For the record

Exhibit #3
Russo/Landmark
Packet 2 of 2

BOS 8/6/25
Public Hearing

NO. CV 13 6040390S	:	SUPERIOR COURT
LANDMARK DEVELOPMENT GROUP LLC	:	
	:	JUDICIAL DISTRICT OF
v.	:	HARTFORD
EAST LYME WATER AND SEWER COMMISSION	:	JUNE 23, 2014

MEMORANDUM OF DECISION

The plaintiffs, Landmark Development Group LLC and Jarvis of Cheshire LLC (Landmark), have brought this appeal[1] pursuant to General Statutes § 7-246a (b), contesting a denial of Landmark's application for a sewer capacity determination by the defendant East Lyme water and sewer commission (the commission).[2]

Initially on June 1, 2012, Landmark submitted to the commission under § 7-246a (a) an application for a sewage discharge capacity determination for up to 118,000 gallons per day (gpd). After a series of public hearings on this application, at a meeting held on December 11, 2012, the commission resolved in part that the record showed that the

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[1] On January 16, 2014, Landmark introduced without objection two deeds, one dated October 2, 2000, the other dated September 21, 2006 to demonstrate aggrievement. The commission did not contest that these deeds proved aggrievement. Based on these exhibits, aggrievement is found. (Transcript, January 16, 2014, pp.48, 49).

[2] Pursuant to § 22a-19, Save the River/Save the Hills and Friends of Oswegatchie Hills Nature Preserve have intervened in favor of the commission.

Mailed to all counsel & OCR 6/26/14 ab/co

"Town has between 130,000 and 225,000 [gpd] of remaining sewerage treatment capacity," that the 118,000 gpd requested by Landmark represented "between 52% and 90% of the Town's remaining sewage treatment capacity," that "the remaining sewage treatment capacity must be made available to the areas of the Town already designated to receive sewer service and to those customers who have the option to connect to the sewer system as a result of assessments levied on their properties," that "the capacity requested in the application is a disproportionately large allocation of the Town's remaining sewage treatment capacity, and that there is not adequate sewer capacity related to the proposed use of land," and thus concluded that the application should be denied. The reason given was that the capacity requested in the application is a disproportionately large allocation of the Town's remaining sewage treatment capacity, and that there is not adequate sewer capacity related to the proposed use of land." This appeal followed.

Landmark stated in its brief on appeal that the commission's December 11, 2012 final decision was erroneous, in part because it did not "consider an application of less than 118,000 gpd" but had instead denied it any sewer capacity. (Brief, August 14, 2013, p. 20). At the oral argument of January 16, 2014, the parties debated whether Landmark had asked for the commission to set an alternative capacity figure if the 118,000 gpd allocation was found to be "disproportionately large." At the conclusion of this oral argument, the court remanded the appeal to the commission for an amended capacity

decision, based on the record, taking into account the need for a capacity reserve.

At the commission's meeting of February 25, 2014,[3] a resolution regarding Landmark's capacity application was unanimously approved. The resolution reads in part as follows:

"WHEREAS, the Commission finds that the Town has between 130,000 and 225,000 gallons per day of remaining sewage treatment capacity; and

WHEREAS, the 118,000 gallons per day of sewage capacity requested by the Applicant represents between 52% and 90% of the Town's remaining sewage treatment capacity; and

WHEREAS, the 118,000 gallons per day of sewage capacity requested by the Applicant represents more than 10% of the Town's current daily sewage flow; and

WHEREAS, the remaining sewage treatment capacity must be made available to the areas of the Town already designated to receive sewer service and to those customers who have the option to connect to the sewer system as a result of assessments levied on their properties; and

WHEREAS, the Commission finds that the capacity requested in the application is a disproportionately large allocation of the Town's remaining sewage treatment capacity, and that there is not adequate sewer capacity related to the proposed use of land; and

WHEREAS, based on a review of all the evidence in the record, including but not limited to the following:

- Weston and Sampson reports and attachments (Exhibits 31 and 38);
- Fuss & O'Neill report, including executive summary and section 5, tables V-4, V-5, State capacity graph on p. 40, Figure V-14 showing capacity breakdown, Figure

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[3] The resolution was re-adopted with modifications not germane to this appeal on March 11, 2014.

V-15 Future Wastewater Flow Estimation for all areas of town, sewered and unsewered, Figure V-16 showing predicted expansion ranges of all parcels, and Figure V-17 bar graph of future flow projections (Exhibit 8);

- AECOM Report (Exhibit 3, Tab 5);
- New London municipal NPFES discharge permit (Exhibit 7);
- Memo from Commissioner Zoller (Exhibit 12) and follow up email that discusses the memo;
- East Lyme sewer flows history (Exhibit 12, Exhibit 3 Tab 2);
- Landmark reports and attachments (Exhibit 3, 30 and 39);
- 1985 Facilities Report, including Table 12 (p. 82) chart of problem areas, Table 13 (p. 84)
- 1985 Facilities Report, including Table 12 (p. 82) chart of problem areas, Table 13 (p. 84) problem area flow estimates, Figure 12 (following p. 85) map of problem areas

The Commission finds that it is willing to grant to the Applicant 13,000 gallons per day of sewage treatment capacity; and

WHEREAS, nothing in this Amended and Clarified Resolution shall be construed as a waiver of the Commission's position that its initial resolution dated December 11, 2012 properly and accurately addressed the Application as submitted.

BE IT THEREFORE RESOLVED, that the East Lyme Water and Sewer Commission, acting as the Town's Water Pollution Control Authority, pursuant to the Superior Court's remand order of January 16, 2014, based on a review of evidence in the record, hereby

GRANTS to the Applicant 13,000 gallons per day of sewage treatment capacity pursuant to an application dated June 1, 2012. . . ."

The minutes of the meeting of February 25, 2014 provide the commission's rationale for this resolution. The commission's attorney explained that this court had stated that "if the Commission felt that 118,000 gpd was too large that they were to come up with some other number and because they did not–[the prior final decision] was not seen as a final resolution." Commissioner Mingo stated that the "[q]uestion is how much of that are they willing to allocate to what deals only with the area within the East Lyme sewer shed area boundaries for the Landmark property. . . . He suggested that they may want to consider [certain exhibits] from the record when discussing a potential determination. . . . He stated that he does feel they deserve something but that he is not sure that he has the expertise to come up with a figure that is equitable."

The commission's attorney referred to Section 5 of the Fuss & O'Neill report. Commissioner Formica referred to Map V-15. Commissioner Bragaw also relied on Map V-15 and parcel 16 where the Landmark property lies. These materials showed that 11,000 gpd had been allocated of 24,000 gpd in this parcel and that 13,000 gpd remained. This led to the commission members adopting the allocation of 13,000 gpd. Mr. Bond said that "he would agree with the figure and that they are all in the ball park percentage

wise that 7.25% of the total available capacity is fair."[4] (Amended return of record, court docket #143, pp. 4-7).

Landmark's appeal has now returned to court for a ruling on the December 11, 2012 and February 25, 2014 final decisions of the commission. The court is assisted by two key Connecticut appellate cases in its resolution of this appeal. The first is *Forest Walk LLC* v. *Water Pollution Control Authority*, 291 Conn. 271, 968 A.2d 345 (2009). Forest Walk appealed from a sewer authority's final decision that had denied it a sewer connection and a sewer extension, and its appeal was dismissed by the Superior Court and the Superior Court was affirmed by our Supreme Court.

While the issue in *Forest Walk* did not directly involve the allocation of sewer capacity, the Supreme Court clearly stated, in language also applicable to this appeal, "a municipality has wide discretion in connection with the decision to supply sewerage." Id., 283, quoting *Wright* v. *Woodridge Lake Sewer District*, 218 Conn. 144, 149, 588 A.2d 176 (1991). The standard of review of the decision of a sewer commission "is limited to whether it was illegal, arbitrary or in abuse of [its] discretion. . . . Moreover, there is a strong presumption of the regularity in the proceedings of a public agency, and we give such agencies broad discretion in the performance of their administrative duties,

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[4] Commissioner Bond was basing his percentage on an assignment of 13,000 gpd out of a total capacity of 177,000 gpd, choosing a mid-number between 130,000 gpd and 225,000 gpd, that the record supported as a range of capacity.

provided that no statute or regulation is violated." (Citation omitted.) *Forest Walk LLC* v. *Water Pollution Control Authority*, 291 Conn. 285-86.

With regard to capacity, *Forest Walk* found that substantial evidence supported the sewer commission's determination of a disproportionately large allocation. The amount sought "would allocate approximately 10 percent of the remaining capacity available for the entire town to a property that represented less than 1 percent of the available land area in town. . . . [S]ubstantial evidence . . . would exist to support the defendant's conclusion that the extension application should be denied because the plaintiff's requested sewage capacity was disproportionately large in relation to the property's size and exceeded the safe design standards for the public sewer." Id., 296.

In the second case, *Dauti Construction, LLC* v. *Water and Sewer Authority,* 125 Conn. App. 652, 10 A.3d 84 (2010), the sewer authority denied an application for sewer capacity based on a "priority matrix" tied to the town zoning classifications. The Appellate Court undertook to review this denial, not to determine whether the sewer authority's priority matrix was "facially invalid," but to determine whether the sewer authority had properly applied the matrix to Dauti Construction's proposal. Id., 658. The test was whether the authority's action was "illegal, arbitrary or in abuse of discretion," Id., 660, citing *Forest Walk LLC* v. *Water Pollution Control Authority,* supra, 291 Conn. 285-86.

The matrix required Dauti to meet the town zoning regulations of 1994. It was this "zoning based" element of the matrix that the Appellate Court found illegal "as limiting any possibility of development that exceeded the equivalent of four dwelling units." Id., 662. "More importantly, the defendant [authority] has not referred to any evidence in the record in support of a finding that the town's sewer system lacks sufficient capacity for the plaintiff's proposed development or that other property owners would be deprived of sewer connections to which they are entitled. . . . Further, the defendant concedes in its brief on appeal before this court that 'there currently is enough capacity for [the] plaintiff's proposed development and there was no evidence of current, identified property owners who absolutely will be deprived of sewer connections if the application is granted." Id., 663-64.

The Appellate Court directed that Dauti's application be approved; this was based upon the rule that in the instance where the agency is required to take only one action, it is not necessary on a finding of error to remand the matter to the agency. See § 8-8 (*l*); *R & R Pool & Patio, Inc.* v. *Zoning Board of Appeals*, 83 Conn. App. 1, 8-9, 847 A.2d 1052 (2004): "When, on a zoning appeal, it appears that as a matter of law there was but a single conclusion which the zoning authority could reasonably reach, the court may direct the administrative agency to do or to refrain from doing what the conclusion legally requires." (Citation omitted.)

These relevant cases indicate the following to the court regarding this appeal:

From *Forest Walk*:

1. The commission has wide discretion in approving or limiting an application for sewer services.

2. The standard of review of the commission's final decision was whether it acted illegally, arbitrarily, or in abuse of its discretion.

3. There is a presumption of regularity of the proceedings in favor of the commission.

4. With regard to capacity, under the substantial evidence test, the commission must consider the remaining capacity for the entire town, the land area represented by the property versus the available land area in the town, the safe design standards for the public sewer, and the percentage of the allocation versus the total remaining capacity.

From *Dauti*:

1. The court followed *Forest Walk*, both with regard to the capacity determination and the standard of review, in an application for an allocation in an existing sewer system.

2. The issue of remaining capacity did not arise in the case as the sewer authority conceded that the application did not affect the remaining capacity. The issue in *Dauti* was, rather, whether the zoning regulations and projections were binding on the sewer authority. The Appellate Court held that the zoning record should not be part of the sewer authority's calculations.

3. The court did order the application to be granted and did not remand the matter, but only because there was no other action that the sewer authority could take under the facts of

this case.

Based on this appellant precedent, the court first indicates, as it did orally on January 16, 2014, that the commission improperly denied Landmark's application on December 11, 2012. The application sought an allocation up to 118,000 gpd and Landmark was entitled to receive a capacity amount, not a complete denial.

The more important question arises after the remand–whether the 13,000 gpd granted by the commission was "illegal, arbitrary or an abuse of discretion." The court concludes that the figure was inappropriately low for the following reasons:

1. The record does not indicate a specific number of remaining capacity *before* Landmark's application is considered. The record before the court shows a range of 130,000 gpd to 225,000 gpd. At the meeting of the commission on February 25, 2014, the figure of 177,000 gpd was used as a compromise. In court on May 27, 2014, the commission's attorney conceded that the commission would not object to a figure of 250,000 gpd. Finally, Landmark points to a reduced usage by the town and state facilities so that the correct figure is between 308,000 gpd and 358,000 gpd. In *Forest Walk,* an expert reviewed the allocation requested by the applicant for safe design standards. Id., 295.

2. The commission made no finding regarding the area of Landmark's development versus the land area of the town.

3. The commission primarily relied upon the data produced by Fuss & O'Neill, developed in 2004 and set forth in Map V-15. This data is not current.

4. The commission made use of the table "Future Waterworks Flow Estimation" (Parcel 16). This table was one ground in determining that 13,000 gpd should be allocated to Landmark. This table shows 24,000 gpd available, but subtracts 11,000 for future possible development. The court's understanding is that this gallonage is being held in reserve for septic tanks that might be converted to sewers. There is nothing in the record to show that any of these residences have requested sewer capacity since the table was developed in 2004.

5. The percentage of 8% of capacity to Landmark, used by the commission, is most likely much lower if total capacity is greater than 177,000 gpd. For example if the remaining capacity is 250,000 gpd, then 13,000 gpd is only 5% of capacity.

Based on these considerations, the court sustains the appeal and remands the matter to the commission for its appropriate action consistent with precedent and the record.

So ordered.

Henry S. Cohn, Judge

LANDMARK DEVELOPMENT
EAST LYME WATER AND SEWER COMMISSION

October 28, 2014

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

Sewer Department Monthly Report

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

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

State CT Flows:

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

Footnotes:

EAST LYME SEWER FLOWS - HISTORY

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

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

Usage of State of Connecticut Reserved Capacity

March 1, 2006 to February 29, 2012

Location	Allocated Flow (gpd)	Average Daily Flow (gpd)(1)	Allocation Remaining During Average Daily Flow (gpd)
Rocky Neck State Park	25,000	0	25,000
Point O' Woods	105,000	17,133(2)	87,867
Pine Grove	39,600	39,600(3)	0
Gates and York Prisons	250,000	249,239	761
Camp Rell (Camp Niantic)	58,400	8,233	50,167
Total:	478,000	314,205	163,795

(1) Data provided by the Town of East Lyme (March 2006 – February 2012)
(2) Not fully connected as of September 5, 2012.
(3) Estimated to be equal to allocated flow.

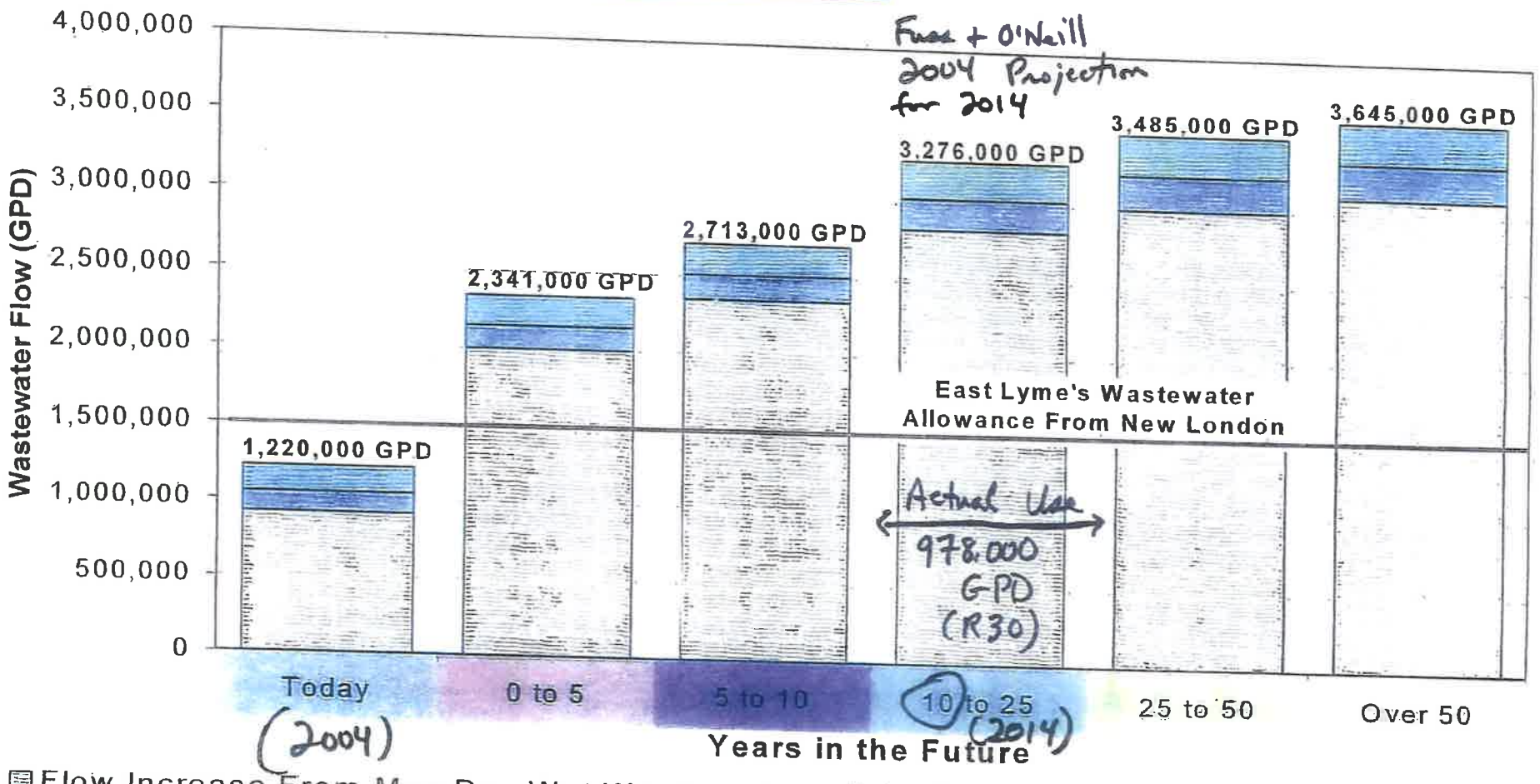
- The State of Connecticut, by agreement and order, appears to have approximately 0.164 MGD of flow allocation remaining

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

Weston&Sampson

East Lyme Sewer System Wastewater Flow Projections

FIGURE V-17



Notes: Limits of expansion of sewered areas created by the Town of East Lyme Planning Department. Includes existing max day I/I rate from 04/13/2004 and estimated future I/I amount based on TR-16.

