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MEMO TO: East Lyme Zoning Commission
FROM: Paul M. Geraghty

re: 91 Boston Post Road 8-30g application for Conceptual Site Plan Approval.

The burden of proof provision has been clarified to affirmatively state in § 8-30g(g) that the commission has the burden of proof on all of the factors based upon the evidence in the record compiled before the commission.

The commission cannot deny an affordable housing application unless there is some quantifiable probability of harm from the defect or problem with the application and not only the mere possibility of harm to the public interest, and reasonable changes cannot be made in the application to address the problem.[34] The denial by the inland wetlands agency of a modified subdivision application was not a ground compelling the planning commission to deny the application even though the commission was required by General Statutes § 8-26 to consider the report of the inland wetlands agency, and the commission had to make its own independent determination whether potential harm to wetlands outweighed the need for affordable housing.[35]

§ 51:6. Proof and judicial review in affordable housing appeals, 9B Conn. Prac., Land Use Law & Prac. § 51:6 (4th ed.)

With an affordable housing appeal under General Statutes § 8-30g(g), the agency must first establish that the reasons for the agency's decision are supported by sufficient evidence in the record, namely whether the administrative record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted.[10] There must be evidence in the record of a quantifiable probability that a specific harm will result if the application is granted, and mere concerns alone are insufficient.[11] If the court finds that one or more of the agency's reasons are supported by sufficient evidence, it then conducts a plenary review of the record and independently determines if: (1) the agency's decision was necessary to protect substantial interests in health, safety, or other matters that the agency can legally consider; (2) whether the risk of such harm to the public interests clearly outweighs the need for affordable housing; and (3) whether the public interest can be protected by reasonable changes to the affordable housing development.[12] The test in General Statutes § 8-30g(g) is also summarized

in a 2012 decision.[13]

§ 51:6. Proof and judicial review in affordable housing appeals, 9B Conn. Prac., Land Use Law & Prac. § 51:6 (4th ed.)

In Landmark . East Lye m Zoning Comm'n the court defined quantifiable as follows:

The **affordable housing** cases make clear, however, that more is required: the commission must also show "a quantifiable probability that a specific harm will result if the application is granted." *AvalonBay Communities v. Planning and Zoning Commission,* 103 Conn.App. 842, 853–854, 930 A.2d 793 (2007), citing *Kaufman v. Zoning Commission, supra,* 232 Conn. at 122, 653 A.2d 798; see also *Christian Activities Council, Congregational v. Town Council,* 249 Conn. 566, 735 A.2d 231 (1999). That term does not require proof to the legal standards of a preponderance of evidence but rather, as the Supreme Court stated in *Christian Activities Council,* where the issue was open space,

> the defendant must establish that it reasonably could have concluded, based on the record evidence, that (1) there was some quantifiable probability—more than a mere possibility but not necessarily amounting to a preponderance of the evidence—that the legitimate preservation of open space would have been harmed by the zone change, ...

Id., at 597, 735 A.2d 231. Although the commission decision here stated that the site plan was reasonably likely to cause various sorts of environmental damage, the evidence before the commission did not meet the *AvalonBay* standard of showing "a quantifiable probability" that a specific harm would result from approval of a **conceptual** site plan. On the eelgrass issue, for example, there was evidence in the record that nitrogen overloading *may* result from the use of septic systems[48] and storm water runoff.[49] But there was no evidence of "*some quantifiable probability* " of these environmental harms.

There is a four-part test on the burden of proof in General Statutes § 8-30g(g)(1). While the *Kaufman* case only decided that the defendant's burden was to establish that its decision and the reasons cited in support of it are supported by sufficient evidence in the record as to the first part, subparagraph A, the Christian Activities Council case has decided that it also applies to subsections B, C, and D.[14] The trial court accepts the factual findings made by the agency and reviews the record before the agency the same as with a conventional zoning appeal.[15]
Under subsection A, the agency is required to show on the basis of evidence in the record that the decision was necessary to protect substantial public interests. In doing so, the agency must establish (1) that it reasonably could have concluded that "substantial public interests" were implicated by the action based on the evidence in the record, and (2) the agency must show that based on the record, it reasonably could have concluded that its decision was necessary, namely that any public interests could not have been protected if it approved the application, and not a mere possibility that granting the application would harm the public interest.[16]
The same analysis applies to subsection B, namely that the public interests clearly outweigh the need for affordable housing, and subsection C, that such public interests cannot be

