MINUTES OF THE CHESHIRE PLANNING AND ZONING COMMISSION PUBLIC HEARING HELD ON TUESDAY, APRIL 24, 2017 AT 7:30 P.M. IN COUNCIL CHAMBERS, TOWN HALL, 84 SOUTH MAIN STREET, CHESHIRE CT 06410

Present
Earl J. Kurtz III, Chairman; David Veleber, Secretary. Members: S. Woody Dawson, Edward Guadio, Vincent Lentini, Gil Linder, Louis Todisco.
Alternates – Jon Fischer, Jeff Natale and Jim Jinks.
Absent: John Kardaras
Staff: William Voelker, Town Planner; 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. Zone Text Applications **PH 4/11/17**
Town of Cheshire - Planning and Zoning Commission **PH 4/24/17**
To amend Section 32(building coverage in Industrial Zones)
To amend Section 32(to reduce the lot size in the I-2 Zone)
To add to Section 23 (Definitions) Low Impact Development (LID)
Creation of new Section 35 to regulate Building Coverage and Storm Water Management and Access Management in the Industrial Zones.

Town Planner Voelker read an excerpt from the Naugatuck Valley Council of Governments (NVCOG) communication regarding Section 32 and definition of Low Impact Development into the record. He also read the two definitions for Low Impact Development (LID) into the record – The Town of Cheshire definition and the DEEP definition. Mr.Voelker said his recommendation (and that of NVCOG staff) would be to use the DEEP definition. He does not recommend using the definition for LID from other towns.

Mr. Voelker read an excerpt from a NCVOG recommendation regarding storm water drainage manual. He said to do what NCVOG suggests would require an amendment to the 2004 Storm Water Quality Management evaluation techniques used now. He

referenced using the DEEP and Town Engineering Department policies, and is confident Cheshire has sufficient techniques in place, and prefers not using another town's policy.

Mr. Voelker submitted copies of materials to the Commissioners. The blue document is the 2004 Connecticut Stormwater Quality Manual. He also submitted the Engineering Department policies for storm water management evaluation. Mr. Voelker noted the Town has an extensive storm water management plan which can be found on line, and there is no need to adopt any other plan.

There were no public comments.

Mr. Todisco asked about there being a material difference between the two LID definitions.

According to Mr. Voelker the PZC can choose either one.

Mr. Todisco thinks the second one is more general and talks about site design strategy…"numerous" site design principles. The first one talks about storm water management approach. In just talking about storm water management, the first one is fine. The second one talks about the language…maintains, mimics or replicates…each has a different meaning and Mr.Todisco is not sure what the different meanings are. The word "numerous" requires numerous changes.

Mr. Voelker said they have to go to the State to get their permit, and using the same permit definition means the applicant will have to use techniques acceptable to the State. It does not matter which is used. Applicants usually hire qualified engineers who know what they have to do. NVCOG recommends using the same language as the State.

It was stated by Mr. Kurtz that he is okay with using the second LID definition as recommended by NVCOG.

Using the second definition is consistent with the State regulations, but Mr. Todisco does not like the way it is worded, and it does the same as the first one.

According to Mr. Voelker everything in the regulations is referenced in the Industrial policy section of the POCD.

Mr. Dawson commented on leaving it the way it was. The potential applicant could come in under special zoning. There is more PZC control, but if the consensus is to go with the second definition, this is okay with him.

Mr. Kurtz said it is making changes in order to bring more business into Cheshire.

When people come in and see the Town Planner, Mr. Dawson said there is a good chance; it depends on where, what section it will be done in; and what is there now. He talked about being proactive rather than reactive; we keep loosening up, losing ground, going backwards instead of forwards. Mr. Dawson believes in letting people do something different, and PZC having more leverage and control. He supports changing the lot size; is not against growth; and likes smaller growth with power.

The Commission was told by Mr. Voelker that this was all discussed during the POCD meetings, and coverage was compared to other towns around Cheshire.

There were no further comments or questions. The public hearing was closed.

2. Amendments to Subdivision Regulations **PH 3/17/17**
Planning and Zoning Commission **PH 4/24/17**
Section 5.6 Cul-de-Sac Street or dead end Street
Section 6.6 Streets to be constructed and/or connected in the future.

Town Attorney Schwartz reviewed Sections 5.6 and 6.6 which were the subject of a recent appeal. In that decision the court stated the current version of these sections were ambiguous. He revised the sections so they were no longer ambiguous and subject to a court challenge.

Attorney Schwartz looked at CGS 8-25 language which covers how subdivision regulations are written; looked at case law and one Appellate Court case where the regulation was subject to court challenge; the applicant thought it was ambiguous and the court ruled it was not. He looked at the language in the general statutes, the language in the court case where the court found the regulation was unambiguous, and tried to mirror the language that was used in both statutes and put it into Cheshire's regulations.

