Exhibit #1 BOS 8/6/25

Russo/Landmark Pub Hrng

HINCKLEY ALLEN

20 Church Street
Hartford, CT 06103
p: 860-725-6200 f: 860-278-3802
hinckleyallen.com

Timothy S. Hollister
(860) 331-2823 (Direct)
(860) 558-1512 (Cell)
thollister@hinckleyallen.com

August 5, 2025

Via Email and Hand-Delivery

The Hon. Daniel Cunningham, First Selectman, and
Board of Selectmen Members
Town of East Lyme
East Lyme Town Hall
108 Pennsylvania Avenue
Niantic, CT 06357

Re: **Proposed "Ordinance Providing for a Moratorium or New Sewer Connection" and "Moratorium on Applications for Allocation of Sewer Capacity"**

Dear First Selectman Cunningham and East Lyme Board of Selectmen Members:

We represent Landmark Development Group, LLC and Jarvis of Cheshire, LLC (collectively, "Landmark"), owners of 236 acres at Calkins Road in East Lyme. This letter and exhibits submitted explain Landmark's opposition to the proposed sewer moratorium.

Summary of Landmark's 25-year effort to develop its land with sewers

As the Board is no doubt aware, Landmark has a court case now pending in the Connecticut Appellate Court, challenging the sewer regulation that was adopted by the East Lyme's Water and Sewer Commission ("WSC") in January 2019, immediately after a Superior Court judge ordered the WSC to grant Landmark's 2012 application for 118,000 gallons per day of capacity based on a conceptual site plan. In lieu of a detailed recitation in this Letter of what led to the 2012 application, the 2018 court order, the 2019 regulation, and Landmark's pending court challenge to the regulation, we have submitted a copy of Landmark's September 2024 Post-Trial Brief with Appendix and November 2024 Reply Brief, Exhibits A and B. We invite the Board to review the history and the evidence, in detail, but in particular to note these highlights:

- In 2000 and 2001, Town officials discussed using the Town's sewer system to prevent affordable housing on Landmark's property;

- In 2003, the Board of Selectmen adopted a resolution stating a goal of preserving Landmark's property as open space; the town has never taken formal steps since to purchase the land;

- In 2012, after a Superior Court judge rejected the Planning and Zoning Commission's claim that none of Landmark's 236 acres could be developed with sewers and directed Landmark to make a formal application for sewer capacity, Landmark applied to the WSC for an allocation of 118,000 gallons per day ("gpd");

- In 2013, the WSC denied Landmark's application, stating that all of the Town's sewer capacity was already allocated to other parties and properties;

- After a judge rejected this claim as unsupported, the WSC in 2013 and 2014 falsely asserted that the Town had only 13,000 gpd available, and then only 14,400 gpd available, and ignored Landmark's documented proof that the actual number was about 360,000 gpd, see Exhibit C;

- In 2015, Landmark discovered, and confirmed in a deposition of sewer administrator Brad Kargl, that the WSC in 2014 had allocated 166,000 gpd to the nearby Gateway luxury apartment complex without any application or public notice; Kargl testified that he had done so because the Town had "ample sewer capacity";

- In 2016, in light of this evidence, a Superior Court judge ordered the WSC to grant Landmark capacity to proceed with development with sewers;

- In 2018, the Connecticut Appellate Court affirmed this order;

- In 2018, the First Selectman, referring to Landmark, was quoted in a newspaper that "The judges can't force us to put the sewer in there";

- In December 10, 2018, facing a possible contempt motion, the WSC granted Landmark 118,000 gpd;

- The next day, the WSC introduced the regulation it adopted three weeks later in January 2019, imposing on sewer applications for over 20 units or 5,000 gpd a set of procedures, including application requirements and expiration deadlines, that are impossible to meet, conflict with state law, and were plainly intended to prevent Landmark (and possibly others) from proceeding with further development of its property with multi-

family and affordable housing; and

- Once the WSC's false representations about capacity had been exposed and rejected by the courts, the WSC, in July 2019, finally conceded its available capacity: 380,000 gpd. See Exhibit F.

In March 2025 a trial judge, declined to invalidate the 2019 regulation. Landmark's appeal of that ruling is pending.

Connecticut Law Regarding Moratoria

It is important to recognize what a land use moratorium is and why one may be imposed only in specific, narrow circumstances. A moratorium is a suspension of property rights. It is an action taken by a municipal commission that tries to temporarily override state real property and land use law. There is no provision in the General Statutes that allows a moratorium. Our Supreme Court has therefore allowed a moratorium only in compliance with strict, specific, and short-term requirements, and only when necessary to address a specific problem with existing regulations. The Court has said that a moratorium may not be imposed to stop or even pause a broad spectrum of development, but only to assist in the administration of regulations when a specific issue arises and then only as necessary to fix the problem. The best recent example is moratoria imposed on cannabis retail stores. When cannabis was legalized, few if any towns had regulations in place to control the opening and operation of stores. Short-term moratoria were thus permissible for the specific purpose of allowing time to draft and adopt regulations where, for good reason, none existed, and avoiding the problem of unregulated stores opening. But only such limited and compelling circumstances warrant a suspension of applications and property rights.

The Town cannot enact a moratorium that conflicts with a state statute. See *MSW Assocs. LLC v. Plan. & Zoning Dep't of City of Danbury*, 202 Conn. App. 707, 723–24 (2021). "There is attached to every ordinance… adopted by…a municipality the implied condition that [it] must yield to the predominant power of the state when that power has been exercised.… [A] local ordinance is preempted by a state statute whenever the legislature has demonstrated an intent to occupy the entire field of regulation on the matter...or...whenever the local ordinance irreconcilably conflicts with the statute." Public Act 2021, No. 21-29, § 4, amended Conn. Gen. Stat. § 8-2, the Zoning Enabling Act, in several respects intended to boost the production of multi-family and affordable housing. Zoning regulations *shall* (emphasis added):

- "Provide for the development of housing opportunities, including opportunities for multi-family dwellings…, for all residents of the municipality and planning region in which the municipality is located…," see General Statutes § 8-2(b)(4);

- "Promote housing choice and economic diversity in housing, including housing for both low and moderate income households," see General Statutes § 8-2(b)(5);

and

- "Expressly allow the development of housing which will meet the housing needs identified in the state's consolidated plan for housing and community development pursuant to [General Statutes] 8-37t...." see General Statutes § 8-2(b)(6).

In light of these recent statutory mandates, there is ample reason to conclude that our courts today will either prohibit moratoria that in effect suspend multifamily and affordable housing development.

Why the East Lyme Sewer Moratorium Proposal Should be Rejected

1. The Board of Selectmen's authority to enact a sewer moratorium has not been explained. Documents submitted by the WSC claim that the Selectmen should address the matter, but with no legal explanation.

2. The moratorium is illegal because it has no quantified goal. The proposed moratorium is intended to last until East Lyme secures "additional" capacity. How much is not stated. This process could take decades.

3. East Lyme has sewer capacity. The WSC Resolution asking the Board of Selectmen to adopt the moratorium asserts that "East Lyme has reached or exceeded its allotted capacity" at the New London treatment plan. In fact, the 478,000 gpd "reserved" for state facilities has never been fully utilized or anything close. The WSC receives monthly reports about what portion of the 478,000 (the prison facilities, Camp Nett, Point O' Woods, Rocky Neck State Park) is utilized. The average appears to be about 30-60 percent since 2012. See Exhibit D. Also, please note that the Town's *total* monthly discharge, see Exhibit E, includes discharges that are part of the 478,000. The discharge has never come close to 1.5m. Also, in the 2020s, flows have generally been lower than what they were 2005-2019, see Exhibit E.

4. Alternative: Renegotiate the 478,000 gpd. The underutilization of the 478,000 gpd has been a fact now for decades. An obvious alternative to a town-wide sewer moratorium is to restart negotiations with the State and the entities that comprise the 478,000 gpd allocation and recapture at least part of it. This would reallocate existing, unused sewer capacity.

5. The 137,000 gpd reserved for sewer benefit assessment payors is speculative. The moratorium proposal is based in part on the assumption that hundreds of property owners who have paid benefit assessments are likely to connect in the foreseeable future and consume 137,000 gpd of capacity. But there is no evidence that this number is complete and accurate and in fact it may be decades before any material percentage of it is actually used. Also, 60,000 of the 137,000 gpd involved is vacant or undeveloped property. There is also no apparent

calculation of how much gallonage these benefit assessments payors will actually use. As is well known, sewer capacity *calculations* are conservative, and often much higher than actual use. Without an accurate timetable as to when benefit assessment payors will connect, and how much gallonage they will actually use, the 137,000 gpd cannot be a basis for a sewer moratorium.

6. Ask New London to increase its capacity. The moratorium proposal is moratorium first, revised Tritown agreement second. But the Tritown agreement has been under discussion for at least a decade. East Lyme, not being in danger of approaching or exceeding 1.5 million gpd, should pursue additional New London plant capacity (and revision of the 478,000 gpd state facility reservation) and a higher limit before imposing a moratorium.

7. "Variances." The proposed contains a vague variance provision. This provision is an invitation to political favoritism.

For at least these reasons, the moratorium should be rejected.

Very truly yours,

Timothy S. Hollister

TSH:afz
Enclosure

cc: Landmark Development Group, LLC
Jarvis of Cheshire, LLC

Exhibit A

NO. KNL-CV-20-6048999-S		
	:	SUPERIOR COURT
	:	
LANDMARK DEVELOPMENT	:	
GROUP, LLC AND JARVIS OF	:	JUDICIAL DISTRICT
CHESHIRE, LLC	:	OF NEW LONDON
	:	
V.	:	
	:	
EAST LYME WATER AND	:	
SEWER COMMISSION	:	SEPTEMBER 16, 2024

PLAINTIFFS' POST-TRIAL BRIEF

Timothy S. Hollister
Hinckley, Allen & Snyder, LLP
thollister@hinckleyallen.com
20 Church Street
Hartford, CT 06103
Tel: (860) 331-2823
Fax: (860) 278-3802
Juris No. 428858
Attorney for Plaintiff, Landmark Development Group, LLC, et al.

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I. INTRODUCTION AND SUMMARY.

The purposes of this post-trial brief are to (1) review the chronology of the plaintiff Landmark's[1] efforts to develop property in East Lyme for multi-family residential use with an affordable housing component; (2) describe the defendant Commission's efforts to use its sewer system to regulate or prevent development; (3) explain the events of August to December 2018 that led to the Commission's January 2019 adoption of the sewer regulation at issue in this declaratory judgment action, and how the regulation was a continuation of the Commission's improper use of sewers to regulate land use and thwart Landmark's affordable housing development; (4) outline the specific, limited powers of sewer commissions under Connecticut statutes and caselaw; (5) explain why the Commission's January 2019 regulation exceeds its statutory authority, is preempted by the state's site plan statutes, and constitutes an illegal effort to use sewers to control zoning and land use; and (6) identify why the Commission's adoption of the regulation was arbitrary, in that the regulation is unrelated to proper management of the sewer system; is aimed specifically at Landmark; and contains requirements that a development like Landmark's cannot satisfy.

It is most important for this Court to recognize that the regulation at issue was not a good faith effort manage the East Lyme sewer system. In September 2018, just weeks after the Appellate Court affirmed Judge Cohn's holding that the Commission's 2016 allocation of only 14,400 gallons per day of sewer capacity was another abuse of discretion and the Commission must grant Landmark's application, the Commission Chair stated publicly that, "Judges can't force us to put sewer in there" and the Commission "should have the ability to oversee management of its sewer system without court interference." *To regard the regulation adopted just four months later as anything other than the Commission carrying out of the Chair's statements is to turn a blind eye to the substantial evidence in this case.* The purpose of the regulation was to use the sewer system to control or prohibit development of the balance of

[1] The plaintiffs, Landmark Development Group, LLC, and Jarvis of Cheshire, LLC, and their joint development efforts, are referred to here as "Landmark."

Landmark's sewerable property; adopt broadly discretionary standards to fend off judicial review; and obstruct the state's § 8-30g program to promote affordable housing development, because sewer commissions are not subject to § 8-30g.

This brief demonstrates these grounds for invalidating the regulation.

II. RELEVANT FACTS.

A. Landmark, Jarvis, The Commission, And The Subject Property.

Glenn Russo is the principal of both plaintiff LLCs, Landmark Development Group, LLC, and Jarvis of Cheshire, LLC. Russo testified to his 40 years of experience in real estate development, encompassing planning, permitting, financing, construction, road building, machinery management, general contracting, and subcontracting. July 19, 2024 trial transcript (hereinafter "Tr.") at 32-33.

Russo described his experience with multi-family residential, single-family residential, subdivisions, apartments, condominiums, and retail. In particular, he explained his detailed involvement in, and understanding of, federal, state, regional, and local permitting, based on numerous experiences with optioning or purchasing undeveloped land and taking it through the permitting process, including state agencies and local planning, zoning, and wetlands commissions. Id.

Russo explained how limited liability corporations are used in real estate development, with "single asset" LLCs, whether newly-formed or repurposed, being used to own individual development parcels to facilitate lender review of financial proposals, and to limit or avoid liability. Id. at 33-34.

The East Lyme Water and Sewer Commission is the municipal agency designated by the Town to carry out the duties of a municipal water pollution control authority, a/k/a "sewer commission," pursuant to General Statutes §§ 7-245 to 7-247. Complaint ¶ 3. As set forth in General Statutes § 7-247, the State has delegated to municipal sewer commissions the power to "establish and revise rules and regulations for the *supervision, management, control, operation, and use of the sewerage system*" in East Lyme. (Emphasis added).

In the late 1990s, Landmark and Jarvis obtained agreements to control two adjacent, undeveloped parcels in East Lyme, totaling 236± acres, on the west side of the Niantic River. Tr. at 34-35. Plaintiffs' Exhibit (hereinafter "PE") 2 (location maps and survey). The plaintiffs purchased the respective parcels in 2000 and 2006. The Landmark parcel is 148 ± acres, and the Jarvis parcel is 87 ± acres. Id. See Appendix at A1 (PE 2 survey with labels added).[2]

Russo was attracted to the land because of:

- views of the River and Long Island Sound;
- an accessible location near Exit 74 off I-95;
- as of the early 2000s, the properties were zoned for development of single-family homes on one acre lots;
- robust and growing employment in the region, such as Electric Boat and the casinos; and
- existing or approved public sewer lines to the north, east, and west of the property.

Tr. 36-37.

The property had been proposed by the Town in the late 1990s for acquisition as public open space, but the State Department of Environmental Protection declined funding due to the property's low "open space score," reflecting "intensive" neighboring residential developments to the west, northeast, and south, and limited public road access. Id. at 37; PE 6, 7.[3]

B. East Lyme's Sewer System And Capacity; Landmark's Access .

The City of New London's wastewater treatment plant serves New London, Waterford, East Lyme, and part of Old Lyme. PE 3; Tr. at 39. As allowed by an intermunicipal agreement among the participant towns, PE 3, East Lyme discharges sewage through transmission lines in

[2] To aid the Court, the Appendix contains two admitted exhibits with explanatory labels added.
[3] In a 1997 letter, PE 6, a DEP assistant Commissioner described a $1 million grant that had been made to East Lyme in 1987 for acquisition as open space of land at "Oswegatchie Hills," which is where Landmark's property is today. The Town did not spend the money. In the 1997 letter, the DEP described its concern with "limited recreational opportunities," lack of contiguity with other state land, and infeasible access to the Niantic River. Id. In the 1998 memo, PE 7, DEP's Wildlife Division commented that it had "no interest" in land acquisition "due to the intensive development in the surrounding area."

Waterford and then to the New London plant. The New London treatment plant's capacity, under its federal Clean Water Act permit, is 10 million gallons per day ("GPD") of average daily flow. Id. East Lyme is entitled by the agreement, PE 3, ¶ 21, to 15 percent, or 1,500,000 GPD.

East Lyme has adopted a detailed Sewer Ordinance, PE 4; Tr. at 39-40. The defendant Sewer Commission had adopted its own "Sewer Use and Sewage Disposal Ordinance," PE 5; Tr. at 39-40. *PE 4 is a comprehensive ordinance that covers all aspects of sewer system management*, including requirements for extensions of and connections to the existing sewer system, and revocation or termination of sewer capacity allocations. See PE 4, §§ 53.022 (sewer connections); § 53.042 and 53.043 (permits); § 53.061 (discharge limitations); § 53.067 (information on discharge volumes and peak rates); § 53.085 (extensions); and § 53.100 *et. seq.* (rates and charges). Similarly, PE 5 addresses connections (§ 3); permits (§ 3.a); regulation of discharges (§ 4); volume and rate of discharge (§ 4-8); and extensions (§ 5-1).

C. Commission's Use Of Public Sewer System To Block Landmark's Development, 2000-2011.

Two important attributes of the Landmark 236 acres with respect to sewers and availability of sewage disposal capacity are that (1) the west, north, and northeast parts of the property are located within the Town's "sewer service district;" and (2) most of the property slopes from its highest points on the west and north sides, to a lowest spot in the northeast corner. More specifically, the 236 acres slopes from its west and north side down to where Landmark's property abuts Route 1, River Road, and Calkins Road. PE 2 (showing contour/elevation lines)/A2. Section 53.085 of East Lyme's Sewer Ordinance (PE 4) states that if part of a parcel of land is located within a mapped service district (as the west, north, and northeast portions of the 236 acres are); and other parts of the property not within the mapped district use but are at a higher elevation than the low point within the mapped district, then the areas not within the sewer district can still be sewered by a "gravity feed" (a downgradient discharge). Section 53.085 of PE 4 (the same provision is in PE 5 at § 5.1) states: "The design of sewers must anticipate and allow for flows from all possible future extensions or

developments within the immediate drainage area; the drainage area being that area which can be easily sewered by gravity." PE 4; Tr. at 40. A drainage area is a downgradient or downhill location. This common sewer practice ensures efficient public infrastructure by avoiding sewer installations that exclude adjacent downgradient land. Here, about 190 of Landmark's 236 acres is either within the sewer district or outside the district but higher than the lowest spot of the sewer district in the northeast corner, and therefore sewerable. The combined mapped district and the gravity feed area are shown on PE 17, Exh. A/A2.

As Russo testified and several exhibits demonstrate, another critical fact is that Landmark's property has multiple places and directions to which it can discharge sewage off-site. Tr. at 41-43. The first is the property's north end, where it has direct frontage on an approved sewer line within Route 1. PE 2, PE 9; PE 17, Exh. A. In the 1990s, the defendant Commission approved a sewer line within Route 1, the Boston Post Road, to serve a hotel/commercial development to be located near Exit 74 of Interstate 95. PE 9; Tr. 43-44. The approved plans for this sewer show it connecting to an existing sewer line in adjacent Waterford, which leads eventually to the New London treatment plant. Tr. at 43-44; PE 16, 17, Exh. A.

In addition to the direct frontage on Route 1, two other sewer connection points are available via River Road and Calkins Road, which are public streets within the residential neighborhood (known as the "Golden Spur") directly north/northeast of Landmark's property. PE 9. The approved Route 1 sewer extension plans provide for "stubs" from the Route 1 line into River Road and Calkins Road, indicating Commission intent that those streets be sewered. Tr. at 43-44; PE 9.

The other potential sewer connection points are west of Landmark's property, where a multi-family, state-subsidized, affordable housing development called "Deerfield," built in the 1980s, is located. PE 16 is a map prepared in 2012 by a sewer engineering consulting firm hired by the Commission, Weston and Sampson. The map shows Deerfield as a "2nd connection point" (in addition to the Route 1 locations) for sewering the Landmark property. Id. Russo testified that Deerfield, in fact, provides two possible connection points, through a right-of-way

and a potential emergency access, shown on PE 16. Tr. 45. In total, the Landmark property has five potential sewer connection points.

In 1999, the Commission adopted a sewer district map, PE 8, that (by cross-hatching shown on the exhibit) depicts most of Landmark's property being sewerable. Tr. at 40-41. This map presumably was based on all the sewer system facts noted above. In the early 2000s, however, as soon as the plaintiffs announced conceptual development plans covering large portions of the acreage, the Commission revealed its intent to fight development, specifically affordable development, and to use withholding of sewer capacity to do so.[4] The first evidence emerged in the early 2000s, when Russo visited the East Lyme Town Hall to inspect Water and Sewer Commission files and came upon a memo summarizing a February 2001 conversation among the Commission Chair and Attorney Robert Fuller, a land use attorney. PE 30 contains an excerpt from that memo:

> No availability for a water and sewer, not in sewer shed, committed elsewhere for availability. This plan would consume a lot of sewer, cannot get affordable housing project through. Water and Sewer Commission has no obligation to extend to property. Does not fall under affordable housing act.