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Fuss & O'Neill Inc. *Consulting Engineers*

Sewer Department Monthly Report

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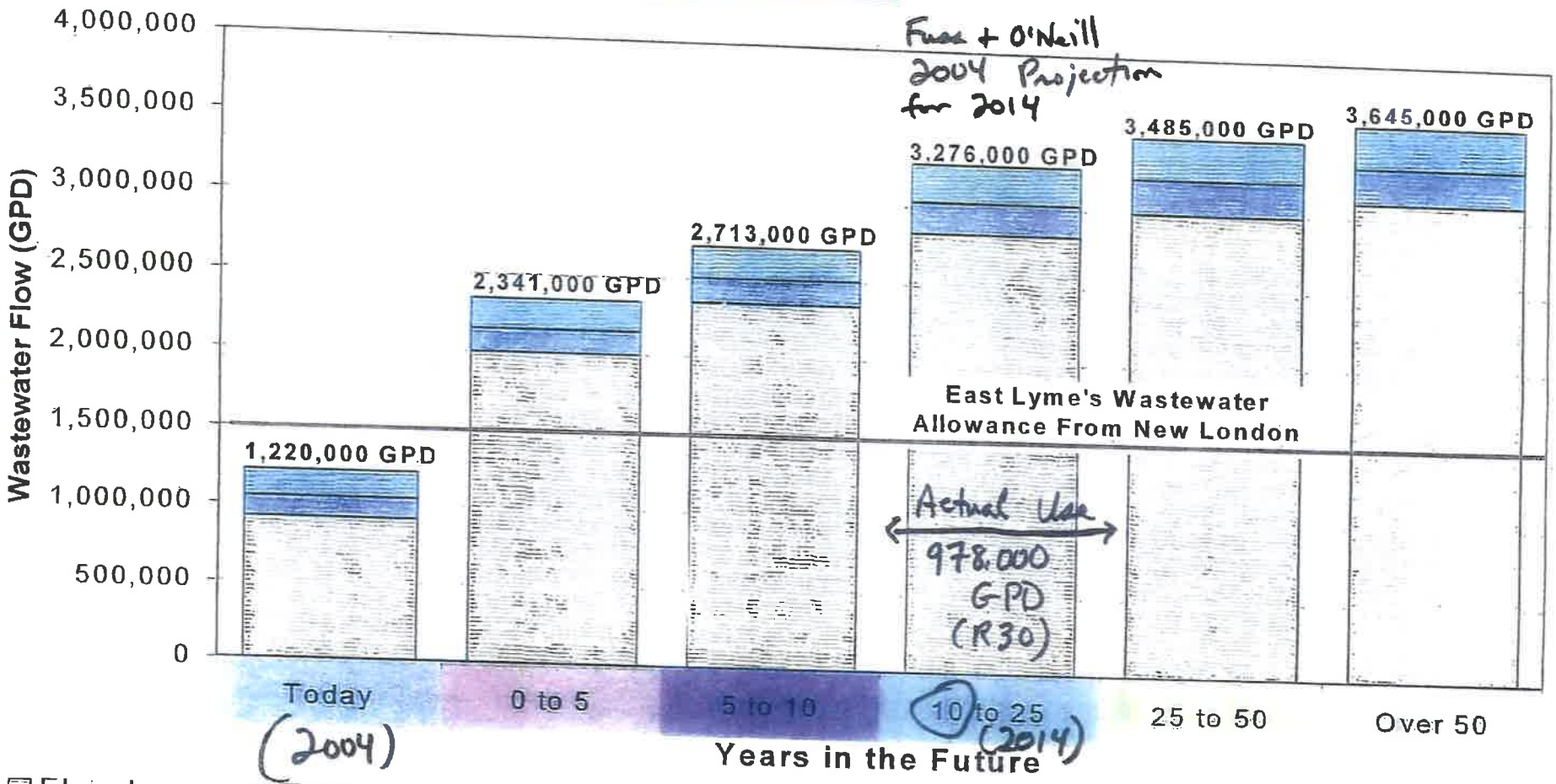
September 25, 2012
Town of East Lyme
Water & Sewer Commission
Public Hearing

Weston&Sampson

East Lyme Sewer System Wastewater Flow Projections

FIGURE V-17



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RETURN DATE: JANUARY 6, 2015	:	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	:	NOVEMBER 24, 2014

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 October 28, 2014 decision of the Water and Sewer Commission of the Town of East Lyme (the "Commission"), published November 15, 2014, denying Landmark's application for a sewer capacity allocation of up to 118,000 gallons per day 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.

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. At public hearings in August – October 2012, 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 more than 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.

21. 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 has received a report demonstrating how the plant's capacity may be increased substantially at relatively low cost.

22. 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.

23. At a meeting held December 11, 2012, the defendant Commission denied Landmark's sewer capacity application, declining to allocate a single gallon of capacity to the property or the Residential Development Area.

24. The defendant Commission published notice of its denial in the *New London Day* on December 18, 2012, and the plaintiffs appealed to this Court, claiming that the denial was illegal, *ultra vires*, and unsupported by substantial evidence in the record.

25. On January 16, 2014, this Court ordered a remand to the Commission. The scope and purpose of the remand, clarified several times on the record, were that the Commission was to conduct new deliberations, without reopening the public hearing, based on the record compiled at hearings in 2012. The remand was ordered because the Commission claimed, incorrectly, that Landmark's sewer capacity application had presented it with only two choices, 118,000 gallons per day or zero.

26. At a regular meeting held on February 25, 2014, the Commission concluded that its available sewer capacity was 177,000 gallons, which it determined merely by taking the midpoint between the 130,000 and 225,000 gallon range provided previously by its consultant. The Commission then allocated 13,000 of the 177,000 gallons to Landmark, which the Commission extracted from Table V-15 of the 2007 Fuss & O'Neill Supplemental / 2007 Sewer Facilities Report, Exhibit 8 in the Record, which allocated sewer capacity was based on the East Lyme Zoning Regulations and sewer system data compiled in 2004.

27. On March 11, 2014, the Commission adopted an Amended Resolution stating the conclusions summarized in ¶ 2 above.

28. After further briefing and oral argument, this Court issued a Memorandum of Decision on June 23, 2014, holding:

a. the Commission cannot use sewer capacity to control land use of zoning;

b. the Commission cannot rely on the outdated Fuss & O'Neill report, Record Exhibit 8 and its 2004 data;

c. the Commission may not reserve capacity indefinitely for unidentified, unquantified, or speculative long-term needs;

d. the Commission has conceded that its available sewer capacity is at least 250,000 gpd; and

e. the Commission's March 2014 allocation of 13,000 gallons was illegal, as it constituted only eight percent of 177,000 gpd or five percent of 250,000 gpd.

29. In this June 23, 2014 Memorandum of Decision, the Court remanded again to the Commission, and provided guidance for the new decision it was ordered to make:

> With regard to capacity, under the substantial evidence test, the commission must consider the remaining capacity for the entire town, the land area represented by the property vs. the available land area in the town, the safe design standards for the public sewer, and the percentage allocation vs. the total remaining capacity.

30. At a court proceeding on September 3, 2014, Judge Cohn stated from the bench that, notwithstanding the June 23, 2014 remand for a new decision on the merits of Landmark's application, the Court considered its June 23, 2014 Memorandum to be a final decision. The undersigned counsel disagreed on the record with that analysis.

31. At its October 28, 2014 meeting, the Commission unanimously:

a. accepted 358,000 gallons per day as the Town's available capacity;

b. did not cite any "safe design standard" as an obstacle to Landmark's application, but

c. allocated only to Landmark 14,434 gpd, which is four percent of the amount it determined to be available to the Town.

32. In adopting this motion, the Commission ignored this Court's June 23, 2014 holding that allocating five to eight percent of the Town's available capacity (where, as here, the property to be developed is within the sewer district, no extension is needed, and there are no safety / engineering issues with connecting to the system) is illegal and an abuse of discretion.

33. The Commission's October 28, 2014 decision is illegal, *ultra vires*, beyond its statutory authority, and not supported by substantial evidence in the record, because the land to be developed is in the Town's sewer district; Landmark will connect through an approved sewer extension; ample capacity exists to grant Landmark's application while maintaining adequate reserve capacity for the Town;' and there are no technical or engineering impediments to Landmark connecting to the sewer system.

34. The Commission published its decision in the *New London Day* on November 15, 2014.

35. Notwithstanding the filing of this appeal to protect Landmark's position, the undersigned counsel has filed with the Court (the Hon. Henry Cohn, J.) a motion to terminate the June 23, 2014 remand and for the Court to decide the merits of Landmark's sewer application.

36. Plaintiffs Landmark Development Group LLC and Jarvis of Cheshire LLC are statutorily aggrieved as they are the owners of the subject property and applicants for the sewer capacity determination that was denied.

WHEREFORE, plaintiffs Landmark Development Group LLC and Jarvis of Cheshire LLC respectfully request the following relief:

1. That this appeal be sustained and the action of the East Lyme Water and Sewer Commission on October 28, 2014 be reversed;

2. That the East Lyme Water and Sewer Commission be ordered to conditionally approve Landmark's application as filed in June 2012 for up to 118,000 gallons per day of public sewer system capacity; and

3. Such other relief at law or in equity as the Court deems appropriate.

PLAINTIFFS,
LANDMARK DEVELOPMENT GROUP LLC
AND JARVIS OF CHESHIRE LLC

By _____

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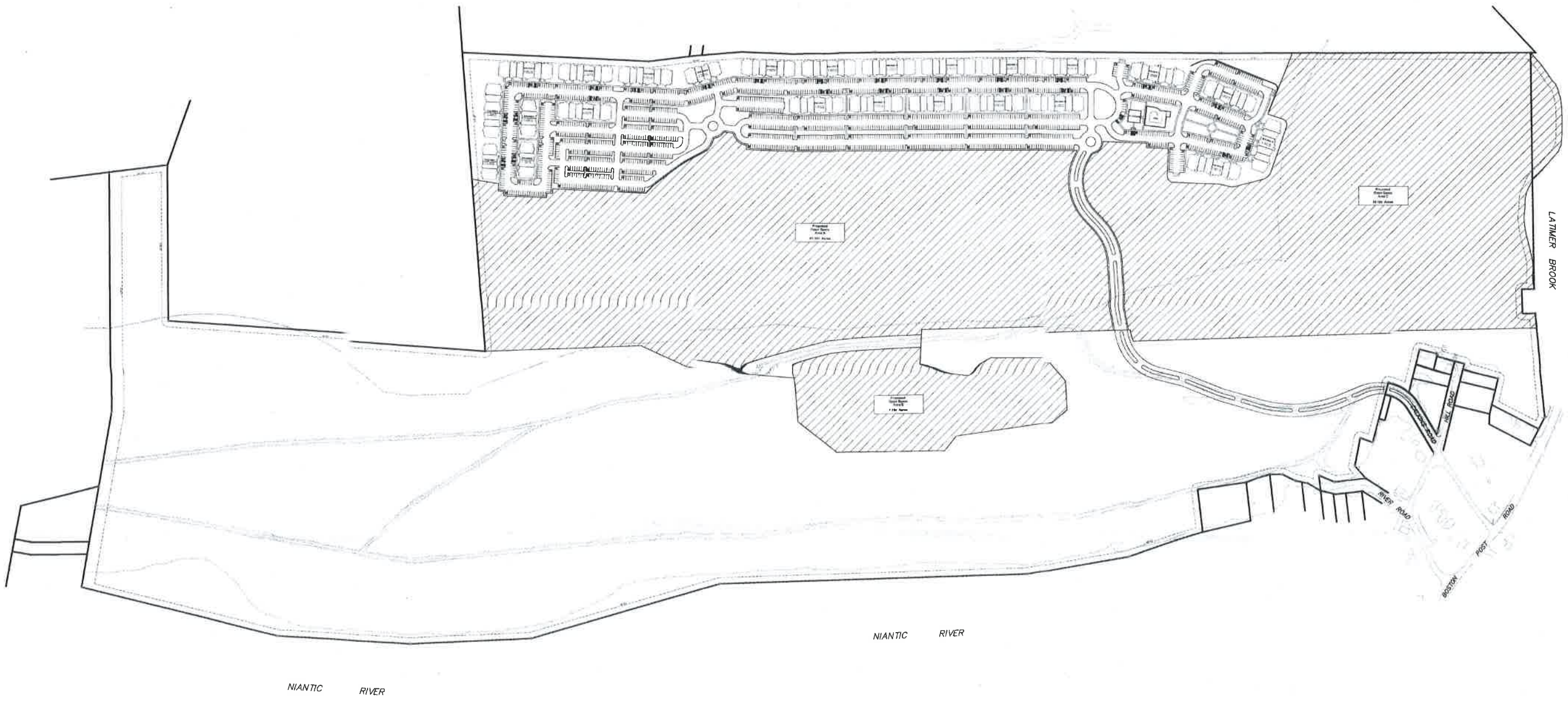
Please enter the appearance of
Shipman & Goodwin LLP for
plaintiffs Landmark Development
Group LLC and Jarvis of Cheshire LLC

_____
Shipman & Goodwin LLP



APARTMENT TABULATION

Building #	Total Units	1-Bedroom Units	2-Bedroom Units
1	30	12	18
2	30	12	18
3	30	12	18
4	36	18	18
5	36	18	18
6	36	18	18
7	36	18	18
8	36	18	18
9	30	12	18
10	36	18	18
11	36	18	18
12	36	18	18
13	36	18	18
14	36	18	18
15	36	18	18
16	36	18	18
17	36	18	18
18	36	18	18
19	36	18	18
20	36	18	18
21	36	18	18
22	36	18	18
23	36	18	18
24	36	18	18
Total	840	408	432

PARKING TABULATION

Number of Spaces

Required: (Section 22.1.2)

1.5 Spaces for each Efficiency or 1-Bedroom unit

2.0 Spaces for each 2-Bedroom of larger Unit

1.0 Spaces for each 3 Units (Guest Parking)

408 1-Bedroom Units x 1.5 spaces per Unit =	612 spaces
432 2-Bedroom Units x 2.0 spaces per Unit =	864 spaces
840 Units x 1.0 spaces per each 3 Units =	280 spaces
	1,756 spaces

Proposed:

1,709 standard (9' x 18') spaces
58 handicap accessible spaces

1,767 Total Proposed Spaces

Internal Parking Lot Greenspace: (Section 24.E.4)

Required: 15 Square Feet per Parking Space

Proposed: 67.8 Square Feet per Parking Space

OPEN SPACE TABULATION

Required: (Section 32.6)

10 percent of total lot area

Total Lot Area (Phase 1) = 123.02 Acres

123.02 Acres x .10 = **12.30 Acres Required Open Space**

Proposed

Open Space Area 'A' =	41.30± Acres
Open Space Area 'B' =	7.74± Acres
Open Space Area 'C' =	38.12 ± Acres

87.16 **Total Proposed Open Space or 70.85 percent**

ZONING DATA TABULATION

Requirement	Section	Required	Proposed
Minimum Lot Size	32.4.1	10 Acres	123.02 Acres
Maximum Multi-Family Unit Density	32.4.3	8 Units per Acre (1-Bedroom)	8 Units per Acre
		6 Units per Acre (2-Bedroom)	6 Units per Acre
Minimum Frontage	32.4.4	50 Feet	50 Feet (Calkins Road)
Minimum Setback	32.4.5	150 Feet From Streetline	983± Feet
Minimum Buffer	32.4.6	25 Feet	25 Feet
Minimum Buffer Area	32.4.7	25 Feet	25 Feet
Minimum Grouping	32.4.8	24 Feet	25 Feet
Minimum Front Yard	32.4.9	25 Feet	983± Feet
Minimum Side Yard	32.4.9	25 Feet	25 Feet
Minimum Rear Yard	32.4.9	50 Feet	1,510± Feet
Maximum Lot Coverage	32.4.10	30 Percent	6.2 ± Percent

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Civil & Traffic Engineers · Surveyors · Planners · Landscape Architects
Phone (860) 653-8000
Fax (860) 844-8800
e-mail mail@fahesketh.com

Revisions:

No.	Date	Description

MASTER PLAN
Approved for
RIVERVIEW HEIGHTS
CALKINS ROAD
EAST LIME, CONNECTICUT

Job no: 07161
Date: 02-04-2015 | Drawn by: KLL | Checked by: GAH | Sheet no: 1 OF 1
Scale: 1" = 200'

MA-1

Docket Entry #154

DOCKET NO: HHD CV-15-6056637-S	:	SUPERIOR COURT
LANDMARK DEVELOPMENT GROUP, LLC Et Al	:	JUDICIAL DISTRICT OF
V.	:	HARTFORD
EAST LYME WATER & SEWER COMMISSION	:	JULY 6 2016

MEMORANDUM OF DECISION

Prior to the commencement of the present action, the plaintiff, Landmark Development Group, LLC, brought an appeal against the defendant, East Lyme Water and Sewer Commission, regarding a sewer capacity determination. Before rendering a decision, the court reviewed the record, including the methodology for the grant of capacity. On June 26, 2014, the court ruled that the defendant must reconsider the allocation of sewer capacity in the amount of 13,000 gallons per day to the plaintiff, Landmark Development Group, LLC. See *Landmark Development Group, LLC* v. *East Lyme Water & Sewer Commission*, Superior Court, judicial district of Hartford, Docket No. CV-13-6040390-S (June 26, 2014, *Cohn, J.*). In so ruling, the court indicated that the defendant must consider the *Forest Walk, LLC* v. *Water Pollution Control Authority*, 291 Conn. 271, 968 A.2d 345 (2009) factors. More specifically, in regard to capacity, the defendant must "consider the remaining capacity for the entire town, the land area represented by the property versus the available land area in the town, the safe design standards

Mailed to all counsel & OCR 7/6/16 ab/co

154 00

for the public sewer, and the percentage of the allocation versus the total remaining capacity." *Landmark Development Group, LLC* v. *East Lyme Water & Sewer Commission*, supra, Superior Court, Docket No. CV-13-6040390-S. On July 29, 2014, the court denied the defendant's motion to reargue. See *Landmark Development Group, LLC* v. *East Lyme Water & Sewer Commission*, Superior Court, judicial district of Hartford, Docket No. CV-13-6040390-S (June 29, 2014, *Cohn, J.*).

In the present action, which was commenced on November 24, 2014, the plaintiffs, Landmark Development Group, LLC, and Jarvis of Cheshire, LLC, ask the court to review a grant of capacity of 14,434 gallons per day to the plaintiffs by the Board. On February 19, 2015, the plaintiffs filed their appeal brief. On March 16, 2015, the defendant, East Lyme Water and Sewer Commission, filed its appeal brief.[1] On March 30, 2015, the plaintiffs filed a motion for permission to supplement the record in administrative appeal. The court heard oral argument on April 2, 2015. On the same day, the court granted the plaintiffs' request, but only as to exhibit C, a letter from Mark S. Zamarka.

