

**EAST LYME WATER & SEWER COMMISSION
PUBLIC HEARING I
Tuesday, NOVEMBER 13th, 2018
MINUTES**

The East Lyme Water & Sewer Commission held a Public Hearing on November 13, 2018 at Town Hall, 108 Pennsylvania Avenue, Niantic, Connecticut on the Application of GDEL Commercial for determination of sewer capacity for a Costco Retail Store at 284 Flanders Road, Map 31.3, Lot 1. Chairman Nickerson called the Public Hearing to order at 6:32 PM.

PRESENT: Mark Nickerson, Chairman, Steve DiGiovanna, Dave Jacques, Dave Murphy, Joe Mingo, Carol Russell, Roger Spencer, Dave Zoller

ALSO PRESENT: Attorney Theodore Harris, Representing the Applicant
Attorney Edward O'Connell, Town Counsel
Attorney Mark Zamarka, Town Counsel
Joe Bragaw, Public Works Director
Brad Kargl, Municipal Utility Engineer

ABSENT: Dave Bond

Pledge of Allegiance

The Pledge was observed.

FILED IN EAST LYME
CONNECTICUT
Nov 20 2018 AT 10:03 AM/PM
Brookline Harris ATC
EAST LYME TOWN CLERK

Public Hearing I

- ◆ **Application of GDEL Commercial, LLC for determination of sewer capacity for a Costco Retail Store at 284 Flanders Road, Map 31.3, Lot 1.**

Chairman Nickerson called the Public Hearing to order at 6:32 PM. He noted that the Notice of Public Hearing had been published in the New London Day on November 1, 2018 and November 8, 2018. He then called upon the applicant or the applicant's representative to present their request.

Attorney Theodore Harris, representing the applicant said that the Costco would be located to the west side of Flanders Road along I-95. Costco is the large format store under the Master Plan for the Gateway District that was approved by the Zoning Commission in 2008. Design and approvals for the Costco have been in process over the last several years and currently all local, State and Federal permits have been obtained. The application for a building permit has been filed and should be approved within these next few weeks. There was a demand for residential housing and that component was developed; during that time the Costco interest developed. He noted the spreadsheet comparatives on other Costco stores sewer demand that he had presented. This was entered as **Exhibit 1**. He said that the actual is less than what was calculated and that they had also found the same to be true with the residential component – the actual is less than what was originally calculated. This is anticipated to be the same.

Ms. Russell asked about statistics for the Food Court, Meat department and why the bathrooms were not included.

Attorney Harris said that the Food Courts and Meat Departments are constants and maximum demand areas – just as they would be with the store in East Lyme.

Mr. Jacques asked where the 99 GM came from in the email.

Mr. Kargl and Mr. Harris said that it is from an actual meter reading.

Mr. Spencer noted that the calculation would not come out correctly.

Mr. Nickerson said that they have provided very real data from actual comparative stores.

Mr. Murphy asked if it would have a brown water system.

Mr. Harris said that he was not sure.

Mr. Nickerson said that they would be using well water for irrigation, etc.

Mr. Nickerson asked if there were any comments from the public -

Attorney Timothy Hollister, place of business, Hartford, CT; representing Landmark Development said that he had a letter that he submitted and would like to read into the record. **(Exhibit 2)** He noted that Landmark has a legally protected interest in the Costco application as outlined in his letter. He asked where the capacity study was for the Costco request as he had not heard anything on it. He noted that Gateway did not begin until late 2012 and that Landmark's application preceded it.

Attorney Roger Reynolds, place of business not identified, - representing Friends of Oswegatchie Hills and Save the River, Save the Hills as interveners with regard to the Landmark application said that he objected to what Attorney Hollister had said with regard to the Courts on the capacity issue in relation to the remaining capacity and what they should allow Landmark.

Mr. Nickerson said that while he is trying to give some leeway here that he wants to stay focused on the Costco application as there are other applications that will also be coming before them in the future.

Mr. Reynolds said that Landmark's assessment is not related to Costco.

Mr. Harris said that he did read the Court memorandum and noted that Gateway was already granted 160,000 gpd and that they really could use some of that. His letter to the Commission was submitted and entered as **Exhibit 3**.

Mr. Nickerson asked if there were other comments.

****MOTION (1)**

Mr. Mingo moved to close the Public Hearing.

Mr. DiGiovanna seconded the motion.

Mr. Nickerson noted that they would have other applications coming before them for sewer capacity.

Mr. Kargl said that information was based on the Weston & Sampson study of 2012 and that since that time he has taken the data and come up with an analysis on gpd available (262,000 gpd) – based on the maximum monthly average over six (6) years. He noted that the New London plant has 10M gpd of maximum capacity which they cannot exceed.

Mr. Nickerson noted that the 262,000 gpd is a moving target and that the 7,650 gpd request is approximately 3% of our capacity.

Attorney Hollister said that what Mr. Kargl just explained is the essence of the capacity study. He would like him to circulate his analysis and for them to postpone closing the public hearing as they have a right to review that information.

A vote was called for the motion and second on the floor.

Vote: 8 – 0 – 0. Motion passed.

Mr. Nickerson closed this Public Hearing at 7:14 PM.

Respectfully submitted,

Karen Zmitruk,

Recording Secretary

(Exhibits 1, 2 & 3 attached)

**SEWER DEMAND
COSTCO**

STORE	BUILDING SIZE (Square Feet)	RELEVANT SEWER DEMAND FACILITIES	AVERAGE DAILY WATER DEMAND	DETERMINATION METHOD
East Lyme (Proposed)	158,800 s.f.	Food Court Meat Department	7,650 GPD	Architect calculated estimate
Waterbury (Actual)	152,700 s.f.	Food Court Meat Department	5,400 GPD	Actual based on water usage
New Britain (Actual)	155,000 s.f.	Food Court Meat Department	7,065 GPD	Actual based on water usage

Exhibit # I

Submitted

Was PHI

11/13/18

Ted Harris

From: Carlson, Michelle [mcarlson@Blcompanies.com]
Sent: Tuesday, September 25, 2018 2:05 PM
To: Brad Kargl
Cc: Victor Benni; 'billm@eltownhall.com'; Pierides, Emile; Ted Harris
Subject: Gateway Commons Costco Water Demand

Hi Brad,

The water demand for Costco is:

99 GM with an anticipated water use of approximately 7,650 GPD. Do you need any other information?

Thanks,

Michelle

Michelle Carlson, P.E.

Director of Land Development

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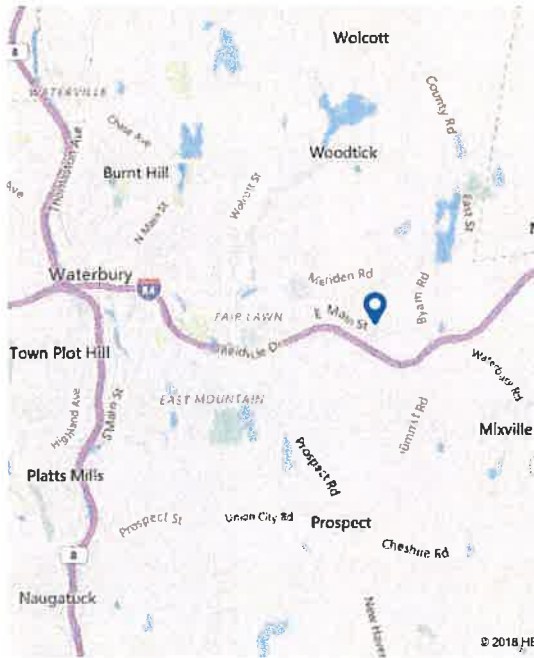
Sign In / Register

Shop All Departments Grocery Business Delivery Optical Pharmacy Services Photo Travel Membership

Locations

Home / Find a Warehouse / Waterbury Warehouse

Print



Waterbury Warehouse

Address

3600 E MAIN ST
WATERBURY, CT
06705-3851

Get Directions

Phone: (203) 596-9967

Hours

M-F 10:00am - 8:30pm
Sat. 9:30am - 6:00pm
Sun. 10:00am - 6:00pm
Thanksgiving Day
Closed

Warehouse Services

- Gas Station +
- Food Court +
- Hearing Aids +
- Optical Department +
- Pharmacy +
- Photo Center +
- Tire Service Center +

Departments and Specialty Items

- ATM
- Bakery
- Fresh Deli
- Fresh Produce
- Independent Optometrist
- Membership
- Service Deli
- Travel
- Auto Buying Program
- Executive Membership
- Fresh Meat
- Gas Station
- Inkjet Cartridge Refill
- Photo Center
- Special Order Kiosk

Opening Date

10/13/1993

Feedback

Gross Area 152,700 ft²

The Assessor's office is responsible for the maintenance of records on the ownership of properties. Assessments are computed at 70% of the estimated market value of real property at the time of the last revaluation which was 2017.

CITY OF WATERBURY

Information on the Property Records for the Municipality of Waterbury was last updated on 10/26/2018.