Thus, in the early 2000s, despite the sewer map and ordinances, the five connection points, and the property's gravity feed topography, the Town Attorney and the Sewer Commission Chair discussed the three ways to prevent Landmark's property from being sewered (no availability, property not in sewer shed, capacity committed elsewhere), and noted that the Sewer Commission is not covered by the affordable housing statute, § 8-30g, and its requirement

[4] In this part of the statement of facts, the plaintiffs have adhered to the Court's sustaining of the Commission's objection to what was marked as PE 35 for identification (Tr. at 89-94), a memo that Mr. Russo discovered in Town files in 2001 about a conversation among Town Officials and an attorney regarding the Town using sewer to block affordable development. This facts section relies only on Russo's admitted testimony and an excerpt from the 2001 memo that was admitted into evidence as part of PE 30, as testified to by Russo without objection. Tr. at 47-51.

to prove in a court appeal a public health or safety basis to support a denial of a zoning application.[5]

Proof of this opposition emerged again when Landmark applied for two development plan approvals in the early 2000s. Both applications were denied in part due to "lack of sewer," see PE 13, 14 (2004 and 2008 court decisions on appeal from 2002 application and 2004 amended application).[6]

In 2003, furthering the 2001 strategy, the defendant Commission tried to "clarify" the mapped sewer service district by claiming that the district boundary followed property lines. PE 11, Tr. at 53-54. This change would have excluded all of Landmark's property from the mapped sewer area. Id. Russo contacted the State DEP (which oversees municipal sewer plans, see General Statutes § 7-245), which in 2004 agreed that the western part of Landmark's property was within the mapped district. PE 12; Tr. at 54-55.

This clarification from DEP established the sewer district line, and thus a gravity feed area, being identifiable on Landmark's property. Again, the illustration of this is PE 17, Exh. A/ App.A2. This mapped sewer area continues from the west side to the north side and northeast

[5] Section 8-30g, on its face, does not list sewer commissions as subject to the statute, but in any event, the Supreme Court confirmed this in *AvalonBay Communities, Inc. v. Milford Sewer Comm'n,* 270 Conn. 409 (2004). As a result, in several § 8-30g cases around the state, municipalities have tried to prevent § 8-30g applications from proceeding by denying sewer capacity. See, e.g. *Dauti v. Water and Sewer Authority,* 125 Conn. App. 652 (2010); *751 Weed Street v. New Canaan WPCA*, 2023 WL 5698139 (Super. Ct. 2023, O'Hanlan, J.); *Greene v. Ridgefield PZC,* 1993 WL 7560 (Super. Ct. 1993) (Berger, J.).

[6] PE 13 is 2004 WL 2166353 (Super. Ct. 2004, the Hon. Barbara Quinn, J.). At *10, the decision recites that, "[the site lacked the infrastructure to provide sewer capacity....[When] the town identified what areas...were to be sewered in 1985, this area was not in the sewer shed boundary. In 1998, when the town prepared a capacity analysis of its system, it determined that all capacity was accounted for...." As explained below, these claims were untrue, but Landmark had not yet been able to disprove them.

PE 14 is an appeal from a 2004 amended application for development of part of the plan proposed in 2002. See 2008 WL 544646 at *2/PE 14. At *19, the Court accepted that Landmark, since 2004, had corrected the record to show that part of its property was within the mapped sewer service district, but held again "no sewer infrastructure available to the portion of the property with the sewer shed...." Id. at *20.

corner, encompassing about 60 acres. Id. The low point on the site that falls within the sewer shed area is the northeast corner (the upper right on PE 18), where Calkins Road and River Road are shown (also see PE 9), and where a sewer line installation has been approved. In other words, most of the property is *upgradient* from the mapped sewer shed area at the northeast corner. The gravity feed area (not in the sewer district but sewerable based on topography) therefore, is the area *between* the red "Sewer Shed Text" line and the blue "Sewer Shed Line" on PE 17/App.A2. The total sewerable area is about 190 acres. Tr. at 43.

D. Judge Frazzini's 2011 Decision.

In 2005, following the DEP sewer map clarification, Landmark developed a conceptual, multi-year plan for approximately 800 units in multiple buildings, with at least part of each building being *within* the mapped sewer service district, on approximately 36 acres at the western part of the site. PE 15; Tr. at 55. Again, this area is illustrated on PE 17, Exh. A, at the left/west side. In light of the already-manifest resistance of the Zoning Commission and the Water and Sewer Commission to development, in this plan Landmark maximized the number of units within the sewer service district, by showing at least part of each building within the mapped sewer service area. Tr. at 55. The 2005 zoning application was filed under General Statutes § 8-30g, the affordable housing statute, with Landmark committing to preserve 30 percent of the units for 40 years for moderate income households. PE 15 at *1.

Processing this application, the Zoning Commission, for the first time, acknowledged that part of the Landmark property was within the sewer service district, PE 15 at *11.

The Zoning Commission in 2005 approved rezoning to multi-family the part of Landmark's buildings that were with the mapped sewer district, but denied the rest of the conceptual site plan, in part claiming that all multi-family development, in any location in the Town, requires connection to public sewers and cannot be supported by on-site septic systems. PE 15 at *11; Tr. at 56-57.

In 2011, this Court (the Hon. Steven Frazzini, J.) overruled the Zoning Commission's claims that the property was only developable for multi-family with sewers, noting in part that

the Zoning Commission in 2006 had approved a large development elsewhere in town ("Darrow Pond") with a community septic system. PE 15 at ** 17-19, 21; 40-41. This Court held that the Zoning Commission's denial of Landmark's proposed zoning regulation amendments that would have allowed on-site septic, was "not supported by sufficient evidence in the record...." Id. at *40. The Court further held that the Zoning Commission's site plan denial "based on lack of public sewers" was not based on evidence in the record. Id. at *41.

As to the conceptual site plan, the Court stated that the Commission could have approved Landmark's application "by a conditional approval that Landmark show in its preliminary or final site application under the amended regulations, that public...sewer can be provided to all or part or all of the entire development...." Id. The Court remanded the application to the Zoning Commission "to approve a conceptual site plan conditioned upon Landmark subsequently demonstrating...that public...sewers can be provided...." Id. at *42. The Zoning Commission adopted the zoning amendments in December 2012. PE 17, ¶ 24.

E. Landmark's Sewer Capacity Application, 2012 – 2018.

In June 2012, as directed by Judge Frazzini, Landmark applied to the Water and Sewer Commission for 118,400 GPD,[7] which would serve the conceptual 840 unit plan, a combination of one and two bedroom units. PE 17 and its Exh. A.

During the 2012 hearings on its sewer application, Landmark submitted evidence that East Lyme and the Sewer Commission had at least 309,000 gallons per day of unused, unallocated sewer capacity, as well as at least 165,000 gallons that it had "reserved" by various agreements, but has never been used.[8] PE 17, ¶ 22.b.

[7] Through the 2012 sewer application and subsequent litigation, Landmark's consulting engineer testified that Landmark could meet all Town engineering and technical requirements to connect to the system, and this was not and has not been disputed. PE 17, ¶¶ 22 d.f.

[8] The relevance of the allocated but never-used capacity is that even if the Commission were to allocate all of its 309,000+ unused capacity, and that capacity were to be actually used, the town would still not be close to exceeding its contractual 1.5 million GPD limit at the New London treatment plant.

In December 2012, however, the Commission denied Landmark's application asserting that *every gallon of the Town's sewer capacity was already spoken for*, PE 17, ¶¶ 25-27 and PE 17, Exh. B.; Tr. at 58-59.

Landmark appealed. PE 17; Tr. at 59. In January 2014, Judge Cohn rejected the Commission's claim that it had no unallocated, unused sewer capacity, and remanded to the Commission for a new decision "based on the record." PE 18 at 2-3; Tr. at 59-60.

The Commission met in February 2014, and at that time approved an allocation of just 13,000 GPD, or less than 10 percent of Landmark's application and about four percent of what Landmark had proved to be available capacity. PE 18, at 3-4; Tr. at 59.

In June 2014, Judge Cohn sustained Landmark's appeal from the 13,000 GPD allocation and remanded for "appropriate action consistent with precedent and the record." PE 18 at 11; Tr. at 59-60. Specifically, Judge Cohn warned the Commission that it could not use sewers to control land use, and could not reserve capacity for speculative, unquantified needs. PE 18 at 11. The Court provided guidance on factors the Commission should consider. PE 18 at 10-11.

The Commission held a remand hearing in October 2014. Landmark submitted PE 19, showing that the Town's unallocated, unused sewer capacity was still between 308,000 and 358,000 GPD. Tr. at 60. In response, the Commission devised an *ad hoc* "formula" that had no legal, regulatory, or mathematical basis; and based on this formula allocated *14,434 GPD* – essentially the same amount and percentage that Judge Cohn had ruled just five months earlier was an abuse of discretion. PE 20 at 6; Tr. at 60-61.

In 2015, concerned by the slow pace of the sewer case, Landmark decided to proceed with a zoning application, seeking approval of the conceptual site plan showing, consistent with its 2012 sewer application, units laid out across 36+/- acres within the mapped sewer service district, along the west side of the property. PE 21; Tr. at 61. This application also proposed an expanse of open space, about 87 acres, in the middle of the property. Id. This zoning application was again filed in compliance with the affordable housing statute, General Statutes § 8-30g. The

Zoning Commission denied this application in September 2015; Landmark's appeal is pending on the Superior Court Land Use Docket in Hartford.[9]

More importantly, in 2015, while the sewer case progressed, Landmark discovered that while the Commission had been telling Landmark *and this Court* through 2012, 2013, 2014, and 2015 that it had no available capacity, and then only 13,000 GPD, and then only 14,400 GPD, GPD, the Commission, through its sewer administrator, *without any public notice or meeting, had allocated approximately 160,000 GPD to a luxury apartment development ("Gateway") about one mile from Landmark.* PE 22 at 3; Tr. at 62-63. The administrator testified he had approved the allocation without any "capacity determination." Id.

Landmark brought the Commission's outright lies to Judge Cohn's attention in 2015.[10] (The Commission's defense was that the deposition and subpoena in which Landmark had uncovered the information should not have been allowed.) In 2016, Judge Cohn held that the Commission's 2014 allocation of 14,400 GPD was an abuse of discretion and ordered the Commission to grant Landmark sewer capacity "sufficient to support its development plan," without ordering a specific gallonage. PE 22.

The Commission appealed to the Appellate Court, which in August 2018 affirmed Judge Cohn's order holding that the 14,434 GPD allocation was an abuse of discretion, *Landmark Development Group LLC et al. v. Water and Sewer Comm'n,* 184 Conn. App. 303, 310-317 (2018). PE 23; Tr. at 63. Notably, in footnote 2 of its opinion, the Appellate Court affirmed that

[9] *Landmark Development Corp. et al v. East Lyme Zoning Comm'n*, No. HHD-CV-15-6064232-S.

[10] In this case, the Defendant's Exhibits G, H, I, J, K are further proof of its fabrications from 2012-2018. Once the Commission had lost the sewer capacity allocation case to Landmark in 2018, there was no reason to continue to deny the availability of capacity, so in 2019 the Commission finally used accurate numbers. For example, in Def. Exh. G, an August 2019 spreadsheet prepared for a sewer application for 35,400 gallons of capacity for "Pazz and Co.," the Commission showed available capacity *of 380,000 GPD.* Def. Exh. J. shows 308,000 GPD remaining in July 2022. There is certainly no evidence that between 2015 and 2019, East Lyme gained capacity in addition to its historical 1.5 million GPD.

even though Judge Cohn in 2016 had not specified a gallonage, he did order the Commission to grant Landmark's application.

F. Fall 2018 Events.

In September 2018, the Commission petitioned the Supreme Court to review the Appellate Court decision. At that same time, the Commission's Chair Mark Nickerson was quoted in the New London Day that, "The judges can't force us to put sewer in there," and "The commission should have the ability to oversee management of its sewage system without court interference." PE 24; Tr. at 64.

On September 25, at its first meeting after the Appellate Court decision, the Commission expressed its vehement disagreement with the Appellate Court decision, and even though it already had a detailed Sewer Ordinance and detailed rules for allocations, with no notice or hearing, the Commission adopted an "interim regulation" to establish new controls *specifically on Landmark's sewer allocation*. PE 26. PE 26 states: "This would be an interim procedure – only for the purposes of the Landmark appeal time frame. This also safeguards the not less than 14,000 GPD up to 118,000 GPD until such case is decided." Id at 3.

On October 31, 2018, the Supreme Court denied further review of the Appellate Court decision. PE 27; Tr. at 66.

During this time, Landmark sent the Commission two letters demanding compliance with Judge Cohn's order. PE 28, 29; Tr. at 64-65. Landmark became concerned about the Commission giving out capacity to others that would undermine the judgment it had obtained. Tr. at 64-65. Receiving no response, on November 27, 2018, Landmark filed a Motion for Judgment. PE 30. The motion recapped the chronology of the Commission's obstructive actions, 1999-2018 (PE 30 at 2-7); the Town's ample capacity (PE 30 at 7); the Commission's continuing resistance to the trial and Appellate Court decisions (PE 30 at 6-7); and the basis for the trial court to enter judgment forthwith (PE 30 at 8-9).

Judge Cohn held a hearing on December 10, 2018. PE 31. During the hearing, Judge Cohn first made it clear that, contrary to Attorney Zamarka's September 25 remarks to the

Commission (PE 26), the Appellate Court had not endorsed a remand for the purpose of picking a capacity allocation between 14,000 and 118,400. PE 31 at 15. When Attorney Zamarka represented that that was what the Commission intended to do at its next meeting in December, Judge Cohn replied, "I don't think so. Not when the Chairman says that judges can't force us to put sewers in there, and when they're being told you can give them 15,000 now and get away with it." The Court continued: "[You] have no reason not to put aside" 118,000 gallons (id. at 18). When Attorney Zamarka claimed, incredibly, that "We have never claimed that there was not capacity potentially for the 118,000," the Court replied that "Capacity is off the table." Id. at 21, 32. The Court noted the Appellate Court's finding that the Town's current capacity was about 358,000, less the allocation to Gateway. Id. at 30. The discussion eventually gravitated to the trial court directing the Commission to "set aside" 118,400 GPD, subject to potential, later adjustment due to the site plan process. Id. at 23, 30-32, 37.

G. December 2018 Motion For Judgment; Court Order.

The next day, December 11, 2018, the Commission held a meeting at which it granted Landmark 118,400 GPD; *but then announced its intent to adopt a new, permanent regulation governing sewer allocations*. PE 32 at 2; Tr. at 69-70. A notable excerpt from the minutes of that meeting states:

> [Chair] Nickerson noted that they had just reduced their available capacity and need to formulate policy and procedures for this as they have other applications that need to be acted upon. He said that his thoughts are that capacity would be based on a viable application that is before the land use commission (an accepted application) and that capacity would be good for a certain amount of time only and then expire.

In the following discussion, Attorney Zamarka and Commission members identified as necessary factors in the allocation procedure the proposed land use and the duration of the allocation. PE 32 at 2. The Commission scheduled a December 14 meeting to discuss further.

H. Commission's Adoption Of Sewer Allocation Regulation, December 2018-January 2019.

The Commission then discussed the adoption of a permanent regulation on December 14, (Def. Exh. D), and considered an actual draft on January 8, 2019. PE 33, 34; Tr. at 73. Landmark, by letter, stated numerous objections to the draft. PE 33. In particular, Landmark objected to the provisions that: (1) had nothing to do with sewer system management; (2) revised procedures and standards prescribed by state statutes, which the Commission could not alter; (3) requested information primarily about land use and zoning compliance, not sewer system management: (4) set the duration of allocation at time periods contrary to the state statutes and impossible to comply with; (5) retained unlimited discretion to the Commission over several aspects; (6) allowed termination of allocated capacity without notice; (7) described application and allocation requirements in such broad, vague, unexplained terms as to leave a property owner unable to comprehend what was requested and how to comply; and (8) failed to explain the relationship and overlaps between the Town's and the Commission's existing ordinances and rules, and the proposed new rules. The Commission ignored Landmark and adopted the permanent regulation – the issue in this action – on January 14, 2019. PE 1; Tr. at 73-74.

I. The Commission's "Grandfathering" Of Its December 2018 Sewer Allocation.

Since December 2018, the Commission has stated on several occasions that the regulation at issue in this case applies prospectively only, and will not be applied retroactively to Landmark's 118,400 GPD allocation. The Commission first used this position in this case to contend that this Court could not invalidate the regulation because Landmark did not have standing. See Motion to Dismiss, Docket Nos. 101, 102. Landmark explained to this Court (the Hon. Kim Knox, J.) that it accepted the grandfathering, but the 118,400 gallons was granted based on the 840 unit conceptual site plan covering the 36± acres, and Landmark has more than 60 acres within the mapped sewer shed, and a total of 190 acres that can be sewered based on the "gravity feed" provision of the existing sewer ordnances, PE 4 and 5. (Landmark has invited the

Commission several times to confirm that it will not apply the January 2019 regulation to any part of Landmark's property other than the 36± acres (shown on PE 9 and 17), but the Commission has declined.) On this basis, Judge Knox held that Landmark has standing to challenge the regulation. Id.

Otherwise, the Commission's grandfathering of the 118,400 GPD allocation is reflected in Def. Exhs. G, H, I, J, and K, all of which show "118,400" GPD as capacity committed to Landmark that must be accounted for in all future sewer capacity applications.

J. The January 2019 Regulation.

The regulation at issue (PE 1) applies to all development projects that either request a sewer connection for more than 20 residential units, or require more than 5,000 gallons per day of sewage treatment capacity. When adopted, Landmark's property and plan were the only pending matter. The regulation requires that each sewer permit application include:

- A Class A-2 survey of the property to be developed, showing the general layout of the proposed use of land; and
- Documentation of the number of residential units, bedrooms per unit, and the methodology used to calculate the capacity request.

Further, the regulation provides that a sewer allocation is only valid initially for 12 months, and *if, within that time, the property owner does not "apply" for all necessary land use permits, and provide proof to the WPCA, the sewer allocation is "void."* The regulation then states that the sewer allocation is valid for only 48 months from the expiration of the appeal period from the applicant's "final land use approval," *extendable only at the Commission's sole discretion.* This regulation thus conflicts with state statutes on zoning, subdivision, and wetlands, which generally grant permits for five years, with an available as-of-right extension of five more years. This limit also conflicts with § 8-30g case law about the order in which permits may be obtained, and the process for several state permits such as from the Office of State Traffic Administration and the DEEP Stormwater General Permit program, for which application *cannot even be made* until *after* all local approvals have been obtained. The regulation then

grants the Commission the sole discretion to determine whether a public hearing on an application is necessary.

The regulation continues with a long list of criteria that the Commission may consider when processing sewer applications. *The criteria are undefined, vague, and mainly unrelated to managing the sewer system*, and clearly aimed at using sewers to control land use:

- Need for service in the proposed development area;
- Pollution abatement and public health;
- Limitation and policies for sewer service;
- Local and state plans of Conservation and Development;
- Whether the proposed development can be served by other means;
- Whether the development area is within the East Lyme Sewer Service Area;
- Size of the property to be developed; and
- Remaining sewered and unsewered land area.

K. Plaintiffs' Testimony About The January 2019 Regulation: Impossible And Arbitrary.

Russo testified as follows regarding the obstacles and impossibilities within the January 2019 regulation:

- At the time it was adopted, Landmark's was the only pending sewer application, Tr. at 75;
- The regulation's demand for a "general layout of the proposed use of the land" is a zoning criterion, unrelated to sewer system management, Tr. at 75;
- The regulation's requirement of a Class A-2 boundary survey serves no sewer planning purpose, and for a large waterfront property is prohibitively expensive, Tr. at 76.
- The requirement that "Within twelve months of capacity allocation, the applicant shall apply for all necessary land use approvals" is an impossibility, because significant development plans usually require state-level permits (such as a DEEP stormwater drainage permit and Office of State Traffic Administration approval), and/or a U.S. Army Corps. of Engineers approval, which cannot be applied for

until local approvals are in place, and which applications themselves can take several years, Tr. at 77-79;[11]

- The provision allowing the Sewer Commission to "terminate" and "void" the sewer allocation if the 12-month requirement is not met will make financing impossible, due to the threat or likelihood of sewer being rescinded either before all approvals are obtained or construction is complete, Tr. at 79-80;
- Yet another impossible aspect of the regulation's requirement for applicant filings is that while the provision for filing applications has a 12 month deadline, the "failure to provide proof of filing" provision has no time frame, Tr. at 80;.
- Section II.3, which says the Commission will notify an applicant when sewer allocation is revoked, also says that failure to provide timely termination notice will not be construed as a waiver, meaning that a property owner might not even be notified of sewer allocation revocation, Tr. at 80-81;
- Section II.4, stating that an allocation shall be in affect "not to exceed 48 months from expiration of the appeal period of the applicant's last land use approval with no appeal" is impossible to satisfy for the same reason as Section II.1 (12 months to file all land use applications), because no lender would participate in such an unpredictable plan with no vested rights, and town power to revoke "is too much risk," Tr. at 82;
- Section IV lists criteria that the Commission "may" consider, "without limitation" making the application process *ad hoc* and undefined – "they can ask for whatever they want," Tr. at 83;
- Then, as to the list of criteria the Commission "may" use, Russo identified terms that are vague, broad, undefined, and to be interpreted at the whim of the Commission:
    - "need for service" (the Commission "can ask for any information they want") ;
    - "other pending applications and areas in town" (they "don't give us criteria");
    - "pollution abatement and public health" ("I don't know what they means");
    - "limitations and policies for sewer service" (doesn't reference what policies they would be considering);

[11] In this testimony, Russo was referring to a "major traffic generator" permit from the State Office of Traffic Administration/OSTA, which under Conn. Gen. Stat. § 14-311(a) must be obtained for any development of more than 100 residential units. Russo described the long-established practice that although OSTA may provide a preliminary review of a development plan for a major traffic generator (see Conn. Gen. Stat. § 14-311(c) and (f)), OSTA will not and cannot (logically or legally) finally approve the development until the municipal planning and zoning commission has granted final approval.

