MINUTES OF THE CHESHIRE PLANNING AND ZONING COMMISSION PUBLIC HEARING HELD ON MONDAY, MARCH 27, 2017 AT 7:30 P.M. IN COUNCIL CHAMBERS, TOWN HALL, 84 SOUTH MAIN STREET, CHESHIRE CT 06410

Present
Earl J. Kurtz III, Chairman; Sean Strollo, Vice Chairman; David Veleber, Secretary.
Members: S. Woody Dawson, John Kardaras, Vincent Lentini, Gil Linder, Louis Todisco.
Alternates - Jeff Natale and Jim Jinks.
Absent: Edward Gaudio. Alternate Jon Fisher.
Staff: William Voelker, Town Planner and Town Attorney Joseph Schwartz

I. CALL TO ORDER
Chairman Kurtz called the public hearing to order at 7:31 p.m.

II. ROLL CALL
The clerk called the roll.

III. DETERMINATION OF QUORUM
Following roll call a quorum was determined to be present.

IV. PLEDGE OF ALLEGIANCE
The group Pledged Allegiance to the Flag.

V. BUSINESS
Secretary Veleber read the call of public hearing for all the applications.

1. Special Permit Application **PH 3/27/17**
Steven W. Davis **MAD 5/31/17**
380 Maple Avenue
Cheshire CT 06410

Steven Davis, applicant, recently purchased the house, with an existing in-law apartment, and he wishes to use the apartment for family.

Mr. Voelker said the approval was originally in 1996 for five years, with no renewals since that time. The application is compliant with the regulations in every way. The applicant would have to return in five years to renew the in-law use. If the application is approved the applicant must file it on the land records of the Town.

Chairman Kurtz closed the public hearing.

MOTION by Mr. Veleber; seconded by Mr. Dawson.

MOVED that the Commission recess the public hearing at 7:41 p.m. and open up the Regular Meeting of the Planning and Zoning Commission.

VOTE The motion passed unanimously by those present.

Chairman Kurtz recessed the public hearing.

Chairman Kurtz reopened the public hearing at 7:43 p.m.

2. Amendments to Subdivision Regulations PH 3/27/17
Planning and Zoning Commission
Section 5.6 Cul-de-Sac Street or Dead End Street
Section 6.6 Streets to be constructed and/or Connected in the Future.

Attorney Schwartz advised that the courts issued a decision on Watts vs. Planning and Zoning Commission regarding appeal of a subdivision application decision by the Planning and Zoning Commission (PZC). The court held that the PZC did everything correct in accordance with the regulations, and issued an opinion based on substantial evidence on the record. The issue of the case was that two of the regulations, Section 5.6 and 6.6, were determined by the court to be ambiguous. As a result, the court overturned the PZC decision based on these grounds, not anything done by the Commission. In particular, the court said that terms such as "practical, desirable, appropriate" were terms in the regulation that were too ambiguous for developers to be able to interpret. In response to that decision, Attorney Schwartz advised that amended sections of the regulations have been drafted to address those ambiguities so this does not happen again. The drafts have been submitted to the Commissioners.

Mr. Dawson asked about any conversations with Public Works Department on this.

Attorney Schwartz replied he has not had conversations. While these amendments were done in response to the court decision, they are meant to be applied universally, and they are not drafted to address one particular application or piece of property.

It was stated by Mr. Dawson that when PZC has something they get information from Public Works. His feeling is that wherever a road can go through it should go through. If there is a subdivision and it is known there will be a subdivision eventually the Commission should make provisions while approving something to look to the future. This is a concern for him.

According to Attorney Schwartz the main reason for these amendments Sections 5.6 and 6.6. and terms like "practical, appropriate, desirable" regards to whether there should be cul de sacs in certain areas, the courts found the terms too ambiguous. In the amendments there is context added to these terms, spelling out the specific considerations the Commission will consider on the record before approving such a permit or temporary cul de sac.