On July 23, 2015, the plaintiffs filed a motion to conduct further discovery/deposition, and to supplement the record. Specifically, the plaintiffs asked the court for permission to take

[1] The two intervening entities, Friends of the Oswegatchie Hills Nature Preserve, Inc., and Save the River-Save the Hills, Inc., have also filed briefs in this action.

the deposition of the Board's administrator, Bradford Kargl, regarding approval of the connection application by Gateway (a similarly-situated apartment complex being developed) where over 160,000 gallons per day capacity was contemplated. The motion was granted by the court on September 8, 2015. The deposition revealed that although Kargl was aware of the Gateway capacity need (Plaintiffs' Exhibit 1, Deposition of Kargl, pp. 39-42/A28-A31, 52/A41, 62/A50), and had the duty to monitor this need (Plaintiffs' Exhibit 1, pp. 15/A9, 17/A10, 61-63/A49-51, 69/A57), he approved the connection application without making a capacity determination (Plaintiffs' Exhibit 1, pp. 33/A23, 66-71/A54-58, 74/A62), and without further reference to the Board (Plaintiffs' Exhibit 21).[2]

The court, as indicated in prior rulings, does not believe that a capacity determining action is ministerial, but is instead a matter of discretion for the Board. See *Forest Walk, LLC* v. *Water Pollution Control Authority*, supra, 291 Conn. 282 ("[A] municipality has wide discretion in connection with the decision to supply sewerage. . . . Although this discretion is not absolute, [t]he date of construction, the nature, capacity, location, number and cost of sewers and drains are matters within the municipal discretion with which the courts will not interfere, unless there appears fraud, oppression or arbitrary action." [Internal quotation marks omitted.]); see also

---

[2] The fact that Kargl failed to even review capacity as to Gateway distinguishes this case from the *Forest Walk* factors which have guided the court to this point.

Straw Pond Associates, LLC v. *Water Pollution Control Authority*, Superior Court, judicial district of Waterbury, Docket No. CV-08-4015126-S (March 8, 2011, *Gallagher, J.*) (discretionary standard of review applied to determination of availability of sewer capacity). The defendant's actions are discretionary even where there is a request for a sewer extension permit. See *Landmark Development Group, LLC* v. *East Lyme*, 374 Fed. Appx. 58, 60 (2d Cir. 2010) ("Plaintiffs had no legitimate claim of entitlement to a sewer-extension permit. Defendants plainly have discretion to deny such permits.").

In light of the supplemental evidence, the court concludes that there is at least 200,000 gallons per day capacity (358,000 gallons per day less 160,000 gallons per day to Gateway) for the entire sewer system.[3] The defendant had broad discretion in determining capacity, but the defendant was obligated to consider capacity when it approved the connection application for Gateway. As to the plaintiff, the court finds that with the large amount of capacity remaining,

[3] In its prior June 26, 2014 decision, this court noted that, as to remaining capacity, "[t]he record before the court shows a range of 130,000 gpd to 225,000 gpd. At the meeting of the commission on February 25, 2014, the figure of 177,000 gpd was used as a compromise. In court on May 27, 2014, the commission's attorney conceded that the commission would not object to a figure of 250,000 gpd. Finally, Landmark points to a reduced usage by the town and state facilities so that the correct figure is between 308,000 gpd and 358,000 gpd." *Landmark Development Group, LLC* v. *East Lyme Water & Sewer Commission*, supra, Superior Court, Docket No. CV-13-6040390-S. More recently, during the commission's October 2014 remand proceeding and resolution, the commission applied the plaintiff's figure of 358,000 gallons per day. (Amended Return of Record, Exhibit D, Postproceeding Exhibits 2, 3).

the capacity figure of 14,434 gallons per day is excessively low. There is an abuse of discretion[4] that the Board must correct. Although the Board is not required to grant the plaintiffs their request for 118,000 gallons per day, the capacity figure of 14,434 gallons per day is insufficient in view of the present remaining capacity of at least 200,000 gallons per day, and in view of the 160,000 gallons per day that was approved for Gateway. In reconsidering the allocation of the sewer capacity, the Board must comply with applicable sewer statutes, regulations and ordinances, and the Board should take into account the demands of the plaintiffs' sewer project and the effect on remaining capacity. Nevertheless, the Board must provide the plaintiffs with sufficient capacity to further the development of their project, and, as such, the Board may not settle on a figure for capacity that would completely foreclose the development of the plaintiffs' project.

This matter is remanded to the Board for a further ruling and is a final decision for purposes of appeal.

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[4] "When a water pollution control authority performs its administrative functions, a reviewing court's standard of review of the [authority's] action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion . . . . Moreover, there is a strong presumption of regularity in the proceedings of a public agency, and we give such agencies broad discretion in the performance of their administrative duties, provided that no statute or regulation is violated." (Citation omitted; internal quotation marks omitted.) *Forest Walk, LLC* v. *Water Pollution Control Authority*, supra, 291 Conn. 285-86.

SO ORDERED,

COHN, JTR

184 Conn.App. 303
Appellate Court of Connecticut.

LANDMARK DEVELOPMENT GROUP, LLC, et al.
v.
WATER AND SEWER COMMISSION
OF the TOWN OF EAST LYME

(AC 39804), (AC 39806)
|
Argued April 10, 2018
|
Officially released August 21, 2018

Synopsis

Background: Property owners sought judicial review of a decision of town's water and sewer commission allocating only 14,434 gallons per day in sewer treatment capacity to owners' housing development. The Superior Court, Judicial District of Hartford, Cohn, Judge Trial Referee, 2016 WL 4497652, sustained owners' appeal and ordered commission to grant owners' application for determination of sewer treatment capacity. Commission appealed.

Holdings: The Appellate Court, Bear, J., held that:

trial court properly allowed owners to supplement record with evidence of allocation to another apartment complex;

trial court prior ruling regarding factors for allocating capacity was not law of the case; and

trial court properly sustained owners' appeal.

Affirmed.

Attorneys and Law Firms

Mark S. Zamarka, with whom, on the brief, was Edward B. O'Connell, New London, for the appellant in AC 39804 (defendant).

Roger F. Reynolds, with whom were John M. Looney, Jr., Hartford, and, on the brief, Andrew W. Minikowski, for the appellants in AC 39806 (intervenors).

Timothy S. Hollister, with whom was Beth Bryan Critton, Hartford, for the appellees in both appeals (plaintiffs).

DiPentima, C.J., and Alvord and Bear, Js.

Opinion

BEAR, J.

**1 *306 This chapter of the protracted dispute between the town of East Lyme (town), and the plaintiffs, Landmark Development Group, LLC, and Jarvis of Cheshire, LLC, involves the plaintiffs' application to the defendant,[1] the town's Water and Sewer Commission (commission), for a determination of sewer treatment capacity. The commission appeals from the judgment of the Superior Court sustaining the plaintiffs' appeal and ordering the commission to grant the plaintiffs' application.[2] On appeal, the commission argues *307 that the court (1) abused its discretion by allowing the plaintiffs to submit supplemental evidence to the court, and (2) improperly concluded that the commission abused its discretion by allocating to the plaintiffs 14,434 gallons per day in sewer treatment capacity. We affirm the judgment of the court.

**2 The following facts and procedural history are relevant to our disposition of this appeal.[3] The plaintiffs own a 236 acre parcel of land in the Oswegatchie Hills area of the town, on which the plaintiffs sought to construct an 840 unit housing development. Giving rise to the present appeal is the plaintiffs' application to the commission for a determination of sewer treatment capacity, which the plaintiffs filed on June 1, 2012. In this application, the plaintiffs requested that 118,000 gallons per day of the town's sewer treatment capacity be reserved for its proposed housing development in the Oswegatchie Hills. In a December, 2012 resolution, the commission found that the plaintiffs had requested a disproportionately large amount of the town's remaining sewer treatment capacity and, therefore, denied the plaintiffs' application. The plaintiffs appealed the commission's decision to the Superior Court, which, on January 16, 2014, remanded the case to the commission for a clarification of its 2012 resolution (first remand). Specifically, the court sought clarification as to the amount of capacity the commission was willing to allocate to the plaintiffs and a justification *308 for that amount. The court also ordered that the parties report back to court on March 17, 2014.

Pursuant to the court's January, 2014 order, the commission addressed the plaintiffs' application at its February, 2014 regular meeting. Following the meeting, the commission allocated to the plaintiffs 13,000 gallons per day in sewer treatment capacity. The parties appeared before the court in May, 2014, to resolve, inter alia, whether the commission's allocation of 13,000 gallons per day was an abuse of discretion. On June 23, 2014, the court sustained the plaintiffs' appeal and remanded the matter to the commission (second remand). In reaching this conclusion, the court relied on *Forest Walk, LLC* v. *Water Pollution Control Authority*, 291 Conn. 271, 968 A.2d 345 (2009),[4] and *Dauti Construction, LLC* v. *Water & Sewer Authority*, 125 Conn. App. 652, 10 A.3d 84 (2010), cert. denied, 300 Conn. 924, 15 A.3d 629 (2011). The court found that the commission's allocation of 13,000 gallons per day was "inappropriately low" for the following reasons: (1) the record did not indicate a specific amount of available capacity before considering the plaintiffs' application; (2) the commission made no finding regarding the area of the plaintiffs' development versus the land area of the town; (3) the commission based its decision on data that was not current; (4) none of the commission's capacity for possible future development had been requested since the reserve for future development was created in 2004; and (5) the plaintiffs requested only a small amount of the commission's remaining capacity.

***309** At its October 28, 2014 regular meeting, the commission again considered the plaintiffs' application. On the basis of the factors set out in *Forest Walk, LLC* v. *Water Pollution Control Authority*, supra, 291 Conn. at 295–96, 968 A.2d 345 (*Forest Walk* factors); see footnote 4 of this opinion; the commission derived a formula to determine what it considered to be an appropriate sewer capacity allocation for the plaintiffs. The formula provided: 358,000 gallons per day of available capacity divided by 5853 total acres of the town, is equal to X divided by 236 acres owned by the plaintiffs, where X equals the appropriate capacity to allocate to the plaintiffs. Application of this formula determined that 14,434 gallons per day of sewer treatment capacity was an appropriate allocation. The plaintiffs again appealed the commission's decision to the Superior Court.

****3** On July 6, 2016, the court issued a memorandum of decision again remanding the matter to the commission (third remand). In its memorandum of decision, the court noted the following relevant procedural history: "In the present action, which was commenced on November 24, 2014, the plaintiffs ... ask the court to review a grant of capacity of 14,434 gallons per day to the plaintiffs by the [commission]. On February 19, 2015, the plaintiffs filed their appeal brief. On March 16, 2015, the [commission] ... filed its appeal brief. On March 30, 2015, the plaintiffs filed a motion for permission to supplement the record in an administrative appeal. The court heard oral argument on April 2, 2015. On the same day, the court granted the plaintiffs' request, but only as to exhibit C, a letter from Mark S. Zamarka

"On July 23, 2015, the plaintiffs filed a motion to conduct further discovery [including the taking of a] deposition and to supplement the record. Specifically, the plaintiffs asked the court for permission to take the ***310** deposition of the [commission's] administrator, Bradford Kargl, regarding the approval of the connection application by Gateway (a similarly-situated apartment complex being developed) where over 160,000 gallons per day capacity was contemplated. The motion was granted by the court on September 8, 2015. The deposition revealed that although Kargl was aware of the Gateway capacity need ... and had a duty to monitor this need ... he approved the connection application without making a capacity determination ... and without further reference to the [commission]."

Thereafter, the court stated: "In light of the supplemental evidence, the court concludes that there is at least 200,000 gallons per day capacity (358,000 gallons per day less 160,000 gallons per day to Gateway) for the entire sewer system. The [commission] had broad discretion in determining capacity, but the [commission] was obligated to consider capacity when it approved [Gateway's] connection application .... As to the plaintiffs, the court finds that with the large amount of capacity remaining, the capacity figure of 14,434 gallons per day is excessively low. There is an abuse of discretion that the [commission] must correct. Although the [commission] is not required to grant the plaintiffs their request for 118,000 gallons per day, the capacity figure of 14,434 gallons per day is insufficient in view of the present remaining capacity of at least 200,000 gallons per day, and in view of the 160,000 gallons per day that was approved for Gateway. In reconsidering the allocation of the sewer capacity, the [commission] must comply with

applicable sewer statutes, regulations and ordinances, and the [commission] should take into account the demands of the plaintiffs' sewer project and the effect on remaining capacity. Nevertheless, the [commission] must provide the plaintiffs with sufficient capacity to further the development of their project, and, as such, the [commission] may ***311** not settle on a figure for capacity that would completely foreclose the development of the plaintiffs' project." (Footnotes omitted.) This appeal followed.

I

The first issue that we must resolve is whether the court abused its discretion by allowing the plaintiffs to submit supplemental evidence (Gateway evidence) pursuant to General Statutes § 8-8(k)(2). The commission argues that the Gateway evidence concerned a sewer connection permit, which does not require a determination of sewer treatment capacity and is a matter that the commission does not handle, rendering the evidence irrelevant and unnecessary for the equitable disposition of the appeal.

The abuse of discretion standard governs our review of a trial court's decision to admit supplemental evidence under § 8-8(k). See *Parslow* v. *Zoning Board of Appeals*, 110 Conn. App. 349, 353–54, 954 A.2d 275 (2008). "When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness.... We will reverse the trial court's ruling only if it could not reasonably conclude as it did.... Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done.... We do not ... determine whether a conclusion different from the one reached could have been reached." (Citations omitted; internal quotation marks omitted.) Id., at 354, 954 A.2d 275.

****4** Section 8-8(k) provides in relevant part: "The court shall review the proceedings of the board and shall allow any party to introduce evidence in addition to the contents of the record if ... (2) it appears to the court that additional testimony is necessary for the equitable disposition of the appeal." See also ***312** *Clifford* v. *Planning & Zoning Commission*, 280 Conn. 434, 447, 908 A.2d 1049 (2006) ("[a]n appeal from an administrative tribunal should ordinarily be determined upon the record of that tribunal, and only when that record fails to present the hearing in a manner sufficient for the determination of the merits of the appeal, or when some extraordinary reason requires it, should the court hear evidence" [internal quotation marks omitted]). " '[A]llowance at trial of additional evidence under the concept of evidence "necessary for the equitable disposition of the appeal," under [§] 8-8(k)[(2)], has generally received a restrictive interpretation to avoid review of the agency's decision based in part on evidence not presented to the agency initially.' " *Gevers* v. *Planning & Zoning Commission*, 94 Conn. App. 478, 489, 892 A.2d 979 (2006).

Here, the Gateway evidence was necessary for the equitable disposition of the appeal. The Gateway evidence established that, even though the commission concluded, after it applied the *Forest Walk* factors, that it did not have sufficient capacity to grant the plaintiffs' application for up to 118,000 gallons per day, Gateway had, in effect, been granted, without application of the *Forest Walk* factors, [5] an allocation of approximately 166,000 gallons per day following the approval of its connection permit. The Gateway evidence, therefore, was relevant for the court to be able to determine that the plaintiffs, when compared to Gateway, had been treated inequitably by the commission. Unlike Gateway, which had been able to build its development, the plaintiffs, because of the commission's 14,434 gallon per day allocation, did not have sufficient capacity to satisfy the estimated sewage requirements of their projected 840 unit development, despite the existence of adequate ***313** available capacity to grant the plaintiffs' request of up to 118,000 gallons per day. [6]

Moreover, the plaintiffs did not have the opportunity to present the Gateway evidence to the commission during the initial hearing, the first remand, or the second remand. Our review of the record shows that the events concerning Gateway occurred in 2014 and 2015, and that the plaintiffs became aware of the Gateway evidence in 2015. Therefore, when the plaintiffs filed their motion under § 8-8(k)(2) in March, 2015, it was their first reasonable opportunity to bring the Gateway evidence to the court's and the commission's attention. Accordingly, because the Gateway evidence could have influenced the commission's decision regarding the plaintiffs' application, and the plaintiffs sought to introduce this evidence at the earliest opportunity, the court did not abuse its discretion by

granting the plaintiffs' motion to supplement the record. See *Clifford* v. *Planning & Zoning Commission*, supra, 280 Conn. at 449, 908 A.2d 1049 ("[t]o penalize the plaintiff for the absence in the record of documents that could have affected the commission's decision on the site plan application, when the plaintiff had no reasonable opportunity to bring such documents to the attention of the commission, would be simply ***314** unfair and not in accordance with basic principles of equity"). [7]

II

***5** The commission's second claim on appeal is that the court improperly concluded that it abused its discretion by allocating to the plaintiffs 14,434 gallons per day of sewer treatment capacity. Specifically, the commission argues that the court erred because it disregarded its ruling from a prior remand concerning the application of the *Forest Walk* factors. See footnote 4 of this opinion. The commission also argues that the court erred by basing its decision, at least in part, on the supplemental evidence admitted pursuant to § 8-8(k)(2) and by holding that the commission was obligated to consider the Gateway evidence in reaching its decision on the plaintiffs' application. We address those arguments in turn.

***315** A

The commission argues that the trial court's ruling regarding application of the *Forest Walk* factors "constitutes an interlocutory ruling that should have been treated as the law of the case in subsequent proceedings." We disagree.

"We consider whether a court correctly applied the law of the case doctrine under an abuse of discretion standard. The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, *in the absence of some new or overriding circumstance*." (Emphasis added; internal quotation marks omitted.) *Perugini* v. *Giulliano*, 148 Conn. App. 861, 879–80, 89 A.3d 358 (2014).

Here, the court did not abuse its discretion by disregarding the *Forest Walk* factors in reaching its decision to sustain the plaintiffs' second appeal and remand the matter, for the third time, to the commission. In the court's June 23, 2014 remand order, it acknowledged that *Forest Walk, LLC,* "indicate[s]" that, "with regard to capacity, under the substantial evidence test, the commission must consider" the four factors. At the time the court issued its June, 2014 remand order, however, it was not aware of the Gateway evidence. In light of the Gateway evidence—which established new or overriding circumstances—the court properly exercised its discretion in disregarding the *Forest Walk* factors, sustaining the plaintiffs' appeal, and remanding the matter to the commission. [8]

***316** B

The commission next argues that the court improperly concluded that it abused its discretion by allocating to the plaintiffs 14,434 gallons per day of sewer capacity. Specifically, the commission argues that the court improperly (1) concluded that it was obligated to consider the Gateway evidence in deciding the plaintiffs' application, and (2) based its decision, at least in part, on the Gateway evidence.

"In considering an application for sewer service, a water pollution control authority performs an administrative function related to the exercise of its powers.... When a water pollution control authority performs its administrative functions, a reviewing court's standard of review of the [authority's] action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion .... Moreover, there is a strong presumption of regularity in the proceedings of a public agency, and we give such agencies broad discretion in the performance of their administrative duties, provided that no statute or regulation is violated....

"With respect to factual findings, a reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the authority] must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [authority].... The question is not whether the trial court would have reached the same conclusion, but whether the record before the [authority] supports the

decision reached.... *317 If a trial court finds that there is substantial evidence to support a [water pollution control authority's] findings, it cannot substitute its judgment as to the weight of the evidence for that of the [authority].... If there is conflicting evidence in support of the [authority's] stated rationale, the reviewing court ... cannot substitute its judgment for that of the [authority].... The [authority's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given.... Accordingly, we review the record to ascertain whether it contains such substantial evidence and whether the decision of the defendant was rendered in an arbitrary or discriminatory fashion." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Forest Walk, LLC* v. *Water Pollution Control Authority*, supra, 291 Conn. at 285–87, 968 A.2d 345. We review the court's decision to determine if, when reviewing the decision of the administrative agency, it acted unreasonably, illegally, or in abuse of its discretion. See *Wasfi* v. *Dept. of Public Health*, 60 Conn. App. 775, 781, 761 A.2d 257 (2000), cert. denied, 255 Conn. 932, 767 A.2d 106 (2001).

