The Planning and Zoning Commission of the Town of Avon held a meeting at the Avon Middle School on Tuesday September 10, 2019. Present were Thomas Armstrong, Vice Chair, Mary Harrop, Joseph Gentile, Lisa Levin, Brian Ladouceur, Jr., and Alternates Jill Coppola (sat), Elaine Primeau, and Linda Preysner. Linda Keith, Chair, was absent. Also present was Hiram Peck, Director of Planning and Community Development, and Kari Olson, Town Attorney.

Mr. Armstrong called the meeting to order at 7pm.

**APPROVAL OF MINUTES**

Mr. Mahoney motioned to approve the minutes of the June 25, 2019, meeting. The motion was seconded by Mr. Gentile and received approval from Messrs. Mahoney, Gentile, Ladouceur, and Armstrong and Mesdames Harrop and Coppola. Ms. Levin abstained.

Mrs. Harrop motioned to approve the minutes of the July 9, 2019, meeting. Mr. Ladouceur requested a correction to his comments on Page 94 (*quality* should be *quantity*). The amended motion was seconded by Ms. Levin and received unanimous approval.

Mrs. Harrop motioned to approve the minutes of the July 23, 2019, meeting. The motion was seconded by Mr. Mahoney and received unanimous approval.

**OUTSTANDING APPLICATION**

App. #4895 - Blue Fox Run Golf Course, LLC, and Nod Road Properties, LLC, owners, The Keystone Companies, LLC, and Sunlight Construction, Inc., applicants, request for Zone Change from A to RU2A, 32.46 acres, 65 Nod Road, Parcel 3290065, and 4.82 acres, 117 Nod Road, Parcel 3290117

Present were Bill Ferrigno, Sunlight Construction; Tony Giorgio, Keystone Companies; and Attorney Tom Fahey, Fahey & Landolina.

Mr. Hiram addressed the Nod Road Preservation petition explaining that the State Statute requires that 20% or more of the lots within 500 feet of the subject property are required to be calculated. He explained that the most conservative approach was taken with regard to Hunter’s Run such that all of the land area was calculated even though not every owner signed the petition. Town GIS was used to calculate the area, subtracting the road that runs through the area. The total percentage of property owners within the 500-foot area is 15.24%, not meeting the 20% requirement and therefore requiring a simple majority vote of the Commission.

Mrs. Harrop made a motion to deny the petition requiring a 2/3 majority vote by the Commission because it did not meet the statutory requirement of 20%, based on Mr. Peck’s findings. The motion was seconded by Ms. Coppola and received unanimous approval.

Mr. Ladouceur communicated a disclosure noting that he was an associate with a firm about 10 years ago that did some easement work in connection with the medical offices located on the corner of the subject parcel. He further disclosed that he has a minor child who is a seasonal part-time employee of the recreation facility located on the subject parcel. He stated that none of these things have anything to do with his decision on this application adding that he has no personal or financial interests in any decisions made by the Commission relative to the subject application.

Mr. Armstrong read aloud the language contained in the State Statute relative to a 22a-19 intervention. He noted that counsel for both sides (applicant and Nod Road) have submitted their arguments relative to CGS 22a-19.

Kari Olson, Town Attorney, explained that she reviewed this same issue when an application for the subject property was before the Inland Wetlands Commission, noting that there is a definite distinction between a 22a-19 intervention relative to a wetlands context (because of the jurisdiction of the Wetlands Commission for a request to re-delineate the wetlands) and the subject 22a-19 intervention for a zone change. There is precedent set by the Supreme Court stating that a zone change does not constitute conduct under 22a-19. The Commission will render its own decision but explained that there is legal justification to rely on the “Pond View” case to determine that the verified pleading does not meet the requirements of 22a-19. She further noted another Supreme Court case, “Red Hill”, that says that if there is a verified pleading that meets the requirements of 22a-19 that intervention is entitled but must meet the burden of establishing that the allegations meet the requirements contained in 22a-19. Ms. Olson explained/clarified that when there is a Supreme Court case that tells us that a zone change is not conduct under 22a-19 it is reasonable to rely on the Court’s decision such that the verified pleading cannot meet the requirements of 22a-19 because it cannot allege conduct which would implicate the Statute. She stated that the Commission’s decision will be made via motion and suggested that a discussion take place explaining the reasons/basis for the vote.

Ms. Levin motioned in favor of granting the petition to intervene according to CGS 22a-19. The motion was seconded by Mr. Mahoney.

Ms. Levin asked why credence is not being given to the “Red Hill” case because it is directly on point as well, as opposed to the “Pond View” case. She asked the Town Attorney what the significance is for allowing a party to intervene at this stage as well as if any litigation were to occur after a decision is made.