- "local and state plan of conservation and development" (these plans are for zoning or planning "not a sewer allocation tool");
- "inflow and infiltration" (unquantified and with no statement of whose responsibility the problem is);
- "Whether the proposed development area can be serviced by other means" (no specifications of what other means, and whether the proposed development means all or part of the development);
- "Whether the property is in the East Lyme sewer services district" (which the record here shows is subject to manipulation);
- "Size of the property to be developed" (unrelated to sewer system management); and
- "Sewered and unsewered land area of the town" (unrelated to site-specific allocation, and with no criteria for what the term means, or who calculates it).

Tr. at 83-88.

Russo summarized: "A developer, knowing that sewer is exempt from § 8-30g and dealing with these sorts of regulations, I think it would completely undermine the 8-30g initiative by the state. No developer's going to do this and no bank's going to finance it....It's absolutely impractical." Tr. at 88-89; see also Tr. at 109-110.

L. Landmark's Appeal And Declaratory Judgment Action.

Landmark filed an administrative appeal pursuant to Conn. Gen. Stat. § 7-246a. In 2020, the Court (the Hon. Marshall Berger, J.) dismissed the appeal, holding that the sewer statutes, unlike the zoning statutes, do not allow an administrative appeal from the adoption of regulations. *Landmark Development Group, LLC, et al. v. East Lyme Water and Sewer Comm'n*, No. HHD-LND-CV-19-6108945-S. In November 2020, Landmark filed this case as a declaratory judgment. At ¶ 30, the Complaint lists the issues in which a declaratory judgment is sought, which correspond to the arguments made in § IV, below.

M. Denial Of Landmark's 2022 Summary Judgment Motion.

In September 2023, this Court (the Hon. Josephine Graff, J.) denied Landmark's Motion for Summary Judgment. The motion was a facial challenge to the regulation, with none of the evidence and testimony adduced in this case. The Memorandum held (1) municipal agencies, when exercising powers delegated by the legislature, may enact rules that "enlarge" delegated authority so long as the rules do not conflict with the statutes or other statutes (Memorandum at 6-7); (2) the provisions in the January 2019 regulation that terminates a sewer allocation unless the property owner/sewer capacity recipient applies for "all necessary land use approvals" within one year, and uses the sewer within four years, "does not conflict" with the state statutes governing the duration of site plans (C.G.S. § 8-3(i) and (m)), subdivision and wetlands permits (generally five years, extendable beyond that) (Memorandum 7-8); and (3) the January 2019 regulation does not use sewers to regulate land use (Memorandum at 9). For the reasons stated in § IV below, Landmark respectfully submits the denial was erroneous.

III. LIMITED POWERS OF SEWER COMMISSIONS IN CONNECTICUT.

"It is settled law that as a creation of the state, a municipality has no inherent powers of its own . . . . A municipality has only those powers that have been expressly granted to it by the state or that are necessary for it to discharge its duties and to carry out its objects and purposes.... This principle applies with equal force to quasi-municipal corporations . . .. " *Wright v. Woodbridge Lake Sewer District*, 218 Conn. 144, 148-49 (1991). Our Supreme Court has recognized that water pollution control authorities are quasi-municipal corporations, created pursuant to statute (§ 7-247), and may exercise "*the power to acquire, construct, maintain, supervise, manage and operate a sewer system and perform any act pertinent to the collection, transportation and disposal of sewage.*" *AvalonBay Communities, Inc. v. Sewer Comm'n*, 270 Conn. 409, 425 (2004); *Dauti Const., LLC v. Water & Sewer Auth.*, 125 Conn. App. 652, 661 (2010) (emphasis added).

Connecticut is a so-called "Dillon's Rule" state, meaning that municipalities and their agencies have only those power expressly delegated by the legislature and powers necessarily

implied from an express delegation. See e.g. *Simons v. Canty,* 195 Conn. 524, 529 (1985). "[A]n administrative agency, in making rules and regulations, must act within its statutory authority, within constitutional limitations, and in a lawful and reasonable manner." *Queach Corp. v. Inland Wetlands Comm'n*, 258 Conn. 178, 193 n. 22 (2001). "It is generally held that the express enumeration of powers granted to municipalities constitutes an exclusion of all other powers not expressly delegated to them." *City Council of City of West Haven v. Hall*, 180 Conn. 243, 250-51 (1980); see also *State ex rel. Barlow v. Kaminsky*, 144 Conn. 612, 620 (1957) ("enumeration of powers in a statute is uniformly held to forbid the things not enumerated"). Therefore, "[i]n determining whether the municipality had the authority to adopt [an ordinance], then, 'we do not search for a statutory prohibition against such an enactment; rather, we must search for statutory authority for the enactment.'" *Buonocore v. Branford*, 192 Conn. 399, 401–402 (1984), quoting *Avonside, Inc. v. Zoning and Planning Comm'n*, 153 Conn. 232, 236 (1965). See also *Bencivenga v. Milford*, 183 Conn. 168, 173 (1981); *Capalbo v. Planning & Zoning Bd. of Appeals*, 208 Conn. 480, 490 (1988).

IV. THE SEWER REGULATION ADOPTED BY THE COMMISSION IS *ULTRA VIRES*, CONTRARY TO STATUTES, PREEMPTED, AND ARBITRARY.

The regulation as adopted by the Commission is illegal, invalid, arbitrary, and *ultra vires* as described below.

The regulation adopted by the Commission is illegal and invalid because it grants unfettered discretionary power to the Commission to deny sewer capacity applications, above and beyond what is granted to sewer districts and water pollution control authorities under the General Statutes. For example, the regulation does not address its relationship to the existing Commission sewer regulations and ordinance, even though both cover sewer allocations. Title V, Chapter 53 of the East Lyme Code of Ordinances sets out an entire set of sewer regulations for the Town. Included in these regulations are requirements for connecting to the public sewer system, prohibited connections, prohibited discharges, *revocations of permits*, and rules regarding sewer extensions. But the 2019 regulation purports to create a new, competing set of

rules whose relationship to PE 4 and 5 is unstated and unclear. Must a property owner applying for sewer capacity follow the PE 4 and 5 ordinance *and* rules and the 2019 regulation, or just the 2019 regulation? The regulation does not say.

In addition, the regulation requires that applicants take steps in the development process that are impossible to meet and are unrelated to and unnecessary for the allocation of sewer capacity. It allows the Commission to regulate zoning and land use, which our Supreme and Appellate Courts have held it does not have the statutory authority to do. The regulation conflicts with and is therefore preempted by state laws about the duration of sewer capacity allocations. The regulation is replete with vague and undefined discretionary standards that will allow the Commission to arbitrarily deny sewer applications, or revoke allocated capacity, with no applicant recourse to judicial enforcement.

It is well established that a regulation that is devoid of standards or criteria to guide the agency is invalid. See, e.g. *Powers v. Common Council*, 156 Conn. 156, 160 (1966); see also *Ghent v. Plan. Comm'n*, 219 Conn. 511, 519 (1991), citing *Sonn v. Planning Comm'n*, 172 Conn. 156, 162 (1976) ("Vague regulations which contain meaningless standards lead to ambiguous interpretations.... Adequate, fixed and sufficient standards of guidance for the commission must be delineated in its regulations so as to avoid decisions, affecting the rights of property owners, which would otherwise be a purely arbitrary choice of the commission; such a delegation of arbitrary power is invalid"). Regulations governing land use "must be as reasonably precise as the subject matter requires and as reasonably adequate and sufficient to guide the commission and to enable those affected to know their rights and obligations." *Helbig v. Zoning Comm'n,* 185, Conn. 294, 307-308 (1981). "To hold otherwise, to permit an administrative agency to develop an ad hoc plan as a yardstick against which to measure any given proposal, is to substitute whimsy for sound judgment.... Although due process is not intended to hold administrative agencies under a short leash, it is designed to restrain them from roaming at will over the adjudicative landscape. To avoid such constitutional problems, statutes sometimes specifically preclude an administrative agency from exercising its statutory powers until it adopts

appropriate regulations to govern its doings." *Monroe v. Middlebury Conservation Comm'n*, 187 Conn. 476, 484 (1982).

As to the plaintiffs' arbitrariness claim, the key points of the above evidentiary narrative are that (1) the Town of East Lyme and the defendant Commission have repeatedly and consistently used – and misused – the sewer system to try to prevent development of plaintiffs' property, including repeated, knowing misrepresentations to Judge Cohn about the sewer shed and Town's available sewer capacity; (2) this defiance continued after the Appellate Court decision in August 2018; and (3) the "regulation" at issue in this case was not a coincidental, good-faith, or necessary regulation adopted to manage the Town's sewer system, but the next step in the Commission's intransigence and obstruction. In addition to being facially illegal in several ways, the regulation is retaliatory, intentionally vague, impossible to comply with, and aimed at undermining sewer allocations and development plans.

A. The January 2019 Regulation Exceeds The Authority Granted To Sewer Commissions By General Statutes §§ 7-246a and 7-247 To Regulate Sewer Systems.

The defendant Water and Commission has only that authority which it has been granted by the state. *Wright v. Woodbridge Lake Sewer District*, 218 Conn. 144, 148-49 (1991). The power of a municipality to enact an ordinance or regulation also is a delegated power. 5 McQuillin Mun. Corp. § 16:8 (3d ed.) ("It is a general power to enact an ordinance to carry out any specific power or powers delegated to it, but it is not a power to enact any conceivable ordinance on any possible subject or with any content material whatsoever … The exercise of a power by ordinance must conform to the grant of that power; it cannot embrace an exercise of power beyond the meaning of the words of grant in the charter or statute, and it must strictly observe any conditions imposed by the grant of power"). "In other words, in order to determine whether the regulation in question was within the authority of the commission to enact, we do not search for a statutory prohibition against such an enactment; rather, we must search for statutory authority for the enactment." *Builders Serv. Corp. v. Plan. & Zoning Comm'n*, 208

Conn. 267, 275 (1988). Indeed, "[i]f the legislation is an ordinance, it must comply with, and serve the purpose of, the statute under which sanction is claimed for it." *Clark v. Town Council*, 145 Conn. 476, 482–83 (Conn. 1958)

General Statutes § 7-247, specifying sewer commission powers, "[does not vest the commission] with the discretion to deny an application that complies with its regulations because of considerations not set forth in the regulations; but requires that the statutory powers of a water pollution control authority be exercised through the regulations it is directed to adopt." *Schuchmann v. City of Milford,* 44 Conn. App. 351, 356, cert. denied, 240 Conn. 924 (1997). Once a sewer commission has designated a parcel for sewer service and has spelled out criteria for connecting to the system, the commission cannot retain discretion to deny sewer service on a case-by-case basis like the Commission is attempting to do here with the regulation at issue. See *Dauti*, 125 Conn. App. at 664 (2010); *Schuchmann*, 44 Conn. App. at, 356-58. More specifically, when (1) an applicant's land is in the sewer service area; (2) capacity can be allocated without infringing the rights of others; (3) the applicant does not seek to extend the sewer across land not in the sewer district; and (4) the application otherwise complies with the WPCA's regulations and specified technical and engineering criteria, the agency has no discretion to deny the connection. *Dauti*, 125 Conn. App. at 662-64, citing *Harris v. Zoning Comm'n*, 259 Conn. 402, 425 (2002); *Schuchmann*, 44 Conn. App. at 358-59.

The Commission, therefore, may not attempt to regulate things which are outside the powers granted it by the legislature. The state has made clear the scope of its delegation regarding local water pollution control authorities in General Statutes § 7-247(a). Such authorities may establish and revise rules and regulations for the "supervision, management, control, operation and use of a sewerage system," including rules and regulations prohibiting or regulating the discharge into a sewerage system of any sewage. Nowhere in § 7-247(a) does the state provide a water pollution control authority the authority to amend or override state statutes, or use sewers to control land use.

The January 2019 regulation provides that all proposed multi-family developments of five or more units, or any proposed residential development that will utilize more than 5,000 gallons of sewer capacity per day, must file an application with the Commission pursuant to § 7-246a(a)(1). But General Statutes § 7-246a already specifies what type of sewer authorizations require an application: "[an] application [to a WPCA] for (1) *determination of the adequacy of sewer capacity* related to a proposed use of land...." The focus of the application permitted by statute is the determination of sewer capacity. The WPCA does not and cannot rule on the proposed land use just because it will generate sewage.

East Lyme's regulation requires, for an allocation, several types of information that have nothing to do with managing the operation of the sewer system. It requires an expensive and necessary Class A-2 boundary survey; the layout of residential units on the property; and a vague, unexplained, discretionary list of application criteria including "local and state plans of Conservation and Development"; the size of the property to be developed; and the "remaining sewered and unsewered land." None of these criteria affects how much sewage will be generated or treated. The regulation, in effect, requires an application for sewer capacity to explain and justify the proposed land use, and undertake a town-wide analysis of development and policies beyond anything relevant to whether the sewer system has capacity for one discrete application.

As such, the regulation goes well beyond management of the sewer system, and establishes a confusing permit application process for sewer capacity that substantially overlaps with existing ordinances and rules. In fact, the fact that the Commission already has a complete set of regulations highlights that the 2019 regulation was aimed squarely at Landmark. The regulation exceeds the rule-making authority of § 7-247. It is a textbook example of regulatory overreach.

B. The Regulation's Expiration and Termination Provisions Are Preempted By State Statutes.

A local ordinance that conflicts irreconcilably with such statutes or policies is preempted. *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 221, 233 (1995).

The regulation here states that if an applicant has not applied "for all necessary land use approvals for the proposed use of land" within 12 months of receiving its allocation, and does not provide the Commission with proof of the same, the "sewer capacity allocated to the applicant shall terminate and be considered null and void."

The regulation conflicts with, and is therefore preempted by, the state's site plan statutes, and by § 8-30g as interpreted by our courts. General Statutes §§ 8-3(i) and (m) provide that site plans are valid for five years, extendable as-of-right for an additional five years. Connecticut law clearly provides that municipal regulations are preempted when they conflict with an express provision of state law. See *Recycling Inc. v. City of Milford*, 2010 WL 4884923, at *3 (Conn. Super. Ct. Nov. 2, 2010), ("[A] local ordinance is preempted by a state statute whenever the local ordinance irreconcilably conflicts with a statute ... The fact that a local ordinance does not expressly conflict with a statute enacted by the General Assembly will not save it when the legislative purpose in enacting the statute is frustrated by the ordinance," citing *Craig v. Driscoll*, 262 Conn. 312, 324 and *Dwyer v. Farrell*, 193 Conn. 7, 14 (1984))

In 2022, our Supreme Court, in *International Investors v. Town Plan and Zoning Comm'n*, 344 Conn. 46 (2022), held that a town zoning commission special permit condition that imposed a deadline for completion of construction that was shorter than the statutory duration of a site plan for that construction was inconsistent with state law, and therefore preempted. Id. at 79 ("We agree . . . that the legislature has manifested a clear intention to afford property owners a substantial period of years to complete development necessary to put a [site] plan or permit into effect"). The special permit condition denied the site plan duration specified by the state – a substantial property right. *The Supreme Court's reasoning is directly applicable to East Lyme's capacity allocation deadline, because it deprives property owners of the right to fully utilize the duration of rights guaranteed by state statutes after approval of a site plan.*

The deadlines provided by the Commission's 2019 regulation are one initial year after sewer allocation to apply for all land use permits (involving the Sewer Commission in a determination of what land use permits a property owner needs), and then 48 months from the

expiration of the appeal period for the "final" land use permit, extendable only at the Commission's "sole discretion." Since the regulation applies to all multi-family residential developments with 20 or more units this would apply to most, if not all, multi-family affordable housing proposals, and certainly to all large developments – 100 units or more. But the state legislature has recognized that large, multi-family developments can take years to develop. Thus, the time limitations imposed by the 2019 regulation conflict with the development permit duration the legislature has specified, through the site plan statutes: 48 months vs. ten years.

It is important to recognize that a sewer allocation application requires a site plan showing the number of units and bedrooms (which is all that the Commission needs to know to manage the sewer system). A site plan, under state law, is valid for five years, extendable to ten. But the 2019 ordinance requires the property owner to obtain sewer capacity approval; then apply for all land use permits, including site plan, within twelve months. The sewer allocation expires 48 months from the expiration of the appeal period of the final land use permit. Failure to meet these deadlines allows the Commission to *revoke* the sewer allocation – which is the basis of the site plan and all other collateral permits. Thus the 2019 ordinance not only conflicts with the five/ten year right in the site plan statutes, but introduces a revocation scenario that undermines site plan and all other land use approvals.

In addition, the 2019 regulation is preempted by § 8-30g. The regulation specifies the sequence in which a property owner must apply for and obtain land use permits. But in *National Assoc. Properties, Inc. v. Planning and Zoning Comm'n*, 37 Conn. App. 788, 800 (1995), the Appellate Court, aiming to avoid the "who goes first?" problem in land use permitting, held that the order in which a property owner obtains permits does not matter and can't be specified by local officials, so long as the property owner eventually obtains all necessary approvals. ("The language of § 8-30g ... assumes that many different types of applications will be brought to many different types of agencies, as it broadly applies to 'any application made to a commission *in connection with* an affordable housing development' (emphasis added); General Statutes § 8-

30g(a)(2).... Section 8-30g does not list any order in which these applications must be brought...").

In denying summary judgment, Judge Graff held that the 2019 regulation was permissible enlargement of the powers delegated to the Commission by Conn. Gen. Stat. § 7-247. Respectfully, the 2019 regulation is not extension or enlargement of a power delegated by statute; the regulation undermines critical aspects of site plan approval, its duration, and protection from revocation.

C. The Regulation Is An Invalid Attempt To Use Sewers To Regulate Land Use.

Sewer commissions and water pollution control authorities may not use sewers to regulate land use, because such authority is not granted to them by the state under General Statutes § 7-247(a). *Dauti Construction*, 125 Conn. App. at 662-64. The 2019 regulation does just that.

On its face, the regulation is a blatant attempt by the Commission to regulate land use. First, the regulation requires that applicants under General Statutes § 7-246a(a)(1) provide a class A-2 survey "showing the general layout of the proposed use of land." Further, the regulation provides that the Commission may consider, when making a decision on the application, issues such as the "size of property proposed to be developed," and "[l]ocal and state Plans of Conservation and Development." All of these items are unrelated to sewer use and allocation and instead relate to the regulation of land use within the town.

"[T]he power to determine what are the needs of a town with reference to the use of real property in it and to legislate in such a manner that those needs will be satisfied is, by statute, vested exclusively in the zoning commission." *Harris v. Zoning Comm'n*, 259 Conn. 402, 425 (2002). "General Statutes § 8-2(a) authorizes a *zoning commission* to 'regulate, within the limits of such municipality, ... *the density of population and the location and use of buildings, structures and land for trade, industry, residence of other purposes.*'" *Dauti Construction*, 125 Conn. App. at 662-63 (emphasis in original), quoting General Statutes § 8-2(a). The layout, both

per se and in relation to the size of the property to be developed, are concerns vested entirely within zoning commissions and are outside the granted jurisdiction of the defendant Commission.

Plans of Conservation and Development shall, *inter alia*, "recommend the *most desirable use of land* within the municipality for ... purposes and include a *map showing such proposed land uses.*" (Emphasis added.) General Statutes § 8-23(e)(1). The Supreme Court has "repeatedly recognized that a [POCD] is to set forth the most desirable use of land and overall plan for the town." *AvalonBay Communities, Inc. v. Town of Orange*, 256 Conn. 557, 574 (2001). The Plan of Conservation and Development (POCD) is a document to be prepared and adopted by planning and zoning commissions pursuant to General Statutes § 8-23. It has no place in a sewer commission's consideration of how much system capacity it has to allocate.

The 2019 regulation also provides that the Commission may consider, among other things, the "[n]eed for service in the proposed development area." However, the regulation provides no guidance or indication to applicants as to what may constitute "need." There is no reference to "need" anywhere else in the regulation. Nowhere does the regulation require or provide any guidance as to what an applicant could submit to show such a "need," but instead appears to vest with the Commission the unfettered discretion to unilaterally determine whether service is, in fact, to support a particular land use.

