees that interpretation is reasonable.

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 subdivision regulations, the Commission is looking for compliance with building-zone regulations. Commissioners Purtill and Shaw both discussed the option of conditioning the approval. Mr. Ranelli acknowledged that the Commission has the ability to condition the 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 excavation activities in the current proposal are different from the excavation activities at issue in the prior denial.

Secretary Botelho stated that he is struggling with the idea that they have to put themselves in the mind of the Town Building Official. He asked if they should call the Building Official here to ask him questions. Attorney Ranelli stated that the excavations shown are exempt, either under subsection (a) or (b). Vice Chairman Purtill expressed concern regarding the opposition’s interpretation of subsection (a) that limits the exemption for excavation activities to within the right-of-way. She stated if that interpretation was applied to the current proposal, the result of the excavation, as allowed under subsection (a) for the road way, would create a canyon with steep side slopes. To complete the road, the applicant would then have to apply for building permits as permitted in subsection (b) to complete the grading required to achieve the Town-mandated minimum road side slopes in the area adjacent to the right-of-way. Ms. Purtill further stated the construction bond posted by the developer normally serves as a safeguard should the developer fail to complete construction of the road and public improvements of a subdivision. The Town, she continued, would then use the bond money to complete construction of the road and public improvements. The Town would not be able to finish the road construction under the opposition’s interpretation and the Town would lose the safeguard.. Mr. Ranelli agreed that particular scenario could be problematic, as a practical matter. If the Commission 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 the proposal was for a special permit. Commissioner Miller stated that, in addition to Section 6.2.4, they also need to consider Section 6.2.7 regarding the required standards for an excavation special 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 noted that he provided staff with a letter granting extension of the public hearing this evening, and they received letters from Attorneys Landolina and Slater on behalf of their clients. Mr. Alter stated that the Commission should only be considering the second part of Section 6.4.2(a) which speaks to a plan of development approved by the Town Plan & Zoning Commission. 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 exemption under subsection (a) is limited to within the 50-foot right-of-way leads to the bizarre result that Vice Chairman Purtill raised earlier. 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.

Attorney Alter explained that Mr. Dufford acquired an excavation permit before but when he built Dufford's Landing and rebuilt a portion of Tryon Street, he did not get an excavation permit. If the Commission believes the language of Section 6.2.4 is ambiguous, then they can look to their past practices, which indicate that exempt excavation activity is not limited the 50-foot right-of-way. He explained that at the last public hearing, they presented the Commission with four examples of previously approved subdivisions that represent 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 the bond and build the road, could the Town build outside the 50-foot right-of-way? Mr. Alter stated that is correct.

Commissioner Shaw asked about Attorney Alter's interpretation of "excavation operations," and whether there is a certain threshold for removal of any earth product. Mr. Alter stated that his understanding is that "excavation operations" is either the removal or filling of earth material on a site, either for commercial purposes or to prepare the site for development. Commissioner Shaw then asked Attorney Alter if he agreed that there is no dispute that this is an excavation operation under the Building-Zone Regulations; Attorney Alter agreed. Chairman Zanolungo inquired how much material was removed in previous phases of this subdivision to make the lots viable. Mr. Alter stated that it was not as much as what is proposed in this application.

Mr. Alter said that he takes exception to some of the conclusions and arguments made by Attorneys Slater and Landolina. He stated that it was his opinion that the clear language of the first part of Section 6.4.2(a) contemplates that a road that meets Town standards can be built. He further stated that in order to build a road to Town standards, excavation activities have to occur in the actual right-of-way but also in the area adjacent to the right-of-way so that

appropriate grades can be achieved. Attorney Alter continued, by saying it was his belief that the aforementioned activities are exempted under 6.2.4(a). To interpret that language otherwise, would 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 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 bond, and the only way to get 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 with regard to a pertinent court case, he and Attorney Landolina are looking at the same case and interpreting it differently. The case to which they both refer is *Farrior versus Zoning Board of Appeals 2002*. The case determined that where more than one interpretation of language is permissible, restrictions on the use of land are not to be extended by implication, and doubtful language will be construed against, rather in favor of, the restriction. The interpretation of this case that the opponent is suggesting the Commission adopt is a restriction on Mr. Dufford's property. His final point was, if the Commission requires an excavation permit before a subdivision permit, then the Commission should be prepared to receive excavation applications before every subdivision application. If the Commission requires this, then they are setting a precedent that is contrary to their previous interpretations of their regulations.