Ms. Olson explained that whether the intervention is granted or not, the applicant has had full participation during the public hearing process. The “Pond View” case is directly on point in dealing with a legislative decision to make a zone change and the Supreme Court made pretty clear that voting to change a zone is not conduct under CGS 22a-19.

Ms. Levin commented that the case also involved almost all of the procedural allegations in the verified pleading that the Commission had allegedly violated and not environmental harm which is the purpose of 22a-19. She noted the significance of that case such that there was a site plan that had already been granted in the intervening period from the time the zone change occurred and then the Commission went on and granted the special exception while the matter was pending before the court; bad facts bad law. The subject application is very different such that there is only a zone change and a verified pleading where every single allegation relates to environmental harm, the very purpose that the Statute intends to protect or provide a remedy for.

Ms. Olson communicated that while she understands Ms. Levin’s point, she explained that the “Red Hill” case found that the loss of agricultural land was not within the purview of 22a-19 either. She reiterated that the allegations of the verified pleading be reviewed to determine if it meets the standards under “Red Hill” as well. She further explained that the Commission has total discretion whether or not to allow intervention. The Commission has the right to rely on the “Pond View” case to deny intervention but if intervention is granted the Commission must take the next step and determine if the burden has been met relative to establishing the likelihood of unreasonable pollution or impairment of a natural resource. The “Pond View” case pointed out clearly, in the context of the fact that there was another pending appeal relating to the site plan and special permit, that that is the proceeding as that is when the conduct is being alleged under which 22a-19 claims should be made and distinguish that from the zone change litigation that was a legislative decision. There have been other cases that have followed “Pond View” on that point. Ms. Olson explained/clarified that she is only trying to be very clear on what she understands the law to be reiterating that the decision is entirely up to the Commission.

In response to Mr. Mahoney, Ms. Olson confirmed that a vote on the intervention does not stop everything. She indicated that an intervention was permitted relative to Inland Wetlands explaining that a wetlands delineation is different from a zone change.

In response to Ms. Levin, Ms. Olson confirmed that the decision by wetlands on the right to intervene has been appealed.

Mr. Ladouceur commented that there is no conduct in the first step but it’s not to foreclose an intervention in the second step. Mr. Ladouceur commented that probably the reason “Pond View” says that a zone change is not conduct because it recognizes that a zone change by itself is not going to be an activity and there is a second step involved.

Ms. Olson agreed adding that “Pond View” is saying that the time to raise the issues is when you have a development application pending. She reiterated that the decision belongs to the Commission.

Ms. Levin asked if intervention is denied at the Commission level do they still have the right to ask for judicial review of the decision.

Ms. Olson explained that if an appeal of the Commission’s decision is taken it is likely that a motion to intervene would be filed and the court would then have to take up the question as to whether they did have appropriate standing. At that time the court would have to look at the “Pond View” case very carefully. Based on the “Pond View” case there’s a good likelihood of grounds to deny a motion to intervene.

Ms. Levin asked if the intervention is not granted in this instance are people going to be discouraged from coming forward in the future and would the Commission have to hire experts in the future in order to understand the views of the other side.

Ms. Olson explained that the Commission may want their own experts to help them make a determination in connection with a 22a-19 intervention as to whether or not there is the likelihood of unreasonable impairments. She added that interveners would also have an opportunity to raise concerns when a property was at the point of development.

Mr. Armstrong commented that if there is an application for a site plan and special exception there is a clear right under “Pond View” to intervene under 22a-19. He noted his understanding of the “Pond View” case law to not allow a petition when the only matter at hand is a zone change request.

In response to Mr. Armstrong and Ms. Levin, Ms. Olson explained/confirmed that “Pond View” cites to “Red Hill” for the notion that petitions to intervene should be accepted when a verified pleading meets the requirements of 22a-19 and goes on to say that a legislative decision such as a zone change is not conduct under 22a-19.

Mr. Ladouceur commented that it’s a two-step process; a zone change is step one. If a zone change is approved the second step could come anytime in the future and although there is no guarantee it would be more likely that it would be viewed favorably by the Commission. The applicant had experts that provided information contrary to that of the Nod Road experts relative to environmental impacts or lack of due to the current use of the subject site as a golf course. He noted that if they could meet the second burden if they got past the first is in question and added that he would not necessarily guarantee that that would happen in the future.

In response to Ms. Levin’s motion, and Mr. Mahoney’s second, in favor of granting the petition to intervene according to CGS 22a-19 were Mesdames Levin and Harrop and Mr. Mahoney. Voting in opposition were Messrs. Armstrong, Ladouceur, and Gentile, and Ms. Coppola.

Ms. Coppola motioned to deny granting the petition to intervene based on the “Pond View” case. The motion was seconded by Mr. Ladouceur.