Parcel Information

Location:	3600 EAST MAIN ST	Property Use:	Retail	Primary Use:	Mall Anchor - Department / Big Box
Unique ID:	040401560612	Map Block Lot:	0404-0156-0612	Acres:	17.09
490 Acres:	0.00	Zone:	CA	Volume / Page:	3379/ 141
Developers Map / Lot:		Census:			

Value Information

	Appraised Value	Assessed Value
Land	1,983,934	1,388,750

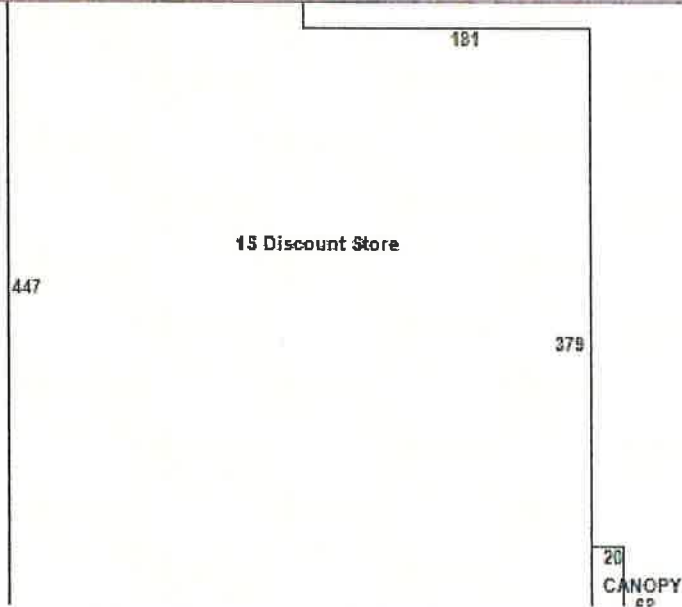
	Appraised Value	Assessed Value
Buildings	15,230,808	10,661,570
Detached Outbuildings	658,042	460,630
Total	17,872,784	12,510,950

Owner's Information

Owner's Data

COSTCO WHOLESALE CORP
PROPERTY TAX DEPT 313
999 LAKE DRIVE
ISSAQUAH WA 98027-8990

Building 1



Category:	Retail	Use:	Mall Anchor - Department / Big Box	GLA:	152,704
Stories:	1.00	Construction:	Average	Year Built:	1993
Heating:	Complete HVAC	Fuel:	Gas	Cooling Percent:	0%
Siding:	Concrete Blck, Tex Face	Roof Material:	Composite Built Up	Beds/Units:	0

Special Features

Mezzanines - Office	2626
Passenger Elevator	1
Sprinklers	152704

Attached Components

Type:	Year Built:	Area:
Canopy	1993	1,360
Enclosed Porch	1993	2,280
Enclosed Porch	1993	2,280

Detached Outbuildings

Type:	Year Built:	Length:	Width:	Area:
Canopy	2001	86	28	2,408
Canopy	2002	86	30	2,580
Asphalt Paving	1993			405,610

Owner History - Sales

Owner Name	Volume	Page	Sale Date	Deed Type	Valid Sale	Sale Price
COSTCO WHOLESALE CORP	3379	141	08/27/1996		No	\$150,000

Building Permits

Permit Number	Permit Type	Date Opened	Date Closed	Permit Status	Reason
2017.2928	Electrical	10/23/2017		Closed	DISCONNECT 3 EXISTING OVENS AND RECONNECT 3 NEW OVENS. NO NEW WIRING.
2017.2931	Mechanical	10/23/2017		Closed	REFLUE 3 OVENS (COSTO)
2017.3600	Comm Renovations	10/19/2017		Closed	REPLACE BAKERY OVENS / RELOCATE ONE FLOOR DRAIN
2017.2822	Plumbing	10/16/2017		Closed	INSTALL FLOOR SINK FOR COOLER AT COSTCO'S
2017.2712	Comm Renovations	05/02/2017		Closed	REPLACE EXISTING BAKERY OVENS / RELOCATE ONE FLOOR DRAIN
2017.1047	Plumbing	05/01/2017		Closed	REPLACEMENT OF EXISTING DISPENSERS
2017.1029	Electrical	04/28/2017		Closed	INSTALL NEW MODEL GAS DISPENSERS TO REPLACE EXISTING
2017.0566	Electrical	03/07/2017		Closed	REMOVE THE GAS OVERFILL ALARM INSIDE COSTCO MAIN BUILDING REMOVE THE HORN LIGHT AND THE RESET SWITC
2017.0185	Plumbing	01/30/2017		Closed	RELOCATE AND PLUG 1 HEAD IN EYECARE ROOM, COSTCO
2017.0167	Mechanical	01/20/2017		Closed	INSTALL AIR CURTAIN AND ROOFTOP UNIT
2017.0024	Remodel	01/12/2017		Closed	FIT OUT FOR NEW PACKAGE STORE, PHOTOLAB AND HEARING CENTER INSIDE COSTCO
2017.0098	Electrical	01/12/2017		Closed	COMMON AREA LIGHTING FOR NEW HEARING AND PHOTO AREA
2017.0053	Plumbing	01/10/2017		Closed	PLUMBING/HEATING AID STATION/ADD 2 SINKS

Permit Number	Permit Type	Date Opened	Date Closed	Permit Status	Reason
2016.2817	Comm Renovations	10/19/2016		Closed	MODIFY SALES AREA TO DEDICATED LIQUOR SALES
2016.2929	Comm Renovations	10/19/2016		Closed	RELOCATE HEARING AID CENTER & PHOTO CENTER
2015.2867	Roof	10/22/2015		Closed	ROOF FRONT LOWER ROOFS ONLY
2015.0292	Plumbing	02/16/2015		Closed	REPLACE BACKFLOW PREVENTER
2014.1916	Electrical	07/21/2014		Closed	ADDING 1 RECEPTACLE & 1 DATA LINE FOR PRICE CHECKER
2013.0783	Electrical	04/02/2013		Closed	REMOVE & REPLACE 3 DELI STANDS
2013.66	Mechanical	04/02/2013		Closed	INSTALL 3 REFRIGERATOR CASES
647/2010	Comm Renovations	07/02/2010		Closed	REMODEL FOOD SERVICE AREA
1593E	Comm Renovations	03/23/2010		Closed	PHARMACY COUNSELING ROOM

Information Published With Permission From The Assessor

New Britain
Gross Area 155000 ft²

405 HARTFORD RD

Location 405 HARTFORD RD

Mblu A2B/ 910/ / /

Acct# 44900405

Owner COSTCO WHOLESALE CORPORATION

Assessment \$11,053,013

Appraisal \$15,790,019

PID 104063

Building Count 1

Current Value

Appraisal			
Valuation Year	Improvements	Land	Total
2017	\$11,417,819	\$4,372,200	\$15,790,019
Assessment			
Valuation Year	Improvements	Land	Total
2017	\$7,992,473	\$3,060,540	\$11,053,013

Owner of Record

Owner COSTCO WHOLESALE CORPORATION
Co-Owner
Address C/O PROPERTY TAX DEPT 1196
 999 LAKE DR
 ISSAQUAH , WA 98027-8990

Sale Price \$4,100,000
Certificate
Book & Page 1897/1090
Sale Date 09/02/2014
Instrument 15

Ownership History

Ownership History					
Owner	Sale Price	Certificate	Book & Page	Instrument	Sale Date
COSTCO WHOLESALE CORPORATION	\$4,100,000		1897/1090	15	09/02/2014
NEW BRITAIN CITY OF	\$0		1412/ 93		05/29/2002
NEW BRITAIN CITY OF	\$0		642/ 110		10/21/1968
NEW BRITAIN CITY OF	\$0		642/ 106		10/21/1968
NEW BRITAIN CITY OF	\$0		214/ 473		01/01/1900

Building Information

Building 1 : Section 1

Year Built: 2015
Living Area: 155,962
Replacement Cost: \$12,797,932
Building Percent Good: 98

Building Photo

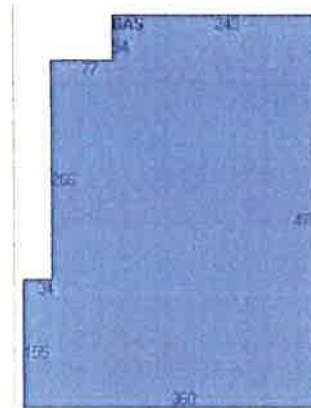
Replacement Cost
Less Depreciation: \$12,542,000

Building Attributes	
Field	Description
STYLE	Retail
MODEL	Comm/Ind
Grade	C+
Stories:	1
Occupancy	1
Exterior Wall 1	Precast Panel
Exterior Wall 2	
Roof Structure	Flat
Roof Cover	T&G/Rubber
Interior Wall 1	Minimum/Masonr
Interior Wall 2	
Interior Floor 1	Finished Concr
Interior Floor 2	
Central Heat	Yes
AC Type	Central
Bldg Use	Retail MDL-94
Apt Units	
Total Bedrms	
Total Baths	
Comm Units	
Ind Units	
1st Floor Use:	
Heat/AC	Heat/AC Pkgs
Frame Type	Steel
Baths/Plumbing	Average
Ceiling/Wall	None
Rooms/Prtns	Average
Wall Height	26
% Corn Wall	



(<http://images.vgsi.com/photos/NewBritainCTPhotos//\00\03\95\82.jpg>)

Building Layout



Building Sub-Areas (sq ft)			Legend
Code	Description	Gross Area	Living Area
BAS	First Floor	155,962	155,962
		155,962	155,962

Extra Features

Extra Features				Legend
Code	Description	Size	Value	Bldg #
SPR1	Sprinkler Wet	145962 S.F.	\$250,300	1
SPR2	Sprinkler Dry	10000 S.F.	\$20,600	1
LDL1	Load Lv Power	4 Units	\$14,100	1
MEZ1	Mezzanine-Unfinished	306 S.F.	\$10,600	1

