

1 and supreme court agreed with me, and I'm now faced with
2 what to do.

3 I'd be glad to give you some discretion. They don't
4 want to give any discretion. I'd be glad to give you some
5 discretion, but I want to make sure that if I see good faith
6 here and you come back with a different number from 118,
7 we'll have a hearing on it. We'll put in some evidence, but
8 I just don't see at this point how I can let anything, let
9 -- tentatively let anything less than 118 be on the board.

10 If you want to come back and say: I know now, we know
11 now, we can figure it out so that 140 -- or 840 units are
12 good, and that we'll comply with it, but we've got other
13 evidence that shows a hundred will do, or we've got
14 something that shows that. Put on your evidence.

15 You're standing here telling me: I don't know how --
16 what number they're going to come up with. They may come up
17 13 again, or they may come up with 25 or something like that
18 because we think it will work. Tell me why. If it works,
19 that's fine.

20 ATTY. ZAMARKA: So we're reopening the public hearing?
21 We're reopening the --

22 THE COURT: Well --

23 ATTY. ZAMARKA: -- evidence? We're reopening the --

24 THE COURT: -- if you want to.

25 ATTY. ZAMARKA: -- record?

26 THE COURT: If you want to, you can do that.

27 I told -- my decision was -- the last sentence which

1 said: the board must comply with the applicable sewer
2 statutes, regulations and ordinances. The board should take
3 into account the demands of the plaintiff's sewer project
4 and effect the remaining -- on the remaining capacity.
5 Nevertheless, the board must provide the plaintiffs with
6 sufficient capacity to further the development of their
7 project; and as such, the board may not settle on a figure
8 for capacity that would completely foreclose the development
9 of the plaintiff's project, and I see it coming. I see this
10 board, based upon what the Chairman said, based upon your
11 advice coming with a figure of 25,000 units per day and say
12 that's what we got.

13 I'd rather see not guaranteeing 118. I'd rather see
14 set it aside. No one's going to touch it. No one's going
15 to tell you that that however -- and give the board the
16 discretion to come up with a different number that says all
17 those terms can be met.

18 Yes, we can -- they can do it on less than 118. Yes,
19 they can still have their project. Yes, this works as a
20 number because we know it, and when because we know it comes
21 into court, they can differ with it. They can say that
22 99,000 figure just doesn't work because we've got an
23 engineer that said -- now Mr. Hollister represented to the
24 court that everybody agrees that you need 118 if you're
25 going to have 850 units. I don't know if that's true or
26 not. Do you know if it's true or not?

27 ATTY. ZAMARKA: Based on their representations?

1 THE COURT: Right. It's based on their representation.

2 ATTY. ZAMARKA: Yeah. Yeah.

3 THE COURT: Maybe you disagree. Maybe you've got
4 somebody down there at the sewer board that's got the
5 scientific knowledge to know that 850 units and, um -- with
6 a capacity. Do you -- do you agree that the capacity's
7 there? That the 800 -- the 118,000 won't kill the capacity
8 of the town?

9 ATTY. ZAMARKA: There has never been a question, Your
10 Honor. We have stated from the beginning that we have
11 between 130 -- granted these are six-year old figures by
12 now. Six-and-a-half year old figures. That the town had
13 somewhere 130 and 225,000 gallons per day available excess
14 capacity. For Attorney Hollister to say: Oh, all of a
15 sudden, the scales have lifted from our eyes is a
16 misrepresentation. We have never claimed that there was not
17 capacity potentially for the 118,000.

18 The problem we're looking at here, Your Honor, is the
19 last sentence of your decision. The matter is remanded to
20 the board and is a final decision. We have a final decision
21 that says we don't have to give them everything.

22 THE COURT: How about my --

23 ATTY. ZAMARKA: We have --

24 THE COURT: -- how about my reading of the appellate
25 court decision?

26 ATTY. ZAMARKA: Okay.

27 THE COURT: In Footnote 2, where they read it the other

1 way. I'm bound

2 ATTY. ZAMARKA: No.

3 They said -- by them. They said the -- it is ordered
4 that the commission "must" grant the plaintiff's
5 application. "Must" --

6 ATTY. ZAMARKA: Yes.

7 THE COURT: -- means I have no choice.

8 ATTY. ZAMARKA: You, you --

9 THE COURT: I'd be glad to give you the discretion if I
10 saw it being properly exercised, and if you came back to
11 court and told me a number that works. That's what I
12 wanted. I said you have the discretion, but I'm not going
13 to have zero, 13, 14. We know now that there are 140 -- 840
14 units, and maybe 118 is not right.

