



ZONING BOARD
OF APPEALS

LYME TOWN HALL
480 HAMBURG ROAD
LYME, CT 06371

LYME ZONING BOARD OF APPEALS
PUBLIC HEARING

The Lyme Zoning Board of Appeals held a regular meeting/public hearing on April 21, 2022 at 7:30 p.m. at the Lyme Town Hall, 480 Hamburg Road, Lyme, CT 06371/

MEMBERS PRESENT: David Lahm, Chairman, Jack Sulger, John Kiker, Fred Harger, seated alternate Toni Phillips, seated alternate Anna James, unseated alternate Judy Davies, Ross Byrne ZEO, and Jennifer Thomas Secretary
Absent Members: Winnifred Gencarella

Lahm called the meeting to order at 7:33 p.m.

Alternate member Phillips was seated for absent regular member Gencarella.

Lahm called for a motion to approve the minutes of the May 20, 2021 meeting. Kiker made the motion, seconded by Phillips, and the minutes were accepted with no changes.

Harger read the public notice.

2022-01 – Eightmile River Farm, LLC, 576 Hamburg Road, Lyme CT, Tax Map 31 Lot 1; an appeal of the Cease and Desist Order listing the following violations; unauthorized change of use without obtaining a zoning permit in accordance with Chapter 315, Article 10.3, land-disturbing activity within the Eightmile Overlay District and within 100 ft. of the Eightmile River in accordance with Chapter 315, Article 19.3.A, and expansion of existing agricultural activity without a zoning permit in accordance with Chapter 315, Article 19.4.A(1).

Lahm read into the record Section 8-6(3) of the General Statutes the five (5) requirements that have to be met before a variance can be granted and stated that the appellate must receive at least four votes in favor in order for the board to overturn the order issued by the ZEO.

2022-01 Eightmile River Farm, LLC 576 Hamburg Road, Tax Map 31 Lot 1

Present: Attorney David Sherwood and Owner David Potts

Attorney Mike Carey representing Ross Byrne, ZEO

Attorney Eric Garofano representing the Zoning Board of Appeals

Harger read the appeal into the record.

Lahm confirmed the certified mailing receipts have been submitted by the ZEO and suggested waiving the reading of the regulations. Sherwood agreed.

Sherwood disagrees with Lahm's assertion that the appellate must prove hardship in this case, as they are not seeking a variance but appealing a decision by the Zoning Enforcement Officer. He submitted materials into the record, including:

- 1) Letter dated April 21, 2022 from Eightmile River Farm, LLC addressed to Ross, Selectmen, and Commission Members including 2019-2020 Lyme Land Conservation Trust Annual Report, 2020-2021 Lyme Land Conservation Trust Annual Report, Secretary of State Report of Lyme Land Conservation Trust, and Concept Siting and Evaluation for Connecticut Agricultural and Conservation Rural Economic Innovation Education Center "CACEE," Connecticut Resource Conservation & Development Area, Inc. June 30, 2018
- 2) Memo dated April 21, 2022 from Attorney David F. Sherwood to Lyme Zoning Board of Appeals
- 3) CT DEP Aerial Photographs dated 6-11-57, 3-1-70, and 3-22-86
- 4) Kingswood Farm Site Plan Proposed Improvements Conn. Rte 156 Lyme, Connecticut Scale 1"=50' May 10, 1987 Revised June 1, 1987 William F. Kent Registered Land Surveyor
- 5) Affidavit of David Potts dated February 16, 2022
- 6) Minutes, Conservation Commission/Inland Wetlands and Watercourses Agency February 16, 2022
- 7) United States Department of Agriculture Economic Research Service Glossary
- 8) Connecticut Farm Bureau, 2015 Recommended Land Use Values and Connecticut Land Classifications
- 9) Town of Lyme Zoning Regulations 315 Attachment 7 T Appendix G Eightmile Watershed Overlay District Map

Potts read from the Eightmile River Farm, LLC Letter dated April 21, 2022 and asserted that any board member who is a member or contributor to the Lyme Land Conservation Trust (LLCT) should recuse themselves due to a conflict of interest as the Lyme Land Conservation Trust considered purchasing 576 Hamburg Road around the same time that Eightmile River Farm, LLC acquired the property. Three board members were identified in the letter, including Kiker, Phillips, and Sulger.