Land

Land Use

Use Code 3220
Description Retail MDL-94
Zone B2
Neighborhood 103K
Alt Land Appr No
Category

Land Line Valuation

Size (Acres) 15.35
Depth
Assessed Value \$3,060,540
Appraised Value \$4,372,200

Outbuildings

Outbuildings						Legend
Code	Description	Sub Code	Sub Description	Size	Value	Bldg #
LT1	Lights1			11 Units	\$18,200	1
LT2	Lights 2			11 Units	\$27,700	1
PAV1	Paving Asphalt			320000 S.F.	\$460,800	1
CAN3	Gas St Canopy			3840 S.F.	\$121,000	1
KSK1	Kiosk-Serv Sta			15 S.F.	\$3,200	1
KSK1	Kiosk-Serv Sta			102 S.F.	\$22,000	1
FN9	Fen w/o Top 8			1900 L.F.	\$33,200	1
FN2	Fence-5' Chain			1770 L.F.	\$22,700	1

Valuation History

Appraisal			
Valuation Year	Improvements	Land	Total
2017	\$11,417,819	\$4,372,200	\$15,790,019
2016	\$10,903,019	\$4,887,000	\$15,790,019
2015	\$10,903,019	\$4,887,000	\$15,790,019

Assessment			
Valuation Year	Improvements	Land	Total
2017	\$7,992,473	\$3,060,540	\$11,053,013
2016	\$7,632,113	\$3,420,900	\$11,053,013
2015	\$7,632,113	\$3,420,900	\$11,053,013

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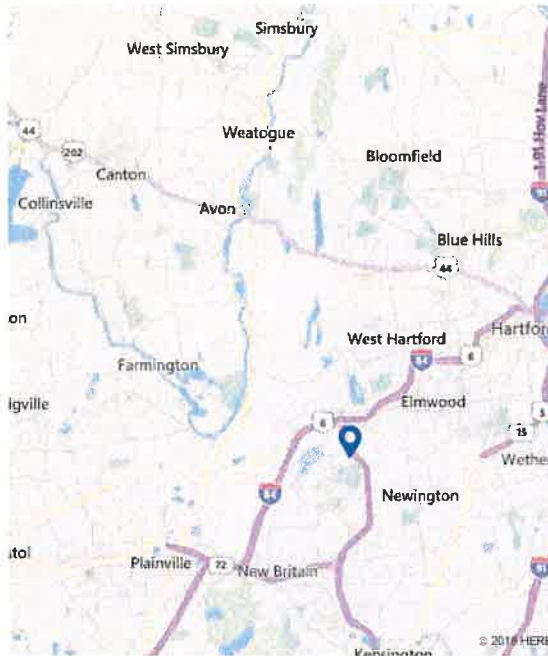
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Locations

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[Print](#)



New Britain Warehouse

Address

405 HARTFORD RD
NEW BRITAIN, CT
06053-1507

[Get Directions](#)

Phone: (860) 893-7001

Hours

M-F 10:00am - 8:30pm
Sat. 9:30am - 6:00pm
Sun. 10:00am - 6:00pm
Thanksgiving Day
Closed

Warehouse Services

- Gas Station +
- Food Court +
- Hearing Aids +
- Optical Department +
- Pharmacy +
- Tire Service Center +

Departments and Specialty Items

- | | |
|--------------------------------------|---|
| Auto Buying Program | Bakery |
| Executive Membership | Fresh Deli |
| Fresh Meat | Fresh Produce |
| Gas Station | Independent Optometrist |
| Membership | Rotisserie Chicken |
| Service Deli | Special Order Kiosk |

Opening Date

10/15/2015

[Feedback](#)



Timothy S. Hollister
Phone: (860) 251-5601
Fax: (860) 251-5318
thollister@goodwin.com

November 13, 2018

VIA HAND DELIVERY

Mr. Mark Nickerson, Chair,
and Commission Members
Water and Sewer Commission
Town of East Lyme
108 Pennsylvania Avenue
P. O. Box 519
Niantic, CT 06357-0519

Mr. Bradford C. Kargl
Municipal Utility Engineer
Water and Sewer Utilities
Town of East Lyme
108 Pennsylvania Avenue
P. O. Box 519
Niantic, CT 06357-0519

Re: Landmark Development and Application of Gateway Commercial LLC for Sewer Allocation for Costco Store

Dear Chair Nickerson, Commission Members, and Mr. Kargl:

As you know, we represent Landmark Development Group LLC and Jarvis of Cheshire LLC ("Landmark"). Landmark has a legal and property right interest in the Costco application because Landmark now has a final court order directing the Commission to allocate sewer capacity to Landmark's proposed residential development on its property adjacent to the "Golden Spur" residential area; and because the Connecticut Appellate Court's August 2018 opinion specifically referenced the sewer capacity allocated to Gateway as an encroachment on Landmark's rights. Thus Landmark has a legally protected interest in this Costco application. Landmark's rights, *which stem from a 2012 application, need to be recognized and given priority over any later-filed sewer capacity application, such as Costco's.*

The courts have now confirmed that this Commission violated Landmark's rights by first denying that Landmark's property was not in the town's sewer district; then asserting that sewer was unavailable; then denying any sewer capacity, claiming it was already allocated to others; then allocating 13,000 GPD; then allocating 14,434 GPD; and then granting capacity it told the

Exhibit #2 submitted Wes PH 11/13/18

Court it did not have to Gateway. In issuing these rulings, the courts have rejected this Commission's assertions of limited capacity, and have directed that this Commission must be transparent and accurate in calculating available capacity; may not use sewers to control land use; and must grant Landmark what it needs to proceed with its land use applications. *What Landmark needs will be determined by the land use permit process, not by this Commission.*

In response to the court rulings, East Lyme officials have been quoted as saying that "a judge can't force us" to give Landmark sewer access. Such a statement, if enforced by this Commission, will constitute contempt of court.

Therefore, in considering and before acting on the Costco application, this Commission must do the following:

1. Grant Landmark's 2012 application by allocating 100,000 GPD, conditioned upon Landmark receiving Preliminary Site Plan approval for its proposed residential development. At this time, Landmark is willing to reduce its capacity allocation application from 118,000 GPD to 100,000 GPD, in an effort to resolve the matter. It is important to recognize that this is a *maximum* that will likely be reduced by the land use permit process. This Commission must grant Landmark's application conditionally and allow the land use permitting process to determine what portion of the allocation will actually be used. Moreover, another public hearing on Landmark's application is unnecessary, because the Commission's obligation is clear.

2. Recapture, and regard as available for town use, the capacity reserved to State that will never be used. At this time, although the Town has ample capacity to grant Landmark's application, the Town needs to request that the State of Connecticut to release the capacity, contracted for in 1990, that has never been used and will never be used. Several hundred thousand GPD reserved for state facilities plainly will never be used. The Town has a legal obligation to request the State to release this capacity; the 1990 contractual reservation is now factually and legally unsupportable. In a recent, similar case, the New Jersey Supreme Court held that a town's refusal to recapture contracted but never-to-be-used capacity was an illegal sewer system management practice. *See 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington*, 221 N.J. 318, 113 A.3d 744 (2015) (copy enclosed). This recapture requirement may also apply to other overstated, unused allocations such as the Point O'Woods allocation.

In summary, this Commission, in considering the Costco application, must at this time conditionally grant Landmark 100,000 GPD of sewer discharge capacity, and protect this grant

November 13, 2018
Page 3

against other applications filed after 2012. This allocation should be set aside and preserved until such time as Landmark obtains Preliminary Site Plan approval of its development plan, at which time the Commission will approve the actual amount to be used.

Very truly yours,



Timothy S. Hollister

TSH:ekf
Enclosure

c: Mark S. Zamarka, Esq. (w/ enc.)
Landmark Development Group LLC (w/ enc.)

221 N.J. 318

Supreme Court of New Jersey.

388 ROUTE 22 READINGTON REALTY
HOLDINGS, LLC, Plaintiff–Appellant,

v.

TOWNSHIP OF READINGTON, Township
Committee of the Township of Readington,
Sewer Advisory Committee of the Township of
Readington, Bellemead Development Corporation,
Readington Commons, LLC, C. DelVecchio, S.
Carbone, A. Carbone, Rolf Ackerman, Valley
National Bank, Ryland Developers, LLC, Lot 3
Development, LLC, Fallone Properties, LLC, URB–
FI Development Corp., Fallone at Spring Meadow,
LLC Country Classics Legacy Readington, and
Winfield Management, Defendants–Respondents,
and

Merck Sharp & Dohme Corp., f/k/a Merck
& Co., Inc., Defendant–Respondent,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic
Association, Wladyslaw Zacios, Joann Zacios, Betty
Ann Coebler, Coddington Homes Co., Inc., Tom Jr.
Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty
Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee
of the Township of Readington, Sewer Advisory
Committee of the Township of Readington, Merck
Sharp & Dohme Corp., f/k/a Merck & Co., Inc.,
Readington Commons, LLC, C. DelVecchio, Scott
Carbone, A. Carbone, Rolf Ackerman, Valley
National Bank, Ryland Developers, LLC, Lot 3
Development, LLC, Fallone Properties, LLC, URB–
FI Development Corp., Fallone at Spring Meadow,
LLC, Country Classics Legacy Readington, and
Winfield Management, Defendants–Respondents,
and

