

**ESSEX PLANNING COMMISSION
SPECIAL MEETING**

November 27, 2012

7:30 p.m.

Essex Town Hall – Auditorium

1. Call to Order and Seating of members:

Chair Tom Danyliw called the special meeting to order at 7:30 p.m. Seated were Chair Tom Danyliw, Vice Chair Linda Herman and Members Carla Feroni, Alan Kerr, and Ralph Monaco. Also present were Alternates Claire Tiernan, Neil Nichols, Robert Laundry, and Ex-Officio Member (First Selectman) Norm Needleman.

Commission Counsel David Royston and Town Planner John Guskowski were also in attendance.

2. Foxboro Subdivision: Status of Frank J. Sciame Appeal, Mandamus Suit, and FOI Response; Consideration of Settlement Proposal

Attorney Terry Lomme, on behalf of the appellant, presented the terms of the proposed settlement to the Commission with a plan revised to 11/18/12 showing the proposed plan changes. These included keeping in place the 150' wide conservation easement area along North Cove, keeping in place the view easement that was filed with the final application plan set, adding a roughly 75' x 80' public-access conservation easement area along the road with a small (18' x 18') gravel parking area, and a fee in lieu of additional open space in the amount of \$120,270, which represents 10% of the Town of Essex appraised value of the property for tax assessment purposes. All easement documents are to be reviewed and approved by Commission Counsel Royston prior to final signing and delivery of mylars. Lot 6 was returned to its area of 82,500 square feet as proposed by the Applicant in the original final plan set.

Attorney Lomme stated that the appellant is offering a public access area of 6,195 square feet within the view easement to allow visitors, pedestrians, etc. the opportunity to enjoy the view. Public access would be limited to daylight hours. Chairman Danyliw sought to clarify the terms of the view easement and what was the height limit for plantings or other objects, and whether plantings could obstruct the view of the windmill. Attorney Lomme responded that a hedge not to exceed 3' in height would be placed along the perimeter of the public access area to delineate it from the rest of Lot #6, but the view easement did not extend onto the windmill property or the entirety of Lot #7. Carla Feroni and Chairman Danyliw discussed the effect on the view by placement of plantings along the slope's contours. Alan Kerr questioned why the unconventional decision to place public access on the private land of Lot #6 was made, rather than just creating a separate parcel. Attorney Lomme stated that Lot #6 was preferable with larger acreage, and it eliminated the concerns of side-yard setbacks that would be created if there was a separate open-space parcel.

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Linda Herman asked if the parking was placed partially on Town land. It was clarified that yes, the Town right-of-way extended from the edge of pavement roughly 10' to the property line, but Attorney Lomme thought the Commission might find off-street parking preferable to potential on-street parking as an alternative. Carla Feroni asked John Guskowski how wide the parking area was and how many cars it would accommodate. Guskowski responded that an 18' wide parking area would accommodate two cars.

Chairman Danyliw summarized that he understood the major difference between the modified and approved plan and the proposed settlement plan was the depth and ownership of the land to be made accessible to the public. Attorney Lomme stated that there was no essential difference between public and private ownership with a deeded easement, as the public would have the same access either way. Chairman Danyliw asked about the character of the meadow and how would it be controlled- whether the language of the easement would allow for creation of lawn vs. meadow. Attorney Lomme read some of the language from the proposed view easement and indicated that to the river side of the "flared area" on the settlement map, no plantings or structures higher than 6' would be allowed. Chairman Danyliw sought clarification for the definition of "structure," and the zoning definition was consulted. He then expressed concern about the different interpretations of height and whether soil could be mounded at the base of an object to reduce its regulatory height. Attorney Royston stated that the final conservation easement language could be worked out later to address such concerns, but the intent of the Commission is very important and should be made clear.

Attorney Royston then asked whether the parking area could be extended or expanded, to which Attorney Lomme stated that it was possible, but the intent was not to have the public-access area turn into a parking lot. Chairman Danyliw stated that he would expect additional cars to simply park along the roadway. Attorney Royston, explaining that he did not transmit the entirety of the settlement offer directly to the Commission but instead summarized its terms, sought clarification on the open space/conservation land percentages. Attorney Lomme clarified that approximately 31% of the property would be protected by easements, and the overlapping view easement and public access easement areas were not double-counted in this percentage. Attorney Royston asked if it would be understood that, if easement restrictions conflicted between view and conservation easements, the more restrictive terms would control. He also confirmed that the small sliver of public access easement not subject to a view easement land on Lot #7 would be respected and the public would not be excluded.