**6 On the basis of our previous conclusions in this opinion—i.e., that the court did not abuse its discretion by (1) supplementing the record with the Gateway evidence and (2) disregarding the *Forest Walk* factors—we conclude that the court did not act unreasonably, illegally, or in abuse of its discretion when it sustained the plaintiffs' appeal and remanded the matter to the commission. Because the court properly admitted the Gateway evidence, it was free to consider that evidence in reaching its decision on the plaintiffs' appeal. That evidence demonstrated that the record, as supplemented, did not reasonably support the conclusion of the commission to grant a 14,434 gallon daily allocation. The evidence in the record as supplemented established that the commission had an available capacity of 358,000 gallons per day, less the 166,000 gallons per day that was effectively allocated to Gateway. There also was evidence that an administrator of the commission, Kargl, was aware of Gateway's capacity need and *318 the existence of the plaintiffs' then pending application. Kargl, however, approved Gateway's application without making a determination of the impact of the grant to Gateway on the plaintiffs' application in light of the remaining capacity available to the town. On the basis of this evidence, the court properly determined that the commission abused its discretion when it granted to the plaintiffs only 14,434 gallons per day of its 118,000 gallons per day request, despite allowing, without applying the *Forest Walk* factors, Gateway's 166,000 gallons per day connection permit application. On the basis of the record as supplemented, the court, in the exercise of its discretion, could reasonably conclude that the commission treated the plaintiffs inequitably and that an injustice had been done. See *Parslow* v. *Zoning Board of Appeals*, supra, 110 Conn. App. at 354, 954 A.2d 275.

The judgment is affirmed.

In this opinion the other judges concurred.

All Citations

--- A.3d ----, 184 Conn.App. 303, 2018 WL 3966966

Footnotes

1 On February 20, 2015, two entities, Friends of the Oswegatchie Hills Nature Preserve, Inc., and Save the River-Save the Hills, Inc., submitted a verified petition to intervene, pursuant to General Statutes § 22a-19, in the appeal between the plaintiffs and the commission. In the petition, the entities argued, inter alia, that the plaintiffs' "application involves conduct which is reasonably likely to have the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water and other natural resources of the State of Connecticut." The petition highlighted several environmental considerations and noted that the Superior Court had found previously that the plaintiffs' development posed a risk of considerable harm to the Oswegatchie Hills. On March 18, 2015, the court granted the petition to intervene. Both the commission and the intervenors have appealed from the court's judgment sustaining the plaintiffs' appeal. The commission's appeal is assigned docket number AC 39804. The intervenors' appeal is assigned docket number AC 39806. The intervenors did not appear in the proceedings before the commission to determine the sewer treatment capacity available for the use of the plaintiffs, and did not submit any evidence in support of their claims. Because the intervenors' claims on appeal essentially are the same as the claims raised by the commission, and rely on the record of the proceedings before the commission made by the plaintiffs and the commission witnesses, we address both appeals in a single opinion.

2 Initially, the plaintiffs contended that the judgment of the trial court was not an appealable final judgment, while the commission argued that it was. At oral argument before this court, the plaintiffs' counsel conceded that the court's July, 2016 decision was an appealable final judgment. We agree and note that "[a] judgment of remand is final if it so concludes the rights of the parties that further proceedings cannot affect them.... A judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations that are not merely ministerial." (Citations omitted; internal quotation marks omitted.) *Kaufman v. Zoning Commission*, 232 Conn. 122, 130, 653 A.2d 798 (1995). Here, the court's judgment so concluded the rights of the parties because it ordered that the commission *must* grant the plaintiffs' application.

3 The dispute between the plaintiffs and the town has been ongoing for approximately eighteen years. Most of the facts and procedural history related to the protracted dispute are not relevant to the issues in this appeal.

4 In its memorandum of decision, the court noted that *Forest Walk, LLC*, "indicate[s] the following to the court with regard to this appeal .... With regard to capacity, under the substantial evidence test, the commission must consider [1] the remaining capacity for the entire town, [2] the land area represented by the property versus the available land area in the town, [3] the safe design standards for public sewers, and [4] the percentage of allocation versus the total remaining capacity." We refer to these as the *Forest Walk* factors.

5 Gateway, unlike the plaintiffs, did not make an allocation application prior to constructing its development.

6 The court found "that with the large amount of capacity remaining, the capacity figure of 14,434 gallons per day is excessively low. There is an abuse of discretion that the [commission] must correct. Although the [commission] is not required to grant the plaintiffs their request for 118,000 gallons per day, the capacity figure of 14,434 gallons per day is insufficient in view of the present remaining capacity of at least 200,000 gallons per day, and in view of the 160,000 gallons per day that was approved for Gateway .... Nevertheless, the [commission] must provide the plaintiffs with sufficient capacity to further the development of their project, and, as such, the [commission] may not settle on a figure for capacity that would completely foreclose the development of the plaintiffs' project." From this finding, we can infer that the court also found that the grant of 14,434 gallons per day foreclosed the plaintiffs from moving forward with their development.

7 Our Supreme Court's decision in *Clifford v. Planning & Zoning Commission*, supra, 280 Conn. at 434, 908 A.2d 1049, informs our resolution of this issue. In *Clifford*, the defendant commission (defendant) approved the proposal of the defendant construction company (company) to store dynamite on the company's property. Id., at 437, 908 A.2d 1049. The plaintiff, Thomas Clifford, appealed to the trial court, and moved under § 8-8(k)(2) to introduce supplemental evidence. Id., at 437–38, 908 A.2d 1049. Specifically, Clifford sought to introduce prior site plan approvals for the property at issue, which established, inter alia, that the storage of hazardous and demolition materials on the property was expressly prohibited and that before any further development could take place on the property, the company would need the approval of the inlands wetlands commission. Id., at 445–46, 908 A.2d 1049. The trial court denied the motion. Id., at 438, 908 A.2d 1049. On appeal, our Supreme Court concluded that the trial court's denial of Clifford's motion under § 8-8(k)(2) was an abuse of discretion. Id., at 445, 908 A.2d 1049. The court held that the additional evidence was necessary for the equitable disposition of the appeal for two reasons. Id., at 448, 908 A.2d 1049. First, "the evidence that [Clifford] sought to introduce consisted of information that, viewed on its face, could well have affected the [defendant's] consideration of [the company's] site plan application if it had been brought to the [defendant's] attention, because the [evidence] revealed conditions that the [defendant] itself previously had imposed upon [the company] ...." Id. Second, the motion under § 8-8(k)(2) was Clifford's "first reasonable opportunity to bring to the court's attention the limitations on the use of [the company's] property that may well have affected the approval of the site plan application." Id., at 448–49, 908 A.2d 1049.

8 The court expressly stated that part of the Gateway evidence, specifically, the deposition of Kargl, established facts that made this case distinguishable from *Forest Walk, LLC*.

End of Document

Appellate court rules against East Lyme in sewage capacity case

Published September 06. 2018 7:40PM | Updated September 06. 2018 8:21PM

By Martha Shanahan

In the latest step of a protracted legal battle between East Lyme's Water and Sewer Commission and the developer of a proposed housing development, an appellate court in Hartford has ruled that the commission must grant the developer more access to the town's sewer system than the commission wants to give it.

The town's lawyers plan to petition the state Supreme Court to appeal the Aug. 21 ruling, which affirms a state Superior Court judge's 2016 order that the commission must reconsider the amount of sewage capacity it is willing to grant for a proposed 840-unit residential development adjacent to the Oswegatchie Hills Nature Preserve along the Niantic River.

Over more than a decade, Landmark Development has sought to develop houses on the 236 acres it owns in the Oswegatchie Hills.

The plan has generated local opposition, which in recent years has taken the form of a coalition between Connecticut Fund for the Environment and two local groups arguing that the development would pollute the Niantic River and degrade wetlands on the property.

Landmark Development and its president, Glenn Russo, also have hit speedbumps before the town's Water and Sewer Commission, which regulates new connections to the pipes and pumps that bring sewage from East Lyme buildings through Waterford to a sewage treatment plant in New London.

A deal between East Lyme, Waterford and New London allows each town to send a certain amount of sewage to the New London sewage treatment plant — 15 percent of the plant's capacity, or about 1 million gallons a month in East Lyme's case — and limits the towns' ability to grant permission to build new sewer lines or allow new developments to connect to the existing ones.

In 2014, the Water and Sewer Commission denied Landmark's request for a guaranteed 118,000 gallons of sewage capacity per day for the development.

Landmark appealed that decision in New London Superior Court in 2014, kicking off the five-year ongoing debate in several courts over the commission's claims that the town's sewage system can't handle the amount of wastewater that a development the size of the Landmark proposal would generate.

The commission's members said that year that it could allow Landmark to generate only 14,434 gallons per day in sewage for the proposed houses, a fraction of the 118,000 gallons per day Landmark asked for in 2014.

Landmark's lawyers have argued that the commission granted the developer of a different housing complex in East Lyme, Gateway Commons, about 70,000 gallons of sewage capacity per day and told Gateway developers that the town had the capacity to handle about 100,000 additional gallons per day from the development. The commission's decision to grant that capacity to the Gateway development shows the town has "ample" sewage capacity for the Oswegatchie Hills proposal, they said.

Hartford Superior Court Judge Henry S. Cohn said in his 2016 ruling that 14,434 gallons per day is "excessively low" in light of the allocation to Gateway, and remanded the issue to the commission.

Town lawyers say the Gateway development's sewer capacity has no bearing on the Landmark case, because Gateway Commons is near one of the town's existing sewer lines and was relatively easy to connect to the system, whereas Landmark's proposal would require the construction of a new line.

The two development projects are "like apples and oranges," said East Lyme First Selectman Mark Nickerson, who is also the chairman of the Water and Sewer Commission as directed by the town's charter. "There's a difference between a connection and an extension," he said.

The appeals court dismissed that argument last month.

"Although the commission concluded that it did not have sufficient capacity to grant the plaintiff's application for up to 118,000 gallons per day, (Gateway) had effectively been granted an allocation of approximately 166,000 gallons per day," the court wrote in its ruling.

"At the end of the day that's not a valid argument," said Timothy Hollister, an attorney with the Hartford law firm Shipman & Goodman representing Landmark in the case. "The Water and Sewer Commission ... determined that the town as a whole has so much capacity that they can grant 166,000 gallons to Gateway ... but they have fought Landmark tooth and nail on every gallon of our request."

Nickerson said he is confident in the town's appeal.

The commission should have the ability to oversee management of its sewage systems without court interference, he said.

"The judges can't force us to put the sewer in there," he said.

He added that the extension of the sewer lines to the Oswegatchie Hills would constitute an unsuitable use of the town's increasingly limited capacity for adding new inputs to the sewer

system and would eat up sewage capacity the town is saving for other neighborhoods where the houses still use septic systems.

The Department of Energy and Environmental Protection has put pressure on the town to expand sewer capacity to those neighborhoods to alleviate pressure on aging septic systems, which takes priority over development proposals like the Landmark plan, Nickerson said.

"If we had unlimited capacity and unlimited funds, we would give out all sorts of capacity," he said.

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September 17, 2018

VIA PDF TO ATTORNEY ZAMARKA

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

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

Re: *Landmark Development Group, LLC, et al. v. East Lyme Water and Sewer Commission*

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

It has come to our attention that the Commission will be meeting in executive session on September 18, 2018 to consider Landmark's sewer capacity allocation application, and will conduct its regular meeting on September 25, 2018.

The purpose of this letter is to request that the Commission, at its next regular meeting, approve an allocation of sewer capacity to Landmark of 118,000 gpd, until such time as the parties obtain a final and unappealable decision regarding Landmark's sewer capacity application.

At this time, a trial court judgment, affirmed by the Appellate Court, requires the Commission to grant Landmark "sufficient capacity to further the development of [Landmark's] project," and "may not settle on a figure for capacity that would completely foreclose the development of [Landmark's] project." Moreover, in its court filings, the Commission has conceded that it must grant Landmark's application.

Landmark has a right to ensure that the Town of East Lyme does not undercut Landmark's judgment by allocating sewer capacity to others, especially those whose applications or administrative requests were filed after 2012. Meanwhile, Landmark has become aware of applications made to Mr. Kargl or the Commission that will require sewer allocations or commitments. The Town cannot defeat Landmark's rights to sewer capacity by allocating capacity to others, or at some future time deny Landmark's application due to third-party allocations that occurred while Landmark's court case was pending. Landmark is prepared to seek a court order to enforce its rights, but hopes that the Commission will at least recognize Landmark's right to an interim protection of its position, as well as avoid Town expense of opposition to this request.

We request an answer to this request no later than the Commission's regular meeting of September 25, 2018, with implementation subject to counsel drafting a mutually acceptable resolution.

Thank you for your attention.

Very truly yours,

Timothy S. Hollister

TSH:ekf

c: Mark S. Zamarka, Esq. (w/ att.)
Glenn Russo (w/ att.)

EAST LYME WATER & SEWER COMMISSION
REGULAR MEETING
TUESDAY, SEPTEMBER 25th, 2018
MINUTES

The East Lyme Water & Sewer Commission held a Regular Meeting on Tuesday, September 25, 2018, at the East Lyme Town Hall, 108 Pennsylvania Avenue, Niantic, CT. Acting Chairman Seery called the Regular Meeting to order at 7 PM.

PRESENT: Kevin Seery, Acting Chairman, Dave Bond, Steve DiGiovanna, Dave Jacques, Dave Murphy, Joe Mingo, Carol Russell, Roger Spencer, Dave Zoller

ALSO PRESENT: Joe Bragaw, Public Works Director
Brad Kargl, Municipal Utility Engineer
Attorney Edward O'Connell, Town Counsel
Attorney Mark Zamarka, Town Counsel
Anna Johnson, Finance Director

ABSENT: Mark Nickerson, Chairman

1. Call to Order / Pledge of Allegiance
Acting Chairman Seery called the Regular Meeting of the East Lyme Water & Sewer Commission to order at 7 PM and led the assembly in the Pledge of Allegiance.

2. Approval of Minutes
- **Regular Meeting Minutes – August 28, 2018**

Mr. Seery called for a motion or any discussion or corrections to the Regular Meeting Minutes of August 28, 2018.

****MOTION (1)**
Mr. DiGiovanna moved to approve the Regular Meeting Minutes of August 28, 2018 as presented.
Mr. Murphy seconded the motion.
Vote: 7 – 0 – 2. Motion passed.
Abstained: Mr. Seery, Mr. Jacques

- **Special Meeting Minutes – September 18, 2018**

Mr. Seery called for a motion or any discussion or corrections to the Special Meeting Minutes of September 18, 2018.

Mr. Seery asked that he be added to those in attendance on Page 1.

****MOTION (2)**
Mr. DiGiovanna moved to approve the Special Meeting Minutes of September 18, 2018 as amended.
Mr. Murphy seconded the motion.
Vote: 8 – 0 – 1. Motion passed.
Abstained: Mr. Zoller

3. Delegations
Mr. Seery called for delegations.

FILED
Oct 2 20 18 AT 10:00 AM/PM
EAST LYME TOWN CLERK

Mr. & Mrs. Libby of 341 Boston Post Road approached the podium asking to be heard regarding their billing issue.

**MOTION (3)
Mr. Mingo moved to add to the agenda under Item 4. – Billing Adjustments – 341 Boston Post Road.
Mr. DiGiovanna seconded the motion.
Vote: 9 – 0 – 0. Motion passed.

There were no delegations.

4. Billing Adjustments
- **341 Boston Post Road**

Mr. Kargl noted that this is not an adjustment that needed approval by the Commission as it was done by the standard '1 in 10' formula. It was adjusted accordingly and does not and is not proposed to bring it back to what a normal bill would be. It shares the burden of the excess that was caused by the leak. He explained the process noting that they had looked at the May billing and the two previous May billings.

Mr. Mingo asked if there was any connection from the meter panel to the electric panel.
Mr. Libby said that as far as he knows there is none.
Mr. Kargl said that the leak was in the service line from the curb stop to the house; there is a meter pit.
Mr. Bond commented that was how it was captured. He asked if the pipe was plastic.
Mr. Libby said that it was plastic.

Mr. Mingo asked Attorney O'Connell if there were any legal remedies.
Attorney O'Connell said that that they have adopted a policy that saves a lot of the Commissions' time by having staff address the issues. They would have to change the policy.

Mr. DiGiovanna asked if the policy is on-line for people to see.
Mr. Kargl said yes.
Mr. DiGiovanna asked if everything was laid out and followed.
Mr. Bragaw and Mr. Kargl said yes.

Me. Seery asked is there was a motion here –
Hearing none –
He said that the Commission will let the decision of Staff stand.

5. Approval of Bills – from Attachment B
Mr. Seery called for a motion on the Well 1A/6 Treatment Project bills.
**MOTION (4)
Mr. Zoller moved to approve payment of the following Well 1A/6 Treatment Project bill: Tighe & Bond, Inv. #081890252-253 in the amount of $48,716.24.
Mr. DiGiovanna seconded the motion.
Vote: 9 - 0 – 0. Motion passed.

**MOTION (5)
Mr. Zoller moved to approve payment of the following Well 1A/6 Treatment Project bill: Robinson & Cole, Inv. #50253369 in the amount of $6,100.00.
Mr. DiGiovanna seconded the motion.
Vote: 9 - 0 – 0. Motion passed.

Mr. Seery called for a motion on the Pattagansett Bridge Water Main Relocation bill.
**MOTION (6)
Mr. Zoller moved to approve payment of the following Pattagansett Bridge Water Main Relocation bill: Lenard Engineering, Inc., #67726 in the amount of $500.00.

Mr. DiGiovanna seconded the motion.
Vote: 9 - 0 – 0. Motion passed.

6. *Finance Director Report*
Ms. Johnson said that they had her report. She noted that the sewer balance increases as the debt has been paid and that it would continue to do so.

7. Consideration and Possible Adoption of Interim Sewer Capacity Measures
Mr. Seery asked Counsel to explain this.
Attorney Zamarka recapped the Landmark Development Group, LLC and Jarvis of Cheshire, known as the Applicant from June of 2012 where they requested 118,000 gallons per day ('gpd') of sewage disposal capacity. Public Hearings were held. The gpd that the Commission allotted (14,434) were appealed and the Judge remanded it back to the Commission to re-work the figures. They were re-worked and Landmark again appealed. In April 2015 the court allowed Landmark to conduct 'discovery' regarding Gateway. In 2016 the court ruled that they would have to grant more than the original number that they had come up with using Forest Walk factors but less than what was originally requested. We contended that the court erred in allowing discovery. In April 2018 briefs were filed and in August 2018 the Appellate Court upheld the Judge's decision. One of our issues has been that the trial and appellate courts equate capacity with a permit for capacity which is incorrect. On September 5, 2018 we filed for re-certification to the Supreme Court contending that the court improperly held 'capacity and a permit for capacity' as same.

