leaving two copies of the appeal papers with Karen M. Galbo, Assistant Town Clerk at the East Lyme Town Hall. (Sheriff's Return.) The appeal was filed with the clerk of the Superior Court at judicial district of New London on February 22, 2005. This appeal, therefore, is timely and the proper parties were served, pursuant to §§ 8-8(e) and 8-30(f).

3. Jurisdictional Challenges

***5** Before turning to the merits of this appeal, it is necessary to address a few preliminary issues that, according to the Commission and the intervenors, implicate the court's subject matter jurisdiction over this appeal and the Commission's authority to consider the application in the first instance.

a. The court has jurisdiction over this affordable housing appeal

Both the Commission and the intervenors claim that this court lacks subject matter jurisdiction over this appeal because the Commission lacked jurisdiction over the application filed by the plaintiffs in this appeal. This assertion is without merit.

The fundamental problem with the claim is that it improperly confounds the issue of this court's jurisdiction with the issue of the Commission's jurisdiction. This court's jurisdiction is derived from the Affordable Housing Land Use Appeal Statute, General Statutes § 8-30g. Subsection (f) of § 8-30g grants the Superior Court jurisdiction to review decisions of municipal agencies regarding affordable housing applications. An affordable housing application is defined as "any application made to a commission in connection with an affordable housing development by a person who proposes to develop such affordable housing." General Statutes § 8-30g(2).

In this case, the Commission plainly denied an application made to it to develop land in East Lyme as affordable housing. In fact, the decision issued by the Commission by its own terms recognizes that Landmark and Jarvis filed an affordable housing application for permission to develop affordable housing. Although the Commission and the intervenors may assert that the application filed by the plaintiffs did not comply with certain filing requirements, and thus did not properly invoke the jurisdiction of the Commission, the fundamental and undeniable fact is that Landmark and Jarvis filed an affordable housing application with the Commission. When the Commission denied that application, Landmark and Jarvis properly exercised their statutory right to seek judicial review from this court.

Accordingly, this court has subject matter jurisdiction to decide the issues in this appeal, including, but not limited to, whether the Commission had jurisdiction over the application filed by Landmark and Jarvis. As courts have often noted, an appellate tribunal has jurisdiction to decide whether the lower court or agency had jurisdiction to hear the case. See, e.g., *Long v. Zoning Commission,* 133 Conn. 248, 249, 50 A.2d 172 (1946); *Ajadi v. Commissioner of Correction,* 280 Conn. 514, 532-36, n. 22, 911 A.2d 712 (2006).

b. The Commission had jurisdiction to consider the application filed by Landmark and Jarvis

The Commission and the intervenors assert that the Commission lacked jurisdiction to consider Application II because it was not accompanied by, or "tethered to," an application for a(1) site plan, (2) special permit, (3) change in zone, or (4) text amendment. The Commission contends that because its jurisdiction is limited to considering only those specific types of applications, it could not consider the stand-alone affordable housing application filed by the plaintiffs. This claim is without merit.

***6** First, it is critical to recognize that affordable housing applications made pursuant to § 8-30g are not made under the traditional land use statutory scheme. *Wisniowski v. Planning Commission,* 37 Conn.App. 303, 317, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 981 (1995). A commission cannot deny an affordable housing application simply because the application does not conform to zoning regulations or that the development proposed violates the existing zoning scheme within the municipality. *Id.,* at 314, 655 A.2d 1146.

In *Wisniowski,* the Appellate Court recognized, in essence, that affordable housing applications are sui generis, and that whenever an affordable housing application seeks approval of a development that is not permitted by existing zoning regulations "a zone change will necessarily be embodied in the application, either as to use or as to bulk ... If no zone change were involved, there would be no need for an application for affordable housing ... No formal zone change application is needed because the act is designed to allow circumvention of the usual exhaustion of zoning remedies

and to provide prompt judicial review of a denial for an application." (Citation omitted.) *Id.*

In light of the Appellate Court's decision in *Wisniowski* and the fact that the applicants had proposed an affordable housing development that did not conform to East Lyme's existing zoning scheme, it is not surprising that the applicants chose not to file a site plan or special permit application. A site plan is a plan filed with a zoning commission to establish that the proposed use or development conforms to the municipality's zoning regulations. *Connecticut Resources Recovery Authority v. Planning & Zoning Commission,* 46 Conn.App. 566, 570, 700 A.2d 67, cert. denied, 243 Conn. 935, 702 A.2d 640 (1997).[3] Simply put, the applicants' proposed development did not conform to existing zoning regulations. Therefore, a site plan application would not have been appropriate.

Similarly, "the basic rationale for the special permit is that while certain land uses may be generally compatible with the uses permitted as of right in a particular zoning district, their nature is such that their precise location and mode of operation must be individually regulated ..." *Irwin v. Planning and Zoning Commission,* 244 Conn. 619, 626, 711 A.2d 675 (1988). The activities and the uses proposed for the site were not among the special permit uses allowed by East Lyme's zoning regulations. Consequently, an application for a special permit would not have been appropriate.

In reality, the application filed by the plaintiffs was an affordable housing application permitted by § 8-30g. Moreover, as *Wisniowski* suggests, the affordable housing application also contained an implicit request for a zone change as to use. Indeed, the Commission's decision approached the application precisely that way by treating it as both a stand-alone affordable housing application and an implicit request for a zone change. Although the Commission cannot by its actions confer subject matter jurisdiction on itself, its own treatment of the application speaks volumes regarding the proper characterization of the application. Accordingly, the Court finds that the Commission had subject matter jurisdiction over the application.

c. The applicants' alleged failure to file a § 8-3(a) notice with the Town Clerk did not deprive the Commission of jurisdiction

*7 The final attack on the Commission's jurisdiction is made by the intervenors alone.[4] They contend that the applicants were obligated, pursuant to General Statutes § 8-3(a), to file with the Town Clerk a legal description of the land and related boundaries that is the subject of the application at least ten days prior to the commencement of the Commission's public hearing in this case. The applicant's failure to do so, the intervenors contend, deprived the Commission of jurisdiction to consider the application.[5] The intervenors cannot prevail on this claim.

The intervenors did not raise this issue before the Commission. Their failure to do so, however, by itself, is not fatal. *City of Bridgeport v. Plan and Zoning Commission,* 277 Conn. 268, 275, 890 A.2d 540 (2006).

Instead, the intervenors raise the claim for the first time in this court. The record did not contain any evidence of the applicants' compliance or lack of compliance with § 8-3(a). The intervenors therefore moved to present evidence to this court, pursuant to General Statutes § 4-183(i), regarding the issue of § 8-3(a) compliance. The court denied the motion. In addressing the intervenors' claim, however, the court will assume, without finding, that the applicants did not file a legal description of the land and related boundaries with the Town Clerk.[6]

The flaw in the intervenors' claim is that § 8-3(a) applies to applications for zone change. See *City of Bridgeport v. Plan and Zoning Commission, supra,* 277 Conn. at 276, 890 A.2d 540. The application here was an affordable housing application pursuant to § 8-30g. Although that application, if granted, may implicitly result in a zone change (at least as to use); see *Wisniowski v. Planning Commission, supra,* 37 Conn.App. at 314, 655 A.2d 1146; an affordable housing application may be a stand-alone application. "[N]o formal zone change application is needed because [§ 8-30g] is designed to allow circumvention of the usual exhaustion of zoning remedies." *Id.,* at 315, 655 A.2d 1146. Because the application in this case was not, in a strict sense, a zone change application, the requirements of § 8-3(a) did not apply. Accordingly, any failure of the applicants to file a legal description of the property with the Town Clerk did not deprive the Commission of jurisdiction.

4. Res Judicata and Collateral Estoppel Do Not Bar Judicial Review of the Application

Having addressed the challenges to subject matter jurisdiction of the court and the Commission, the court next turns to a special defense raised by the Commission. The Commission contends that the doctrines of res judicata and collateral estoppel bar judicial review of the Commission's decision to deny the affordable housing application. Specifically, the Commission contends that all of the issues in this appeal were fairly and fully litigated before Judge Quinn. In the Commission's view, Judge Quinn's 2004 decision upholding the Commission's denial of the zone change and text amendment application (Application I) prevents further judicial review of the Commission's subsequent decision denying Application II. The Commission cannot prevail on this claim.

***8** First, it is firmly established that the denial of one application by a zoning commission does not necessarily bar a party from filing a second, but related, application regarding the same property. See, e.g., *Vine v. Zoning Board of Appeals,* 102 Conn.App. 863, 869-70, 927 A.2d 958 (2007). "When a party files successive applications for the same property, a court makes two inquiries. The first is to determine whether the two applications seek the same relief. The zoning board determines that question in the first instance, and its decision may be overturned only if it has abused its discretion ... If the applications are essentially the same, the second inquiry is whether there has been a change of conditions or other considerations have intervened which materially affect the merits of the matter decided ... For an appellate court, the only question is whether the trial court's finding as to the zoning board's decision is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Id.,* at 869-70, 927 A.2d 958.

In this case, the Commission appears to have concluded that the applicants were entitled to a second adjudication regarding the proposed development. Although the Commission took pains to characterize Application II as an application for a zone change and a text amendment (like Application I), it is clear that Application II sought explicit approval of a specific plan of development of affordable housing. Chairman Nickerson of the Commission recognized this reality in stating: "We have to look at this separately. It's a separate application. And this Commission members are different and all that." (Exhibit VIII, p. 46.)

Application I did not seek approval for a specific plan of development. Instead, it sought approval of a zone change and text amendment to the zoning regulations that, if granted, would alter the existing zoning scheme under which a specific affordable housing development could then be proposed. Indeed, if the Commission had granted Application I for a zone change, then Landmark and Jarvis would have been obligated to file a second application that included a site plan showing that the proposed development conformed to the existing regulation, which, at that point, would have included the zone change. Moreover, the Commission itself in its decision treated Application II as containing a request for relief that was not sought in Application I. See Decision of Commission, January 6, 2005, Part C (Exhibit XIV).

Finally, the Connecticut Supreme Court has held that a zoning board "may grant a second application which has been substantially changed in such a manner as to obviate the objections raised against the original application ..." *Rocchi v. Zoning Board of Appeals,* 157 Conn. 106, 111, 248 A.2d 922 (1968). It is important to note that Application II included specific proposals that were not contained in Application I. For example, Application II included more detailed proposals for a community-based septic and on-site water system rather than reliance on the extension of Town water and sewers to serve the housing development. Application II provided increased erosion and sedimentation controls. In addition, Application II proposed fewer condominium units than would have been permitted if the Application I for a zone change had been granted. Finally, Application II sought to phase in development of the property at a different rate than was contemplated by Application I. (Exhibit 105.) These changes to the proposed development were at least sufficiently material for the Commission to decide, as it did, that the applicants were entitled to proceed to a public hearing and decision on Application II. [7]

***9** If the Commission believed that the applicants were not entitled to a "second bite at the apple" with respect to the project, the appropriate time to have made such a determination was when it was considering Application II, not on appeal to this court. If that had happened, this court would review that determination under an abuse of discretion standard. Because the Commission did not take that position but instead rendered a decision on an application that seeks different relief and contains material differences from a prior application, Judge Quinn's decision reviewing Application I, does not bar this court from reviewing the Commission's

decision regarding Application II.[8] Accordingly, the court concludes that this appeal is not barred by the doctrines of res judicata or collateral estoppel.

B. Discussion

1. Preliminary Considerations

a. East Lyme is subject to the provisions of § 8-30g

The affordable housing procedures established by § 8-30g apply only if the property that is the subject of the application is located in a municipality in which less than 10 percent of dwelling units in the municipality meet the statutory criteria as affordable housing. General Statutes § 8-30g(k). The record is clear in this case that East Lyme has an undeniable need for additional affordable housing. Only 4.8 percent of East Lyme's housing stock qualifies as affordable and most of that serves as elderly housing. Accordingly, East Lyme is subject to the procedures of § 8-30g.

2. Standard of Review

Section 8-30g(g) and *River Bend Associates, Inc. v. Zoning Commission,* 271 Conn. 1, 856 A.2d 973 (2004), set forth the standard for judicial review of an agency's decision regarding an affordable housing application. "The trial court must first determine whether the decision ... and the reasons cited for such decision are supported by sufficient evidence in the record. General Statutes § 8-30g(g). Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of specific harm to the public interest if the application is granted. If the [c]ourt finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determine independently whether the Commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission may legally consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission, supra,* 271 Conn. at 26, 856 A.2d 973. The Commission bears the burden of persuading the trial court to uphold its decision. General Statutes § 8-30g.

The cases make clear that the statute is remedial, and its purpose is to assist property owners in overcoming local zoning regulations that are exclusionary or provide no real opportunity to overcome arbitrary or local limits, and to eliminate unsupported reasons for denial. See *West Hartford Interfaith Coalition v. Town Council,* 228 Conn. 498, 508-12, 636 A.2d 1342 (1994).

***10** The statute requires the Commission to state its reasons and analysis in a written decision. *Christian Activities Council, Congregational v. Town Council,* 249 Conn. 566, 576, 735 A.2d 231 (1999). The Commission, in its denial resolution and its brief, must discuss, with references to the record, how each of its reasons for denial satisfies the criteria stated in the statute. See *Quarry Knoll II Corp. v. Planning & Zoning Commission, supra,* 256 Conn. at 729-31, 780 A.2d 1.

The statute eliminates the traditional judicial deference to commission factual findings. Regarding the statutory criterion of a "substantial public interest in health or safety," the Commission must identify the type of harm that allegedly will result from approval of the application and the probability of that harm. See *Kaufman v. Zoning Commission,* 232 Conn. 122, 156, 653 A.2d 798 (1995).

Finally, the statute requires the court to conduct an independent examination of the record and to make its own determination with respect to the second, third, and fourth criteria of subsection (g). See *Quarry Knoll II Corp. v. Planning & Zoning Commission, supra,* 256 Conn. at 727, 780 A.2d 1. It is incumbent upon the Commission to first establish the correctness of its decision. If such a demonstration is made, it is then incumbent upon the court to conduct a plenary review pursuant to the last three prongs of the statute.

3. Review of Commission's Denial of Application II

In this case, the Commission made a number of detailed findings regarding the proposed development that can be summarized as follows: (1) the proposal is incompatible with the local and state plan of development and the preservation of Oswegatchie Hills as open space; (2) the site is unsuitable for high-density multi-family housing because it (a) lacks infrastructure and capacity to provide adequate water and

sewer, (b) has poor soil characteristics and (c) no motor vehicle access; (3) the proposal would adversely impact Long Island Sound, the Niantic River and surrounding woodland habitats; (4) the affordable housing units are not comparable to the market-rate units; and (5) the application does not comply with Section 32 of East Lyme's affordable housing regulations because it lacks necessary information required by the regulations.

a. The record establishes that there is more than a mere theoretical possibility of a specific harm to the public interest if the application is granted

The court first examines "whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of specific harm to the public interest if the application is granted." *River Bend Associates, Inc. v. Zoning Commission, supra,* 271 Conn. at 26, 856 A.2d 973. In this case, the record establishes beyond reasonable dispute that the plaintiffs seek to develop a piece of property that includes and borders upon natural resources of significant value to both the residents of East Lyme and the State as a whole. The proposed development contemplates the construction of scores of condominium units that are within several hundred feet of the Niantic River. The Niantic River itself is part of the coastal resources of Long Island Sound, which "form an integrated natural estuarine ecosystem which is both unique and fragile." See General Statutes § 22a-91(1). The proposed development also contemplates significant development activity both within and adjacent to a coastal boundary, as defined in General Statutes § 22a-94. In addition, the property borders on Latimers Brook and contains significant areas of wetlands. There is also a long-standing public interest in preserving the Oswegatchie Hills area as open space.

***11** There is substantial and significant evidence in the record regarding more than a mere theoretical possibility of specific harm to these interests posed by the proposed development. For example, the record contains evidence that the development, even phased in as proposed in Application II, would cause increased nitrogen loading to the Niantic River thereby adversely and significantly impacting eel grass growth, as well as shellfish and fish habitats. (Exhibit 24.) The record contains substantial evidence that the alterations to the site-including the construction of building structures, access roads, and septic systems-would significantly impact coastal resources, as well as water quality in both the Niantic River and Latimer Brook. The court cannot ignore this evidence or conclude that it raises only a theoretical possibility of harm. Finally, it is clear that the proposed development would severely impact the public interest in preserving this unique and important property as open space. Accordingly, the court concludes that the record establishes more than a theoretical possibility, but not necessarily a likelihood, of specific harm to the public interest if Application II is granted.

b. The reasons set forth by the Commission in denying Application II are legally and factually adequate

The court now must fully review the record and determine independently whether the Commission's decision was necessary to protect substantial interests in health, safety or other matters that the Commission legally may consider. Accordingly, the court turns to the specific reasons given by the Commission in its denial of Application II.

(i) Preservation of the property as open space

The first reason provided by the Commission was the significant public interest in preserving the property as open space. Judge Quinn addressed this issue at some length in her decision upholding the denial of Application I: "The [C]ommission concluded that the proposal was incompatible with the local and state plans of development for the area, which all sought to preserve and protect Oswegatchie Hills as open space. The record reflects a long history of efforts to preserve this area for such purposes beginning with the preparation of the comprehensive plan for the town in 1967. Some years later, in 1974, the Conservation Commission along with the Southeastern Connecticut Regional Planning Agency developed an open space acquisition plan including this area. In a 1977 report by the town's Land Use and Natural Resources Subcommittee of the Planning Commission, the committee recommended that this area should be purchased outright by the Town or protected by easement against development. In 1987, the first selectman sought assistance from local state representatives to secure legislation and/or appropriations to preserve the areas. East Lyme's 1987 revision to its plan of development again lists the area as a target for preservation. The State legislature in 1987 designated the area as a 'Conservation Zone' and established the Niantic River Gateway Commission, which has as its purpose development of minimum standards to preserve the character of the area.

***12** "In 1990, the area was rezoned for lower density as a rural residential (RU-120) zone, requiring a three-acre minimum lot size. As true today as it was at that time, the first selectman wrote: 'If ever there was a place that nature never intended to be developed, the east slope of the Oswegatchie Hills is that place. Nowhere else is the land less suitable for construction, the natural resources on and adjacent to the land more susceptible to damage, and the public benefits to be gained from preservation greater.' Efforts to later change the zoning to require five-acre building lots failed, after a court determination that there was improper publication of the effective date of the zone change. *Wilson v. Zoning Commission,* 77 Conn.App. 525, 823 A.2d 405 (2003).

"In addition to local preservation efforts, there was also substantial evidence that the application was inconsistent with state and regional plans of development. The [Department of Environmental Protection] reported that the application was inconsistent with the Coastal Management Act, the Municipal Coastal Program and the Harbor Management Plan as well as with the Town of East Lyme Plan of Development. The Southeastern Connecticut Council of Governments stated that the zone change was inconsistent with the regional plan of conservation and development of 1997, which had classified the areas for low-density development and conservation. Area residents were opposed, with over 1700 signatures collected on various petitions to preserve the Oswegatchie Hills area." *Landmark Development v. East Lyme Zoning Commission, supra,* Superior Court, Docket No. CV 02 0520497.

In addition to the facts marshaled by Judge Quinn, the record in the present appeal contains evidence that demonstrates ongoing preservation efforts. For example, at the municipal level, the August 5, 2004, Planning Commission Report concluded that the proposed development continued to be inconsistent with the Plan of Conservation and Development. (R105 and Exhibit 21.) At the State level, the 2004-2009 Recommended Conservation and Development Plan issued by the Intergovernmental Policy Division of the Office of Policy and Management concluded that the Oswegatchie Hill's area should be redesignated as a Conservation Area that would correspond and supplement the Niantic River Gateway Commission's Conservation Area (in which a large portion of the applicants' property already falls). (R31.)

The applicants contend, as they did in the prior appeal, that despite the availability of a one million dollar grant in state aid in 1987, the Town has never seen fit to acquire the land for preservation. In the applicants' view, the Town has instead attempted to so heavily regulate the property that it can achieve preservation of the land as open space without having to incur the costs to acquire it.

The court does not share the applicants' view for several reasons. First, there is no evidence in the record that this state financial assistance alone would have been sufficient to purchase the property, which undoubtedly remains highly valuable even if it can only be developed at a lower density than that proposed by the applicants here. Second, the applicants are, in essence, trying to morph a regulatory takings claim into an assertion that they are entitled, as a matter of law, to approval of this specific project.

***13** Moreover, as Judge Quinn concluded, the "lengthy history of preservation efforts alone make it apparent that the area has been under consideration for conservation due to its unique features for a long time. In addition, it is precisely some of the site's unique features, its fragile soils and rocky slopes as well as any development's impact upon the water resources which make it physically less suitable for dense development than other areas of the town." *Landmark Development v. East Lyme Zoning Commission, supra,* Superior Court, Docket No. CV 02 0520497. Although the Town may not have been able to muster the financial resources to acquire the property itself either through purchase or condemnation, that fact alone does not convert this unique and fragile property into an appropriate location for the type of high density development proposed by the applicants.

In *Christian Activities Council, Congregational v. Town Council,* 249 Conn. 566, 597, 735 A.2d 231 (1999), the Connecticut Supreme Court found that preservation of open space can, in the appropriate circumstance, constitute a substantial public interest that may outweigh the public interest in the creation of public housing. As with the conclusion in *Christian Activities Council* with respect to the property in that case, the court here concludes that State and Town interests in preserving Oswegatchie Hill, or significant portions thereof, has been more than an idle or passing thought.

Finally, the applicants claim that its proposal to set aside approximately 20 percent of the property as open space would be a site-specific modification that is adequate to address and protect the public interests in open space. The court concludes, and the record supports,[9] that this modification,

which lacks any specifics in the record,[10] is far from adequate to accommodate the very compelling public interest in preserving the property as open space. A 20 percent set-aside does not ameliorate the high density development of 80 percent of the property, nor adequately ensure the benefits from preservation and recreational that flow to the public if the property, or large portions thereof, are maintained as open space.

As a result, the court finds that the Commission has sustained its burden of proof that there are no modifications to this site-specific application (with the general density of development it proposes), that could accommodate the public interest in open space. The record supports the Commission's finding that the public interest in preserving the area as potential future open space outweighs the public interest in affordable housing, given the unique nature of the site.

(ii) The development is inconsistent with the policies and criteria of the Coastal Management Act

There is no dispute by the parties in this case, and the record is clear, that a significant portion of the property the applicants seek to develop lies within a coastal boundary. See General Statutes § 22a-94(b). In fact, the coastal boundary extends far beyond the 100-foot setbacks proposed by the applicants. Consequently, this appeal raises an important question regarding the applicability of the Coastal Management Act (the "CMA"), General Statutes §§ 22a-90 through 22a-212, and its relationship to the affordable housing statute. The court is not aware of any decisions addressing the interplay between the affordable housing statute and the CMA. In fact, the attorney for the applicants, who has extensive experience in zoning cases, stated at oral argument that he is unaware of any instance in which an affordable housing application has been filed regarding property that falls, at least in part, within a coastal boundary.

***14** In enacting the CMA, the General Assembly made a series of legislative findings that indicate a significant public policy in preserving and protecting the waters of Long Island Sound and its coastal resources. General Statutes § 22a-91. These finding include:

> (1) The waters of Long Island Sound and its coastal resources, including tidal rivers, streams and creeks, wetland and marshes, intertidal mudflats, beaches and dunes, bluffs and headlands, islands, rocky shorefronts and adjacent shorelands form an integrated natural estuarine ecosystem *which is both unique and fragile.*
>
> (2) Development of Connecticut's coastal area has been extensive and has had a significant impact on Long Island Sound and its coastal resources.
>
> (3) The coastal area represents an asset of great present and potential value to the economic well-being of the state, and there is a state interest in the effective management, beneficial use, protection and development of the coastal area ...
>
> (5) The coastal area is rich in a variety of natural, economic, recreational, cultural and aesthetic resources, but the full realization of their value can be achieved only by encouraging further development in suitable areas and by protecting those areas unsuited to development.
>
> (6) *The key to improved public management of Connecticut's coastal area is coordination at all levels of government* and consideration by municipalities of the impact of development on coastal resources ... when preparing plans and regulations and reviewing municipal and private development proposals.
>
> (7) Unplanned population growth and economic development in the coastal area have caused the loss of living marine resources, wildlife and nutrient-rich areas, have endangered other vital ecological systems and scarce resources.

(Emphasis added.) General Statutes § 22a-91.

In light of these findings, it is a stated public policy:

> "(1) To insure that the development, preservation or use of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water resources to support development, preservation or use without significantly disrupting the natural environment or sound economic growth.
>
> (2) To preserve and enhance coastal resources ...
>
> (3) To coordinate the activities of public agencies to insure that state expenditures enhance development while affording maximum protection to natural coastal resources and processes in a manner consistent with the state plan for conservation and development adopted pursuant to part I of chapter 297.

General Statutes § 22a-92.

The CMA expresses a strong preference for enhancing economic development and activities that are dependent upon proximity to the water and/or shorelands that are immediately adjacent to marine and tidal waters, while prohibiting or minimizing activities that are not marine dependent, particularly those that will adversely impact these fragile natural resources.

***15** Against the backdrop of these legislative findings, goals and policies, the General Assembly has mandated that municipalities specifically review zoning regulations, and changes thereto, that affect areas within the coastal boundary; see General Statutes § 22a-104(e); as well as site plans, plans and applications for activities and projects to be located fully or partially within the coastal boundary; see General Statutes § 22a-105; for compliance and consistency with certain provisions of the CMA.

As a preliminary matter, the Commission and the intervenors appear to argue that the applicants were obligated to file a separate coastal site plan application along with their affordable housing application. The applicants argue that no separate coastal site plan application was necessary, but concede that the Commission was obligated to review their application for compliance with the CMA, at least for those portions of the property that fall within the coastal boundary. Specifically, the applicants contend that a separate coastal site plan application was not required because an affordable housing application is not within the enumerated list of proceedings in § 22a-105(b) [11] that trigger coastal site plan review.

This court concludes that the applicants were not obligated to file a separate coastal site plan application in addition to the affordable housing application, but that the affordable housing application must contain sufficient information for the zoning authority to evaluate the development's compliance with the CMA. In *Fort Trumbull Conservancy v. Planning and Zoning Commission,* 266 Conn. 338, 348-60, 832 A.2d 611 (2003), the Connecticut Supreme Court addressed a similar question in deciding whether an application pursuant to General Statutes § 8-24 for approval of certain municipal improvements required a separate coastal site plan application if the property falls within a costal boundary. The Supreme Court concluded that no separate site plan application was required. "[A] coastal site plan review under the act is to be conducted as part of the planning and zoning applications ... and not as a separate application or proceeding ... The act envisages a single review process, during which proposals for development within the coastal boundary will simultaneously be reviewed for compliance with local zoning requirements and for consistency with the policies of planned coastal management." (Internal quotation marks omitted.) *Fort Trumbull Conservancy v. Planning and Zoning Commission,* 266 Conn. 538-39.