The memo from Attorney Schwartz dated April 17, 2017 to the Planning and Zoning Commission highlights the key language in the general statute as well as the Appellate Court case, and the key language he used in the proposed revised version of Sections 5.6 and 6.6.

At the last hearing Attorney Schwartz noted there was discussion about the word "harmony" and whether that term would be viewed as ambiguous by the courts. Section 8-25 uses the word "harmony" in discussing how the town's regulations are supposed to be drafted, so the word "harmony" is taken from the general statutes.

There were also public comments about the ambiguity of the proposed language. Attorney Schwartz told the Commission he does not have a crystal ball, and is not the

judge ultimately reviewing these regulations. If further challenges are met, the Town Attorney will look at what the courts have previously said on other regulations and mirror those regulations and what the court has stated.

On Section 5.6 Mr. Todisco said this becomes the new first paragraph of the regulation, and the specific regulations after that (5.6.1 etc.) remain the same.

Attorney Schwartz said that was correct.

Mr.Voelker said the intention is to read each of these proposed sections into the record so it is clear the regulation being considered.

Town Planner Voelker read the proposed Section 5.6 and Section 6.6 into the record of the meeting. He also read an excerpt from the POCD, page 31, Facilities Section into the record.

It was stated by Mr. Dawson that engineers can make almost anything work; he believes when engineers do calculations, testify that something will work; and it is hard to vote against something. Commissioners vote with their conscience and this is the way he works. There is also reliance on the Town Attorney. But, mistakes are made.

Attorney Smith said there is nothing in the regulations preventing Commissioners from hearing expert testimony, decided whether the cul-de-sac is suitable in certain areas. He has read the Appellate Court cases, and quoted an excerpt into the record…*"It would be impractical to attempt to establish regulations that would address every possible scenario regarding a topographic or other natural conditions the land".*

The courts do not expect regulations to address every possible scenario, and the Commission is at liberty to listen to all testimony and consider it. Attorney Schwartz said it would be impossible for anyone to draft regulations to cover every possible scenario. The current revisions to these regulations get as close to that as possible.

Stating he does not disagree, Mr. Dawson tries to make good decisions and not put the Town in a position to have to fight in court.

Mr. Kurtz stated the PZC does not want to put too much into the regulations; the Commission needs to be able to make a decision; and with more and stronger wording there is no decision for the Commission. It is what it is and has to be.

Section 5.6, first sentence, "may be permitted" was raised by Mr. Todisco, who said the decision is still discretionary and wide open, even if there is no danger to health or public safety, and is in harmony. It is hard saying "no" to this, and "may" would allow that.

It does allow discretion and Attorney Schwartz said the cul-de-sac character would be in harmony…this is a reason to approve.

Section 6.6 language says "may" require that a provision be made to the street layout…and Mr.Todisco said the existing 6.6 says "shall". He read an excerpt into the record.

Mr. Todisco pointed out that Section 5.6 talks about cul-de-sacs; Section 6.6 talks about throughway itself.

Mr.Gaudio said this does not handcuff the Commission and gives options.

At the last hearing Mr. Veleber said the idea was raised about the issue of whose presumption is it to address these issues when presented. Will there be a through road or stub left for the through road…whose presumption is it…the neighbor or the applicant. He said the applicant may not know what to do with the property.

Like any application, Attorney Schwartz said the burden is not on the Commission; it is on the applicant who has no intention of developing a through street; or neighboring property owner stating there is no intention of developing their property, but wants to preserve and protect that right for the future. An expert can be hired and the burden is to show the Commission it is possible. The Commission looks at everything; if there is no expert testimony to rebut; it is not the Commission's burden to make that decision.

Chairman Kurtz asked if the abutting property owner can hire their own engineer and present testimony.

In response, Attorney Schwartz said the abutter can come in, say his piece, that is simple. If the Commissioners do not agree or have questions, need answers, and the burden is back on the applicant.

A question was asked by Mr. Strollo about how much undeveloped land is left in Cheshire.

Mr. Voelker said he could not provide accurate information at this meeting. However, most R-40 and R-80 and R-20 are developed; there are no sanitary sewers in R-80 zones; most R-40 zones do not have sanitary sewers. Most applications coming in have some limitations…wetlands, slopes, odd issues, and the best properties were taken long ago. But, there are some good properties out there. The reason the POCD includes this recommendation is recognition of what is there has limitations. It clarifies the ability to evaluate what a public highway will mean on an adjacent property. Part of the Commission's burden is whether it feels public highways are appropriate for that purpose. PZC must determine what the street layout should be town wide. Just because someone shows a layout of a piece of property and possibility of a cul-de-sac, it is the PZC's decision whether the road should be extended based on the merits of

every case. The regulations clarify the Commission's ability to evaluate circumstances and where public highways belong.

