

PLANNING & ZONING COMMISSION
 Regular Meeting
 May 18, 2010

The Planning & Zoning Commission held a regular meeting on Tuesday, May 18, 2010. Chairman Michael DelSanto, called the meeting to order at 7:00 o'clock, p.m.

The following Commissioners were present, viz:

James Sinclair	Francis Kenefick
Edward Pocock, Jr.	Paul Chaplinsky
Kelly DelDebbio*	Michael DelSanto, Chair

Alternates: Lisa Conroy
 Steve Kalkowski
 Ed Costello
 Patrick Saucier

Ex-officio members present were as follows, viz:

Anthony J. Tranquillo, Director of Public Works/Town Engineer
 Mark J. Sciota, Deputy Town Manager/Town Attorney
 John Weichsel, Town Manager
 Jennifer Yoxhall, Special Counsel for AOB

Absent: Zaya Oshana

(*Arrived with meeting in progress)

The Chair seated Ms. Conroy for Mr. Oshana and Mr. Costello for Ms. DelDebbio until her arrival. A quorum was determined.

The Pledge of Allegiance to the American Flag was recited by everyone in attendance.

The Minutes are being prepared summary style and the video and audio tapes are available for further detail.

MICHAEL DELSANTO, Chairman, presiding:

Approval of Minutes - Regular Meeting of May 4, 2010

Mr. Sinclair made a motion to approve which was seconded by Mr. Pocock. Motion passed on a majority voice vote with Mr. Chaplinsky abstaining.

Mr. Chaplinsky indicated for the record he had read the Minutes and viewed the video of the last meeting.

BUSINESS MEETING:

A. Zoning regulation text amendments, Adult Oriented Businesses, Section 2-01A, 2-19S, Sections 4-01.2, 4-02.2, 4-03.2, 4-04.3 and Section 11-17 ZA #553.

Ms. Savage Dunham framed the discussion points. The application is proposed revised Adult Oriented Businesses text and deletion of the Sexually Oriented Business text. The public hearing was opened and closed on May 4th. At that meeting you heard a lot of information from the public and you discussed the potential separation distances. Based on that discuss, the AOB subcommittee was charged with getting together with staff and Attorney Yoxhall to review the mapping and propose separation distances, as well as other possible revisions to the text. We did just that.

A copy of the revised zoning text amendment was mailed to you in your packet. I sent you a redlined text. Some of the comments and changes are simply housekeeping changes.

The more substantive changes for the commission to discuss this evening are the changes to the proposed separation distances, which are on the very last page, and the current proposal for the record is that:

- the separation distance between other adult oriented businesses would be 1,000 feet.
- The separation distances between an AOB and a church, school, public building, public park or recreation area or private recreation area is 500 feet.
- The separation distance between an AOB and residentially zoned land is proposed to be 750 feet.
- And, the other substantive proposed change would be to remove the requirement for a special permit use as part of this process. To that point, I have a hard copy of a letter for you from Attorney Yoxhall.

I will also pass to you a table that I have that corresponds with the mapping. This is the revised map showing the separation distances that the subcommittee advised staff to apply. The table goes with that.

With these proposed separation distances, there are approximately 14 possible location in town.

Explained the mapping. There are one or two locations along Queen Street, there's one on West Street and there are a couple down on the Meriden Waterbury Road down on the Cheshire boundary. You have four exiting sites in town which if the businesses were to leave, possibly another business could come in depending on the timing and a couple of other factors.

(Ms. DelDebbio entered the meeting.)

With that, I will turn it over to Commissioner Kalkowski.

Mr. Kalkowski thanked the citizens for coming forward at our last meeting to speak openly and honestly about their thoughts on this subject. I appreciate the received emails in the last two weeks. We did take every word seriously and took that into account and hopefully you'll see that tonight as we continue forward.

I'd like to ask Attorney Yoxhall to address the letter regarding the SPU. (On file in the Town Planner's Office for review.)

Attorney Jennifer Yoxhall from Carmody and Torrance reviewed the letter. Essentially, you have the right to regulate AOBs. But you can't regulate them for content. You can regulate them for their negative secondary impacts.

You can enact ordinances to reduce those impacts. They have to be content neutral, time, place, and manner restrictions. In order for them to be legal, there has to be reasonable alternative locations. In other words, there has to be places in town where these types of businesses can operate. You can't just prohibit them in your town.