It is true that affordable housing applications are not among the zoning commission proceedings that are explicitly denominated in § 22a-105(b) as requiring coastal site plan approval. As discussed at length above, an affordable housing application seeking approval of a specific plan of development may not fall squarely within the traditional proceedings that are conducted by zoning commissions, particularly if the proposal does not conform to existing zoning regulations. See *Wisniowski v. Planning Commission, supra,* 37 Conn.App. at 317, 655 A.2d 1146. On the other hand, an affordable housing application will usually contain an implicit request for a zone change as to use, thereby implicating § 22a-104(e), which requires that the zoning agency consider the criteria and policies of the CMA in its decision. In any event, given the critical public policies outlined by the CMA, it is inconceivable that the legislature would have intended that affordable housing projects be exempt from coastal site plan review, particularly since such affordable housing projects typically propose high-density development with the attendant environmental risks that such development entails.

***16** In its brief, the Commission contends that the applicants did not submit sufficient information to decide whether the project was consistent with the policies and criteria of the CMA. See General Statutes §§ 22a-92 and 22a-102. Nevertheless, the Commission, as required by statute, notified the Department of Environmental Protection (the "DEP"), which made comments critical of the application. Despite the Commission's concern about the lack of information submitted by the applicants, the Commission ultimately concluded that the proposed development was inconsistent with the CMA. Accordingly, the court finds that the Commission had sufficient information to conduct the review required by the CMA. [12]

The Commission made specific findings, with citations to the record, regarding the manner in which the proposed development was inconsistent with the policies and criteria

of the CMA. First, the Commission noted that many of the development's physical characteristics would adversely impact coastal resources if the property was developed at the high-density rate proposed by the applicants. These characteristics included the site's steep slopes and bedrock soils in close proximity to the Niantic River; the necessity for clear cutting and blasting on the site; erosion and groundwater run-off into the Niantic River; and the fragile nature of many of the coastal resources and habitats within the coastal boundary. In addition, the Commission found that the proposed development did not adequately provide for future water-dependent uses and access for the public to future water dependent uses. Finally, it is obvious that a condominium development is not itself a water dependent use and is therefore not the type of development activity encouraged by the CMA.

These conclusions find substantial support in the record. The Commission considered extensive evidence from a variety of sources that support its findings regarding the steep topography of the land, the extensive bedrock at the site, the poor soil conditions, the likelihood of increased nitrogen loading to the Niantic River, the detrimental effect of high density development to shellfish habitats, and other adverse effects to coastal resources. The sources of this information included the Town's Planning Commission, a marine scientist, the Waterford East Lyme Shellfish Commission, a biology professor from Connecticut College, and interested citizens.

The applicants attack some of these evidentiary foundations by arguing that it presented contrary or better evidence. For example, the applicants contend that the only evidentiary basis for the conclusion regarding inadequate soils at the site is a county soil survey, which is not reliable evidence upon which the Commission could reasonably rely. This assertion is incorrect both legally and factually. First, evidence regarding the types of soils at the site came from a variety of sources, not just the county soil survey itself. The record is replete with information referring to the extensive presence of bedrock over significant portions of the site. This information was submitted by individuals, including those with expertise, who had performed field visits and actually walked the site. By way of example only, the DEP performed a field visit that revealed that throughout the property there was "till soils ... with very shallow depth to bedrock and exposed bedrock." In addition, a hydrogeologist hired by the Commission to review the proposal walked the site and noted that exposed bedrock was much more prevalent at the site than was reflected in the applicants' conceptual site plan. Although the applicants may have submitted evidence that it believes would support a contrary conclusion, the Commission can consider all of the reliable evidence in the record regarding the topography and soil types at the site. The issue for this court is whether there is substantial evidence in the record to support the conclusion that the Commission reached, not whether the applicants submitted any evidence to the contrary.

***17** Engaging in the coordination between public agencies required by the CMA, the DEP extensively reviewed the proposal and its submissions to the Commission are of particular note. In a letter to the Commission, dated August 24, 2004, the DEP concluded that the proposed development is "inconsistent with the policies and standards of the [CMA] based upon severe development constraints at the site, the proposal's unacceptable adverse impacts to water quality and coastal resources, as well as inconsistency with ... the Town's Plan of Development, Municipal Coastal Program and Harbor Management Plan." The DEP also found that any reduction in "overall potential density" that had been proposed in Application II "will not significantly alleviate any of the potential adverse impacts to coastal resources, water quality, submerged aquatic vegetation, finfish, shellfish and wildlife on the Oswegatchie Hills site ... and in the Niantic River and Latimer Brook."

The DEP concluded that there would be "significant environmental consequences." The shallow depth to bedrock and steep slopes "would mandate significant alterations of the site to provide suitable land for road access, septic systems or water and sewer service and inhabited structures. Such alteration of this natural area and associated runoff would significantly impact coastal resources and water quality along the river ... [and] cause sedimentation and erosion, nitrogen loading and impacts on submerged aquatic vegetation, finfish, shellfish and wildlife on the site and in the Niantic River and Latimer Brook."

The DEP also noted that the 100-foot set back proposed in Application II would not ameliorate the significant environmental consequences of the development, in part because the setback applies only to residential units and does not include restrictions on clear cutting or other ground disturbances.

At the conclusion of its analysis, the DEP indicated that the information submitted by the applicants was incomplete at best. The DEP, however, provided an opportunity for

the applicants to provide additional information about the proposal and to address its stated concerns. The DEP then met with the applicants and received additional information for its consideration.

The applicants, however, were unable to change the DEP's position regarding the proposal and its inconsistency with the policies and criteria of the CMA. In a letter to the Commission dated September 29, 2004, the DEP indicated that the additional submissions were both incomplete and inadequate, and had done little to change the DEP's strongly held view that Application II is inconsistent with the CMA.

Stymied by the strength of this evidence and the DEP's strong opposition to the proposed development, the applicants argue that the DEP's submission is unreliable because the author of these letters did not personally appear at the public hearings. The applicants, however, did not take any steps to compel any DEP representative to appear at the hearing despite knowing that the letters had been admitted into the record and were quite damaging to its chances of receiving approval. See *Timber Trails v. Planning and Zoning Commission,* 99 Conn.App. 768, 780-81, 916 A.2d 99 (2007).

***18** The applicants conceded at oral argument to this court that the Commission could properly rely on this evidence, yet argue that the evidence should be entitled to little weight in this court's plenary review of the record. The court disagrees. If the applicants had wished to undermine the credentials of DEP employees, or the strength of the DEP's technical analysis of the proposal, they could have compelled DEP representatives to attend in order to cross-examine them on the relevant issues. This court can only infer that such testimony would not have been significantly helpful-and might even have been damaging-to the applicants' chances of success.

The court therefore concludes that there is substantial evidence in the record that the proposal is inconsistent with the criteria and policies of the CMA. The court also concludes that the applicants have received numerous opportunities to make site-specific modifications to the proposed development to address its lack of compliance with the CMA. It is clear to this court that such modifications are not possible in light of the specific nature of the site and the high-density development which is at the heart of the application. Finally, the court concludes, and the record supports, that the public interest in protecting the unique nature of the site, including, but not limited to, those portions within the coastal boundary, outweighs the public interest in affordable housing.

(iii) The unavailability of water and sewer at the site

The court next reviews the Commission's conclusion that denial of the application was warranted in light of the unavailability of water and sewer to service to the development at the high-density rates proposed by the plaintiffs. The court finds that the application was properly denied on this basis.

The applicants do not appear to dispute that a commission may properly reject an affordable housing application if the development proposed will have inadequate water and sewer facilities to serve the development. Obviously, there is a substantial and compelling public health and environmental interest in ensuring that a large, high-density development such as the one proposed here has adequate water and sewer services. Courts that have addressed this issue are in agreement with this fundamental fact. See, e.g., *Greene v. Ridgefield Planning & Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 90 0442131 (Jan. 6, 1993, Berger, J.) [8 Conn. L. Rptr. 137]; *D'Amato v. Orange Planning and Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 92 0506426 S (Feb. 5, 1993, Berger, J.) [10 Conn. L. Rptr. 444]; *Halter Estates Senior Community, LLC v. Bethany Planning and Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 06 4010191S (May 3, 2007, Schuman, J.).

At the outset, it is important to note that Judge Quinn thoroughly reviewed the adequacy of the sewer and water services in upholding the denial of Application I. Judge Quinn's thorough analysis of the issue bears repeating: "The first application filed by Landmark proposed that the development would be served by municipal sewer and water. The Commission found that the site lacked the infrastructure to provide such water supply and sewer capacity. The director of Public Works reported that the availability of such services was restricted. First, the town system did not extend to the site. Second, the town is under a consent order issued by the State Department of Environmental Protection that prevents extension of the water service area. While the town may submit a written request for extension, it must await the Commissioner's written decision prior to enacting any additional ordinances. In addition, when the town identified

what areas of the town 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 and any expansion would require no services to areas to which sewers were now committed. And although Landmark stated it could connect to the Boston Post Road extension, the Chairman of the Water and Sewer Commission testified that this was not correct. There is substantial evidence in the record that municipal water and sewer service will not be extended to the property.

***19** "The commission determined that since such services were not available, this militated against the proposed zone change and the density of development the application envisioned. Indeed, in the town plan of conservation and development of 1999, a stated objective is that the town 'should continue to provide for multi-family housing ... to meet a portion of the regional need for a variety of housing types available at affordable cost.' It recommends that housing sites to be considered should generally be 'free of major site development constraints such as wetlands, bedrock, steep slopes and primary aquifers and within the boundaries of or readily connected to the municipal water and sewer service area.' Such site development constraints, the court concludes, with the exception of primary aquifers, are all present in the land that is the subject of this affordable housing application. Such development would be contrary to the town plan, as noted by the supervisory sanitary engineer for the water management bureau of the Department of Environmental Protection.

"In its modified application, Landmark in the alternative, proposed on-site water supply wells and sewer. The commission found that such systems are rarely allowed by the State Health Department or the Department of Environmental Protection, and only when there is clear evidence that such systems can be supported by the site and function properly ..." *Landmark Development v. East Lyme Zoning Commission, supra,* Superior Court, Docket No. CV 02 0520497.

With a few minor exceptions, the applicants have not modified the proposal that Judge Quinn reviewed, as it relates to the provision of water and sewer services. Instead, the applicants argue that Judge Quinn's conclusions regarding this issue are fatally flawed because she relied upon two incorrect premises: (1) that the Town's sewer shed does not extend to the property; and (2) the DEP rarely gives out permits for community septic systems. The applicants contend that the record with regard to Application II establishes that both of these facts are not true and, therefore, the Commission's decision to deny the application on the basis of the unavailability of water and sewer at the site must be overturned.

Although the court agrees that the record here demonstrates that a portion of the property may be within the sewer shed, that fact alone does not undermine either Judge Quinn's decision or the Commission's decision regarding Application II. The Commission thoroughly re-reviewed the question of the availability of municipal water and sewer at the site, including a consideration that a portion of the property falls within the sewer shed.

With respect to the issue of water service, the Commission considered the conclusions from the Director of Public Works that "[w]ater from the East Lyme system is not available to serve the site as proposed." (Exhibit 59, 114.) The Commission also considered information that any additional purchases of water from New London were already allocated to an existing neighborhood not far from the applicants' property. (Exhibit 59, 114.) The site also did not front on any existing water main and there is no existing infrastructure available to supply the site. Thus, the Commission properly concluded that the development would still lack appropriate access to available municipal water services.

***20** The Commission considered similar evidence regarding the availability of municipal sewer services at the site. First, the Commission heard evidence that while a portion of the property may be within the sewer shed, the majority of the property is not. Even with respect to the portion of the property that falls within the sewer shed, the provision of municipal sewer was problematic because the Town's Facilities Plan designated that any sewerage from this area flow eastward to Waterford. The amount of sewerage that Waterford would accept is limited and already allocated to existing homes. Moreover, there was no sewer infrastructure available to the portion of the property within the sewer shed and the Town was not legally obligated to extend the sewer and necessary infrastructure to the applicants' property. See *Avalon Bay Communities, Inc. v. Sewer Commission,* 270 Conn. 409, 43-32, 853 A.2d 497 (2004).

Importantly, the DEP was of the view that "the extension of sewers into [areas of the applicants' property not within the sewer shed] to foster new development would likely be disapproved by [the] DEP, because such an extension would conflict with the state's Plan of Conservation and

Development ..." These facts, along with the fundamental reality that the majority of the property is not within the sewer shed, makes it significantly unlikely that municipal sewer services could ever adequately serve the property, particularly at the density proposed by the applicants.

The court now turns to the applicants' claim that on-site wells and a community septic system would be adequate to serve the site. Specifically, the applicants contend that Judge Quinn's decision is incorrect because she was under the misapprehension that the DEP rarely issues permits for community septic systems. Instead, the applicants argue, onsite wells and a community septic system are feasible and that the Commission should grant the application and condition the grant on obtaining the necessary regulatory approvals for on-site wells and a community septic system. The applicants cannot prevail on this claim.

There is substantial evidence in the record demonstrating that it is highly unlikely that the applicants could obtain appropriate regulatory approvals for a community septic system. In addition, to the evidence discussed above regarding the soil types and steep slopes on the site, the Commission heard testimony specifically describing how these site characteristics would negatively affect and limit the potential for on-site waste water disposal. Installation of a community septic system would require blasting of bedrock that would in turn result in groundwater contamination. Groundwater contamination in turn would increase the potential for cross-contamination of on-site wells. A hydrogeologist explained that fractures in the bedrock, and the directions in which they run on the site, "could result in partially treated effluent with pathogenic bacteria getting into the fractures and contaminating either the on-site wells or offsite wells to the north." (Exhibit X, p. 136.)

***21** Approval by both the DEP and the Department of Public Health is necessary for a community septic system. In this case, there is substantial evidence that the DEP was highly unlikely to give the necessary approval. The DEP, in repeated correspondence with both the Commission and the applicants, expressed its concerns that major site development constraints exist at the site. Although the DEP repeatedly asked the applicants for additional information on this issue, there is nothing in the record to indicate that anything submitted by the applicants was sufficient to change the DEP's views on this subject, particularly in light of the fact that a portion of the property was within the coastal management zone. In fact, the DEP informed the applicant that it still had not provided the additional information sought, and that, in any event, the DEP did not "anticipate our overall comments and recommendations to the Commission to change given the overall site plan remains the same."

The applicants rely heavily on a statement in the record made by a DEP representative that "it is most likely that the proposed community system will require a lateral sand filter and a wastewater treatment plant to meet the Department's criteria for large scale on-site waste water systems." The applicants in their brief contend that this statement "can be reasonably regarded only as indication that on-site water disposal was possible, not impossible."

The court does not agree with the applicants' characterization of this statement. Taken in context, it is clear that DEP was trying to communicate to the applicant that the site plans it had reviewed depict only a more conventional septic system, which obviously was not adequate in light of the site's characteristics. Although the DEP did not and could not take the position that it would refuse to consider a significantly redesigned proposal, there is nothing in these statements that undermined the Commission's conclusion, based upon the extensive evidence in the record, that an on-site community septic system was extremely problematic, at best. (Exhibit 119.)

It is true that while the applicants have presented some evidence to dispute the conclusions of the Commission regarding Application II, as Judge Quinn correctly noted in reviewing Application I, the key question is whether there is substantial evidence in the record supporting the Commission's decision. As noted in *Samperi v. Inland Wetlands Agency,* 226 Conn. 579, 588, 628 A.2d 1286 (1993), "the possibility of deriving two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Just as Judge Quinn concluded that there was substantial evidence in the record to support the Commission's decision regarding Application I, this court concludes that the record regarding Application II supports the Commission's conclusion. The court also concludes that the public's interest in ensuring the adequate provision of water and sewer services in this instance clearly outweighs the need for affordable housing. Again, because of the site-specific nature of the application, there were no specific modifications that could be made to accommodate these public interests and provide affordable housing at this site.

III. CONCLUSION

***22** In *Mackowski v. Planning & Zoning Commission,* 59 Conn.App. 608, 757 A.2d 1162 (2000), citing *West Hartford Interfaith Coalition, Inc. v. Town Council, supra,* 228 Conn. at 513, 636 A.2d 1342, the Appellate Court stated that an agency's decision in "an affordable housing land use appeal, as in a traditional zoning appeal ... must be sustained if *even one* of the stated reasons is sufficient to support it." (Emphasis added.) As discussed above, the Commission properly denied Application II with respect to at least three reasons. It is therefore unnecessary to reach the remaining issue. The plaintiffs' appeal is therefore dismissed.

Judgment shall enter accordingly.

Parallel Citations

45 Conn. L. Rptr. 63

Footnotes

1 Some of the procedural history has been adopted from *Landmark Development v. East Lyme Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 02 0520497 (Sep. 7, 2004, Quinn, J.).

2 Because Application II did not, in the Commission's view, contain a "site plan," the Commission decided to treat Application II as containing three parts: (1) an application for a text amendment to the zoning regulations; (2) an application for a zone change; and (3) an application for approval of an "Affordable Housing Development." Throughout this appeal, the plaintiffs dispute the Commission's characterization and treatment of Application II. The plaintiffs contend that Application II is best characterized as an application for a specific affordable housing plan and not necessarily as a resubmission of an application for a text amendment and zone change to the zoning regulations. As discussed later, the Court agrees with the plaintiffs that they were entitled to submit a stand-alone affordable housing application.

3 A site plan has been further described as "a physical plan showing the layout and design of a proposed use, including structures, parking areas and open space and their relation to adjacent uses and roads, and containing the information required by the zoning regulations for that use." *Connecticut Resources Recovery Authority v. Planning & Zoning Com'n, supra,* 46 Conn.App. at 566, 570, 700 A.2d 67.

4 The Commission does not agree with the intervenors' claim.

5 The intervenors again improperly confound this court's subject matter jurisdiction with the subject matter jurisdiction of the Commission. The court, therefore, treats this claim solely as an attack on the Commission's jurisdiction.

6 The record in this appeal does indicate that the application filed by Landmark and Jarvis was filed with the Town Clerk at least ten days before the public hearings commenced on the application. The application included an overall site plan (Drawing No. 0-1) as well as property boundary maps (B-1, B-2, and B-3). Although these plans and maps may or may not comply with the requirements of § 8-3(a); see *City of Bridgeport v. Plan and Zoning Comm'n, supra,* 277 Conn. at 276-80, 890 A.2d 540; the public had actual notice of the property that is the subject of the application.

7 It is true, as discussed later, that the differences in the proposal were not so substantial that the Commission was obligated to grant Application II. Nevertheless, it appears that the Commission viewed the changes as sufficiently material to warrant a second look.

8 On the other hand, it is also true that Judge Quinn's decision's need not be totally disregarded by this court. In reaching her decision, Judge Quinn analyzed a proposal that is quite similar to the present one. For example, Judge Quinn reached certain conclusions regarding the historical efforts to preserve the property as open space. That history has not changed from the time Application I was filed to time Application II was filed. Consequently, although the issues are not necessarily identical for collateral estoppel purposes, much of Judge Quinn's decision remains quite relevant.

9 See, e.g., ROR 104.

10 At oral argument, counsel for the applicants could not specify the manner in which 20 percent of the property would be preserved or how the public might have access to those portions of the property.

11 Section § 22a-105(b) provides in relevant part: "The following site plans and applications for activity or projects to be located fully or partially within the coastal boundary ... shall be defined as 'coastal site plans' and shall be subject to the requirements of this chapter: (1) site plans submitted to a zoning commission in accordance with section 22a-109; (2) plans submitted to a planning commission for subdivision or resubdivision in accordance with section 8-25 or with any special act; (3) applications for a special exception or special permit submitted to a planning commission, zoning commission or zoning board of appeals in accordance with section 8-2 or with any special act; (4) applications for a variance submitted to a zoning board of appeals in accordance with subdivision (3) of section 8-6 or with any special act, and (5) a referral of a proposed municipal project to a planning commission in accordance with section 8-24 or with any special act."

12 The Commission also contends that the more deferential standard of review that applies in affordable housing appeals should not apply when reviewing the Commission's determinations regarding whether the proposed development is consistent with the criteria and policies of the CMA. The court concludes that it is not necessary to reach this issue because even under the more rigorous standard of review required by § 8-30g the Commission's CMA analysis must be upheld.

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2011 WL 5842576
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Britain.

LANDMARK DEVELOPMENT GROUP, LLC et al.
v.
EAST LYME ZONING COMMISSION.

No. HHBCV064016813S.
|
Oct. 31, 2011.

Opinion

STEPHEN F. FRAZZINI, Judge.

***1** This case is the third judicial appeal from the denial of a land use application by the plaintiffs under the affordable housing statute, General Statutes § 8–30g. [1] The plaintiffs (who will be referred to throughout as "Landmark") are owners of approximately 236 acres of land in an area of East Lyme known as Oswegatchie Hills, a tract of land bordering the Niantic River near Long Island Sound. In the previous appeals, courts upheld denials by the defendant of (i) plaintiffs' amended application in 2002 for amendments to the town's zoning regulations and a zone change for their property [2] and (ii) plaintiffs' application in 2004 to build 352 dwellings that would have included affordable housing on certain portions of their land. [3] In the present case, Landmark appeals a decision by the defendant denying an application in 2005 for an amendment to the town's zoning regulations, a zone change for the property, and approval of a preliminary site plan for 840 residential units that would include affordable housing. Two intervening parties, Save the Hills, Inc., and Friends of Oswegatchie Hills Nature Preserve, Inc., (hereinafter, the "intervenors") also participated in these proceedings. The parties and intervenors appeared with counsel for trial of this matter on October 29, 2010, after which the matter was continued for a site visit by court and counsel on December 6, 2010. Trial concluded on January 6, 2011, after the court and counsel spent some time reconstructing the record originally submitted to the court in order to provide clearer copies of certain exhibits. The matter is now ready for decision. [4]

I—JURISDICTION

A—Aggrievement and Standing

As in any administrative appeal, the court must first consider the questions of aggrievement and standing. "[P]leading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an administrative appeal ... It is [therefore] fundamental that, in order to have standing to bring an administrative appeal, a person must be aggrieved." (Citation omitted; internal quotation marks omitted.) *Bongiorno Supermarket, Inc. v. Zoning Board of Appeals,* 266 Conn. 531, 537–38, 833 A.2d 883 (2003). Under General Statutes § 8–30g(b)(2)(f), "[a]ny person whose affordable housing application is denied ... may appeal such decision pursuant to the procedures of this section." At the hearing before this court, the parties stipulated that, at the time of the public hearings and the time of trial before this court, the plaintiffs owned the property in question. Transcript of proceedings, January 6, 2011, at 59. The plaintiffs are thus aggrieved by the defendant's decision; *Quarry Knoll II Corp. v. Planning & Zoning Commission,* 256 Conn. 674, 703, 780 A.2d 1 (2001) (holding that a court can find aggrievement based upon a plaintiff's status as owner or contract purchaser); and have standing to bring this appeal under § 8–30g.

***2** In order to qualify as an affordable housing development covered by the affordable housing statute, a development must set aside 30% of the total number of units. § 8–30g(a)(6). Of this 30%, 15% must be affordable for individuals making 80% of the area median income and 15% must be affordable for individuals making 60% of the area median income. *Id.* All affordable units must be conveyed by deeds requiring the units to remain affordable for forty years. The plaintiff's application satisfies these requirements. Moreover, the affordable housing statute only applies if less than 10% of the housing in the municipality qualifies as affordable. At the time the application was submitted, less than six percent of East Lyme's housing qualified as affordable, thus subjecting the parties to the law and procedures set forth in § 8–30g.

B—Timeliness and Service of Process

Appeals under the affordable housing statute apply the time periods for filing set forth in General Statutes §§ 8–8, 8–9, 8–28, or 8–30a, as applicable. See General Statutes § 8–30g(f). Pursuant to General Statutes sections 8–8(b),[5] 8–8(f)(2)[6] and 52–57(b)(5),[7] an affordable housing appeal must be commenced by service of two copies of process on the clerk of the municipality within 12 days from the date that the commission's notice of decision is published and, pursuant to General Statutes §§ 52–46 and 52–48, at least 12 days but no more than two months before the return date.[8] The plaintiffs have pleaded and the defendant admits that notice of the decision was published on December 14, 2005. A marshal's return appended to the appeal shows that two copies were served on the East Lyme town clerk on December 23, 2005, and one copy that same day on each of the authorized agents of service for the two intervenors. The appeal was filed with the clerk of the superior court for the judicial district of New London on January 9, 2005. This appeal, therefore, is timely and the proper parties were served, pursuant to Connecticut General Statutes §§ 8–8(e) and 8–30(g).

II—PROCEDURAL HISTORY

A—First Applications and Judicial Appeal

Landmark filed its first affordable housing application for the Oswegatchie Hills site in December 2001 by applying for an amendment to the East Lyme zoning regulations to create a new "affordable housing district" and simultaneously seeking a zone change to that newly-proposed zone for approximately 236 acres of land in Oswegatchie Hills. The application proposed to use municipal water and sewer for the development. After three days of hearing, the defendant denied those applications. As recounted in the first judicial appeal,

> The Commission ... cited a total of five reasons: (1) the proposal was incompatible with the local and state plans of development for the area, which sought to preserve and protect Oswegatchie Hills as open space; (2) the site was inadequate as to the available infrastructure for water and sewer at a capacity to make the proposed dense development feasible, (3) the development at the density proposed could result in substantial damage to the ecosystem of Long Island Sound and the Niantic River; (4) similar damage would occur to Latimers Brook in the North; and (5) the volume of traffic generated by development at the proposed density levels would cause unsafe conditions for motorists and exceed current roadway capacity because of restricted access to the site. The commission stated that denial was necessary for four related reasons: (1) to protect the public's substantial interest in the preservation of open space; (2) to protect the public's health due to the limited facilities for water and the disposal of sewage; (3) to protect public safety as to traffic conditions; and (4) to protect the area waters from the fallout of dense development on the steep slopes and thin top soil of the Oswegatchie Hills and generally to protect the Oswegatchie Hills' fragile ecosystem which could not be properly insulated from the effects of such dense development. Based on these reasons, the commission also denied the amendments to the zoning regulations.

***3** *Landmark Development v. East Lyme Zoning Commission,* Superior Court, judicial district of New Britain, docket no. CV 02–05204975 (September 7, 2004) (Quinn, J.) ("Appeal I").