They are here tonight as they know that there will be an expansion to Gateway (Phase II) and a Costco. Therefore to grant Gateway a connection without a ruling on capacity would fly in the face of the courts. They also recently received a letter from Attorney Hollister (copy attached) seeking the 118,000 gpd that they requested until a decision is reached.

Attorney Zamarka said that on Page 5 of the trial court opinion that they said that 14,434 gpd is insufficient but 118,000 gpd does not have to be granted. Taking this all into consideration, Gateway Phase II or any substantial development cannot be granted administratively. They are therefore recommending that a procedure for a certain amount units and/or gpd require a connection permit. The Commission will have to come up with a figure above which they would decide. This would be an interim procedure – only for the purposes of the Landmark appeal time frame. This also safeguards the 'not less than 14,000 gpd up to 118,000 gpd' until such case is decided.

The following was read and moved:
****MOTION (7)**
Mr. DiGiovanna moved the following Resolution regarding Interim Sewer Connection Procedure:
WHEREAS, on June 1, 2012, Landmark Development Group, LLC and Jarvis of Cheshire ("Applicant") filed with the East Lyme Water and Sewer Commission ("Commission"), acting as the East Lyme Water Pollution Control Authority, an application "pursuant to §7-246a(1) of the General Statutes, seeking confirmation of the availability of 237,090 gallons per day of sewage disposal capacity in the Town's sewer system to serve Landmark Development's proposed residential development adjacent to Caulkins road"; and

WHEREAS, at the public hearing on the application held on August 24, 2012, Landmark amended its application to request availability of 118,000 gallons per day of sewage disposal capacity in the Town of East Lyme's ("Town") sewer system; and

WHEREAS, the Commission held three public hearings on the application and listened to hours of testimony during those hearings. Numerous exhibits were submitted by Landmark, the Commission, and individuals for consideration during the hearing process. In making its decision the Commission is considering and taking into account all of the testimony and exhibits submitted at the three hearings; and

WHEREAS, the Commission has wide discretion in connection with the decision to supply sewer service to particular properties; and

WHEREAS, the Commission found that as of Landmark's application in 2012, the Town had between 130,000 and 225,000 gallons per day of remaining sewage treatment capacity; and

WHEREAS, Landmark appealed the Commission's capacity allo9cations to the Connecticut Superior Court; and

WHEREAS, The New Britain Superior Court (Cohn, J.) (the "Trial Court") allowed Landmark to conduct discovery regarding a sewer connection permit for a different development project, known as "Gateway," and allowed Landmark to supplement the record on appeal with documents related to the Gateway connection application; and

WHEREAS, ON July 6, 2016, the Trial Court issued a Memorandum of Decision holding in part that:

1. The Commission ". . . is not required to grant the plaintiffs their request for 118,000 gallons per day . . ."
2. The Commission ". . . must provide the plaintiffs with sufficient capacity to further development of their project, and . . . may not settle on a figure that would completely foreclose the development of the plaintiffs' project."
3. The Commission ". . . was obligated to consider capacity when it approved the connection application for Gateway."

WHEREAS, the Commission appealed the Memorandum of Decision to the Connecticut Appellate Court; and

WHEREAS, on August 21, 2018, the Appellate Court issued its decision ("Decision") on the Commission's appeal, which upheld the Trial Court Memorandum of Decision, and held that the Commission is required to perform a sewer capacity analysis when considering applications to connect to the East Lyme sewer system; and

WHEREAS, the Commission disagrees with the Decision and has filed a petition for certification to the Connecticut Supreme Court, which is currently pending; and

WHEREAS, by a letter dated September 17, 2018, Landmark requested that the Commission approve an allocation for its full 118,000 gpd sewer capacity request, pending final resolution of its appeal; and

WHEREAS, neither the Trial Court nor the Appellate Court held that Landmark was entitled to the full amount of its capacity request, and the proceedings are stayed until the Supreme Court acts on the Commission's petition for certification. While reserving all of its rights set forth during the appeal process, the Commission nevertheless does not want to ignore the Trial Court and Appellate Court holdings that require a sewer capacity analysis be done in conjunction with a sewer connection permit application.

BE IT THEREFORE RESOLVED, that the East Lyme Water and Sewer Commission, acting as the Town's Water Pollution control Authority, hereby enacts the following interim procedure:

1. An application to connect to the East Lyme sewer system for a project that either (a) requests a connection for more than _____ residential units or (b) requires more than _____ gallons per day of sewage treatment capacity, shall also require an application for determination of sewer capacity pursuant to General Statutes §7-246a;
2. Said application for determination of sewer capacity shall be submitted wither prior to or contemporaneously with a sewer connection application;

3. **An application to connect to the East Lyme sewer system may not be granted if the commission determines that there is not adequate sewer capacity for the proposed use of land.**

BE IT FURTHER RESOLVED that the above procedure does not reflect official policy or procedure of the Commission of the Town of East Lyme. Rather, it is adopted on an interim basis only in direct response to the Appellate Court Decision, and shall be in place only during the pendency of the Landmark sewer capacity appeal process. In enacting this interim procedure, the commission does not agree with the holdings of the Trial Court Memorandum of Decision or the Appellate Court Decision. Any findings made pursuant to this interim procedure (i.e. available sewer capacity, etc.) shall be for the purposes of that sewer capacity application only, and shall not be adopted, incorporated or made part of the record in the pending Landmark sewer appeal.
Mr. Murphy seconded the motion.

Mr. Mingo said that he would be agreeable to moving to give a caveat with more gpd and a two year development time
Attorney Zamarka said that would be out of scope of this as they are beyond that point now.
Mr. Seery asked Mr. Kargl how many units or gpd he would suggest for anyone applying.
Mr. Kargl said that he would suggest not more than 20 residential units or exceeding 5,000 gpd.
Attorney O'Connell said that this is only pertaining to this interim procedure.

Mr. Bond said for clarification and understanding that it would mean that anyone who exceeds 20 residential units and/or exceeds 5,000 gpd must come before the Commission for capacity.
Attorney Zamarka said that was correct.
The commissioners were in agreement with the figures.

Mr. DiGiovanna moved to amend the following section of the MOTION (7) to read:
1. An application to connect to the East Lyme sewer system for a project that either (a) requests a connection for more than 20 residential units or (b) requires more than 5,000 gallons per day of sewage treatment capacity, shall also require an application for determination of sewer capacity pursuant to General Statutes §7-246a;
Mr. Murphy seconded the amended section of MOTION (7).
Vote on Motion (7) with amended section: 9 – 0 – 0. Motion passed.

8. Water & Sewer Operating Budget Status Reports
Mr. Bragaw said that it was still early in the new fiscal year.

9. Sewer Project Updates
Mr. Kargl said that he did not have anything new here. He has the Weston & Sampson final billing to review.
Mr. Murphy asked if they are still pursuing vendor delay issues and compensation.
Mr. Kargl said that he has not had a chance to review the final bill yet to see if it is there.

10. Water Project Updates
- **Well 1A and 6 Treatment Plant Modifications and Upgrades**

Mr. Kargl said that the design is complete and they saw the final invoices this evening. He is in the process of completing with the State to start paying on the loan. It came in significantly under.

Ms. Russell asked if there was any research on reverse osmosis.
Mr. Kargl said yes; noting that they would still have to do what they are doing here. It would be a lot more expensive – by approximately $10M.

- **Route 156 Valve Replacement**

Mr. Kargl recalled that he had asked for $53,000 to replace the broken valve. The next day they found that some telephone banks ran over the valve and they were able to find someone who could repair the valve in place. It all came together well and they were able in the end to save some $15,000 between parts and labor.

11. Correspondence Log

There were no comments.

12. Chairman's Report

Mr. Seery reported that Gary Orefice, a former State Representative had passed on Sunday.
The Bike n' BBQ event at the Smith Harris House is this weekend.
The Oyster Fest to benefit Miracle League will be held on October 6, 2018.

13. Assistant Utility Engineer Update

Mr. Bragaw said that he is trying to get interviews set up for the third week in October. He noted that Mr DiGiovanna would be on the panel.

14. Staff Updates

a. Water Department Monthly Report

Mr. Murphy asked if we are far behind taking back water from New London.
Mr. Kargl said yes, we are behind as it has been a wet season. He added that we can use the water for flushing the north end of Town.

b. Sewer Department Monthly Report

There were no comments.

15. Future Agenda Items

Ms. Russell said that she had asked about a discussion on the water quality report and that she had spoken with Mr. Kargl during the summer about contaminants by well.
Mr. Seery said that possibly they could discuss it in November.

16. ADJOURNMENT

Mr. Seery called for a motion to adjourn.

****MOTION (8)**
Mr. Spencer moved to adjourn this Regular Meeting of the East Lyme Water & Sewer Commission at 8:09 PM.
Mr. DiGiovanna seconded the motion.
Vote: 9 – 0 – 0. Motion passed.

Respectfully submitted,

Karen Zmitruk,
Recording Secretary

RESOLUTION REGARDING INTERIM SEWER CONNECTION PROCEDURE

SEPTEMBER 25, 2018

WHEREAS, on June 1, 2012, Landmark Development Group, LLC and Jarvis of Cheshire ("Applicant") filed with the East Lyme Water and Sewer Commission ("Commission"), acting as the East Lyme Water Pollution Control Authority, an application "pursuant to §7-246a(1) of the General Statutes, seeking confirmation of the availability of 237,090 gallons per day of sewage disposal capacity in the Town's sewer system to serve Landmark Development's proposed residential development adjacent to Caulkins Road"; and

WHEREAS, at the public hearing on the application held on August 24, 2012, Landmark amended its application to request availability of 118,000 gallons per day of sewage disposal capacity in the Town of East Lyme's ("Town") sewer system; and

WHEREAS, the Commission held three public hearings on the application and listened to hours of testimony during those hearings. Numerous exhibits were submitted by Landmark, the Commission, and individuals for consideration during the hearing process. In making its decision the Commission is considering and taking into account all of the testimony and exhibits submitted at the three hearings; and

WHEREAS, the Commission has wide discretion in connection with the decision to supply sewer service to particular properties; and

WHEREAS, the Commission found that as of Landmark's application in 2012, the Town had between 130,000 and 225,000 gallons per day of remaining sewage treatment capacity; and

WHEREAS, Landmark appealed the Commission's capacity allocations to the Connecticut Superior Court; and

WHEREAS, the New Britain Superior Court (Cohn, J.) (the "Trial Court") allowed Landmark to conduct discovery regarding a sewer connection permit for a different development project, known as "Gateway," and allowed Landmark to supplement the record on appeal with documents related to the Gateway connection application; and

WHEREAS, on July 6, 2016, the Trial Court issued a Memorandum of Decision holding in part that:

1. The Commission "... is not required to grant the plaintiffs their request for 118,000 gallons per day ..."
2. The Commission "... must provide the plaintiffs with sufficient capacity to further development of their project, and ... may not settle on a figure that would completely foreclose the development of the plaintiffs' project."

3. The Commission "... was obligated to consider capacity when it approved the connection application for Gateway."

WHEREAS, the Commission appealed the Memorandum of Decision to the Connecticut Appellate Court; and

WHEREAS, on August 21, 2018, the Appellate Court issued its decision ("Decision") on the Commission's appeal, which upheld the Trial Court Memorandum of Decision, and held that the Commission is required to perform a sewer capacity analysis when considering applications to connect to the East Lyme sewer system; and

WHEREAS, the Commission disagrees with the Decision and has filed a petition for certification to the Connecticut Supreme Court, which is currently pending; and

WHEREAS, by a letter dated September 17, 2018, Landmark requested that the Commission approve an allocation for its full 118,000 gpd sewer capacity request, pending final resolution of its appeal; and

WHEREAS, neither the Trial Court nor the Appellate Court held that Landmark was entitled to the full amount of its capacity request, and the proceedings are stayed until the Supreme Court acts on the Commission's petition for certification. While reserving all of its rights set forth during the appeal process, the Commission nevertheless does not want to ignore the Trial Court and Appellate Court holdings that require a sewer capacity analysis be done in conjunction with a sewer connection permit application.

BE IT THEREFORE RESOLVED, that the East Lyme Water and Sewer Commission, acting as the Town's Water Pollution Control Authority, hereby enacts the following interim procedure:

1. An application to connect to the East Lyme sewer system for a project that either (a) requests a connection for more than 20 residential units or (b) requires more than 5K gallons per day of sewage treatment capacity, shall also require an application for determination of sewer capacity pursuant to General Statutes §7-246a;
2. Said application for determination of sewer capacity shall be submitted either prior to or contemporaneously with a sewer connection application;
3. An application to connect to the East Lyme sewer system may not be granted if the Commission determines that there is not adequate sewer capacity for the proposed use of land.

BE IT FURTHER RESOLVED that the above procedure does not reflect official policy or procedure of the Commission or the Town of East Lyme. Rather, it is adopted on an interim basis only in direct response to the Appellate Court Decision, and shall be in place only during the pendency of the Landmark sewer capacity appeal process. In enacting this interim procedure, the Commission does not agree with the holdings of the Trial Court Memorandum of Decision or the Appellate Court Decision. Any findings made pursuant to this interim procedure (i.e. available sewer capacity, etc.) shall be for the purposes of that sewer capacity application only, and shall not be adopted, incorporated or made part of the record in the pending Landmark sewer appeal.

330 Conn. 937
Supreme Court of Connecticut.

LANDMARK DEVELOPMENT GROUP, LLC, et al.
v.
WATER AND SEWER COMMISSION
OF the TOWN OF EAST LYME

Decided October 31, 2018

Attorneys and Law Firms

Mark S. Zamarka, in support of the petition.

Timothy S. Hollister, in opposition.

Opinion

*1 The defendant's petition for certification to appeal from the Appellate Court, 184 Conn. App. 303 (AC 39804), is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

All Citations

Slip Copy, 330 Conn. 937, 2018 WL 5925181 (Table)

End of Document

SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW

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Fax: (860) 251-5318
thollister@goodwin.com

November 13, 2018

VIA HAND DELIVERY

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

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

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

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

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

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

Exhibit #2 submitted WES PH1 11/13/18

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Locations

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New Britain Warehouse

Address

485 HARTFORD RD
NEW BRITAIN, CT
06053-1607

Get Directions

Phone: (860) 833-7001

Hours

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

Warehouse Services

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

Departments and Specialty Items

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

Opening Date

10/15/2015

Feedback

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

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

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

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

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

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

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

Very truly yours,

Timothy S. Hollister

TSH:ekf
Enclosure

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

221 N.J. 318
Supreme Court of New Jersey.

388 ROUTE 22 READINGTON REALTY HOLDINGS, LLC, Plaintiff–Appellant,
v.
TOWNSHIP OF READINGTON, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Readington Commons, LLC, C. DelVecchio, S. Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Ryland Developers, LLC, Lot 3 Development, LLC, Fallone Properties, LLC, URB–FI Development Corp., Fallone at Spring Meadow, LLC Country Classics Legacy Readington, and Winfield Management, Defendants–Respondents,
and
Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Defendant–Respondent,
and
Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.
388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,
v.
Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Ryland Developers, LLC, Lot 3 Development, LLC, Fallone Properties, LLC, URB–FI Development Corp., Fallone at Spring Meadow, LLC, Country Classics Legacy Readington, and Winfield Management, Defendants–Respondents,
and
Bellemead Development Corporation, Defendant–Respondent,
and
Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.
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and

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Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants
388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,
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388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,
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Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Ryland Developers, LLC, Fallone Properties, LLC, at Spring Meadow, LLC, and Country Classics Legacy Readington, Defendants–Respondents,
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Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty

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

A-63 September Term 2013, 073322

Argued Dec. 2, 2014.

Decided May 5, 2015.

Synopsis

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

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

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

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

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

Affirmed in part, vacated in part, and remanded.

Attorneys and Law Firms

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

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

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

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

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

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

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

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

Opinion

Justice ALBIN delivered the opinion of the Court.

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

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

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

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

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

We now conclude that the Appellate Division erred. As the trial court held, the Township cannot meaningfully exercise its discretion whether to repurchase sewer capacity unless it examines the reasons given by each entity for not using capacity assigned to it. A policy of not recapturing unused sewer capacity is the functional equivalent of a moratorium on development. We approve of the sound approach taken by the trial court, requiring the Township both to undertake a detailed analysis of the unused capacity in the hands of private parties and to explain whether any of that capacity can be recalled.

I.

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

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

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

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

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

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

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

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

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

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

As of December 2010, of the 322,009 gpd of unused capacity, 141,900 was held by **753 Merck, 66,060 by Bellemead, [3] 32,000 or 38,860 by Fallone Properties, LLC, and 30,125 by Ryland Developers, LLC. Each remaining defendant held less than 10,000 gpd of unused capacity. Merck's unused capacity represents forty-four percent of the entire capacity yielded from Readington's portion of the Authority's plant expansion.

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

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

> A. Order of priority; reserves.
>
> (1) By existing joint agreement with the Readington Lebanon Sewerage Authority, the Township of Readington has a total sewer allocation of 935,000 gpd. Upon study by the Township, there is a limited amount of sewer capacity in Readington Township at the present time. Any remaining capacity from Readington's portion of its allotted capacity in the Readington Lebanon Sewerage Authority sewer service area shall be allocated in the following order of priority, subject to availability:
>
> (a) First, to those projects which will enable the Township to meet its future Mount Laurel affordable housing obligations; and
>
> (b) Secondly, to remedy those properties within the sewer service area which constitute an "emergency" due to failing septic systems.
>
> (2) The Township reserves the right to keep that portion of sewerage capacity needed for "reserve" to meet NJDEP requirements.
>
> B. Allocations for sewer capacity from Readington's allotted portion of sewer capacity shall be made by the Readington Township Committee upon written agreement to be entered into with the applicant, after the allocation request has been reviewed and a favorable recommendation has been made by the Readington Township Sewer Advisory Committee.
>
> C. In the case of those development projects which have not received an approval by the appropriate township board having jurisdiction at the time a request for gallonage is made, allocation agreements shall

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

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

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

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

On August 4, 2010, plaintiff's attorney and professional planner appeared before the Readington Sewer Advisory Committee, describing plaintiff's plan to develop the property at 388 Route 22 into retail space and a restaurant. They requested a hookup to the sewer system and 11,260 gpd of wastewater capacity. The Committee's chairman replied that all capacity was either used or reserved by property owners who financed the sewer plant's expansion. He stated that the Township was bound by contracts with those property owners, although the ordinance allowed for an owner to "voluntarily" give up capacity. The chairman made clear that "the policy of this board and the policy of the Township Committee has been not to take any capacity back." The chairman finally noted that his committee's recommendation was advisory and that the Township Committee would make the final decision.

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

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

II.

A.