Alan Kerr pointed out that while structures were regulated in the easement areas, pavement was not. Attorney Lomme stated that paving in the easement areas will be prohibited as well. Carla Feroni asked what surface the parking area would have, to which Attorney Lomme stated it would be gravel, and that a small path and up to two benches could also be placed in the public-access area per the Commission's discretion. Chairman Danyliw asked about the large pine tree in the view easement, and Attorney Lomme indicated that it could be removed. Carla Feroni asked about the ability to install plantings in the view or conservation easement areas. Attorney Lomme indicated that not much could be planted and anything had to be below 4' or 6' depending on the area. John Randolph, on behalf of the applicant, assisted in clarification of the discussion on where the 4' maximum and 6' maximum areas were, relative to the topography of the site. Carla Feroni asked why the 6' maximum was chosen, to which Attorney Lomme stated that it allowed for some property-to-property privacy. Carla Feroni stated that it would be beneficial for the Commission to review a planting plan.

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Ralph Monaco questioned whether the current discussion was for settlement purposes only, and Attorney Lomme stated that yes, they probably were. Attorney Royston stated that the current discussion was for settlement purposes only, and that additional discussion would take place in Executive Session. If the Commission wishes to make formal response to the settlement offer, it would be able to set the parameters of its response after the Executive Session and have a formal Commission vote. Ralph Monaco asked Attorney Lomme if the statements of the Commissioners in the current discussion would be for litigation purposes, to which Attorney Lomme stated that no, they were not for litigation purposes and he did not believe the discussion would be admissible. Attorney John Bennet (in the audience) stated his disagreement with this opinion. Attorney Royston recommended that the Commissioners simply ask objective questions of clarification and not state their point of view. Ralph Monaco stated that this answered his questions but did not satisfy his concerns, as questions could also indicate mindset. He suggested that questions be limited. Attorney Lomme repeated his position that he would not use the discussion for litigation purposes.

Neil Nichols asked if plantings in the easement areas would be native. Attorney Lomme indicated that he was uncomfortable with the term “native,” but stated that types of plantings would be appropriate to the area and would not obscure the views. Attorney Royston asked when the proposed fee would be paid, to which John Randolph responded that per the Statutes, they would be paid fractionally when each lot was sold.

Chairman Danyliw then recognized Attorney John Bennet, who represents the neighbors in a separate appeal of the subdivision modification and approval. Attorney Bennet stated that his clients would not agree to the proposed settlement and have petitioned the court to consolidate the two appeals. He stated that he was surprised and grievously disappointed that his clients were not engaged in settlement discussions. He objected specifically to the proposed parking area, as well as the public access area, questioning whether the Commission had the authority to compel public access. He suggested that parking vehicles in a view corridor was anathema.

Chairman Danyliw, upon concluding the discussion, asked whether it would be appropriate to enter Executive Session to discuss pending litigation. Attorney Royston stated that it would be advisable.

Motion to enter Executive Session at 8:29 p.m. by Carla Feroni, **seconded** by Ralph Monaco. **Motion carried unanimously.** The Commission retired to Meeting Room B for its Executive Session.

Motion to exit Executive Session at 10:22 p.m. by Ralph Monaco, **seconded** by Carla Feroni. **Motion carried unanimously.**

Chairman Danyliw asked the Commission if there was a motion on the settlement offer. **Motion to accept the proposed settlement with modifications to be voted upon separately** by Alan Kerr, **seconded** by Carla Feroni. Chairman Danyliw opened the floor for discussion of the motion.

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Alan Kerr questioned whether the public access easement and view easement are sufficient alternatives to the fee-ownership of the modified approval. He did not know what is truly gained by requiring deeded open space. Chairman Danyliw stated that in his opinion, the proposal meets the Subdivision Regulations, and the proposed public access could also meet the Commission's concern that the view be able to be appreciated by the public. He believed that with properly restrictive language in the easements, the major concern of the preservation of the view could be met. Attorney Royston stated that any Commissioner could propose such a specific amendment to the pending motion to accept the settlement. Chairman Danyliw stated that he was concerned that the conservation area would be kept in a natural state, and that lawn furniture, tents, functions, etc. did not encroach. He thought that maximum heights should be reduced in the view easement, and be restricted to plantings below 4'. He believed the parking area was unneeded.

Linda Herman agreed that the parking was unnecessary and should be eliminated, as there were other parking options available. Carla Feroni concurred, and then stated that she believed the conservation easement area should be left in as natural a state as possible. She stated that she did not like the idea of adding additional plantings in the view corridor. Ralph Monaco stated that he did not support accepting the settlement offer, and felt that the modified and approved subdivision best met the intent and purpose of the Commission's charge.