The board voted to enter into executive session at 7:49 p.m. to discuss the issue of recusal.

Executive session was closed at 8:01 p.m. and the public hearing resumed.

Sulger stated that he will remain seated as he has only monetarily contributed to the LLCT and has no knowledge of prior interest in the property.

Phillips stated that she will also remain seated and has only given monetarily to the LLCT.

Kiker recused himself because a member of his household is an officer with the LLCT.

James was seated in place of recused member Kiker.

Sherwood stated that he believes the order is unenforceable and hopes to come to an expedient and fair resolution. He asked that the board recognize that the property has a preexisting nonconforming legal use as a farm, stating that the farm has been used as a farm since 1950 at least. He argues that the premises is defined as the entire lot and the appellate intends to continue the agricultural use. Sherwood stated that Byrne's position that the area of the farm in question has not been actively farmed since 2005 does not hold because farms have varied uses that change over time and it does not constitute abandonment of the use.

Lahm questioned how Section 315.19.3.C(3)(b) of the regulations fits into this, regarding the expansion of farming activity. If the type of farming changes in an area to a more intensive use, can that be considered an expansion?

Sherwood argues that the farm should be seen as a unit and not divided up within the parcel. Lahm also questioned the term "abandonment" and how it can be determined if a farm is intentionally abandoned.

Sherwood stated that the property would need to be turned into something else, and not planting fields is not clear enough to be seen as abandonment.

Lahm clarified that the Cease & Desist Order referenced violations of both Planning and Zoning and Conservation Commission/Inland Wetlands and Watercourses Agency, but that the Zoning Board of Appeals only has jurisdiction over the Planning & Zoning part of the order. Sherwood agreed and stated that the Conservation Commission/Inland Wetlands and Watercourses Agency has issued a jurisdictional ruling lifting their portion of the Cease & Desist Order.

Lahm also pointed to a scrivener's error in the Cease and Desist Order, clarifying that the Regulation is Chapter 315, not 314 as seen in paragraph 2, number 3.

Sherwood stated that their position is that the text of the Cease and Desist Order was insufficient to provide notice, and one of the reasons is the incorrect citing of the regulation. He also stated that combining the orders for two commissions was inappropriate and that the map referenced in Appendix G of the regulations is unreadable.

Lahm asked if there were any other objections to the Order and Sherwood said no. Lahm stated that the section of the regulations regarding the Eightmile Overlay District was clear in the regulating of the area within 100 feet of the river.

Lahm asked if there were any procedural objections. Sherwood stated that the enforcement has been discriminatory, and if permits are not needed in all instances then there has been discrimination. Lahm asked for the basis of the discrimination and Sherwood said that the LLCT is trying to make the appellate adhere to their wishes for the property because they were an interested party in the purchase of the property in 2017. Sherwood stated that the LLCT has engaged in clearing the abutting property and no action was taken by the ZEO. Lahm asked for evidence this is the case.

Carey stated that making a case of discriminatory enforcement is not a defense for appealing a cease and desist order and argues that the accusations against the LLCT members, board members, and Byrne are insulting.

Sherwood stated that he believes it is a question of influence in the town.

Carey stated that the board should be looking at what the regulations say, what transpired, and what do the regulations allow.

Sherwood stated that a final reason for dismissal of the order is a conflict of interest between the Eightmile Overlay District regulations in the Zoning Regulations and the Inland Wetlands and Watercourses Act. The wetlands regulations exempt agricultural activities and the Eightmile regulations attempt to regulate those activities.

Lahm asked if Sherwood was challenging the regulation and Sherwood stated that he was not, but finds that it conflicts with State Law.

Sherwood stated that if the board finds that the use is a legal preexisting nonconforming use and no abandonment has taken place, that would resolve the matter.

Potts pointed to a Map of Kingswood Farm dated May 10, 1987, revised June 1, 1987 which shows the area in question notated as "pasture area for use during dry season only."

Carey stated that the board may want to continue the public hearing until the next meeting to give everyone a chance to review all of the submitted materials formulate a response and Lahm agreed that it would be helpful to give all of the members time to read all of the material.