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

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

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

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

In justifying its refusal to recapture unused sewer capacity, the Township Committee adopted in the resolution "the full contents and arguments of the listed correspondence submitted by various defendants." The Township Committee gave further reasons for the denial of plaintiff's request: (1) all excess capacity held by the Township is reserved for affordable housing and emergencies; (2) the sewer ordinance allowed the Township to extend its sewer allocation agreements with defendants for "good cause" and, having done so, the Township did not act unreasonably or arbitrarily; (3) several defendants "have development approvals which fall under the protections afforded by the Permit Extension act," a separate reason constituting "good cause" for continuing the allocation agreements; (4) the previous owner of plaintiff's property expressed no "interest in acquiring sewer capacity at the time the Township announced that it was available for purchase"; (5) Township Committee members did not believe that it was "in the public interest to force the termination of ... existing sewer agreements"; and (6) plaintiff had not determined whether the holder of any unused capacity had an "interest in voluntarily selling their capacity back to the Township."

B.

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

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

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

de facto moratorium on any development which requires sewerage."

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

Plaintiff and several defendants appealed.

C.

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

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

The panel, however, determined that the Township Committee did not abuse its discretion **757 in not recapturing unused sewer *336 capacity for plaintiff. The panel described plaintiff's development plan as "at best speculative" and "vague." Although the panel acknowledged that the Township "Committee simply relied on a policy of not re-taking sewer rights granted by contract," it concluded that plaintiff did not "establish that the denial of its request was arbitrary because it failed to overcome the presumption of validity to which the decision is entitled." The panel based its conclusion on the fact that defendants paid a "great expense" for their sewer rights and that plaintiff failed to identify those who were holding unused sewer capacity "without good cause for delay." The panel also faulted plaintiff for its "preference for litigation or settlement over development and presentation of a more definitive request." Last, the panel declined to rule on whether the sewer allocation agreements are protected under the Permit Extension Act.

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

III.

A.

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

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

B.

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

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

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

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

IV.

A.

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

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

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

B.

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

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

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

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

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

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

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

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

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

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

[*Ibid.*]

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

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

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

V.

A.

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

First, the ordinance sets temporal limits on the right of a property owner to keep unused sewer capacity. The Township has the discretion to terminate an allocation agreement and repurchase capacity if a ****761** developer (1) does not make application for development approvals within two years of having received sewer capacity or (2) has not begun construction within two years after having received preliminary approval. *Readington Code, supra,* § 187–26C. Second, the ordinance provides that an allocation agreement "may be extended upon application to the Township if ***343** there is a showing of good cause, at the option of the Township Committee." *Ibid.*

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

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

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

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

B.

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

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

Approximately one-third of Readington's entire sewer capacity—322,009 gpd—is not in use. That unused capacity is largely in the hands of a relatively small number of private entities. Currently, Merck has 141,900 gpd and Bellemead has 66,060 gpd of unused sewer capacity capacity allocated for more than a decade but still not in use. Both companies received approvals for their development projects in the late 1980s. That sewer capacity was allocated by contracts to private entities that financed the plant expansion project and was paid for at considerable expense cannot be the end of the analysis. Otherwise, the ordinance requiring Readington to exercise its discretion in recapturing sewer capacity would be meaningless. Those entities that purchased unused ***345** capacity did so knowing that the ordinance placed potential temporal limits on how long that capacity could be held in reserve and gave the Township the authority to recapture unused capacity for distribution to developers with projects ready to go. The ordinance made clear that sewer rights were not to be held in perpetuity. That other landowners did not participate in purchasing capacity to help finance the plant expansion may indicate nothing more than that they did not have a need for sewer capacity at the time.

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

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

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

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

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

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

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

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

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

VI.

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

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

*349 *For affirmance in part/reversal in part/ remandment*—Chief Justice RABNER and Justices ALBIN, PATTERSON, FERNANDEZ–VINA and SOLOMON—5.

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

All Citations

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

Footnotes

1 *N.J.A.C.* 7:9A 1.8 prohibits the use of a septic system to manage a wastewater capacity of over 2000 gpd without permission from the New Jersey Department of Environmental Protection.

2 In 1988, Merck obtained preliminary site plan approvals for projects to be constructed on its Readington property. The approvals were set to expire in twenty years. In 2008, Readington granted Merck a ten-year extension of its preliminary site plan approvals, and the Township agreed that it would not seek to recapture any unused sewer capacity until 2018.

3 In 1988, Bellemead was granted preliminary and final site plan approval for its "Halls Mills Farm" development project. The approval was set to expire in eight years. Bellemead was granted multiple extensions with the final extension set to expire in July 2010. As a result of the Authority's plant expansion, Bellemead was allocated 68,746 gpd of capacity, making its total capacity 110,746 gpd. Bellemead is using 44,686 of that gallonage, while 66,060 gpd—the amount required to operate its Halls Mills project—remains unused.

4 The court excepted from the order defendants Country Classics of Readington and Readington Commons because they evidently are using their capacity.

5 The plaintiff also unsuccessfully sought an order requiring Medford to expand the capacity of the sewage plant. *Id.* at 418, 423–24, 599 A.2d 1248.

6 The concept plan suggested by the Township resembles the informal review available under *N.J.S.A.* 40:55D–10.1. A planning board is permitted to conduct "an informal review of a concept plan for a development for which the developer intends to prepare and submit an application for development." *N.J.S.A.* 40:55D–10.1. An applicant can "benefit from the exchange of ideas and expression of the board's preferences" without having to "expend[ ] the significant amounts of money required in the preparation of development plans and applications." 36 *New Jersey Practice, Land Use Law* § 13.10 (David J. Frizell & Ronald D. Cucchiaro) (3d ed.2014). However, importantly, neither the board nor the applicant are bound by the discussions. *N.J.S.A.* 40:55D–10.1. An applicant must still proceed through the ordinary approval process.

End of Document

STEVENS, HARRIS & GUERNSEY, P.C.
ATTORNEYS AND COUNSELORS AT LAW
351 MAIN STREET
P. O. DRAWER 660
NIANTIC, CONNECTICUT 06357

RONALD F. STEVENS
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PAUL M. GUERNSEY

TEL (860) 739-6906
FAX (860) 739-2697
E-MAIL shg-realestate@snet.net

October 17, 2018

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

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

Dear Mr. Nickerson:

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

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

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

Exhibit #3 Submitted WaS PH 1 11/13/18

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

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

Yours very truly,

Jonathan A. Harris

TAH:jd

SEWER DEMAND
COSTCO

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

Exhibit #I Submitted WCS PH I 11/13/18

Ted Harris

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

Hi Brad,

The water demand for Costco is:

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

Thanks,

Michelle

Michelle Carlson, P.E.

Director of Land Development

View Warehouse Savings | Find a Warehouse | Get Email Offers | Customer S

COSTCO WHOLESALE

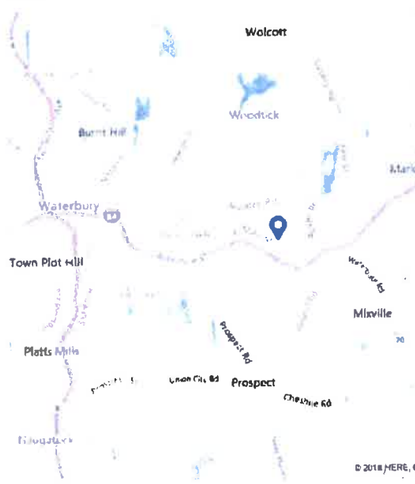
All | Search | Sign In / Registe

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

Locations

Home / Find a Warehouse / Waterbury Warehouse

Print



Waterbury Warehouse

Address

3600 E MAIN ST
WATERBURY, CT
06705-3851
Get Directions

Phone: (203) 596-9967

Hours

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

Warehouse Services

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

Departments and Specialty Items

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

Opening Date

10/13/1993

Feedback

Gross Area 152,700 ft²

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

CITY OF WATERBURY

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

Parcel Information

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

Value Information

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

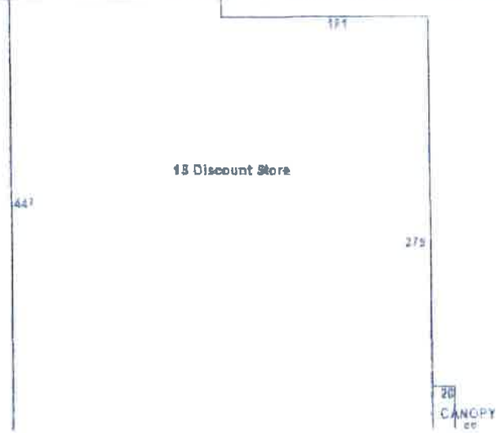
	Appraised Value	Assessed Value
Buildings	15,230,808	10,661,570
Detached Outbuildings	658,042	460,630
Total	17,872,784	12,510,950

Owner's Information

Owner's Data

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

Building 1



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

EAST LYME WATER & SEWER COMMISSION
REGULAR MEETING
TUESDAY, NOVEMBER 13th, 2018
MINUTES

The East Lyme Water & Sewer Commission held a Regular Meeting on Tuesday, November 13, 2018 at the East Lyme Town Hall, 108 Pennsylvania Avenue, Niantic, CT. Chairman Nickerson called the Regular Meeting to order at 7:15 PM immediately following the previously scheduled Public Hearing.

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

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

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

ABSENT: Dave Bond

1. Call to Order / Pledge of Allegiance
Chairman Nickerson called the Regular Meeting of the East Lyme Water & Sewer Commission to order at 7:15 PM immediately following the previously scheduled Public Hearing which was closed at 7:14 PM. The Pledge was previously observed.

2. Approval of Minutes
- **Public Hearing Meeting Minutes – October 23, 2018**
- **Regular Meeting Minutes – October 23, 2018**

Mr. Nickerson called for a motion or any discussion or corrections to the Public Hearing Meeting Minutes or Regular Meeting Minutes of October 23, 2018.

****MOTION (1)**
Mr. DiGiovanna moved to approve the Public Hearing Meeting Minutes and the Regular Meeting Minutes of October 23, 2018 as presented.
Mr. Zoller seconded the motion.
Vote: 6 – 0 – 2. Motion passed.
Abstained: Mr. Nickerson, Mr. Jacques

3. Delegations
Mr. Nickerson called for delegations.
There were no delegations.

4. Consider Allocation of Sewer Capacity for Costco
Mr. Mingo said that the 160,000 gpd that was approved for Gateway does not necessitate going any further as the Costco can get capacity from there.

Mr. Nickerson said that they should go through the process anyways – they are looking for 7,650 gpd from the approximate 262,000 gpd available.
Mr. Mingo asked for the Attorney to rule on it.

Attorney Zamarka, Town Counsel said that the 160,000 gpd is a court analysis. He noted that they are here by Resolution and added that Attorney Hollister is correct that Landmark does have an interest in the Costco application as the Landmark application is also out there for capacity. Costco does need to be analyzed for available capacity.

Mr. DiGiovanna asked if that isn't what Brad came up with in his analysis.
Mr. Kargl said that he would feel more comfortable with his analysis once he has conversation with the DEEP on it and receives their input.

Mr. Mingo asked if he would be correct that they should not put a motion on the floor and asked Counsel if that is within the parameters.

Attorney Zamarka said that it would not be out of order as long as it would not exceed the 118,000 gpd that Landmark is seeking.

****MOTION (2)**
Mr. Mingo moved to grant Costco sewer capacity in the amount of 7,650 GPD as requested.
Mr. DiGiovanna seconded the motion.

Ms. Russell said that she has a concern with going with an estimate on the 262,000 gpd rather than a more definitive number.

Mr. Nickerson said that he has enough confidence in Mr. Kargl that he is pretty accurate and further the Court is aware of the number of 160,000 gpd given to Gateway. Further, he added that he would love to pursue the State capacity that is sitting out there unused even though they claim that they will use it.

Ms. Russell said that she feels that it is difficult to wrap yourself around as the figures fluctuate.
Mr. Kargl said that is exactly why he took an average.

Mr. Mingo said that based on the new resolution that those below 5,000 gpd can just have it – two of those added together will have eaten up the 7,650 gpd and them some so it is a moot point.

Mr. Jacques asked Mr. Kargl what he would be asking the DEEP.
Mr. Kargl said that he would be asking what they would be looking at as it states that we have 15% of the 10M gpd but what is the metric that is being used and is that the starting number.

Mr. Mingo asked Mr. Kargl what the next step would be.
Mr. Kargl asked that he be allowed to complete the process that he has started.
Mr. Nickerson called for a vote on the motion.

Vote: 7 – 1 – 0. Motion passed.
Against: Ms. Russell
(Note: a brief break was taken here)

5. Set Public Hearing Dates for Sewer Capacity Applications
Mr. Nickerson asked Attorney Zamarka for input.
Attorney Zamarka said that in following the land use statutes for time frames that he would suggest that any new application public hearings are set towards the farther end.

Mr. Nickerson said that they would have to set more meetings as there are a number in the pipeline so the parameters will have to be set. They would have to determine if they would give sewer capacity 'tickets' and if they would have an expiration date. They have specific meeting dates to establish procedures.
Attorney Zamarka said that he is not aware of other applications that were specific to this and not a zoning application. He suggested that perhaps as of this date that they have 65 days to schedule.

Mr. Mingo asked for a legal opinion regarding what would stop the Old Lyme beaches from going to Waterford or New London for sewer capacity and bypassing us completely.
Attorney O'Connell, Town Counsel said that the DEEP does not recognize beach communities as a WPCA agency. Those communities are a quasi-municipality and are communities that are set up by special act.

Mr. Nickerson suggested that they set the public hearing for JAG, Gateway II (120 apartments) and Pazzaglia for January before their regular meeting on that same evening as long as it falls within the 65 days. It was determined that they would have to hold that public hearing on January 8, 2019.
Mr. Nickerson asked Mr. Kargl to have the capacity information for them for their December meeting.

6. Landmark Remand Hearing Procedure
Attorney Zamarka noted the current status of the case for Landmark and that it was remanded a number of times. The latest being that in August the Judge upheld the decision of Judge Cohen's ruling. They petitioned the Supreme Court and the Supreme Court denied their petition so Judge Cohen's decision stands. He explained that while the 14,000gpd figure was low that is does not mean that the 118,000gpd that they requested has to be granted. The Commission has to grant somewhere between the 14,000 gpd and 118,000 gpd while taking into consideration that they cannot deny use of the property or make it non-usable. He noted that the New Jersey case that was cited in Attorney Hollister's letter would not be relevant here. He added that Attorneys Hollister and Reynolds have requested to address the remand process in the Landmark case.

Mr. Nickerson asked if he would suggest how/when they should proceed. Should they set up special meetings.
Attorney Zamarka said that he feels that it would be in their best interest to reach a decision on the Landmark capacity prior to the other applications. They have more than sufficient information to work with on that and would concur that special meetings should be set.

Mr. Mingo said that he takes issue with listening to anymore attorneys this evening and that without the capacity figure that it is a waste of time.
Mr. Nickerson said that he would allow them only three (3) minutes each and asked that they focus on the remand issue.

Attorney Hollister said that he mostly agrees with Mr. Mingo especially on the capacity issue/DEEP as otherwise they are flying blind. He cautioned that their decision cannot be on controlling land use and that the decision is between 14,000 gpd and the new figure that they provided this evening of 100,000 gpd but should be no where near the 14,000 gpd. They need to get a fair number and that legally they should be granted the 100,000 gpd and then let the land use arena make their determination.

Attorney Reynolds said that Attorney Hollister has said that they have to allow the project to proceed but that is not what was said. While they cannot shut down the project, 814 units are not reasonable as there has not been an 800 unit project in this area. Gateway may in the end be 400 units but that would have been the maximum number so 814 units are just unreasonable. Further they haven't actually seen projects of more than 100 units so to do that size project would be far less than for the 800 that they are seeking.

Mr. Nickerson said that they would have their Regular Meeting on December 11, 2018 and a Special Meeting on December 18, 2018 for the Landmark remand.

Mr. Mingo noted that they need to remember that they are not a land use agency.

7. Waterford/Three Beaches Letter
Mr. Nickerson asked Attorney O'Connell to review this.

Attorney O'Connell explained that they had received a letter from Chairman Green of the Waterford Utility Commission stating that they object to East Lyme contracting with three (3) beach communities

(Old Lyme) to take their sewer flow as that flow will affect Waterford's sewer system infrastructure without Waterford approving the terms and conditions of use. Mr. Nickerson sent a letter in response stating that they could not find anything prohibiting it and that in fact they were ordered by the CT DEEP to accept sewage flow from the beach communities and to enter into an agreement with them. This was imposed upon East Lyme and the DEEP did not order Waterford to do anything. Also, East Lyme paid Waterford a substantial sum for the right to transmit sewage (up to 8M gpd) through Waterford's mains.

8. Billing Adjustments
There were none.

9. Approval of Bills
Mr. Nickerson called for a motion on the Niantic & Pattagansett Pump Station PER bill.
****MOTION (3)**
Mr. DiGiovanna moved to approve payment of the following Niantic & Pattagansett Pump Station PER bill: Weston & Sampson, Inv, #485250 in the amount of $58,605.00.
Mr. Zoller seconded the motion.
Vote: 8 - 0 – 0. Motion passed.

Mr. Nickerson called for a motion on the Booster Station Upgrades bills.
****MOTION (4)**
Mr. DiGiovanna moved to approve payment of the following Booster Station Upgrades bills: Integrated Control Systems Inv. #3202 in the amount of $5,700.00 and Integrated Control Systems Inv. #3203 in the amount of $710.00.
Mr. Zoller seconded the motion.
Vote: 8 - 0 – 0. Motion passed.

Mr. Nickerson called for a motion on the Water Main Improvement bills.
****MOTION (5)**
Mr. DiGiovanna moved to approve payment of the following Water Main Improvement bills: B&L Construction Inv. #73558 in the amount of $12,193.00 and B&L Construction Inv. #73559 in the amount of $5,311.49.
Mr. Spencer seconded the motion.
Vote: 8 - 0 – 0. Motion passed.

10. Finance Director Report
Ms. Johnson said that she would get the information to them once all of it was entered into the system as it was not ready at this time. She recalled that she had requested the closing out of projects and that had been done along with another one that was completed.

11. Water & Sewer Operating Budget Status Reports
Mr. Bragaw noted that they had been provided with the spreadsheet as well as the assumptions that he had made with regard to the Well 1A and 6 upcoming projects. He noted that it assumes a 2.75% water budget increase each year over the next eight (8) years. There are anticipated increased revenues as well and with all of this in mind he said that he felt that they could reasonably afford going forward with the Well 1A and 6 projects while still being able to pay for and implement the meter replacement project. He also noted that they need to get our of the meter deposit business.

12. Water Project Updates
- **Well 1A and 6 Treatment Plant Modifications and Upgrades – Discussion and Possible Project Authorization for Construction Phase**

Mr. Kargl recalled that the issue here was affordability and that Mr. Bragaw was working on that aspect. Mr. Bragaw explained that they had a debt spike this year but then it goes way down so he felt for the reasons cited above that they could afford this project.

**MOTION (6)
Mr. DiGiovanna moved to forward the Well 1A and Well 6 Water Treatment Project with an estimated cost of $4,640,000 to the Board of Selectmen for approval and to begin the authorization process.
Mr. Zoller seconded the motion.
Vote: 8 – 0 – 0. Motion passed.