Bellemead Development Corporation,
Defendant–Respondent,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic
Association, Wladyslaw Zacios, Joann Zacios, Betty
Ann Coebler, Coddington Homes Co., Inc., Tom Jr.
Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty
Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee
of the Township of Readington, and Sewer
Advisory Committee of the Township of
Readington, Defendants–Respondents,

and

Bellemead Development Corporation, Merck
Sharp & Dohme Corp., f/k/a Merck & Co., Inc.,
Readington Commons, LLC, C. DelVecchio, Scott
Carbone, A. Carbone, Rolf Ackerman, Valley
National Bank, Ryland Developers, LLC, Lot 3
Development, LLC, Fallone Properties, LLC, URB–
FI Development Corp., Fallone at Spring Meadow,
LLC Country Classics Legacy Readington, and
Winfield Management, Defendants–Respondents,
and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic
Association, Wladyslaw Zacios, Joann Zacios, Betty
Ann Coebler, Coddington Homes Co., Inc., Tom Jr.
Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty
Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee
of the Township of Readington, Sewer Advisory
Committee of the Township of Readington,
Bellemead Development Corporation, Merck
Sharp & Dohme Corp., f/k/a Merck & Co., Inc.,
C. DelVecchio, Scott Carbone, A. Carbone,
Rolf Ackerman, Valley National Bank,
Ryland Developers, LLC, Lot 3 Development,
LLC, Fallone Properties, LLC, URB–FI
Development Corp., Toll NJ I, LLC, and Winfield
Management, Defendants–Respondents,
and

Country Classics Legacy at Readington,
Readington Commons, LLC, and Ryland
Developers, LLC, Defendants–Respondents,
and

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Ryland Developers, LLC, Fallone Properties, LLC, URB–FI Development Corp., Fallone at Spring Meadow, LLC, and Country Classics Legacy Readington, Defendants–Respondents,

and

Lot 3 Development, LLC and Winfield Management, Defendants–Respondents,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Lot 3 Development, LLC, Fallone Properties, LLC, URB–FI Development Corp., Fallone at Spring Meadow, LLC, Country Classics Legacy Readington, and Winfield Management, Defendants–Respondents,

and

Ryland Developers, LLC, Defendant–Respondent,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.

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Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Ryland Developers, LLC, Lot 3 Development, LLC, URB–FI Development Corp., Country Classics Legacy Readington, and Winfield Management, Defendants–Respondents,

and

Fallone Properties, LLC, and Toll NJ I, LLC, Defendants–Respondents,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Ryland Developers, LLC, Fallone Properties, LLC, at Spring Meadow, LLC, and Country Classics Legacy Readington, Defendants–Respondents,

and

Lot 3 Development, LLC, and Winfield Management, Defendants–Respondents,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty

Ann Coebler, Coddington Homes Co., Inc., Tom Jr.
Property, Inc., and WPS Realty, LLC, Defendants.

A-63 September Term 2013, 073322

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Argued Dec. 2, 2014.

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Decided May 5, 2015.

Synopsis

Background: After township declined property developer's demand that the township, in accordance with sewer allocation ordinance, recapture sufficient sewer capacity to allow its construction project to proceed, developer filed a complaint in lieu of prerogative writs against the township and multiple private entities to compel the transfer of allocated but unused sewer capacity. On cross-motions for summary judgment, the Superior Court, Law Division, Peter A. Buchsbaum, J.S.C., affirmed validity of the ordinance, but determined that township's blanket policy of not recalling unused sewer capacity violated principles of *First Peoples*. Township appealed. The Superior Court, Appellate Division, 2013 WL 4769373, reversed. Developer appealed.

Holdings: The Supreme Court, Albin, J., held that:

ordinance provided adequate standards to guide township's discretion when considering whether to repurchase sewer capacity; but

as applied, ordinance violated dictates of *First Peoples*; and

Supreme Court would order township both to undertake a detailed analysis of the unused capacity in the hands of private parties and to explain whether any of that capacity could be recalled.

Affirmed in part, vacated in part, and remanded.

Attorneys and Law Firms

****750** Lawrence S. Berger, Morristown, argued the cause for appellant (Berger & Bornstein, attorneys).

Christopher John Stracco argued the cause for respondent Merck Sharp & Dohme Corp. (Day Pitney, attorneys; Mr. Stracco and Jennifer Gorga Capone, Parsippany, on the brief).

Robert A. Ballard argued the cause for respondents Township of Readington, Township Committee of the Township of Readington, and Sewer Advisory Committee of the Township of Readington, (Ballard & Dragan, attorneys).

Glenn S. Pantel argued the cause for respondent Bellemead Development Corporation (Drinker Biddle & Reath, attorneys; Mr. Pantel, Florham Park, and Karen A. Denys, Princeton, on the brief).

Deborah B. Rosenthal argued the cause for respondents Winfield Management Corp. and Lot 3 Development, LLC (Gebhardt & Kiefer, attorneys; Robert C. Ward, Annandale, on the brief).

Alexander G. Fisher, Somerville, argued the cause for respondents Ryland Developers, LLC, Readington Commons, LLC and Country Classics Legacy at Readington, LLC (Mauro, Savo, Camerino, Grant & Schalk, attorneys).

Thomas W. Sweet argued the cause for respondents Fallone Properties, LLC and Fallone at Spring Meadow, LLC.

Salvatore Alfieri submitted a letter in lieu of brief on behalf of respondents Scott Carbone, A. Carbone, and C. DelVecchio (Cleary Jacobbe Alfieri Jacobs, attorneys).

Opinion

Justice ALBIN delivered the opinion of the Court.

***326** Access to sewer service is vital to any major development of property. In *First Peoples Bank v. Township of Medford*, we held that a municipality cannot delegate the exercise of its land-use authority to private parties by allowing them to purchase and hoard unused sewer rights, thereby stifling development by those who are prepared to build. 126 N.J. 413, 420–21, 599 A.2d 1248 (1991). Instead, a “[t]ownship must retain sufficient control to assure that sewer permits are either used or repurchased so that others may use them.” *Id.* at 420, 599 A.2d 1248.

Plaintiff 388 Route 22 Readington Realty Holdings, LLC is seeking to construct a **751 retail outlet and a restaurant but cannot do so unless it secures access to 11,260 gallons per day (gpd) of sewer capacity. At the time that plaintiff requested access to that amount of sewer capacity from Readington Township, approximately twenty private entities possessed 322,009 gpd of unused capacity. The Township sold most of that unused capacity on the private market as a means of financing the expansion of sewer service from the Readington–Lebanon Sewerage Authority (Sewerage Authority or Authority).

Plaintiff demanded that the Township—in accordance with a municipal ordinance governing allocation of sewer rights—recapture sufficient sewer capacity to allow its construction project to proceed. Consistent with its policy of not repurchasing capacity, the Township declined to do so. Plaintiff then filed a complaint in lieu of prerogative writs against the Township and multiple private entities to compel the transfer of allocated but unused sewer capacity. Plaintiff claimed that the municipal ordinance addressing the allocation of sewer capacity was invalid either on its face or as applied by the Township.

On cross-motions for summary judgment by the parties, the trial court affirmed the validity of the ordinance. The court, however, determined that the Township's blanket policy of not recalling unused sewer capacity violated the dictates of *First Peoples*. The court issued a writ of mandamus ordering the *327 Township to exercise its discretion under its ordinance and to provide “a reasoned basis for refusing to recapture” the unused capacity held by multiple private entities.

The Appellate Division reversed. Although the Appellate Division agreed with the trial court that the Township “simply relied on a policy of not re-taking sewer rights granted by contract,” it concluded that plaintiff could not overcome the presumption of validity that attaches to municipal decision-making.

We now conclude that the Appellate Division erred. As the trial court held, the Township cannot meaningfully exercise its discretion whether to repurchase sewer capacity unless it examines the reasons given by each entity for not using capacity assigned to it. A policy of not recapturing unused sewer capacity is the functional equivalent of a moratorium on development. We approve of the sound approach taken by the trial court, requiring

the Township both to undertake a detailed analysis of the unused capacity in the hands of private parties and to explain whether any of that capacity can be recalled.

I.

We now review the relevant parts of the record on the summary-judgment motions.

In December 2007, plaintiff purchased property and a warehouse located at 388 Route 22 West in Readington Township. The wastewater at that site is serviced by a septic tank that allows for a maximum of 2000 gpd of capacity.¹ The Township rezoned plaintiff's property from the Mixed–Use District to the Business District, where retail and restaurant uses are permitted. Plaintiff's septic tank does not have sufficient capability to process the wastewater generated for the uses plaintiff proposes.

*328 Plaintiff's property is in an area serviced by the Sewerage Authority, which manages wastewater for Readington and **752 Lebanon Townships. A sewer line is located directly in front of plaintiff's property. After the zoning change, plaintiff made plans to redevelop the property for use as a restaurant and for other retail purposes. Plaintiff's proposed project requires 11,260 gpd of sewer capacity, which can only be accomplished by connecting to the Authority's sewer system. However, the Township advised plaintiff that there was no available sewer capacity to allocate to the project.

Around 1999, the Sewerage Authority began the expansion of its plant capacity to allow the treatment of an additional 320,000 gpd of Readington's wastewater. As a result of the plant expansion, Readington Township was allocated, in all, approximately 939,000 gpd of sewer capacity. The Township agreed to pay the Authority \$6,024,704 for the increased capacity. To finance the project, the Township relied on private investment. The Township offered landowners the opportunity to purchase portions of the 320,000 gpd of increased capacity. In response to the offering, to name a few, Merck Sharpe & Dohme Corporation purchased 141,900 gpd of capacity for \$2,196,764, Bellemead Development Corporation purchased 58,746 gpd of capacity for \$1,106,187, and Readington Commons, LLC purchased 7628 gpd of capacity for \$143,635. The prior owner

of plaintiff's property declined to invest in future sewer capacity.