If someone with land is hoping for future development, and plan a road, Mr. Dawson said they think about these things. They come to a public hearing, get an attorney, engineer, present facts, and PZC does its due diligence. The PZC must listen to them.

Mr. Voelker said not every property is developable. He also questioned the Commission knowing every development scenario for every piece of property.

Mr. Todisco talked about how everything works together. The application is for Section 5.6; the PZC makes various determinations; and permits a cul-de-sac. On the same application, the PZC can superimpose a possible another street to be constructed in the future based on Section 6.6.

The way he reads it, Attorney Schwartz said Section 5.6 creates the cul-de-sac, and Section 6.6 gives the easement or right-of-way to the Town for connecting property for the right to put in a through street if an abutting property were ever developed. They would not be simultaneously built.

Mr. Todisco said it might be a temporary cul-de-sac, and it is approved because it meets the regulations. Under 6.6 it reserves the right to change it in the future.

Stating that is correct, Attorney Schwartz said it is the cul-de-sac as approved. At a later time it could be a through street because of the dedicated right-of-way.

Mr. Todisco said this depends on how the cul-de-sac is laid out.

Mr. Veleber asked for clarification on the effect of the change in Section 6.6. He said it remains a presumptive through street or a stub is left. The word "shall" is turned into "may"; it becomes more descriptive on whether the stub will be left.

The proposed revision is "may" and Attorney Schwartz said the reason for the amendment is to clarify certain term the courts find ambiguous. The word "may" in Section 6.6 gives more discretion. The current version has "shall", followed by places where the Commission deems it appropriate. The word "appropriate" was a term found by the courts to be ambiguous. Mr. Schwartz argues that using "shall" and tying it to a word like "appropriate" gives more discretion.

PUBLIC COMMENTS AND QUESTIONS

Whitney Watts, 825 Wallingford Road, is in favor of cul-de-sacs and developments. He develops roads and cul-de-sacs, has been before the Commission; has talked to the Town Planner Voelker, and agrees with having a stub. He said there should be a straight forward rule, put it in or don't put it in. There cannot be control how a piece of

land will be developed. Engineers will dispute what is being said, and it can be simple or looking for trouble.

Joan Molloy, Attorney, 150 South Main Street, Wallingford CT, thanked Attorney Schwartz for the additional statements he submitted. There must be clarity as to who has the obligation to present evidence regarding future road extensions. She realizes the Commission needs discretion to look at applications, she gets the sense that the Commission is moving more towards someone having to prove the need for a through road rather than we are going to use that as a starting point that there should be a through road. Evidence would have to be presented that it is not appropriate for a through road. That is an important planning decision to be considered while looking at the regulations.

Ms. Molloy said "shall" should be kept in the regulation, as it says to the applicants that we need to look at that. The revised regulation has factors to look at for decision making about an individual application. The word "may" makes it seem like cul-de-sacs will be a priority. She understands the POCD, the Town Planner's comments on the amount of developable land, and wanting to keep larger lots for multiple uses. Parcels are sometimes combined and reconfigured, and options must be kept open and be maintained. Ms. Molloy commented on the important decisions made, telling the public who has what obligation. Some property owners do not have options and capacity for attorneys and engineers, so she is glad to hear it is the applicant's burden to establish that whatever the regulations say…those reasons prevent a through road going through. Ms. Molloy believes "shall" should stay in the regulation; it says we need to consider this; as the Commission determines for reasons contained in the regulations it is not appropriate. It makes applicants do a presentation about whether it is appropriate or not, and give factual evidence to make a decision.

A question was asked by Mr. Veleber on how "shall" versus "may" impacts the regulation.

According to Attorney Schwartz it gives less discretion for a through way. The Commission could be faced with a scenario if the regulation says "shall", and there is no evidence regarding the suitability of the abutting land. A neighbor may not be at the hearing, know about the application, the applicant did not hire an expert, and the situation could be difficult. The regulations says you must have the through way, and there is no evidence before the Commission to say one way or the other. The Commission makes a decision "yes", and it gets appealed. The test for overturning an appeal is arbitrary and capricious, with very high standards. Most decisions are not overturned. If there is no evidence before the Commission regarding the suitability, and it is forced to make a decision with lack of evidence, the court may say there was no evidence, and the decision is arbitrary. The word "may" gives more discretion. There is no requirement to allow the through way. In a situation where there is lack of evidence, "may" gives more discretion that there was no evidence before the Commission.