Carey argues that the appeal itself does not state the grounds for the appeal and that the board could reject the appeal. He also agrees with Lahm that four votes would be needed to win the appeal, not three as Sherwood stated.

Carey asked Byrne to review the facts and the pertinent regulations.

Byrne stated that he was hired as ZEO in November of 2019 and was on the Planning and Zoning Commission and Zoning Board of Appeals in the past. He said that Potts was honest regarding his intentions from the interaction. Byrne said that he received a phone call from Potts and a follow up letter on January 28, 2022 stating his intent to clear and farm the area, including cutting some trees and brush. Byrne asserted that it is his interpretation that the area was not being actively farmed when the Eightmile Overlay District regulations were put in place. He has had multiple conversations with people familiar with the property who have all stated that no farming has taken place on that portion of the property in the last 50 years. On February 2, 2022 he found that clearing activity had started, and a Cease and Desist was written on February 3, 2022 and mailed on February 5, 2022.

Byrne submitted for the record eight photos taken of the disturbed area, a 1990 Aerial Photograph, a 2019 Aerial photo from GIS, a letter dated April 1, 2022 to Byrne from Patricia Young, Program Director for the Eightmile River Wild & Scenic Watershed, an enlarged Eightmile River Lyme Watershed Overlay District Map, and a map entitled "Land Ownership Lyme, Conn Oct. 1968.

Byrne described the disturbed area as he viewed it from abutting properties, and stated that he went on a site walk of the property that morning with Potts and Lahm.

Carey stated that he believes that the Zoning Board of Appeals does not have authority to decide if the written regulations are legal or invalid, he believes 4 affirmative votes would be needed to overturn the order, the Overlay District regulations have their genesis in Federal Law, and the meaning of as-of-right does not mean not regulated. The ZEO is still required to ascertain whether an activity is exempt or review to determine whether a permit or special permit is needed. He also pointed out the regulations discuss a vegetative buffer and that the prohibited uses refer to "as of right within the district." This language is specific and differentiates the overlay district from the entire parcel.

Carey stated that the property has been used for farming on and off over the years but that the area within the district has not been actively farmed for quite some time.

He pointed out that he does not believe the appellate cannot meet the requirements regarding expansion, and noted that 19.6 discusses that in cases of overlapping regulations, the more restrictive takes precedence.

Carey said that during the Conservation Commission/Inland Wetlands and Watercourses Agency meeting, Potts agreed to submit his affidavit and verbal testimony as application, and so he conceded that he was required to submit an application for a jurisdictional ruling. Lahm called for any public comment.

Frederick Gahagan gave an account of his personal knowledge of the history of the property and stated that he was not for or against the appeal. He reviewed the history of the property and used the Land Ownership Lyme Conn Oct. 1968 Map to point to areas of the property that had been used as pasture before 1964. He stated that in 2016 he was on the property and noted that the area was virtually impenetrable due to all of the shrubbery at that point.

Anthony Irving stated that he has been the Director and Preservation Chair of the LLCT. He stated that the LLCT did look at the property in 2017, but that he made a recommendation to the LLCT board at that time not to purchase the property. He had no knowledge of the appellate or his intent to purchase the property and it was not a factor in the decision made by the LLCT not to move forward with pursuing acquisition of the property.

Lahm asked former ZEO Bernie Gigliotti, who was present at the meeting, if he recalls issuing any orders or having any dealings with the Eightmile Overlay District.

Gigliotti stated that he can recall three instances during his time as ZEO, two of which were not related to farming. The third related to reconstruction of an accessway across a brook in order to move cattle.

Carl Fontneau, member of Salem Planning and Zoning Commission, stated that they have had similar discussions in the Town of Salem, and they have revised their regulations because of the opinion of Attorney Michael A Zizka to make them more clear and more enforceable.

Lahm stated that the board has been given a lot of information to review and digest, and asked for a motion to continue the hearing.

Harger made the motion, seconded by Sulger, and the motion carried.

The hearing will be continued to a mutually agreeable time, most likely in June 2022. Sherwood agreed that an extension will be granted when the continuation date has been set. A packet containing all of the submitted materials will be made available to the members and parties involved.

Respectfully submitted,
Jennifer Thomas Secretary