Landmark then submitted an amended request, which the defendant denied after public hearing, and on October 29, 2002, Landmark brought Appeal I. In dismissing that appeal, the court, Quinn, J., found that the defendant's decision

was "based on the substantial public interests in preserving the Oswegatchie Hills area as open space, protection of the public's health due to the limited facilities for water and disposal of sewage, the adverse traffic conditions, the protection of area waters from the fallout of dense development on the slopes and thin top soil of the area as well as protection of the Oswegatchie Hills' fragile ecosystem. The commission properly concluded that these public interests clearly outweighed the need for affordable housing at this location. Because the reasons are site-specific, there were no reasonable changes that could have been made to accommodate the other adversely impacted public interests found." *Id.*

B—Second Application and Judicial Appeal

While Appeal I was pending, Landmark filed a new application (referred to here as Application II) seeking approval of a specific site plan for the building of 352 dwelling units, including affordable housing, that would be located in the middle of the northern half of the property. Some of the development would be in a coastal management area protected under General Statutes §§ 22a–90 through 22a–212, and all of it lay within portions of the Landmark property designated by the town as open space. The court's decision in the second judicial appeal describes the reasons that the defendant denied that application on January 6, 2005:

> Because the Commission treated Application II as including an application for a text amendment and a zone change, the Commission's decision is divided into three parts. First, the Commission concluded that any text amendment would be inadequate to protect the substantial public interests in health and safety and inadequate to promote affordable housing. Among other things, the Commission determined that the type of high density development contemplated by the application could only be supported by public water and sewer.
>
> Second, the Commission concluded that the application for any zone change contravenes substantial public interests in health and safety. The Commission's principal reasons for its conclusion can be summarized as follows: (1) the proposal is incompatible with the local and state plan of development and the preservation of Oswegatchie Hills as open space; (2) the site is unsuitable for high-density multi-family housing because it (a) lacks infrastructure and capacity to provide adequate water and sewer, (b) has poor soil characteristics and (c) no motor vehicle access; (3) the proposal would adversely impact Long Island Sound, the Niantic River and surrounding woodland habitats; and (5) the affordable housing units are not comparable to the market-rate units.
>
> *4 Finally, the Commission addressed the applicants' specific affordable housing plan. Recognizing that the proposed development need not be in strict compliance with East Lyme's existing zoning regulations, the Commission nevertheless concluded that the proposal must be denied for numerous reasons. These reasons included, by specific incorporation, each of the Commission's findings articulated in the portion of its decision denying a zone change. Additionally, the Commission concluded that the application does not comply with Section 32 of East Lyme's affordable housing regulations because it lacks necessary information required by the regulations.

Landmark Development v. East Lyme Zoning Commission, Superior Court, judicial district of New Britain, docket no. CV 05–4002278S (February 1, 2008) (Prescott, J.) [45 Conn. L. Rptr. 63].

On February 1, 2008, the court dismissed the plaintiffs' second appeal. On the open space issue, after noting Judge Quinn's discussion of "the long history of efforts to preserve this area for such purposes beginning with the preparation of the comprehensive plan for the town in 1967," Judge Prescott concluded that

> the plaintiff's proposal to set aside approximately 20 percent of the property as open space ... is far from adequate to accommodate the very compelling public interest in preserving the property as open space. A 20 percent set aside does not ameliorate the high density development of 80 percent of the property, nor adequately ensure the benefits from preservation and recreational that flow to the public if the property, or large portions thereof, are maintained as open space. As a result, the court finds that the Commission has sustained its burden of proof that there are no modifications to this site-specific application (with the general density of development

> it proposes), that could accommodate the public interest in open space. The record supports the Commission's finding that the public interest in preserving the area as potential future open space outweighs the public interest in affordable housing, given the unique nature of the site.

Id.

The court also noted that "a significant portion of the property the applicants seek to develop lies within a coastal boundary" protected by the Coastal Management Act (the "CMA"), General Statutes §§ 22a–90 through 22a–212. The court held that

> that there is substantial evidence in the record that the proposal is inconsistent with the criteria and policies of the CMA ... [M]odifications are not possible in light of the specific nature of the site and the high-density development which is at the heart of the application. Finally, the court concludes, and the record supports, that the public interest in protecting the unique nature of the site, including, but not limited to, those portions within the coastal boundary, outweighs the public interest in affordable housing.

Id.

Finally, the court found that the defendant had properly denied the application "in light of the unavailability of water and sewer to service to the development at the high-density rates proposed by the plaintiffs." The court observed that the first application had originally proposed using public water and sewer, but that Judge Quinn had concluded that "[t]here is substantial evidence in the record that municipal water and sewer service will not be extended to the property." When the applicants' modified submission of that first proposal had then proposed to use on-site water and sewage disposal, Judge Quinn concluded that "that such systems are rarely allowed by the State Health Department or the Department of Environmental Protection, and only when there is clear evidence that such systems can be supported by the site and function properly ..." *Landmark Development v. East Lyme Zoning Commission (I), supra.*

***5** In the second judicial appeal, the court noted that "the applicants have not modified the proposal that Judge Quinn reviewed, as it relates to the provision of water and sewer services. Instead, the applicants argue that Judge Quinn's conclusions regarding this issue are fatally flawed because she relied upon two incorrect premises: (1) that the Town's sewer shed does not extend to the property; and (2) the DEP rarely gives out permits for community septic systems. The court agreed that "a portion of the property may be within the sewer shed," but held "that fact alone does not undermine either Judge Quinn's decision or the Commission's decision regarding Application II." To the Landmark request that the application be granted conditionally upon obtaining DEP permits, the court held that

> there is substantial evidence in the record demonstrating that it is highly unlikely that the applicants could obtain appropriate regulatory approvals for a community septic system. In addition, to the evidence discussed above regarding the soil types and steep slopes on the site, the Commission heard testimony specifically describing how these site characteristics would negatively affect and limit the potential for on-site waste water disposal. Installation of a community septic system would require blasting of bedrock that would in turn result in groundwater contamination. Groundwater contamination in turn would increase the potential for cross-contamination of on-site wells. A hydrogeologist explained that fractures in the bedrock, and the directions in which they run on the site, "could result in partially treated effluent with pathogenic bacteria getting into the fractures and contaminating either the on-site wells or offsite wells to the north."

C—The Present Application

On June 2, 2005, while the appeal of the second application was pending, Landmark filed the present application (sometimes referred to herein as Application III) seeking approval of amendments to the town zoning regulations, a change of zone and approval of a preliminary site plan for an affordable housing development named Riverview Heights. The application consisted of a series of maps showing

the Landmark depiction of a "conventional subdivision" of 60 homes on three-acre lots in accord with the land's present zoning classification;

an "overall site plan" showing the location of 850 housing units in 24 buildings and 1,831 parking spaces on 35 acres on the western boundary of their property;

an "overall slope analysis plan" showing the land's topography;

an "overall open space plan" that showed 85.7 acres set aside as permanent open space;

A set of 14 maps and drawings showing Landmark's proposed development in more detail.

ROR, exhibits 8–12.

Other than a "boulevard style" [9] access driveway between the development and Calkins Road, all of the portion to be developed would be outside both the coastal management area and, Landmark claimed, any portion of the property designated by the town for open space.

*6 Landmark also proposed amendments to the town's recently adopted affordable housing district regulations that would

eliminate the requirements in the current regulations for (i) public water and sewer connections, (ii) "fall zones" between buildings, and (iii) buffer areas between an affordable housing development and other multi-family housing, and

modify the procedure for approval of an affordable housing development by establishing a three-stage process of conceptual, preliminary and final site plans and reducing the amount of information a developer would need to provide to the commission.

ROR, Exhibit 2, Comparison of Proposed Amendment to Existing AHD Regulations. Finally, Landmark sought rezoning of the entire parcel of 236 acres to an affordable housing district based on the proposed amendments.

Prior to public hearing on the application, the defendant acknowledged that its prior claim that all of the Landmark property was outside the town sewer boundaries was incorrect, and the town's Office of Water and Sewer Commission notified the zoning commission on September 1, 2005, that, although "the majority of the property is located in a sewer avoidance area," a portion of the property lay within town sewer shed. ROR, ex. 16. The maps submitted by Landmark with the application showed a sewer boundary line that ran north and south at distances of 250 to 700 feet from the eastern border of the Landmark property and that encompassed all of the parcel on which Landmark proposed construction of housing units. See ROR, exhibit 9. The sewer boundary that the Water and Sewer Commission now claimed to be the correct one was closer to the western edge of the Landmark property, however, and effectively dissected the area in which Landmark proposed to build, with approximately two-thirds of the proposed dwelling units inside the sewer shed area and the other third outside it. See ROR, exhibit 16C.

At the three public hearings held in August and September of 2005, the applicant argued that all the proposed construction lay within the town's sewer shed and that the entire property would have access to the public water. In response to previous commission decisions, sustained on appeal, that the property is not appropriate for on-site water and sewage disposal, Landmark submitted soil maps that it claimed showed the property was potentially suitable for a community septic system and on-site wells. Landmark also introduced evidence at the hearing that, after the commission's denial of Application II on January 6, 2005, based, in part, on lack of public water or sewer to serve the site and the inadequacy of the site for on-site water and septic, the commission had approved 600 units of senior housing on another location in East Lyme with similar soil types as found on plaintiffs' land, without requiring public sewers, and including on-site wells to supplement municipal water. Landmark representatives also stated during the hearing that, pursuant to the Commission's statutory authority to approve an affordable housing application with reasonable changes or restrictions; see General Statutes § 8–30g(g) and (h); [10] Landmark would agree to the Commission (i) limiting any rezoning to the 123 acres on which Landmark now proposed construction or open space, thereby eliminating the remainder of the property from the proposal [11] and (ii) requiring that any dwelling units be located inside the town's sewer boundary as drawn by the Water and Sewer Commission. [12] Landmark also told the commission that it would consider providing additional access to the development other than the currently proposed access drive. [13]

*7 On December 1, 2005, the East Lyme Zoning Commission voted (i) to deny the proposed amendments to the town's affordable housing zoning regulations, (ii) to approve with restrictions the rezoning of that portion of the plaintiff's land that lies within the town's sewer service district as drawn by the Water and Sewer Commission to an affordable housing district under section 32 of the town's existing zoning regulations, and (iii) to deny the applicant's request for approval of a preliminary site plan. ROR, ex. V.

III—DISCUSSION

A—Special Defenses

The court must first address the town's special defenses of res judicata and collateral estoppel based on the courts' decisions in the prior judicial appeals.[14] The town argues that "[t]his third application by the plaintiffs involves the same parties, the same property, the same proposed zoning regulations and the same proposed development ... [T]he major components of the earlier trial court decisions—the unavailability of public water and sewer, the necessity for those utilities in developing the property for affordable housing, and preservation of the property as open space as grounds for denying an affordable housing application—remain unchanged." Def.'s Br., at 17. Landmark responds that the present case involves a completely different application than was presented in the first two appeals. For much the same reasons as given by Judge Prescott in rejecting these defenses in Appeal II, however, the commission cannot prevail on these claims and this appeal is not barred by the doctrines of res judicata or collateral estoppel:

> First, it is firmly established that the denial of one application by a zoning commission does not necessarily bar a party from filing a second, but related, application regarding the same property. When a party files successive applications for the same property, a court makes two inquiries. The first is to determine whether the two applications seek the same relief. The zoning board determines that question in the first instance, and its decision may be overturned only if it has abused its discretion. If the applications are essentially the same, the second inquiry is whether there has been a change of conditions or other considerations have intervened which materially affect the merits of the matter decided. For an appellate court, the only question is whether the trial court's finding as to the zoning board's decision is clearly erroneous.
>
> (Internal alterations and quotation marks omitted; citations omitted.) Appeal II, *supra.*

Under the doctrine of res judicata, "a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim. A judgment is final not only as to every matter [that] was offered to sustain the claim, but also as to any other admissible matter [that] might have been offered for that purpose." *State v. Aillon,* 189 Conn. 416, 423, 456 A.2d 279, cert. denied, 464 U.S. 837, 104 S.Ct. 124, 78 L.Ed.2d 122 (1983). Under the transactional test used in civil matters,[15] the doctrine of res judicata does not bar the plaintiffs' application, as the transaction here is substantially different from the prior transactions. Landmark here presented a specific site plan, unlike the first applications, which consisted of proposals for a zoning amendment and zone change. The site plan for this application placed all the proposed housing units at the top of the ridge and outside the coastal management area, whereas the second application had dispersed development throughout the entire property and much of it lay within the coastal management area. As the Connecticut Supreme Court has held, a zoning board "may grant a second application which has been substantially changed in such a manner as to obviate the objections raised against the original application ..." *Rocchi v. Zoning Board of Appeals,* 157 Conn. 106, 111, 248 A.2d 922 (1968), and that is precisely what Landmark claimed to have done in this third application—"modified their Application in response to each of the Commission's prior objections." Pl.s' Br., at 32.

*8 The Commission here did not treat the application as precisely the same as earlier applications and refuse to consider it, but instead evaluated the third application on its merits, determined that the changes made from prior applications did not meet its concerns, and then denied the application. Here the Commission "appears to have concluded," just as Judge Prescott found it had done for the second application, "that the applicants were entitled to a [third] application regarding their proposed development."

> If the Commission believed that the applicants were not entitled to a "second bite at the apple" with respect to the project, the appropriate time to have made such a determination was when it was considering Application

> II, not on appeal to this court. If that had happened, this court would review that determination under an abuse of discretion standard. Because the Commission did not take that position but instead rendered a decision on an application that seeks different relief and contains material differences from a prior application, Judge Quinn's decision reviewing Application I, does not bar this court from reviewing the Commission's decision regarding Application II.

Appeal II. Although the defendant also claims that the proposed zoning amendments here are the same as those presented in the first applications, there was no evidence offered during this proceeding about the content of the amendments proposed in the first applications for the court to assess this claim.

Despite the enhanced level of review that a court undertakes in an affordable housing appeal, as opposed to other administrative appeals, the court's role remains *to assess the evidence in the record.* Collateral estoppel, sometimes referred to as "issue preclusion," prevents relitigation of issues or facts "actually litigated and necessarily determined in a prior action." *Aetna Casualty & Surety Co. v. Jones,* 220 Conn. 285, 296, 596 A.2d 414 (1991). "Furthermore, '[t]o invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding.' " *Mazziotti v. Allstate Ins. Co.,* 240 Conn. 799, 812, 695 A.2d 1010 (1997). The facts and issues "actually litigated and necessarily determined" in the prior judicial appeals were the sufficiency of the records in those cases to sustain the commission's prior decisions. The court here must determine the adequacy of the evidence on a different record.

On the other hand, Judge Prescott's conclusion that "Judge Quinn's decision need not be totally disregarded by this court" applies here to both prior judicial appeals, for the records below in all three cases, though different, also have marked similarities. This court agrees with his remark that "Judge Quinn reached certain conclusions regarding the historical efforts to preserve the property as open space. That history has not changed from the time Application I was filed to time Application II was filed. Consequently, although the issues are not necessarily identical for collateral estoppel purposes, much of Judge Quinn's decision remains quite relevant." Appeal II.

B—Standard of Review

*9 In *River Bend Associates, Inc. v. Zoning Commission,* 271 Conn. 1, 856 A.2d 973 (2004), the court set forth the standard for judicial review of an agency's decision regarding an affordable housing application under General Statutes § 8–30g. "The trial court must first determine whether the decision ... and the reasons cited for such decision are supported by sufficient evidence in the record. General Statutes § 8–30g.[16] Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of specific harm to the public interest if the application is granted. If the [c]ourt finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determine independently whether the Commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission may legally consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission, supra,* 271 Conn. at 26, 856 A.2d 973. As noted by Judge Prescott, the Commission bears the burden of proof on these issues.

Under the affordable housing statute, "if a town denies an affordable housing land use application, it must state its reasons on the record, and that statement must take the form of a formal, official, collective statement of reasons for its actions ..." *Christian Activities Council, Congregational v. Town Council,* 249 Conn. 566, 576, 735 A.2d 231 (1999). The role of the court on appeal is to determine if there is sufficient evidence to support those reasons; *West Hartford Interfaith Coalition, Inc. v. Town Council,* 228 Conn. 498, 513, 636 A.2d 1342 (1994); not to scrutinize the record to determine if there were possible other reasons that might have supported the decision.

Justice (then Judge) Eveleigh's analysis of a zoning commission's burden of proof under § 8–30g is particularly instructive:

1. The statute is remedial, and its purpose is to assist property owners in overcoming local zoning regulations that are exclusionary or provide no real opportunity to overcome arbitrary or local limits, and to eliminate unsupported reasons for denial.

2. The statute requires the Commission to state its reasons and analysis in writing.

3. The Commission, in its denial resolution and its brief, must discuss, with references to the record, how each of its reasons for denial satisfies the criteria stated in the statute.

4. The statute eliminates the traditional judicial deference to commission factual findings and regulatory interpretations for all types of zoning or planning applications, including zone changes.

5. Regarding the statutory criterion of a "substantial public interest in health or safety," the commission must identify the type of harm that allegedly will result from approval of the application and the probability of that harm.

***10** 6. The statute requires the Court to conduct an independent examination of the record and to make its own determination with respect to the second, third, and fourth criteria of subsection (g). It is incumbent upon the Commission to first establish the correctness of its decision. If demonstrated it is then incumbent upon the Court to conduct a plenary review pursuant to the last three prongs of the statute.

Juniper Ridge Assoc. v. Wallingford Planning and Zoning Commission, Superior Court, judicial district of New Britain at New Britain, docket no. CV02–0518845S (March 8, 2004).

C—Description of the Property

The property involved in this appeal consists of approximately two hundred and thirty-six (236) acres of undeveloped land in the Oswegatchie Hills area of East Lyme. The Landmark property is bordered on the east by the Niantic River, from which it rises approximately 1,800 feet up to the ridgeline of Oswegatchie Hills, and from the topographical maps in the record a portion of the property appears to go slightly down the western slope. Directly to the west of the property, down the western slope, is a condominium development known as Deerfield Commons as well as other undeveloped property. The property is bordered on the north by Interstate Route 95, Latimers Brook and residences on Calkins and River Roads and on the south by Smith Cove, residences and other undeveloped portions of Oswegatchie Hills. Prior to the present proceeding, the property was zoned for single-family housing requiring three-acre lots. Much but not all of the property has been designated as open space in the town's prior plans of development contained in the record. The property contains wetlands and, as noted by Judge Prescott in Appeal II, a significant portion of the property lies within a coastal boundary protected under the Coastal Management Act. Much of the property is also inside a "conservation zone" established by the legislature in General Statutes 25–109e. [17]

D—The Commission's Decision

The commission's decision denying Landmark' application consisted of three parts addressing the proposed amendments to the zoning regulations, the request for a zone change, and the proposed preliminary site plan. The Commission rejected the proposed amendments to the zoning regulations, rejected rezoning of the entire site but approved rezoning a portion with certain restrictions, and denied the preliminary site plan. Certain themes ran through all three decisions: lack of public sewers, noncompliance with the requirement for public sewers and public and potable water in the town's affordable housing regulation, loss of open space, and environmental damage.

1. Reasons for denying the proposed regulation

The commission's decision gave five principal reasons for denying the amendments to the zoning regulations: the applicant's proposed regulations (i) did not require that a development be served by public water and sewer, (ii) eliminated the requirement in the town's affordable housing zoning regulations for a special permit, traffic impact statement and general traffic access and circulation information, building dimensions, utility locations, soil type survey, and "other information required by the Town's affordable housing regulations which the Commission ... deems necessary to evaluate the application to protect the health and safety of the public," [18] (iii) eliminated the

requirement in the town's affordable housing regulations for submission of an affordability plan with a conceptual site plan, (iv) included buffer space as open space, and (v) eliminated the requirements of a buffer area between affordable housing districts and other "multifamily districts" and "adequate fall zones" between buildings "that correspond to the height of the building." The commission then determined that reasonable changes could be made to the proposed regulations by requiring public water and sewer, buffer areas between adjoining land owners and fall zones between buildings commensurate with building height, and more information at the preliminary or conceptual site plan stages and by not including buffered areas as open space. ROR, ex. IV, at 3–4.

2. Reasons for denying zone change for entire property

***11** After denying the zoning amendments, the commission stated that it then evaluated the applicants' request for a zone change of the entire property under the town's existing affordable housing regulations. Although Landmark's site plan covered only half of its property, the Commission reasonably assumed "from the proposed regulations and development plan submitted that high-density development is contemplated throughout the identified parcels ... far in excess of what is currently proposed." *Id.*, at 8, 636 A.2d 1342. In denying a zone change for the entire property, the Commission gave the following reasons: (i) "[L]arge portions" of the applicants' property are "outside the town's designated sewer service district," are thus "inappropriate for the density of development proposed," and would therefore "adversely affect the health and safety of the community"; (ii) Since large portions of the plaintiff's property are inside the coastal boundary described by General Statutes § 22a–94 and the Conservation Zone created by General Statutes § 25–109d, "development of the site at the density allowed by the proposed regulations was inconsistent with the purposes and scope of § 25–109f and would result in damage to the ecosystem and habitat of Long Island Sound."[19] (iii) "[L]arge portions of the land, if not the entirety of the designated land ... have been the subject of many decades of persistent and explicit efforts by and on behalf of the Town to preserve the area as open space," and by the Town and others "to preserve the land for its unique environmental qualities," and rezoning the entire property "would be antithetical to that purpose, if ... not significantly reduced in scope and location." *Id.*, at 5–6, 636 A.2d 1342.

The Commission then approved rezoning that portion of the Landmark property that lies within the sewer service boundaries drawn by the Town as an affordable housing district under § 32 of the town's zoning regulations, subject to approval by the Niantic River Gateway Commission before becoming effective.[20] It gave its reasons for limiting the rezoned area as follows: A zone change for the entire property would be contrary to the "[t]own's policy of allowing dense multifamily development only where public sewer is available"; incompatible with the "stated goals" of preserving Oswegatchie Hills in the local and state plans of development and inconsistent with the town's "longstanding efforts to preserve Oswegatchie Hills as open space"; "incompatible with local and state, public and private efforts to preserve the environmentally unique and diverse qualities of Oswegatchie Hills"; and incompatible with the purposes of the coastal management act. The Commission found that "[b]y reducing the scope and location of the zone change" to that area, "the Town's goals of preserving Oswegatchie Hills can be achieved [,] ... the riverfront and hillside woodlands can be preserved, [and] ... the zone change affects a significantly smaller portion of land within the Coastal Boundary." *Id.*, at 6, 636 A.2d 1342.

3. Reasons for denying preliminary site plan

***12** Having rejected the proposed zoning amendments that provided for a preliminary site plan, the Commission treated Landmark's application for approval of a preliminary site plan as a "conceptual site plan" under § 32 pertaining to affordable housing districts in the town's existing zoning regulations. Its decision acknowledged that affordable housing applications need not comply with a town's existing zoning regulations, but said that § 32 "contains basic requirements that must be addressed in any 'Affordable Housing Regulations.' " The Commission found that Landmark's application did not comply with the requirements in § 32 because it did not include letters from the town's Water and Sewer Commission certifying the existence of adequate public sewer and potable water, was not, accompanied by an application for a special permit and "evidence required thereunder," and had been "deemed inadequate by the Department of Long Island Sound Programs and was recommended for denial from that office." The Commission's decision stated that it had concluded that "all of the reasons" it had enumerated for denying the zone change application "apply equally" to the "applicant's

Preliminary Site Plan application," including but not limited to "the need for open space preservation and the lack of access to Town sewer services." The commission's decision then specified the following additional grounds for denial:

> inadequate traffic access,
>
> "the proposed use of the site ... will have potentially adverse impacts on coastal resources and future water dependent activities" that were "inconsistent with the policies and standards of the Connecticut Coastal Management Act, the Town's Plan of Development, the Municipal Coast Program and the Harbor Management Plan based on onsite development constraints and the potential adverse impact on coastal resources and water quality" and "would not adequately provide for future water-dependent uses and access for the public to future water dependent resources."
>
> "the proposed development on the site is reasonably likely to have the effect of unreasonably polluting, impairing and destroying the surrounding natural resources."

Id., at 6–7, 636 A.2d 1342.

E—Analysis

1. Water supply and waste disposal

The parties devoted much of their briefs and arguments at trial to the issues of water and waste disposal. The town argued that its regulations require public water and sewers for affordable housing developments in order to protect the public health [21] and relied on noncompliance with those regulations as a basis for denying the site plan and a zone change for the entire property. It justified its decision to limit the zone change on the grounds that public sewers were not available to the rest of the property [22] and denied the site plan because the entire development would not have access to public sewers.

Landmark on the other hand initially claimed that its site application fell within the town's sewer boundaries; but, after the town's water and sewer commission presented a revised map of the sewer district that included only a portion of the Landmark project in the sewer service district, Landmark then argued that requiring public water and sewers could not be justified since the town did not impose the same requirement for certain multifamily elderly projects.

*13 The parties' briefs and arguments at trial also devoted considerable attention to whether the Landmark property itself was conducive to community wells and septic systems, issues that were also addressed in the two prior appeals. Judges Quinn and Prescott had both concluded that the records in the first two appeals supported the commission's decision to deny the earlier applications on the grounds that public water and sewer were not available and that state approval for onsite wells and community septic systems was unlikely. On the water issue, the commission's decision on Application III rejected the proposed regulations for not requiring public water, did not mention any water-related reasons for limiting the zone change request, and in rejecting the site plan referred to the lack of a letter from the town Water and Sewer Commission indicating the availability of potable water pursuant to § 32.8.3 of the town's zoning regulations [23] but did not mention any site-specific reasons. On the sewer issue, the town relied on both noncompliance with town regulations and what it claimed was the necessity for public sewers for a project of the proposed density on this terrain.

a. Zoning amendments

The denial of Landmark's zoning amendments stated that public water and sewer are "deemed necessary to protect public health and [are] required for all multifamily units by the current regulations." The court's first task is to determine whether the commission's decision on this ground is "supported by sufficient evidence in the record." (Internal quotation marks omitted.) *Quarry Knoll II Corp. v. Planning & Zoning Commission, supra,* 256 Conn. at 717, 780 A.2d 1. "The sufficient evidence standard under the first prong of § 8–30g(g) requires the commission 'to show a reasonable basis in the record for concluding that its decision was necessary to protect substantial public interests. The record, therefore, must contain evidence concerning the potential harm that would result if [the application were granted] and concerning the probability that such harm in fact would occur." *AvalonBay Communities, Inc. v. Planning & Zoning Commission,* 103 Conn.App. 842, 846–47, 930 A.2d 793, 797 (2007), quoting *River Bend Associates, Inc. v. Zoning Commission, supra,* 271 Conn. at 26, 856 A.2d 973, quoting *Kaufman v. Zoning Commission, supra,* 232 Conn. at 156, 653 A.2d 798. The court initially examines "whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a

likelihood, of a specific harm to the public interest if the application is granted." *River Bend Associates, Inc. v. Zoning Commission, supra,* 271 Conn. at 26, 856 A.2d 973.