Each landowner purchasing future sewer capacity entered into a sewer allocation agreement with the Township. The Township's "Sample Sewer Allocation Agreement," in part, provides:

Should Developer not begin construction on the aforementioned properties within two (2) years of the date of this agreement, then the Township shall have the option to terminate this agreement and all capacity assigned herein under shall be returned to the Township for reallocation at the discretion of the Township.

The sample allocation agreement—in compliance with the sewer allocation ordinance—places a temporal limit on the right of a landowner to hold on to unused capacity.

*329 The allocation agreements with Merck, however, do not follow the protocols in the ordinance or sample allocation agreement. Merck's 2003 and amended 2008 sewer allocation agreements allow Merck to maintain unused sewer capacity for the periods the Township extended Merck's site plan approvals for proposed construction in Readington. A past approval ran from 1988 to 2008, and the current approval runs from 2008 to 2018. Merck's agreements have barred the Township from recapturing unused capacity for a period lasting at least fifteen years.²

The typical allocation agreement provides that the landowner pay a certain sum for unused sewer capacity annually. The full annual amount was due the third year after acquisition. The first and second year payments were set at one-third and then two-thirds of the full amount annually due. For example, Merck agreed to pay \$48,720 the first year, \$97,440 the second year, and then \$146,160 annually for as long as the allocated gallonage remained unused.

As of December 2010, of the 322,009 gpd of unused capacity, 141,900 was held by **753 Merck, 66,060 by Bellemead,³ 32,000 or 38,860 by Fallone Properties, LLC, and 30,125 by Ryland Developers, LLC. Each

remaining defendant held less than 10,000 gpd of unused capacity. Merck's unused capacity represents forty-four percent of the entire capacity yielded from Readington's portion of the Authority's plant expansion.

*330 Defendants have not proceeded with construction projects for a variety of reasons. One reason given by some defendants has been the downturn in the economy.

By ordinance, the Township provides the methodology for allocation of sewer capacity to landowners and for the recapturing of unused capacity. *Readington Township Code* § 187–26 states:

A. Order of priority; reserves.

(1) By existing joint agreement with the Readington Lebanon Sewerage Authority, the Township of Readington has a total sewer allocation of 935,000 gpd. Upon study by the Township, there is a limited amount of sewer capacity in Readington Township at the present time. Any remaining capacity from Readington's portion of its allotted capacity in the Readington Lebanon Sewerage Authority sewer service area shall be allocated in the following order of priority, subject to availability:

(a) First, to those projects which will enable the Township to meet its future Mount Laurel affordable housing obligations; and

(b) Secondly, to remedy those properties within the sewer service area which constitute an "emergency" due to failing septic systems.

(2) The Township reserves the right to keep that portion of sewerage capacity needed for "reserve" to meet NJDEP requirements.

B. Allocations for sewer capacity from Readington's allotted portion of sewer capacity shall be made by the Readington Township Committee upon written agreement to be entered into with the applicant, after the allocation request has been reviewed and a favorable recommendation has been made by the Readington Township Sewer Advisory Committee.

C. In the case of those development projects which have not received an approval by the appropriate township board having jurisdiction at the time a request for gallonage is made, allocation agreements shall

provide that if the applicant does not make formal application to the appropriate township board within two years of approval of the allocation, then the Township Committee may, in its discretion, terminate the agreement. If within two years after preliminary approval, construction has not commenced, the Township Committee may, at its discretion, terminate the agreement. The agreement may be extended upon application to the Township if there is a showing of good cause, at the option of the Township Committee.

D. Applicants who received capacity allocations under this section shall enter into a sewer plant expansion developer **754 contribution agreement which is intended to cover the Township's share of the portion of the costs of expanding the [Sewerage Authority] treatment plant until such time as those costs have been satisfied....

E. Allocation of sewer capacity may not be transferred from the owner without prior approval of the Readington Township Committee, upon review and recommendation of the Readington Township Sewer Advisory Committee.

*331 In March 2010, plaintiff wrote to the Readington Township Committee and the Readington Sewer Advisory Committee requesting that 388 Route 22 be permitted to hook up to the Authority's sewer system and gain access to approximately 10,000 gpd capacity. Plaintiff expressed its belief that the Township possessed sufficient sewer capacity to accommodate plaintiff's request. Alternatively, in the event that all sewer capacity had been allocated, plaintiff stated that Readington should buy back unused capacity from property owners who had "not made formal application for development of [their] properties" or who had "failed to commence construction of improvements within two years after receipt of preliminary approval from the appropriate Township Board." In making this demand for the buyback of unused capacity, plaintiff relied on paragraph C of the Readington Township sewer allocation ordinance. The Readington Township Committee replied that it did "not wish to terminate any of its existing sewer agreements."

On August 4, 2010, plaintiff's attorney and professional planner appeared before the Readington Sewer Advisory Committee, describing plaintiff's plan to develop the property at 388 Route 22 into retail space and a restaurant. They requested a hookup to the sewer system and

11,260 gpd of wastewater capacity. The Committee's chairman replied that all capacity was either used or reserved by property owners who financed the sewer plant's expansion. He stated that the Township was bound by contracts with those property owners, although the ordinance allowed for an owner to "voluntarily" give up capacity. The chairman made clear that "the policy of this board and the policy of the Township Committee has been not to take any capacity back." The chairman finally noted that his committee's recommendation was advisory and that the Township Committee would make the final decision.

On September 20, 2010, plaintiff's attorney appeared before the Township Committee and requested 11,260 gpd of sewer capacity for plaintiff's project. He indicated that plaintiff had contacted *332 fifteen property owners, and none were interested in selling their unused capacity. The attorney noted that plaintiff would pay the holder its costs in acquiring and retaining the unused capacity. Nevertheless, Committee members expressed concern about breaching contracts with landowners holding unused capacity.

By letter dated October 14, 2010, the Township Committee advised plaintiff that there was no sewer capacity available. The Committee invited plaintiff to present "a conceptual plan, either through the Planning Board or Board of Adjustment, whichever is applicable, ... and that the application would be conditioned on obtaining a suitable solution to wastewater."

II.

A.

In November 2010, plaintiff filed its lawsuit seeking an order compelling the Township to recapture 11,260 gpd of unused sewer capacity for its project. Plaintiff's complaint in lieu of prerogative writs named as defendants Readington Township, **755 Bellemead, Merck, Readington Commons, and various other parties listed in the caption. Among plaintiff's claims are the following: (1) as a result of Readington Township's sewer allocation ordinance, the Township has failed to retain control over the allocation of sewer capacity and, in effect, has delegated to certain private landowners the authority to prevent other property owners from developing their

land; (2) the Township's policy of not recapturing sewer capacity in the hands of private entities is arbitrary, capricious, and unreasonable under the ordinance; (3) the "Township has sufficient unused capacity to allocate to [p]laintiff's [p]roperty"; and (4) the Township's failure to allocate to plaintiff sewer capacity amounts to an unconstitutional taking of its property. Plaintiff's claims, in essence, constitute a facial and as-applied challenge to the validity of the municipal ordinance.

Plaintiff and defendants moved for summary judgment. The trial court—the Honorable Peter A. Buchsbaum, J.S.C.—remanded *333 the matter to the Township Committee to "review the reasoning set forth in its prior rejection" of plaintiff's request for sewer capacity and to "provide a statement of reasons as a supplement to its decision."

In response to the remand order, the Township Committee held a public hearing on July 5, 2011 and issued a resolution denying plaintiff's request for sewer capacity. The resolution referenced letters received from defendants Merck, Readington Commons, Bellemead, Fallone, and Urb-Fi Development Corp., which recited their allocation agreements with the Township and described the development status of their projects. Those and other defendants objected to the transfer of any of their unused capacity to plaintiff.

In justifying its refusal to recapture unused sewer capacity, the Township Committee adopted in the resolution "the full contents and arguments of the listed correspondence submitted by various defendants." The Township Committee gave further reasons for the denial of plaintiff's request: (1) all excess capacity held by the Township is reserved for affordable housing and emergencies; (2) the sewer ordinance allowed the Township to extend its sewer allocation agreements with defendants for "good cause" and, having done so, the Township did not act unreasonably or arbitrarily; (3) several defendants "have development approvals which fall under the protections afforded by the Permit Extension act," a separate reason constituting "good cause" for continuing the allocation agreements; (4) the previous owner of plaintiff's property expressed no "interest in acquiring sewer capacity at the time the Township announced that it was available for purchase"; (5) Township Committee members did not believe that it was "in the public interest to force the termination

of ... existing sewer agreements"; and (6) plaintiff had not determined whether the holder of any unused capacity had an "interest in voluntarily selling their capacity back to the Township."

B.

The trial court held that Readington's sewer ordinance passed muster under *First Peoples, supra*, 126 N.J. 413, 599 A.2d 1248. *334 In a written opinion, the court determined that the ordinance, on its face, ensures "municipal control of sewer rights" and "provides mechanisms" for the Township "to recapture sewer capacity." In reaching this decision, the court recognized "the tradition of judicial deference" in upholding "broad standards for local action in the land use area."