13. Correspondence Log
There were no comments.

14. Chairman's Report
Mr. Nickerson reported that he had held a meeting on a new Public Safety building going forward and that the proposed project is for $6M for the current Honeywell building as they are leaving their building here and moving to another area in Connecticut. They have made a purchase and sales agreement that is contingent upon all approvals. They need to get the Police out of the downtown building which has a lot of issues not to mention space. He said that he would like to do this within 120 days and get it to referendum as it is a very important project and this building is well set up for this and for future expansion of the important emergency management system.

15. Appoint Water Regulations Subcommittee
Mr. Bragaw said that they are moving forward with the water regulations as this is necessary to support the meter replacement project.

Mr. Mingo said that the subcommittee that is for the sewer regulations serves for both – so they would also work on the water regulations.
Mr. Bragaw asked if Mr. Mingo, Mr. Zoller and Ms. Russell are still interested in serving on this subcommittee and if anyone else wishes to serve on it, they could let him know.

16. Assistant Utility Engineer Update
Mr. Bragaw said that they held interviews and that the skill set is a tough one. They have found that they need very strong water skills so they decided to go back out and advertise again for that certain type of person and skill set as he suspects that some of the people who may have been interested were very strong with the water side but did not apply due to how the description was worded. They will re-advertise and re-assess.

17. Staff Updates
a. Water Department Monthly Report
Mr. Murphy noted that there is still 31% that has to come from New London as we have only taken 69%. He asked if they are going to make it before they have to start pumping back.
Mr. Kargl said that they are using it to flush the hydrants in the north end of Town and that Well 1A will also go off for surging so that will mean that they will utilize more. He said that he is hoping that they will get close to the 100%.

b. Sewer Department Monthly Report
There were no comments.

18. Future Agenda Items
No comments.

19. ADJOURNMENT
Mr. Nickerson called for a motion to adjourn.

**MOTION (7)
Mr. Murphy moved to adjourn this Regular Meeting of the East Lyme Water & Sewer Commission at 8:51 PM.
Mr. DiGiovanna seconded the motion.
Vote: 8 – 0 – 0. Motion passed.

Respectfully submitted,

Karen Zmitruk,
Recording Secretary

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

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

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

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

ABSENT: Dave Bond

Pledge of Allegiance
The Pledge was observed.

Public Hearing I

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

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

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

Ms. Russell asked about statistics for the Food Court, Meat department and why the bathrooms were not included.
Attorney Harris said that the Food Courts and Meat Departments are constants and maximum demand areas – just as they would be with the store in East Lyme.

Mr. Jacques asked where the 99 GM came from in the email.
Mr. Kargl and Mr. Harris said that it is from an actual meter reading.
Mr. Spencer noted that the calculation would not come out correctly.
Mr. Nickerson said that they have provided very real data from actual comparative stores.
Mr. Murphy asked if it would have a brown water system.

Mr. Harris said that he was not sure.
Mr. Nickerson said that they would be using well water for irrigation, etc.

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

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

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

Mr. Nickerson said that while he is trying to give some leeway here that he wants to stay focused on the Costco application as there are other applications that will also be coming before them in the future.
Mr. Reynolds said that Landmark's assessment is not related to Costco.

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

Mr. Nickerson asked if there were other comments.

****MOTION (1)**
Mr. Mingo moved to close the Public Hearing.
Mr. DiGiovanna seconded the motion.
Mr. Nickerson noted that they would have other applications coming before them for sewer capacity.

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

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

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

A vote was called for the motion and second on the floor.
Vote: 8 – 0 – 0. Motion passed.

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

Respectfully submitted,

Karen Zmitruk,
Recording Secretary
(Exhibits 1, 2 & 3 attached)

NO. HHD LND CV 15 6056637S	:	SUPERIOR COURT
LANDMARK DEVELOPMENT GROUP LLC, ET AL.	:	JUDICIAL DISTRICT OF HARTFORD
v.	:	LAND USE DOCKET
EAST LYME WATER AND SEWER COMMISSION	:	NOVEMBER 27, 2018

MOTION FOR JUDGMENT[1]

Plaintiffs Landmark Development Group LLC and Jarvis of Cheshire LLC (collectively, "Landmark") hereby move for the entry of judgment in this matter, specifically an order to the defendant Commission to conditionally grant Landmark's 2012 sewer capacity application for 118,000 gallons per day, with the final, actual allocation being the gallons per day needed to support a Preliminary Site Plan, when approved by the East Lyme Zoning Commission.

This Motion is made at this time because (1) this Court's July 6, 2016 decision, that the Commission must grant Landmark "sufficient capacity to further the development of their project" is now final; (2) the Appellate Court, 184 Conn. App. 303, 306 n.2, held that the Commission on remand "*must* grant" (original emphasis) the application; (3) as a matter of law, *"sufficient capacity to further the development" has only one meaning* – the sewer capacity to support whatever development plan is approved by East Lyme's land use (wetlands and zoning) process – *not the land use or residential density that the defendant Sewer Commission deems acceptable*; (4) there is, therefore, only one legal remedy that this Court can grant at this time in this administrative appeal; and (5) in the past several weeks, the Commission has expressly stated its disagreement with and intent to resist this Court's order, defy this Court again, and continue to violate Landmark's rights.

[1] Attorney Roger Reynolds, representing intervenors Friends of the Oswegatchie Hills Nature Preserve, Inc. and Save the River-Save the Hills, Inc., has not appeared in this docket number, but in a companion case, and is copied in the Certification of Service.

Recited below, supported by an Affidavit of Glenn Russo and public record exhibits and the record of this appeal as on file, are the relevant facts and a legal analysis regarding why this Court must enter judgment at this time.

I. RECAP OF RELEVANT BACKGROUND; COMMISSION ACTIONS SEPTEMBER 17 TO NOVEMBER 13, 2018.

This Court is fully familiar with the facts of this matter, from the early 2000's, when East Lyme officials first stated their intent to block multi-family / affordable housing development by Landmark by denying sewer access;[2] through the town's denial that any of Landmark's property was in the sewer service district (overruled by DEEP in 2004); the 2005 denial of any sewer service (overruled by Judge Frazzini in 2011); the Commission's contention in 2012 that it had no capacity for Landmark because all of the town's available sewer capacity was already allocated to others (overruled by this Court); the allocation in March 2014 of 13,000 GPD, based on the towns' three acre lot size zoning – which had already been repealed (invalidated by this Court); the October 2014 allocation of 14,434 GPD, based on a supposedly "scientific formula" but using manipulated data to yield a patently absurd and illegal result (invalidated by this

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[2] The record of this appeal (Commission's Appellate Court Record, p. A421, contains minutes of a February 1, 2001 phone call between Town officials and land use attorney Robert Fuller. Those minutes state in part:

> 1. NO AVAILABILITY FOR WATER AND SEWER
>
> – Not in sewer shed, commitment elsewhere for availability. This plan would consume a lot of sewer and would require an extension.
>
> – Without water and sewer, cannot get affordable housing project through.
>
> – WATER AND SEWER COMMISSION HAS NO OBLIGATION TO EXTEND TO PROPERTY – DOES NOT FALL UNDER AFFORDABLE HOUSING ACT.
>
> . . .
>
> Atty. Fuller stated that the Zoning Commission needs a basis for denial. He suggested including the water and sewer report, addressing traffic and environmental, and the Planning Commission's report in the record.

Court); and finally through three years, 2013-16, when the Commission repeatedly lied to this Court, claiming its available capacity was 130,000 to 225,000 GDP, while simultaneously, and without public notice, allocating 166,000 GPD to the nearby Gateway development – and then justifying that action by asserting that the Town plainly had such ample capacity that a capacity study and an application were unnecessary.

Enough.

On July 6, 2016, this Court held, based on the Commission's Gateway subterfuge, that the October 2014 allocation of 14,434 GPD to Landmark was an abuse of discretion and ordered the Commission to grant Landmark "sufficient capacity to further" its development. Exh. A. In August 2018, the Appellate Court affirmed this Court's decision, 184 Conn. App. 303, Exh. B. On October 31, 2018, the Supreme Court denied further review, Exh. C, making this Court's decision a final order.

The following undisputed facts have occurred since the Appellate Court decision, and are supported by attached public records exhibits and Mr. Russo's Affidavit:

1. In September 2018, while the Commission's certification petition in the Supreme Court was pending, Landmark became concerned again that the Commission would try to undermine the Appellate Court ruling by continuing to allocate sewer capacity to Gateway and other users, and then asserting that it had insufficient capacity for Landmark. As a result, on September 17, 2018, Landmark filed with the Commission a letter asking that the Commission approve Landmark's application. Exh. D.

2. In response, at its meeting on September 25, 2018, the Commission, without any notice or hearing, adopted an "Interim Sewer Connection Procedure," Exh. E, which in relevant part states (emphasis added):

> WHEREAS, on August 21, 2018, the Appellate Court issued its decision ("Decision") on the Commissions' appeal, which upheld the Trial Court Memorandum of Decision, and held that the Commission is required to

perform a sewer capacity analysis when considering applications to connect to the East Lyme sewer system;[3] and

WHEREAS, *the Commission disagrees with the Decision* and has filed a petition for certification to the Connecticut Supreme Court, which is currently pending; and

WHEREAS, by a letter dated September 17, 2018, Landmark requested that the Commission approve an allocation for its full 118,000 gpd sewer capacity request, pending final resolution of its appeal; and

WHEREAS, neither the Trial Court nor the Appellate Court held that Landmark was entitled to the full amount of its capacity request, and the proceedings are stayed until the Supreme Court acts on the Commission's petition for certification. While reserving all of its rights set forth during the appeal process, the Commission nevertheless does not want to ignore the Trial Court and the Appellate Court holding that require a sewer capacity analysis by done in conjunction with a sewer connection permit application.

BE IT THEREFORE RESOLVED, that the East Lyme Water and Sewer Commission, acting as the Town's Water Pollution Control Authority, hereby enacts the following interim procedure:

1. An application to connect to the East Lyme sewer system for a project that either (a) requests a connection for more than 20 residential units or (b) requires more than 5,000 gallons per day of sewage treatment capacity, shall also require an application for determination of sewer capacity pursuant to General Statues § 7-246a;[4]

2. Said application for determination of sewer capacity shall be submitted either prior to or contemporaneously with a sewer connection application;

3. *An application to connect to the East Lyme sewer system may not be granted if the Commission determines that there is not adequate sewer capacity for the proposed use of land.*

BE IT FURTHER RESOLVED that *the above procedure does not reflect official policy or procedure of the Commission or the Town of East Lyme.*

---

[3] In fact, the Appellate Court opinion says nothing of the kind, and the Resolution contains no citation.

[4] General Statutes § 7-246a already requires an application for a sewer capacity allocation.

> Rather, it is adopted on an interim basis only in direct response to the Appellate Court Decision, *and shall be in place only during the pendency of the Landmark sewer capacity appeal process*. In enacting this interim procedure, *the Commission does not agree with the holdings of the Trial Court Memorandum of Decision or the Appellate Court Decision.* Any findings made pursuant to this interim procedure (i.e. available sewer capacity, etc.) shall be for the purposes of that sewer capacity application only, *and shall not be adopted, incorporated or made part of the record in the pending Landmark sewer appeal.*

3. In September 2018, Commission Chair Mark Nickerson was quoted in *The Day* newspaper as saying that, "The judges can't force us to put sewer in there," and that extending sewer to Landmark would constitute "an unsuitable use." Exh. F.

4. On October 24, 2018, Landmark filed a renewed Freedom of Information Act request, seeking disclosure of all applications or requests for more than 5,000 GPD of sewer capacity, *see* Exh. G.

5. In response to Landmark's FOIA request, the Commission provided an application filed by Gateway for the commercial use portion of its development, a Costco store, requiring 7,650 GPD of capacity; the application was filed under General Statutes § 7-246a, and the "interim procedure."

6. Also in response to the FOIA request, the Commission provided a copy of an "application" filed by Pazzaglia Construction, Exh. H, *for 86,250 GPD*, for a "830G" [sic] development. This application was not accompanied by any site plan or any documents demonstrating that it is an actual development plan, or any evidence of compliance with General Statues § 8-30g.

7. At a Commission hearing on November 13, 2018, Landmark filed the attached letter, Exh. I, clarifying that if the local land use process results in a site plan approval that requires less than 118,000 GPD, Landmark will accept that allocation.

8. The Commission ignored Landmark's request, processed the Costco application under its interim procedure, and approved the Costco application *without making any*

finding, as required by ¶ 3 of its own interim procedure (Exh. E), as to the town's overall available sewer capacity. Exh. J (minutes of Commission hearing, November 13, 2018).

9. At its regular meeting on November 13, 2018, the Commission scheduled a special meeting for December 11, *to consider what criteria it will devise and use to act on Landmark's application on remand*. Russo Affidavit, Exh. L, ¶ 4.

10. During the November 13 discussion, Chair Nickerson stated that action on Landmark would be based on "What is fair, given the size of our town." Russo Affidavit, Exh. L, ¶ 5.

11. During the discussion, Town Attorney Zamarka told the Commission that it had "wide discretion" in acting on Landmark, and that the Commission's only obligation is to grant capacity "between 14,000 and 118,000. . . ." Exh. K at 3.

12. At the November 13 meeting, contradicting this Court's 2016 ruling that sewer commissions do not control land use, Attorney Roger Reynolds, representing environmental intervenors, advocated that the Commission base the sewer allocation on controlling land use, by granting capacity for 110 residential units (about 20,000 GPD), that being the "average size" of a § 8-30g affordable housing development. Russo Affidavit, Exh. L, ¶ 6.

13. At the November 13 meeting, the Commission discussed action in January 2019 on other sewer capacity applications, including 120 additional residential units for Gateway (and thus above its 275 units / 166,000 GPD); and the above-mentioned Pazzaglia application. Russo Affidavit, Exh. L, ¶ 7.

14. In this discussion, none of the Commissioners or the Town Attorney discussed giving Landmark's application, which dates to 2012, priority over applications filed later, much less in 2018. Russo Affidavit, Exh. L, ¶ 9.

15. At this time, the Town of East Lyme has ample sewer capacity to conditionally grant Landmark's application without impacting other users: (a) the Appellate Court decision, 184 Conn. App. at 317, based on data to 2014, found that the Town has at least

358,000 GPD, minus the Gateway allocation, estimated at 166,000 GPD, leaving 200,000; (b) however, on November 13, Sewer Administrator Kargl stated that the Gateway residential portion is actually only using "about half" of its allocated capacity (Russo Affidavit, Exh. L, ¶ 8), which would add more than 50,000 GPD to the Town's available capacity, making nearly 300,000 GPD available; (c) this Court may take judicial notice of Exh. M, which shows that in 2016, the Town's *total* average monthly discharge was 785,390 GPD, down from 1,089,279 in 2013, and the Town was using only 50.1 percent of total New London treatment plant capacity; and (d) in November 2017, the total state facility flow was only 164,009, which under the formula accepted by Sewer Administrator Kargl in his 2015 deposition would result in:

Town capacity after State set aside (1.5 million - 468,000)	1,022,000
Total flow, October 2017 running monthly average	822,550
State use	164,000
Town use (822,550 - 164,000)	658,550
Available to Town	363,450

However, this calculation is very conservative, because the State facility use of 164,000 GPD is actually part of the 468,000 deducted from the 1.5 million GPD available to the Town. So if this adjustment is made, the Town's current available capacity is 527,450 GPD.

16. In addition, this Court should bear in mind that the State of Connecticut has a contract to use 468,000 of East Lyme's available 1,500,000 GPD at the New London treatment plant, but historically has used no more than 60 percent of this amount, and in recent years, between 30 and 40 percent. As a result, East Lyme is in no danger of exceeding its total treatment plant capacity.

17. The record of this appeal, supplemented by facts of the past 60 days, demonstrate that (a) Landmark's land is in the Town's sewer service district; (b) the Town has approved an extension of the public sewer line to two locations which abut Landmark's land, such that Landmark does not need new permission to extend the sewer system to connect to the sewer system; (c) there is ample capacity to grant Landmark's application, without disenfranchising others; (d) through six years of hearings and remands, the Commission has

never identified any engineering issue with respect to Landmark physically connecting to the public system; (e) Landmark has a final court order to the Commission that it grant Landmark "sufficient capacity" to proceed with its development; and (f) the Commission disagrees with and intends to violate this court order.

II. BASES FOR ENTRY OF JUDGMENT

1. This case is an administrative appeal. It is axiomatic that in an administrative appeal, if the record makes it clear that there is only one remedy that will remedy the defendant's violation, the trial court is empowered and obligated to grant that remedy. *See, e.g., Thorne v. Zoning Commission*, 178 Conn. 198 (1979).

2. The Appellate Court, 184 Conn. App. at 306 n.2, held that the Commission "*must* grant" Landmark's application, and without need for further evidentiary determination or discretionary action.

3. This Court has ruled that the so-called "*Forest Walk*" factors are inapplicable to this case, given the Commission's conduct. Thus, at this point, the Commission cannot act on Landmark's application by devising a new formula or ratio based on acreage, proportionality, or similar factors.

4. It is also clearly established that the Commission cannot allocate sewer capacity based on controlling land use, such as density.

5. This Court's order to the Commission is not to pick a number between 14,434 and 118,000 GPD, but to grant Landmark what it needs to proceed with its land use applications. At this time, "sufficient capacity" for Landmark's development is not a matter of Commission discretion because the Town has ample capacity to grant Landmark's application, and may not use the allocation to control density.

6. At this time, Landmark's application, pending since 2012, must be given priority as against Gateway's application for sewer, which occurred after Landmark's, as well as newly-

filed applications. The Commission cannot undermine Landmark's rights by giving away capacity while this case proceeds.[5]

7. Landmark is entitled to be treated equally with Gateway, but in fact requests substantially less gallonage than Gateway even though Landmark's parcel is much larger: while Gateway has been approved (166,000 GPD) for 11.0 percent of the Town's total allocation, Landmark (at 118,000) seeks only 7.8 percent, and thus Landmark's application is for 30 percent less than Gateway.

8. Sewer Administrator Kargl, in 2015, testified that the Town had so much available capacity that Gateway's application did not even require a review process; Landmark is now entitled to equal treatment.

9. This court has inherent authority to enforce its own orders. The Commission is poised to violate this Court's order.

For these reasons, Landmark moves that this Court enter judgment, directing the defendant Commission to grant Landmark's sewer capacity application, and preserve that allocation until Landmark obtains Preliminary Site Plan approval, at which time the allocation shall be modified to the amount needed to support that Site Plan.

[5] Landmark's appeal of the East Lyme Zoning Commission's 2015 denial of a zone change and Preliminary Site Plan is pending before Judge Berger.

PLAINTIFFS,
LANDMARK DEVELOPMENT GROUP LLC
AND JARVIS OF CHESHIRE LLC

By_____

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Their Attorney

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Motion for Judgment and attached Exhibits were electronically delivered this 27th day of November, 2018, to all counsel of record and written consent for electronic delivery has been received from all counsel.