protected by reasonable changes to the affordable housing development.[17] The need for affordable housing is determined on a local and not a regional basis.[18] To comply with the factor in subsection C that public interests could not be protected by reasonable changes to the affordable housing development, there must be evidence that the public interest could not be protected by "reasonable changes" to the size of the zone, the density of the zone or the specific designs presented.[19] Where a sufficiently supported reason is site specific so that no changes can protect the substantial interest that the agency has identified, subsection C is complied with.[20]

§ 51:6. Proof and judicial review in affordable housing appeals, 9B Conn. Prac., Land Use Law & Prac. § 51:6 (4th ed.)

Since 1998, Applicants have prevailed in more than 68% of the appeals which have been decided on the merits. This is significantly different than conventional zoning and planning appeals where the municipal agencies prevail in over 80% of the cases.
In the cases where the municipal agency's denial of an application was upheld on appeal, *there were substantial reasons supported by evidence in the record which were related to public health and safety, such as an inadequate water supply or unavailability of sewers.*

As with conventional zoning cases, traffic problems and related safety concerns can be a valid reason for a denial, but there must be more than a traffic increase, and either traffic congestion or an unsafe road design at or near the entrances and exits from the site.1

A conclusion that downzoning was not in the interests of the area was rejected for an inadequate factual basis and because it was inconsistent with amendments to § 8-2 requiring the plan of development to address low and moderate income housing; there was no evidence in the record that a zone change would adversely affect property values in the area, and imposing additional burdens on the school system was not a proper reason for denying a zone change.6

In one case, the size of the units and possible problems due to the proposed density of the site did not outweigh the need for affordable housing.[8]

In weighing the need for affordable housing, evidence of housing on the market at a low cost and private efforts to encourage development of low cost housing in the town were not considered relevant factors, but the court declined to consider if the need for affordable housing should be decided on a regional or local basis.[9]

The fiscal impact on the municipal school system is not an adequate reason to reject an affordable housing application.[10]

Nonconformity to zoning is not in and of itself a valid reason to deny an affordable housing application, but the agency can do so if it proves that the zoning regulations are necessary to protect substantial public interests in health, safety, and other matters.[11]

The trial court can, but is not required to, examine the town wide zoning plan to decide whether the application adversely affected public health and safety.[12]

Even where other property in the town has previously been zoned for affordable housing, the zoning commission must prove that the public interest outweighs the need for affordable housing presented in the particular proposal before it.[13]

On an appeal from the denial of a variance from a regulation requiring affordable housing units to be served by public sewers, the zoning board of appeals has the burden of proof since it was an affordable housing matter under General Statutes § 8-30g; there was no self-created hardship because the regulation was imposed by the town, there was evidence that septic systems were possible, and there was no evidence that the denial was necessary to protect substantial public health and safety interests or that such interests outweighed the need for affordable housing.[15]

While traffic safety may be a substantial public interest allowing rejection of an affordable housing application, one case has held that concerns over safety of children living in the proposed units was not a legitimate reason where it was not supported by substantial evidence in the record, and there were safeguards which the commission could adopt to prevent a safety problem.[16]

In addition, the commission could not impose a sight line distance standard on a state highway in excess of the minimal standards of the Connecticut Department of Transportation to outweigh the need for affordable housing.