The last section of the 2019 regulation is a list of "criteria" that the Commission "may" consider, but "without limitation," and most of the criteria are unrelated to sewer service, and are undefined and unexplained. This vagueness opens the door for the Commission to use sewers to regulate land use. The 2019 regulation attempts to exercise powers vested solely by zoning commissions by attempting to utilize sewer regulations to regulate land use.

D. The Regulation Is Arbitrary, In That It Uses Sewers To Stop Further Development Of Landmark's Property, And Contains Impossible Requirements.

The law is clear that the while a sewer commission generally has discretion to enact sewer regulations, this "discretion must be exercised under the law and not contrary thereto, and

it must not be arbitrary, vague, or fanciful but legal, regular, and sound discretion governed by rule and exercised under the established principles of law." 52 Am.Jur.2d, supra, § 51, cited in *AvalonBay Communities, Inc. v. Sewer Comm'n*, 270 Conn. at 433 n.26. "Municipal regulations are upheld as a legitimate exercise of the police power provided that they are rationally related to the public health, safety and welfare and operate in a manner that is not arbitrary, oppressive or fraudulent." *Wright v. Woodridge Lake Sewer Dist.*, 218 Conn. 144, 149 (1991).

"An arbitrary decision is one that is made 'without adequate determining principle and without reason.' *United States v. Carmack*, 329 U.S. 230, 247, (1946)," cited in *Baywing, LLC v. Wilton Water Pollution Control Authority*, 2024 WL 2717495 at *23 (Conn. Super. Ct., May 24, 2024) (O'Hanlan, J.). In *Baywing*, the Court overturned the denial of a sewer capacity allocation that that was based on the Town Engineer's inaccurate claim that approval would exceed the capacity of the existing sewer system, and inaccurate advice that all engineering maintenance and operational details had to be spelled out in a contract before capacity approval, rather than handled as a condition of approval. See also *TLC Development v. Branford*, 855 F. Supp. 555, 558, (D. Conn. 1994) (zoning commission "not entitled to make the law by arbitrarily, i.e. without lawful basis, denying approval of a site plan.... The test is not whether the commission was wrong but whether it acted on indefensible reasons...", cited in *Baywing*, 2024 WL 2717495 at *23; and Black's Law Dictionary (12th ed. 2024), defining arbitrary as "Depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures").

In *Dauti Construction*, 125 Conn. App. at 662-64, the Appellate Court affirmed a trial court holding that a denial of sewer capacity based on the Authority's policy of granting sewer capacity only in conformance with existing zoning was, among other things, without any legal basis because the sewer authority has no zoning powers.

The Commission here claims it was acting in good faith to manage its sewer system when it adopted the January 2019 regulation. But the facts now in evidence, framed by the cases above explaining arbitrary action, tell a different story:

In the early 2000s, the Sewer Commission Chair and an attorney discussed using the sewer system to prevent residential development, particularly affordable housing, by denying that capacity was available, denying that Landmark's land is in the sewer service district, and/or claiming that any available capacity was already committed to others. The facts of following years show the defendant Commission trying each one of these tactics.

Several times in the early and mid-2000s, the Sewer Commission told the Zoning Commission, incorrectly, that Landmark's land was not in the sewer service district.

In 2003, the Sewer Commission tried to remove all of Landmark's property from the sewer service district, until the state DEP stepped in.

In 2008, the Sewer Commission took the position that sewers would not be extended to Landmark's property. When that was overruled by Judge Frazzini and Landmark applied for capacity in 2012, the Commission then said it had no capacity to allocate, and then 13,000 GPD, then 14,400 GPD.

In 2015, Landmark discovered the Gateway allocation and that the Commission had been lying to this Court for four years about available capacity.

In 2018, the Sewer Commission Chair defied the trial court and the Appellate Court decisions, stating that "no judges" would tell East Lyme what to do with its sewers, and the Commission should be free from "court interference."

In November 2018, Landmark was forced to file a Motion for Judgment to effectuate the trial and Appellate Court decisions.

Directly after finally granting Landmark's application on December 11, 2018, the Commission adopted a regulation that targets land use, not sewer system management, and carried out the Chair's resistance to court orders.

The Commission has never explained why it had to adopt the January 2019 regulation when both the Town and the Commission have detailed ordinances covering every aspect of sewer system management, including allocation.

As discussed above, the adopted regulation is replete with provisions intended to use sewers to regulate land use development; several statements of reserved and unlimited discretion; and a raft of vague undefined statements which make regulatory compliance impossible. Thus provisions are intended to insulate Commission actions from judicial oversight.

The Commission cannot seriously argue that its January 2019 action was in good faith, or for a valid regulatory purpose.

The regulation is not just illegal and arbitrary but also retaliatory, which the Connecticut Supreme Court, in *Marmah, Inc. v. Town of Greenwich*, 176 Conn. 116 (1978), has held to be improper. In that case, the zoning commission denied, without prejudice, a site plan application to construct a post office – a use permitted as of right in the particular zone. Id. at 122. The zoning commission then quickly amended its zoning regulations to remove post offices as a permitted use. Id. at 123. By the time the bases for denial of the first application were corrected, and the application ready to be acted on again, post offices were no longer a permitted use in the zone. Id. In reaching its conclusion that the commission acted with an improper motive, the Court considered the "interplay" between proceedings on the regulation amendment and proceedings on the plaintiff's site plan applications; the "zoning amendment [at issue] was enacted primarily for the purpose of preventing the plaintiff from going forward with its contemplated building project; in such circumstances it was inequitable to allow changed building zone regulations to act as bar to the builder's contemplated project." Id. The same retaliatory motive is improper here. The record shows that the Commission Chair and members were angry about the Court decisions and intent on undermining their effect. The regulation itself evinces them acting on their anger. Like in *Marmah*, the regulation is illegal because it is not a valid sewer system regulation and was adopted in retaliation to the court decision and orders that Landmark obtained.

V. THE INVALID PORTIONS CANNOT BE SEVERED, REQUIRING INVALIDATION OF THE REGULATION.

The illegal portions of the regulation are the core provisions: duration, deadlines, revocability, unlimited discretion, procedures. The unobjected-to portions are not severable. The overall regulation should be invalidated. See e.g. *Vaszauskas v. Zoning Board*, 215 Conn. 58 (1990) (if invalid provisions are integral, entire regulation should be invalidated).

IV. CONCLUSION.

For these reasons, this Court should issue a judgment declaring, for one or more of the reasons above, that the January 2019 regulation is invalid.

PLAINTIFFS,
LANDMARK DEVELOPMENT GROUP,
LLC AND JARVIS OF CHESHIRE, LLC

By */s/ Timothy S. Hollister*

Hinckley, Allen & Snyder, LLP
thollister@hinckleyallen.com
20 Church Street
Hartford, CT 06103
Tel: (860) 331-2823
Fax: (860) 278-3802
Juris No. 428858

CERTIFICATION OF SERVICE

I hereby certify that the foregoing Post-Trial Brief was electronically delivered this 16th day of September, 2024, to all parties listed below and written consent for electronic delivery has been received from all parties.

Mark S. Zamarka, Esq.
Waller, Smith & Palmer, P.C.
52 Eugene O'Neill Drive
P.O. Box 88
New London, CT 06320
Mszamarka@wallersmithpalmer.com

/s/ Timothy S. Hollister
Timothy S. Hollister
Commissioner of the Superior Court

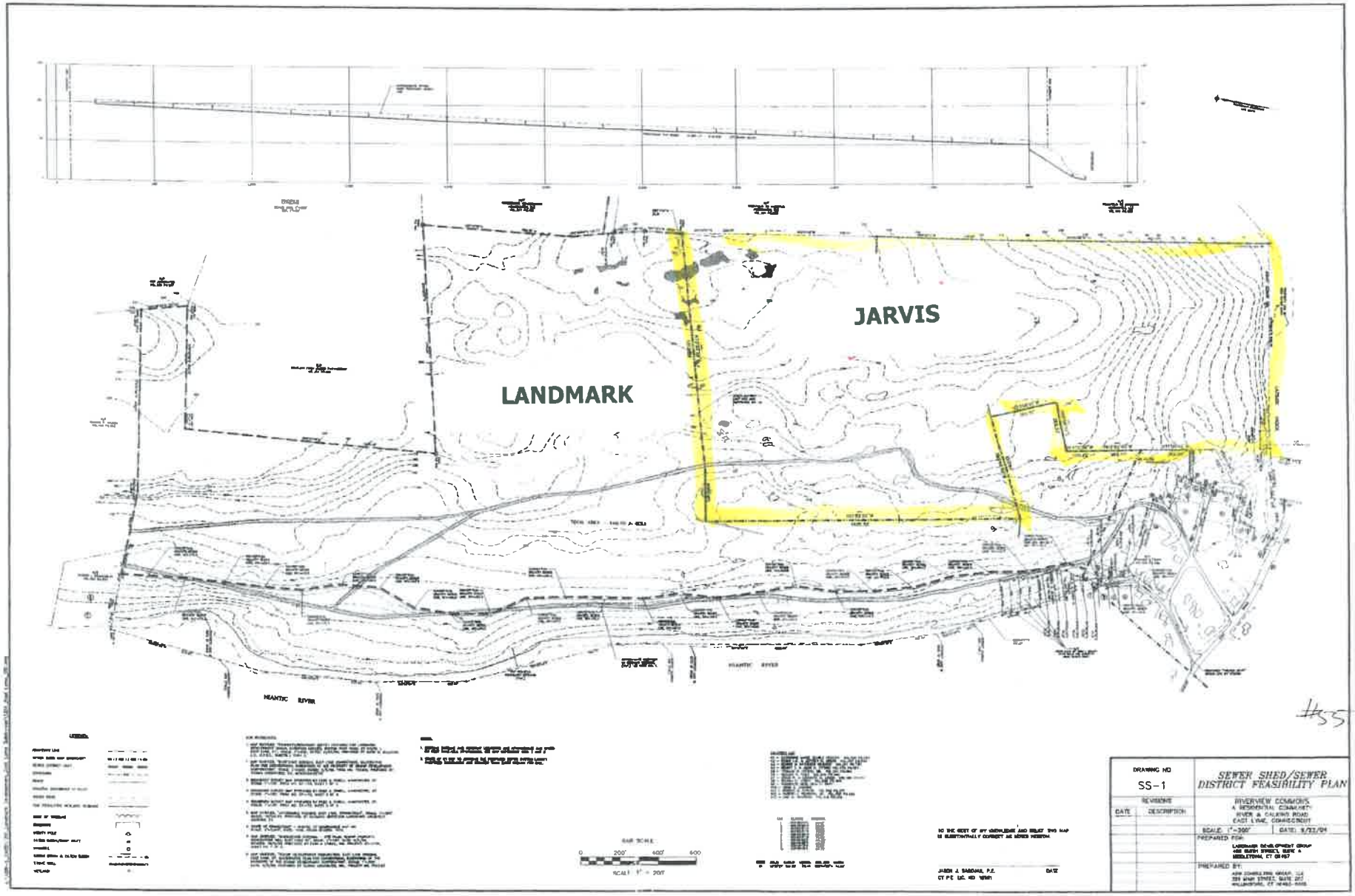
NO. KNL-CV-20-6048999S		
	:	SUPERIOR COURT
	:	
LANDMARK DEVELOPMENT	:	
GROUP, LLC AND JARVIS OF	:	JUDICIAL DISTRICT
CHESHIRE, LLC	:	OF NEW LONDON
	:	
V.	:	
	:	
EAST LYME WATER AND	:	
SEWER COMMISSION	:	SEPTEMBER 16, 2024

APPENDIX TO PLAINTIFFS' POST-TRIAL BRIEF

APPENDIX

Plaintiffs' Exh. 2, showing Landmark and Jarvis parcels, and contour/elevation lines

Exh. 2


JARVIS
LANDMARK
MIANTIC RIVER
DRAWING NO
SS-1
SEWER SHED/SEWER DISTRICT FEASIBILITY PLAN
RIVERVIEW COMMONS
A RESIDENTIAL COMMUNITY
RIVER & CALHOUN ROAD
EAST LYME, CONNECTICUT
SCALE: 1"=200'
DATE: 9/22/04
PREPARED FOR:
PREPARED BY:

Plaintiffs' Exh. 17, Exh. A to that exhibit:
showing (1) the mapped sewer district on the west and north sides and northeast corner (upper right); (2) concept plan for 840 units; (3) mapped sewer district line, "Sewer Shed Line (blue); and
(4) "Sewer Shed Text" (red).
"Text" refers to the "gravity feed" regulation in Plaintiffs' Exh. 4 (§ 53.085) and Exh. 5 (§ 5.1).

190 sewerable acres are mapped sewer district plus gravity feed area between red and blue lines

Exh. 17

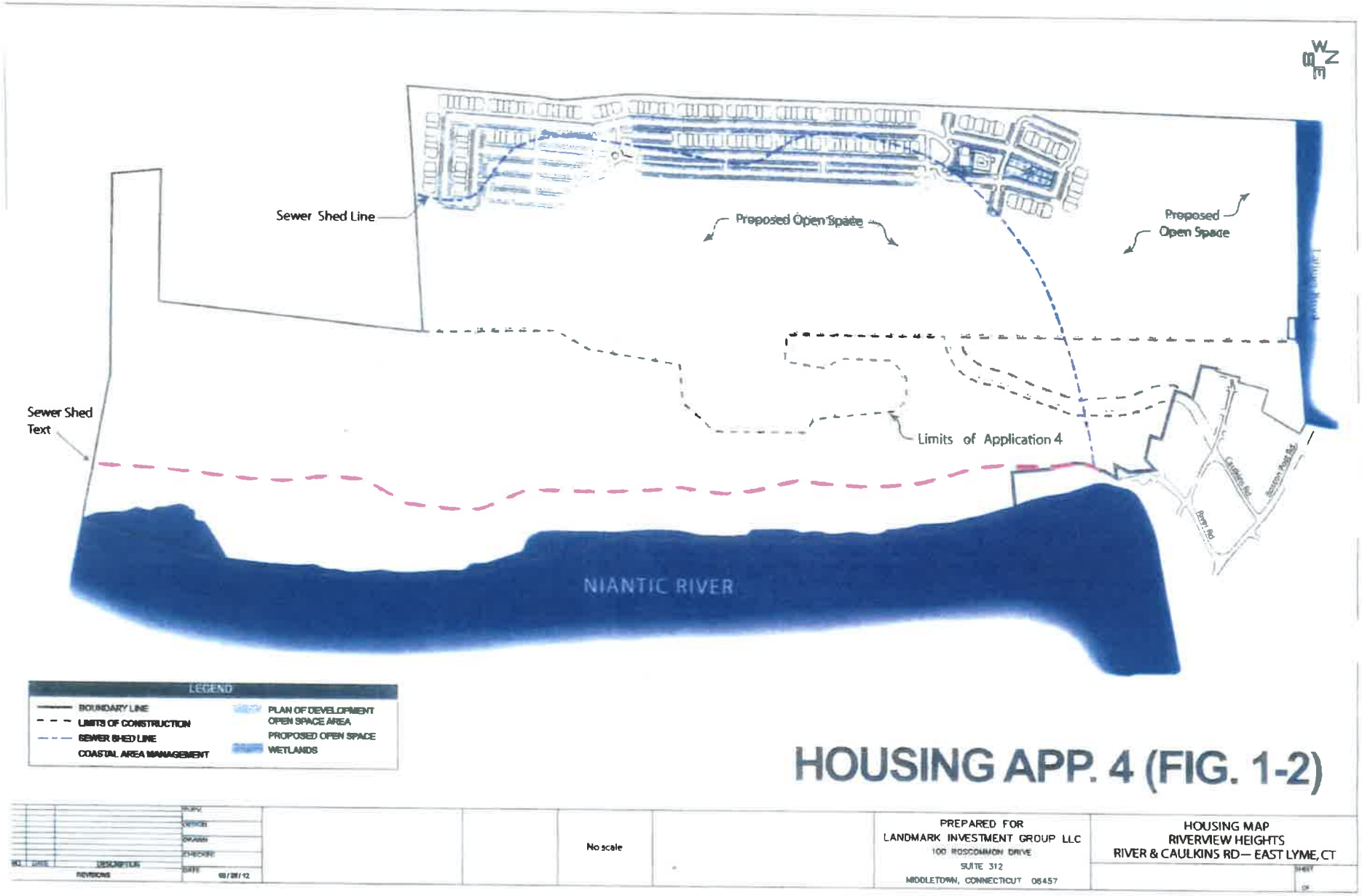


EXHIBIT A

Exhibit B

NO. KNL-CV-20-6048999-S	:	SUPERIOR COURT
LANDMARK DEVELOPMENT GROUP, LLC AND JARVIS OF CHESHIRE, LLC	:	JUDICIAL DISTRICT OF NEW LONDON
V.	:	
EAST LYME WATER AND SEWER COMMISSION	:	NOVEMBER 12, 2024

PLAINTIFFS' REPLY BRIEF

I. THE SEPTEMBER 2023 DENIAL OF LANDMARK'S SUMMARY JUDGMENT MOTION DOES NOT BIND THIS COURT.

Contrary to the Commission's claims at 1-2 and 5, this Court's 2023 denial of Landmark's summary judgment motion does not bind this court on any issue, by any res judicata, collateral estoppel, law of the case, or other theory.

A trial court's decision on any issue raised and rejected in a summary judgment motion does not preclude a party from raising the same issue later at trial, or the trial court deciding the issue after trial. See *Marco v. Starr Indem. & Liab. Co.*, 205 Conn. App. 111, 124-25 (2021). The Appellate Court explained: "[A] trial judge may choose to reach a contrary conclusion on an issue of law previously decided if the judge is convinced that the prior ruling was wrong." Id. Other courts have held the same: "[The] denial of a motion for summary judgment does not necessarily preclude an eventual judgment on the merits consistent with the motion for summary judgment nor does it preclude an eventual judgment at odds with the motion." *Doe v. Wilton Bd. of Educ.*, 2022 WL 15281221 at *3 (Conn. Super. Ct., Oct. 14, 2022) (copy attached).

II. THE REGULATION IS *ULTRA VIRES* BECAUSE IT CONTAINS PROVISIONS THAT DO NOT CONSTITUTE SEWER SYSTEM MANAGEMENT, AND USES SEWERS TO REGULATE LAND USE.

At 1, the Commission argues that the only issue in this case is whether the regulation at issue, "adopted pursuant to statutory authority, is valid." Landmark agrees that Conn. Gen. Stat. § 7-247 generically authorizes sewer commissions to adopt regulations. The Commission has

done so, see PE 4 and 5. *However, this statutory authority is subject to several limitations that the Commission ignored when adopting the regulation at issue here.*

Most importantly, the text of § 7-247 is clear that a sewer commission may regulate *"the supervision, management, control, operation and use of sewerage system..."* (emphasis added).[1] In Connecticut, as explained in Landmark's Brief at 19-20, the powers delegated to municipal agencies are strictly construed, and in determining the validity of a regulation, a court must find an express authorization, not the absence of a prohibition. Local commissions have no inherent authority.[2] Here § 7-247 expressly limits sewer regulation to sewer system management, which in plain language means physical and engineering aspects of collecting, treating, and discharging sewage.

The Commission makes a head-scratching claim (at 5-6 and 14) that neither §§ 7-246a or 7-247 contains any limit on the content of sewer regulations. To the contrary, the text quoted above is an express limitation on the scope of permissible sewer regulations.

Another express limit, consistently misstated in the Commission's Memorandum (at 5, 7, 11), is that sewer authorities have "discretion to *supply* sewers" (emphasis added). "Supply" means to make a sewer connection and capacity physically available to a particular property. This is achieved by building or contracting with a sewage treatment plant; obtaining or contracting for sewage disposal capacity; installing sewage transmission lines and laterals; approving boundaries of the sewer service district; and adopting rules for capacity allocation and physical connection. This is what East Lyme has done as stated in PE 3, 4, 5, and 8. *As of 2012, East Lyme had completed all of these discretionary steps to provide sewers to Landmark's property, establishing for Landmark a vested, administrative right to connect to the sewer system*

[1] The provision in § 7-247 about matters "in the opinion of the water pollution control authority" only modifies the prior phrase regarding discharges into the sewer system and stormwater runoff; it does not state that a sewer commission has free reign to regulate anything it wants.
[2] The Commission's citation at 9 to a municipal powers case from Kansas is inaccurate. Kansas has constitutional and statutory home rule, the antithesis Connecticut's system. See *Kansas Const. Art.* 12, § 5.

and use available capacity. In other words, as explained in Landmark's Brief at 19-20, where a property is designated for sewer service; no system extension is needed; capacity exists; and there are no technical or engineering issues, a property owner has a right to connect, and a sewer commission cannot retain discretion to "supply" sewers. These are the rights adjudicated and recognized in the *Dauti* and *Schuchmann* cases, the Appellate Court's 2018 decision in this matter, and Judge Cohn's decisions and orders in 2016 and 2018. Put another way, East Lyme did not in 2019 have the authority to adopt a regulation to specify whether or how it would "supply" sewers to Landmark's property, because in 2019 (in fact, as of 2001) it already had supplied sewers to the property and adopted regulations to govern that supply. Indeed, the only cases that discuss ongoing discretion with respect to sewers are those involving sewer *extensions*, such as *Forest Walk* and *AvalonBay v. Milford,* but as noted, Landmark does not need an extension – it has 60+ acres within the sewer district, and five abutting potential connection points, and the Town has ample capacity. The regulation exceeds the Commission's authority because it transforms existing rights to non-discretionary sewer approval into not just a discretionary process, but one governed by vague, undefined terms, infused with standardless, limitless Commission discretion, and subject to impossible time deadlines.