Mr. Veleber asked if there is any impetus for an applicant to put in the request for the through roadway. An applicant can come to the Commission with a subdivision regulation proposal that has a roadway stub, and potentially requests it not be approved. He said, to him, this ultimately leads applicants to forget about the roadway stub and go straight to a subdivision with a true cul-de-sac.

In a situation where they do not want a throughway, just a cul-de-sac, the property may be more valuable, and Attorney Schwartz said evidence might not be submitted regarding the throughway. The Commission might envision more development around this area, the town might reserve a through way for planning circumstances, and have a suggestion on whether it could be submitted. Without submission of evidence, it could be said the property is suitable; we want a through way there; we want to reserve the right for the abutter; and make the determination. If the abutter is aware and wants to reserve that right it would be at their expense.

Mr. Veleber said the burden shifts back to the Commission, and talked about an applicant coming in without showing a road stub.

Under 5.6 Mr. Voelker said the applicant makes the case as to why it is being shown as a permanent cul-de-sac and show consideration of various things listed.

Mr. Veleber said the Commission is a watch dog on these applications.

Attorney Schwartz explained it is up to the applicant to show why their application meets the regulations. If an applicant wants a throughway situation, the suitability must be shown. If a neighbor wants it, they show suitability. If no one comes to the Commission with any throughway, the PZC takes a step back, says the cul-de-sac is approved, Section 6.6 allows a throughway, and it decides on this right for the abutter. It is not required, but there is this discretion. Mr. Schwartz does not see the word change putting more of a burden on the Commission. If the applicant did not want the throughway; the abutter did not testify; the Commission is left in the same situation…the throughway has to be put in, if appropriate. We are in the same situation, and instead of “appropriate” more verbiage can be put in.

Under 6.6 Mr. Veleber asked if there can be request of a waiver, or is it part of the application as a whole.

Mr. Todisco said if someone wants to build a cul-de-sac they come in under 5.6, and 6.6 does not have to be mentioned. As a practical matter road stubs will not be considered…unless someone says there should be one there. The PZC can take the initiative under 6.6. It can protect possible future development by addressing 6.6.

The Commission was informed by Mr. Voelker that applications are reviewed, and comments are received from many town departments.

Mr. Kurtz said it could be a situation where the Commission sees something in the future.

Unless someone comes in and says there is possible development further down in t he area, Mr. Todisco said 6.6 will not be thought about. This is the way it is right now, and with someone bringing up 6.6 the rules have changed.

Mr. Dawson said the Commission would have the power to do it. He said the applicants are reviewed before coming to the PZC, and there is a point where Mr. Voelker can lead the applicant to say…the neighbor has land over here and have you talked to him. The opportunity is there, so PZC is not caught in a catch 22.

In the context of the regulation, Mr. Voelker said he would say the Commission would likely ask why you are proposing a permanent cul-de-sac, and have good reason, and be prepared to discuss the position of the abutting property owner.

Section 6.6 was cited by Mr. Linder, "may' versus "shall"…and in the first long sentence that starts out "Commission may require; several lines down there is a comma followed by "if". He suggested taking the sentence and turning it around…starting with "If". He said it makes no difference whether it is "shall" or "may".

Attorney Schwartz agreed with the logical conclusion being made by Mr. Linder. However, the courts interpret the word "may" and "shall"…with "may" being more discretionary and "shall" being mandatory. In this case the difference is somewhat significant. If it is not suitable the Commission has no discretion .

Attorney Anthony Fazzone, Two Towne Center, Cheshire CT, said what is being missed is the PZC asked to revise the regulation. The revision is being done, not for any particular piece of property, but for any property coming before the Commission. He said it is not easy to write a regulation to cover every situation, and the court language has said this. Mr. Fazzone considers the word "may" as more appropriate; it goes along with what was heard earlier that pieces of property that can be developed in town are not easy to develop. One key word and aspect of this regulation talks about conditions of the adjacent property but on the sub-divided property. There could be a situation where there would be no expedient way to require a through street or stub. In those cases coming before the Commission, it will be the applicant's burden to prove that the stub is not required.

Attorney Fazzone said Mr. Voelker is correct…this is not the only place in the regulations where staff and departments reviewing the application will ask about a place to put in a stub or not. He said "may" is the appropriate word to be used.

There were no further questions or comments. The public hearing was closed.

VI. ADJOURNMENT

MOTION by Mr. Strollo; seconded by Mr. Dawson

MOVED to adjourn the public hearing at 8:45 p.m.

VOTE The motion passed unanimously by those present.

Attest:

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Marilyn W. Milton, Clerk