While potable water and adequate waste disposal are surely necessary for any human development, the Commission's decision to reject the zoning amendments on the ground that public water and sewer are necessary for all multifamily units in order to protect public health is not supported by sufficient evidence in the record. Although § 32 of the town's zoning regulations does require public water and sewer for affordable housing districts, the town's regulations also permit multifamily dwellings on large tracts of land in special use elderly (SU–E) districts without requiring public water and sewer. See exhibit VII, Zoning Regulations, §§ 12A .4.3(d) and (e) and 25.5.[24] The evidence in the record thus shows that the commission does not require that all zones with multifamily housing use public water and sewers. On June 17, 2004, moreover, the commission approved a zone change to SU–E for 190 acres at Darrow Pond in East Lyme and a special permit application to build 80 units there without requiring public sewers. Nine months later, on March 3, 2005, which was three months before Landmark filed the current application, the commission approved a zone change to SU–E for an additional 115 acres at Darrow Pond and a preliminary special permit for the construction of 600 units of elderly housing on 61 acres and approximately 240 acres of open space. The minutes of the public hearing show that "there are no Town sewers available to the site" and that a community septic system was planned. ROR, ex. 28, at 2. Although the property had access to public water,[25] the commission was told at the 2004 public hearing about "the potential availability of wells," that "there are some existing wells on-site, and the irrigation will be done by on-site well water." ROR, ex. 27, at 2. When the developer later sought rezoning of the additional 115 acres and preliminary approval for increasing the size of the development to 600 units, the commission was told that "[w]ater will be developed on-site." ROR, ex. 28, at 2. There is no evidence in the record to support a distinction of requiring public water and sewers for multifamily affordable housing but not for multifamily elderly housing in an SU–E district.

***14** After a plenary review of the record, as required by § 8–30g, the court finds that the commission has not met its burden of proving, based upon the evidence in the record compiled before such commission, that the decision to require public water and sewer for multifamily affordable housing districts but not for multifamily elderly housing in SU–E zones was "necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider"; that "such public interests clearly outweigh the need for affordable housing"; or that "any substantial public interests in health, safety, or other matters which the commission may legally consider cannot be protected by reasonable changes to the affordable housing development ..." The commission has not established any legitimate reason why the town's regulations should require public water and housing for multifamily affordable housing developments but not for large elderly developments with multifamily housing. Its reply brief relies on Landmark's failure to persuade a federal court that such a distinction was a due process or equal protection violation, but those are not the legal issues before this court.

When questioned about this issue at trial, counsel for the town made two arguments. First, counsel claimed that the Darrow Pond property has "different physical characteristics" than the Landmark property, but that argument is more relevant to whether a particular development should be required to have public water and sewer, not whether the zoning regulations should require public utilities for all affordable housing but not for multifamily SU–E elderly housing. Second, town counsel argued that an affordable housing zone would "have more density than you would normally have in an elderly zone," and that "you can't do a large density project without having public water and sewer." Transcript of proceedings on 10/29/10, at 42, 41.

Perhaps this latter argument might raise a theoretical possibility as to why a lack of public water for affordable housing projects might cause a specific harm to the public interest. But our Supreme Court has cautioned that § 8–30g requires that the record establish "that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted." *River Bend Associates, Inc. v. Zoning Commission,* 271 Conn. 1, 26, 856 A.2d 973 (2004). The commission must show "a quantifiable probability that a specific harm will result if the application is granted." *AvalonBay Communities, Inc. v. Planning & Zoning Commission,* 103 Conn.App. 842, 853–54, 930 A.2d 793 (2007), citing *Kaufman v. Zoning Commission, supra,* 232 Conn. at 156, 653 A.2d 798; see also *Christian Activities Council, Congregational v. Town Council,* 249 Conn. 566,

597, 735 A.2d 231 (1999). The commission here has not met that standard.

Although there is a theoretical difference in density between an affordable housing district, which is permitted under the town's current regulations to have 100 percent of the dwellings be multifamily housing, and an SU–E district, where only 40% of the units can be multifamily dwellings, the facts of this case show why a per se rule requiring public sewers for affordable housing districts not necessary to protect the public interest. The commission approved a zone change to an affordable housing district for that portion of the Landmark property that lay within the town's service district boundaries, as recently redrawn by the Water and Sewer Commission. An examination of exhibit 16C shows that almost 60 percent of the dwelling units shown on Landmark's site plan drawings are inside the town's sewer service district and were hence inside the area that the commission rezoned.[26] Thus, only the remaining approximately 40 percent of the units at Riverview Heights would need access to community septic. The Darrow Pond project would thus have 600 units needing community septic on 61 acres, while Riverview Heights would have approximately 340 units (approximately 40 percent of the planned 840 units) needing community septic on 32 acres, not much of a difference in density. Nothing in the record shows that permitting a distinction requiring public sewers for the affordable housing district but not for the SU–E district is necessary to protect substantial public interests in health, safety, or other matters that the commission may legally consider and that clearly outweigh the need for affordable housing.

***15** The final reason that a requirement for public sewers and public water was not a sufficient reason to reject the draft regulations lies in the affordable housing statute itself as construed by the courts. As numerous courts have pointed out, § 8–30g does not permit a zoning commission to deny an affordable housing application merely on the grounds that it does not comply with existing zoning regulations. *Wisniowski v. Planning Commission*, 37 Conn.App. 303, 317, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 981 (1995). "Instead of simply questioning whether the application complies with those regulations, however, under § 8–30g, the commission considers the rationale behind the regulations to determine whether the regulations are necessary to protect substantial public interests in health, safety or other matters." *Id.*, at 317–318, 655 A.2d 1146. A blanket rule requiring public water and sewers for affordable housing will always need to be tested against the potential of any site proposed for affordable housing to provide safe and adequate waste disposal and public water. If any particular site proposed for affordable housing is capable of providing potable water by on-site wells and waste disposal by a community septic system, a requirement in the town's regulations for public water and sewer will not meet the *Wisniowski* test and be an insufficient reason to reject that site for affordable housing. Despite the town's insistence otherwise, a requirement in the town's regulations for public water and public sewer is therefore not necessary to protect public health and safety, for, in the final analysis, approval of any site for affordable housing will always depend on the capacity of that site to provide adequate potable water and waste disposal for the particular development, whether through public or onsite means.

b. Zone change

The commission's reasons for restricting a zone change to the portion of the site plan in the sewer district, while not mentioning the absence of public water, did assert that "a zone change for the entire property would be contrary to the Town's policy of allowing dense multifamily development only where public sewer is available." ROR, ex. IV, at 6. In view of the commission's approval of the Darrow Pond project for 600 housing units on 61 acres without requiring public sewers and the absence of a requirement of public sewers in the town's SU–E regulation, such a "town policy" is unevenly applied[27] and does not provide sufficient evidence on this record for denying a zone change for either the site plan area or the entire property based on the absence of public sewers for the portions outside the sewer district. As discussed in the previous section, the requirement in the town's current affordable housing regulations for public sewers does not pass muster under § 8–30g review. To the extent that the commission denied a change of zone for the entire property simply because the property did not comport with the requirement set forth in § 32 for public sewers, there is insufficient evidence in the record to support that decision.

***16** The commission's decision also refers to the need for public sewers because of the "density of development proposed";[28] and Landmark's request to rezone the entire property logically and reasonably supported the inference that Landmark was contemplating additional affordable housing

in the future on other portions of the property than those covered in the site plan presented with this application. Even if the commission could assume that a change of zone for the entire property might result in proposals for additional affordable housing in the future, however, its approval of 600 elderly units at Darrow Pond without public sewers shows that there was no legitimate reason and insufficient evidence in the record to deny a change of zone for lack of public sewers on the grounds of density. There is no evidence in the record supporting a distinction between the density of the Darrow Pond project that the commission approved without requiring public sewers and the density of the project proposed by Landmark here that would require a combination of public sewers and community septic. Nothing in the record supports a decision to deny a change of zone to an affordable housing district on the grounds that the density of development, either as proposed or as might occur in the future, necessitates public sewers.

This was particularly the case for the portion of the property that Landmark proposed to use for the project presented to the commission. Although the Landmark site plan proposed a project of overall density greater than at Darrow Pond, fewer of the units shown on the Landmark site plan drawings would need a community septic system than at the Darrow Pond development, because a significant portion of the Landmark units were inside the town's sewer district and would thus be served by public sewers.

In the public hearings, Landmark suggested to the commission that it did not need to rezone the entire property and, in effect, repeatedly suggested that the commission could rezone only that portion of the property covered by the present application. For example, speaking at the final public hearing, Landmark's attorney said to the commission:

> So if you were uncomfortable with rezoning the entire piece of property you could rezone only so much of it as would be necessary to accommodate that particular plan ... [I]f the Commission would prefer to do it that way and lock in the development and the open space that we show on there for that area and then not do anything for the remainder of the property, leave that just as it is, you know, that's fine. Because that's all we're talking about at this point. And that's something that the Commission has the right to do.

ROR, ex. IIID, at 125. The project developer said later at that same hearing:

> If the Commission wanted to exclude that portion that is not included in either our open space or the area that we're developing, the land down by the water, if they wanted to eliminate that portion from the zone change we are amenable to that.

***17** *Id.*, at 184, 655 A.2d 1146. See also ROR, ex. IE, at 45.

In the two previous judicial decisions, the courts upheld determinations by the commission that the state departments of public health and environmental protection rarely approve the use of on-site wells and community septic "and only when there is clear evidence that such systems can be supported by the site and function properly." Appeal I. That evidence was not presented to the commission for this application, however. Judge Quinn also found that there was "substantial evidence in the record from which the Commission could properly determine that the site's topography and soil conditions made a community septic system not feasible." *Id* . In the second judicial appeal, Landmark contested Judge Quinn's previous conclusion that the DEP rarely approves community septic, but Judge Prescott found that there was evidence presented before the commission that the soil types and steep slopes on the property "would negatively affect and limit the potential for on-site waste water disposal." Appeal II. There was also evidence in the record in the second judicial appeal that installing a community septic system would require "blasting of bedrock that would in turn result in ground water contamination" and that "in turn would increase the potential for cross-contamination of on-site wells." *Id.* Judge Prescott thus concluded that there was "substantial evidence that the DEP was highly unlikely to give the necessary approval." *Id.*

For the present application, there were various general statements in the record that the property was unsuitable

for onsite water or septic.[29] Judge Quinn's decision had cited evidence in the record of the first judicial appeal of a soil survey of New London County "show[ing] severe constraints to such a system in that [o]ver 60% of the site is encumbered by wetlands and/or steep slopes." *Id.* Most of the eastern side of the property does have steep slopes, but the topographical and soil maps in the record show that much of the area where Landmark proposes to situate the present Riverview Heights development, at the top of the ridge, is much less steep.[30] Most of the property has soil classified by the U.S. Department of Agriculture's Soil Conservation Service as belonging to one of two Hollis–Charleton–Rock outcrop complexes, HrC or HrD. Each of these is a mix of approximately 40 percent Hollis soil which has bedrock at a depth of 17 inches, 25 percent Charleton soil, which has loam to a depth of 60 inches, 20 percent rock outcrop, and 15 percent other soils.[31] The Soil Conservation Service characterizes these two soil complexes as ranging from moderate to severe in constraints for development. ROR, ex. 32–34.[32] Although the Soil Survey cautions that "extensive onsite investigations are often needed to locate a suitable site for onsite septic systems" for both soil complexes; ROR, ex. 32, at 21–22; neither type of soil complex is ruled out as a potential site for a community septic system. As explained by the plaintiff's counsel at the public hearing, presenting himself as an expert on hydrology issues, the Soil Survey "indicates that there are going to be pockets where you're going to find shallow to bedrock soils or rock, but there are going to be other places where site investigations may very well yield soils that are suitable for septic systems." ROR, ex. IIID, at 105–106. He claimed to the commission that the developer's engineer had tested soils on the property "and found areas that were well suited for septic systems on this property, that the soils were adaptable to septic systems on this property." *Id.*, at 106, 655 A.2d 1146. Exhibit 34 in the record showed that the Darrow Pond property contained soil types similar to the Landmark property. Landmark did not claim that the soil maps are "site-specific designations of where you can put ... septic systems or not." Transcript of proceedings on January 6, 2011, at 69. Instead, it sought the same opportunity provided to the developer of the Darrow Pond property "to do a specific onsite analysis ... to see whether there are opportunities to put subsurface sewage disposal in there ..." *Id.* In the absence of evidence in this record about the standards used by DEP for evaluating community septic proposals or the DEP's history in addressing applications to use septic, and the presence of evidence that the soil types at Oswegatchie Hills have the potential, with "extensive onsite investigations" to provide a suitable site for onsite septic systems, there was insufficient evidence in this record to support the commission's decision to reject a zone change, or at least to condition a zone change on subsequent approval by the DEP of community septic.

***18** In light of the commission's approval of the Darrow Pond project, which would have resulted in more units using community septic than Landmark's present application would entail, there was insufficient evidence in the record to support its refusal on the grounds of lack of public sewers to rezone at least the 120 acres covered by Application III as a reasonable modification to Landmark's application. Nor did the commission sustain its burden of proving, based upon the evidence in the record, that denying rezoning of the 120 acres on the grounds that a portion of that area was outside the sewer service district was "necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider"; that "such public interests clearly outweigh the need for affordable housing"; or that "any substantial public interests in health, safety, or other matters which the commission may legally consider cannot be protected by reasonable changes to the affordable housing development ..."

Moreover, the commission has not shown any legitimate reason why public sewers should be required for an affordable housing zone of 232 acres when the commission did not require sewers for the 310 acres at Darrow Pond that were rezoned to SU–E and on which 600 units that would use a community septic system were planned. The court thus concludes that there was insufficient evidence in the record to deny a change of zone for the entire property on the grounds that most of the site was outside the town's sewer service district or that the density proposed necessitated public sewers. The commission did not meet its burden of proving, based upon the evidence in the record compiled before such commission, that the decision to deny a zone change for lack of public sewers was "necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider"; that "such public interests clearly outweigh the need for affordable housing"; or that "any substantial public interests in health, safety, or other matters which the commission may legally consider cannot be protected by reasonable changes to the affordable housing development ..."

c. The preliminary site plan

As it did in denying the zone change for the entire property, the commission's decision rejecting Landmark's site plan relied upon noncompliance with the requirements in § 32 of the town zoning regulations for affordable housing districts. On the sewer question, the decision stated that "[t]he application did not include a letter from the Water and Sewer Commission indicating adequate sewer capacity to serve the proposed development, pursuant to 32.8.2 of the regulations." It then cited "lack of access to Town sewer services" as a reason for rejecting the site plan. For the same reasons recited above, however, there is insufficient evidence in the record to support the commission's decision to deny a conceptual site plan for failing to comply with the requirement of the town's zoning regulation that public sewers be available for affordable housing projects. The plenary review of the record required by § 8–30g, moreover, does not show the commission meeting its burden of proving, based upon the evidence in the record compiled before the commission, that the decision to require public sewers for the Landmark site plan, but not for the Darrow Pond project, was "necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider"; that "such public interests clearly outweigh the need for affordable housing"; or that "any substantial public interests in health, safety, or other matters which the commission may legally consider cannot be protected by reasonable changes to the affordable housing development ..."

***19** Approximately 60 percent of the Landmark development proposed in the site plan submitted with the third application would have access to public sewers. Landmark disputed the recent determination by the Water and Sewer Commission that the remainder of the development was outside the town's sewer area, but the evidence before the commission, including the report by the engineers hired by the town to review the sewer district boundaries, provided a sufficient basis for the commission to have credited the Water and Sewer Commission's redrawing of those boundaries. Although Landmark said at the public hearing that it was not then requesting approval for a community septic system, as it was then still asserting that its development was all within the town's sewer district, a plenary review of the record, in view of the evidence offered at the hearing, shows that reasonable changes to the proposal could have protected the public interest by permitting the consideration of community septic for the remaining 40 percent of the units. Some of the soil types on the property can potentially support a community septic system, which the commission approved for the Darrow Pond project on similar types of soil. This record did not contain the types of evidence recounted by the courts in the prior appeals that supported the commission's decisions on the earlier affordable housing applications. The public interest can be protected, moreover, by the fact that any community septic system will need approval of the state DEP.

On the issue of water, the commission's decision denying Landmark's preliminary site plan did not expressly refer to the requirement in § 32.2 of the zoning regulations that town water be available to an affordable housing district, but instead relied on Landmark's failure to comply with the more general requirement in § 32.8.3 of its regulations that "[a]n application for designation as an Affordable Housing District which does not include a Special Permit application" should include a "letter from the Water and Sewer Commission indicating that an adequate source of potable water is available to serve the proposed development." In view of § 32.2, however, the commission's decision to rezone that portion of the property inside the sewer district to an affordable housing district under its own regulations suggests that the commission concluded that the rezoned portion of the property would have access to public water.

At the public hearing Landmark offered evidence that it could obtain water for the project in a variety of ways. First, Landmark showed that in 1999 the Water and Sewer and Planning Commissions had approved an extension of water, using water from New London via Waterford, and the construction of necessary infrastructure from an existing water main along the Boston Post Road "from the property formerly known as Lulu's to the Waterford Town line." ROR, ex. 49, minutes of East Lyme Planning Commission, 9/14/99. Section 2.3(a) of the town's Sewer Use and Sewage Disposal Ordinance allows owners of property "abutting on any street, alley or right of way on which there is located or where construction has been funded for public sewers" to connect to those sewers at the property owner's own expense. ROR, ex. 56, at 154. The northern boundary of Landmark property has frontage on the Boston Post Road; see ex. 26; and Landmark told the commission that it intended to build out the water extension along the Boston Post Road as approved by the Water and Sewer Commission in 1999 and then invoke its right under § 2.3(a) to connect at the Boston Post Road to that extension at its own expense.

*20 Although a consent order then (but no longer) in effect between the town and the state department of environmental protection prohibited any "further water extensions ... which may utilize the East Lyme public water supply"; ROR, ex. 16, at 7; the Lulu's extension had been approved and enacted as Water Main Extension Ordinance # 15 before the effective date of the consent order; see ROR, ex. 52; and Landmark proposed to obtain water from New London. While a letter from the Water and Sewer Commission in the record stated that only 50,000 gallons per day (g.p.d.) of water would be available from New London, the developer's own expert stated that "the City of New London has confirmed that the necessary 170,000 g.p.d. or so can be supplied from their water treatment plan and existing infrastructure." ROR, ex. 56.

Moreover, although the commission did not expressly say so, it is reasonable to infer that the commission had concluded that public water would be available to the rezoned property inside the sewer district boundaries, since its decision described the rezoned area as an "Affordable Housing District under Section 32 of the Town's current regulations," which require public water for such zones. Landmark could conceivably connect to that public water to serve the remainder of the property outside the sewer service district. Second, Landmark sought the same opportunity that the commission had provided to the developer of the Darrow Pond project to explore the use of community wells. The Soil Survey and soil maps introduced into the record show "no reason why sufficient water for this project could not be obtained from bedrock drilled wells on this site ..." ROR, ex. IIID, at 205.

There can be no doubt that the public interest requires the provision of water and waste disposal for any housing development. This court has previously concurred with the opinion of Judge Prescott in the second judicial appeal that "a commission may properly reject an affordable housing application if the development proposed will have inadequate water and sewer facilities to serve the development. Obviously, there is a substantial and compelling public health and environmental interest in ensuring that a large, high-density development such as the one proposed here has adequate water and sewer services. Courts that have addressed this issue are in agreement with this fundamental fact." *Forest Walk v. Town of Middlebury Planning and Zoning Commission,* Superior Court, judicial district of New Britain, docket number CV 02 0518161S, 2008 WL 5156480 (November 13, 2008), citing Appeal II, *supra.* This record, unlike those that might have been before Judges Prescott and Quinn, however, contains no evidence suggesting the probability that those state agencies would reject applications for community septic or water from Landmark.[33] The record here contains no justification or rationale to support the commission's unwillingness to give Landmark the time and opportunity to obtain approval for a community well water system from the Departments of Public Health and Public Utility Control under General Statutes Sections 25–32 et seq. and 16–262m et seq., and from the Department of Environmental Protection for a community septic system under General Statutes Section 22a–430 et seq.

*21 The commission's decision to deny the site application on the grounds that it lacks public sewers does not pass the first level of muster under § 8–30g(c)(1)(A) that the commission show its decision on this ground to have been supported by sufficient evidence in the record.[34] There was sufficient evidence, however, to deny the conceptual site plan on the grounds that Landmark had not shown an adequate supply of potable water for the development. The court's independent and plenary review of the record before the commission does not show that the commission's decision to reject the site plan for lack of public sewers and public or potable water was necessary to protect a substantial interest in health, safety or other matters that clearly outweigh the need for affordable housing. Even though Landmark had not yet shown that it could provide water and waste disposal to the entire development, either through public sewers, public water, community septic, or onsite wells, the substantial public interest in the provision of potable water and adequate waste disposal could have been protected by a conditional approval that public water and sewers be provided to the entire development or to the extent that the relevant state agencies had approved community septic and water. Here, as in *River Bend Associates v. Zoning Commission,* 271 Conn. 1, 40, 856 A.2d 973 (2004), the commission "has pointed to no evidence in the record establishing that there is no reasonable probability" that the plaintiff's application for water ... would not be approved once submitted and, hence, that plaintiff could not obtain public water for the development. Under *Kaufman v. Zoning Commission,* 232 Conn. 122, 163–164, 653 A.2d 798 (1995), approval by another municipal agency shall be presumed in the affordable housing context in the absence of evidence to the contrary, and the court can see no reason why the same rule should

not apply to presumption of approval, in the absence of such contrary evidence, from a state agency. [35]

Judge Mottolese has aptly described the court's role in cases such as this:

> the court is required to apply the principle first formulated in *Faubel v. Zoning Commission,* 154 Conn. 202, 224 A.2d 538 (1966), and repeated in a long line of decisions, including affordable housing decisions, ... This principle simply states that a zoning authority's action "which is dependent for its proper functioning on action by other agencies over which the zoning authority has no control cannot be sustained unless the necessary action appears to be a reasonable probability." In the context of an affordable housing appeal where the burden of proof is always on the zoning authority, the zoning authority must prove under Section 8–30g(b)(2)(g) that there is sufficient evidence in the record to establish that it is more than a mere possibility that such approval will not be forthcoming. In other words, the Commission must show a reasonable basis in the record to support its conclusion that the sewer connection probably will not be approved by the BPUC. Unlike a conventional zoning appeal the burden of establishing reasonable probability of attainment does not rest with the plaintiff. Indeed, in an affordable housing appeal unlike a conventional administrative appeal, approval of necessary applications by coordinate municipal agencies should be presumed to be a probability in the absence of any evidence to the contrary.

***22** (Citations omitted.) *Toll Brothers v. Bethel Planning and Zoning Commission,* Superior Court, judicial district of New Britain at New Britain, docket no. HHB CV03–0523881 S (October 19, 2006). A conditional approval here would have protected the substantial public interest of ensuring that any development built would have adequate water and waste disposal.

2. Preservation of Oswegatchie Hills

Running throughout the board's decision and the briefs filed by the town and intervenors is a strong desire to limit any development on Oswegatchie Hills, manifest in two principal ways: maintaining the area and its "unique environmental attributes" as open space and preventing environmental damage to Niantic River and its environs. Much of the property lies inside coastal boundaries protected under the coastal management act, [36] and inside the "conservation zone" established by the legislature in General Statutes 25–109e. Standards adopted by the Niantic River Gateway Commission in 2002 for the conservation zone state that "[a]s much of the land as possible shall remain in a natural state to protect indigenous natural features including but not limited to trees, plants, exposed bedrock, ponds, streams, wetlands, sensitive coastal resources and animals." ROR, ex. 2, attachment D. A theme underlying the town's opposition to all three of Landmark's applications to building affordable housing there has been that any such proposal "is incompatible with the goal to preserve and protect Oswegatchie Hills." Planning Commission Report of 3/20/02, ROR ex. 2, Attachment C. The East Lyme Harbor Management/Shellfish Commission stated that "impact on the natural resources of the Oswegatchie Hills would be extremely detrimental ... The proposal is at crossed purposes with the stated desire of the commission to protect undeveloped lands in Oswegatchie Hills." ROR, ex. 5, at 2. The record is replete with references to the commission's concern that "development of the site at the density allowed by the proposed regulations" would cause harm to the river, the sound, and forest and aquatic animal and plant species. The commission decision denying a zone change for the entire property stated that "the land which is the subject of this application ... has been the subject of extensive efforts by and on behalf of the Town, the Intervenors, members of the public, conservation groups and others to preserve the land for its unique environmental qualities ... and ... the proposed zone change would be antithetical to that purpose if not significantly reduced in scope and location." ROR, ex. IV, at 5. Although these are related issues on which the commission's reasons overlapped in many respects, for the purposes of this decision the court will separately address the principal themes running through the environmental issues: preserving open space, avoiding general environmental damage to Oswegatchie Hills itself and its environs, and avoiding damage to areas protected by the Coastal Management Act and Conservation Zone statute.

a. Open space

***23** As with the first two applications, one reason for denying the zone change for the entire property, limiting the rezoned property to the area within the sewer service district, and disapproving the site plan was preservation of open space. The commission's decision stated that Landmark's proposal was "incompatible with the local and state plans

of development and the stated goals to preserve and protect Oswegatchie Hills." *Id.*, at 6, 653 A.2d 798. It cited "the long-standing efforts by the Town to preserve the Oswegatchie Hills as open space demonstrated by the evidence showing a long history of conservation efforts." *Id.* Landmark has insisted in this appeal that the site plan it submitted is "entirely out of the area that was designated by the Council of Governments and town planning commission to be preserved as open space transcript of proceedings, 10/29/2010, at 136; while the town claims that "[e]very East Lyme Plan of Conservation and Development for the last 40 years as well as the State Conservation and Development Policies Plan has noted the entire Oswegatchie Hills area as a sensitive resource worthy of preservation." Reply Brief, at 12.[37]

The record here contains evidence of those efforts to preserve Oswegatchie Hills as open space dating back to 1967, as recounted by both Judges Quinn and Prescott in their decisions.[38] In 1967 the town's comprehensive plan stated that "The Oswegatchie Hills area represents a scenic hilltop with vistas of the ocean and the Niantic River worthy of protection." It recommended maintaining "the area from the banks of the Niantic River to the crest of Oswegatchie Hills" "as open space to provide a place of passive recreation consisting of hiking trails, picnic areas, nature paths and camping areas."[39] ROR, ex. 2, attachment D. That recommendation is consistent with the action of the commission here in limiting the rezoned area to the sewer service district, whose boundary is approximately the ridge of Oswegatchie Hill.