The denial of a zone change for affordable housing has been upheld where there was sufficient evidence in the record that there would be an adverse impact on future use of a public water supply source for property owned by a water company which was zoned as a public water supply source and that a change would degrade other nearby water sources.[18]
An appeal was sustained where the record did not sufficiently support the commission's reasons for denial that the traffic generated by the development and the size of it at the proposed location was sufficient to outweigh the need for affordable housing.[19] The developer's rezoning application from commercial zones to a residential zone was upheld even though the agency raised safety concerns about flooding and nearby oil tanks where it was offset by countervailing evidence.[20]

In one case, the applicant applied for an amendment to the zoning regulations to create a new zone and also applied to reclassify the zone of his land and place it in the new proposed zone in order to build 25 houses with six of them designated as affordable housing. The appeal from denial of the application was sustained, and the trial judge rejected all 18 reasons for denial, which included (1) spot zoning; (2) failure to comply with the zoning regulations, including height, setbacks, density, and parking; (3) failure to provide for continuing commission review as to affordability of the houses; (4) the existence of other housing in the town which was priced to be affordable although not meeting the statutory definition of affordable housing; (5) lack of proof that a lesser number of houses on the land would still result in a reasonable profit; (6) failure to prove that if the zone change was granted that the land would be used for affordable housing; (7) inconsistency with the town plan of development; and (8) the possibility of future overload of the sewer system.[22]

The fact that the proposed affordable housing is not consistent with the surrounding residential neighborhood is not a sufficient basis for denying an application.[23]

A zoning commission improperly denied an application when it only made generalized statements about adverse impact on public health and safety as to

traffic and sewer capacity and the specific evidence before the commission established that there would be no significant problems with traffic or the sewer system from the project; the expression of concerns on these subjects was inadequate absent the possibility of substantial harm.25

Even though a town had affordable housing zones, an application to allow 12 units per acre on a six acre parcel in a one acre zone was ordered to be approved to allow 66 units; the court concluded that the existing affordable housing zones did not justify denial of the application since they tended to exclude rather than include affordable housing, and claims related to open space, utilities, parking, and roadway design were not sufficiently supported by the record to prevent the proposed density for affordable housing.29

The denial of an affordable housing subdivision for 24 lots was overturned because the commission's reasons related to matters which were outside the jurisdiction of the commission, and its concerns about stormwater management and drainage, an adequate water supply, and possible effect of development on wells in an adjacent subdivision were not supported by sufficient evidence in the record or could easily be met by reasonable changes in the plan.30

The zoning commission did not meet its burden of proof in denying an application for a 36 unit affordable housing building in a multifamily residential zone where 27 conventional units were allowed with a special permit; the reasons for denying the application such as claimed on site and offsite traffic problems were not supported by substantial evidence in the record, and even if they had been proven, they would not outweigh the need for affordable housing in the town where less than 5% of the residential units met the definition of affordable housing.31

The denial of a 45 lot affordable housing subdivision on 27.9 acres based on claims of noncompliance with various zoning and subdivision regulations including the grade of some of the land on the site, excavation and filling, design of retaining walls, and the location of two lots on a temporary dead end road, was reversed, and the application ordered to be approved because the commission did not meet its burden of marshalling the evidence, and the need for affordable housing outweighed any concerns of the commission; in addition, the site had public water and sewer available in the road which abutted the property, the road had been built to industrial road standards, and the subdivision arguably qualified as a conventional subdivision under the zoning and subdivision regulations.32

The denial of a zone change, special permit, and site plan application for affordable housing was reversed and remanded even though the plan of development recommended the site to be developed for office use and some surrounding properties were used for that use because the legitimate intent to encourage economic development was not a substantial public interest which outweighed the need for affordable housing in a town where 5.8% of the dwelling units were considered affordable under the statute.[35]

The denial of an affordable housing application for a zone change and an amendment to the zoning regulations for a multifamily zone was reversed where there was insufficient evidence that the use of the property for multifamily use would have a detrimental effect on the area, and inconsistency with the surrounding zone and concerns about higher density did not outweigh the need for affordable housing.[36]
A zoning commission cannot impose unreasonable conditions on an affordable housing application, in one instance requiring removal of on-street parking ostensibly to improve sightlines for traffic and reducing the building height from 60 to 40 feet, causing a loss of 20 of 40 units.[37] It is unreasonable to require an § 8-30g applicant to enter into agreements with the town regarding emergency access where "[t]he record falls well short of meeting the Commission's burden to show that the safety concerns on which it based the challenged conditions clearly outweigh the need for affordable housing."[38]