The court decision says the regulations must be specific enough for a developer to know what has to be approved…but not so specific that it gives away all the PZC

discretion. It is kind of a gray area and happy medium which PZC must balance. Attorney Schwartz is comfortable and confident in the amendments to the sections, and the compromise has been reached. He cannot say 100% that any provision appealed will stand up…at this point he is confident the issue of the court decision has been addressed.

Mr. Kardaras said that the context is that the "desirable, practical" terms were ambiguous, and asked if that is correct.

In reply, Attorney Schwartz said he would not phrase it that way…its not as if it is just picking a synonym to those terms. More than that has been done.

Mr. Linder commented on reading the amended regulations and said there is a vast improvement, and decisions for the Commission will be much easier. It presents, crystal clear, what is being talked about regarding cul de sacs and extensions.

In looking and the proposed regulations, Mr. Natale talked about his understanding of "does not pose a danger to health or the public safety". He asked about…"and if the cul-de-sac is in harmony with existing or proposed principal thoroughfares", and asked about "harmony" and extending through streets.

Attorney Schwartz advised those terms were taken from the general statute. Determining what is "in harmony" is the subject for the Commission to determine, and it is impossible to put it in more specific words. It is up to the Commission, when it gets a cul-de-sac application, to say…is it in harmony with the other streets, will it cause traffic issues, are there safety concerns giving emergency vehicle access.

There was a very brief discussion about no "harmony" with the other streets; this is why there is a cul-de-sac proposed; making a finding; and decision being based on a case-by case basis.

These terms were taken from the general statutes and Attorney Schwartz said the purpose of this meeting is to go through the amended regulations and discuss any issues. He will take the statements and concerns under advisement and see if there is better language to better address the concerns.

Chairman Kurtz said it is confusing talking about a cul-de-sac and asking about it being in harmony with the existing streets.

Attorney Schwartz stated he could see cul-de-sacs, in certain instances, being in harmony, and connecting with certain streets could cause more traffic concerns. He can see it both ways.

As an example, Mr. Dawson talked about sidewalks on both sides in the old part. Someone comes in and puts in a street…within harmony…and now we are more lenient saying one side is enough, both sides don't need to be done. Somewhere, he thinks

when PZC is approached, it looks at how it fits with the neighborhood…with 20 houses here…and a new section will be 4 or 5 houses.

Attorney Schwartz understands what is being said. The amended regulations are a good example of courts saying not to be too strict, not being too ambiguous. "Harmony" may not mean the same thing for one cul-de-sac as it means to another. The word "harmony" gives the Commission a fair amount of flexibility.

Mr. Veleber commented on "harmony" and case law where courts define situations determining harmony, and not in harmony.

It is fact specific and Attorney Schwartz said the words "in harmony" are in the general statutes and are used by other towns in their zoning regulations, and have been upheld. It is a common term.

Mr. Veleber talked about something presented - a proposed cul-de-sac being narrower than the rest of the roads and with other features not on other roads in the subdivision. Would this be a consideration for harmony.

Mr. Linder looked up "harmony", and it says "compatible", and asked if this would be a better word.

It was stated by Attorney Schwartz that certain synonyms for "harmony" are probably better. He has a little reservation using a different synonym because "harmony" is used in the general statutes, has been upheld, and he cannot say for certain that a synonym might not be ambiguous down the line. In drafting the amended regulations with a majority of the terms, he tried to find court cases with similar language with Cheshire's general statutes as closely as possible. Then, if he had to go back to court on any one of these regulations, he had familiarity.

Mr. Todisco stated it is wise to use the words already in the statutes. He asked about cul-de-sac regulation 5.6 being applied, whether the particular cul-de-sac was looked at as temporary or permanent cul-de-sac. He said the same regulation would apply.

Attorney Schwartz said that was correct.