Later efforts by the town to preserve Oswegatchie Hills as open space do not appear to be quite as expansive as going all the way to the ridge top. A 1974 memorandum from the East Lyme Conservation Commission regarding "Proposed Open Space Acquisition Plan for East Lyme" identified 212 acres of Oswegatchie Hills for acquisition. A topographical map attached to that memorandum is not clear enough to determine whether this 212 acres runs all the way to the top of the ridge. See ROR, ex. 2, attachment D. A report from the Land Use and Natural Resources Subcommittee to the East Lyme Zoning Commission in October 1977 stated that it had "re-evaluated the open space question and has developed a prioritizing method which indicates more variables than the original New England Commission survey and also adds to the Conservation Commission proposal." It identified an "approximate area" of 200 acres on Oswegatchie Hills as "open space lands that are not owned by East Lyme and that should be purchased outright by the Town or protected by easement against development." *Id.* The 1978 Plan of Development and the 1987 Revision both identified and recommended 200 acres "on the northern east slope of Oswegatchie Hill, including the mile of undeveloped waterfront on the Niantic River, be designated open space and acquired by the Town." *Id.* The 1987 Revision stated that the East Lyme Coastal Area Development Plan adopted in 1982 had made that same recommendation. *Id.* The commission may have been aware of this inconsistency with regard to the amount of acreage on Oswegatchie Hills historically designated for open space, for its decision stated that "large portions of the land, if not the entirety of the designated land, within the proposed zone change are and have been the subject of many decades of persistent and explicit efforts by and on behalf of the Town to preserve the area as open space.

***24** The town was legitimately concerned, in light of the long efforts to protect Oswegatchie Hills as open space, that rezoning the entire property to an affordable housing zone would cause development of the remaining part of the property not covered by the site plan. As Judge Quinn noted, "[i]n *Christian Activities Council, Congregational v. Town Council,* 249 Conn. 566, 597, 735 A.2d 231 (1999), the Connecticut Supreme Court found that preservation of open space can, in the appropriate circumstance, constitute a substantial public interest that may outweigh the public interest in the creation of public housing. Just as the Supreme Court held in *Christian Activities Council* with respect to the property in that case, this court concurs with Judge Quinn's conclusion that State and Town interests in preserving Oswegatchie Hills, or significant portions thereof, "has been more than an idle or passing thought."

Landmark's first application was a request to rezone the entire Landmark property to an affordable housing zone. Its second application proposed a specific development that scattered housing throughout the property, one portion near the northern part of the ridge and another portion in the northeast corner near existing housing. Only 20 percent of the property was specifically set aside as open space in the second application. Slightly less than half the property was designated as "other land to be developed." See ex. 1, submitted at trial by stipulation of the parties. Either one of those earlier applications would have left the amount of open space far below the levels historically designated to be preserved. Similarly, Landmark's request in the present application to rezone the entire property, either under its

proposed amendments or the town's existing regulations, would leave the remaining portions of the property not covered by the current site plan vulnerable to loss of open space in the future. There is sufficient evidence in the record to support the commission's decision to deny rezoning the entire property to an affordable housing zone in order to preserve open space, and this court concurs with the conclusions of Judges Quinn and Prescott that "[t]he record supports the Commission's finding that the public interest in preserving the area as potential future open space outweighs the public interest in affordable housing, given the unique nature of the site."

Landmark repeatedly stated to the commission, however, that, while reserving the opportunity to seek additional development of the remaining property later, it would acquiesce in a decision to rezone only the specific area proposed for development and open space on the site plan that it submitted. Landmark's site plan proposed to build the Riverview Heights development on 35 of its 236 acres, to set aside another 80 acres for open space, and to leave the remaining 121 acres of its property undesignated. Approving the site plan and a more limited zone change for just the area covered by the site plan would thus have preserved 201 acres of the property, more than the 200 acres that the recent town plans in the record have identified as the town's open space goal for Oswegatchie Hills, as either designated open space, the 80 acres in the site plan application, or potential open space in the future, the remaining 121 acres. There was thus insufficient evidence in the record to support the commission's reason for denying the site plan based on the need to preserve open space.

***25** On the open space issue, after its own plenary review of the record the court concludes, moreover, that the commission did not meet its "burden to prove, based upon the evidence in the record compiled before such commission, that (1)(A) its decision to limit the rezoned area only to the Landmark property inside the sewer service district is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; [and] (B) such public interests clearly outweigh the need for affordable housing; ..." The substantial public interest in preserving open space at Oswegatchie Hills could have been protected by modifying the proposal and rezoning only the area of the site plan, and approving the site plan on the acreage proposed. Such a modification would have left more than 200 acres, the amount specified for open space on the most recent town plan in the record, as designated or potential open space.

b. Environmental Damage

The potential for environmental damage pervades the town's decision to reject Landmark's proposed regulations,[40] to deny the zone change for the entire property[41] and the site plan,[42] and to limit the rezoned area to the portion of Landmark's property inside the sewer district.[43] In view of the fact that the court has already concluded that sufficient evidence supports the commission's decision to deny a zone change for the entire property in order to protect the substantial public interest in preserving potential open space, the court will first address whether the commission has met its burden under § 8–30g to reject the site plan and Landmark's proposed regulations for these environmental reasons.

The physical characteristics of the Landmark property—the forest, the animal species dependent on the forest, its many steep slopes, the bedrock, soils, and wetlands on the property, and its proximity to the Niantic River—have long been a concern for the Town. Its 1987 Plan of Development stated, for example, that "[s]lopes have an impact on the water runoff area and in turn have a direct effect on the quality and quantity of water entering our streams, wetlands, and aquifers. Because development of an area necessitates, at least in part, the stripping of natural ground cover, increasing the runoff rate and causing erosion and sedimentation, careful study and planning with regard to slope is mandatory." ROR, ex. 2, attachment D. In 2002 the Niantic River Gateway Commission adopted Niantic River Gateway Standards stating that "[t]he soil, bedrock and hydrologic characteristics of the land within the conservation zone limit the level of development that can be supported." *Id.* A letter from the East Lyme Harbor Management/Shellfish Commission in the record aptly summarizes these concerns about the suitability of Oswegatchie Hills for development:

> Oswegatchie Hills is one of the largest undeveloped parcels of land in the Connecticut coastal area of Long Island Sound. The soil and bedrock conditions amid steep slopes do not provide good conditions for on-site sewage disposal and high-

> density development in this area would result in increased levels of non-point source pollutants, including excess nutrients and coliform bacteria that would threaten existing shellfisheries. Further stress to the Niantic River ecosystem would result from inputs of other contaminants contained in stormwater runoff. We should protect this unspoiled hillside from development that would destroy its natural beauty and environmental resource values. We must protect the Niantic River by preserving the natural environment of the hills above it.

***26** ROR, ex. 5, at 3.

The record here contains considerable evidence regarding potential environmental harm that could result from approving the site application, adopting the proposed regulations, or rezoning the entire property. The East Lyme Harbor Management/Shellfish Commission letter stated that "one of the major concerns identified in the Upper Niantic River Planning Unit is poor water quality. Future development, particularly of Oswegatchie Hill, could intensify water quality problems." ROR, ex. 5, at 3. The letter explained that nitrogen overloading from land runoff "is a direct consequence of development in the watershed" and "has led to die-offs in the eelgrass beds, which serve as a refuge for juvenile marine animals." A letter from a scientist responsible for supervising marine ecological studies associated with the Millstone Power Station wrote that the loss of eelgrass population resulting from declining water quality due to nutrient inputs from residential septic systems and fertilizer use has had broad impact on the declines in once abundant species that rely on eelgrass meadows for nursery and feeding habits, including finfish and bay scallops. A 2004 letter from DEP stated that the second application, for fewer units than the present one but inside the coastal management and conservation areas, "would allow for inappropriately intensive development ... in an area incapable of supporting intensive development without significant environmental consequences. The subject site is characterized by both shallow depth-to-bedrock and steep slopes which ... would mandate significant alterations of the site to provide suitable land for road access, septic systems or water and sewer service, and inhabited structures. Such alteration of this natural area and associated runoff would significantly impact coastal resources and water quality along the river. Such a development would also cause sedimentation and erosion, nitrogen loading, and impacts on submerged aquatic vegetation, finfish, shellfish and wildlife on the site and in the Niantic River and Latimer Brook." ROR, ex. 19. A letter from the DEP on this application stated that Landmark had not provided all the information that DEP had requested to conduct its review of the proposal pursuant to General Statutes § 22a–104(e). DEP thus recommended to the commission that it deny the proposed regulations and zone change because of the potential adverse impact on on-site and adjacent coastal resources as well as constraints posed by on-site conditions including steep slopes, exposed bedrock, shallow depth to bedrock and high erosion potential in proximity to the Niantic River. See ROR, ex. 4. This and the other evidence before the commission surely established that the potential for environmental harm is more than theoretical. There is no doubt that such potential environmental damage is a substantial public interest that the commission may consider.

(1) Amendments to zoning regulations

***27** The East Lyme zoning regulations allow developers to submit affordable housing applications in either one stage (an application for a special permit accompanied by a site plan) or in two stages (first a conceptual site plan,[44] which is followed by an application for a special permit and a site plan[45]). See ROR, exhibit VII, East Lyme zoning regulations; sections 24, 25, and 32. Landmark made a compelling case that a more graduated process for submitting affordable housing applications would have the benefit of reducing the cost burden associated with such applications, consistent with the policy considerations expressed by the Supreme Court in *Kaufman v. Zoning Commission,* 232 Conn. 122, 140–141, 653 A.2d 798 (1995). The commission's decision acknowledged that adding another level of review would have the "salutary effect of making the affordable housing application process more access and affordable to developers which would result in the promotion of affordable housing in East Lyme." ROR, ex. IV, at 4.

The amendments to the affordable housing regulations submitted by Landmark called for three stages in the affordable housing application process consisting of conceptual, preliminary, and final site plans. Conceptual site

plans would provide a property line survey and topographical contours at ten-foot intervals and show the location of proposed buildings, areas designated for open space and recreation, and any wetlands, watercourses, and steep slopes. Preliminary site plans would provide an affordability plan, preliminary designs for buildings, and a table with the number of buildings, dwellings, and bedrooms per unit. Final site plans would include a large array of information, including waste disposal and storm water drainage, but would have to be approved if in conformity with the preliminary site plan approval. Under the Landmark amendments, the preliminary site plan is thus the critical stage of the application process and is approved or disapproved before a developer is required to submit such information as its sewage disposal plans, storm drainage plans, and erosion and sedimentation plans, the very types of information that the DEP pointed out here was necessary for it to assess the potential for environmental damage. The town's existing regulations for a special permit or site plan require such information on proposed storm drainage, sewage disposal, water supply, and erosion and sedimentation controls. The three-stage process proposed by Landmark, however, had the defect of eliminating the requirement that a developer submit the type of detailed information, before approval had become mandatory, that towns need to determine whether, for example, damaging environmental impact would result from a proposal.

Rejecting Landmark's proposed amendments because they would require approval of an affordable housing application without the submission of "the information deemed necessary for the Commission to satisfactorily evaluate the application to protect the health and safety of the public," *id.*, the commission's decision stated that the commission had treated Landmark's site plan "as an application for approval of a Conceptual Site Plan under the regulations." *Id.*, at 5, 653 A.2d 798. The record is clear here that certain requirements in the town's zoning regulations were necessary under the standard set in *Wisniowski v. Planning Commission, supra,* 37 Conn.App. at 317, 655 A.2d 1146, to protect the substantial public interest in health, safety and other matters; and the commission's decision to reject the draft regulations because they would require final approval of an affordable housing application before a developer was required to submit essential information related to environmental impact is supported by sufficient evidence in the record and necessary to protect substantial public interests that clearly outweigh the need for affordable housing.

***28** The commission's decision stated that reasonable changes could be made to Landmark's proposed amendments in accord with § 8–30g(g)(1)(C). One change was that "any provision for a Preliminary or Conceptual Site Plan must provide the Commission with adequate information ... that would allow the Commission to adequately evaluate the proposed development to ensure its harmony with the relevant environmental, developmental, health and safety considerations and other considerations which it may consider." *Id.*, at 4, 655 A.2d 1146. Such a requirement was a reasonable change to the proposed amendments and consistent with the provision of General Statutes § 8–30g(g)(1) that substantial public interests in health, safety, or other matters which the commission may legally consider and which clearly outweigh the need for affordable housing can be protected by reasonable changes to the affordable housing application.

Under the town's existing regulations, an application for designation as an affordable housing district that does not contain a special permit must be accompanied by a conceptual site plan. If the conceptual site plan is approved, an applicant must then obtain a special permit, provide an affordability plan, and submit a final site plan before beginning construction.[46] The regulations provide that an application for a special permit[47] must provide a variety of types of information similar to that requested by DEP. In view of the commission's recognition of the benefits of a graduated application process and the fact that the town's current regulations do not require all of this information with a conceptual site plan, the public interest does not require that the special permit information be provided at the first stage.

The record thus contains sufficient evidence to support the commission's decision to reject the proposed amendments in their current form for the reason that such an approval would have allowed Landmark to obtain final approval of its affordable housing application without commission town ever knowing whether the development would cause environmental or coastal damage. The court's own plenary review of the record shows a substantial public interest, in knowing whether the development would cause such harm that clearly outweighs the need for affordable housing. That public interest could have been protected, however, by approving modified amendments that allowed affordable housing applications in three stages and required the

information set forth in the previous paragraph before final approval, at either the preliminary or final site plan stage.

(2) Zone change

The affordable housing applications reviewed in the first and second judicial appeals proposed development throughout Landmark's property. Judge Prescott found that there was substantial support in the record for the commission's conclusion in that case that "many of the development's physical characteristics would adversely impact coastal resources if the property was developed at the high-density rate proposed by the applicants." Although most of the evidence in the record pertained to Landmark's current proposal, which placed all of the development, other than designated open space and the access road/driveway, outside the coastal management area, there was sufficient evidence in the record here to support that same conclusion that *rezoning the entire property,* which would permit more extensive development and construction in the coastal management zone and conservation zones, would have such an effect. See, e.g., the 2004 letter from the DEP stating that the second application for 352 units located partially in the conservation and coastal management zones was "inconsistent with the policies and standards of the CCMA based on severe development constraints at the site, and the proposal's unacceptable impacts to water quality and coastal resources ... ROR, ex. 19. These were issues of substantial public interest that the commission was entitled to consider and clearly outweighed the need for affordable housing.

***29** After rejecting the zone change request for the entire property, the commission applying its own regulations for affordable housing districts, approved, with certain restrictions, rezoning the area within the town's sewer service district. The commission found that "by reducing the scope and location of the zone change," "the town's goals of preserving Oswegatchie Hills can be achieved ... the riverfront and hillside woodlands can be preserved ... [and] the zone change affects a significantly smaller portion of land within the Coastal Boundary." ROR, ex. IV, at 6. Such a decision was consistent with the commission's finding that there was sufficient evidence to reject a zone change for the entire property and the requirement of § 8–30g(g)(1)(C) that it approve affordable housing applications if "the public interest can be protected by reasonable changes to the affordable housing development." Without evidence as to the types of information sought by the DEP, however, this court, after its own plenary review of the record, cannot determine that the public interest could also have been protected by expanding the area rezoned to include the entire site plan. The public interest may be protected, however, by directing the commission on remand to reconsider the zone change request for the site plan area after Landmark has submitted a preliminary or final site plan and provided the information that the commission deems necessary to assess environmental damage to the area, coastal resources, and the interests protected by the coastal management act and conservation zone statute.

(3) Site plan

Although Landmark referred to its application as a preliminary site plan; see, e.g., ROR, ex. IIC, transcript of public hearing on 9/1/05 at 118; presumably with the intention of having it reviewed as such under its proposed regulations, and as stated above, the record contains sufficient evidence to support the commission's decision to deny Landmark's application as a preliminary site plan under those amendments, which would have allowed Landmark to obtain final approval of its affordable housing application without the town ever knowing whether the development would cause environmental or coastal damage. Having rejected those amendments, the commission's decision said that "applicant's request for approval of a Preliminary Site Plan cannot be adequately addressed by the Town's current regulations as no such category of site plan approval exists within Section 32 of those regulations." ROR, ex. IV, at 6. Recognizing its duty under *Wisniowski v. Berlin Planning Commission* not to reject an affordable housing application based on noncompliance with town regulations, the commission stated in its decision that it would treat the site plan application as a conceptual site plan under its regulations which, the commission's decision said, contain "basic requirements that must be addressed in any "Affordable Housing Application," including provisions for approval of a Conceptual Site Plan, which is sufficiently similar to the applicant's proposal so that the applicant's proposal can be treated as an application for approval of a Conceptual Site Plan under the regulations." *Id.*, at 6–7, 655 A.2d 1146. Except for letters from the Water and Sewer Commission and locating utility lines on its site plans, Landmark's application included most of the information required by the town's current affordable housing regulations for approval of a conceptual site plan (see footnote 44 above) but not the more detailed information required by the town's zoning regulations for a final site plan or special permit on

a wide variety of topics, such as erosion and sedimentation controls or storm water management that DEP stated was necessary to assess the environmental impact of the proposal.

***30** The court must first determine whether the commission's decision to reject a conceptual site plan on the various environmental grounds, as specified in more detail in footnotes 41 (the commission's reasons for denying a zone change that it incorporated into its reasons for denying the site plan) and 42 above, "is supported by sufficient evidence in the record." *Quarry Knoll II Corp. v. Planning and Zoning Commission of Greenwich, supra,* 256 Conn. at 716, 780 A.2d 1. "The sufficient evidence standard requires the commission to show a reasonable basis in the record for concluding that its decision was necessary to protect substantial public interests. The record, therefore, must contain evidence concerning the potential harm that would result if [the application were granted] and concerning the probability that such harm in fact would occur." (Internal quotation marks omitted). *AvalonBay Communities, Inc. v. Planning and Zoning Commission of Town of Wilton,* 103 Conn.App. 842, 846–847, 930 A.2d 793, 797 (2007), citing *River Bend Associates, Inc. v. Zoning Commission,* 271 Conn. 1, 24, 26, 856 A.2d 973 (2004), quoting *Kaufman v. Zoning Commission,* 232 Conn. 122, 156, 653 A.2d 798 (1995). The court initially examines "whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted." *River Bend Associates, Inc. v. Zoning Commission, supra,* 271 Conn. at 26, 856 A.2d 973.

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

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

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

***31** Most of the construction for the current site plan would not be in statutorily protected zones or areas with the steepest slopes. The DEP's written analysis of this application thus differs somewhat from its recommendations to deny the first two applications because of "unacceptable impacts to water quality and coastal resources." [50] Although the DEP letter this time stated that the present proposal raised "all the coastal resource, water-dependent use, water quality, in-river resource issues" as the previous applications, DEP did not specifically find that the third application would cause "unacceptable impacts." Its letter to the commission instead mentioned the "*potential adverse impacts* on on-site and adjacent coastal resources ..." (Emphasis added.) DEP recommended denial of the third application because Landmark did not provide sufficient information to show that the current site plan would not have the same likely consequences that defeated the second application.

Despite the DEP recommendation, the town's zoning regulations do not require that a special permit application or the information sought by the DEP be submitted for a conceptual site plan. Although there was also, as discussed above, sufficient evidence to reject the application as a *preliminary site plan,* there was thus insufficient evidence in the record before the commission to reject the application *as a conceptual site plan because of DEP's recommendation or*

these environmental reasons. Despite Landmark's referring to its application as a preliminary site plan, treating and approving the application as a conceptual site plan is a reasonable change in the application that would protect the public interest. The potential for environmental harm or damage to coastal resources may be assessed by requiring the developer to submit an application for approval of a preliminary or final site plan that includes the information necessary for the commission to assess the environmental and coastal impact, such as that requested by the DEP.

c. Coastal Management Act

The commission decision stated various reasons related specifically to the coastal management act, of which Judge Prescott conducted a lengthy and erudite analysis in Appeal II, for denying the zone change and site plan. Since the court has already determined that the commission acted properly in denying rezoning of the entire property in order to protect the public interest in preserving the area as potential future open space or avoiding the environmental harm discussed in the previous section, the court will focus here on ascertaining whether denying a zone change for the site plan and rejecting the site plan are justified on CMA grounds.

(1) Site Plan

The CMA-related reason that the commission cited for rejecting the site plan was that "[t]o the extent that the applicant's Coastal Management application sought *preliminary site plan* review, it was deemed inadequate by the Department of Environmental Protection, Office of Long Island Sound Programs, and was recommended for denial from that office." (Emphasis added.) ROR, ex. IV, at 7. Yet, the commission expressly stated that it was treating the Landmark application as a *conceptual* site plan. In denying the site plan, the commission stated that

> ***32** pursuant to General Statutes 22a–106, ... the proposed use of the site, which is fully or partially within coastal boundary, will have potentially adverse impacts on coastal resources and future water dependent activities. The Commission finds the proposed coastal site plan review application inconsistent with the policies and standards of the Coastal Management Act ... based on severe onsite development constraints and the potential adverse impact on coastal resources and water quality. Additionally, the Commission finds that the proposed use would not adequately protect for future water-dependent uses and access for the public to future water dependent uses; ...

Id. Although all these concerns may be matters of public interest the commission may consider, "potentially adverse impacts" do not meet the standard of quantifiable probability of specific harm to the Sound, the river, their ecosystems and habitats, other coastal resources, or future water dependent resources. Submission of the information necessary to assess such an impact is not required by the town's regulations to obtain a conceptual site plan and is thus not a sufficient reason to deny the application as a conceptual site plan. There was thus insufficient evidence in the record to support the commission's decision to reject the Landmark application as a conceptual site plan under the town's regulations on these. Under § 22a–109, a coastal site plan may be denied if not in compliance with the town's zoning regulations. Upon submission of a preliminary site plan with the information required by the amended regulations, the commission and DEP will have sufficient information to review a coastal site plan under the CMA. The court therefore concludes that the public interest will be protected by treating and approving Landmark's site plan as a conceptual site plan and requiring subsequent submission of the information necessary for the commission to assess environmental and CMA issues with the preliminary or final site plan .[51]

(2) Zone change request

In denying the zone change for the entire property, the commission's decision stated that

> large portions of the land within the proposed zone change are within the Coastal Boundary as described

> in General Statutes 22a–94 and as depicted on the applicant's overall Site Plan (Exhibit 12). The development of the site at the density allowed by the proposed regulations would result in adverse impacts to the ecosystem and habitat of Long Island Sound, which includes the Niantic River.

ROR, ex. IV, at 5. There was sufficient evidence in the record, as recounted in previous sections, to support this reason as a basis for not approving a zone change for the entire Landmark property. The substantial public interest in safeguarding coastal resources protected under the statute clearly outweighs the need for affordable housing; and, in the absence of the sort of information requested by the DEP, the court cannot determine, after a plenary review of the record pursuant to § 8–30g(g)(1)(C), that a reasonable change to the application could be made by limiting the zone change to the area covered by the site plan. The public interest would be protected, however, by approving the Landmark application as a conceptual site plan and allowing consideration of rezoning the site plan area after Landmark has submitted a preliminary site plan accompanied by the information requested by the DEP or commission to ascertain the environmental impact of the proposal.

(3) Preservation of unique environmental qualities as a reason for denying zone change for entire area

***33** The record contains many references to the desire of the commission, town officials, the intervenors, and general members of the public to preserve the "unique environmental" qualities of Oswegatchie Hills, and the one reason given by the commission for denying a zone change for the entire area was that "the proposed development at the site is reasonably like to have the effect of unreasonably polluting, impairing and destroying the surrounding resources ..." (See last paragraph of footnote 41.) Such a desire overlaps substantially with the town's goals of preserving open space on Oswegatchie Hills and preventing damage to the coastal management area and conservation zone already protected under the General Statutes. As Landmark has pointed out, moreover, the property is already zoned for three-acre housing, and even if development consistent with that zoning might not lead to construction of all 60 homes shown on one of the drawings submitted by Landmark, such development would probably cause damage to many of the property's treasured environmental characteristics. But rezoning the entire Landmark property to an affordable housing district would allow development at a much greater density throughout the property, including on land protected by the coastal management act and conservation zone statute, and there was sufficient evidence to support preserving the environmental qualities of this property as a reason for denying rezoning of the entire property that would permit such increased density. There is a substantial public interest in protecting against such environmental damage that the commission may legally consider and that clearly outweighs the need for public housing. The commission has already decided that this public interest may be adequately protected by a limited rezoning of the portion of the property inside the town's sewer service district. Without evidence as to the types of information sought by the DEP, however, this court, after its own plenary review of the record, cannot determine that the public interest could also have been protected by expanding the area rezoned to include the entire site plan. But the public interest can be protected by remanding this issue to the commission with instructions to reconsider expanding the rezoned area to encompass the entire area of the site plan after Landmark has submitted the information required by the commission under the amended regulations at the preliminary or site plan stages.

3. Other reasons

a. Lack of buffer areas between multifamily zones in proposed regulations

Another of the commission's reasons for rejecting Landmark's proposed regulations was that they "eliminate the requirement that the applicant provide for any buffer area where the parcels adjoining the Affordable Housing District are zoned for multifamily use. The existing regulations provide for a buffer of 100 feet between where the parcels adjoining the Affordable Housing District are zoned for multifamily use districts and the Commission deems it inequitable and discriminatory to eliminate that requirement in situations where the multifamily development contains affordable housing." ROR, ex. IV, at 3. The zoning regulations give the commission discretion to waive the 100–foot buffer requirement for special use or special use elderly districts, although they do require a minimum of 50 feet[52] and,

similarly, allow the commission to include an unspecified portion of the buffer strip to count toward the ten percent open space requirement for affordable housing districts. No criteria are provided for exercise of that discretion. The zoning amendments proposed by Landmark eliminated the 100–foot requirement between an affordable housing project and "the boundary of any lot or parcel outside the AHD, unless such lot or parcel is already zoned for multi-family residential uses." ROR, ex. 2. At the public hearing, Landmark's spokesperson Russo agreed to modify the regulations to provide 25–foot buffers between affordable housing and other properties zoned for multi-use family housing. ROR, ex. IIID, at 196. The court will therefore consider the proposed regulations as imposing such a 25–foot requirement.

***34** There is sufficient evidence in the record to establish that Landmark's proposed amendments to the regulations deviate from the town's own regulations, but, under § 8–30g(g), noncompliance with a town's zoning regulation is not, per se, an adequate basis to deny an affordable housing application, since the requirements in § 8–30g(g)(1)(A)–(C) also requires a commission to determine whether "the rationale behind the regulations to determine whether the regulations are necessary to protect substantial public interests in health, safety or other matters." *Wisniowski v. Planning Commission, supra,* 37 Conn.App. at 317–318, 655 A.2d 1146. At the third public hearing one of the commissioners engaged in a dialogue with Glenn Russo from Landmark on the reason for requiring buffers.[53] On appeal, however, the court may only consider the reasons articulated in the commission's decision, in which the only rationale stated for this requirement was that eliminating any buffers would be discriminatory and inequitable, although it did not specify to whom. There was insufficient evidence in the record to support this reason as a basis for denying the proposed regulations. The court's own plenary review of the record does not find that the commission sustained its burden of proving, based upon the evidence in the record compiled before such commission, that the commission's decision on this point was "necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider" or that any public interests advanced by the buffer requirement, with the modification acceded to by Russo, clearly outweigh the need for affordable housing.