Vice Chairman Purtill stated that she is concerned with the truck traffic impacting the neighbors on Dug Road. Mr. Alter stated that they would accept the same conditions that the Commission might propose for an excavation permit, including hours of operation. Commissioner Sexton asked why there is a different plan of development referred to in the subdivision regulations. Attorney Alter noted the reference in the subdivision regulations is to the Plan of Conservation & Development.

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 of Section 6.2.4(a) 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 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 approve 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 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 Building Official. Subsection (c) does apply in this situation because the applicant does not need a building permit to do the work necessary to create the proposed lots. The Building Official's job is not to manage the excavation. Secretary Botelho countered that it is, per the regulations. He stated that Attorney Slater is not giving the benefit of building a home 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 building permit is not under the Commission's discretion but rather the discretion of the Building Official. Attorney Slater argued that the Commission cannot approve a subdivision that does not comply with zoning, and the proposed lots do not comply with zoning. The reason the lots do not comply with zoning is because they involve excavation work in excess of 600 cubic yards, which does not require a building permit. In this situation an excavation permit is required to make the lots zoning-compliant. Attorney Slater then stated that by deferring to the discretion of the Building Official, the Commission runs the risk of the Building Official rejecting the grading plan and thus rendering the lots illegal.

Chairman Zanlungo stated that a bond is needed for a roadway. The applicant has to deliver a roadway that conforms to the Town standards, in order for that bond to be released back to the applicant. 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 subsection (a) (meaning outside the roadway), even though the Building-Zone Regulations say that that is not allowed.

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 (the attorney represented the Blairs and their neighbors in a previous application) 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 the applicant should do. Under Section 6.2.7.a.2, the permitted area of excavation shall not be located within 50 feet of the property line/street/road right-of-way. Attorney Alter then pointed to the area on the site plan where the applicant could not excavate under the aforementioned section of the Building-Zone Regulations. So, when his client applies for an excavation permit, inevitably, someone will point out that the proposal does not meet that regulation, and therefore, cannot receive an excavation permit. His client 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 subsections 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. Before the applicant conducts the operations, they need a building permit, but not before approval by the Commission. Subsection (c) also contains language as directed and approved by the Building Official. This Commission would have to see if the excavation activities are the type that would fit under subsection (b), a bona fide construction operation, and would, 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 a permit.

Commissioner Miller asked if the Building Official is in charge of monitoring compliance with the grading plans that get approved. Ms. Dodds replied yes, but other staff members also monitor compliance as well.

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 approval has a duration of 5 years with an option to renew for another 5 years, which is most bothersome to her. The previous 10 years of her family's lives were affected; based on current market conditions, the sale of excavated material could extend the project 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 as part of the excavation permit on Dug Road but there will be no screener as part of the subdivision approval. 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. 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

Attorney 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 bank building. The Planned Commerce Zone's design is not set out to allow the use that the applicant proposes, 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 at 730 Hebron Avenue and their square footages to determine parking requirements. 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 that business had an approved use variance. Mr. Alter replied yes; Asana Organics offers a different set of services. Ms. Dodds added that, in terms of the regulations, they view the two businesses to be the same use. Vice Chairman Purtill stated that she has no problem with the use variance because the proposed use and similar personal service uses are taking the place of retail in these types of buildings. Commissioner Miller added that he would rather see these uses than a typical Planned Commerce use.

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