On the other hand, the court found that the ordinance as applied by the Township **756 raised serious doubts about the legitimacy of the Township's sewer policy. Based on the summary-judgment record, it accepted that plaintiff was unsuccessful in its efforts to purchase sewer capacity from defendant developers and that the policy of the Township, as expressed by the Chairman of the Sewer Advisory Committee, "is not to take capacity back." The court described the Township's resolution as "*pro forma*" and a "brushoff" that "simply recites what was received from [defendants'] counsel." The resolution failed to "contain a development by development analysis" or to provide "a reasoned explanation" for the Township's decision not "to exercise discretion" to recapture any of the unused capacity, which constituted one third of the entire flow allocated to Readington. Further, the resolution failed to analyze whether the Permit Extension Act, N.J.S.A. 40:55D-136.1 to -136.6, applied "to each and every development." The court held that "the ordinance requires the exercise of discretion," yet the Township followed a "flat policy" of refusing to assert its right to recapture unused capacity. It construed *First Peoples* as standing for the proposition that sewer rights "cannot be held in perpetuity" and that at some point the Township has a duty to recapture unused capacity.

According to the trial court, the Township's obligation is not dependent on whether plaintiff can "beg, borrow or cadge capacity from others" but rather "to terminate agreements where it is appropriate to do so." It found that the Township's no-buy-back policy "functioned as a

de facto moratorium on any development which requires sewerage.”

*335 As a remedy, the court ordered that the Township undertake, within ninety days, a review of the unused sewer capacity listed by plaintiff and provide “a reasoned basis” for not recapturing that capacity.”⁴ It cautioned that agreements between the Township and defendants granting extended sewer rights may not control when a present holder of capacity has seemingly reserved the right indefinitely and a “party seeking sewer allocation is ready to imminently make use of those rights.” The court acknowledged, however, that the application of the Permit Extension Act might limit the Township’s discretion.

Plaintiff and several defendants appealed.

C.

In an unpublished opinion, the Appellate Division affirmed the Law Division’s rejection of plaintiff’s facial challenge to the ordinance but reversed the Law Division’s finding that the Township Committee did not give a reasoned basis for not recapturing sewer capacity for plaintiff’s project.

Like the trial court, the appellate panel was satisfied that the ordinance provided “standards sufficient to insure ‘fair and reasonable exercise’ of the discretion granted,” quoting *First Peoples, supra*, 126 N.J. at 419, 599 A.2d 1248. Nevertheless, the panel suggested that the Township follow the guidance offered in *First Peoples* and consider whether the Township and property owners would be better served if the ordinance gave “ ‘more specific standards defining the conditions under which’ good cause for extension will and will not be found, and procedural requirements applicants interested in repurchase should follow,” quoting *id.* at 423, 599 A.2d 1248.

The panel, however, determined that the Township Committee did not abuse its discretion **757 in not recapturing unused sewer *336 capacity for plaintiff. The panel described plaintiff’s development plan as “at best speculative” and “vague.” Although the panel acknowledged that the Township “Committee simply relied on a policy of not re-taking sewer rights granted by contract,” it concluded that plaintiff did not “establish

that the denial of its request was arbitrary because it failed to overcome the presumption of validity to which the decision is entitled.” The panel based its conclusion on the fact that defendants paid a “great expense” for their sewer rights and that plaintiff failed to identify those who were holding unused sewer capacity “without good cause for delay.” The panel also faulted plaintiff for its “preference for litigation or settlement over development and presentation of a more definitive request.” Last, the panel declined to rule on whether the sewer allocation agreements are protected under the Permit Extension Act.

We granted plaintiff’s petition for certification. 388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington, 217 N.J. 287, 87 A.3d 773 (2014).

III.

A.

Plaintiff advances several arguments: (1) the sewer allocation ordinance is invalid because it does not set forth adequate standards to guide the Township in determining when unused sewer capacity should be recaptured; (2) the Township’s blanket refusal to recall unused sewer capacity violates principles set forth in *First Peoples*, amounts to an unconstitutional delegation of governmental authority over land use into the hands of private parties, and constitutes an unlawful moratorium on development; and (3) the Appellate Division mistakenly ratified the Township’s policy on the erroneous grounds that plaintiff “should have presented a more definitive plan for its proposed development,” the holders of sewer rights expended considerable money to acquire the allocated capacity, and the Permit Extension Act expresses *337 the Legislature’s view that sewer agreements should be extended in periods of economic downturn. With regard to the last of those points, plaintiff emphasizes that developers who paid for allocations of sewer capacity did so “with full knowledge of the recapture rights of the Township under the Ordinance which, in many, if not all, instances, were embodied in the allocation agreements themselves.” Plaintiff also maintains that neither the Township nor any court has determined whether any particular sewer allocation attached to a development project is protected by the Permit Extension Act. Last, plaintiff contends that the Appellate Division erred by dismissing its claim that the Township has understated

its available capacity—a claim that has never been adjudicated.

B.

Defendants individually and collectively urge this Court to affirm the Appellate Division. First, they submit that the sewer allocation ordinance is valid on its face for the reasons given by the Appellate Division: the ordinance allows the Township to terminate or extend allocation agreements for good cause, grants the Township authority over the transfer of sewer rights, sets benchmarks for the recapture of capacity, and establishes an order of priority for allocating available capacity.

Defendants also maintain that the Township Committee did not act unreasonably or arbitrarily in declining to recall sewer capacity allocated to property owners who funded the sewer plant expansion, who **758 have approved site plans, and who paid and continue to pay for reserved capacity. Defendants emphasize that plaintiff had purchased 388 Route 22 with notice that sewer capacity was unavailable, had no definitive plan to develop the property, and made no application for land-use approvals.

Defendants contend that the Township rightly relied on the policy objective of “the Permit Extension Act as well as the explicit protections afforded by the Act in finding good cause to extend and not recapture the sewer allocations,” particularly given *338 the downturn in the economy that stalled development projects. Defendant Merck, in particular, claims that the Township is bound to honor its contractual obligations and that an impairment of those obligations would violate its rights. Merck points out that its agreement bars the Township from recalling sewer capacity before Merck’s site plan approvals expire in 2018. Merck maintains that any recapture of its “unused sewer capacity prior to that time would unlawfully vitiate Merck’s site plan approvals, resulting not only in a breach of its contracts with the Township, but also an unconstitutional taking.”

Finally, various defendants represent that they are currently using or in the process of using their allocated sewer capacity because their projects are either completed or underway.

IV.

A.

Our primary task here is to resolve issues of law: whether the Readington sewer allocation ordinance is facially valid, and whether the ordinance as applied by the Township Committee constitutes an improper delegation of land-use authority to private parties in violation of *First Peoples*. In construing the meaning of a statute, an ordinance, or our case law, our review is de novo. *Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n*, 215 N.J. 522, 535, 74 A.3d 860 (2013). “We need not defer to the trial court or Appellate Division’s interpretative conclusions” unless they are correct. *Murray v. Plainfield Rescue Squad*, 210 N.J. 581, 584, 46 A.3d 1262 (2012).

This appeal comes to us from a grant of summary judgment in favor of defendants, resulting in a dismissal of plaintiff’s action in lieu of prerogative writs. In this procedural posture, plaintiff, as the non-moving party, is entitled to “the benefit of all favorable evidence and inferences presented in the record before us.” *Murray*, supra, 210 N.J. at 584–85, 46 A.3d 1262; see also *Gormley v. Wood-El*, 218 N.J. 72, 86, 93 A.3d 344 (2014) (“A court *339 should grant summary judgment only when the record reveals ‘no genuine issue as to any material fact’ and ‘the moving party is entitled to a judgment or order as a matter of law.’” (quoting R. 4:46–2(c))). Accordingly, the summary-judgment record must be viewed “through the prism of [plaintiff’s] best case.” *Gormley*, supra, 218 N.J. at 86, 93 A.3d 344.

With those principles in mind, we begin with a review of the law that controls the distribution of sewer rights.

B.

The Legislature has the constitutional authority to delegate to municipalities the “police power” to enact ordinances governing “the nature and extent of the uses of land,” *N.J. Const.* art. IV, § 6, ¶ 2, and the Legislature has done so through the passage of the Municipal Land Use Law (MLUL), *N.J.S.A.* 40:55D–1 to –163. The constitutional power delegated to municipalities to enact

land-use regulations, **759 however, is not unlimited. That power “must be exercised for the general welfare,” and “regulations that conflict with the general welfare ... are unconstitutional.” *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel*, 92 N.J. 158, 208, 456 A.2d 390 (1983) (*Mt. Laurel II*); see also *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel*, 67 N.J. 151, 175, 336 A.2d 713 (1975) (*Mt. Laurel I*) (noting that police power exercised by municipality must promote “the general welfare”). Consistent with this fundamental tenet, one of the express purposes of the MLUL—indeed the first enumerated purpose—is “[t]o encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare.” *N.J.S.A.* 40:55D–2(a).