The other buffer-related reason given by the commission for denying the draft regulations was that they "provide that any buffers required by the regulations can be included in the calculation of open space, thereby effectively lessening the amount of land dedicated to open space, which is in direct opposition to the Town's goal of increasing open space and preserving open space." ROR, ex. IV, at 3–4. The zoning regulations already give the commission discretion to count a portion of the buffer strip toward the open space requirement. Landmark's brief argues that buffers "*are,* effectively, open space," (emphasis in original) and asks "what 'substantial interest' is being protected" "given the substantial percentage of open space that the Plaintiff's proposal would have required." Pl.s' brief, at 38. The commission's briefs offer no analysis of or justification for this reason for denying the draft regulations. On this record, the court cannot find that there is sufficient evidence to support this reason for rejecting the draft regulations or that this reason is necessary to preserve the public interest in preserving open space and clearly outweighs the need for affordable housing.

b. Lack of fall zones

The commission also stated that a reason for denying Landmark's proposed regulations was that they did not require "fall zones that correspond to the height of the building." Section 32.4.8 of the town's zoning regulations for affordable housing districts provides that "[t]he shortest distance between any two structures shall be no less than the height of the taller structure, with a minimum of 24 feet. The commission may waive the separation requirement if design of the proposed development is benefitted by closer spacing." ROR, ex. VII, at 194. Although the commission's decision rejecting Landmark's proposed regulations stated that the fall zone requirement was "essential to public safety," there was not a whit of evidence in the record that such a requirement has any bearing on public safety or that the commission's decision on this ground was "necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider."

c. Lack of affordability plan in proposed regulations

***35** The commission stated that another reason for rejecting Landmark's proposed regulations was that they did not require that an affordability plan be submitted with a conceptual site plan. The town's current regulations pertaining to affordable housing districts do not require submission of an affordability plan with the conceptual site plan. Affordable

housing applicants applying for approval in two stages under the current regulations need not submit the affordability application until they apply for a special permit, after approval of the conceptual site plan. Landmark complains in its brief that "there was no need" for the proposed regulations to include such a requirement because the general statutes already require submission of an affordability plan with any affordable housing application in § 8–30g(b)(1). There was insufficient evidence in the record to support a requirement that an affordability plan be submitted with a conceptual site plan. In view of the fact that the town's own regulations do not require an affordability plan with a conceptual site plan for an affordable housing development, the court cannot find that the commission's decision was necessary to protect a substantial public interest that the commission may legally consider. On the other hand, it is reasonable for a zoning commission to be able to verify that a proposed affordable housing development contains an affordability plan in compliance with the statutory requirements before giving final approval, and nothing stated herein should be construed as prohibiting the commission from requiring submission of such a plan at the preliminary or final site plan stage.

> d. Lack of requirement in proposed regulations that a conceptual site plan include a special permit application, "traffic impact statement and general traffic access and circulation information," building dimensions, utility locations, soil type survey, and "other information required by the Town affordable housing regulations which the Commission has duly adopted and deems necessary to satisfactorily evaluate the application to protect the health and safety of the public" ROR, ex. IV, at 3.

This reason for rejecting Landmark's text amendments to the town's affordable housing regulations implies that the town already requires that a special permit application accompany a conceptual site plan, but that is not correct. See footnote 44 *supra,* which sets forth the requirement for a conceptual site plan. Since the current zoning regulations do not require that a special permit application, and the information required by the town regulations for such an application, be submitted at the conceptual site plan stage, there was insufficient evidence in the record to support rejecting the proposed regulations for failing to include the special permit information that the commission itself has previously deemed need not be provided with a conceptual site plan. In view of the commission's recognition of the benefits of a graduated application process and the fact that the town's current regulations do not require all of this information in the conceptual site plan stage, the public interest does not require that the special permit information be provided with a conceptual site plan.

***36** In its decision, the commission recognized the benefit of adding a third stage to the affordable housing application process, but one change that it suggested for the proposed zoning amendments was to add requirements that

> any provision for a preliminary or conceptual site plan must provide the Commission with adequate information as described in paragraphs # 1 ["letters from Water and Sewer Commission indicating adequate facilities for sewer and water"], 2 [requirements for special permit, traffic impact statement and traffic access information, building dimensions, utility locations, soil survey, and other information "deemed necessary ... to satisfactorily evaluate the application" for health and safety issues], 3 [affordability plan], and 5 [preliminary site plan must provide "information deemed necessary for the Commission to satisfactorily evaluate the application to the protect health and safety of the public"] above [referring to earlier paragraphs of the decision stating the commission's reasons for considering the proposed amendments inadequate] that would allow the Commission to adequately evaluate the proposed development to ensure its harmony with the relevant environmental, developmental, health and safety considerations and other considerations which it may consider.

Id., at 4, 655 A.2d 1146. It is difficult to tell from the commission's decision that "any provision for a preliminary or conceptual site plan" must contain all the above information means that the commission intended for both conceptual and preliminary site plans to provide all this information, or whether it meant that all of this information must be provided at one stage or the other.

To the extent that the commission intended to require such information at both stages, such a decision is not necessary to protect substantial public interests in health, safety or other matters that the commission may legally consider. Yet, as this court has already noted, the commission may require, before final approval of an affordable housing application, that an applicant provide information necessary for the commission to assess the impact of a project on substantial public interests in health, safety or other matters. The failure

of the draft regulations to include this information at any of the three stages in the affordable housing application process before final approval was a sufficient reason, under the *Wisniowski* standard, to reject the proposed regulations. Requiring these types of information at some stage in the application process before final approval is necessary to protect substantial public interests in health, safety, and other matters that the commission may consider and those interests clearly outweigh the need for affordable housing.

On the other hand, the commission's decision did not articulate whether or why the various types of information should be provided at the conceptual or preliminary site plan stage. The commission itself, rather than the court, should, in the first instance, make such an assessment. Those public interests may be protected by a remand to the commission for it to amend its regulations to implement its recognition of the salutary purposes of multistage applications by adding a third stage to the affordable housing process. Consistent with the goals "of making the affordable housing application process more access and affordable to developers which would result in the promotion of affordable housing in East Lyme," the commission shall apply its own judgment and expertise in determining what types of information should be provided at the various stages. [54]

e. Traffic

***37** Traffic generated by the project and its effect on the surrounding neighborhood were other reasons stated by the commission for denying the site plan:

> the Preliminary Site Plan fails to adequately address the considerable difficultics in providing a singular vehicle access to the site through the narrow, winding streets of the existing Golden Spur neighborhood and onto the state route system in manner consistent with public health and safety of the residents of Golden Spur, the future residents of the Affordable Housing Development and the users of town and state roads.

Id., at 7, 655 A.2d 1146. The commission's original brief argued that "a licensed transportation engineer determined that the development would lack proper access to public roadways." (Brief, at 34.) In the town's reply brief, the commission also asserted that the amount of traffic on the access drive on Landmark's property "is per se inconsistent" with the coastal management act. (Reply Brief, at 14 .) This latter argument, although not so expressly stated in the commission's decision, is consistent with another of the commission's stated reasons for denying the site plan application—that "the proposed use of the site, which is fully or partially within coastal boundary, will have potentially adverse impacts on coastal resources and future water dependent activities." The court will consider these two traffic-related reasons for denying the site plan separately.

(1) Increased traffic on public roads

The Landmark site plans showed that vehicles would enter the development on an access road or driveway, described as "boulevard style," [55] running approximately 2,000 feet from Calkins Road in the Golden Spur neighborhood northeast of the property to the Riverview Heights development site consisting of 840 housing units, ancillary structures, and 1831 parking spaces at the top of the ridge. At present, Calkins Road runs from U.S. Route 1 to Hill Road, which itself has a second point of access to Route 1 via River Road. Both the commission and Landmark offered exhibits and testimony from professional engineers at the public hearing regarding the traffic that would be generated by the development. The commission's expert identified certain "issues" that "need to be addressed relative to this project" [56] and testified at the public hearing that "my report ... doesn't have any improvements proposed ... [W]e are going with what's existing out there." ROR, ex. IIC, at 36–37. Landmark's expert, on the other hand, identified the same issues as had the commission's but then recommended specific improvements. He said that these improvements "will provide safe access and egress to and from the site," and that with them the proposed development "will not significantly impact the traffic operations on the roadways and intersections in the vicinity of the site." ROR, ex. 26, at 9–10. [57]

While a zoning commission is not required to accept the testimony of any witness, even that of an expert, and is entitled to decide which of two experts to credit, its own

expert, Kalluri, did not give any opinion or testimony about the improvements recommended by DeSantos. The commission must have sufficient evidence in the record to support the reasons it gives for denying an affordable housing application. It is obvious from the commission's decision that, without expressly saying so, it did not credit the testimony of Landmark's expert that the improvements he recommended would ameliorate the concerns identified by its expert. When the decision of a commission rejects an expert's opinion, however, there must be sufficient evidence in the record for that decision and for rejecting that opinion. "Although the commission would have been entitled to deny an application because it did not believe the expert testimony, ... the commission had the burden of showing evidence in the record to support its decision not to believe the experts—i.e., evidence which undermined either the experts' credibility or their ultimate conclusions." *Kaufman v. Zoning Commission, supra,* 232 Conn. at 156–157, 653 A.2d 798. Here there is no evidence supporting the commission's decision to reject DeSantos's report, testimony, or conclusions. The record does not contain sufficient evidence to support this reason. Although there was sufficient evidence to show that the development presented safety concerns, which are matters of legitimate public interest, an approval conditioned on the developer obtaining approval from the state department of transportation [58] for DeSantos's recommended improvements and the developer then implementing those improvements its own cost would have protected the public interest of ensuring safe traffic flow to and from the site and in the surrounding neighborhood. [59]

(2) Effect of traffic on coastal management area

***38** The commission's reply brief raises, for the first time, the concern that the many cars coming and going from the development would adversely affect the coastal management area:

> It stretches both reason and commonsense to contend that such usage, along a road that is admittedly within a coastal boundary, somehow preserves or enhances coastal resources or is in any water dependent as contemplated by CMA. High volume activity of this kind is per se inconsistent with CMA, no matter how the plaintiff tries to avoid the elephant in the room.

Town's Reply Brief, at 14. The record does not contain any evidence of the "quantifiable probability," however, of the environmental impact of the access road/driveway on the coastal management area. Since the coastal management act and town regulations exempt driveways from review under the coastal management act, it is obvious that the act contemplates some level of vehicular access to and traffic in a coastal management area to be consistent with the goals of the act. As Judge Prescott noted in his decision, the coastal management act

> expresses a strong preference for enhancing economic development and activities that are dependent upon proximity to the water and/or shorelands that are immediately adjacent to marine and tidal waters, while prohibiting or minimizing activities that are not marine dependent, particularly those that will adversely impact these fragile natural resources.

Appeal II. The DEP was legitimately concerned about the impact of the development on the coastal management area, but did not specifically mention the effect of the road on the CMA. The court concludes that the commission's concern is not supported by sufficient or quantifiable evidence as to the impact of the road and traffic on the coastal area, but that lack may be the result of the fact that Landmark did not submit any of the information requested by the DEP. In view of the paucity of evidence, this was not an adequate basis to deny a conceptual site plan, but this issue can be addressed again when Landmark has provided the information to be required by the DEP and for a preliminary site plan. After Landmark has provided details of its plans for sedimentation and erosion control, drainage, storm water management, and other such information, the commission will be better able to assess whether the road and traffic will adversely impact these fragile natural resources.

IV—OTHER GROUNDS FOR APPEAL

A—Rezoning smaller area

One of the grounds raised in the applicants' appeal claims that "[t]he Commission had no legal authority, in rendering the decision at issue, to place the plaintiffs' property into a zone that the plaintiffs had not requested"—i.e., to restrict the rezoning to only a portion of the area covered by the development shown in the preliminary site plan. See appeal complaint, ¶ 46(e). During the public hearings, representatives of the applicant had repeatedly reminded the commission of its authority under the affordable housing statute to make "reasonable changes" to the Landmark application.[60] At the public hearing on August 18, 2005, counsel for the applicants invited the commission to approve a preliminary site plan and rezone only for the area inside the town's sewer service district boundaries. The commission, however, rejected the site plan without modifications but then rezoned the part of the Landmark property inside the town's sewer boundaries.

***39** General Statutes § 8–30g(g) requires a zoning commission authority to determine whether the "substantial public interests" being protected by denial of an affordable housing application can instead be protected "by reasonable changes to the affordable housing development." By merely rezoning a portion of the property but not approving any site plan, it cannot be said that the commission made a change to an affordable housing development. Since the town rejected any site plan, the court cannot find that its act of rezoning, while simultaneously finding that no reasonable modifications could be made to the site plan, was a reasonable modification to the application. The matter is ordered remanded to the commission with direction to rescind the rezoning unless it subsequently approves a site plan submitted by applicants.

B—Commission Procedures

The applicants also repeatedly complained at the public hearing that commission staff had been unwilling to meet with them prior to the public hearings to discuss staff critiques of the application and provide Landmark an opportunity, in advance of the hearings, to make changes in the application to address those comments, and raised that same complaint in paragraphs 46(a) through 46(b) of their appeal complaint. In paragraph 46(c), the applicants allege that "[t]he town's denial of the plaintiffs' application was predetermined, as evidenced, inter alia [in original], by the fact (reflected in the Commission's minutes) that the Commission's attorney had draft the resolution for denial at a time when he already purported to know "what the Commission feels would be appropriate; ..." The town's answer denied these allegations.

The affordable housing statute does not mandate towns to employ any particular procedures prior to public hearing, and applicants have not provided any law to the court on its claims embodied in paragraphs 46(a) and (b) or evidence to support that the town's conduct violated any legal requirements. This ground for the appeal is denied.

The minutes for the East Lyme Zoning Commission on December 2, 2005, when it made its decision on Landmark's affordable housing application, show that the commission's attorney submitted three draft resolutions to the commission: one to deny all of Landmark's requests, another to reject the zoning amendments but grant a "Partial Approval of the Zone Change—with restrictions—to rezone a designated portion of the applicant's property" in accordance with the current affordable housing zoning regulations, and the third "for Approval of the Regulations with Modifications—this approves the text amendment but changes it to conform to what the Commission feels would be appropriate." ROR, ex. 4, at 3. Plaintiffs' appeal suggests that this latter statement indicates off-the-record discussions prior to the public hearing between one or more of the commission members and the commission's attorney. Their brief further states that "despite the fact that the minutes of the Commission's meetings do not reflect any direction to the Commission's attorneys to draft a motion for either approval or denial, the record shows that no draft motion for approval was ever presented or considered." Pl.s' Brief, at 23. No copies of the two draft resolutions rejected by the commission are in the record before this court. The record as it does exist before this court is insufficient to find any improper conduct on the commission's part. The ground for appeal in paragraph 46(c) is also rejected.

V–CONCLUSION

***40** Several issues have been presented on this appeal, which will be addressed in turn.[61] Under General Statutes 8–30g(g), if a zoning commission meets its burden of proof under the statute, an affordable housing appeal must be

dismissed. If a zoning commission does not satisfy its burden under subsection (g), "the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it."

A—Amendments to Zoning Regulations

With regard to Landmark's request for amendments to the zoning regulations, the commission's decision to deny those amendments because they did not require public water and sewer for affordable housing projects and did not require that conceptual site plans for an affordable housing project be accompanied by an affordability plan and the information required for a special permit was not supported by sufficient evidence in the record and was not necessary to protect public interests in health, safety, or other matters that the commission may legally consider. Such public interests did not clearly outweigh the need for affordable housing. Nor was there sufficient evidence in the record to support the commission's decision to reject the proposed amendments to the zoning regulations for (i) not requiring 100–foot buffers between multifamily zones, as opposed to the 25–feet buffers to which Landmark agreed, (ii) not requiring fall zones that correspond to the height of a building for affordable housing projects, or (iii) for counting buffer space as open space. None of these requirements was necessary to protect public interests that the commission could consider or outweigh the need for affordable housing.

The commission did have sufficient evidence in the record before it, however, not to adopt the proposed amendments in their current form, because those amendments as currently drafted would have allowed a developer to obtain approval of an affordable housing development without the commission ever knowing whether the development would cause environmental or coastal damage. The court's own plenary review of the record shows a substantial public interest that the commission may legally consider in knowing whether the development would cause such harm that clearly outweighs the need for affordable housing without having such knowledge. Those public interests could have been protected by reasonable changes to the proposed amendments, namely by (i) eliminating the requirement of automatic approval of a final site plan after approval of a preliminary site plan and (ii) providing that, at the conceptual, preliminary or final site plan stage, an applicant would, consistent with the holdings in this opinion, provide information necessary to assess whether the development would cause environmental and coastal damage and other matters relevant to public health and safety.

Pursuant to § 8–30g(g), the appeal regarding the proposed zoning amendments is remanded to the commission to adopt amendments to the town's zoning regulations consistent with this opinion and incorporating Landmark's proposed amendments, with the exception of requiring, before a final approval of an affordable housing application, that an affordable housing applicant provide, in the conceptual, preliminary, or final site plan, "adequate information ... that would allow the Commission to adequately evaluate the proposed development to ensure its harmony with the relevant environmental, developmental, health and safety considerations and other considerations which it may consider." The commission shall use its own expertise and judgment to assess precisely which requirements are necessary to enable it to make such assessments and, consistent with this decision, at what stage various types of information should be provided.

B—Change of zone

*41 There was insufficient evidence in the record to support the commission's decision to deny a zone change for the entire property based on the lack of public sewers for an affordable housing district with the proposed or potential density as here. There was also insufficient evidence to support this reason as a basis for rejecting Landmark's suggestion that the commission rezone only the site plan area.

There was sufficient evidence in the record, however, to support the commission's reasons to deny a zone change for the entire Landmark property based on preserving open space and preventing adverse impact on environmental and coastal resources. Both of these are matters of substantial public interest that the commission could consider and clearly outweigh the need for affordable housing. The court also finds, however, that the substantial public interest in preserving open space there could have been protected by modifying the proposal and approving a change of zone for the area covered by the site plan drawings in the record. Without the types of information sought by the DEP, on the other hand, the court cannot find that the substantial public interest in avoiding damage to coastal resources or the environment could have been protected by expanding the change of zone from that approved by the commission

—the area inside the town's sewer service district—to the entire area covered by the site plan drawings. The substantial public interest in avoiding excessive environmental harm and damage to coastal resources can be protected, however, by a remand for the commission to amend its zoning regulations as specified above, for Landmark then to submit a preliminary or final site plan that provides the information necessary for the commission to assess those matters, and for the commission then to determine whether the substantial public interest in avoiding damage to coastal resources or the environment can be protected by expanding the change of zone from that approved by the commission—the area inside the town's sewer service district—to the entire area covered by the site plan drawings.

The appeal regarding commission's denial of a zone change is therefore remanded to the commission for further proceedings as specified in the previous paragraph.

Finally, the commission's decision to grant a limited zone change to the area inside the town's sewer service district boundaries, without simultaneous approval of a conceptual site plan for the rezoned area, having been found not to be a reasonable modification to the affordable housing application, that order is remanded to the commission with direction to rescind the rezoning unless it subsequently approves a site plan submitted by the applicants.

C—Site Plan

Although the town's regulations require that a conceptual site application be accompanied by letters from the town's Sewer and Water Commission indicating that there was adequate sewer capacity and that the development had an adequate source of potable water, the requirement in those regulations for use of public sewers in affordable housing districts is not supported by sufficient evidence and is not necessary to protect the substantial public interest of having adequate waste disposal. There was thus not sufficient evidence in the record to support lack of public sewers as a reason for denying a conceptual site plan. There was also insufficient evidence in the record to support the commission's decision to deny a conceptual site plan because it was not accompanied by a special permit and "information required thereunder" by the zoning regulations and had been deemed inadequate by the DEP. There was sufficient evidence in the record, however, to support the commission's denial of the conceptual site plan on the grounds that Landmark has not yet shown adequate potable water available to serve the development. The substantial public interest in having adequate waste disposal and sufficient potable water could have been protected in both instances by a conditional approval that Landmark show, in its preliminary or final site application under the amended regulations, that public water and sewers can be provided to part or all of the entire development or to the extent that the relevant state agencies have approved community septic or water for portions not served by public sewer or water.

***42** On the open space issue, there was insufficient evidence in the record to deny a conceptual site plan on the basis of preserving open space. The development proposed by Landmark will leave more than 200 acres, the amount designated by the town's most recent plans in the record as open space on Oswegatchie Hill, as either designated or potential open space.

On the traffic access issue, the record does not contain sufficient evidence to support this reason as a basis for rejecting the site plan. Ensuring safe traffic flow to and from the development and through the Golden Spur neighborhood could have been protected by an approval conditioned on the developer obtaining approval of DeSantos's recommendations from the state department of transportation and then implementing them at Landmark cost. There was also insufficient evidence to deny a conceptual site plan based on harm caused by the road and traffic thereon to coastal resources, an issue that can be addressed again when Landmark has provided the information to be required by the DEP and for a preliminary site plan.

On the environmental issues, damage to coastal resources and the environment (as specified in more detail in footnotes 41 and 42 above), there was a sufficient basis in the record for the commission to deny a preliminary site plan based on the draft regulations, which would have allowed approval of an affordable housing application before a developer had provided sufficient information to assess potential harm to environmental or coastal resources. The substantial public interest of avoiding such harm could have been protected by a reasonable change to the application in treating and approving it as a conceptual site plan and requiring Landmark to present information pertinent to environmental or coastal harm in subsequent applications for a preliminary or final site plan under the amended regulations. The town's own regulations do not require an applicant to provide, when submitting a conceptual site plan, information necessary to assess the probability of such damage. There was thus insufficient

evidence in the record to support either of these reasons as a basis for denying a conceptual site plan.

The Landmark application for a preliminary site plan is therefore remanded to the commission with instructions for it to approve a conceptual site plan conditioned upon Landmark subsequently demonstrating in its preliminary or final site application under the amended regulations that public water and sewers can be provided to the entire development, that the relevant state agencies have approved community septic and water, or that a combination of public and onsite water and waste disposal can serve the entire development; and that the state department of transportation approve the improvements recommended by Fuss and O'Neill; and that Landmark bear the full cost of those improvements. [62]

All Citations

Not Reported in A.3d, 2011 WL 5842576

Footnotes

1 Pursuant to Connecticut Code of Evidence this court has taken judicial notice of the prior court decisions and the history of earlier administrative and judicial proceedings on the plaintiff's previous affordable housing applications as recounted in those decisions.

2 *Landmark Development v. East Lyme Zoning Commission,* Superior Court, judicial district of New Britain, docket no. CV 02–05204978 (September 7, 2004) (Quinn, J.).

3 *Landmark Development v. East Lyme Zoning Commission,* Superior Court, judicial district of New Britain, docket no. CV 05–40022788 (February 1, 2008) (Prescott, J.) [45 Conn. L. Rptr. 63].

4 After conclusion of the trial, the record was clarified by the submission of clearer copies of certain materials contained in the exhibits and one document that had inadvertently and erroneously not been included in the return of record filed with the court, and all parties agreed that the time for the court to issue its decision would run from the date the record was finally complete.

5 General Statutes § 8–8(b) provides in relevant part as follows: "Except as provided in subsections (c), (d) and (r) of this section and sections 7–147 and 7–147i, any person aggrieved by any decision of a board, including a decision to approve or deny a site plan pursuant to subsection (g) of section 8–3 or a special permit or special exception pursuant to section 8–3c, may take an appeal to the superior court for the judicial district in which the municipality is located, notwithstanding any right to appeal to a municipal zoning board of appeals under section 8–6. The appeal shall be commenced by service of process in accordance with subsections (f) and (g) of this section within fifteen days from the date that notice of the decision was published as required by the general statutes. The appeal shall be returned to court in the same manner and within the same period of time as prescribed for civil actions brought to that court."

6 General Statutes § 8–8(f)(2) provides in relevant part as follows: "For any appeal taken on or after October 1, 2004, process shall be served in accordance with subdivision (5) of subsection (b) of section 52–57."

7 General Statutes § 52–57(b) provides as follows: "Process in civil actions against the following-described classes of defendants shall be served as follows: ... (5) against a board, commission, department or agency of a town, city or borough, notwithstanding any provision of law, upon the clerk of the town, city or borough, provided two copies of such process shall be served upon the clerk and the clerk shall retain one copy and forward the second copy to the board, commission, department or agency; ...

8 General Statutes § 8–8(b) provides in relevant part as follows: "The appeal shall be returned to court in the same manner and within the same period of time as prescribed for civil actions brought to that court." General Statutes §§ 52–46 provides as follows: "Civil process, if returnable to the Supreme Court, shall be served at least thirty days, inclusive, before the day of the sitting of the court, and, if returnable to the Superior Court, at least twelve days, inclusive, before such day." General Statutes § 52–48 provides in relevant part as follows: "(b) All process shall be made returnable not later than two months after the date of the process and shall designate the place where court is to be held."

9 At the October 6, 2005, public hearing, Landmark's traffic engineer Ted DeSantos told the Commission that "[t]he site driveway itself we're recommending that it be a boulevard style entry, that it have a median island separating the entrance and exit lanes." ROR, ex. IIID, at 27.

10 General Statutes 8–30g describes in subsection (g) a commission's (and court's) responsibility to determine whether "the public interests in health, safety, or other matters which the commission may legally consider" and which lead a commission to deny an affordable housing application can "be protected by reasonable changes to the affordable housing development" and refers in subsection (h) to "a decision by a commission to reject an affordable housing application or to approve an application with restrictions ...

11 MR. ZISKA: [Although the proposal itself could encompass the entire property for the zoning ... in terms of the preliminary site plan that we're presenting in accordance with the proposed regulations, that is the only portion of the property that we are focusing on in terms of site plan development ...

> [I]f the Commission agrees that ... the regulations are appropriate and that at least a portion of the property could be rezoned, the Commission could, in fact, limit the rezoning to the area shown in red ...
>
> [I]t would be feasible for the Commission to zone some lesser portion of the property in the new zone.

ROR, ex. IE, at 44–45.

12 MR. MIKE ZISKA: But among the things we're going to present tonight is a potential alternative for the Commission's consideration ... We have prepared a proposed alternative plan that the Commission may consider ... under 8–30g of the General Statutes, which requires you to consider proposed alternatives or modifications to the plan that might meet any objections you may have to the approval of an affordable housing development.

> And that plan that we are going to be showing you places all of the proposed units within the sewer shed boundary as depicted by Mr. Giannattasio [from the Town's Office of Water and Sewer Commission].

ROR, ex. III D, at 18–19.

13 MR. MULLHOLAND: Have you given any consideration to attempting to acquire another entrance in and out based on the number of units and based on the limitations that we've heard some testimony regarding the entrance through—out to 161? Is there any alternative?