Mr. Todisco said there is less discretion with this regulation. The first finding is that it does not pose a danger to the health and public safety, and this is an easy standard to be met. He could not envision a situation where a cul-de-sac would pose a danger to public health and safety. Mr. Todisco said the real standard is whether the cul-de-sac is in harmony with existing or proposed principal thoroughfares…and he does think a lot of situations would be found in this regard. On a personal note, Mr. Todisco said he likes cul-de-sacs and lives on one. The phrase "does not pose a danger to health and public safety" is standard and fairly specific.

In the instances where posing a danger to health and public safety might come up, Mr. Schwartz said it would be for a very long street, or on the edge of town where emergency services require 15 to 20 minutes response time because there is no through street. He has seen those instances where health and public safety might be an issue, or putting a cul-de-sac in an area where it will significantly increase traffic due to 50 houses on each end.

Mr. Todisco commented on the words being used, and "compatible" being a good word, but "harmony" has always been used in cases, meaning "not vague".

Attorney Schwartz stated Section 6.6 was amended for the same reasons as Section 5.6. He talked about rights-of-way and easements which are already defined in the subdivision regulations. There is a street right-of-way, which means land dedicated for highway purposes…and this is not being talked about in these sections…we are talking about just "right-of-ways". Right-of-way easements, in some instances, are synonymous with one another, and this is the case here. It was felt by Mr. Voelker and Mr. Schwartz that right-of-way is more clear and gives more context to what is being talked about.

Mr. Voelker said it was a more clear term. (parts of statement and brief Commission discussion inaudible). He talked about the design challenge. Standards are set forth in the subdivision design standards. Mr.Voelker said if someone has a 30 footer, that is a design problem on an individual application given topography, drainage, and other things to be evaluated. This regulation changes none of that.

Easement 1.17 - Attorney Schwartz said Right-of-Way 1.18 in the Subdivision Regulations. An easement means legal authorization for use of a designated part of private owned property by a party or parties, other than the owner of said property for a particular use. In this case it would be giving a strip of land to the Town…for eventually putting in a street. A "right-of-way" is almost identical to this definition, but refers to giving someone an easement for the right-of-way. A regular easement is more broad, and can be given for anything. A right-of-way is, essentially, an easement for a right-of-way.

A right-of-way is defined as any physical area subject to the right of any person other than the owner to use that area for the purpose defined by a recorded easement or purposes according to law.

Attorney Schwartz said the way it is defined in the subject matter, easement or right-of-way are almost identical in definition. Just saying right-of-way in this regulation gives more context of what it is.

Mr. Dawson cited an example…if he had a right-of-way that would come off a main road; one of the houses owned the right-of-way; and also had easement to get to the farm land; the law changes as things go, but he thinks you cannot take away what you already have. Mr. Dawson owns the land in the back; wants to put in some houses

back there; he talks to the neighbor on the road with a strip going up; and he does not have enough to get the Town the requirement but is close…where is there room for this. He understands you cannot land lock a piece of property.

According to Mr. Voelker these regulation changes have nothing to do with what Mr. Dawson's questioned. In order to develop the back property cited by Mr. Dawson there is a separate section of the regulations to build a road. If you don't have sufficient right-of-way width you can petition the Commission for modification variance under Section 11.1. The amended regulation has nothing to do with the example cited. If Mr. Dawson, for development purposes, wanted to build a road, his obligation is to the standards set forth in another section of the regulations.

Going with what Mr. Voelker is saying, Mr. Dawson said if he had enough road but not what is required, he could get a modification. If other dangerous things are involved, he asked what happens.

Mr. Voelker said the Commission looks at things on an individual basis. A person can ask for waiver of any standards of the Subdivision Regulations.

Attorney Schwartz said the ultimate question was "easement" replacing the word "right-of-way". According to definition of these two terms in the regulations they are synonymous for this purpose, and he does not see an issue using either term. He and Mr. Voelker felt that "right-of-way" gave more context, and easement was changed to "right-of-way".

The main reason for the other amendments in Section 6.6 was due to the section having the term "appropriate". The court said "appropriate" was too ambiguous, so Attorney Schwartz took additional language to give the term more context…language approved by the Appellate Courts in another decision a few years ago, and general statute language. Again, if this section was ever challenged again, he knows the arguments he would make.