Like all ordinances, Readington's sewer allocation ordinance is entitled to a presumption of validity, and the “party challenging the ordinance bears the burden of overcoming that presumption.” See *Runson Estates, Inc. v. Mayor & Council of Fair Haven*, 177 N.J. 338, 350, 828 A.2d 317 (2003). An ordinance *340 must be “‘liberally construed’ ” in favor of its validity. *Id.* at 351, 828 A.2d 317 (quoting *N.J. Const.* art. IV, § 7, ¶ 11). Our charge is to pass not on the wisdom of a municipal ordinance, but only on whether it complies with the Constitution and the MLUL. See *ibid.*

Courts must also pay deference to the decision-making of municipal bodies, recognizing that they possess “peculiar knowledge of local conditions [and] must be allowed wide latitude in the exercise of delegated discretion.” *Kramer v. Bd. of Adjustment*, 45 N.J. 268, 296, 212 A.2d 153 (1965). A municipal land-use determination should not be set aside unless the public body has engaged in “a clear abuse of discretion.” *Id.* at 296–97, 212 A.2d 153. If there is “substantial evidence to support” the municipal decision, a court should not interfere by substituting its judgment. *Id.* at 296, 212 A.2d 153.

Specific to this case, “a sewer ordinance should withstand a challenge unless it is inequitable, unfair, or lacks adequate standards to insure the fair and reasonable exercise of municipal authority.” *First Peoples, supra*, 126 N.J. at 419, 599 A.2d 1248 (citing 5 McQuillin, *The Law of Municipal Corporations* § 18.12 at 453 (3d ed.1989)). Nevertheless, “[t]he municipal obligation is to provide a level playing field so that applicants are treated equally.” *Ibid.*

In assessing the validity of Readington's sewer ordinance and the Township's application of that ordinance, we are not addressing novel issues. We are returning to issues that we reviewed in *First Peoples*, and therefore a discussion of that case will help guide us here.

In *First Peoples*, Medford Township financed the expansion of its sewage plant through the sale of sewer permits that were available on an equal basis to all developers. *Id.* at 415–17, 599 A.2d 1248. Medford's sewer ordinance gave property owners “the option to purchase connection permits before obtaining municipal land use approvals.” *Id.* at 416, 599 A.2d 1248. The plaintiff bank *341 declined the opportunity to do so. *Id.* at 417, 599 A.2d 1248. Later, when the plaintiff wanted to develop its property, its request for several sewer permits was denied because all permits had been allocated. *Id.* at 418, 599 A.2d 1248. The plaintiff then instituted a lawsuit, challenging the validity of the ordinance and seeking an order directing Medford to repurchase unused permits.⁵ *Ibid.*

**760 Our focus in *First Peoples* was whether the ordinance articulated “adequate standards to guide the exercise of municipal discretion when considering the repurchase of permits.” *Id.* at 421, 599 A.2d 1248. Ultimately, we concluded that the “ordinance, although not exquisitely drafted, contain[ed] sufficient standards to withstand the [plaintiff's] challenge.” *Id.* at 422, 599 A.2d 1248. We gleaned from various clauses of the ordinance, including one that provided that “reservation of capacity is not irrevocably committed to a proposed user,” that Medford “when exercising its right of repurchase, must consider the public health, safety, and welfare, a reasonable and equitable allocation of costs, and the allowance of moderate growth.” *Id.* at 422–23, 599 A.2d 1248. Importantly, we considered Medford's sewer ordinance to be far from a model ordinance. *Id.* at 423, 599 A.2d 1248. We stated that

it would better serve both the Township and property owners if it contained more specific standards defining the conditions under which permits would be subject to repurchase. Such standards could appropriately include the criteria the municipality will apply when exercising its rights to repurchase permits and a formula for more closely correlating the issuance of building permits and sewer permits. In the absence of such standards, the

municipality runs the risk that in another case the ordinance might be found vulnerable as applied.

[*Ibid.*]

Significantly, in *First Peoples*, no one disputed that “the Township must retain sufficient control to assure that sewer permits are either used or repurchased so that others may use them.” *Id.* at 420, 599 A.2d 1248. We declared that “[w]ithout an adequate *342 repurchase provision, the ordinance could result in the improper delegation of access to the sewer system to private landowners who, by purchasing permits, could prevent other owners from developing their land.” *Id.* at 420–21, 599 A.2d 1248.

We nevertheless rejected the plaintiff’s as-applied challenge to the ordinance, finding nothing to suggest that Medford had “acted arbitrarily in deciding whether to exercise its repurchase option.” *Id.* at 423, 599 A.2d 1248. We specifically noted that Medford “had repurchased approximately fifteen permits and that it was considering the repurchase of others,” and that the record did not indicate that the plaintiff “had made demand on Medford to repurchase specific permits.” *Ibid.* For those reasons, we viewed the plaintiff’s “attack on the repurchase provision as essentially facial.” *Ibid.*

With those principles in mind, we now turn first to the facial challenge to Readington’s sewer allocation ordinance and then its application of the ordinance to this case.

V.

A.

We reject plaintiff’s challenge to the ordinance itself. We find that Readington’s sewer allocation ordinance provides “adequate standards to guide the exercise of municipal discretion when considering the repurchase of permits.” *First Peoples, supra*, 126 N.J. at 421, 599 A.2d 1248.

First, the ordinance sets temporal limits on the right of a property owner to keep unused sewer capacity. The Township has the discretion to terminate an allocation agreement and repurchase capacity if a **761 developer (1) does not make application for development approvals

within two years of having received sewer capacity or (2) has not begun construction within two years after having received preliminary approval. *Readington Code, supra*, § 187–26C. Second, the ordinance provides that an allocation agreement “may be extended upon application to the Township if *343 there is a showing of good cause, at the option of the Township Committee.” *Ibid.*

As was true in *First Peoples, supra*, the ordinance here was not “exquisitely drafted.” *See* 126 N.J. at 422, 599 A.2d 1248. Nevertheless, we must “‘liberally construe[]’” the ordinance in favor of its validity. *Rumson Estates, supra*, 177 N.J. at 351, 828 A.2d 317 (quoting *N.J. Const.* art. IV, § 7, ¶ 11). We presume that the ordinance’s drafters intended certain practical considerations to be taken into account by the Township Committee in exercising its discretion whether to terminate an allocation agreement or extend one based on good cause. Such considerations would include (1) the length of time a landowner has possessed unused sewer capacity, (2) the development plans of the landowner to tap some or all of the unused capacity and the imminence of that happening, (3) the complexity of the development project and the importance of the project to the community, (4) whether the economy has retarded economic development, (5) proposed development projects by others that cannot proceed because of unavailability of sewer capacity and the importance of those projects to the community, and (6) any other relevant factors.

Plans for the treatment of wastewater is a critical component of any development project, for without sewer approval no development project can go forward. *Field v. Franklin Twp.*, 190 N.J. Super. 326, 328–35, 463 A.2d 391 (App.Div.), *certif. denied.*, 95 N.J. 183, 470 A.2d 409 (1983). This ordinance, as written, in no way suggests that the Township as a matter of law has delegated its authority to control land use—and more specifically to control access to sewer capacity—to private parties. The ordinance suggests that access to sewer capacity is to be managed by the Township Committee for the general welfare of the community.

We conclude that the sewer allocation ordinance—when read with the commonsense considerations implied within the enactment—provides adequate guidelines for the Township to exercise its discretion whether and when to repurchase sewer capacity.

*344 We next turn to plaintiff's argument that the ordinance, as applied, violates the dictates of *First Peoples*.

B.

In *First Peoples, supra*, we did not find evidence that Medford had acted arbitrarily in deciding whether to exercise its option to repurchase sewer capacity. 126 N.J. at 423, 599 A.2d 1248. That was so because the "Township had repurchased approximately fifteen permits" and "was considering the repurchase of others" and because the plaintiff had not demanded that Medford "repurchase specific permits." *Ibid*. We noted that had Medford acted arbitrarily, "a court might direct it to exercise its option to repurchase." *Ibid*. That scenario, envisioned by our Court, presents itself here.

Based on the summary-judgment record before us, it is apparent that, despite its ordinance, Readington maintains a blanket policy of not repurchasing unused sewer capacity allocated to developers. The Chairman of the Sewer Advisory Committee told plaintiff's attorney that "the policy of this board and the policy of the Township Committee has been not to **762 take any capacity back." The Chairman's statement reinforced the Township attorney's earlier communication to plaintiff that the Township Committee did "not wish to terminate any of its existing agreements."

Approximately one-third of Readington's entire sewer capacity—322,009 gpd—is not in use. That unused capacity is largely in the hands of a relatively small number of private entities. Currently, Merck has 141,900 gpd and Bellemead has 66,060 gpd of unused sewer capacity—capacity allocated for more than a decade but still not in use. Both companies received approvals for their development projects in the late 1980s. That sewer capacity was allocated by contracts to private entities that financed the plant expansion project and was paid for at considerable expense cannot be the end of the analysis. Otherwise, the ordinance requiring Readington to exercise its discretion in recapturing sewer capacity would be meaningless. Those entities that purchased unused *345 capacity did so knowing that the ordinance placed potential temporal limits on how long that capacity could be held in reserve and gave the Township the authority to recapture unused capacity for distribution to developers with projects ready to go. The ordinance made

clear that sewer rights were not to be held in perpetuity. That other landowners did not participate in purchasing capacity to help finance the plant expansion may indicate nothing more than that they did not have a need for sewer capacity at the time.

The Township Committee invited plaintiff to present "a conceptual plan" of its development project to the appropriate land-use board, adding "that the application would be conditioned on obtaining a suitable solution to wastewater." But given the Township's stated policy not to recapture sewer capacity, the presentation of that plan would have constituted an exercise in futility. A developer may be hesitant to expend great sums of money to secure preliminary approvals for a development project that has no prospect of securing necessary sewer capacity. Plaintiff can hardly be faulted for deciding that judicial relief was the only viable option.