A zoning commission could consider site specific concerns where a zoning text amendment and zoning map amendment were intertwined with an affordable housing plan, but the commission did not sustain its burden of proof that soil contamination was more than a mere possibility, or that defects in the applicants' initial affordability plan did not amount to sufficient evidence of harm to identified public interests to justify the denial, or why reasonable changes could not be made to the plan to protect any such interest.[39]

However, the planning commission in the same town properly denied an affordable housing subdivision application for 371 residences after the water pollution control authority had denied a sewer application when the commission concluded that there was no reasonable probability that the applicants could obtain approval of a sewer connection within a reasonable time, and the

commission could not grant approval conditional upon the obtaining of approval by the water pollution control authority.[40]

The denial of an affordable housing application for four residential units on a parcel containing 48,000 square feet in a zone with a 40,000 minimum lot size was overturned on appeal, and the court rejected all of the commission's reasons for denial which were that the applicant failed to identify the agent to be responsible for managing the housing project in conformity with § 8-30g, adverse impact on the adjacent residential neighborhood where there was no proof that the noise level in the area would increase substantially from four additional residences, unavailability of public transportation which is not a necessary component of an affordable housing application, problems with utility services in the area, and the fact that only one affordable housing unit was obtained from the property.[41]

An affordable housing plan for 160 apartments which was amended after the denial of the initial plan was reduced to 146 units and changes were made to the original plan to make the site more accessible to fire fighting equipment and address traffic concerns of the commission was ordered to be approved by a remand order from the trial court directing the commission to make changes necessary to protect public health and safety concerns, which were site specific revisions.[45]

Claims by a zoning commission about inadequate gaps in traffic to allow drivers to safely exit from a proposed development on a road with a high traffic volume, inadequate, and unsafe recreational space in the development because of some steep slopes, and safety concerns for children at a nearby bus stop were merely speculative and not supported by sufficient evidence in the record where there was no evidence as to the extent of harm posed by those claimed safety concerns or the probability of such harm if the application was granted.[46]

[That] the design of the affordable units were not comparable to the market rate units because there was one less bedroom and a smaller floor area, but an order from the trial court remanding the application to the commission with instruction to approve a modified plan for unit design which conformed to General Statutes § 8-30g(g) was valid if the application did not conform to either a statute or a municipal regulation.[49]

A zoning commission improperly denied an affordable housing application on the basis that the applicant's sewer connection application, which was necessary to develop the property but had not been filed, would probably be denied, and the commission was required to grant the zoning application on the condition that the applicant obtain the sewer connection because there was only a preliminary negative review and report from the water pollution control authority of the plan because of insufficient information.[50]

The denial of affordable housing plan because of safety concerns for emergency vehicle access for fire trucks, the adequacy of a public street for a secondary emergency access, and that a new inland wetlands permit application was required for a new site plan despite prior review of a site plan were not reasons supported by sufficient evidence in the record which outweighed the need for affordable housing, and the record did not establish that there was more than a theoretical possibility of a specific harm to the public interest.[52]
Where the defendant maintained a complete bar on residential development in a watershed, it did not prove that this restriction was necessary to protect the public interest in safe drinking water within the watershed which contained a reservoir, and a ban on sewering within the watershed was not necessary to protect that public interest; the test was not whether the defendant's decision was reasonable but whether the decision was necessary, and there must be evidence on potential harm if the zone was changed and evidence concerning the probability that such harm would in fact occur.[53]

The approval of a 14 unit application subject to conditions which included a requirement for a groundwater monitoring analysis because of concerns of the commission about the impact of the proposed stormwater management system on downstream properties was supported by sufficient evidence where there was insufficient data how the proposed drainage system would work, and an appeal challenging the condition was dismissed.[54]

An affordable housing appeal from denial of an application for noncompliance with a town road ordinance and the fire code was reversed where there was no evidence of any specific harm by a private road not strictly complying with the road ordinance, and no probability of specific harm to public safety based on the fire code; the appeal was remanded to the zoning commission with instructions to approve it with conditions.[55]