The next important limit on § 7-247 regulations that the 2019 regulation exceeds is that sewers cannot be used to regulate land use, as held in the *Harris* and *Dauti* cases, see Landmark's brief at 28. Landmark has identified, at 27-28, several provisions of the regulation that allow the Commission to base on a sewer allocation decision on zoning and land use criteria.[3] Among other infirmities, these criteria resemble the "sewer matrix" (a limit on sewer allocation based on the use allowed by the Zoning Regulations) that the Appellate Court invalidated in *Dauti,* 125 Conn. App. at 662-64.

The Commission argues (at 15-16) that nothing in the regulation specifies setbacks,

[3] In summary: the proposed land use layout; the "need" for sewers in relation to the proposed land use; consideration of the State and Town Plan of Conservation and Development, which are land use planning documents; and time limits on when land use applications must be filed and final permits obtained.

density, height, etc. This is true, but as Mr. Russo testified, by establishing procedures that Landmark and any owner pursing a development plan of more than 20 units cannot meet, *the regulation effectively prohibits or curtails land development by creating intolerable risk of proceeding,* and preventing a property owner from obtaining a protected, vested property interest. The regulation does not specify site plan features, but it does make applying for a sewer allocation a fool's errand because of the termination provisions, open-ended criteria, and undefined terms.

The regulation also exceeds § 7-246a, which tasks sewer commissions with determining capacity allocations for a proposed land use, but in no way authorizes use of sewers to curtail, shape, specify, or prohibit the proposed land use. The subject regulation targets developments that require multiple permits and imposes unnecessary, impossible, and illegal requirements, and by doing so regulates land use and exceeds § 7-246a.

III. THE REGULATION CONFLICTS WITH STATE LAW BY PREVENTING A PROPERTY OWNER FROM THE STATUTORY DURATION OF AN APPROVED SITE PLAN, AND THE RIGHT TO OBTAIN PERMITS IN ANY ORDER.

In its Memorandum at 1, 17-20, the Commission cites to case law holding that a municipal regulation is preempted by state law if it conflicts with state law. The common phrasing of this principle is that preemption occurs when a municipal regulation prohibits what the state allows, or vice versa, as opposed to the town regulating consistently but more strictly. The Commission asserts at 20 that the regulation at issue "does not prohibit anything that [General Statutes § 8-3, the site plan statute] allows or allow anything that § 8-3 prohibits." The Commission dismisses the 2022 *International Investors* decision of our Supreme Court as "of limited application" because it was based on "the inextricable link between special permits and site plan...."

International Investors, 344 Conn. at 46, 79 is clear: any municipal regulation that terminates a site plan earlier than set forth in General Statutes § 8-3(i) (five years plus a five year extension) conflicts with those statutes. The case properly regards the *duration* of a site plan as

an essential aspect of the permit, and essential to statewide uniformity in our land use system. Under the regulation here, if a property owner obtains a sewer allocation and then a site plan based on that sewer allocation, but for any number of reasons is unable to file for "all necessary land use approvals" within 12 months of the allocation, *the allocation terminates automatically, with no extension, exception, or appeal – which necessarily (and as Mr. Russo testified without challenge) makes a site plan impossible to propose, much less build.* Thus, the state site plan statute gives an owner who has obtained site plan approval up to ten years to apply for and obtain all collateral approvals, but the regulation here creates the likelihood that the process must shut down after 12 months, based on failure to file or even providing proof of filing to the Commission. The same consequence attends the 48 month limit which requires completion of the entire development before the deadline; and limit is extendable for good cause but only at the Commission's "sole discretion" (an oxymoron) – that is, completely unpredictable, and at the whim of the Commission. The regulation thus indisputably conflicts with a critical component of the state site plan statute, the *right* to a duration that cannot be undermined by the status, timing, or sequence of other necessary approvals. The subject regulation is not a more stringent but consistent limit; in fact, it takes away what state law grants.

As explained in Landmark's brief at 26-27, the regulation also conflicts with the right of property owners, recognized in *National Associated Properties*, 37 Conn. App. 788, 800, to obtain permits in whatever order is most logical and feasible, so long as all approvals are ultimately in hand at the same time. The 12 month application limit makes sequential choices impossible.[4]

IV. THE COMMISSION'S REGULATION IS ARBITRARY BECAUSE IT ESTABLISHES IMPOSSIBLE PRECEDURAL REQUIREMENTS, AND WAS BASED ON INDEFENSIBLE REASONS.

The Memorandum is replete with false claims aimed at painting a picture of a

[4] Moreover, what constitutes "all necessary land use approvals" is unpredictable, as plan changes can create new permit needs.

Commission operating in good faith.[5] The Commission claims (at 3) that it politely "waited" until Landmark's 2012 sewer application was "resolved" before adopting the regulation at issue in the case. It claims (at 20) that the 2019 regulation was only intended to avoid sewer capacity from lying dormant for extended periods (a claim contradicted by the Commission's concession at 2 that several hundred thousand gallons of its New London treatment plant allocation have been "reserved" and unused *since 1990*, see PE 3).

First, we should bear in mind that since the 1990s, this Commission has had a detailed sewer ordinance and regulations, PE 4 and 5, and thus in 2018-19 had no demonstrated need for additional sewer management rules. Moreover, the Commission cannot identify any procedural or administrative problem or concern to which the January 2019 regulation responded; the regulation was not a retroactive fix of anything. Third, from 2012 to 2018, the Commission claimed it had no capacity or only a miniscule amount available, *and thus there was no discussion while the Commission processed Landmark's application 2012-2017 of a new regulation needed to manage future or additional capacity allocations.* It was only in August 2018, when the Appellate Court affirmed that the Commission had been hiding available capacity and East Lyme had ample capacity to allocate what Landmark sought, that the Commission suddenly became interested in controlling sewer capacity on Landmark's remaining

[5] At 7, the Commission refers to a "presumption of regularity" that supports municipal agency action. Here, an agency that lied to a Superior Court judge for six years about sewer capacity, and whose Chair answered the Appellate Court 2018 decision by vowing that "No judge will tell East Lyme where to provide sewers," has forfeited that presumption. The Commission's outrageous claim of entitlement to this presumption should also cause this Court to reconsider Plaintiffs Exh. 35, I.D., as a full exhibit. The first paragraph of that exhibit (in evidence through PE 30, p. 2) shows the Commission Chair, Town staff, and land use attorney Robert Fuller in 2001 crafting an illegal plan to use sewers to block affordable housing because sewer regulations are not governed by 8-30g ["SEWER COMMISSION DOES NOT FALL UNDER AFFORDABLE HOUSING ACT"]. The rest of the document, indisputably from Town files, reflects a thorough discussion of using sewers, traffic, and state open space acquisition to prevent development. This document plainly demonstrates the start of the Commission's efforts to prevent affordable housing, with sewers as the centerpiece.

property.[6]

The Commission (at 3) defends its January 2019 final regulation by falsely claiming it was merely a continuation of ("the same as") the September 2018 "interim" regulation. However, PE 26, pp. 4-5 (the Commission meeting minutes) reveal that the interim regulation had nothing to do with sewer system management, and was "specific to Landmark" and intended to prevent Landmark from proceeding while the Commission's Supreme Court petition for certification was pending.[7] (The petition was denied in October). In fact, a side-by-side comparison of the interim regulation (PE 26) with the January 2019 permanent one, PE 1, at 3-5, shows that they are not comparable in structure or content.

Further proof of indefensible reasons for the regulation's adoption is that this Commission has never explained why it needed a new or interim regulation when it had a complete, detailed regulation and ordinance that had been in place since the 1990s; why it did not try to amend that set of regulations instead of starting from scratch; or how the regulated community could understand and comply with a new regulation that substantially overlaps with the existing one.

The Commission's claim that its December 2018-January 2019 regulation drafting and adoption were a reasonable, good-faith response to deficiencies in its existing regulations is pure fantasy, contradicted by the memo about the 2001 plan to use sewers to block development (quoted in PE 30 and fn. 6, *supra*), the lies 2012-2018, and the 2018 defiance of the Appellate Court. The regulation does not address or promote sewer system management; it inserts

[6] At 25, the Commission asserts that the regulation was not retaliatory because it was not retroactive to Landmark's 118,000 gallons allocation. But the regulation does not say that, and it was only in the months after January 2019 that the Commission, trying to argue that Landmark had no standing to challenge the regulation due to grandfathering, that the Commission described the 118,000 as grandfathered. In any event, the grandfathering is irrelevant here because as Judge Knox ruled in 2021, Landmark has standing based on the regulation's impact on Landmark's remaining 146 acres (the sewer district and gravity feed areas) that can be sewered under PE 4 and 5.

[7] At 25, the Commission states that the interim regulation "did not apply" to Landmark. PE 26 at 3-4 shows it was adopted specifically for Landmark.

retaliatory, impossible, termination provisions and unlimited discretion. The Commission's attempt to put lipstick on the true nature and impetus of its action is robustly contradicted by the evidence.

A recurring theme in the Commission's memorandum is that Landmark has presented no direct evidence that the Commission members in 2019 intentionally adopted the regulation to block affordable or multi-family housing. This is not true; but in any event in *United States v. City of Black Jack,* 508 F.2d 1179, 1185 (8th Cir. 1974), the Court observed that in discrimination cases, "Effect, not motivation, is the touchstone, in part because clever men may easily conceal their motivations...." See also *Soules v. U.S. Dept. of Housing and Urban Devel.,* 967, F.2d 817, 822 (2d Cir. 1992). The circumstantial evidence is also clear and consistent over 20 years of Commission malfeasance.

Regarding the impossibility of compliance with the regulation's procedural requirements, Mr. Russo testified, Tr. at 76-80 (summarized in Landmark's brief at 16-18), that the regulation's requirement that an applicant "shall apply for all necessary land use approvals" within twelve months of capacity application, which failure *voids* the sewer allocation, no exceptions or extensions, creates an impossibility, in part because under General Statutes § 14-311, any development with more than 100 residential units or 200 parking spaces requires Office of State Traffic Administration approval, and disturbance of more than five acres requires a DEEP Stormwater General Permit and possibly the U.S. Army Corps approval. Mr. Russo testified, without challenge, that these approvals can be applied for only *after* local approvals have been granted. Thus, to satisfy the regulation's 12 month limit, the property owner must apply for all local approvals, obtain them, and then apply for all state approvals, which is unlikely if not impossible for almost any development. An additional obstacle is that zoning commissions sometimes decline to accept an application until after wetlands approval is obtained. Moreover, the 2019 regulation makes no exception for a delay caused by a procedural defect or discovery during or after the 12 months that another permit is needed. A third party appeal to court from a wetlands or site plan approval could also derail the application schedule.

Mr. Russo testified that *in light of this wholly inflexible requirement, no property owner would even proceed with a sewer application much less a zoning approval (zone change, special permit, site plan) due to the likelihood of the sewer allocation terminating during the land use approval process.* The risk continues in the regulation's provisions about failure to provide proof of local land use filing, and sewer termination "48 months from expiration of the appeal period of the applicant's last land use approval with no appeal." The 48 month provision means the site plan *must be completed* within this time period which may be extended in the Commission's "sole discretion" if it determines that good cause exists – not just "good cause" as the Commission states at 20. Again, the Commission has provided no response to these obstacles.

As to impossibility of compliance, Landmark must also bring up questions asked of Mr. Russo on cross examination by Attorney Zamarka about another application pending in 2019 by a Mr. Pazzaglia, Pazz Construction. As shown in the attached transcript pp. 110-116 (A.9-A.14). Attorney Zamarka asked, "If I told you that Pazz applied for and received an allocation and fully complied with the requirements of the regulation, you wouldn't have any reason to doubt that, would you....?" Mr. Russo replied, "Well, yes, I would unless they've been able to...fully comply....[It] would have to be within the time frames that are in the regulation." Mr. Russo continued: "I've filed applications that require state approval and I know the timeline and...you could not do this regulation with that timeline." Attorney Zamarka then said, "It appears Pazz did," to which Mr. Russo replied, "It's a small development." Attorney Zamarka then testified, "I believe Pazz is about 150 units" – which would at least require Office of State Traffic Administration approval after site plan approval.

It is, of course, axiomatic that "Statements and arguments of counsel are not evidence," *RAL Management, Inc. v. Valley View Associates*, 102 Conn. App. 678, 684 (2007), citing *Travelers Property & Casualty Co. v. Christie*, 99 Conn. App. 747, 761 (2007). Thus, Attorney Zamarka's statements that another developer "complied" with the 2019 regulation, and the project was 150 units, must be disregarded. But his statements were also incorrect. Def.

Exhibits G and H show that Pazzaglia received its sewer allocation, 35,400 gallons, in July 2019, starting the 12 month clock. This Court may take judicial notice of the attached, certified Town of East Lyme Zoning Commission documents (see Appendix A.15-A.25), showing that (1) the Pazz development in 2019 was not 150 units but only 80 units, so under the 100 unit State Office of Traffic Administration threshold; but even so, (2) *in 2023 and 2024*, Pazz (now d/b/a North Bride Brook, LLC) applied for a necessary land use approval, for the same development, based on the 2019 sewer allocation (A.22), with no extension of the 48 month deadline from the Commission, so Pazzaglia applied well *after* the 12 month and 48 month deadlines. On top of all this, the 2023/2024 application increased the plan to 100 units and expanded soil disturbance to more than five acres – resulting in another necessary land use application, a DEEP stormwater permit as the zoning documents show (A.20). Thus, the Pazz development *did not comply* with the 2019 regulation. Under the 2019 regulation, Pazz's sewer allocation terminated in 2020. In addition, the Court should note from Def. Exhibits G and H that in its 2019 sewer allocation approval to Pazz, the Commission said absolutely nothing about compliance with the 2019 regulation criteria and standards.

V. CONCLUSION.

With the 2019 regulation in place, Landmark cannot move forward with development or sell the property. The regulation creates a stifling, debilitating risk of proceeding with an application to develop the area beyond the portion of Landmark's 236 acres that was not part of the 2012-2018 sewer application. The evidence is clear that this is precisely what the Commission intended: stop further multi-family development, and impose discretionary standards not subject to 8-30g, so as to prevent the courts from interfering. This Commission's litany of lies and reign of obstruction need to come to an end. Judge Cohn and the Appellate Court eventually saw through this Commission's lies and bad faith. This Court should also by invalidating the regulation.

PLAINTIFFS,
LANDMARK DEVELOPMENT GROUP,
LLC AND JARVIS OF CHESHIRE, LLC

By *_/s/ Timothy S. Hollister_*

Hinckley, Allen & Snyder, LLP
thollister@hinckleyallen.com
20 Church Street
Hartford, CT 06103
Tel: (860) 331-2823
Fax: (860) 278-3802
Juris No. 428858

CERTIFICATION OF SERVICE

I hereby certify that the foregoing Reply Brief was electronically delivered this 12th day of November, 2024, to all parties listed below and written consent for electronic delivery has been received from all parties.

Mark S. Zamarka, Esq.
Waller, Smith & Palmer, P.C.
52 Eugene O'Neill Drive
P.O. Box 88
New London, CT 06320
Mszamarka@wallersmithpalmer.com

/s/ Timothy S. Hollister
Timothy S. Hollister
Commissioner of the Superior Court

NO. KNL-CV-20-6048999-S	:	SUPERIOR COURT
	:	
LANDMARK DEVELOPMENT GROUP, LLC AND JARVIS OF CHESHIRE, LLC	:	JUDICIAL DISTRICT OF NEW LONDON
	:	
V.	:	
	:	
EAST LYME WATER AND SEWER COMMISSION	:	NOVEMBER 12, 2024

APPENDIX

Appendix

2022 WL 15281221
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
JUDICIAL DISTRICT OF STAMFORD/ NORWALK AT STAMFORD.

James **DOE** PPA
v.
WILTON BOARD OF **EDUCATION**

FSTCV205023769S
|
October 14, 2022

MEMORANDUM OF DECISION re: MOTION FOR SUMMARY JUDGMENT (#115.00)

POVODATOR, JTR.

Background

***1** This is a lawsuit in which the plaintiffs claim that the 4-5-year-old minor plaintiff was sexually assaulted by an employee of the **Wilton** Board of **Education**. A somewhat unusual aspect of this case is that it is the third case brought against these defendants based on the alleged sexual misconduct of the same employee.

The plaintiffs assert a number of claims of negligence on the part of Board of **Education** staff and officials, in turn forming the basis for a claim of institutional liability, with the town, in turn, also being claimed to be liable; see, General Statutes § 52-557n.

The defendants have claimed a lack of liability predicated on the doctrine of governmental immunity. Currently before the court is the defendants' motion for summary judgment, relying on that doctrine. Recognizing that there are exceptions to the doctrine of governmental immunity, the defendants contend that the plaintiffs cannot satisfy any exception to that immunity, as a matter of law, based on undisputed facts.

The plaintiffs have filed an objection, relying in part on adverse decisions relating to similar motions filed by the same defendants in the earlier two cases involving the same employee. [1]

The plaintiffs contend that governmental immunity does not apply so as to bar this action, at least as a matter of law, based on the exception for identifiable victims in imminent peril of harm. Somewhat complementary, they also allege breach of ministerial duties.

Approximately two months after this motion was argued to the court, counsel for the defendants sent to the court a copy of a then-recent decision of the Appellate Court, *Doe v. City of New Haven*, officially published at 214 Conn. App. 553, 281 A.3d 480.

Legal Principles

The court need not discuss, in detail, the well-established standards for summary judgment. The party moving for summary judgment must establish the absence of any material issue of fact, and that based on such undisputed facts, it is entitled to judgment as a matter of law. See, e.g., *Vossbrinck v. Hobart*, 207 Conn. App. 490, 510, 263 A.3d 390 (2021). Only after a moving party establishes its entitlement to judgment, on a prima facie basis, does the non-moving party have the obligation to demonstrate the existence of a material issue of fact, by its own evidentiary submission.

Governmental immunity generally is codified by General Statutes § 52-557n. A lack of immunity for so-called ministerial acts is essentially embodied in the statute to the extent that the statute provides immunity for discretionary acts. Common-law exceptions to governmental immunity include the closely-related concepts of identifiable victim at risk of imminent harm, and member of an identifiable class of victims at imminent risk of harm. See, e.g., *Cotto v. Board of **Education** of City of New Haven*, 294 Conn. 265, 274–77, 984 A.2d 58, 63–65 (2009) for a general if somewhat out-of-date overview; see, *Haynes v. City of Middletown*, 314 Conn. 303, 101 A.3d 249 (2014) for reformulation of concept of imminent harm.

***2** "[Our Supreme Court] has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer

that his or her failure to act would be likely to subject an identifiable person to imminent harm.... This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.... All three must be proven in order for the exception to apply.... [T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court ... [unless] there are unresolved factual issues ... properly left to the jury.

"[Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state. [T]he question of whether a particular plaintiff comes within a cognizable class of foreseeable victims for purposes of this exception to qualified immunity is ultimately a question of policy for the courts, in that it is in effect a question of duty.... This involves a mixture of policy considerations and evolving expectations of a maturing society.... [T]his exception applies not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims.... Our [Supreme Court's] decisions underscore, however, that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims.... [The court has] interpreted the identifiable person element narrowly as it pertains to an injured party's compulsion to be in the place at issue.... In fact, [t]he only identifiable class of foreseeable victims that [the court has] recognized ... is that of schoolchildren attending public schools during school hours...." (Internal quotation marks and citation, omitted.) *Kusy v. City of Norwich*, 192 Conn. App. 171, 182–84, 217 A.3d 31, 38–39 (2019).

To the extent that the plaintiff invokes the doctrine of collateral estoppel:

"The fundamental principles underlying the doctrine of collateral estoppel are well established. The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality.... Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim.... For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment....

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined.... An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered.... If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent action. Before collateral estoppel applies [however] there must be an *identity of issues* between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be *identical to* those considered in the prior proceeding." (Internal quotation marks and citation, omitted.) *MacDermid, Inc. v. Leonetti*, 328 Conn. 726, 739, 183 A.3d 611, 622 (2018).