Plaintiff identified the entities that were holding unused capacity and contacted approximately fifteen of those entities, inquiring whether they would relinquish some of their unused capacity. The opposition to this lawsuit is the ultimate testament to defendants' unwillingness to freely give back any of their unused capacity.

The Appellate Division placed on plaintiff the burden of showing that defendant developers were acting "without good cause for delay" by not voluntarily surrendering their sewer rights for the fair value offered by plaintiff. But that defeats the purpose of the ordinance and of the policy of the MLUL, which is to have the Township exercise its decision-making authority in land-use matters. One of the objectives of the sewer allocation ordinance was to ensure that the Township exercised discretion, when appropriate, to recapture unused capacity and to avoid "the improper *346 delegation of access to the sewer system to private landowners who, by purchasing permits, could prevent other owners from developing their land." See *First Peoples, supra*, 126 N.J. at 420–21, 599 A.2d 1248. The MLUL requires that townships exercise their authority to develop lands "in a manner which will promote the ... general welfare," N.J.S.A. 40:55D–2(a), and the repurchase provision of the sewer allocation ordinance was a means to that end. We concur with the trial court that the Township's obligation to terminate agreements, when appropriate, was not dependent on whether plaintiff could "beg, borrow or cadge capacity from others." The **763 Township's no-buy-back policy

has rendered the ordinance toothless, and, as the trial court determined, “functioned as a *de facto* moratorium on any development which requires sewerage.”

We substantially agree with the conclusions that Judge Buchsbaum reached from the summary-judgment record. In declining to recapture unused sewer capacity for plaintiff's project, the Township in its resolution incorporated by reference, wholesale and uncritically, the arguments of the developer defendants. That approach suggests that the Township had effectively delegated its land-use authority to private entities. The resolution failed to analyze development by development why none of the unused capacity—after years of lying idle—could be recaptured.

The resolution also failed to analyze which developments, if any, fall under the dictates of the Permit Extension Act, *N.J.S.A.* 40:55D–136.1 to –136.6. The Permit Extension Act tolls the expiration date of certain land-use approvals for a period of time “due to the present unfavorable economic conditions.” *N.J.S.A.* 40:55D–136.2(m). The Act covers “an agreement” between a developer and municipality “for the use or reservation of sewerage capacity.” *N.J.S.A.* 40:55D–136.3. Admittedly, the Permit Extension Act would take precedence over an ordinance and therefore might limit the Township's discretion.

Last, and most significantly, the resolution did not give a “reasoned explanation” for the Township's failure to exercise *347 discretion, as required by its own ordinance. The Township and defendant developers cannot contract away their obligation to comply with the law—whether it is *First Peoples*, the MLUL, or the Readington sewer ordinance. Private parties do not have a right to hoard unused sewer capacity indefinitely and therefore effectively impose a moratorium on development. As a best practice, we suggest that the Township maintain updated records of the unused capacity held by private parties so that it can exercise its discretion, when necessary, with current information. In addition, a property owner seeking capacity should have access to data that is necessary to making an informed decision whether to proceed with a development plan.

We adopt the thoughtful approach taken by Judge Buchsbaum. We order the Township Committee, within ninety days, to undertake a critical review of the unused capacity identified by plaintiff and to determine whether

any such capacity can be recaptured from defendants to satisfy plaintiff's development needs. The Committee should consider the factors outlined earlier to guide the exercise of its discretion. We add that if a property owner, presently holding a substantial amount of unused capacity, has moved its business operations to another municipality and there is no realistic prospect that approvals previously acquired will result in a project coming to fruition, that factor must be given significant weight in deciding whether to recall capacity.

Last, we address when a party has a sufficient stake to purchase unused capacity. Needless to say, the Township should not recapture unused sewer capacity from one party and allow its sale to another party that is unlikely to put that capacity to use in the near future. A party that has received preliminary site plan approval obviously will have a stake in requesting capacity, but we are loath to impose that as the necessary test because of the significant costs involved in securing such an approval. Here, the Township offered plaintiff the opportunity to present a conceptnicceptityceptniccept **764 *348 plan to the appropriate board.⁶ If such a plan is satisfactory, and assuming that sufficient unused capacity is available, then the Township could commence the process of recapturing capacity at plaintiff's expense and hold that capacity in escrow, contingent on plaintiff securing all necessary approvals. If plaintiff does not secure the necessary approvals, then the Township can sell that capacity to another developer that needs it for an imminent project, or resell it to the original owner.

VI.

For the reasons given, we affirm the Appellate Division's judgment upholding the trial court's dismissal of plaintiff's facial challenge to the Readington Township sewer allocation ordinance. We reverse, however, the Appellate Division's judgment rejecting the trial court's determination that the ordinance, as applied, violates principles espoused in *First Peoples*. The Township Committee shall undertake a critical review of the unused capacity identified by plaintiff and determine within ninety days whether any capacity can be recaptured to satisfy plaintiff's development needs. We remand to the trial court for proceedings consistent with this opinion.

Chief Justice RABNER and Justices PATTERSON, FERNANDEZ-VINA, and SOLOMON join in Justice ALBIN's opinion. Justice LaVECCHIA and Judge CUFF (temporarily assigned) did not participate.

**349 For affirmance in part/reversal in part/remandment*—Chief Justice RABNER and Justices

ALBIN, PATTERSON, FERNANDEZ-VINA and SOLOMON—5.

Not Participating—Justices LaVECCHIA and Judge CUFF (temporarily assigned)—2.

All Citations

221 N.J. 318, 113 A.3d 744

Footnotes

- 1 *N.J.A.C. 7:9A-1.8* prohibits the use of a septic system to manage a wastewater capacity of over 2000 gpd without permission from the New Jersey Department of Environmental Protection.
- 2 In 1988, Merck obtained preliminary site plan approvals for projects to be constructed on its Readington property. The approvals were set to expire in twenty years. In 2008, Readington granted Merck a ten-year extension of its preliminary site plan approvals, and the Township agreed that it would not seek to recapture any unused sewer capacity until 2018.
- 3 In 1988, Bellemead was granted preliminary and final site plan approval for its "Halls Mills Farm" development project. The approval was set to expire in eight years. Bellemead was granted multiple extensions with the final extension set to expire in July 2010. As a result of the Authority's plant expansion, Bellemead was allocated 58,746 gpd of capacity, making its total capacity 110,746 gpd. Bellemead is using 44,686 of that gallonage, while 66,060 gpd—the amount required to operate its Halls Mills project—remains unused.
- 4 The court excepted from the order defendants Country Classics of Readington and Readington Commons because they evidently are using their capacity.
- 5 The plaintiff also unsuccessfully sought an order requiring Medford to expand the capacity of the sewage plant. *Id.* at 418, 423–24, 599 A.2d 1248.
- 6 The concept plan suggested by the Township resembles the informal review available under *N.J.S.A. 40:55D-10.1*. A planning board is permitted to conduct "an informal review of a concept plan for a development for which the developer intends to prepare and submit an application for development." *N.J.S.A. 40:55D-10.1*. An applicant can "benefit from the exchange of ideas and expression of the board's preferences" without having to "expend[] the significant amounts of money required in the preparation of development plans and applications." 36 *New Jersey Practice, Land Use Law* § 13.10 (David J. Frizell & Ronald D. Cucchiaro) (3d ed.2014). However, importantly, neither the board nor the applicant are bound by the discussions. *N.J.S.A. 40:55D-10.1*. An applicant must still proceed through the ordinary approval process.

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OCT 17 2018

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October 17, 2018

Mr. Mark Nickerson, Chairman
East Lyme Water and Sewer Commission
PO Box 519
Niantic, CT 06357

Re: Gateway Development/East Lyme, LLC/ Gateway Commercial, LLC

Dear Mr. Nickerson:

Please consider this letter as a request, pursuant to the recent interim procedure for sewer connections, and in particular, with respect to the large format store (Costco) as provided in the Master Plan for the Gateway District approved by the Zoning Commission in 2008. This approval involved a regulation change and ultimate Master Plan approval, which was considered over a two year period, involving several public hearings. During this process, water and sewer demand was considered, and data provided. As construction began in 2013, additional data relative to consumption was provided to the Water and Sewer department covering all phases of planned development, both commercial and residential. The site is also the subject to 3 sewer assessments, not including supplemental assessments based on constructed residential units. Finally, both a sewer and water mains have been brought into the site, as well as a sewer and water pump stations constructed, designed to meet the needs of the development.

Design and approvals for the Costco store have been in process over the last several years, and at this stage, all local, State and Federal permits have been obtained, Costco has filed their application for a building permit, and will shortly be filing a connection request.

Based upon architect's calculation, we expect that the total daily sewer demand will be 7,650 GPD. As you will note, the expected demand is not substantially above the 5000 GPD requiring application to the Commission for capacity evaluation prior to a connection request.

Exhibit #3 submitted was PH 1 11/13/18

Mr. Mark Nickerson, Chairman
October 17, 2018
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Would you kindly place this on the next Commission agenda for consideration. I will be available at the meeting to answer any questions, and/or elaborate on the request.

Neither this request nor any information provided herein, shall be construed as a waiver of any right to capacity which the applicant may have by virtue of prior procedures, municipal representations, or otherwise. Further the fact of this application shall not be deemed evidence that such rights do not exist.

Yours very truly,

A handwritten signature in dark ink, appearing to be 'Theodore A. Harris', written in a cursive style.

Theodore A. Harris

TAH:jpl