Where there was a resubmitted application for an affordable housing development after a remand order, the defendant, which had denied the application, was required under section 8-30g(g) to affirmatively prove that its decision to deny an affordable housing development was necessary to protect substantial public interests in health, safety, or other matters, that such public interests clearly outweighed the need for affordable housing, and that such public interests could not be protected by reasonable changes to the affordable housing development; the defendant failed to prove there was insufficient evidence in the record to deny the application, and the Appellate Court affirmed the trial court's decision.[59]

Where a planning and zoning commission denied an application to construct an affordable housing application on the basis that the access way to it was insufficient to allow trucks sufficient space to turn around on the property, the trial court dismissed the commission's appeal and concluded that the commission's concern did not outweigh the town's need for affordable housing; the Appellate Court affirmed the trial court's decision because the record was replete with evidence of the need for affordable housing in the town, and the commission did not prove that the denial of the application was necessary to protect substantial public interests, and the width of the access way was adequate to comply with national fire safety standards and the turnaround area.[60]

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Footnotes

1
CMB Capital Appreciation, LLC v. Planning and Zoning Com'n of the Town of North Haven, 124 Conn. App. 379, 399, 4 A.3d 1256 (2010), certification granted in part. 299 Conn. 925, 11 A.3d 150 (2011), citing this text.

6 Pratt's Corner Partnership v. Southington Planning and Zoning Com'n, 9 Conn. L. Rptr. 291, 1993 WL 229752 (Conn. Super. Ct. 1993).

8
West Hartford Interfaith Coalition, Inc. v. Town Council of Town of West Hartford, 228 Conn. 498, 515, 636 A.2d 1342, 1351 (1994).
9
West Hartford Interfaith Coalition, Inc. v. Town Council of Town of West Hartford, 228 Conn. 498, 521, 522, 636 A.2d 1342, 1353, 1354 (1994); Kaufman v. Zoning Com'n of City of Danbury, 232 Conn. 122, 166 n.25, 653 A.2d 798, 820 n.25 (1995).

10
National Associated Properties v. North Branford Planning and Zoning Com'n, 1993 WL 489486 (Conn. Super. Ct. 1993), aff'd, 37 Conn. App. 788, 658 A.2d 114 (1995); Shapiro Farm Ltd. Partnership v. Planning and Zoning Com'n of Town of North Branford, 1993 WL 452234 (Conn. Super. Ct. 1993); Barberino Realty & Development Corp. v. Town Plan and Zoning Com'n of Town of Farmington, 1994 WL 547537 (Conn. Super. Ct. 1994).

11
Wisniowski v. Planning Com'n of Town of Berlin, 37 Conn. App. 303, 317, 318, 655 A.2d 1146, 1153 (1995).

12
Wisniowski v. Planning Com'n of Town of Berlin, 37 Conn. App. 303, 321, 655 A.2d 1146, 1155 (1995).

13
Town Close Associates v. Planning and Zoning Com'n of Town of New Canaan, 42 Conn. App. 94, 105, 679 A.2d 378, 384 (1996).

15
Frumento v. Zoning Bd. of Appeals of Town of North Branford, 17 Conn. L. Rptr. 391, 396, 397, 1996 WL 456317 (Conn. Super. Ct. 1996).

16
Old Farm Crossing Associates Ltd. Partnership v. Planning and Zoning Com'n of Town of Avon, 1996 WL 367734 (Conn. Super. Ct. 1996).

18
Christian Activities Council v. Town Council of Town of Glastonbury, 17 Conn. L. Rptr. 619, 1996 WL 532485 (Conn. Super. Ct. 1996).

20
Glastonbury Affordable Housing Development, Inc. v. Town Council of Town of Glastonbury, 1996 WL 521162 (Conn. Super. Ct. 1996).

22. Thompson v. Zoning Com'n of Town of Stratford, 26 Conn. L. Rptr. 318, 2000 WL 73519 (Conn. Super. Ct. 2000).

23
North Haven Opportunity for Afford. Housing, Inc. v. North Haven PZC, 1999 WL 73919 (Conn. Super. Ct. 1999).

25
Mackowski v. Planning and Zoning Com'n of Town of Stratford, 59 Conn. App. 608, 616, 617, 757 A.2d 1162, 1166, 1167 (2000).