Whether there are sufficient venues within the municipality is a fact specific inquiry. When you ask how many do you have to have, I can't answer that for you. I can tell you that I think that the number that the subcommittee has come up with with the separating distances they propose, I think is very defensible and I think you have a very good argument if anybody were to challenge this regulation in court.

However, the issue with the special permit is that the courts have found that if there are regulations that give zoning boards greater discretion to review applications at a hearing or which require them to obtain a special permit, can be looked at eliminating the opportunity to utilize those alternate locations as of right. So if you have --- the courts have said, if there are ambiguous and indefinite requirements such as considering public health, safety and convenience, or that allow the commission to manipulate such concepts as welfare, decency and good order. Those very discretionary types of regulations call into question whether those alternative locations are really available.

When you have so much discretion to look at things like health and welfare, when someone comes in with an application, you really have a pretty strong basis for denying and also as you know, Commissioner Kalkowski at the public hearing, put in a binder full of studies that show in fact these types of businesses do have a negative secondary effect. And, that's the whole basis for you being able to regulate them.

Discussion.

The SPU in there, the court may say they may not have those 14 locations available. If this is challenged, as noted the last time, the types of businesses that are concerned with these regulations, they have a great financial interest in operating their businesses and they are very willing to litigate if they think your ordinances, your regulations are illegal.

If you want to have a regulation that is going to be effective, you certainly want to make it as compliant with the law as you possibly can. You really want to make it as strong as possible. That was my concern with the special permit. I think it calls into question the availability of the alternate avenues which you have to provide.

Mr. Kenefick asked how long we have had SPU regulations in place and why do we have SPU regulations. Attorney Sciota said they had been around probably for more than 30 years. They give a higher level of scrutiny by the board. Mr. Kenefick said anybody who has to go through SPU; can't they claim the same thing our attorney is telling us? Attorney Sciota said no, this is not an AOB situation. Examples given.

The Attorney is saying your regulations, under the law, are your SPU. You are putting forth: manner and location. You're saying tonight that the location itself, which is what the SPU is all about, is this particular use in harmony with the location, that's what an SPU is.

What you are saying here is that by your regulations, themselves, this can only in so many different locations in town. You're taking into account what you would do with an SPU in your regulations.

Under these regulations there is 14 potential locations where this particular use can go. Mr. Kenefick stated he thought 14 was very liberal.

Discussion.

Attorney Yoxhall noted that with the separating distance required by AOBs, it is possible that once one would locate then there would be a buffer around that one. In the end you won't end up with 14 of them. Right now you have 14 potential locations.

Discussion.

These types of uses are a freedom of speech issue, noted Attorney Yoxhall. With a karate studio you don't have that freedom of speech issue that you have with these. These raise more constitutional issues than some other kinds of uses that might be coming in for a special permit.

Mr. Chaplinsky stated that current for AOBs, we require an SPU permit. Attorney Sciota said that if an AOB, right now under your current regulation, if it's within that 750' area, if they're not doing any change in building at all, it would be just a zoning permit.

Mr. Chaplinsky said the point is we use SPUs now for other aspects of uses, is this different in that fact that this is a first amendment issue that we're talking about and there is a higher probability we would get sued --- the SPU is a secondary check on this?

Discussion.

Attorney Yoxhall noted when you use the SPU for other uses; typically, you don't have a set separating distance. Explained.

By enacting these separating distances, you are limiting the zones for these types of uses to be in and you've really limited where they can go by virtue of the separating distances.

Discussion.

Discussion of what is considered under special permit criteria. It's location and harmony and what the subcommittee has done is predetermined that by this regulation.

Mr. Chaplinsky said by putting the SPU in, it doesn't mean somebody is going to sue us. Secondly, if they do, they're suing us for the opportunity to try to come to town.

Discussion.

Attorney Sciota pointed out that when somebody sues in a situation like this and if the court finds the regulation is flawed, the regulation is gone. And, that's our concern here. The fact that the battle to say we want to put an SPU in here, let's assume that's challenged. The courts say, no, I'm sorry, you've already pre-regulated area based upon the regulation and the SPU says to the applicant that your second step means there is really is as of right location you can go to. The courts then say, your whole regulations is flawed.