Discussion

***3** Before attempting to provide a detailed analysis of the merits of the parties' respective positions, the court will address certain preliminary matters. As implicit in the discussion of legal principles above, reliance on cases prior to *Haynes* must be done with caution, to the extent that earlier cases may have relied upon the concept of imminent harm as it existed prior to that decision. While some "older" cases certainly may have been unaffected by *Haynes*, cases relying upon *Burns v. Board of Education*, 228 Conn. 640, 638 A.2d 1 (1994) and/or *Purzycki v. Town of Fairfield*, 244 Conn. 101, 708 A.2d 937 (1998) must be viewed with caution, as *Haynes* explicitly overruled aspects of those decisions. This is in addition to the steady increase in the body of law relating to application of governmental immunity to varying circumstances.

During argument, the court questioned the ability to rely on the summary judgment decisions in the earlier cases for purposes of collateral estoppel. The court continues to be of the opinion that the earlier decisions in cases involving the same alleged perpetrator, same school administrators, and same defendants, do not rise to the level of collateral estoppel. The earlier decisions did not resolve an issue that had been essential to a judgment – there was no judgment for which

an issue actually resolved was essential to the outcome, and there was no substantive determination of an issue bearing any indicium of finality. In each of the earlier cases, the court did not decide directly or conclusively any substantive issue. At most, those decisions might be entitled to law-of-the-case status within the context of each case, but even then, the law of the case does not preclude a contrary outcome at a later stage but rather only suggests that a subsequent decision on the same issue should be approached with some non-binding level of deference. See, *Breen v. Phelps*, 186 Conn. 86, 99-100, 439 A.2d 1066 (1992).

More generally, the denial of a motion for summary judgment does not necessarily preclude an eventual judgment on the merits consistent with the motion for summary judgment nor does it preclude an eventual judgment at odds with the motion. Indeed, a denial of a motion for summary judgment does not preclude a later motion within the same case, a second attempt that might address (correct) a deficiency in an earlier motion. For example, the denial of a motion for summary judgment might identify a failure to provide sufficient evidence of a required element for the judgment sought, which might be cured/curable through a second motion with additional evidentiary support.

To put it differently if perhaps somewhat simplistically – a determination that there may be one or more material issues of fact is not a determination of an issue with the requisite level of finality to entitle the decision to collateral estoppel effect. More narrowly, a decision that a defendant has not established a defense sufficient to entitle it to judgment via summary judgment is not a final determination that the defense does not apply as a matter of law – equivalent to the defense being stricken. That does not mean, however, that this court cannot rely on the analysis of the underlying issue in those earlier cases, just as the court can rely on the analysis of any other trial court decision to the extent that this court finds the analysis to be helpful if not persuasive.

To be more precise: In the 2017 decision – the first case – the court did not explicitly decide whether the duties involved were ministerial or discretionary (but subject to an exception), instead concluding that there were material issues of fact to be decided. In the 2019 decision, the court stated that it was relying upon a then-recent Supreme Court decision,[2] concluding that the issue of ministerial or discretionary was presumptively a matter of law, but then proceeding to state that "there is no reason to decide this issue in the present case [because] ... even if it was determined that the actions were discretionary in nature, the plaintiffs satisfy the requirements of the identifiable person-imminent harm exception to discretionary governmental immunity."

***4** Given these detailed histories, there was no final resolution of an issue, sufficient for purposes of collateral estoppel. Under a law-of-the-case analysis, a judge subsequently handling either case for any purpose (including trial) might be required to revisit the issue, including a determination, with greater finality, as to whether any particular duty involved was ministerial (as a matter of law), or was discretionary (as a matter of law) but subject to determination of applicability of an exception such as identifiable victim/class of victims.

The procedural posture provides an overlay or alternate perspective. In the prior cases, as here, the court was not presented with a motion seeking an affirmative determination that a duty was ministerial or that a discretionary duty was subject to the identifiable victim/class of victims exception as a matter of law. In each instance, the court was being asked to determine that there was a discretionary duty without an available exception or that there was no breach of a ministerial duty, and in each instance, using differing terminology and/or a different approach, the court declined to do so. The denial of the relief sought is not equivalent to the granting of opposite relief.

Even if collateral estoppel theoretically could be based on a denial of a motion for summary judgment, the plaintiff does not adequately explain why the facts of the cases are sufficiently similar so as to warrant application. To be sure, at the most general level, they involve the same defendants, the same school employee (assailant), and claims of sexual abuse of children 4-5 years old. The first case, however, which involves events that are claimed to support the claims in the subsequent two cases, has a material distinction in the sense of governmental immunity analysis. In that first case, ¶¶ 11 and 12 of the complaint assert the violation of an explicit mandatory policy prohibiting a single adult such as Mr. Von Kohorn from accompanying a child into a bathroom (so-called toileting policy), including the failure of other school personnel to enforce that explicit policy. There is no claim in this case that there was a violation of that policy. While the 2019 decision may have focused on *Ventura* as characterizing the existence of a duty as a legal issue, this court has generally focused on the aspect of that decision emphasizing the importance of a clear mandate to act in a particular manner, that to establish a ministerial duty, a

plaintiff must identify "some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion" (330 Conn. 631). The identified existence of such a rule in the first case, not asserted to be directly applicable in this case, would seem to suggest that the cases may be sufficiently dissimilar that the requirement for collateral estoppel of identity of issues is not (would not be) necessarily satisfied.

Before proceeding further, an aspect of the burden on the moving party needs to be emphasized. In a case in which there are multiple specifications of negligence, a plaintiff may prevail if at least one of the specifications is proven. The necessary implication is that a defendant, moving for summary judgment, is required to negate every specification of negligence; the defendant would not be entitled to judgment if there was at least a possibility of a plaintiff prevailing on the "surviving" specification. Therefore, in order to defeat a motion for summary judgment, a plaintiff need only identify at least one specification that has not been refuted to a no-material-issue-of-fact standard. This can be accomplished in one of two ways – the plaintiff can simply point to an inadequacy of the defendant's presentation, explaining why the defendant has not established at least a prima facie case of governmental immunity, [3] or if there is a perception that a prima facie case has been established, the plaintiff can submit facts that establish the existence of a material issue of fact. Therefore, the court need only find one specification/allegation that survives the legal challenge of the defendants, in order to be obligated to deny the motion.

***5** Although not binding in a collateral estoppel sense, there is ample reason to find the analyses in the earlier decisions to be useful if not persuasive – without necessarily agreeing to every detail and recognizing as already noted that there are variations in facts that may affect the weight to be given.

The plaintiffs discuss extensively the extent to which Mr. Von Kohorn violated the toileting rules. In the absence of a particular context, it is difficult to understand how a violation of a seemingly undisputed and unambiguous rule prohibiting a solo-adult from accompanying or "assisting" a 4–5-year-old student while in the bathroom, can be characterized as anything other than a breach of a ministerial duty, especially in the context of determining whether a plaintiff has established the existence of a ministerial duty. However, related to a number of reservations already identified by the court, the facts in this case do not appear to include any abuse or otherwise-improper conduct in a bathroom by Mr. Von Kohorn with respect to this student/plaintiff. The court has reviewed the operative complaint and the submission of the plaintiffs, and could find no claim of violation of the toileting policy as directly relates to this minor plaintiff. A breach of ministerial duty is not actionable if the breach does not cause harm.

The court has used the term "directly" for a reason. If there were a claim of violation of that policy as to this minor plaintiff, that would seem to satisfy the requirement of identification of a ministerial duty, thereby precluding summary judgment. There is no such claim. That does not necessarily render the violation as to one or more other similar students irrelevant to the issue of governmental immunity.

Prior to the time frame of the events in this case, Mr. Von Kohorn was identified as having violated the toileting policy. That violation was eventually admitted, after first denying it (characterized by the plaintiffs as a lie). He had been observed by other school personnel in instances of violation, such that it was known to others with an apparently admitted responsibility to not allow the practice to continue but with no apparent reporting to supervisory personnel. Mr. Von Kohorn had been observed engaging in other forms of questionable conduct – seemingly crossing the boundary between appropriate contact with students and overly-personal, e.g., having a student sitting on his lap during a gym-type activity involving bouncing on a large ball.

The only reactions of supervisory personnel were prompted by the explicit claim of sexual abuse, as set forth in the first lawsuit. The complaint of misconduct was referred to DCF, which ultimately concluded that there was insufficient evidence. (There does not appear to have been any further internal investigation by school personnel.) As a result of the complaint and lack of affirmative action by DCF, the only apparent response of school personnel was to re-assign Mr. Von Kohorn to a different classroom.

In a sense Mr. Von Kohorn, himself, was the imminent risk of harm, in the context of a preschool program (4–5-year-old students). He was known to have violated the toileting policy, despite an initial denial. It was discovered as a consequence of an accusation of sexual abuse of a student. That the accusation was not sufficiently verifiable that DCF took no further action was not an exoneration. The court recognizes that not every accusation of improper

conduct is well-founded and that the mere existence of an inadequately-verified/corroborated claim of misconduct does not necessarily require termination. The existence of such a charge, and the institutional knowledge of other violations of the toileting policy and other signs of failing to recognize boundaries, at least plausibly suggests a need for closer supervision/monitoring; no such response appears to have occurred.

***6** The risk plausibly was enhanced by the vulnerability of the target class. Mr. Von Kohorn was employed in an environment of children in the range 4-5 years old. They would have limited if any comprehension of the wrongfulness of the improper nature of the conduct alleged. They would have limited communication skills, and the evidence submitted reflects that many of the students had disabilities, with some unspecified number/percentage being non-verbal. (The minor plaintiff in this case is identified as having some unspecified disability.)

> "Our statement in *Evon v. Andrews*, supra, 211 Conn. 508, 560 A.2d 403, that a harm is not imminent if it 'could have occurred at any future time or not at all' was not focused on the *duration* of the alleged dangerous condition, but on the *magnitude of the risk* that the condition created. Accordingly, the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." *Haynes v. City of Middletown*, 314 Conn. 303, 322-23, 101 A.3d 249 (2014).
>
> "Of course, whether harm in any particular case was imminent necessarily is a fact bound question. Thus, under different factual circumstances, an individual's presence in a field during a storm may give rise to a duty on the part of a police officer to take immediate steps to prevent harm to that person. See, e.g., id., 315, 101 A.3d 249 n.7 ('[a] condition that is not an imminent harm in one context may be an imminent harm in another context'). For example, if White had been a child rather than an adult, the defendants quite likely would have been under a duty to take immediate steps to ensure the child's safety." *Brooks v. Powers*, 328 Conn. 256, 275, 178 A.3d 366 (2018).

As noted earlier, the defendants submitted a recent case, presumably because of a perception that it adds weight to their arguments. The court believes that it does not add to the weight of their arguments; the material differences between the current situation and that in ***Doe*** *v. New Haven* (hereafter, "*New Haven*") tend to confirm the need for differing treatment.

In *New Haven*, the student was a sophomore in high school, and 15 years old. There had been a thorough background check of the teacher with whom the student had had sexual contact, and each of the teacher's references had "provided a positive recommendation." "Prior to the events giving rise to [the lawsuit], neither [the principal] nor the board had received any complaints about [the teacher], and her personnel file was devoid of any disciplinary actions." The teacher had been a teacher for fifteen years prior to assignment at the high school (teaching at the elementary school level). The teacher and student took steps to ensure that no one knew of the sexual conduct between them. As soon as there was a discovery of the conduct by a security guard, appropriate action was taken, leading to the arrest of the teacher.

In *New Haven*, the trial court had found that there was no basis for a claim that there was any "reasonable cause to suspect" the improper conduct prior to it being discovered (inadvertently) by a security guard, and that the teacher and student "took measures to avoid being discovered."

In *New Haven*, the court in turn discussed ***Doe*** *v. Madison*, 340 Conn. 1, 262 A.3d 752 (2021). In *Madison*, prior to the discovery of the event leading to the litigation, "the teacher had been held in high regard by her colleagues, and her record was unblemished" (340 Conn. 25) and nothing seemed to have been out of the ordinary prior to the discovery of improper conduct.[4]

***7** The court in *New Haven* stated that there was "nothing inherently suspicious" about the prior observed conduct of the teacher (214 Conn. App. 572); to the contrary, some of the conduct explicitly was described as "[n]ot uncommon at all."

Virtually everything identified above is contrary to the actual or plausibly-supported facts of this case. The plaintiffs have submitted plausible evidence of a perfunctory reference check

when Mr. Von Kohorn had been hired, including plausible claims of substantial misrepresentations of experience (beyond what might be reasonably tolerated) that likely would have been discovered had there been a more thorough process. As of the events in this case, Mr. Von Kohorn had engaged in conduct that was inherently suspicious and conduct that was uncommon, including conduct that had been explicitly prohibited and conduct that made others somewhat uncomfortable. His record was not unblemished as there had been an accusation of sexual misconduct prior to the events in this matter. He had not been in the **Wilton** school system for an extended period of time. Assuming he tried to conceal his activities, there had been witnessed violations of the toileting policy as well as other witnessed conduct that seemed at best questionable (e.g., bouncing on ball with student on his lap).

Implicit but of major differentiation is that in *New Haven* (and in *Madison*), the students had been teenagers/ adolescents. Unlike a teenager, the students in the care of (and vulnerable to) Mr. Von Kohorn were 4-5 years old. These children would be very unlikely to challenge or question any conduct of an adult in authority; they would have limited understanding of what was happening; they would lack the physical ability to resist or leave; and at best they would have limited communication skills. In that last regard, many of the students were characterized as having a disability (including this minor plaintiff (no specificity as to nature of the disability)), and some were described as non-verbal.

As noted in the excerpt from *Brooks v. Powers* quoted above, age and conditions associated with age can be major factors, distinguishing the imminent harm analysis from one involving a more mature person. The plaintiff in this case is in a class of potential victims – more precisely, a subclass of students in general – who plausibly are especially vulnerable. Aside from the lack of apparent warning signs in the two cases involving adolescents, as recited above, the increased vulnerability of the minor plaintiff and other pre-school students (again, many disabled and some unknown number non-verbal) made the risk more pronounced. That increased risk impacts on the fact-sensitive nature of a determination of whether the identifiable victim/member of class of potential victims exception to governmental immunity is or might be applicable.

The defendants' reliance on ***Doe*** *v. Sulzicki* (mis-identified as Sulziki) is misplaced, as that case appears to have relied upon the absence of facts providing notice to municipal officials sufficient to apprise them of the existence of an imminent risk of harm, especially as to identification of a specific employee – the requirement that the risk of harm had been apparent. (The court explicitly found that the risk was sufficient to satisfy the imminent harm requirement.) As in cases discussed above, the court specifically found there to be an absence of any prior basis to suspect the defendant teacher of engaging in improper conduct:

> ***8** "First, the DCF report is too vague to establish a genuine issue of material fact that it was apparent to Robinson that John **Doe** was at risk of imminent harm from Sulzicki. The report does not set forth facts concerning whether Robinson's suspicions concerned Sulzicki at all. Furthermore, in an affidavit submitted by the board in support of its motion, Robinson states the following: 'I received no complaints about Ms. Sulzicki during her time working for the Stratford Board of **Education**, save for the complaint brought by John **Doe** in September 2015, and, prior to that, her personnel file was devoid of any complaints or disciplinary actions. I received no complaints concerning John **Doe** and Ms. Sulzicki at any time prior to September 24, 2015.' " **Doe** v. Sulzicki, Docket No. CV165031712S, 2018 Conn. Super. LEXIS 878 at *20, 2018 WL 2292898, at *6 (Super. Apr. 27, 2018); ***aff'd***, 193 Conn. App. 903, 215 A.3d 759 (2019).

This case is distinguishable to the extent that there had been a complaint about Mr. Von Kohorn relating to the sexual improprieties, and there was relatively widespread awareness of other questionable conduct, prior to the alleged misconduct directed to this minor plaintiff.

Conclusion

Although the defendants do cite post-*Haynes* cases, they also cite and rely upon earlier cases, some of which are no longer good authority. They cite and extensively discuss ***Doe*** *v. Board of* ***Education***, 76 Conn. App. 296, 819 A.2d 289 (2003), which relies upon both Purzycki and *Burns*, explicitly relying upon those cases for the no-longer-valid requirement of a limited duration (76 Conn. App. 303-04). (The discussion in their brief at pp. 20-21 is close to a full page.)

Near the bottom of page 21, the defendants then attempt to rely on *Tryon v. North Branford*, 58 Conn. App. 702, 712, 755 A.2d 317 (2000) claiming that it stands for the

proposition that "[t]he plaintiff may not satisfy the 'imminent harm' element of the three-part test. Imminent harm is 'harm ready to take place within the immediate future' " Again, *Tryon* relies in part on Purzycki and *Burns*.[5]

The court is required to view the evidence in a manner most favorable to the non-moving parties. The defendants marshal the evidence in a manner most favorable to them – while not inherently surprising, it does not directly address the approach that the court must take.

The court has not addressed the individual specifications of negligence because most or all of them are in the category of a failure to take remedial or preventive/protective action, given the imminent harm presented by Mr. Von Kohorn's presence in the school and almost unlimited access to the pre-school students. Alleged negligence in his initial hiring may be an exception, but as identified earlier, survival of even one specification would require denial of this motion.[6]

Having concluded that the complaint and evidence sufficiently support the viability of the claimed exception to governmental immunity for an identifiable victim (or member of an identifiable class of victims) at imminent risk of harm, the court need not address the question of whether the plaintiffs have asserted a claim of ministerial duty. The defendants, of course, are not precluded from challenging applicability of this exception at trial; the court only has concluded that the defendants have not established that governmental immunity bars the plaintiffs' claim, as a matter of law.

For all of these reasons, the defendants' motion for summary judgment is denied.

All Citations

Not Reported in Atl. Rptr., 2022 WL 15281221

Footnotes

1 ***Doe*** *v.* ***Wilton*** *Board of* ***Education***, Docket No. FSTCV165016074S, 2019 Conn. Super. LEXIS 2166, 2019 WL 4060169 (Super. Aug. 2, 2019) (sometimes referred to as the second case) and ***Doe*** *v.* ***Wilton*** *Board of* ***Education***, Docket No. FSTCV155015035S, 2017 Conn. Super. LEXIS 10599, 2017 WL 11490232 (Super. Nov. 9, 2017) (sometimes referred to as the first case).

2 The court referred to *Ventura v. Town of East Haven*, 330 Conn. 613, 199 A.3d 1 (2019). The notion that governmental immunity often was an issue that could be addressed as a matter of law was not new; see, e.g., *DeConti v. McGlone*, 88 Conn. App. 270, 869 A.2d 271 (2005), recognizing that governmental immunity could often be addressed by way of a motion to strike, even before an answer had been filed raising a possible issue of governmental immunity by way of special defense. In a case involving an occurrence predating the passage of Tort Reform I in 1986, the Supreme Court stated that "[n]otwithstanding the procedural posture of a motion to strike, this court has approved the practice of deciding the issue of governmental immunity as a matter of law." *Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 170, 544 A.2d 1185 (1988). *Ventura*, then, may have placed additional emphasis on the legal quality of duty and immunity determinations, but the decision did not establish a new paradigm.

In *Trifero v. Norwalk*, J.D. Stamford, FSTCV196041869S, the court dealt with the application of the then-recent decision in *Ventura*. In response to an initial motion to strike, the plaintiff amended her complaint to identify a claimed source of a ministerial duty (before the motion to strike was argued). A second motion to strike was filed, and among the arguments made, the defendant contended that the defendant's "Roadway Standards" manual which the plaintiff claimed to be a source of a ministerial duty, was not applicable to the situation presented in the lawsuit. The court rejected the argument that the standards were inapplicable,

as the court did not believe that the manual was of a nature that the court could take judicial notice of its contents and the court was limited to the record before it. After the court denied the second motion, the plaintiff, apparently recognizing that the standards were factually inapplicable, filed yet another amended complaint, deleting the reference to the manual; a third motion to strike was then granted. But for the candor of the plaintiff in deleting the reference to the manual, the legal issue of ministerial duty was dependent on what the manual said and its applicability to the facts of the case. See, *Trifero v. City of Norwalk*, Docket No. FSTCV196041869S, 2020 Conn. Super. LEXIS 471, 2020 WL 1953652, (Super. Feb. 25, 2020) as followed later that same year by 2020 Conn. Super. LEXIS 1463, 2020 WL 8024755, (Super. Nov. 16, 2020). Thus, even as a matter of law, there often is a factual underpinning that needs to be addressed.

3 Technically, the burden is on the court to determine the sufficiency of the submission of a party moving for summary judgment (*Capasso v. Christmann*, 163 Conn. App. 248, 135 A.3d 733 (2016), regardless of whether there is any written opposition submitted (*Bayview Loan Servicing, LLC v. Frimel*, 192 Conn. App. 786, 218 A.3d 717 (2019).

4 "Unblemished" is used three times in the *New Haven* decision, twice referring to *Madison* and on one occasion stating that the record in *New Haven* similarly reflected an unblemished record (214 Conn. App. 581).

5 In *Haynes*, the condition had existed for at least seven months, prior to anyone being injured; 314 Conn. 325.

6 The same point is made in ***Doe*** *v. Sulzicki*, supra, 2018 WL 2292898, at *5.

End of Document

And you also said that it would be impossible for an 8-30g developer to adhere to the -- to adhere to the regulation, correct?