15 You've got the capacity. Set it aside. Come up with a
16 number. Come up with a figure. Come back to court and say
17 they're all wet on 118. They can get by with their project
18 at 100 or 99 or 75 or something like that. When you get
19 that number to me -- if you can't agree with 118, you have
20 the discretion to lower it, and you can go back and tell
21 that to plaintiff and the plaintiff can come in and say:
22 sorry, we've got other evidence that goes along with that.

23 ATTY. ZAMARKA: So, so I understand procedurally, Your
24 Honor. We have a final judgment that was upheld by the
25 appellate court.

26 THE COURT: Right.

27 ATTY. ZAMARKA: And now without the benefit of having

1 it opened or set-aside, we're going back and revisiting it?

2 THE COURT: You can -- I -- the specific intent was
3 14's too low. The board retains jurisdiction over whether
4 or not another figure can be used with the understanding
5 that the project must be allowed to succeed.

6 That's how I left it. Remanded it. When it was zero,
7 I remanded it and told you to think it again. When it was
8 13, I told you it was too low, think it again. When it was
9 14, I said it was too low, think it again. You can think it
10 again all you like, and if you had a number that works,
11 which is what I said, that let's the project go forward from
12 your prospective, then the board can be -- you've got all
13 the other boards in the town that can take a look at it and
14 see if you meet it. But you can't just say: we're going to
15 think it out and we're going to come back with 1,700 now, or
16 17,00 or 75,000, no.

17 I think we have to have a figure set-aside so there's
18 no problem with that. Put it on the books. It's not what
19 the court is ordering. It just gets it out of the way. And
20 if you don't like the number, if you don't like 118, go back
21 tomorrow and tell them to come up with a different figure
22 and we'll continue to go through this process of seeing
23 whether or not it's viable. That's what we did three other
24 times. That's what's got to be done here.

25 I see nothing wrong with setting aside 118 so that
26 that's the maximum. You know where you stand. Again, the
27 cases say you have some sort of the discretion in this, but

1 the discretion must be tempered by the fact that they have
2 the right to have something that works, and so far I haven't
3 heard it yet. So that's how I'm going to leave it.

4 Did you want to say something, sir?

5 ATTY. REYNOLDS: Only to support, in general, the
6 position of the Town, but we do believe that this motion is
7 premature and that the agency should be allowed to exercise
8 its discretion before the plaintiffs return to court.

9 THE COURT: You weren't in this case until now?

10 ATTY. REYNOLDS: Uh, we -- I put in an appearance in
11 lieu of Jason --

12 THE COURT: Right. But you weren't here for the three
13 other times --

14 ATTY. REYNOLDS: I, I was not personally here. No,
15 Your Honor.

16 THE COURT: Did you want to say something?

17 ATTY. HOLLISTER: No. I, I just said, we recognize
18 that Mr. Reynolds has taken over for Mr. Westcott, and
19 that's fine.

20 THE COURT: Did you want to say anything about my
21 understanding here of how this case should go?

22 ATTY. HOLLISTER: Well, regard -- regarding whether we
23 have a final judgment, I will just point to Attorney
24 Zamarka's brief in the appellate court where he recognized
25 that the 20 -- your 2016 decision grants the application,
26 quote, in an amount to be determined, unquote. We need --
27 we need the number to have a complete judgment.

1 THE COURT: I can't really tell you that number yet.

2 ATTY. HOLLISTER: Well, Your Honor, I think it -- I
3 take from what -- the colloquy today, and I think it's
4 exactly correct the site plan that's before Judge Berger is
5 based on 840 units. I don't think either Mr. Zamarka or Mr.
6 Reynolds would disagree that going back to day one of this
7 case, June of 2012, there is a letter in the record that
8 says the formula -- and this is an engineering formula that
9 would support a hundred and, uh -- 840 units is 118,000
10 gallons per day. And I think Your Honor is saying exactly
11 what we asked the court to do, which is to ask the -- well,
12 tell the commission to set-aside, preserve that capacity and
13 let the land-use process go. So I'm in complete agreement
14 with --

15 THE COURT: What do you think, though, if I say: okay,
16 I'll set -- I'll order that the agency set aside 118,000
17 gallons per day, but they can go ahead and do their own
18 thing if they want. Just like they did the other times and
19 bring it back to court.