Now, we have absolutely no AOB regulation. That's what concerns us and the planning department. With no regulation, they can go wherever they want. That's been our biggest fear.

Mr. Saucier says per the regulation, they have said where these businesses can go. We also use our SPU for safety.

Discussion.

Not requiring an SPU, while we can determine where and where it's in harmony with the surrounding area and is acceptable to this commission, the one thing that we are taking out of our purview with an SPU is the safety clause. Not the content. Not what they're selling or how they're selling, freedom of speech. But is it a safe location for the amount of traffic? How do we address that?

Attorney Sciota said you may or may not have site plan review. It may be a zoning permit situation. The answer is: You would not. That's why it's a business zone. A business zone means in most cases, we have a very slight SPU in your business. The reason why you have an SPU for carwashes is you need input from the water department and there may be an issue about standing cars.

It is implied, by making it a business zone that a business use is able to go there and traffic is able to be handled in a business zone and that's why it's called a business zone. You might be able to take a look at it at site plan or you might not be able to take a look at it if it's a zoning permit.

Explained.

Mr. Saucier again brought up the safety issue aspect. By taking it out of an SPU what we're taking away is the checks and balances if it is simply a zoning permit and may not come in front of the commission for input. For this commission to provide input on a use, a vehicle we've used in the past is through an SPU. That is my concern. If we eliminate the SPU, we eliminate the vehicle for this commission to provide input on something that a permit would be issued on. That is my biggest concern with removing the SPU.

Discussion.

Mr. Saucier said if a site plan is required, the eliminates the issue of the zoning permit and this use comes in front of us under a site plan. Attorney Sciota said you still need a zoning permit. You come here to get a site plan first before a zoning permit.

Mr. Sinclair discussed the concerns of the staff as to why they wanted SPU out of this regulation with Attorney Yoxhall and Attorney Sciota.

Ms. DelDebbio asked if the court says our regulation is flawed and it is then effectively gone, at what point would you recreate the regulation. Attorney Sciota explained the procedure starting with a moratorium and ending with adoption of the regulation.

Discussion.

Discussion about taking the SPU requirement out but putting in they have to come in for a site plan was had in response to a comment by Mr. Kenefick. Somehow, we want these applications to come before the Boards.

Attorney Sciota said you can add in there that an AOB is a change in use and then under your regulations you would call for a site plan. Site plan is not discretionary, it's administrative. It must be approved by this Board if it meets the criteria of site plan. Attorney Yoxhall said she thought that would be okay, as long as there are objective criteria in your site plan regulations.

Discussion.

The Town Planner added you may need to change your site plan regulations. The way the reg works right now, it says if there is not a site plan on that property, you have to come in for one. And, it says, otherwise, if there is an existing building or site plan and the proposed use requires exterior structural alterations or additional parking, we need to do a site plan.

Discussion.

Mr. Chaplinsky pointed out he felt there were a lot of gray areas left to the eye of the beholder. What is considered X and Y? When you put a definition around it, a person who looks at it could make a judgment call. What I'm hearing is our preference would be to have us be the people who have that decision making authority as to what is labeled AOB from a content perspective and what is not.

Discussion.

Mr. Sinclair agreed with Mr. Chaplinsky. I agree this body should be the body that makes the determination of is this AOB, does this fall within our regulations. It shouldn't be staff.

Discussion.

Mr. Kalkowski stated he felt we had very tight regulations with no gray areas proposed to you this evening. And, this is your time to now tighten up the regulation. I do not believe the SPU is necessary.

Mr. Saucier said he would like to see us classify a change of use to an AOB as requiring site plan approval. To that, we will require a text change to our site plan regulations to require with an AOB. I would not want to see us adopt any of these regulations before getting the change to the text.

Discussion.

Attorney Sciota noted the site plan section could be modified to reference this, except in this particular reg where site plans are going to be required, even if no change in site plan. This regulation stays the way it is. The one where it talks about site plans, that has to be modified.

Mr. Saucier noted there would be a window where an application could come in, meet our regulation as far as AOB and not require a site plan. Text change procedure was explained.

Mr. Kenefick wanted to be on the record as saying the committee did an excellent job. But I am not going to give up the SPU.