Mr. Todisco said the language is greatly improved. He recalls reading a judge's decision wherein he said "appropriate" is one of the great weasel words. Mr.Todisco asked about the word "suitable" being accepted by the courts and not being too vague. In terms of certain things…natural features as listed in Section 5.2 and Plan of Conservation and Development and the land's innate characteristics…the Commission has lots of specific things to look at to determine suitability.

Regarding this statement, Attorney Smith said "suitable" is defined by giving due consideration to the other characteristics.

Mr. Todisco said part of the standard is "reasonably be harmful to the safety, welfare…and "reasonable" is an objective term in legal parlance. He expects this word to be okay.

Stating "yes", Attorney Schwartz noted this language was in the regulation that was challenged in the Appellate Court case he mentioned, and it was upheld. There is no black and white science for any of these terms. It is what the Commission and judges decide is, and is not, ambiguous.

Mr. Todisco granted that "suitable" with a period is different than "suitable" with different factors stated after the word.

Regarding dedicated rights-of-way in streets, Mr. Veleber asked if this should be capitalized in the regulations.

In reply, Attorney Schwartz said there are certain terms capitalized throughout, but rights-of-way is capitalized throughout.

Mr. Veleber talked about distinction between rights-of-way and easement, with easement being a broader term.

Attorney Schwartz said an easement is for anything; a right-of-way is, essentially, an easement for a right-of-way.

PUBLIC COMMENTS AND QUESTIONS

Tom Norback, 383 Briar Court, said he felt the Commission should have discretion in the cases. He does not see how the ambiguity has been removed. He asked who would define "harmony" on any given finding. The amended language is as ambiguous as the original terminology. Maybe its defensible. He is surprised the words are so similar in ambiguity.

Attorney Schwartz stated he sees the point made, and said the word "harmony" is a term taken from the general statutes, as opposed to "appropriate". There are certain terms which will be found to be appropriate versus ambiguous. In this case the word "harmony" is taken right from the general statutes, and it is given some further context if you read throughout the regulations. It talks about harmony with the existing physical through ways, especially in regard to safe intersections. Reading the regulation as a whole, harmony has a lot to do with safety issues.

Mr. Norback said this was addressed in the other part…cause no harm or danger to the public. That's been taken care of, and that does not fall under the purview of harmony. He is hard pressed to figure it out. He said it is important for the Commission to have discretion and latitude…and asked how to put harmony in…there is no definition for harmony. Whatever the statute says or defined or defended, harmony is discretionary. He asked if it is harmonious to have a cul-de-sac or not have one. It is important as defining the terms for approving a subdivision as it is to have these terms for denying. Using words like harmony give discretion, and Mr. Norback said it holds it to a standard beyond discretion.

(Mr. Voelker speaking; inaudible)

The General Assembly, in its wisdom, decided to use that word, and it forces commissions to rely upon it. Case law talks about it. We are stuck with what is there. It is up to this Commission, on an individual basis, to decide whether a proposal for a certain piece of property for a cul-de-sac, based upon the record. Like it or not, harmony is the word the General Assembly has given to commissions to use as a statutory term. We must be careful using a synonym.

Mr. Norback said harmony is a matter of perception. There seems to be some confusion. If the Commission is ruling on something he would be concerned that the perception of harmony, either harmony itself or the definition of harmony, presents a challenge.

Chairman Kurtz asked if someone came in for a cul-de-sac and he found it to be in harmony with the streets…is this what harmony means.

Section 5.6 is about cul-de-sacs, not temporary cul-de-sacs. Mr. Voelker said 5.6 is whether we want to allow a cul-de-sac at all…the extension of a cul-de-sac. The tests for a temporary cul-de-sac are in 6.6; 5.6 is whether a cul-de-sac will be allowed in a location. To him, the reading is whether a cul-de-sac is appropriate form. Section 5.6 is not about should we require it to be a permanent cul-de-sac…it is should we allow a cul-de-sac to begin with.