> MR. ZISKA: Well, absolutely.
>
> ...
>
> [I]f you want us to look at another route of access, if you're saying we're really concerned about that, we will look at that.

ROR, Ex. IIC, at 127–128.

14 Although our courts have held that the doctrines of collateral estoppel and res judicata apply to administrative matters such as proceedings before a zoning commission; see *Carothers v. Capozziello*, 215 Conn. 82, 94–95, 574 A.2d 1268 (1990); the town's special defenses do not assert that the commissions' factual findings during the administrative proceedings on the first and second applications have preclusive effect here. Instead, the town's special defenses assert that the courts' decisions in the resulting judicial appeals have preclusive effect. As the doctrines of "res judicata and collateral estoppel are affirmative defenses that may be waived if not properly pleaded;" *Singhaviroj v. Board of Education*, 124 Conn.App. 228, 233, 4 A.3d 51 (2010); this court may consider the special defenses here only as pleaded by the town or briefed by the parties. *Id.*, at 234 (holding that waiver of these defenses by failing to plead them may itself be waived where the parties argued the merits of those issues).

15 "In deciding whether the doctrine of res judicata is determinative, we begin with the question of whether the second action stems from the same transaction as the first. We have adopted a transactional test as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of res judicata. [T]he claim [that is] extinguished [by the judgment in the first action] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." (Internal quotation marks omitted.) *Powell v. Infinity Ins. Co.*, 282 Conn. 594, 604, 922 A.2d 1073 (2007).

16 General Statutes Section 8–30g provides in pertinent part as follows: "(g) Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission that the decision from which such appeal is taken and the reasons cited for such decision are supported by evidence in the record. The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1)(A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development ..."

17 The conservation zone is a statutorily designated area set forth in General Statutes § 25–109e, which establishes its boundaries in terms of distances from such landmarks as Interstate 95, Route 1, and the Niantic River. It is clear from a review of the maps in evidence that much of Landmark's property is inside those boundaries.

18 In a related but separately-stated reason for denying the proposed regulation, the commission's decision acknowledged that the applicants' proposed regulations "included an extra level of review (Preliminary Site Plan review) that the Commission deemed to have "a salutary effect of making the affordable housing development application process more accessible and affordable to developers which would result in the promotion of affordable housing in East Lyme," but then reiterated its critique that the proposed regulations for that new level of review did not provide sufficient information: "The proposed Preliminary Site Plan regulations require the applicant to provide even less information than the Town's regulations for a Conceptual Site Plan ... [and] do not require the application to provide the information deemed necessary for the Commission to satisfactorily evaluate the application to protect the health and safety of the public." ROR, ex. IV, at 4.

19 The commission's reasons regarding the coastal boundary stated as follows: "The development of the site at the density allowed by the proposed regulations would result in adverse impacts to the ecosystem and habitat of Long Island Sound, which includes the Niantic River. Pursuant to General Statutes 22a–106, the Commission finds that the characteristics of the site, including the proximity of its steep slopes to the Niantic River and the river's dependent environmental resources and the proposed site's freshwater wetlands and watercourses that feed into the Niantic River, the necessity for clear cutting and blasting on the site and the erosion and run-off into the river that would precipitate, the precarious condition of the Niantic River's dependent resources such as the struggling eelgrass and shellfish populations and the diminishing habitats for nesting and migratory birds along coastal waterways, all contribute to the potential for unacceptable adverse impacts on coastal resources, as defined by General Statutes 22a–93. The substantial evidence clearly demonstrates the potential for detrimental effects on coastal resources by rezoning the site to allow for high density multifamily structures and uses within the coastal boundary. The Commission deems such high density development in that area inappropriate at the density of development proposed and contrary to the health and safety of the community and would have an adverse impact on coastal resources and future water dependent development activities, if the proposed zone change is not significantly reduced in scope and location."

On the Conservation Zone, the commission decision stated that "such high density development in those areas [is] inappropriate for the density of development proposed and contrary to the purposes and standards of Connecticut General Statutes 25–109f, if the proposed zone change is not significantly reduced in scope and location."

20 General Statutes Section 25–109f(b) provides in pertinent part, that "[n]o adoption, amendment or repeal of a local zoning, subdivision or planning regulation with respect to property within the conservation zone within such town shall be effective which has not received the approval of the Niantic River Gateway Commission."

In explaining the Commission's decision to require approval from the Gateway Conservation District Commission for the rezoning the Commission approved, the town's brief states that two small portions of the area that the commission rezoned are in the Conservation Area. See Town's Brief, p. 8 fn3. The Commission itself, however, did not make a specific finding to that effect. Its decision instead stated that the area it had rezoned "*roughly corresponds to the area of the applicant's property outside the Conservation Area.*" (Emphasis added.) ROR, ex. IV., at 6. The record does not contain a precise comparison of the Landmark property and the Conservation Zone, but does have a topographical map on letter-sized paper showing the boundaries of the Conservation Zone but not of the applicants' property. Due to the small scale of those maps, it was extremely difficult for this court to determine whether and where the conservation zone overlaps either the area approved for rezoning or the area that Landmark proposed to develop. A contour line at an elevation of 200 feet adjacent to the western edge of the Conservation Zone and approximately midway between the northern and southern edges of the Zone is one of the distinguishing characteristics of the Conservation Zone shown on that map. From examination of other topographical maps in the record that show the site plan, it appears, however, that buildings 1, 2, 23, and 24 and portions of the Riverview Heights recreation center and parking lot on Landmark's site plan drawings *may* be inside the conservation zone. The court cannot positively determine, either from that map or attempting to overlay the statutory boundaries of the conservation zone onto other maps in the record, how much, if any of the area approved for rezoning or that covered by the site plan is in the conservation zone. In view of the Commission's statement in its decision that the area rezoned is "roughly" outside the Conservation Zone, the court cannot conclude that there was sufficient evidence for such a restriction on the zone change enacted by the commission.

Since this court is remanding Landmark's application to the commission for further proceedings on its request for a zone change for the site plan property, however, the commission will have an additional opportunity to address this issue should it decide to grant a zone change for the area of the site plan.

21 "[T]he applicants' proposed regulations did not require that affordable housing developments be served by public water and sewer, which the Commission deemed necessary to protect the public health." Town's brief, at 18.

22 "A zone change for the applicant's entire property would be contrary to the Town's policy of allowing dense multifamily development only where public sewer is available." Decision, ROR ex. IV, at 6. The town's brief stated as follows: "[A] zone change for the entirety of the applicant's property would be contrary to the Town policy of allowing dense multifamily development only where public water and sewers are available." Town's brief, at 23.

23 Section 32.8 of the zoning regulations, captioned "GENERAL PROVISIONS" states in pertinent part as follows: "An application for designation as an Affordable Housing District which does not include a Special Permit application shall be accompanied by the following:

* * *

32.8.3 Letter from the Water and Sewer Commission indicating that an adequate source of potable water is available to serve the proposed development."

24 Section 12A of the town's zoning regulations governs "SU–E Special Use Elderly Districts" whose "General Description and Purpose" the regulations describe as "designed to accommodate elderly housing uses on large tracts of land in appropriate locations to be determined by the Commission." ROR, ex. VII, at 61. Under § 12A.4.1(c), 40 percent of the units in an SU–E district located on 300 acres or more may be "multi-family dwellings not to exceed 24 units per building." *Id.*, at 63–64, 922 A.2d 1073. Section 12A.4.3, captioned "General Provisions," provides as follows:

"(d) UTILITIES: 1. The water supply shall be approved by the Town Director of health and State Department of Health.

"2. All utilities shall be underground.

"(e) SEWAGE DISPOSAL: The development shall be served by a sewage disposal system(s) meeting Town Health Department and State Health Department Services regulations and as applicable, regulations of the State Department of Environmental Protection."

Id., at 25, 922 A.2d 1073. Section 25 of the zoning regulations contains the requirements for a special permit. For elderly housing in a CA district and for multi-family multi-story dwellings in a supportive elderly housing development in an SU district, municipal water and sewers are required; *Id.*, at 163 and 165, 922 A.2d 1073; but there is no such requirement for SU–E elderly housing.

25 At the public hearing on the initial application for a change of zone to SU–E and special permit to build 80 units on 190 acres, the commission was informed by counsel for the developer that "[w]ater is available to the property via a booster pump station." ROR, ex. 27, at 2.

26 At the second public hearing, a representative of the town's sewer and water commission, Mike Giannattasio, agreed with a comment from Landmark's developer that a majority of the proposed units are inside the town's

sewer service boundaries. See ROR exhibit IIC, transcript of second public hearing held on September 1, 2005, at pages 78 and 84.

27 The SU–E regulations permit 40% of a development to be multi-family dwellings with up to 24 units per building, whereas the maximum density under the affordable housing regulations is 12 units per building. Compare Town Zoning Regulations § 12A.4.1(c) and § 32 .4.3.

28 The commission decision stated that "large portions of the land within the proposed zone change are outside the Town's designated sewer service district as determined by the Water and Sewer Commission ... and ... such areas by virtue of their lack of sewer service are inappropriate for the density of development proposed and would adversely affect the health and safety of the community; ..."

29 For example, a letter from the Southeastern Connecticut Council of Governments Regional Planning Commission contained a report on the Landmark application stating "[t]he site proposed as the Affordable Housing District does not have the recommended characteristics for the placement of multi-family housing due to: ... b.) Unsuitability of soils for building site development at the density proposed. A Soil Suitability Analysis was prepared by the Planning Department for this application based on the Soil Survey of New London County, prepared by the U.S. Department of Agriculture Soil Conservation Service which shows severe development constraints on the property proposed for designation as an Affordable Housing District." (ROR, ex. 3, at 3.). Similarly, a letter from the East Lyme Harbor Management/Shellfish Commission stated that "[t]he soil and bedrock conditions amid steep slopes on this hill do not provide good conditions for on-site sewage disposal and high-density development in this area would result in increased levels of non-point source pollutants, including excess nutrients and coliform bacteria that would threaten existing shellfisheries." ROR, ex. 5, at 3.

30 Near proposed building 20 the slope is approximately 20 percent, and near proposed building 7 the slope is approximately 27 percent; but the area between buildings 11 and 19 has a slope of less than 3 percent, and the proposed parking lot east of buildings 15 and 18 has a slope of approximately 6 percent.

31 According to the Soil Survey of New London County prepared by the Soil Conservation Service, the HrC and HrD soil complexes differ principally in their slopes, the Soil Conservation Service describing HrC as "gently sloping to sloping" with slopes between 3 to 15 percent slopes, and HrD as "moderately steep to very steep" with slopes between 15 and 45 percent. ROR, ex. 32.

32 The Soil Survey for New London County described the capacity of these two soils types for development as follows:

> HrC ... The major limiting factors for community development are the shallow depth to bedrock in many places, and Rock outcrop. Extensive onsite investigations are often needed to locate a suitable site for onsite septic systems. Onsite septic systems need careful design and installation. Stones and boulders need to be removed for landscaping. The Hollis soil is droughty. Rock outcrops provide an attractive setting for homes in many places. Excavations require blasting in many places. Quickly establishing a plant cover and using mulch and netting, temporary diversions, and sediment basins help to reduce erosion during construction.

ROR, ex. 32, at 21.

> HrD ... The major limiting factors for community development are the steep slopes, shallow depth to bedrock, and Rock outcrop. Extensive onsite investigations are generally needed to locate suitable home sites. Onsite septic systems need careful design and installation to prevent effluent from seeping to the surface in areas downslope from the leeching system. Stones and boulders need to be removed for landscaping. Excavations require blasting in many places. Quickly establishing a plant cover and

> using mulch and netting, temporary diversions, and sediment basins help to reduce erosion during construction.
>
> ROR, ex. 32, at 21–22. The record also contains a map and legend entitled "Soils Analysis for Building Site Development" prepared in 2004 by the Town of East Lyme's Planning Department that describes soils with these mixtures as having moderate to severe capacity for development and defines those two terms as follows:
>
> > Moderate—Soil properties or site features are not favorable for the indicated use and special planning, design or maintenance is needed to overcome limitations.
> >
> > Severe—Soil properties or site features are so unfavorable or difficult to overcome that special design, significant increases in construction costs and maintenance are required.
>
> Ex. 2.

33 This court's decision thus does not reach the same conclusion as the prior judicial appeals on this issue; nor is it controlled by those decisions under any principle of stare decisis, res judicata or collateral estoppel. In those earlier judicial appeals, the function of the court had been to determine whether (i) the evidence before the commission in those earlier cases provided a sufficient basis for the commission's administrative decision and (ii) whether an independent plenary review of the record before those earlier commissions showed that the commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission may legally consider, whether the risk of such harm to such public interests clearly outweighed the need for affordable housing, and whether the public interest could have been protected by reasonable changes to the affordable housing development. Both earlier decisions relied on the evidence before the commission in the particular proceeding. In the present appeal, the record contains evidence that could not have been offered to or considered by the commission in the earlier proceedings—i.e., the vidence of the commission's actions on the Darrow Pond project. Thus, the judicial decisions do not have any preclusive effect as to factual matters decided by the commission. Here, just as in *Cumberland Farms, Inc. v. Groton*, 262 Conn. 45, 808 A.2d 1107 (2002), the trial court's first function in an affordable housing appeal is to determine whether the reasons given by the commission are supported by sufficient evidence in the record. The court's second function does involve a fact-finding capacity, but only as to the facts presented at the commission and in the current record.

34 The commission's decision rejecting the site plan also incorporated the reasons it gave for rejecting the zone change request, one of which had stated that the portions of the property outside the Town sewer district are inappropriate for the density of development proposed "by virtue of their lack of sewer service." There is insufficient evidence in the record to support this reason for denying the site plan request. More than half of the units would be served by public sewer, and the number and density of units not served by public sewer was not significantly greater than at Darrow Pond.

35 The recent case of *CMB Capital Appreciation, LLC v. Planning and Zoning Commission of The Town of North Haven*, 124 Conn.App. 379, 4 A.3d 1256 (2010), cert. granted, 299 Conn. 925, 11 A.3d 150 (2011), is illustrative here. In that case, the trial court overturned the town's denial of an affordable housing application that had been based on a negative referral the developer had received from the local water pollution control authority. The Appellate Court held that, in the context of affordable housing, the *Kaufman* presumption of approval should apply. The court distinguished the holding of the Supreme Court in *River Bend Associates, Inc. v. Planning Commission*, 271 Conn. 41, 55, 856 A.2d 959 (2004), that a town need not approve an affordable housing application for *subdivision approval* conditioned on subsequent sewer approval when the local water pollution control authority had already denied a sewer application. In *River Bend*, the Supreme

Court held that "the planning commission was entitled to rely on the water pollution control authority's denial of the sewer application in concluding that there was no reasonable probability that the plaintiffs could obtain approval of the sewer application within a reasonable time." *Id.*, at 58, 856 A.2d 959. In *CMB*, on the other hand, "the plaintiff had not yet submitted a formal application and the authority's negative referral was preliminary in nature. The evidence in the record shows that the authority anticipated that any potential sewerage problem would be addressed when the plaintiff submits a formal application to it. The fact that the authority provided negative referrals does not necessarily mean that the agency would deny a formal application made by the plaintiff." 124 Conn.App. at 392. The Appellate Court noted that the holding in *River Bend* analysis was limited to an application for subdivision approval, cited a subsequent Supreme Court case, *Gerlt v. Planning & Zoning Commission*, 290 Conn. 313, 963 A.2d 31 (2009), which had stated that "the approval [of subdivisions] ... cannot be subject to conditions," and then quoted from *River Bend* itself that the "purpose of the rule disfavoring conditional approvals of subdivision applications in the absence of a reasonable probability that the condition can be fulfilled within a reasonable time period is to avoid placing subdivision applications in limbo for indefinite periods." [*River Bend Associates, Inc. v. Planning Commission*, 271 Conn. 41, 64, 856 A.2d 959 (2004)]. Since the Connecticut Supreme Court has granted certiorari in the *OMB* case, it has little controlling effect here. What is applicable from that case, however, is the proposition that where, as here, the other agency has not issued a denial, the *Kaufman* principle still has vitality.

36 The CMA boundary cuts a broad swatch effectively dissecting Landmark's property in half, the eastern downslope portion of the property lying with the CMA zone and the western upslope portion on which Landmark proposed to build the development lying outside the CMA boundaries. The Landmark site plan placed all of the housing and parking on the eastern and western tips of the ridge, outside the CMA zone, but did locate the access road/driveway and some of the designated open space inside the CMA zone. Most of the remaining 120 undesignated acres of the property lay inside the CMA boundaries.

37 The town's reply brief also stated that "the most recent East Lyme POCD notes that the entirety of the plaintiff's site is located in an area planned as future open space. (ROR 2.)" Reply Brief, at 12. The record does not support that assertion. The 1987 Revision to the town plan is the most recent plan in the record, and it describes 200 acres as the amount to be preserved as open space.

38 Judge Prescott wrote "that Judge Quinn addressed this issue at some length in her decision upholding the denial of Application I: 'The [C]ommission concluded that the proposal was incompatible with the local and state plans of development for the area, which all sought to preserve and protect Oswegatchie Hills as open space. The record reflects a long history of efforts to preserve this area for such purposes beginning with the preparation of the comprehensive plan for the town in 1967. Some years later, in 1974, the Conservation Commission along with the Southeastern Connecticut Regional Planning Agency developed an open space acquisition plan including this area. In a 1977 report by the town's Land Use and Natural Resources Subcommittee of the Planning Commission, the committee recommended that this area should be purchased outright by the Town or protected by easement against development. In 1987, the first selectman sought assistance from local state representatives to secure legislation and/or appropriations to preserve the areas. East Lyme's 1987 revision to its plan of development again lists the area as a target for preservation. The State legislature in 1987 designated the area as a "Conservation Zone" and established the Niantic River Gateway Commission, which has as its purpose development of minimum standards to preserve the character of the area.

> "In 1990, the area was rezoned for lower density as a rural residential (RU–120) zone, requiring a three-acre minimum lot size. As true today as it was at that time, the first selectman wrote: 'If ever there was a place that nature never intended to be developed, the east slope of the Oswegatchie Hills is that place.

> Nowhere else is the land less suitable for construction, the natural resources on and adjacent to the land more susceptible to damage, and the public benefits to be gained from preservation greater.' Efforts to later change the zoning to require five-acre building lots failed, after a court determination that there was improper publication of the effective date of the zone change. *Wilson v. Zoning Commission*, 77 Conn.App. 525, 823 A.2d 405 (2003)."

39 The town's 1967 Comprehensive Plan also recommended that "the lands around Darrow Pond ... should be maintained as open space to protect these valuable waterfront lands, ..." ROR, ex. 2, attachment D.

40 In rejecting the proposed regulations, the commission stated that "[t]he proposed Preliminary Site Plan regulations in their present form do not require the applicant to provide the information deemed necessary for the Commission to satisfactorily evaluate the application to protect the health and safety of the public. Additionally, an approval of a Preliminary Site Plan obligates the Commission to approve a Final Site Plan, if the Final Site Plan conforms with the Preliminary Site Plan. Without sufficient information accompanying the Preliminary Site Plan the Commission cannot properly determine "conformity" with a late submitted Final Site Plan, which it may be obligated to approved, and adequately protect the public interest in health and safety."

41 In denying Landmark's proposal to rezone the entire property, the commission also stated that "development of the site at the density allowed by the regulations would result in adverse impacts to the ecosystem and habitat of Long Island Sound ... The characteristics of the site, including the proximity of its steep slopes to the Niantic River and the river's dependent environmental resources and the proposed site's freshwater wetlands and watercourses that feed into the Niantic River, the necessity for clear cutting and blasting on the site and the erosion and run-off into the river that would precipitate, the precarious condition of the Niantic River's dependent resources such as the struggling eelgrass and shellfish populations and the diminishing habitats for nesting and migratory birds along coastal waterways, all contribute to the potential for adverse impacts on coastal resources defined by General Statutes 22a–93. The substantial evidence clearly demonstrates the potential for detrimental effects on coastal resources by rezoning the site to allow for high density multifamily structures and uses within the coastal boundary. The Commission deems such high density development in that area inappropriate at the density of development proposed and contrary to the health and safety of the community and would have an adverse impact on coastal resources and future water dependent resources if not significantly reduced in scope and location.

> "[L]arge portions of the land within the proposed zone change team are within the Conservation Zone as described in General Statutes 25–109d ... [T]he commission deems such high density development in those areas inappropriate for the density of development proposed and contrary to the purposes and standards of General Statutes 25–109f, if the proposed zone change is not significantly reduced in scope and location;
>
> * * *
>
> "[T]he land which is the subject of this application is and has been the subject of extensive efforts by and on behalf of the Town, the intervenors, members of the public, conservation groups and others to preserve the land for its unique environmental

> qualities ... [T]he proposed zone change would be antithetical to that purpose, if the proposed zone change is not significantly reduced in scope and location; ..."

ROR, ex. IV, at 5.

42 In rejecting the site plan, the commission stated that:

> "[T]he Commission finds that the applicant's Conceptual Site Plan for an Affordable Housing Development does not comply with Section 32 for one or more of the following reasons:
>
> * * *
>
> "3. The application was not accompanied by a Special Permit Application and evidence required thereunder.
>
> "4. To the extent that the applicant's Coastal Area Management application sought preliminary site plan review, it was deemed inadequate by the Department of Environmental Protection, Office of Long Island Sound Programs, and was recommended for denial from that office.
>
> "[A]ll of the reasons enumerated above ... that were found that weighed against the approval of the zone change application apply equally to the evaluation of the applicants' "Preliminary Site Plan" ...
>
> * * *
>
> "[P]ursuant to General Statutes 22a–106, ... the proposed uses of the site, which is fully or partially within coastal boundary, will have potentially adverse impacts on coastal resources and future water dependent activities. The Commission finds the proposed coastal site plan review application inconsistent with the policies and standards of the Connecticut Coastal Management Act, the Town's Plan of Development, the Municipal Coast Program and the Harbor Management Program based on severe onsite development constraints and the potentially adverse impact on coastal resources and water quality. Additionally, the Commission finds that the proposed use would not adequately provide for future water-dependent uses and access for the public to future water dependent uses; and
>
> "[T]he proposed development at the site is reasonably likely to have the effect of unreasonably polluting, impairing and destroying the surrounding natural resources, including the Niantic River's eelgrass and shellfish populations, the woodland habitats of nesting and migratory forest birds and the wildlife dependent on the site's vernal pools. Any feasible and prudent alternative must demonstrate that the planned construction will not be likely to impair, pollute or destroy the above mentioned natural resources and would substantially mitigate the likelihood of unreasonably polluting the Niantic River and its surrounding and dependent natural resources."
>
> ROR, ex. IV, at 7.

43 The Commission stated that "by reducing the scope and location of the zone change to regions within town's sewer service district, the riverfront and hillside woodlands can be preserved, while balancing the needs for affordable housing in East Lyme."

44 Section 32.8 of the regulations specifically states as follows:

> GENERAL PROVISIONS
>
> An application for designation as an Affordable Housing District *which does not include a Special Permit application* shall be accompanied by the following:
>
> 32.8.1 Conceptual site plan based on an A–2 property line survey and topographic contours at no less than 10# intervals prepared and signed by a professional architect, land surveyor or engineer licensed in the state of Connecticut. The conceptual site plan shall include the following basic information:
>
> a. General location, dimension and elevations of all proposed buildings including the total number of units.
>
> b. General location and surface treatment of all proposed parking and loading spaces, traffic access and circulation drives, and pedestrian walks.
>
> c. Location of wetlands, watercourses, and steep slopes in excess of 25%.
>
> d. Location of proposed utility lines including water, gas, electricity, sewer and transformers.
>
> e. Soil types from the New London County Soil Survey.
>
> f. Areas designated for open space and/or recreational purposes.
>
> 32.8.2 Letter form [sic] the Water and Sewer Commission indicating that there is adequate sewer capacity of existing lines to handle new volume and adequate pressure of pump systems to serve the proposed development.
>
> 32.8.3 Letter from the Water and Sewer Commission indicating that an adequate source of potable water is available to serve the proposed development.
>
> 32.8.4 Traffic Impact statement or report indicating the amount of traffic to be generated from the proposed development and any potential road improvements that might be necessary to accommodate the increase in traffic.
>
> (Emphasis added.) ROR, ex. VII., p. 195–196.

45 Section 32.8.5. of the zoning regulations provides in pertinent part that "[u]pon successful petition to the Zoning Commission for designation as an Affordable Housing District, and prior to issuance of a building permit, a Special Permit shall be obtained meeting all the requirements of Section 25 of the Zoning Regulations." ROR, ex. VII, at 196. Section 25.3 of the zoning regulations provides in pertinent part that "[a]n application for a Special Permit shall be accompanied by a site plan prepared in accordance with Section 24." *Id.*, at 157, 823 A.2d 405.

46 Section 32.8.5 of the zoning regulations states as follows: "Upon successful petition to the Zoning Commission for designation as an Affordable Housing District, and prior to issuance of a building permit, a Special Permit shall be obtained meeting all the requirements of Section 25 of the Zoning Regulations. In addition to the application requirements of Section 25, an Affordability Plan shall be submitted with the Special Permit Application."

47 The commission's decision did not state that any modification to Landmark's proposed amendments must require an application for a special permit, as the town's current regulations do, only that either the conceptual or site plan provide the information now required under the town's regulations for special permit.

48 The letter from the East Lyme Harbor Management/Shellfish Commission, for example, noted that recent fish kills in the upper Niantic River have been "attributed to low dissolved oxygen levels resulting from nuisance blooms of algae brought on by high nutrient run-off ... The origin of nutrients in the ground water has been linked to on-site sewage disposal, which can continue to leach nutrients for many years following installation of municipal sewer systems." ROR, ex. 5, at 5.

49 The Millstone scientist, for example, wrote about the consequences of permitting 900 residences to be built on this site: "the likely inputs of nutrients from septic systems and fertilizers, and of other contaminants contained in storm water runoff from roads and parking areas associated with the residences would surely exacerbate the current water quality problems and associated ecosystem impacts." ROR, ex. 19.

50 The record in this proceeding contains a 2004 letter from the DEP on the second application stating that the proposal for development there for 352 units partially located in the conservation and coastal management zones was "inconsistent with the policies and standards of the CCMA based on severe development constraints at the site, and the proposal's unacceptable impacts to water quality and coastal resources ..." ROR, ex. 19.

51 The Landmark site plan showed an access road or driveway running approximately 2,000 feet from Calkins Road at the northeast edge of the property to the development site at the top of the ridge. The Fuss & O'Neill traffic study submitted by Landmark described it as a "full access boulevard style drive." ROR, ex. 26, at 4. The coastal management act specifically allows local zoning commissions to exempt "driveways" from coastal site plan review, and the East Lyme zoning regulations enact such an exemption and provides in General Statutes § 22a–109 as follows:

> (b) The zoning commission may by regulation exempt any or all of the following uses from the coastal site plan review requirements of this chapter: ... (2) construction of new or modification of existing structures incidental to the enjoyment and maintenance of residential property including but not limited to ... driveways, ...