Reasons for denial: Mr. Armstrong said that it (i.e., a zone change) is not conduct within the definition/meaning of the Statute. Mr. Ladouceur noted that the burden of showing environmental harm has not been met (he referenced Town Staff memo dated September 5, 2019). The finding is based, at least in part, on the CT Supreme Court decision of “Pond View”.

The motion to deny received approval from Ms. Coppola and Messrs. Ladouceur, Armstrong, and Gentile. Voting in opposition were Mesdames Levin and Harrop and Mr. Mahoney.

App. #4895 - Blue Fox Run Golf Course, LLC, and Nod Road Properties, LLC, owners, The Keystone Companies, LLC, and Sunlight Construction, Inc., applicants, request for Zone Change from A to RU2A, 32.46 acres, 65 Nod Road, Parcel 3290065, and 4.82 acres, 117 Nod Road, Parcel 3290117

Mr. Peck referenced his comments for App. #4895, dated September 5, 2019, explaining that he reviewed the entire file record for all information submitted for the Commission’s review; all information received from the applicants as well as all information received from the opposition. He explained that the information in his memo is in “draft” form such that the Commission can modify any of the language; it is the Commission’s decision whether to approve or deny.

Mr. Armstrong referenced Item #3 (future open space offer) on Page 4 of Mr. Peck’s memo and suggested that this language should be included in the vote because both the applicant and the Nod Road Preservation do not think it should be part of any approval, for legal reasons.

Ms. Olson pointed out that the law does not allow for conditions to be placed on zone changes.

Mr. Armstrong read aloud Items #1-11 relative to denying the zone change, as contained on Pages 4 and 5 of Mr. Peck’s memo, dated 9/5/19.

Mr. Mahoney motioned to deny App. #4895 including the language in Items #1-11 on Pages 4 and 5 of Mr. Peck’s memo, dated 9/5/19. The motion was seconded by Ms. Coppola.

Mr. Armstrong indicated that Items #1-11 are all independent findings such that if one is deemed to be inappropriate the other findings still stand and are not void. Mr. Mahoney and Ms. Coppola agreed.

Mr. Ladouceur communicated his position that the Commission would be making a mistake by denying this application. Attorney Smith indicated at the July 23 public hearing that a zone change is being requested so the applicant can build a certain type of development on the site. However, it was also revealed that a future applicant could come in under CGS 8-30g for affordable housing and they would not need to seek a zone change. He asked which of the 11 aforementioned items would be able to stop an 8-30g application noting his understanding that the bases to deny an 8-30g application would be very limited, if any at all. The informal presentation to the Commission some months ago proposed apartment buildings for this site which the Commission did not favor. The applicant changed their proposal to include owner-occupied residences 300 to 400 feet back from Nod Road, 300 to 400 feet away from the Farmington River, and developing less than 40 of the 80 developable acreage. He asked if the Town is willing to risk an out of state developer coming in and proposing a development that could have two to three times more units that could be rentals and also greatly increase the number of school-age children. He noted that this is not an acceptable option for him and it’s foolish not to take advantage of an applicant willing to work with the community and shape a less intrusive development. He referenced the current and past POCDs noting that both the Farmington River and the subject golf course are shown as floodplain. He commented that it wasn’t due to laziness or mal intent - creating maps is a lot of work and no one was looking to build on the subject site so it was categorized as floodplain. A recent survey of the property determined that 80 acres of the total site acreage is developable and above the 100-year flood with a portion being above the 500-year flood. The next POCD will have to discuss the subject parcel differently than has been done in the past as developable land exists and may be appropriate for the same type of development that exists at 100 Nod Road. He commented that he doesn’t think this is over; if this application is denied the next application won’t have to discuss the aforementioned 11 items because we will be down to next to none. He asked the Commission to be mindful that there was no compelling information relative to the subject application and the number and type of units proposed that there would be additional risk for accidents and the traffic was mitigated. He asked if an 8-30g application would have to meet the aforementioned 11 items.

Ms. Olson explained, relative to 8-30g applications, that there is much latitude given to the property owner to develop affordable housing such that zoning regulations can be escaped in most instances. Avon currently has satisfied only 3% of the required affordable housing and therefore would not be excused from an affordable housing application that does not have to comply with zoning. She referenced a recent Supreme Court case where an applicant was allowed to escape a road ordinance that was not under the jurisdiction of a Planning and Zoning Commission. She explained that if a significant public health risk can be established (e.g. potable water cannot be provided) that could be grounds to deny an 8-30g application but clarified that the circumstances are very limited. If an applicant submits an 8-30g application and a commission denies it the burden is now on the commission to establish that whatever the concerns are far outweigh the need for affordable housing. The courts have said that the instances are very restricted such that concerns over how many children will be in the school system or overcrowding of land is not going to get you there. Ms. Olson concluded by explaining that the Supreme Court has made very clear that a commission will need expert testimony to substantiate their concerns relative to an 8-30g application.