20 In other words, when you asked for 118, I said they
21 don't have to do that. They had to do something. They
22 don't have to that.

23 ATTY. HOLLISTER: Well --

24 THE COURT: That was the first time.

25 The second time they came up with 13. I said that's
26 not good enough. The third time they come up with 14. I
27 says that's not good enough, but you have to come up with a

1 number that works.

2 So now you're asking that the court, based upon what's
3 happened so far, set-aside in a -- like a lockbox the 118.
4 So if the capacity goes away, you're still protected?

5 ATTY. HOLLISTER: Correct.

6 THE COURT: But suppose they want to have their own
7 formula, and they wanted a crack at it again, how can I stop
8 them from doing that?

9 ATTY. HOLLISTER: Well, because, as Your Honor said,
10 the appellate court told you to do that. They said that
11 they would grant it if your -- if the appellate court
12 affirmed your order which is what they did --

13 THE COURT: But how can I stop --

14 ATTY. HOLLISTER: -- so --

15 THE COURT: -- in other words, if I say: okay, fine.
16 If you get another party that comes in and wants to build an
17 apartment house and needs a hundred and -- 200,000, and they
18 want to do it. This way they can tell them, no, because
19 we've got --

20 ATTY. HOLLISTER: Well --

21 THE COURT: -- 118 here, and, and we've got to set it
22 aside.

23 On the other hand, they can have 60 hearings if they
24 want and come up with another figure, at which point you can
25 say that figure -- that's what I envisioned. That they
26 would take a look into the size of the project, take a look
27 at the Gateway, take a look at what they allowed in Gateway,

1 what, um -- the amount of capacity they have in the town and
2 come up with a new figure that would work. That would allow
3 840 units --

4 ATTY. HOLLISTER: Okay. And --

5 THE COURT: -- to be built, and if -- and that's -- so
6 I remanded it again for the third time.

7 Do this math again and come back, and instead they took
8 an appeal, and in the appeal the, the um -- the appellate
9 court said you -- that the understanding was that it must be
10 done, but it seems to me, that I have to protect your
11 interest. You're right on that, but I don't have to shut
12 them off from having a hearing.

13 If they want to have a hearing tomorrow and come up
14 with a different formula and come up with 75,000 and say
15 well it's workable. Our people say something about it.
16 Then you've got this engineer that's going to say, no, and
17 we can have a hearing on that. What's wrong with that?

18 ATTY. HOLLISTER: Well, first, is their engineer said
19 in 2012, and I, I can produce the --

20 THE COURT: Well, that's a different story. If they
21 come back with 75, and you've got an engineer that says
22 118 --

23 ATTY. HOLLISTER: Their --

24 THE COURT: -- why can't he have a hearing, and each
25 one gets on the stand and the court decides who's right?

26 ATTY. HOLLISTER: Well, Your Honor, the -- the first
27 priority is we're asking the court to set-aside 118

1 because --

2 THE COURT: Yeah, you see that's where I think you're
3 on the right track.

4 ATTY. HOLLISTER: Okay.

5 THE COURT: That way -- if everything goes the way you
6 say and it works out, but if it doesn't, and at some point
7 they reduce the number or somebody comes in --

8 ATTY. HOLLISTER: Yeah.

9 THE COURT: -- Costco -- six other Costcos come in and
10 chew up. So then they come back and say: hey, we thought
11 we had the capacity, but we don't anymore. We've given it
12 all away.

13 ATTY. HOLLISTER: Yeah.

14 THE COURT: Then you're protected. Okay?

15 ATTY. HOLLISTER: Yup.

16 THE COURT: But on the other hand, if they in good
17 faith come back, have their hearings, have their meetings --
18 if they want to. They don't have to. They could say:
19 Okay, we agree with you. We're done. Let it go forward
20 through the zoning process. Fine. We'll see what happens
21 there. Or they could say, no, it's our right. We have the
22 discretion. We're going to allow 75.

23 We've got P.E. Smith who will come in and say that,
24 that -- that workable number of 840, you can have 75,000
25 gallons a day, and they want to put him on the stand, and
26 the court will decide whether your man is right or his man
27 is correct.