Attorney Sciota said as to Patrick's point, it's very easy in that during that period of time, under your regulations, staff does not issue a zoning permit within 2 weeks, then it comes to this commission, anyway. To cover that period of time, what we would do is we wouldn't issue zoning permits and they would come to this board.

Discussion.

Mr. Pocock said he didn't disagree with the SPU but his fear is what counsel is telling us here. If we lose in court, we lose these regulations that we have in place, once we do that, we have an open door.

Discussion.

Mr. Costello commented he thinks our discretion is in the new regs. Whether there is something unconstitutional in the regs or something that goes on at an SPU hearing that's unconstitutional, we're going to be taken to task. I believe these regs cover it as well as it can be covered. I think the SPU has to go to get this done. The new regs cover it.

Mr. Chaplinsky asked about the mapping. The separation distances were reiterated.

Can we say no AOBs in our CB zone? Attorney Yoxhall explained how it has already been done with the regulation.

Extensive discussion.

Mr. Chaplinsky wanted to know how we've addressed in this regulation one single inventory item that constituted a very large volume of the AOB stock and how we are prohibiting that from occurring.

Attorney Yoxhall noted a number of different ways of determining how a business is an AOB type. Explained.

(End of Tape #1, Side A)

(Beginning of Tape #1, Side B)

Explanation continued on the criteria in the regulation. We've put so many ways of looking at it in it would be very hard to manipulate the inventory in such as a way as to get around being called an AOB.

Mr. Chaplinsky read Commissioner Oshana's comments into the record. The letter is dated May 18, 2010 and is on file in the Town Planner's Office.

Mr. Saucier said it appears from the map, we have four existing AOBs in town. There are 14 other locations. The one thing missing from the new regulations that was in our existing regulations was that of addressing residential dwelling or residential use. We have residential use property in B zones. The majority of the properties on the list don't fall into that category. There is one property on Queen Street that does abut a 55 and Older Community within the 750' buffer. By removing residential dwelling out of our regulations, it is allowed in the new regulations. In our existing regulations it would not be allowed. That is a concern, the removal of residential dwellings. I would like to see the terminology of residential dwelling added wherever we reference residentially zoned properties.
Discussion.

Attorney Sciota suggested if you want to define it as a complex consisting of five or more residential units.
Discussion.

Center Street and West Street were discussed. Why not take out CB zones altogether.

The Chair commented on the fact that the businesses, if they have the where with all, they can actually go around the SPU. They'd go to court.

Discussion.

The Chair also said that what happened last summer, we want things to come before this Board, we want to be the party to decide, I don't think we're going to have that much say so. Back last summer we didn't have the regulation that's going to go forward tonight. The regs we had didn't have the teeth that this new regulation does.

Discussion.

The other thing about the SPU that kind of concerns me is that content can't be brought up. Ninety percent of the gripes that come up, you know are going to be on content. And, we can't allow it. I don't see the need to go forward with the SPU.

I do like having it for site plan, but I do think that is prolonging the inevitable. Give us an extra 30 days. Let's hope the regulations voted on tonight are going to be enough to really limit or take a good look at what is and what isn't allowable in town.

Great job to the committee: Steve, Lisa and Jim.

Berlin does use the SPU process. Mr. Chaplinsky asked why they use the process. What's the difference between their regulations and our regulations? What other towns use an SPU?

Extensive discussion.

Ms. Savage Dunham explained what would happen if this did not become effective prior to the expiration of the moratorium.

Mr. Kenefick said he was in favor of all the regulations but he was not in favor of giving up the SPU. Mr. Kenefick made a motion to approve this document with the SPU language added back in. Mr. Sinclair seconded.

Stipulations:

- Disallow AOBs in the CB zone.
- In addition to the restriction of residentially zoned for the buffer, we want to also add residential use in a B zone when there are multifamily five or greater.

Mr. Kenefick agreed to add those to his motion as did Mr. Sinclair, the seconder.

Mr. Pocock totally disagreed. I'm not afraid to go to court with anything but the problem we have here is if we do go to federal court with this and we lose this, we're leaving the door wide open. With the site plan, we have a chance to have administrative review. I don't disagree with the residential, but I do think we need to get rid of the SPU. If we lose these, we're going to have these people come into town.

We don't know how many towns have these types of businesses come in as far as SPU. They're being used in these other towns or cities, we don't know that. They obviously haven't been used because these businesses are there.

Discussion.