Mr. Voelker cited an example…8 lots on a cul-de-sac (temporary or permanent); this is 64 trips per day; and this would be an example of not being in harmony with the street system. If the Commission feels it should be extended this recommendation can be made.

The Commission members held a short discussion about Sections 5.6 and 6.6 (some is inaudible, people talking over each other).

Attorney Schwartz talked about coming in with the 8 lot subdivision example, there will, probably, be a cul-de-sac because you don't want to lose a lot. That is under 5.6; it is a permanent cul-de-sac and Commission would decide, based upon public health, safety, etc. whether it is in harmony to put a permanent cul-de-sac in that subdivision. Given the curb issue, PZC could say it is not in harmony, but otherwise it could be said it is in harmony. PZC could also say maybe it is and maybe it isn't…and look at 6.6 to say it would be seen in harmony if it is allowed to be a temporary cul-de-sac. In that instance, Section 6.6 says the Commission may require that a provision be made in the street layout of the Subdivision Plan for the reservation of a dedicated right-of-way. It might be taken a step further in PZC stating, as a permanent cul-de-sac, the harmony is not seen…but it will be made a temporary cul-de-sac with a dedicated right-of-way at the back end…and harmony is seen.

A statement was made (speaker name unknown) about what lies behind the cul-de-sac, temporary or permanent, i.e. leaving access to a previously undeveloped piece of property, PZC does not know the development potential is for this property. It is hard to

decide whether something is in harmony before it even gets there and see a proposed thoroughfare, not only what is 1/4 mile away where other activity could be taking place. (inaudible words) What we think of potential for a through street does not always cost somebody…sometimes it does.

Attorney Schwartz disagreed on one point, stating 6.6 even if you don't have any type of proposed development on where the right-of-way would be, the section gives the Commission a tremendous amount of characteristics to consider in deciding whether to put in the right-of-way…i.e. "flooding, improper drainage, steep slopes, rock formations, adverse road formation or topography, utility easements and other features that may reasonably be harmful to the safety, health and general welfare of the present of future inhabitants of the subdivision and/or its surrounding areas." To Attorney Schwartz, this says "yes"; there are a variety of ways to develop certain streets and through ways. There is enough consideration where the Commission, given the topography of a certain area, given flooding, utilities, steep slopes, rocks…can say it cannot see how this area could be developed in a safe, efficient manner. Section 6.6 gives them enough to consider to make a decision.

The speaker stated that is counting on the Commission's expertise on whether something is developable or not or creates a challenge, which may only be a design challenge addressing the items and safety issues. This can be addressed by a professional engineer on how to meet those challenges. He cautioned the Commission not to paint themselves into a corner, and stated appreciation for the expertise of the Commissioners.

Mr. Strollo talked about a last lot that could be linked to Alpine Drive which meets all the rules. It's a nice cul-de-sac, but maybe someday it would nice to connect to Alpine Drive.

(speaker) To that point, this could be explored, but that neighborhood is fully built.

Mr. Strollo said this is an option.

Mr. Todisco asked Mr. Voelker to restate the example he stated earlier.

Mr. Voelker said 5.6 is for a cul-de-sac. There could be a sight line issue, vertical or horizontal curb. (part of his statement is inaudible on the tape). The Commission can make a finding; there could be circulation issues; concerns about 64 trips per day; could be a temporary cul-de-sac due to safety issues; and these are things that PZC can consider. He said the PZC has this same responsibility right now under these regulations, and the amended regulations change nothing. The next test would be whether it is a permanent or dead-end and safety review.

At the request of Mr. Todisco…Attorney Schwartz repeated his statement about an application coming in for a permanent cul-de-sac. Using Mr. Voelker's example of it being on a bad turn/safety issues…as a permanent cul-de-sac it would not be in

harmony given the safety issues. It is possible to look at Section 6.6 and the Commission has the discretion to put in a dedicated right-of-way, if suitable. If it was found suitable, the Commission could say as a permanent cul-de-sac we don't find it suitable or we are on the fence about it being harmonious. It now becomes a temporary cul-de-sac with potential for eventually connecting to other streets, that pushes it over the fence, and now PZC think its harmonious under Section 5.6. and it might be approved.