29
Mutual Housing Ass'n of Southwestern Connecticut, Inc. v. Planning and Zoning Com'n of Town of Trumbull, 1996 WL 488912 (Conn. Super. Ct. 1996), further decision Mutual Housing Ass'n v. Town of Trumbull, 1999 WL 682696 (Conn. Super. Ct. 1999).
30
Charles E. Williams, Inc. v. New Milford Planning Com'n, 2000 WL 775643 (Conn. Super. Ct. 2000).
31
Smith-Groh, Inc. v. Planning and Zoning Com'n, Town of Greenwich, 2002 WL 314014 (Conn. Super. Ct. 2002).
32
Novella v. Planning and Zoning Com'n of Town of Bethel, 2001 WL 576678 (Conn. Super. Ct. 2001).
35
AvalonBay Communities, Inc. v. Milford Planning and Zoning Bd., 2004 WL 203007 (Conn. Super. Ct. 2004).
36
Juniper Ridge Associates, LLC v. Wallingford Planning and Zoning Com'n, 2004 WL 574511 (Conn. Super. Ct. 2004).
37
131 Beach Road, LLC v. Town Plan and Zoning Commission of Town Fairfield, 2022 WL 1978683, *12 (Conn. Super. Ct. 2022) ("In sum, the commission has not met its burden to prove that it properly considered the text amendment in light of § 8-30g(g) or that the conditions of approval upon the site plan or certificate for zoning compliance were necessary to protect a substantial public interest outweighing the need for affordable housing.").
38
Housing Authority of the Town of Branford v. Town of Branford Planning and Zoning Commission, 2020 WL 8455465, *9 (Conn. Super. Ct. 2020).
39
River Bend Associates, Inc. v. Zoning Com'n of Town of Simsbury, 271 Conn. 1, 31–37, 856 A.2d 973, 991–995 (2004).
40
River Bend Associates, Inc. v. Planning Com'n of Town of Simsbury, 271 Conn. 41, 53, 58, 856 A.2d 959, 969, 970 (2004).
41
Phoenix Housing of Shelton, LLC v. Planning and Zoning Com'n of City of Shelton, 37 Conn.L.Rptr. 579 (2004).
45
Avalonbay Communities, Inc. v. Stratford Zoning Com'n, 2004 WL 1925945 (Conn. Super. Ct. 2004).
46

Avalonbay Communities, Inc. v. Planning and Zoning Com'n of Town of Wilton, 103 Conn. App. 842, 930 A.2d 793 (2007).

49

Dauti Const., LLC v. Planning and Zoning Com'n of Town of Newtown, 125 Conn. App. 665, 675–677, 10 A.3d 92 (2010).

50

CMB Capital Appreciation, LLC v. Planning and Zoning Com'n of the Town of North Haven, 124 Conn. App. 379, 392, 394, 4 A.3d 1256 (2010).

52

AvalonBay Communities, Inc. v. Zoning Com'n of Town of Stratford, 130 Conn. App. 36, 53, 54, 21 A.3d 926 (2011).

53

Eureka V, LLC v. Planning and Zoning Com'n of Town of Ridgefield, 139 Conn. App. 256, 275, 276, 57 A.3d 372 (2012).

54

Eppoliti Realty Co., Inc. v. Planning and Zoning Com'n of Town of Ridgefield, 2013 WL 6510893 (Conn. Super. Ct. 2013).

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Brenmor Properties, LLC v. Planning and Zoning Com'n of Town of Lisbon, 162 Conn. App. 678, 136 A.3d 24 (2016), certification granted in part, 320 Conn. 928, 133 A.3d 460 (2016).

59

Autumn View, LLC v. Planning and Zoning Commission of the Town of East Haven, 333 Conn. 942, 218 A.3d 1048 (2019).

60

Garden Homes Management Corporation v. Town Plan and Zoning Commission of Town of Fairfield, 191 Conn. App. 736, 216 A.3d 680 (2019), certification denied, 333 Conn. 933, 218 A.3d 594 (2019).