A Yes.
Q Okay.
A I think I said of a substantial size.
Q Okay. Well, what's substantial?
A I would say 200 units. 400 units maybe.
Q Okay.

ATTY. ZAMARKA CONTINUING:
Q Mr. Russo, I'm going to show you Exhibit H --

Q Okay. Can you look at subheading A for me, please, where it says, Applicant Development.
A Yes.

Q It says, Pazz & Company.
A Yes.
Q Okay. You aware of what that development is?
A I think that is a development over by where the

police station -- kind of in that area.

Are you aware that it's an 8-30g development?

A I heard that, yes.

Q Okay. If I told you that the Town knew that this project was in the works when they adopted the regulation, you wouldn't have any reason to dispute that, would you?

A No.

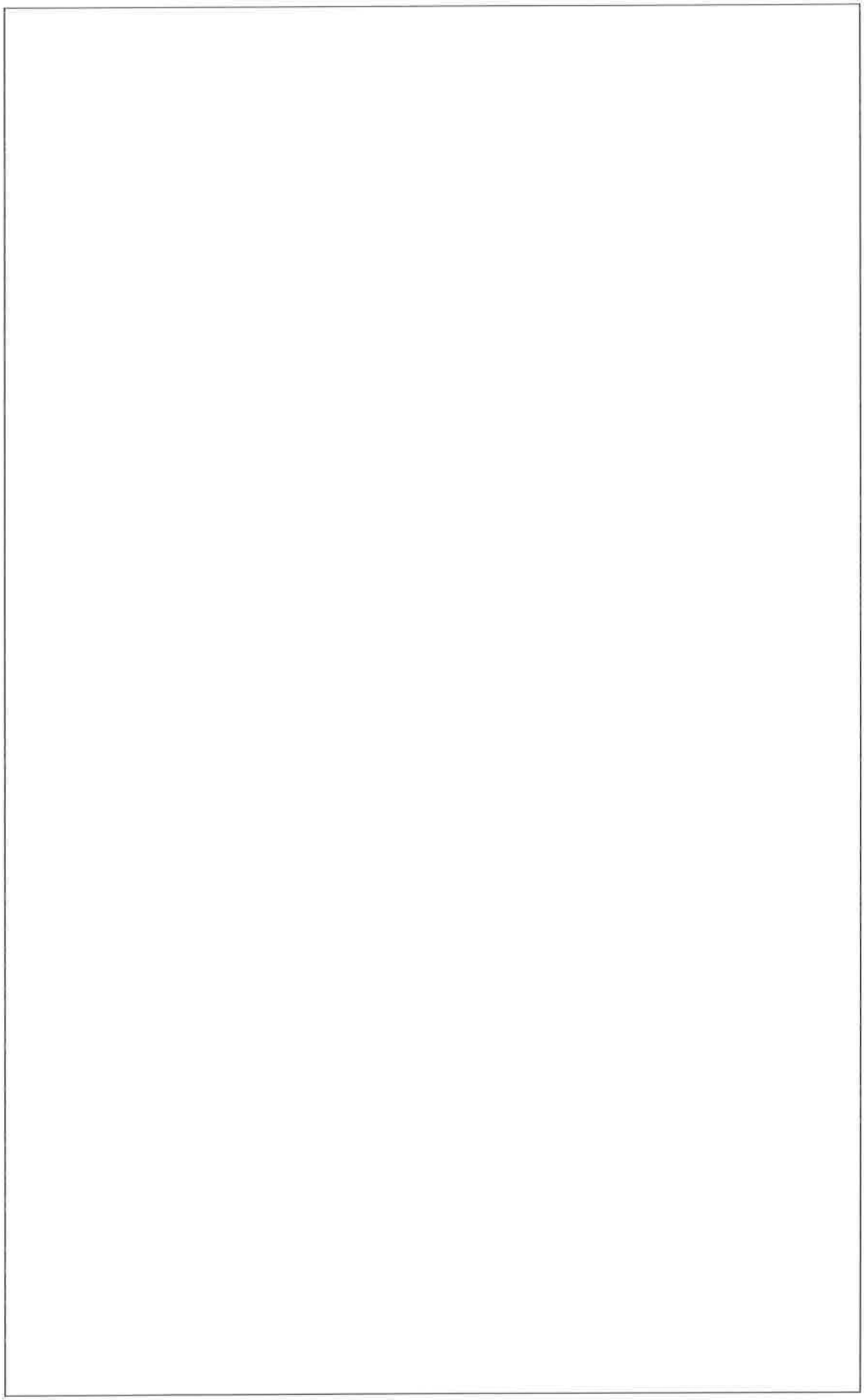
Q Okay. If I told you that Pazz applied for and received an allocation and fully complied with the requirements of the regulation, you wouldn't have any reason to doubt that, would you, or any basis to doubt that?

A Well, yes, I would, unless they've been able to -- to fully comply, you have to build it.

Q Oh, understood. And so let me back up. If I told you that the project is -- has been and is still being built out, would you -- would you have any reason to doubt that?

A I don't have a reason to doubt it, but it would have to be within the time frames that are in the regulation.

Q Well, do the timeframes in the regulations is one thing you brought up.



A.12

Where it says under, Duration, heading two number four, that the Commission can extend the allocation beyond four years; that's correct, right?

A At the last sentence, is that what you're referring to? The last sentence of the paragraph?

Q Yes. Last sentence of number four. Yes, sir.

A Yeah. In its sole discretion.

Q Sure, sure. Understood. Not for a good cause.

A That clause exists so it would be up to the discretion -- sole discretion of the Commission.

Q Right. For a good cause. You've never filed an application under this regulation, have you?

A No.

Q Well, you've never filed under this regulation.

A But I've filed applications that require state approval and I know the timeline and this time-- and that timeline -- you could not do this regulation with that timeline.

Q It appears Pazz did.

A It's a small development. This is a small development.

Q I believe Pazz is about 150 units.

"Certified to be a true and attested copy."
Signed:
Dated: 10/31/24

PAZZ & CONSTRUCTION, LLC
AFFORDABLE HOUSING APPLICATION

December 3, 2020

APPROVAL OF ZONE CHANGE AND
APPROVAL OF AFFORDABLE HOUSING DEVELOPMENT

WHEREAS on July 10, 2020, Pazz & Construction, LLC ("Applicant") filed an "Application for Site Plan Approval of an eighty (80 unit multi-family set-aside affordable housing development submitted pursuant to the provisions of Section 8-30g of the Connecticut General Statutes at property identified in the application as N. Bride Brook Road, East Lyme Assessor's May 9, Lot 37-2 ("Application") and;

WHEREAS, the Application was not submitted pursuant to §32 of the East Lyme Zoning Regulations but rather pursuant to Wisniowski v. Berlin Planning Comm., 37 Conn.App. 303 (1995); and

WHEREAS, the Commission is required to make appropriate findings under the Affordable Housing Statute C.G.S.§8-30g; and

WHEREAS, the Commission received referral reports from Victor Benni, Town Engineer, and Gary Goeschel, Inland Wetland Agent/Planning Director; and

WHEREAS, the Applicant has applied for and received from the East Lyme Water and Sewer Commission an allocation for 35,400 gallons per day of sewer treatment capacity; and

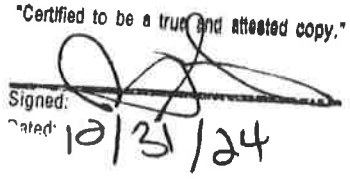
WHEREAS, the Commission held two (2) public hearings on the application during which it listened to numerous hours of testimony. Approximately seventeen (17) exhibits were submitted by the Applicant and various agencies and individuals for consideration during the hearing process. In making its decision, the Commission is considering and taking into account all of the testimony and exhibits submitted at the hearings on the Application; and

WHEREAS, the Commission, having determined that the Application includes a request for a change in zone, has made the requisite referrals to the Planning Commission pursuant to General Statutes§ 8-3a and the Southeastern Connecticut Council of Governments pursuant to General Statutes §8-3b; and

WHEREAS, for the purposes of this affordable housing application, the Commission will address this motion in two separate parts:

A. The request for a zone change;
B. The request for approval of an affordable housing development

{00554521 1}



A. THE PROPOSED ZONE CHANGE TO THE APPLICANT'S PROPERTY

WHEREAS, the Commission finds and recognizes that there is a need for affordable housing in the Town of East Lyme, and that less than 10% of its available housing stock meets the statutory definition of affordable housing; and

WHEREAS, the Applicant is applying for a zone change for 20.24 acres of its property that is the subject of this application. The development plan submitted proposes 80 residential units to be located on 8.13 acres of the 20.24 acres that are the subject of the zone change and that the remaining 12.11 acres will remain undeveloped at this time; and

WHEREAS, the Application notes that the development will be located entirely within the East Lyme Sewer Service District ("SSD"); and

WHEREAS, the Commission has determined, based on sufficient evidence in the record, that the change of zone to AHD is in the public interest and does not pose a harm to the public interest in health, safety or other matters that the Commission may consider.

BE IT THEREFORE RESOLVED, the Commission hereby APPROVES the application of Pazz & Construction, LLC to re-zone the Applicant's property to an Affordable Housing District.

B. THE REQUEST FOR APPROVAL OF A FINAL SITE PLAN

WHEREAS, the Commission finds and recognizes that there is a need for affordable housing in the Town of East Lyme, and that less than 10% of its available housing stock meets the statutory definition of affordable housing; and

WHEREAS, the Applicant is applying for approval of an Affordable Housing Site Plan pursuant to Wisniowski v. Berlin Planning Comm., 37 Conn.App. 303 (1995); and

WHEREAS, the Commission is required to make appropriate findings under the Affordable Housing Statute C.G.S.§8-30g; and

WHEREAS, the Commission finds that the Application complies with the requirements of §8-30g; and

WHEREAS, the Commission has determined, based on sufficient evidence in the record, that the Application does not pose a harm to the public interest in health, safety or other matters that the Commission may consider and is in the public interest; and

BE IT THEREFORE RESOLVED, the Commission hereby APPROVES the application of Pazz & Construction, LLC for approval of an Affordable Housing Site Plan.

"Certified to be a true and attested copy."

Signed:

Dated: 10/31/24

Town of East Lyme

P.O. Drawer 519
Department of Planning & Inland Wetlands
Gary A. Goeschel II, Director of Planning / Inland Wetlands Agent

108 Pennsylvania Ave
Niantic, Connecticut 06357
Phone: (860) 691-4114
Fax: (860) 860-691-0351

"Certified to be a true and attested copy."
Signed:
Dated: 5/29/24

MEMORANDUM

To: **William Mulholland, Zoning Official, East Lyme Zoning Commission**

From: **Gary A. Goeschel II, Director of Planning/Inland Wetlands Agent**

Date: **January 30, 2024**

Re: **94 North Bride Brook Road- Multi-Family Development**: Application of Bride Lake, LLC (successor to Pazz & Construction, LLC); Applicant/Owner; Application to modify the December 3, 2020 Site Plan Approval for Affordable Housing identified in the application known as 94 North Bride Brook Road, Assessor's Map# 09.0, Lot# 37-2, East Lyme, CT

Information submitted by the Applicant which was considered in this review:

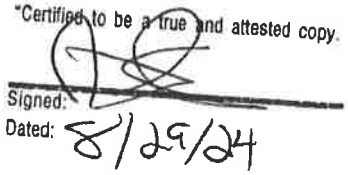
- **Application for Site Plan Review and associated narrative of the Application Details**
- **Site Development Plan (10-sheet plan set) entitled:** "North Bride Brook MF Development, Site Modification Plans, prepared for Bride Lake, LLC, Sheets 1 thought 10, dated 9/25/2019 and revised through 10/10/2023," by Brandon J. Hanfield, P.E. of Yantic River Consultants, LLC of 191 Norwich Avenue, Lebanon, CT
- **Property Survey entitled:** "Property Survey, Land of Pazz & Construction, LLC, North Bide Brook Road-East Lyme, Connecticut, Scale 1"= 60', dated January 31, 2019 revised through June 8, 2020, by Robert C. Simoni, L.S. of 44 Ingham Hill Road, Old Saybrook, CT 06457
- **Stormwater Management Report entitled:** "Proposed Site Modifications, Brookside Apartments MF Development, 94 North Bride Brook Road, East Lyme, CT" prepared for Bride Lake, LLC dated November 1, 2019, Revised November 6, 2023

This office has reviewed the above referenced information and has the following comments:

1. The East Lyme Inland Wetlands Agency at their duly noticed meeting of July 13, 2023, considered and voted to enter into a Stipulation to Judgement (see attached Motion for Judgement In Accordance With Stipulation).

2. Through the Stipulation of Judgement, the parties to the administrative appeal (Pazz & Construction, LLC VS the Town of East Lyme Inland Wetlands Agency) agreed and stipulated that judgement in the appeal approving a modified plan of development may enter on certain terms and conditions. More specifically, that judgment was entered in favor of the Plaintiff approving a modified plan for the development of up to one hundred (100) units of multi-family affordable housing which, shall conform to the requirements delineated on a plan entitled "North Bride Brook Multi-Family Development, Prepared for Pazz & Construction, LLC, Overall Layout Plan N. Bride Brook Road (Assessor's Map 9, Lot 37-2) East Lyme, CT Sheet 1 of 8 Date 9/25/19 Revisions 1/15/20 Per Town Comments & Updated Survey Mapping 7/10/20 Revised Development Layout 10/30/20 Per Town Comments 11/17/20 Per Town Comments 5/23/23 Revised Layout Revised 5/23/23" prepared by Yantic River Consultants, LLC (see Attached Stipulation to Judgment).

3. Review of the modified plans submitted by the applicant indicated they conform to the Stipulation of Judgement and the requirements of the approved modified plan entitled "North Bride Brook Multi-Family Development, Prepared for Pazz & Construction, LLC, Overall Layout Plan N. Bride Brook Road (Assessor's Map 9, Lot 37-2) East Lyme, CT Sheet 1 of 8 Date 9/25/19 Revisions 1/15/20 Per Town Comments & Updated Survey Mapping 7/10/20 Revised Development Layout 10/30/20 Per Town Comments 11/17/20 Per Town Comments 5/23/23 Revised Layout Revised 5/23/23" prepared by Yantic River Consultants, LLC. As such, the proposed activities are non-regulated, and an Inland Wetlands Permit is not required.



Town of East Lyme

P.O. Drawer 519
Town Engineer
Alexander T. Klose, P.E.

108 Pennsylvania Ave
Niantic, Connecticut 06357
Phone: (860) 691-4112
AKlose@eltownhall.com

February 29, 2024

RE: Revised Application of Bride Lake, LLC, North Bride Brook Road, Drawings Revised to 2/6/2024 and Operations and Maintenance Plan Revised to 2/8/2024

Mr. Mulholland,

As requested, I have reviewed the stormwater management design submitted for the proposed amendment to the 94 North Bride Brook Road development. I also reviewed the comment response letter from Mr. Handfield of Yantic River Consultants, LLC, the letter submitted to the Zoning Commission by Mr. Trinkaus of Trinkaus Engineering, LLC, and the meeting minutes capturing Mr. Handfield's response to Mr. Trinkaus' letter.

After review I provide the following comments;

1. Mr. Handfield is the engineer of record for the proposed development and the stormwater management design, it appears he has designed a system utilizing both traditional conventions outlined in the guidelines set forth in the 2004 Connecticut Stormwater Quality Manual and his professional engineering judgement and experience, which is acceptable as a licensed professional.

2. The engineer of record, Mr. Handfield should inspect and certify that the stormwater management system has been installed correctly and an as-built of the system should be submitted to the town.

3. I recommend that the stormwater pond system (forebays, retainer cell and filter bed) as a whole collect, retain and treat the 1" water quality volume (WQV). This can likely be accomplished with minor modifications to the basin system during construction and captured in the as-built drawings and the engineer's certification.

4. I note that the amendment would increase the proposed area of disturbance on site to greater than 5 acres and a General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities will likely be required through the Connecticut Department of Energy and Environmental Protection which will involve regular erosion control inspection and recordkeeping by a "Qualified Inspector" as defined in the permit.

Respectfully,

Alex Klose, P.E.
Town Engineer

"Certified to be a true and attested copy."
Signed:
Dated: 8/29/24

Received
FEB 29 2024
Town of East Lyme
Land Use

Date and Time:	3/7/2024 7:30PM to 10:40PM
Present:	Members: Anne Thurlow, Chairman, Nancy Kalal, Secretary, Norman Peck, Michael Foley, Denise Markovitz, Gary Pivo. Alternates: Sarah Susco. Ex-Officio: Roseanne Hardy. Recording Secretary: Jessica Laroco. Town Attorney: Michael Carey
Absent:	Alternate: Cathy Yuhas, Staff: William Mulholland.
Location:	East Lyme Town Hall, Upper Conf. Room, 108 Pennsylvania Avenue

1. **Call Meeting to Order and Pledge**
   Chairman Thurlow called the March 7, 2024, Regular Meeting of the East Lyme Zoning Commission to order at 7:30PM and led the Pledge of Allegiance.

2. **Attendance**
   Ms. Thurlow called the roll and noted that Alternate Cathy Yuhas and Staff William Mulholland were absent, and that Attorney Michael Carey was present to represent the Town.

3. **Public Delegations**
   Ms. Thurlow noted that it had come to her attention that Members were not given the most current set of By-Laws and that the set recorded with the Clerk's Office on April 27, 2023, are the most current set. This set indicated that Public Delegations were a time for members of the Public to speak to items that were not on the agenda. She offered a current set to the Commissioners and invited the Public to speak.
   a. Eric Vilcheck, 4 Meadow St, has concerns over the potential development at the Trakas property including the pollinator pathway, the wetlands.
   b. Lisa McGowan, 3 Spinnaker Dr, stated that Ms. Thurlow lost the previous election. She read an excerpt of an ethics code on conflicts of interest.

4. **Public Hearing**
   a. **Application by Kristen Clarke. P. E., "for Conceptual Site Plan approval for Conn. Gen. Stat. 8-30g (affordable housing)" of a 25-unit age-restricted single-and multi-family affordable residential housing development to be located on the northerly side of Boston Post Rd on a parcel identified as 91 Boston Post Road, Assessor Map 31.0 Lot 2.**

   Ms. Thurow noted that Attorney Mike Carey was present to represent the Town.

   Mr. Pivo asked for clarity on the decision required of the Board regarding this application.

   Attorney Carey stated that he believed the Applicant was filing under 8-30g of the CT Gen. Statutes and not by East Lyme Zoning Regulations. He noted that this is conceptual only and not to be considered a final site plan and they were looking to have a general approval of the application on the proposed location. He asked that the Applicant layout the details of the application.

   Ms. Kalal read a memo from Town Engineer Alex Klose (Exhibit item P

There was a 3-minute break.

5. Regular Meeting

a. Approval of Minutes of February 15, 2024, Regular Meeting

DECISION MOTION 2
Ms. Kalal moved to approve the minutes of the February 15, 2024; Regular Meeting as presented.
Ms. Markovitz seconded the motion.
Motion passed 6-0-0.

b. Continuation of the application of Bride Lake, LLC, for site plan approval for the modification of the December 3, 2020, approval of an eighty (80) unit affordable housing multi-family residential development pursuant to Connecticut General Statutes 8-30g increasing the total unit count to one hundred (100) multi-family units on the westerly side of N. Bride Brook Rd (20.24 acres) now bearing street number 94, Assessor Map 9.0 Lot 37-2.

Ms. Thurlow noted that Mr. Peck recused himself.

Ms. Thurlow asked Ms. Susco if she had reviewed all the materials and videos and if she was comfortable sitting in for Mr. Peck.

Ms. Susco stated she reviewed the materials.

Ms. Thurlow reviewed a memo from the Town Attorney about the process and reminded the Commission that if anyone had gone to the site and walked around, "Member cannot rely upon facts learned from a firsthand investigation without giving the parties before them an opportunity to rebut the evidence. Site inspections must take place before public hearing is concluded".

Ms. Thurlow asked for discussion and gave instructions that if a motion was made to deny, the reasons for the denial must be clearly stated prior to a second being made. She noted that approval/denial drafts were in each Members packet, or the discussion could be continued.

Mr. Foley noted that he had not heard anything, despite objections over water runoff, in the application to indicate that 20 additional units of an already approved 80-unit project would make a difference.

Ms. Thurlow agreed with Mr. Foley, noting that the third engineer (S. Trinkaus) had not visited the site, nor come to the Regular Meeting to be cross examined. She noted that the town engineer and the applicants engineer had spent a lot of time reviewing and discussing.

Mr. Foley pointed out that the Trinkaus letter was referring to the overall project, not the additional 20-unit application that is before the Commission.

Ms. Thurlow also stated that a denial would mean a lawsuit for the town, and she would not like to spend taxpayer money on a case the town would not win anyway.

Ms. Kalal stated her agreement.