Attorney Schwartz stated that the way Section 5.6 was worded before, instead of the words "in harmony", there was "practical and desirable". It was those terms the court found to be ambiguous. What is being done is trying to add a clearer standard for any developer. The word "harmony" and the following additional terms have been found to be unambiguous by the courts. Nothing new is being added to change the overall landscape of the regulations…just a more clear context…so they are not as ambiguous. To the extent there were and are cul-de-sacs in Cheshire that were approved before this will not prevent any cul-de-sac from being approved in the future. If the word "harmony" is an issue, Mr. Schwartz said this can be looked into.

PUBLIC

Joan Malloy, Esq. 50 South Main Street, Wallingford CT, addressed the Commission about the proposed regulations. She stated appreciation for the Commission and Town Attorney acknowledging that the changes will apply to all properties in the Town subject to the subdivision application and proposed changes. She stated it is important for the applicant and citizens be advised of their obligations, going forward, when the regulations are modified. Ms. Malloy read the regulations, and it appears the Commission is going to have evidence presented regarding the appropriateness of the cul-de-sac, and in some cases the appropriateness for future road extension.

Attorney Malloy had a number of general questions, but did not expect answers, as they are food for thought questions. The questions were cited as follows:

1. Who will have the obligation to present the evidence about the factors as listed in the regulations.

2. The applicant is the only person really before the Commission; so it would seem that it would be the applicant's responsibility to establish necessary facts.

3. As an attorney who represented applications and cases, she asked what type of application will be submitted to the Commission…will a cul-de-sac be proposed.

4. If a cul-de-sac is proposed, would road extensions be proposed.

5. How does Attorney Malloy advise clients; how do we get the necessary information if we are proposing a future road extension; there are factors that have to be decided. There is information on the subdivision property, but there is no access to the possible connected property. She knows there are many ways

that sensitive property cannot be developed…there are ways to design and interfere around wetlands and other factors.

6. How do you determine its not possible to develop a parcel (inaudible)…through the regulation.

7. To satisfy the question about who is supposed to make the presentation; what is the standard for showing compliance.

8. Does the mere presence of one or more of the factors listed in the new regulations create a presumption of reasonable harm to public safety, health or general welfare.

9. As to future roads…does someone have to prove a property can be developed in a sensitive manner before the Commission will approve a future road extension.

10. If true, who has the obligation to make this presentation and how do they do it.

11. If the Commission is deciding it is really the property owner on whose road the property will be connected by this future road extension…how do we notice that property owner that they have this obligation.

12. How do we give them time to prepare a plan; are we going to make them present.

13. Is this a fair burden to put on somebody who just happens to own property that is next to property which is the subject of a subdivision.

14. Looking at this from a general perspective, without clear procedures for presenting evidence, including who has the obligation, and the type of facts beyond the mere listing of factors in the regulation. The Commission will be basing its decision on incomplete and possibly inaccurate information.

Attorney Malloy made a general comment about loss of lots, and said there is nothing in the current or proposed regulations that says loss of a lot is a valid consideration for whether a cul-de-sac should be required. Focusing on a developer or applicant before the Commission who would lose a lot is not relevant. Who owns the abutting property is not relevant. The Commission should keep this in mind during considerations.

Regarding Section 5.6, Attorney Malloy said under the proposed regulation the Commission is required to determine if the character of the cul-de-sac, including but not limited to the length, the number of lots and distance from emergency service, does not pose a danger to health or public safety.

Attorney Malloy raised the following questions:

- Will an applicant be required to provide evidence that the cul-de-sac does not pose a danger to health and public safety, or is that the Commission's job.