Attorney Royston clarified what he understood to be three of the key modifications to any motion to accept the settlement per the discussion. These are: 1) The standard conservation easement language be modified to ensure that no furniture, playscapes and the like, nor social events or like activities would be permitted in the easement area; 2) The language of the view easement be modified from the filed document to reduce the maximum height limit for plantings, structures, buildings, etc. from 6' to 3'; and 3) The parking area on the public access easement be eliminated. He then asked whether, by the elimination of the parking area, the Commission wished to raise the issue of the amount of the offered fee, and how it would be paid. Chairman Danyliw stated that the Statute dictated that the appraised value be determined by an appraiser mutually selected by the Town and applicant, and asked when the property was appraised by the Town. Attorney Royston stated that the current tax assessment appraisal dated from 2008. Attorney Royston clarified that since this was a settlement offer and not a statutory fee-in-lieu proposal, the parties were not bound by the payment schedule in the Statutes. He suggested that a modification to the settlement terms could require the payment at the time of submission and signing of the final mylars. Chairman Danyliw stated that this would be the fourth modification, and suggested that the Commission consider the amendments separately.

Motion to add amendment (#1) to settlement acceptance to eliminate the parking area by Tom Danyliw, **seconded** by Alan Kerr. **Danyliw, Kerr, and Feroni in favor; Herman and Monaco abstain. Motion carried.**

Motion to add amendment (#2) to settlement acceptance to require fee of \$120,270.00 be paid at time of filing of mylars by Tom Danyliw, **seconded** by Carla Feroni. **Danyliw, Kerr, and Feroni in favor; Herman and Monaco abstain. Motion carried.**

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Motion to add amendment (#3) to settlement acceptance to modify language of conservation easement documents to state that furniture and the like, and events and like activities are prohibited by Tom Danyliw, **seconded** by Carla Feroni. **Danyliw, Kerr, and Feroni in favor; Herman and Monaco abstain. Motion carried.**

Motion to add amendment (#4) to settlement acceptance that language of original filed view easement document be modified to reduce the height of plantings, improvements, structures and the like to a maximum of 3' and that vehicles, trailers, playscapes and other like items obstructing the view are prohibited; and that no hedges or fences be placed parallel to the shoreline by Tom Danyliw, **seconded** by Carla Feroni. **Danyliw, Kerr, and Feroni in favor; Herman and Monaco abstain. Motion carried.**

Attorney Royston suggested that a catchall be added to easement documents indicating that wherever language conflicted between overlapping easement areas, the more restrictive language control.

Motion to add amendment (#5) to settlement acceptance that all easement documents be subject to approval of Commission Counsel to ensure compliance with the intent of the Commission expressed in discussion by Carla Feroni, **seconded** by Ralph Monaco. **Danyliw, Kerr, and Feroni in favor; Herman and Monaco abstain. Motion carried.**

Chairman Danyliw then requested John Guszowski to restate the motion with each amendment before calling the question and conducting a roll-call vote. Vote on Alan Kerr's motion to accept settlement offer, as amended, was:

Alan Kerr – in favor
Linda Herman – opposed
Tom Danyliw – in favor
Carla Feroni – in favor
Ralph Monaco – opposed

Motion carries 3-2.

Attorney Royston stated that this action is a formal decision of the Commission that is effectively a counter-offer to the proposed settlement. It is now up to the plaintiff to review this counter-offer for acceptability. John Guszowski asked whether a formal Notice of Decision would need to be published, which Attorney Royston confirmed it would. Ralph Monaco asked whether it would be appropriate to expect a response from the plaintiff by the Commission's next regular meeting on December 13. Attorney Lomme stated that his client would accept the counter-offer, but sought clarification on Amendment #5, specifically whether the prohibition on plantings parallel to the shoreline would not apply to the proposed hedge delineating the public access area. There was general agreement from the Commission that the prohibition in amendment #4 did not include that hedge.

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3. Review and Payment of Invoices

Chairman Danyliw reviewed the invoices, which included statements from CME Associates, Dzialo, Pickett & Allen, and Halloran & Sage.

Motion to pay invoices by Ralph Monaco, **seconded** by Alan Kerr. **Motion carried unanimously.**

4. Adjournment

Motion to adjourn by Ralph Monaco, **seconded** by Linda Herman. **Motion carried unanimously.** Meeting adjourned at 11:00 p.m.

Respectfully submitted,

John Guskowski
Town Planner (Consulting)