Similarly, section 14.2 of the East Lyme Zoning Regulations, captioned "COASTAL SITE PLAN REVIEW EXEMPTIONS," states as follows:

> 14.2.l Pursuant to Section 22a–109(b) of the Connecticut General Statutes the following activities are exempt from coastal site plan review requirements:
>
> * * *
>
> C. Construction of new or modification of existing structures incidental to the enjoyment and maintenance of residential property including, but not limited to ... driveways, ...

ROR, ex. VII, at 75.

Neither the CMA nor the town zoning regulations give any definition of a driveway or of "structures incidental to the enjoyment and maintenance of residential property." The Merriam Webster online dictionary defines a driveway as "a private road giving access from a public way to a building on abutting grounds." See http://www.merriam-webster.com/dictionary/driveway, last visited 9/11/2011. Section 20 of the zoning regulations, captioned "General Regulations," does provide as follows:

20.23 PRIVATE DRIVEWAYS—Private driveways designed for vehicular traffic for more than two residences, or for commercial purposes, shall have the following minimum widths:

Two-way traffic: 24 feet wide

One-way traffic: 16 feet wide

The widths do not include space for parking vehicles. All private driveways are to be cleared to a height of 14 feet in order to ensure passage of fire and emergency vehicles.

ROR, ex. VII, at 134–135.

The town regulations also contain certain requirements or driveways standards for site plan applications in section 24, captioned site plan review requirements. Section 24.6, standards for site plan applications, states as follows:

A. SURFACING AND DRAINAGE—Driveways to and from all buildings, outside storage, sales and display areas will be properly graded and paved. The flow of storm water from the site onto the street will be minimized to reduce peak flow volume and sediment loads to predevelopment levels. When deemed necessary by the Commission or Zoning Enforcement Officer due to such factors as emergency vehicle access requirements or the anticipated level of on-site traffic, the commission or the Zoning Enforcement Officer may require private driveways and/or parking areas to be constructed to Town road standards, as contained in the East Lyme Subdivision Regulations, for: width, geometry and cross-section; base construction and surfacing; sidewalks; lighting; street signs; and drainage.

B. DRIVEWAYS—Driveway entrances and/or exits will be the minimum number necessary to provide efficient and safe access to the site. Combined entrances/exits will be no less than 24 feet in width. One-way entrances or exits will be no less than 16 feet in width.

Id., at 154–155, 823 A.2d 405.

Whether the Landmark access road/driveway constitutes a "driveway" within the meaning of the coastal management act and East Lyme zoning regulations need not be addressed here, however, since the issue of whether the construction and maintenance of the driveway will cause environmental harm will be addressed in review of the preliminary site plan.

52 Section 12 of the East Lyme Zoning Regulations, "SU Special Use Districts" provides in § 12.2.3, captioned "SETBACKS," as follows: "No new building or structure shall be placed less than 150 feet from the street line or 100 feet from any other property line. The zoning commission may waive the 100 feet from the property line and/or the 150 feet from the street line. A 50–foot buffer is required along all SU district zone lines." ROR, ex. VII, at 58.

Section 12A of the East Lyme Zoning Regulations pertains to "SU–E Special Use Districts," which the regulations state are "designed to accommodate elderly housing uses on large tracts of land in appropriate locations to be determined by the Commission." *Id.*, at 61, 823 A.2d 405. Section 12.2.3, captioned "SETBACKS," states as follows: "No new building or structure shall be placed less than 150 feet from the street line or 100 feet from any other property line. The Zoning Commission may waive the 100 feet from the property line and/or the 150 feet from the street line. A 50–foot buffer is required along all SU–E district zone lines." *Id.*

Section 32 of the East Lyme Zoning Regulations, "Affordable Housing Districts," provides as follows:

> 32.4.6 "BUFFERS—A suitable landscaped buffer strip not less than 100 feet wide shall be provided along the property line where any Affordable Housing District abuts any other property line." 32.6 OPEN SPACE—For any affordable housing development, an area equal to 10% of the total lot area shall be set-aside as Open Space.
>
> 32.6 "OPEN SPACE—For any affordable housing development, an area equal to 10% of the total lot area shall be set-aside as Open Space."

Id., at 194, 823 A.2d 405.

53 The buffers are there to protect the neighbors from other property, so it's kind of its own property ... [B]uffers are there to kind of also distinguish between projects ... [Y]ou want to put this right next to the other one but you don't even have a means of access between the two ... So not requiring buffers is like maybe you can make the statement that maybe you do if they're kind of connected along the same road, but these aren't even connected on the same roads. These people can't even drive to the other people's place unless they drive three miles around the whole town." ROR, IIID, transcript of public hearing on 10/6/05, at 188–190.

54 The current record contains no basis for this court to determine whether all of the commission's current requirements for a special permit or site plan meet the *Wisniowski* standard of being "necessary to protect substantial public interests in health, safety, or other matter" and to pass muster under § 8–30g(g)(1)(A) through (C). While it is obvious that certain site plan requirements contained in § 24.5.2.B of the town's zoning regulations would be necessary for a proper assessment, such as storm drainage and sewage disposal, this court lacks the expertise possessed by the commission to know which other requirements, such as mandating that a site plan identify proposed landscaping and outdoor illuminating facilities; see Section 24.5.2.B of the zoning regulations; are pertinent to assessing environmental impact or harm to coastal resources. Such a determination need not be made here, however, and not unless the matter is subject to further judicial review after the commission has, on remand, adopted amended regulations, specifying what information should be provided with preliminary and final site plans.

55 At present, Calkins Road ends at Hill Road, approximately 200 feet north of the Landmark property. Under Landmark's proposal, an "extension of Calkins Road should be constructed as a boulevard style roadway from Hill Road to the subject site, and the site driveway will be an extension of this boulevard in to the site." ROR, ex. 25, at 4.

56 Sharat Kalluri, a professional engineer from Wilbur Smith Associates retained by the commission, prepared and testified about a "peer review of the site plan" conducted to "determine the suitability of the proposed single access driveway with respect to safety and operations" and "estimate the amount of traffic generated by this development." ROR, ex. 15, at 1. Kalluri's report estimated that between 412 and 428 vehicles would enter or leave the site during the morning peak traffic hours, and between 480 and 520 vehicles during evening peak traffic hours. Kalluri's report thus stated that it anticipated "a significant traffic impact of this development on Calkins Road and at the U.S. Route 1/Calkins Road intersection." *Id.*, at 3–4, 655 A.2d 1146. The report further stated that (i) the use of Calkins Road as an access road to the development "creates traffic operations and safety issues"; *id.*, at 4, 655 A.2d 1146; (ii) using Calkins Road for emergency vehicle access "is a concern due to the relatively steep grade of the roadway"; *id.*; and (iii) the intersection of Route 1 and River Road "does not meet sight distance requirements" of the state department of transportation. *Id.* The report also stated that improvements on Route 1 "would be required as a result of this project" and that a "feasibility study would need to be undertaken to determine the ability to implement any improvements and their impacts to the U.S. Route 1 bridge over Latimer Brook." *Id.*, at 2, 655 A.2d 1146.

57 Ted DeSantos, a professional engineer from Fuss and O'Neill hired by Landmark, conducted and testified about a "Traffic Impact Study" that he conducted which analyzed the traffic to be generated by the development and "its impact ... on traffic conditions throughout the adjacent roadway network." ROR, 26, at 1. His estimates of the traffic were similar to those of Kalluri—415 vehicles entering or leaving the site during the weekday AM peak hours and 480 vehicles during weekday PM peak hours. His report then suggested various "Recommended Improvements" to be paid for by the developer; with implementation of those improvements, his report stated that "it is the professional opinion of Fuss and O'Neill, Inc., ... the proposed Riverview Heights residential complex will not significantly impact the traffic operations on the roadways and intersections in the vicinity of the site." *Id.*, at 10, 655 A.2d 1146.

More specifically, DeSantos agreed with Kalluri's conclusion that the intersections of Route 1 with Calkins Road and River Roads did not provide adequate sight distances to the left and right on Calkins Road and to the left on River Road, and his report proposed specific changes to traffic flow to address that problem: one-way and do-not-enter signs on Calkins Road at Hill Road to prevent vehicles from using Calkins Road to enter Route 1; installation of a traffic signal at the intersection of River Road and Route 1 "to provide safe egress for vehicles turning out of River Road"; and "a right-turn on red prohibition" at this signal for vehicles turning onto Route 1; and widening Route 1 westbound "to accommodate a left turn storage bay for left turns from Route 1 to River Road." ROR, ex. 25, at 6. At the public hearing he testified that "we've conducted a very thorough study, comprehensive with a study area and the roadways we are proposing significant recommendations to improve the roadways and intersections near the site to accommodate our traffic. And with those improvements there will not be a significant impact to traffic operations in the vicinity of the site." ROR, ex. IIID, at 33. "With these conditions set in place, traffic can be safe." *Id.*, at 61, 655 A.2d 1146.

Kalluri's report also stated concerns about the use of Calkins Road for emergency access to the development due to the "relatively steep grade" of "Calkins Road ... entering the U.S. Route 1 intersection." Ex. 15, at 3. DeSantos's report recommended widening Calkins, River and Hill Roads, which are presently two-lane roads with no striped centerline and widths varying from between 17 and 23 feet, to 12–foot wide lanes in each direction with a striped centerline. It also proposed that the extension of Calkins Road from Hill Road to the Landmark property would be the same divided "boulevard style roadway" proposed for the property, with "frequent breaks in the median island proposed for it and the access drive to facilitate crossover by emergency vehicles." Finally, DeSantos' report pointed out that emergency vehicles could access the site from Route 1 by either Calkins Road or River Road to Hill Road, and then up the boulevard extension from Hill Road to the property and then to the development. While stating that "typically a secondary access" is preferred to facilitate emergency access to a site; ROR, ex. IIC, at 26; Kalluri acknowledged that a two-lane boulevard emergency entrance to a site, if wide enough, can provide two acceptable points of entry to a development. *Id.*, at 44–46, 655 A.2d 1146.

58 As pointed out by Landmark's expert and its brief, its traffic plan and safety concerns associated with the development would also be subject to review and approval by the state department of transportation. General Statutes Section 14–311(a) provides as follows: "No person, firm, corporation, state agency, or municipal agency or combination thereof shall build, expand, establish or operate any open air theater, shopping center or other development generating large volumes of traffic, having an exit or entrance on, or abutting or adjoining, any state highway or substantially affecting state highway traffic within this state until such person or agency has procured from the State Traffic Commission a certificate that the operation thereof will not imperil the safety of the public." The DOT regulations define a "major traffic generator" as follows:

> Major Traffic Generator—within the context of sections 14–311 and 14–311a of the General Statutes of Connecticut, as revised, any open air theater, shopping center or other development generating large volumes of traffic shall mean any development providing two-hundred or more parking spaces, or a gross floor area of 100,000 square feet or more which substantially affects State highway traffic within this State, and as provided for in the Administrative Regulations promulgated by the State Traffic Commission.

Regulations, Connecticut State Agencies, § Sec. 13b–17–2 ("Definitions"). The DOT regulations on major traffic generators further provide as follows:

> No permit for work under Section 14–311 will be issued by the District Maintenance Manager and no work shall be started by the permittee until a State Traffic Commission Certificate is issued, a town or municipal government building permit has been obtained by the developer, and a complete review of the applicant's plans and drainage proposals has been made and approved by the State.
>
> Subsequent to completion of the work described in the Bureau of Engineering and Highway Operations permit and prior to opening the development to the public, the permittee must notify the District Maintenance Manager that the work within the State highway right of way is ready for inspection. The District Maintenance Manager will report the results of the inspection to the State Traffic Commission by copy of the letter of acceptance sent to the permittee.

Regulations, Connecticut State Agencies, Section 13b–17–16 ("Major traffic generators").

59 At public hearing one commissioner also raised the question of the effect on homes in the Golden Spur neighborhood of potentially 400 to 500 cars driving past each hour during morning and evening high traffic hours. According to that commissioner, at least one of those houses was located less than ten feet from a road in the Golden Spur neighborhood that would be used by traffic to and from the development. There can be no doubt that residents in a home that close to a road, that once had little traffic and dead-ended at undeveloped property and after construction of the development had many cars going by, would feel a loss of seclusion and privacy. To the extent that this is a consideration factored into the commission's decision to deny the site plan because of traffic impact, such a concern does not outweigh the need for affordable housing.

60 At the first public hearing, Landmark told the commission that that "[c]ommissions have the right to make reasonable modifications to an application. You don't have to—you're not limited to approving or denying exactly what's proposed. You can say, "You know what? I'd like to see something different here or different there." ROR, ex. IIC at 58, 8/18/05 public hearing, remarks of Paul Russo. Earlier in that same hearing, Russo had told the commission that it could "limit the rezoning to the area shown in red or to some other portion of the property, perhaps drawing a slightly bigger development envelope around the property ... Because the notice is effective for the entire property, ... it would be feasible for the Commission to rezone some lesser portion of the property in the new zone. So this basically gives you the flexibility to rezone the entire pieces of property if you wanted both parcels or rezone the portion of the property shown for the preliminary site plan or some other configuration." *Id.* at 45, 655 A.2d 1146. It is clear from the record that by the "red" area, he meant the site plan area.

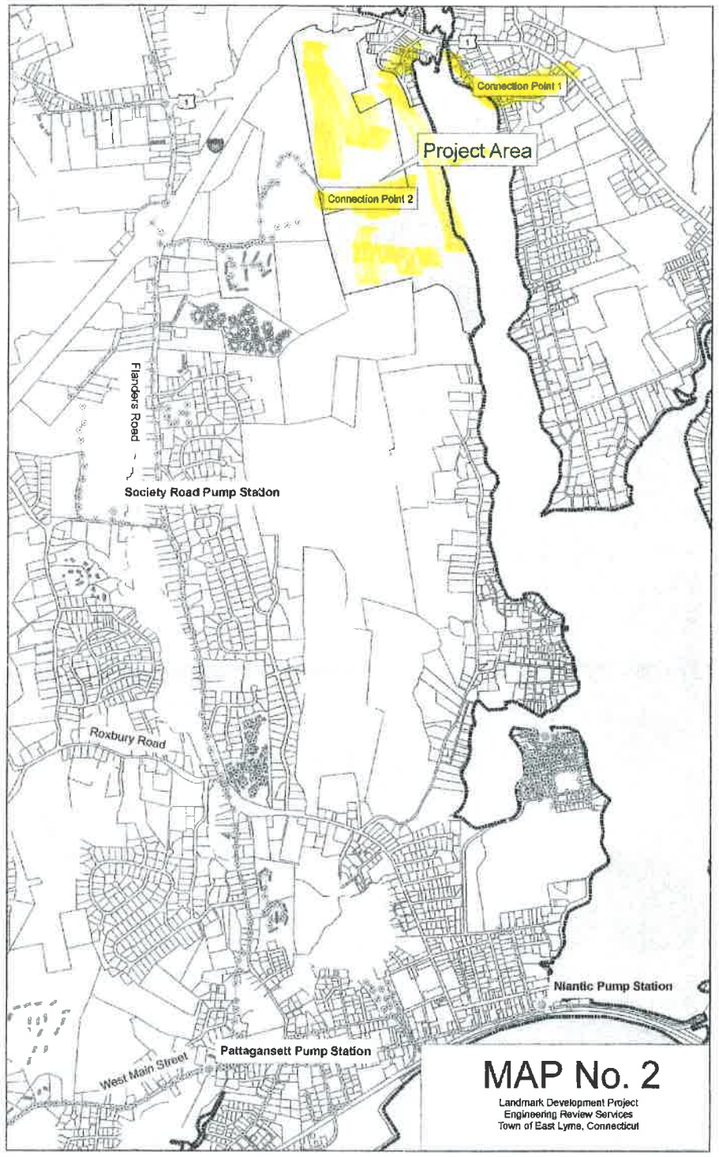
61 The appeal also claimed that the procedures employed by the commission for reviewing Landmark's affordable housing application violated § 8–30g because "the Commission made no effort to require its staff to meet with plaintiffs at reasonable times prior to the [public] hearing so that the plaintiffs would have an opportunity to present their responses at an earlier time; ... failed to engage the plaintiffs in any substantive dialogue regarding the nature and details of the application in order to help promote affordable housing by reaching any reasonable compromise, but, instead, consistently refused to entertain any plan for allowing

affordable housing on the site; [and][t]he Commission's denial of the plaintiffs' application was predetermined by the Commission, as evidenced, inter alia, by the fact (reflected in the Commission's minutes) that the Commission's attorney had drafted the resolution for denial at a time when he already purported to know 'what the Commission feels would be appropriate.' " Appeal, ¶ 46(a)—(c), at 11–12. The commission denied these allegations in its answer. No proof was offered as to these claims at the hearing before this court. Nothing in the record shows any violation of the procedures set forth in § 8–30g for the deciding of an affordable housing application. Plaintiffs have not sustained their burden of proof on these claims.

62 As noted in the text on page 13 above, at public hearing Landmark stated that it was asking the commission to consider a "potential alternative plan ... plac[ing] all of the proposed units within the sewer shed boundary." ROR, ex. IIID, at 18–19; pl's brief, at 20–21. At the hearing before this court, however, Landmark's counsel appears to have abandoned that request as "financial infeasible"; see transcript of hearing on October 29, 2010, at 129–131. The commission then rezoned that portion of Landmark's property within the sewer service to an affordable housing district, but the commission's decision never expressly considered the request made by Landmark at the last public hearing that the commission consider approving a more limited site plan.

End of Document

Sanitary Sewer Capacity Assessment



- 2 Proposed Connection Points
  - Connection Point 1 – Gravity sewer to the Town of Waterford along Boston Post Road
  - Connection Point 2 – Connection to 8" PVC gravity sewer through Deerfield Village
- Connection Point 1
  - Requires downstream analysis of Waterford system
- Connection Point 2
  - Flows through two downstream pump stations
  - Pattagansett Pump Station
  - Niantic Pump Station
- The feasibility of both connections has not been demonstrated to date.

September 25, 2012
Town of East Lyme
Water & Sewer Commission
Public Hearing

Weston&Sampson

Exhibit 22

RETURN DATE: FEBRUARY 5, 2013	:	SUPERIOR COURT
LANDMARK DEVELOPMENT GROUP LLC AND JARVIS OF CHESHIRE LLC	:	JUDICIAL DISTRICT OF NEW LONDON
v.	:	AT NEW LONDON
EAST LYME WATER AND SEWER COMMISSION	:	DECEMBER 28, 2012

CITATION

TO ANY PROPER OFFICER:

You are hereby commanded by the authority of the State of Connecticut to summon the Water and Sewer Commission of the Town of East Lyme to appear before the Superior Court for the Judicial District of New London at New London on the Return Date of February 5, 2013, then and there to answer the attached Appeal of Landmark Development Group LLC, 100 Roscommon Drive, Suite 312, Middletown, Connecticut 06457; and Jarvis of Cheshire LLC, 100 Roscommon Drive, Suite 312, Middletown, Connecticut 06457, by leaving **two** (2) true and attested copies of this Citation and attached Appeal, at least twelve (12) days before the Return Date, with the Town Clerk of the Town of East Lyme, or his / her ~~agent~~, 108 Pennsylvania Avenue, Niantic, Connecticut 06357, and directing the Town Clerk to retain one copy and forward the second copy to the Water and Sewer Commission of the Town of East Lyme. Such appearance shall not be made in person, but shall be made by filing a statement of appearance with the Clerk of the Court, whose address is 70 Huntington Street, New ~~London~~, Connecticut 06320, on or before the second day following the Return Date. Glenn Russo, 288 Margarite Road, Middletown, Connecticut 06457, as principal, and Maria L. Drag, 168 Rimfield Drive, South Windsor, Connecticut 06074, as surety, are recognized in the amount of $250 to comply with all orders and decrees entered hereunder.

Hereof fail not, but of this writ with your actions thereon make due service and return according to law.

Dated this 28th day of December, 2012 at Hartford, Connecticut.

Timothy S. Hollister
thollister@goodwin.com
Commissioner of the Superior Court
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919
PHONE: (860) 251-5000
FAX: (860) 251-5318
Juris No. 057385

State of Connecticut
Judicial Branch

Attorney/Firm: SHIPMAN & GOODWIN LLP (057385)

E-Mail: tdavidson@goodwin.com

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Document Summary

Confirmation Number:	**VXJNA47DDBF6**
Docket Number:	KNL-CV-13-6015987S
Case Name:	**LANDMARK DEVELOPMENT GROUP LLC ET AL v. EAST LYME WATER AND SEWER COMMISSION**
Type of Transaction:	**E-File New Case**
Fee Amount:	**$350.00**
Date Filed:	**JAN-9-2013**
Motion/Pleading By:	**SHIPMAN & GOODWIN LLP Juris# 057385**
Document Filed:	**SUMMONS** **COMPLAINT** **RETURN OF SERVICE**
Date and Time of Transaction:	**Wednesday, January 09, 2013 2:56:44 PM**

RETURN DATE: FEBRUARY 5, 2013	:	SUPERIOR COURT
LANDMARK DEVELOPMENT GROUP LLC AND JARVIS OF CHESHIRE LLC	:	JUDICIAL DISTRICT OF NEW LONDON
v.	:	AT NEW LONDON
EAST LYME WATER AND SEWER COMMISSION	:	DECEMBER 28, 2012

APPEAL FROM WATER AND SEWER COMMISSION

Pursuant to General Statutes § 7-246a, Landmark Development Group LLC and Jarvis of Cheshire LLC (collectively "Landmark") appeal the December 11, 2012 decision of the Water and Sewer Commission of the Town of East Lyme (the "Commission") denying Landmark's application for a sewer capacity determination for the East Lyme sewer system.

1. Plaintiff Landmark Development Group LLC is a Connecticut limited liability company with a place of business at 100 Roscommon Drive, Suite 312, Middletown, Connecticut 06457.

2. Plaintiff Jarvis of Cheshire LLC is a Connecticut limited liability company with a place of business at 100 Roscommon Drive, Suite 312, Middletown, Connecticut 06457.

3. The defendant Commission is the agency designated by the Town of East Lyme (the "Town") to carry out the duties of a municipal water pollution control authority and to receive, process, and act upon applications for sewer capacity determinations in the Town.

4. Landmark owns or controls 236 acres of land adjacent to Caulkins Road in East Lyme.

5. In evaluating sewer applications, the Commission acts in an administrative capacity, and in a ministerial capacity when an application complies with the applicable ordinances and regulations and adequate sewer capacity exists.

6. Pursuant to the provisions of General Statutes § 7-246 and the ordinances adopted by the Town, the Commission has adopted regulations governing sewer system connections and use.

7. The 236 acre Caulkins Road property is abutted on the west by a multi-family, subsidized housing development known as Deerfield Condominiums; on the south by a residential neighborhood; on the east by the Niantic River; on the north by Route 1; and on the northeast by a residential area known as the Golden Spur.

8. The Caulkins Road property has vehicular access, from two routes, to Route 1 and Interstate 95.

9. The Caulkins Road property has frontage on a section of Route 1 through which the defendant Commission has previously approved construction of a sewer extension, and is also bounded on the west by the Deerfield development, which is served by the Town's public sewer system.

10. Proceeding west to east, the 236 acres has three distinct areas, a relatively flat plateau at the western half, an area of slopes and rock outcrops on the east side of the plateau, and frontage on the Niantic River.

11. In 2005, Landmark applied to the East Lyme Zoning Commission for approvals to construct on 36± of the 236 acres, on the western plateau, an 840 unit multi-family residential development (the "Residential Development Area"), in which 30 percent of the homes would be preserved for 40 years for moderate income households in compliance with General Statutes § 8-30g. That plan also proposed 113± acres of open space. See Exhibit A.

12. The 36 acre Residential Development Area contains no inland or tidal wetlands, and is outside the portion of the 236 acres that lies within state coastal boundary.

13. The 36 acre Residential Development Area is located in the Town's sewer service area.

14. The East Lyme Zoning Commission denied Landmark's zoning application, and Landmark appealed to the Superior Court pursuant to General Statutes § 8-30g.

15. In November 2011, the Superior Court sustained Landmark's appeal and remanded the case to the East Lyme Zoning Commission for further proceedings, including the adoption of a zoning regulation governing the development of multi-family residential use in compliance with § 8-30g, including the proposed method of sewage disposal.

16. Pursuant to the Court's November 2011 decision, on June 1, 2012, Landmark submitted to the East Lyme Zoning Commission a request that it adopt a new section of the Town's Zoning Regulations, to facilitate housing development compliant with § 8-30g.

17. On the same day, also pursuant to the Court's November 2011 decision and General Statutes § 7-246a, Landmark submitted to the defendant Water and Sewer Commission, an application for a sewage discharge capacity determination, to confirm the availability of sewer capacity for the Residential Development Area.

18. Specifically, Landmark requested confirmation of 118,000 gallons per day of sewer capacity to serve the Residential Development Area.

19. In addition, as required by East Lyme's Sewer Regulations, Landmark submitted a calculation of the potential additional sewer capacity needed for future development of the subject property.

20. The defendant Commission ignored Landmark's repeated requests to convene a public hearing on its application within the timeframe required by General Statutes § 7-246a and § 8-7(d), and eventually convened a hearing on August 28, 2012.

21. The hearing continued on September 25 and October 23, 2012, when it was closed.

22. At the public hearings, the Commission received substantial evidence of the following facts:

a. The Town, by inter-municipal agreement, is allocated 1,500,000 gallons of sewer capacity (15 percent) at the City of New London's 10,000,000 gallon sewage treatment plant;

b. Although approximately 478,000 gallons of East Lyme's sewer capacity is reserved by contract to various State of Connecticut facilities, the Town / Commission, as of 2012, has approximately 309,000 gallons of unused sewer capacity, which does not include approximately 165,000 gallons that is reserved to the State but in recent years has not been used;

c. All of Landmark's proposed residential buildings are located within the Town's sewer service area;

d. Landmark's Residential Development Area can be physically connected to the Town's sewer system without the defendant Commission needing to modify the sewer service area or approve a new extension of the existing system;

e. The Town of Waterford's sewer system, through which East Lyme sewage is transmitted to the New London treatment plant, has ample capacity to convey Landmark's proposed sewage discharge to New London; and

f. Landmark is able to connect its development to the Town's sewer system in compliance with the defendant Commission's rules and regulations.

23. In addition, evidence received at the hearings revealed that the Town and the Commission have requested up to 1,500,000 gallons of additional capacity at the New London treatment plant, and the City of New London in May 2012 received a report demonstrating how the plant's capacity may be increased substantially at relatively low cost.

24. On December 6, 2012, the East Lyme Zoning Commission adopted a zoning regulation amendment applicable to Landmark's property, which requires a site plan to include the proposed sewage disposal method.