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_____
Timothy S. Hollister
Commissioner of the Superior Court

No: HHD-LNDCV15-6056637 : SUPERIOR COURT

LANDMARK DEVELOPMENT AND JARVIS OF CHESHIRE LLC : JUDICIAL DISTRICT OF NEW BRITAIN

v. : AT NEW BRITAIN, CONNECTICUT

EAST LYME WATER and SEWER COMMISSION : December 10, 2018

ADMINISTRATIVE HEARING

B E F O R E: The Honorable Henry S. Cohn, JTR

A P P E A R A N C E S:

Representing the Plaintiff:

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Representing the Defendant:

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Also Present: Attorney Roger Frank Reynolds

Recorded By:
Donna L. Peluso

Transcribed By:
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(In open court 10:04:09 AM).

THE COURT: Good morning.

ATTY. ZAMARKA: Good morning, Your Honor.

ATTY. HOLLISTER: Good morning, Your Honor.

THE COURT: Can I have everybody's name, please?

ATTY. HOLLISTER: Good morning, Your Honor. Tim Hollister, Shipman &Goodwin representing *Landmark Development and Jarvis of Cheshire*, with me is Mr. Russo my client.

ATTY. ZAMARKA: Mark Zamarka on behalf of the East Lyme Water and Sewer Commission.

THE COURT: And who's with you?

ATTY. REYNOLDS: And Roger Reynolds on behalf of the intervenors: *Friends of the Osewgatchie* --

THE COURT: Okay.

ATTY. REYNOLDS: -- *Hills Nature Preserve and Save the River-Save the Hills*.

THE COURT: Why don't you sit down. And, Mr. Hollister, what's your position on this? What -- would you like to put it on the record?

ATTY. HOLLISTER: Yes. Your Honor, if I could just maybe take a few minutes to explain the motion? I think --

THE COURT: Go right ahead.

ATTY. HOLLISTER: -- that would -- thank you. The first is that the court has jurisdiction --

THE COURT: Yeah, that was a point that was raised by the other side.

ATTY. HOLLISTER: Yes. That --

THE COURT: Why do I have jurisdiction?

ATTY. HOLLISTER: I'll explain why.

You have jurisdiction to enter as the final judgment the actual number, the gallons per day, which is the basis of the original application of *Landmark* going back to 2012.

The, the trial court's order in 2016 was that the commission needs to order sufficient capacity to further *Landmark's* development quote/unquote. The appellate court affirmed that order, but to effect --

THE COURT: At the, at the end of the opinion (my opinion) I said that this is a -- remanded because of what you just said, an inadequate amount had been allowed. The 14,000. And then I had another part of that sentence which said: this is a final decision for purposes of appeal.

ATTY. HOLLISTER: Right.

THE COURT: Does that change your analysis?

ATTY. HOLLISTER: No. And, and that's -- maybe the most important thing we need to put on the record today is what's final and what isn't.

We need -- the application under 7-246a is for a specific gallonage, and we don't have that number yet. But what Your Honor has the jurisdiction to do today -- not a -- not just the authority but the obligation, and I'll explain why -- is to enter the specific number.

Now let me just take two or three minutes and explain how, how we get to this conclusion. So the trial court

decision from 2016, you ordered, quote, sufficient capacity to further Landmark's development, unquote, but you also said, at that time, not -- does not necessary mean the 118,000 that *Landmark* had applied for.

Now, in the appellate court, *Landmark* argued -- first, when we were opposing certification, and then when we were opposing the merits -- that this was not a final judgment because Your Honor had not specified the final gallons per-day number.

In the appellate court, the commission and the intervenors specifically argued that this was a final judgment, because if the trial court decision was affirmed, "we," meaning the commission, must grant *Landmark's* application as filed with no further evidentiary proceeding and no commission discretion on remand.

I want to read you a quote. Very quickly, an excerpt from the oral argument. This is, first, Judge Bear, uh -- speaking to Mr. Zamarka, and Mr. Zamarka said -- this is page 29: MR. ZAMARKA: If this court decides that the appeal should be sustained and the case should be remanded, the commission is going to have grant this appeal and is going to have to grant an amount, and, basically, whatever *Landmark* says they need whether or not that has an adverse affect on the East Lyme system. Then in response to judge -- Chief Judge DiPentima, Mr. Zamarka said: It says then they must grant an amount sufficient to further development and cannot grant an amount that would foreclose development.

As we read Judge Cohn's decision, that right there completely destroys the commission's discretion on remand, and that is why we are here today. Now --

THE COURT: Then there's also the sentence in Footnote 2 of the appellate decision.

ATTY. HOLLISTER: And, and -- and the appellate court accepted that representation.

But here's the, the key point, Your Honor. We had -- as we approached oral argument, we had now had briefing and we were ready to oral argue -- orally argue the case. We had to make a decision as to whether we were going to continue to argue that there was no final judgment or whether we were going to accept the representations of the commission and the intervenors that if your order was affirmed, that application has to be granted in the amount filed for. No further evidentiary hearings. No further discretion.

I told the court we accept that representation. We will now change our position. We agree. If that is the representation they're willing to make on the record, then it's a final judgment.

We are here today to effectuate that final judgment. There is no discretion. There is no need for a further evidentiary hearing. The commission is, unfortunately, going in that direction. They have a first step in that direction scheduled for tomorrow night, which is why I asked for the hearing today.

THE COURT: Let me interrupt you to ask you. The last sentence of one of your, I think it was the status report where you said: there's only one remedy which is to approve the 2012 application to set-aside 118,000 gallons conditioned on the receipt of the preliminary site plan approval.

ATTY. HOLLISTER: Right.

THE COURT: What does that mean?

ATTY. HOLLISTER: Okay. The commission --

THE COURT: Suppose I were to do that.

ATTY. HOLLISTER: Okay. We know, as a matter of law and even from one of your, your own decisions in this case, the commission does not -- the sewer commission does not have the ability to be the zoning commission. They can't say we're going to grant X-thousand because that would result in X-number of residential units and we think that's the right number. That's the zoning commission's job. Your Honor, actually, found that earlier in this case. So --

THE COURT: Where does that stand?

ATTY. HOLLISTER: Where is it --

THE COURT: With the zoning commission: have they ruled?

ATTY. HOLLISTER: No. We are in front of Judge Berger on -- (Overlapping) --

THE COURT: Right.

ATTY. HOLLISTER: -- on a --

THE COURT: Why are you in front of Judge Berger? Did

they --

ATTY. HOLLISTER: Because we --

THE COURT: -- rule --

ATTY. HOLLISTER: -- because --

THE COURT: -- already or --

ATTY. HOLLISTER: -- because while we were dealing with this case --

THE COURT: Right.

ATTY. HOLLISTER: -- we applied for preliminary site plan approval.

THE COURT: Okay.

ATTY. HOLLISTER: And the commission denied it citing sewer or a lack of sewers as one --

THE COURT: Is that the --

ATTY. HOLLISTER: -- of the reasons.

THE COURT: -- only thing they used as a ground, or did they say it's too big, or it's not a good idea or --

ATTY. HOLLISTER: Oh, they --

THE COURT: -- the --

ATTY: HOLLISTER: -- they said everything under the --

THE COURT: -- there's -- there's no water coming in or something --

ATTY. HOLLISTER: They, they said everything under the sun. Sewer was one of the reasons for denial. It would take me several hours to summarize their reasons --

THE COURT: So it was --

ATTY. HOLLISTER: -- for denying this.

THE COURT: -- more than the sewers?

ATTY. HOLLISTER: Oh, much more than sewer, yes.

They said fire access and too -- too much of a burden on the town. You know, sort of litany of ani-development reasons. But it's very important that Your Honor understands the -- the judgment that we are asking for. We -- *Landmark* is not ready to start pumping sewage into the public system. We still have to go through the land use process.

The land use process should be what determines the capacity that *Landmark* needs to further its development. One --

THE COURT: Suppose it turns out that the land use process doesn't need 118?

ATTY. HOLLISTER: It may well be. In other words, 118, if it's -- we're not asking that that be allocated in the physical sense. We're asking that be set-aside. Let *Landmark* go through the land, the land use process, and whatever comes out of that, whatever comes out of Judge Berger's courtroom will be a number of units and that will decide --

THE COURT: Maybe the, um --

ATTY. HOLLISTER: -- what the --

THE COURT: -- at that point, the sewer commission will have a role as well again. If they're told by --

ATTY. HOLLISTER: With a --

THE COURT: -- the --

ATTY. HOLLISTER: -- with a connection permit. That's correct.

THE COURT: -- with -- but wouldn't the, um -- in the site plan process, they come -- the -- that board, the zoning board.

ATTY. HOLLISTER: Right.

THE COURT: Comes up with a number.

ATTY. HOLLISTER: Right.

THE COURT: And could they refer it back at that point to the sewer commission to also be a part of that process to reduce the number?

ATTY. HOLLISTER: No.

THE COURT: Or how would that work?

ATTY. HOLLISTER: No. No, no. What the sewer commission -- we're asking that the sewer commission be directed to set=aside a maximum number. We go through the site plan process, and that's -- comes up with a number, which is very likely to be less than 118,000; but at that point, that is the actual allocation that is -- that *Landmark* ends up with.

THE COURT: And sewer commission doesn't have a role at that point at all?

ATTY. HOLLISTER: They have a role in the connection, and they will review the -- essentially, the engineering part to make sure it can be engineered. That we've been through seven years and they haven't raised any issue about engineering, but there is a technical aspect that they will

have jurisdiction over. But then, again, you know as well as I do and everybody from the beginning, this is about planning capacity. This is the -- about what number of units is possible given the infrastructure that's available.

Now one other really important thing, because it's quite a dramatic shift in this case, in his status report, Mr. Zamarka has finally conceded that the commission, the town has ample capacity to grant *Landmark's* 118, to set aside without impacting others. That is a monumental representation with -- where we finally --

THE COURT: Why --

ATTY. HOLLISTER: -- got to in this court.

THE COURT: -- why don't you read the paragraph of that. It's one of the one things that -- I saw it myself, and it's the one thing I didn't print. So maybe we want to --

ATTY. HOLLISTER: Okay. This is Mr. --

THE COURT: -- just --

ATTY. HOLLISTER: -- the, uh -- commission's November 29th status report, page 4: On November 13th, 2018, the commission allocated 7,650 gallons per day to a retail store (which was a Costco) pursuant to its interim procedure. In making that allocation, the commission noted that there was sufficient capacity available to satisfy the plaintiff's full 118,000 gallons per-day request. That's, that's Mr. Zamarka's (Inaudible). So I think we're done with the capacity arguments and we're asking the court to effectuate

the judgment.

Now there's one other aspect I'd like to put on the record. We came here today because the commission has scheduled meetings tomorrow night and on the 18th to create a new set of criteria. A new set.

THE COURT: I didn't understand the other thing, which was if it's of a certain amount or certain size. This was between the -- while the petitions for certiorari are pending or something or other --

ATTY. HOLLISTER: Well --

THE COURT: -- while it -- while it was in that limbo period, the finality of the decision, there was a certain amount of allocation set-aside for everybody or something. I, I didn't understand --

ATTY. HOLLISTER: Well, the --

THE COURT: -- do you know what I'm talking about?

ATTY. HOLLISTER: Uh, the commission, as reflected in the minutes of which the court can take judicial notice, the commission is now receiving other applications filed in 2018, and we -- we went to them several weeks ago and said we would like to be clear that you -- *Landmark* has priority. It will be -- its allocation will be preserved over later-filed applications. They declined to give us that assurance.

That's why -- that's another reason that we're here today. Is our -- our application with -- this is just what they did with *Gateway*. We, we want to make sure that

they're not going to give capacity out the backdoor and undermine our rights that we've achieved with an application filed in 2012. So that's another reason that we ask that the 118,000 --

THE COURT: I'm just reflecting on something that was put into place. A protocol or something --

ATTY. HOLLISTER: Oh, there was --

THE COURT: -- that --

ATTY. HOLLISTER: -- there was an interim procedure.

THE COURT: That's what I'm referring to.

ATTY. HOLLISTER: Oh, okay. Yeah, and that's -- in our, our motion for judgment, that is Exhibit E, and that is -- that is the document in which they stated their expressed disagreement with the appellate court. Essentially, they're saying they're not going to follow the appellate court. They don't -- they don't -- for whatever reason, they don't believe they have an obligation to do that.

They said that that interim procedure would be in place until the supreme court acted on their certification petition, which it denied on October 31st. So, technically -- I guess by their own words, that interim procedure is not no longer existent.

Tomorrow night, on their agenda, they have an item to establish a, uh -- essentially, a protocol to deal with the, with the gate, with -- to deal -- to deal with the *Landmark* application on remand.

We -- as I stand here today, I have no idea what the commission is going to do. What criteria. I know -- I can say that Mr. Zamarka has told them they have to pick a number between 14,000 and 118,000, which we absolutely disagree with. But the commission has made it clear they are going to continue to defy the, the rulings of the courts and do what they think is --

THE COURT: Now that --

ATTY. HOLLISTER: -- correct.

THE COURT: Now you have all of this property there, but your initial filing, your initial approval and your site plan and so forth is for 850 units. Is that right?

ATTY. HOLLISTER: Well, it's a conceptual site plan for 840 units, but I --

THE COURT: Forty?

ATTY. HOLLISTER: -- as I have tried to emphasize, we don't have an engineered site plan for 840 units. We're trying to establish the capacity, the planning capacity of the land so we can go through zoning and the wetlands process where the town will take shots at us and, and reduced -- try to reduce --

THE COURT: Have --

ATTY. HOLLISTER: -- the density.

THE COURT: -- have you or your staff looked into what 840 might require?

ATTY. HOLLISTER: Well, it's -- that's the -- the 118. That's 118,000 --

THE COURT: Because it looks like 118. It doesn't look like there's other numbers there.

ATTY. HOLLISTER: No, no, no. That, that's -- that's very clear from day one.

The 118,000 was based on a formula. I will say the one engineering thing that the parties agreed on throughout this process is that based on one and -- the number one-and-two bedroom units, roughly the same within the 800-plus units, would require 118,000 --

THE COURT: And how's it going to reduce?

ATTY. HOLLISTER: Because when we go through the, the -- the zoning process, there will be wetland's issues, there will be setback from wetland's issues. Attorney Reynolds has already tried to make that one of his lead arguments. There will be road-capacity issues. So we're starting -- we're trying to establish the ceiling. And, and by the way, as it -- there's no risk, and this is the *CMB Capital Appreciation* decision of the appellate court. There's no risk to the town in a conditional set-aside because of Mr. Zamarka -- Mr. Zamarka -- because if Mr. Russo does not get the permits, then the capacity will be returned to the town. That's, that's what a conditional approval means.

So the -- the *CMB Capital* case holds that in this situation, a so-called "dependent" permit, where the permit is dependent on other land-use applications being granted. There's no risk for the town, and the agency, the local agencies are obligated to issue a conditional approval.

That is an additional justification for Your Honor to enter judgment today to effectuate what the appellate court said.

But I'd -- as, as a concluding point, Your Honor, I just really want to emphasize, there was the commission and the intervenors that said in the appellate court: If you -- the appellate court affirmed Judge Cohn, we will be obligated to grant the application. We relied -- that is a judicial admission that we relied on. We could have played it a different way in the appellate court, but we didn't because of what they said, and that is the basis that Your Honor should enter a conditional -- a judgment of conditional set-aside pending preliminary site plan approval today. Thank you.

THE COURT: Okay. I'll let you reply. Why don't you go ahead --

ATTY. HOLLISTER: Thank you.

THE COURT: -- Mr. Zamarka.

ATTY. ZAMARKA: I don't know where to begin, Your Honor.

THE COURT: Why don't we begin with somebody that -- and I think it was you -- because it says right in the status report of plaintiff, you were told by the counsel that has the discretion to pick a number between 14,000 and 18,000. That ain't true. That's just not true, and it's not going to be enforced by this court.

ATTY. ZAMARKA: Your Honor --

THE COURT: Period. And I also heard a little

something about the Chair declared that judges can't force us to put sewers in there. Both are wrong and not going to happen. You lost in the appellate court. You lost --

ATTY. ZAMARKA: Yes, we did.

THE COURT: -- in the supreme court, and we don't appreciate being told that we ain't going to be told what to do, and all I know is in Footnote 2, to the appellate court ruling it says -- the final sentence of Footnote 2: Here, the court's judgment (that's me) so concluded the rights of the parties because it "ordered" that the commission must grant the plaintiff's application.

ATTY. ZAMARKA: That's correct, Your Honor. You did, and you sustained their appeal the first time through.

What that fails to take into account is the second part of this court's decision that -- up on remand, and that is clear that this matter was remanded to the commission. That was upheld by the appellate court. That on remand the commission has to consider an amount that will further but not completely foreclose development of --

THE COURT: Does that mean you can tell --

ATTY. ZAMARKA: -- the project.

THE COURT: -- them that they can pick a number between one, uh -- 14 and 118?

ATTY. ZAMARKA: Well, we don't have to give them everything and we can't give them 14,000. Clearly, 14,000 was an abuse of discretion.

THE COURT: And it's 850 units. How do you get -- if

you can tell me today that you can pick -- that's why I asked Mr. Hollister -- if you can pick a number less than 118 and still accomplish the building of the property, I'd -- I'd consider it.

ATTY. ZAMARKA: Well, that's -- and that's -- that's what they're going to do on the 18th.

THE COURT: I don't think so. Not when the Chairman says that judges can't force us to put sewers in there, and when they're being told you can give them 15,000 now and get away with it.

ATTY. ZAMARKA: Your Honor.

THE COURT: Is there any basis upon which 850 units can be built there with less than 118,000?

ATTY. ZAMARKA: We have no idea.

THE COURT: Why not? When you have an idea, come back --

ATTY. ZAMARKA: Because we're not land use.

THE COURT: -- and see me.

ATTY. ZAMARKA: We're not a land use agency, Your Honor.

THE COURT: Right. And that's --

ATTY. ZAMARKA: Mr. Hollister's pointed that out.

THE COURT: That's why you're going to have to -- it seems to me we're going to have to have some kind of set-aside here until the whole thing is straightened out.

ATTY. ZAMARKA: That's entirely possible. That's entirely possible, but this court remanded it --

THE COURT: Would you accept that?

ATTY. ZAMARKA: You remanded it to the commission, Your Honor.

THE COURT: Yes.

ATTY. ZAMARKA: For them to figure out an amount. Clearly, if we come in at 15,000, knowing 14,434 was an abuse of discretion, that is not something that would be done, that is not something that would be recommended.

THE COURT: Why can't I set -- tentatively set-aside an amount just so it doesn't get used up of 118,000, and let you go ahead with your process?

ATTY. ZAMARKA: Because then you're blowing apart your own decision, Your Honor.

THE COURT: I don't think so.

ATTY. ZAMARKA: You said --

THE COURT: Tentatively. Tentatively. Not committed, but just tentatively.

Then come back to the court and say we've got a different formula. It takes into account 850 units, it takes into account that the property can be done. It, um -- it's scientifically worked out so that it will be viable. I'd accept that.

But until that number comes in here, you have no reason not to put aside 118, until such time as the, um -- as I said in my own decision that -- first, it was none. Then it was 13. Then it was 14. And *Gateway's* getting all this other stuff. And the supreme court -- the appellate court