We should take the SPU out and have the regulations work the way this committee has worked hard to put them together and they will work and they'll satisfy the court.

Ms. Conroy said the current zoning regulations that we have regarding AOBs was comprised of maybe a page of regulations. The one we're proposing now is about eight pages. We could've tripled the length of this and I think we would still be open to any kind of litigation. I agree with what Mr. Oshana said in his written comments in that we should do what we feel is best for the town. I think what's best for the town is for us to at least have this come to our commission so we are aware and the public is aware and no surprises

are sprung on anybody so we don't have the same sort of circus that we had last year. I think site plan revision is fine.

Mr. Pocock agreed with Lisa's comments. We do need the public to get involved.

Discussion.

Ms. DelDebbio added that as much as she would like to have people come in front of us with SPU, I think that we need to listen to counsel and the regulations we're proposing are very thorough and I would agree that it would be important for them to come in front of us at least on a site plan. We should take out the SPU part.

Mr. Kenefick asked if the committee felt they wanted an SPU when they first started. Mr. Kalkowski said he didn't. Mr. Sinclair and Ms. Conroy did. Why the change in thinking?

Discussion.

Mr. Saucier noted the review in front of this commission is the SPU. After listening to counsel and seeing what may happen to the regulations after the hard work, we search for an alternative. I feel the alternative of a site plan for change of use to an AOB use gives us the vehicle for it to come in front of us. It is the Chair's discretion to allow public input on a site plan.

Discussion.

I feel, as counsel has pointed out to us that by leaving in an SPU we may be nullifying everything we worked on. They are tight and more solid regulations.

Mr. Chaplinsky said if SPU is taken out of this, we're not prohibited from revisiting the language and doing further studies on impacts from SPU and going through the process and adding it back in if we wanted to. Am I correct?

Attorney Sciota asked: Since you can't deal with content, this could be a business use in a business zone and under site plan you look at traffic and traffic flow. What particular aspect of an SPU under your regulations, what information would you be looking for that you would not get under a site plan? Your SPU deals is this location appropriate for the zone. You can't deal with content. What information would you be getting under the SPU process that you would not be getting under the site plan process? I think you should think about that before you vote.

The Chair said that is the crux of the SPU to have some valid reason to come up here and say we do not want this because of something that falls under SPU. And, not content. It's not allowed.

Discussion.

I'm afraid to go to court. We're broke. I can't see spending money to pay lawyers when we have children with textbooks from 1987. We have two attorneys telling us that we don't have a case. It's mind boggling.

Discussion.

The motion before us is to approve with the condition that the SPU requirement language be placed back in.

The modification was to also disallow AOBs in the CB zone and to add the 750' setback for residential uses in a business zone with five or more units.

The Town Attorney advised before voting, each one has to say on the record they did a thorough review of the documentation that was given to you and you understand the contents of the documentation. It is important.

MR. COSTELLO: I fully understand what I received today. Absolutely, I've looked at it all and I understand it.

MR. KALKOWSKI: I read the entire binder and understand it.

MR. POCOCK; I have read the entire binder and understand it and all the contents.

MR. CHAPLINSKY: I have also reviewed the binder and I understand it.

THE CHAIR: I've read the binder and I've read all the included information provided.

MS. DELDEBBIO: I've read the binder and I understand it.

MR. SINCLAIR: I've read the binder and I understand it.

MR. KENEFICK: I've read the binder and I understand it.

MR. SAUCIER: I fully reviewed the materials supplied to me and I understand it.

MS. CONROY; I've reviewed the material and understand it.

ROLL CALL:	Chaplinsky:	No
	DelDebbio:	No
	Kenefick:	Yes
	Pocock:	No
	Sinclair:	Yes
	Conroy:	Yes
	DelSanto:	No

Motion fails.

Mr. Chaplinsky made a motion to approve the text that's before us with the stipulation that we add in the site plan requirement, the no CB zone language and the change in text regarding residential dwelling to residential use that was previously stipulated multifamily five units or more. Ms. DelDebbio seconded.

Discussion of the timeframe for approval.

The Town Planner noted the current reg has site plan approval in there, already.

Mr. Saucier reminded the Town Planner in the future the site plan regulations have to be revised to trigger an AOB.