Mr. Ladouceur reiterated that he thinks it’s a mistake to deny the zone change adding that the only item (of the aforementioned 11 items) that addresses what was just talked about is Item #8, which is a conclusion based without facts and no evidence. Item #8 contained in the language for the “motion to approve” says the subject application would have no adverse impacts to public health but that doesn’t mean that an 8-30g application with, for example, a 350-unit apartment building, is not going to change that dynamic. This application/ proposed development for approximately 98 units is served by Town sewer and water; provides safe access and egress for pedestrians and vehicles and also has walking trails; and is in conformance with the Town’s Comprehensive Plan. The Commission has the ability to control the subject proposal but will not have the same ability with an 8-30g application that could be submitted in the future and result in something that Avon would not make the residents happy. He concluded by noting that due to these concerns he is opposed to denying the subject application.

Mr. Armstrong commented that 8-30g has been openly discussed and added his belief that the residents have been informed, are aware, and understand all the issues. Solar panels and the CT Siting Council has also been openly discussed; this issue is solely under the control of the Siting Council. He noted that the statements made by the Town Attorney as well as Mr. Ladouceur are true adding that he feels confident that the residents have been informed of this information during the public hearing process.

Voting in favor of Mr. Mahoney’s motion to deny App. #4895, seconded by Ms. Coppola, were Messrs. Mahoney, Gentile, Armstrong, and Mesdames Coppola, Levin, and Harrop. Voting in opposition was Mr. Ladouceur.

**OTHER BUSINESS**

Staff Update - Avon Village Center

Mr. Peck reported that the required bonding (LOC) for erosion and sedimentation control has now been worked out such that site work should be starting by late September 2019. Signage will be installed on Route 44/Climax Road alerting residents/motorists to upcoming road detours, closures, and temporary roads. He explained that the road phasing plan would still be adhered to and the Town is trying to reduce/minimize the time that roads would be closed. He explained, clarified that the roads that are currently Town public roads will remain that way after road construction is completed. He also indicated that very detailed agreements are still being drawn up with the developer regarding the Town’s rights in connection with the entire development.

Dom’s Coffee – 20 West Main

Mr. Peck asked the Commission’s thoughts on modifying the café permit regulation and explained that any type of restriction (i.e., music, dancing, entertainment) can be placed on the regulation via a special exception. Dom’s Coffee has indicated that they would comply with such restrictions.

Mrs. Harrop commented that she doesn’t think the location is appropriate for alcohol; it’s close to a church and there are children. Dom’s Coffee started out as a little place and they need to get a bigger place.

Mr. Peck noted his understanding but added that he would not like to see Dom’s Coffee move out of Avon.

Messrs. Ladouceur and Gentile indicated that the Town has a café permit for a reason and do not want to change it because that would set a precedent.

Mr. Mahoney commented that he doesn’t see a problem in modifying the café permit regulations because it could be controlled by requiring a special exception.

In response to Ms. Levin, Mr. Peck explained that Dom’s Coffee has a State Permit that contains language pertaining to Café permits which the Town cannot check off since café permits are not allowed in Avon.

In response to the Commission’s discussion, Mr. Peck indicated that the attorney for Dom’s Coffee has confirmed that they would submit in writing the exact hours that alcohol would be served on the site (e.g. 6pm to 9pm – no morning hours).

In response to Mr. Ladouceur, Mr. Peck explained that the Town had to sign off providing a statement that Dom’s Coffee complies with all local zoning regulations before their State Permit could be issued. There are a number of things on the State Permit application that the Town has discretion on whether to allow or not allow (e.g., live entertainment, music, etc.).

Mr. Armstrong commented that he thinks café permits could be permitted but require special exception review and approval by the Commission.

Ms. Olson offered some clarifications on café permits. Before an applicant could receive a State Liquor Permit they would have to possess a Certificate of Zoning Compliance by the Town of Avon. She explained that if Avon really wants to protect itself there needs to be language in the Regulations that requires a special exception for this type of use because once someone gets a State Liquor Permit things could change in the future.

Ms. Levin commented that she is not worried about Dom’s Coffee and would like to find a way to allow them to operate as they have proposed but noted her concern about precedent setting in the future.

Mr. Ladouceur noted his concerns/reservations to amend the Regulations and allow café permits because we don’t know where in Town they could be located; we don’t know who the next applicant would be.

Mr. Peck explained that café permits could be restricted by zone and added that he will talk to the attorney for Dom’s Coffee to get in writing exactly what they propose for their business.

2020 PZC Meeting Schedule

Mr. Mahoney motioned to approve the 2020 Meeting Schedule. The motion was seconded by Mrs. Harrop and received unanimous approval.

There being no further business the meeting adjourned at 8:30pm.

Linda Sadlon

Avon Planning and Community Development