Mr. Pivo added that the additional 20 units, or 25%, would also be a change on the stormwater management. He noted that the stormwater management system proposed is different than the one originally approved. He suggested that there was substantial evidence in the record that questions the effectiveness of the system. He read from the Trinkaus letter. He is unconvinced by Mr. Handfield's rebuttal. He stated that he does not want to deny the application, but he wants to be sure the system

proposed will work. He suggested the applicants engineer and Mr. Trinkaus sit and speak to come to an agreement.

Ms. Thurlow wondered why Mr. Trinkaus did not visit the site or come to be cross examined, and she felt it was difficult to put any weight into relying on such a letter.

Mr. Foley also pointed out that he was hired by someone who was opposed to the project.

Mr. Pivo pointed out that if the project is approved and there is a problem as stated by the Trinkaus letter, then the additional 25% increase in units is 25% increase in pollution.

Ms. Thurlow suggested that the conversation be continued.

Mr. Foley asked who would pay Mr. Trinkaus if he would be involved going forward.

Mr. Pivo indicated that the Town has a $60 million budget and if we have a world class expert who is supporting us then he would be happy to ask the First Selectman for the money. He is also concerned with the lack of sidewalks and stated that it's dangerous not to have them within the site. Additionally, he stated that this site does not provide for the affordable housing need in town, as they are not affordable.

Ms. Markovitz stated that if a citizen is concerned enough to spend her own money, then we need to take the time to address it.

Ms. Susco agreed that pursuing the Trinkaus point of view was important and questioned if the As-Built site plan is a change from the original.

Mr. Pivo listed off Mr. Trinkaus' credentials.

Ms. Thurlow asked if Mr. Pivo knew him personally, and he responded "no".

There was discussion on bringing in a third party to refute the two differing expert opinions.

Ms. Thurlow will speak with Mr. Mulholland and approach Mr. Cunningham to ask for funding to pay Mr. Trinkaus.

Ms. Susco stepped down and Mr. Peck resumed his place.

6. **Old Business**

a. Subcommittee - Outdoor Lighting

Ms. Thurlow noted that Mr. Peck and Mr. Mulholland had met and were working on a schedule.

b. Subcommittee - Text Amendment in CA Zone

Mr. Peck met with Mr. Mulholland and will schedule a meeting. He wished to discuss eliminating new mixed use which would reduce the chance of tearing down old buildings in town. Since Flanders Road has been redeveloped, there is very little, if anything, left worth saving. He suggested forming a new zone, possibly titled a CA-1, which would be the same as a CA zone except for mixed use. So that CA would have mixed use, but CA-1 would not have mixed use. It is intended to save the historic part of town.

c. Affordable Housing Update

Ms. Thurlow noted that Attorney Bleasdale is still planning on coming to update the committee.

Exhibit "II"

Town of East Lyme
AGENDA
East Lyme Zoning Commission
SPECIAL MEETING

March 14, 2024 - 7:30 P.M. – East Lyme Town Hall
108 Pennsylvania Avenue, Niantic, Connecticut

1. Call the March 14, 2024, East Lyme Zoning Commission Special Meeting to Order

2. Pledge of Allegiance

3. Public Delegations - Time set aside for the public to address the Commission on items not on the agenda.

4. Public Hearing

a. Continuation of Application by Kristen Clarke, P.E., "for Conceptual Site Plan approval per Conn. Gen. Stat. 8- 30g (affordable housing)" of a 25-unit age-restricted single- and multi-family affordable residential housing development to be located on the northerly side of Boston Post Rd on a parcel identified as 91 Boston Post Road, Assessor Map 31.0 Lot 2.

5. Regular Meeting

a. Approval of Minutes of March 7, 2024.

b. Continuation of Application by Kristen Clarke, P.E., "for Conceptual Site Plan approval per Conn. Gen. Stat. 8- 30g (affordable housing)" of a 25-unit age-restricted single- and multi-family affordable residential housing development to be located on the northerly side of Boston Post Rd on a parcel identified as 91 Boston Post Road, Assessor Map 31.0 Lot 2.

c. Continuation of the application of Bride Lake, LLC, for site plan approval for the modification of the December 3, 2020, approval of an eighty (80) unit affordable housing multi-family residential development pursuant to Connecticut General Statutes 8-30g increasing the total unit count to one hundred (100) multi-family units on the westerly side of N. Bride Brook Rd (20.24 acres) now bearing street number 94, Assessor Map 9.0 Lot 37-2.

6. Old Business

a. Subcommittee - Outdoor Lighting

b. Subcommittee – Text Amendment CA Zone (Mixed Use)

c. Affordable Housing Update

7. New Business

a. Zoning Official

b. Comments from Ex-Officio

"Certified to be a true and attested copy."
Signed:
Dated: 8/29/24

RECEIVED FOR RECORD
EAST LYME, CT
2024 MAR 11 A 11:55
TOWN CLERK

Town of East Lyme

PO Box 519
Niantic, CT 06357
(860) 691-4114
Fax: (860) 691-0351

Special Permit #_____

Date Entered into SP Log _____

MODIFICATION OF DECEMBER 3, 2020 SITE PLAN APPROVAL FOR AFFORDABLE HOUSING

APPLICATION FOR SITE PLAN

Date of Application: 11/08/2023 Zone: R-40 (8-30g) Affordable Housing Pre-Emption modification of prior approval

Applicant's Name: Bride Lake, LLC, successor to Pazz & Construction, LLC

Applicant's Address: 21 Darrows Ridge Road, East Lyme, Connecticut 06333 Telephone: (860) 961-2364

Location of Affected Premises: westerly side of North Bride Brook Road (20.24 acres) now bearing street number 94 Assessor's Map/Block/Lot: 9/37-2

Owner of Record: Bride Lake, LLC, transferee from Pazz & Construction, LLC Volume/Page: 1087/720

Owner's Address: 21 Darrows Ridge Road, East Lyme, Connecticut 06333 Telephone: (860) 961-2364

See attached continuation sheet.

Application Details _____

BRIDE LAKE, LLC

Signature of Owner: _____
By: Jason Pazzaglia, its Member

BRIDE LAKE, LLC

Signature of Applicant: _____
By: Jason Pazzaglia, its Member

****

Below this line for Office Use Only:

****

Attach a true copy a Site Plan {10 copies required}.

Site Plan Attached: (YES) NO N/A

PERMIT FEE:	
SITE PLAN FEE	$300.00
STORM WATER	$300.00
STATE FEE:	$60.00
TOTAL DUE:	$ 660.00
CHECK #: 4093	

Date Approved: _____ Date Denied: _____

Approval subject to conditions below:

1. _____
2. _____
3. _____

Approval to become effective upon publication and date of entry into the land records of the Town of East Lyme affecting the premises as described in this application.

Date: _____ Attest _____
East Lyme Zoning Chairman

"Certified to be a true and attested copy."

Signed: _____
Dated: 10/31/24

Received
NOV 14 2023
Town of East Lyme
Land Use

Reviewed and updated 10/20/2022

Exhibit C

LANDMARK DEVELOPMENT
EAST LYME WATER AND SEWER COMMISSION

October 28, 2014

1.	Town of East Lyme's allocated sewer capacity at New London treatment plant		1,500,000 GPD
2.	Capacity reserved by contract for State facilities		478,000
3.	Capacity remaining for Town of East Lyme		1,022,000
4.	September 2011 – September 2012 (most recent full year data in record)		
	a.	Total usage Town and State facilities	978,000
	b.	Amount used by State facilities	264,000
	c.	Town's use: 978,000 – 264,000	714,000
	d.	CAPACITY AVAILABLE TO TOWN: 1,022,000 – 714,000	308,000
5.	If use D. Lawrence State facilities flow calculation, 2006-2012, 314,000 gallons, then (substitute 314,000 for 264,000 above) Town capacity rises to		358,000

Exhibit D

East Lyme Sewer Department

Monthly Average Day Wastewater Flows (MGD)

Tuesday, June 24, 2025
Sewer Flows for the Month of May

		Total Daily Combined Flows from East Lyme and State			State Average Daily Flows by Facility					State Allocation (0.478 MGD)			East Lyme Allocation (1.022 MGD)		
Year	Month	Niantic Sewer Pump Station Flows			DOC	Camp Nett	Rocky Neck	POW	Pine Grove	Daily Usage	Capacity Remaining	Percent Capacity Remaining	Daily Usage	Capacity Remaining	Percent Capacity Remaining
		Average	Max	Min	0.250	0.058	0.025	0.105	0.040						
2025	January	0.833	0.909	0.776	0.120	0.008	0.000	0.007	0.040	0.175	0.303	63%	0.658	0.364	36%
	February	0.836	1.071	0.751	0.116	0.006	0.000	0.008	0.040	0.169	0.309	65%	0.667	0.355	35%
	March	0.876	1.047	0.795	0.121	0.011	0.000	0.012	0.040	0.185	0.293	61%	0.691	0.331	32%
	April	0.912	0.999	0.874	0.133	0.008	0.000	0.012	0.040	0.193	0.285	60%	0.719	0.303	30%
	May	1.005	1.120	0.874	0.143	0.010	0.000	0.026	0.040	0.219	0.259	54%	0.786	0.236	23%
	June														
	July														
	August														
	September														
	October														
	November														
	December														
	Annual Avg. (Jan - Dec)	0.892	1.029	0.814	0.127	0.009	0.000	0.013	0.040	0.188	0.290	61%	0.704	0.318	31%
	Rolling 2 Year Average												0.770	0.252	25%

All figures reported in Million Gallons Daily (MGD)

Sewer Department Monthly Report

Tuesday, June 24, 2025

Data For the Month of: **May 2025**

Monthly Running Avg:	**848,266 GPD**
Daily Avg:	**1,001,494 GPD**
Daily Max:	**1,120,000 GPD**
Daily Min:	**874,000 GPD**

Daily Average as a Percent of Monthly Running Average: **84.70%**

State CT Flows:

	DOC	Camp Nett	Rocky Neck	POW	Pine Grove	Total
Actual GPD AVG.	142,721	10,071	0	26,003	40,000	218,795
Design GPD AVG.	250,000	58,400	24,600	105,000	40,000	478,000
% of Design GPD	57.1%	17.24%	0	24.76%	100.00%	45.77%
% of East Lyme Average Daily Flow	16.83%	1.19%	0.00%	3.07%	4.72%	25.79%
% of East Lyme 1.5 MGD Allotment	9.51%	0.67%	0.00%	1.73%	2.67%	14.59%

Sewer Department Monthly Report

Tuesday, April 22, 2025

Data For the Month of: **March 2025**

Monthly Running Avg:	**848,266 GPD**
Daily Avg:	**875,581 GPD**
Daily Max:	**1,047,000 GPD**
Daily Min:	**795,000 GPD**

Daily Average as a Percent of Monthly Running Average: **96.88%**

State CT Flows:

	DOC	Camp Nett	Rocky Neck	POW	Pine Grove	Total
Actual GPD AVG.	121,342	11,349	0	12,217	40,000	184,908
Design GPD AVG.	250,000	58,400	24,600	105,000	40,000	478,000
% of Design GPD	48.5%	19.43%	0	11.64%	100.00%	38.68%
% of East Lyme Average Daily Flow	14.30%	1.34%	0.00%	1.44%	4.72%	21.80%
% of East Lyme 1.5 MGD Allotment	8.09%	0.76%	0.00%	0.81%	2.67%	12.33%

Sewer Department Monthly Report

February 18 2025

Data For the Month of: **January 2025**

Monthly Running Avg:	**832,968 GPD**
Daily Avg:	**832,968 GPD**
Daily Max:	**909,000 GPD**
Daily Min:	**776,000 GPD**

Daily Average as a Percent of Monthly Running Average: **100.00%**

State CT Flows:

	DOC	Camp Nett	Rocky Neck	POW	Pine Grove	Total
Actual GPD AVG.	120,287	7,633	0	6,961	40,000	174,881
Design GPD AVG.	250,000	58,400	24,600	105,000	40,000	478,000
% of Design GPD	48.1%	13.07%	0	6.63%	100.00%	36.59%
% of East Lyme Average Daily Flow	14.44%	0.92%	0.00%	0.84%	4.80%	20.99%
% of East Lyme 1.5 MGD Allotment	8.02%	0.51%	0.00%	0.46%	2.67%	11.66%

Sewer Department Monthly Report

Nov-17

Oct-17	Monthly Running Avg:	822,550 GPD
	Daily Avg:	752,273 GPD
	Daily Max:	952,760 GPD
	Daily Min:	676,560 GPD

Daily Average as a Percent of Monthly Running Average: 91.46%
Daily Average as a Percent of 1.5 MGD Allotment at NLWWTP: 50.15%

State CT Flows:

	DOC	Camp Niantic	Rocky Neck	POW	Total
Actual GPD AVG.	149,741	4,555	0	9,713	164,009
Design GPD AVG.	250,000	58,400	64,600	105,000	478,000
% of Design GPD	59.9%	7.80%	0	9.25%	34.31%
% of East Lyme Average Daily Flow	19.91%	0.61%	0.00%	1.29%	21.80%
% of East Lyme 1.5 MGD Allotment	9.98%	0.30%	0.00%	0.65%	10.93%

Footnotes:

NR = No Reading

Sewer Department Monthly Report

Sep-12

Aug-12		
	Monthly Running Avg:	966,169 GPD
	Daily Avg:	1,018,439 GPD
	Daily Max:	1,243,220 GPD
	Daily Min:	841,600 GPD

Daily Average as a Percent of Monthly Running Average: 105.41%
Daily Average as a Percent of 1.5 MGD Allotment at NLWWTP: 67.90%

State CT Flows:

	DOC	Camp Niantic	Rocky Neck	POW	Total
Actual GPD AVG.	221,464	7,854	0	35,319	264,637
Design GPD AVG.	250,000	58,400	64,600	105,000	478,000
% of Design GPD	88.6%	13.45%	0	33.64%	55.36%
% of East Lyme Average Daily Flow	21.75%	0.77%	0.00%	3.47%	25.98%
% of East Lyme 1.5 MGD Allotment	14.76%	0.52%	0.00%	2.35%	17.64%

Footnotes:

Exhibit E

EAST LYME SEWER FLOWS - HISTORY

	2005	2006	2007	2008	2009	2010[1]	2011	2012	% +/- Prev. Yr.
JAN.	1,081,493	1,125,420	1,137,320	1,002,851	1,081,072	1,037,939	918,818	956,431	4.09%
FEB.	1,084,724	1,078,408	1,027,091	1,015,914	1,025,974	1,001,694	959,700	912,442	-4.92%
MAR.	1,002,300	985,381	1,083,167	1,178,427	1,026,586	1,424,903	1,001,537	886,778	-11.46%
APR.	1,112,100	1,010,703	1,205,514	1,148,892	1,075,581	1,341,021	938,509	915,628	-2.44%
MAY	1,091,659	1,120,890	1,135,617	1,128,447	1,053,265	1,119,627	1,046,507	1,016,580	-2.86%
JUN.	1,093,098	1,144,452	1,136,675	1,117,479	1,122,961	1,067,205	1,017,256	996,993	-1.99%
JUL.	1,119,647	1,156,290	1,187,186	1,167,524	1,195,467	1,117,893	1,027,843	1,026,063	-0.17%
AUG.	1,051,086	1,167,040	1,158,667	1,167,600	1,162,253	1,040,808	970,097	1,018,439	4.98%
SEPT.	1,004,498	1,106,387	1,068,659	1,093,745	1,039,287	932,705	1,167,520		-100.00%
OCT.	1,177,896	1,124,860	1,026,567	1,072,337	997,294	928,254	966,767		-100.00%
NOV.	1,051,614	1,130,857	1,011,845	1,017,881	991,412	869,937	983,082		-100.00%
DEC.	1,098,235	1,064,774	1,000,163	1,118,268	1,103,500	882,347	1,133,107		-100.00%
AVG.	1,080,696	1,101,289	1,098,206	1,102,447	1,072,888	1,063,694	1,010,895	966,169	-34.56%

(1) March 30, 2010 storm event - 8.88 inches of rain/16.43 inches of rain for the month (Well 3A rain gauge)

EAST LYME SEWER FLOWS - HISTORY

	2010[1]	2011	2012	2013[2]	2014	2015	2016	2017	% +/- Prev. Yr.	Precip. 2017 (in.)
JAN.	1,037,939	918,818	956,431	975,330	1,011,343	787,646	747,284	784,837	5.03%	3.87
FEB.	1,001,694	959,700	912,442	1,010,626	994,771	832,681	809,701	765,648	-5.44%	2.05
MAR.	1,424,903	1,001,537	886,778	1,139,232	1,026,812	1,017,280	790,851	777,452	-1.69%	3.89
APR.	1,341,021	938,509	915,628	1,042,500	1,126,058	938,861	796,611	897,161	12.62%	7.34
MAY	1,119,627	1,046,507	1,016,580	1,057,182	1,145,107	913,816	777,446	872,268	12.20%	6.03
JUN.	1,067,205	1,017,256	996,993	1,243,099	1,007,792	880,190	815,281	849,504	4.20%	4.83
JUL.	1,117,893	1,027,843	1,026,063	1,217,939	1,038,583	1,048,427	879,952	883,851	0.44%	2.23
AUG.	1,040,808	970,097	1,018,439	1,203,763	999,147	977,543	868,636	873,017	0.50%	2.79
SEPT.	932,705	1,167,520	912,093	1,288,056	837,706	878,563	762,544	769,493	0.91%	2.42
OCT.	928,254	966,767	949,719	1,020,390	852,281	861,521	738,247	752,273	1.90%	7.22
NOV.	869,937	983,082	963,598	928,615	787,769	803,842	709,481		-100.00%	
DEC.	882,347	1,133,107	983,849	944,611	835,260	788,121	728,649		-100.00%	
AVG.	1,063,694	1,010,895	961,551	1,089,279	971,886	894,041	785,390	822,550	3.07%	
									Precip. Total	42.67

(1) March 30, 2010 storm event - 8.88 inches of rain/16.43 inches of rain for the month (Well 3A/3B rain gauge)
(2) 10.65 inches of rain for June 2013 (Well 3A/3B rain gauge)
7.18 inches of rain for July 2013 (Well 3A/3B rain gauge)

EAST LYME SEWER FLOWS - HISTORY

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	% +/- Prev. Yr.	Precip. 2025 (in.)
JAN.	787,646	747,284	784,837	781,519	1,090,311	849,497	938,302	942,646	1,029,157	1,177,819	832,968	-29.28%	1.45
FEB.	832,681	809,701	765,648	865,263	842,611	859,175	911,422	988,646	997,413	912,457	836,250	-8.35%	3.88
MAR.	1,017,280	790,851	777,452	927,771	893,805	832,803	886,441	948,873	984,116	1,048,941	875,581	-16.53%	4.72
APR.	938,861	796,611	897,161	778,780	918,456	885,983	962,591	965,456	1,015,438	1,066,788	912,157	-14.50%	3.68
MAY	913,816	777,446	872,268	746,049	947,042	900,485	951,501	922,857	1,061,763	989,756	1,001,494	1.19%	8.74
JUN.	880,190	815,281	849,504	906,535	875,000	882,463	976,981	989,299	984,241	966,701			
JUL.	1,048,427	879,952	883,851	1,026,307	977,552	853,930	1,047,771	995,433	1,086,674	991,582			
AUG.	977,543	868,636	873,017	905,718	932,181	911,419	978,158	1,000,871	1,063,381	955,027			
SEPT.	878,563	762,544	769,493	875,918	833,237	823,590	1,051,008	921,227	1,020,678	851,600			
OCT.	861,521	738,247	752,273	903,915	806,576	812,506	917,384	905,482	1,053,620	813,935			
NOV.	803,842	709,481	732,848	871,111	815,129	786,482	937,414	864,223	954,365	787,600			
DEC.	788,121	728,649	728,437	894,050	927,335	896,694	895,121	950,524	1,057,605	853,600			
AVG	894,041	785,390	807,232	873,578	904,936	857,919	954,508	949,628	1,025,704	951,317	891,690	-13.49%	4.49
												Precip. Total	22.47

Exhibit F

DRAFT

East Lyme Sewer Department
Sewer Capacity Allocations
Jul-19

	Average Month East Lyme Allocation Remaining (7 years)								380,000 (gallons)
A	Applicant/Development	Date of Request	Type of Use	Additional Project Description	Date of Public Hearing	Status	Methodology Used to Determine Capacity	Sewer Capacity Requested (gallons)	Sewer Capacity Allocated or Need Anticipated (gallons)
1	Landmark Dev. Group		Residential	Apartments				0	118,400
2	Costco		Commercial	Retail				0	7,650
3	Gateway Phase II		Residential	Apartments				0	18,681
4	Plazz & Construction		Residential	Multi-family				35,400	0
	Subtotal							35,400	144,731
B	Prior Approved Projects Under Construction (>5,000 gpd)								
1	Village Crossing		Residential	Condominiums				0	14,400
2	Orchards Subdivision		Residential	Single Family				0	42,600
									0
									0
	Subtotal							0	57,000
C	Other (>5,000 gpd)								
	Subtotal							0	0
							Total	35,400	201,731
							Balance Remaining		178,269