ROLL CALL:	Chaplinsky:	Yes
	DelDebbio:	Yes
	Kenefick:	No
	Pocock:	Yes
	Sinclair:	Yes
	Conroy:	Yes
	DelSanto:	Yes

Motion passes 6 to 1.

The Town Attorney asked this go into effect not 15 days from publication but on the 23rd of June to give us time at the Council level to put ours in place.

B. Central Connecticut Contracting, LLC, proposed 173,293 sf sports complex, spring Street and Smoron Drive (Assessor's Maps 156 and 144, Parcels 006 and 001 (SPR #156)

The applicant requested a table. Mr. Sinclair made a motion to table which Ms. DelDebbio seconded. Motion passed unanimously on a voice vote.

C. Shop Rite, site plan application for improvements to former Shaw's building, 750 Queen Street SPR #1573.

Ms. Savage Dunham noted the plan has been revised and all outstanding items have either been resolved or under agreement between staff and the property owner. This application is ready for action.

Mr. Sinclair made a motion to approve. Mr. Chaplinsky seconded.

Ms. Saucier questioned the lighting at the site. The Planner indicated they have a zoning permit for the lighting changes. We did approve that with the stipulation they are full cut off light fixtures

at the zoning permit level. They have to comply with that to get a sign off.

Discussion.

Motion passes 7 to 0 on a roll call vote.

(End of Tape #1, Side B)

(Beginning of Tape #2, Side A)

D. A. Duie Pyle, release of \$75,000 performance bond, Aircraft Road SPR 1312.1.

Staff supports this. Mr. Sinclair made a motion to approve which Mr. Pocock seconded. Motion passed unanimously on a voice vote.

E. Flanders East Apartments, release of \$1,000 erosion and sedimentation bond, Darling Street SPR #1221.

Staff supports this. Mr. Sinclair so moved the motion. Ms. DelDebbio seconded. Motion passed unanimously on a voice vote.

F. First Union National Bank, release of \$1,200 erosion and sedimentation bond, 781 South Main Street SPR #1183.

Staff supports this. Mr. Sinclair so moved the motion. Ms. DelDebbio seconded. Motion passed unanimously on a voice vote.

G. Mt. Southington Ski Area, release of \$1,000 erosion and sedimentation bond, Mount Vernon Road, SPR #1138.

Staff supports this. Mr. Sinclair so moved the motion. Mr. Pocock seconded. Motion passed unanimously on a voice vote.

H. Church of Jesus Christ of Latter Day Saints, release of \$1,000 erosion and sedimentation bond, 750 Meriden Waterbury Road SPR \$244.1.

Staff supports this. Mr. Sinclair so moved the motion. Ms. DelDebbio seconded. Motion passed unanimously on a voice vote.

Items to Schedule for Public Hearing

None this evening.

Administrative Reports

None this evening.

Receipt of New Applications

None this evening.

Commissioner Comments/Communications

Mr. Kalkowski thanked Lisa and Jim for their exceptional teamwork on the subcommittee. And, he also thanked Mary for being available when we got into the site distances and separation distances to turn around the maps as quickly as she did. And, Mark and Attorney Yoxhall's supports and guidance along the way.

He also thanked his fellow commissioners. He commended Fran for his opinion and his vote.

He thanked all for their additional add ins.

The Chair noted the great job this subcommittee and the commission had done on this issue.

Mr. Kenefick asked the Town Planner how come it takes so long to reduce these E & S bonds. Some of these have been around for about ten years. The Town Planner explained to Mr. Kenefick the way bonds are reduced or released.

Discussion.

The Town Attorney spoke about the procedure as well indicating it was the Town Planner who caught a lot of these based upon a review of the files and a lot of these applicants didn't even know they had the bond on file.

Mr. Sinclair thanked the Chair for his appointment to the subcommittee and he talked the team for their work, back and forth. He thoroughly enjoyed the work.

The Chair advised he got word from Mr. Oshana on his subcommittee for the northwest quadrant. He will be scheduling a meeting in the future and information will be forthcoming.

Mr. Chaplinsky reported on his committee regarding regulation enhancement and continuous improvements. He noted they are almost at the end. We will be providing a final list to the commission soon.

Mr. Sinclair made a motion to adjourn. Mr. Pocock seconded. Motion passed unanimously.

(Whereupon, the meeting was adjourned at 8:45 o'clock, p.m.)