- There is reference to the proposal including reference to length…is the intent to allow a cul-de-sac longer than permitted in the regulations, or is the Commission raising the possibility that the permitted length is, of itself, posing a danger to the public health and safety.

- The reference to the number of lots…what is the intent; is it saying allowance of more lots; or the already committed number of lots will impose a danger to public health and safety.

- Proximity to emergency services on cul-de-sacs. Is this being laid against…if a connection is made. Does the proximity and distance include existing neighbors that might have better access to the connection made. Who has the obligation to look at all of these considerations; are these factors the Commission is considering; it would appear from the regulations that some of those things are a possibility.

- Clarity - what should an applicant be looking at; what has to be presented.

- Attorney Malloy said the regulation goes on to state (and she read an excerpt into the record) …if the cul-de-sac is in harmony with existing or proposed principal thoroughfares, including but not limited to major streets, collector streets or arterials as defined in these regulations and as subscribed and shown on the Plan of Conservation and Development.

- There was a long Commission discussion on "harmony" and Attorney Malloy said there is a full vetting of the issue. She asked for the Commission to provide her with examples of what would make a cul-de-sac in harmony or not.

- The Subdivision Regulations define major streets but not arterial streets.

- The Plan of Conservation and Development discusses arterials but not major streets…are they one and the same.

- Attorney Malloy asked why we are tying the determination of harmony to whether it is a major street, a collector street, or an arterial. She also asked if there is intent to limit where cul-de-sacs will be allowed.

- How does one arrange a cul-de-sac to divide adequate and convenient system for present and prospective traffic needs.

- Permanent cul-de-sacs provide no relief for traffic flow. If the Commission is talking about future, prospective improvement of traffic, connection to another street is how this is done.

- If it is being said that a cul-de-sac must provide for adequate and meaning systems for both current and prospective trafficking, Ms. Malloy does not see how those two make sense.

- Section 6.6, the regulation states…The Commission may require a street layout that provided for a dedicated right-of-way for future streets to connect with future streets on adjoining property. Attorney Malloy said she looks at the definition of street right-of-way versus regular right-of-way. She said the Commission may want to consider the term being used in the regulation…is it street right-of-way, or is it just right-of-way. Street right-of-way says it is dedicated for future roadway. This is a discussion point to have.

Attorney Malloy read another excerpt from Section 6.6 into the record.

Ms. Malloy asked:

- How the Commission determines the presence of one or more of these factors creating reasonable harm to public safety, health or general welfare.

- Is it the intent that the mere existence of natural features or one of the characters presents evidence of reasonable harm to public safety, health or general welfare.

- Who will have the obligation to provide evidence that there may be such harm.

- What if the property being developed has the same or similar characteristics that is likely to receive approval.

- How does the Commission make a determination that an abutting parcel cannot be developed without harm unless it receives more detailed information.

- The POCD states the Planning and Zoning Commission should not allow future road connections without considering impact of any road construction on sensitive environmental areas. How does the detailed development plan determine this.

Chairman Kurtz noted that the points made by Attorney Malloy will be addressed.

Mr. Linder noted that Attorney Malloy said quite a bit, and it sounds like an indictment on Cheshire's regulations…and this is the way he took it. He said Ms. Malloy is outlining all the reasons why the town's proposed and past regulations are totally inadequate. He asked Attorney Malloy, who works in Wallingford CT, if there are surrounding towns that have tight regulations of the kind that have raised questions by Ms. Malloy. To him it sounds like the regulations have to be very precise, much more voluminous than what Cheshire has…more than two paragraphs. If there is anything to help the Commission or the Town Attorney develop something more to Ms. Malloy's

liking, he asked for examples of much improved regulations from Wallingford or similar towns.

Ms. Malloy said Wallingford's regulations are more along the lines that you must provide for road extension unless proof can be provided it can't be done. She has not looked at other towns' regulations in a long time, and the specific question has not come up. Ms. Malloy said she is asking how to do this; and tries to do it; how will the next person in this situation propose to respond. The citizen, property owners, have a right to know how the decision will be made. If her comments came across as an indictment, Ms. Malloy said this was not her intent. It was to think about what the Commission is saying. Things are written because they are being looked at in one way…and she is as guilty as anyone else. Someone else is needed to look at it, and say think about it. There should be some flexibility, but standards should be set to apply to all applications.

Mr. Linder noted all that is being talked about is a cul-de-sac. Decisions based on a subdivision and specific cul-de-sac are no more complicated than any other possible decision. The Commission weighs factors and to apply regulations to a specific application.

Stating Mr. Linder is right, Attorney Malloy said it is very fact specific. She talked about property, all developed, and a determination can be made that a cul-de-sac is appropriate. But, if there is property where a road connection could be made, then it's a different scenario. She is suggesting the Commission take into consideration, as it adopts language, who will make the presentation, what will they have to present in order to establish what is appropriate for a cul-de-sac. If it is to be decided a cul-de-sac is going to be permanent or temporary…there must be facts and evidence presented to make this determination. Who has this responsibility and what will be required.

Attorney Schwartz expressed appreciation for Ms. Malloy's statements. He said it is good to have comments from both sides…the developer and Commission, with important points to consider. In his original point made, Attorney Schwartz said courts have said regulations cannot be so ambiguous that the developer does not know what they have proposed, and can't be so strict that the Commission has no discretion. We are trying to reach a happy medium here. In drafting the amendments, Attorney Schwartz said he took terms from general statutes and court cases. To the extent there are terms still deemed invicuous such as "suitable or harmony" Attorney Smith said he tried to add language to those terms.

Lori Watts, Wallingford Road, asked how the changes differ from the prior regulations.

Attorney Smith said the terms the court found to be ambiguous in 5.6 were "practical and desirable", and they are no longer in this section. They have been replaced with terms from the general statutes and cases upheld not to be ambiguous. Section 6.6 had the word "appropriate" deemed to be ambiguous, and this has been taken out, and "suitable" put in the regulation. Attorney Smith cited what makes something

"suitable"…considering natural features as listed in the regulations…and read an excerpt into the record. The terms were clarified, and that is the difference.

Lori Watts asked how those words change the outcome.

Attorney Schwartz said the prior words that were ambiguous to the applicant are replaced with unambiguous terms that the legislature and court cases have upheld…they do give guidance to an applicant to know what has to be proposed to the Commission.

Ms. Watts asked if different things will have to be proposed because of the changes.

Attorney Schwartz said not, necessarily, different things…the terms there now will, and should, provide an applicant with enough information to know what must be shown to the Commission. It was thought the prior terms did; the court felt otherwise; and the amendments correct this.

Ms. Watts asked who will determine, how it will be determined, that what we have now is better.

In drafting these regulations, Attorney Schwartz looked at court cases where similar challenges to regulations were raised, where terms were ambiguous. He looked at cases which upheld sections as unambiguous and adopted that language. The language was found that has been upheld by the courts and inserted them into these regulations. As to who will determine that, a court has already done that, but if these sections are ever appealed again it will be a court making that determination.

Ms. Watts tried to make a statement about her appeal.

Attorney Schwartz stated he would not get into prior court issues, and said these amendments to the language are based on court cases and statutes that have found the language to be unambiguous. What was raised in a prior court case is not before this Commission and Attorney Schwartz would not get into that.

Mr. Kardaras stated that the Commission has language to be looked at, weighs against it, and the Commission interprets the law and applies it. If there is a problem a judge makes a decision; if there is still a problem, then another judge makes the decision…this is how it works.

Ms. Watts commended the Commission for its work, made a comment about arbitrary situations that arise…(the rest of her comments are inaudible).

Chairman Kurtz left the public hearing open.

4. ADJOURNMENT

MOTION by Mr. Dawson; seconded by Mr. Linder.

MOVED to adjourn the public hearing at 9:00 p.m.

VOTE The motion passed unanimously by those present.

Attest:

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Marilyn W. Milton, Clerk
Transcribed from Tape