1 ATTY. HOLLISTER: Okay. Your Honor, my concern with
2 that is, that we have a hard-fought appellate court decision
3 that I think we agree ordered 118 based on 140 units. That,
4 that -- to do anything other than that, order anything other
5 than that at this point would be a -- divergence from the
6 appellate court order.

7 I'm also, frankly, based on five years of being in this
8 court in this case, very concerned that if the court gives
9 them the discretion to go back and pick a number like 75,
10 that puts Mr. Russo unfairly, may I say, in the position of
11 having to come back to this court with experts and engineers
12 and formulas, and we'll be right back in the soup where we
13 were --

14 THE COURT: It's a different thing, though, because
15 what we were arguing mostly over the last time was the
16 capacity and how do you determine capacity and whether or
17 not this case is distinguished from *Gateway* and whether or
18 it's distinguished from --

19 ATTY. HOLLISTER: Yeah.

20 THE COURT: -- the other case --

21 ATTY. HOLLISTER: And, and by --

22 THE COURT: -- the other cases that I cited there. The
23 *Forest Walk* and --

24 ATTY. HOLLISTER: Right.

25 THE COURT: -- things of that nature.

26 ATTY. HOLLISTER: Right. And, and by the way, on that
27 point, Attorney Zamarka just said that the commission's

1 capacity is between 130,000 and 225,000. That number was
2 overruled by Your Honor and by the appellate court, because
3 you found and the appellate court affirmed 358,000 gallons
4 per day available capacity minus whatever Gateway is using.
5 And, oh, by the way, on the record, Gateway's attorney said
6 on November 13th, that they're only using about half of what
7 they were allocated which means that capacity is more like
8 400,000. So I think that was what led Mr. Zamarka to
9 concede that there is ample capacity. Capacity should be
10 off the table.

11 THE COURT: Well, I think -- you see the thing is we're
12 talking about capacity. We're talking about *Forest Walk*,
13 we're talking about whether Gateway is analogous. Those
14 were all the issues that I saw.

15 Now we're at a different stage. Now we are -- you must
16 do the project. There's no question about it. You have to
17 come with up a number to make the project work, and that's
18 affirmed by the appellate court, and certiorari was denied
19 by the supreme court. So we know that it must go through.
20 It must be logical. It must be supported whatever that
21 figure is, but do I have to say now you must build it and
22 you must use 118? I'm not so sure that I do.

23 ATTY. HOLLISTER: No, Your Honor. I, I think you -- at
24 this point, the only way you could comply with the appellate
25 court ruling is to direct the commission to set-aside 118.

26 Now --

27 THE COURT: Yes.

1 ATTY. HOLLISTER: -- let --

2 THE COURT: -- I'm agreeing with you --

3 ATTY. HOLLISTER: -- me -- oh, okay.

4 THE COURT: -- on that.

5 ATTY. HOLLISTER: And let, let me suggest. If Your
6 Honor wants to keep the door opened slightly for the
7 commission, if something comes up that we have -- we don't
8 know about yet or something unforeseen, the commission has
9 -- first of all, they could -- they could file a motion
10 to -- for review in the appellate court of whatever order
11 you might enter today. They can have their meeting tomorrow
12 night and discuss if there's some compelling reason that
13 they should come back to you and challenge your order of
14 118, they -- they have the ability later on in the process
15 to review and --

16 THE COURT: I'm just wondering why -- if I set-aside
17 118, and say that is what's required now under the order of
18 the appellate court --

19 ATTY. HOLLISTER: Right.

20 THE COURT: -- why I have to also say they must use
21 that number, and if they, if they, in they in their august
22 wisdom, want to take another shot at it -- (Overlapping) --

23 ATTY. HOLLISTER: And --

24 THE COURT: -- I can stop --

25 ATTY. HOLLISTER: -- and I think you --

26 THE COURT: -- them from doing that.

27 ATTY. HOLLISTER: -- I think Your Honor could craft an

1 order that orders the set-aside of 118, and leaves it at
2 something like -- I'll just come up with the -- try to come
3 up with the words. If after entering -- after setting aside
4 this capacity, the commission identifies some compelling
5 fact that would counsel against the set-aside, they can come
6 -- they can file a motion in this court for, for a further
7 review, but that -- something along those lines. Then the
8 order is set. Mr. Russo's judgment is effectuated. The
9 commission is not foreclosed forever for all time. I, I
10 think that would be the way to --

11 THE COURT: Well, they could do that. If they go to
12 their meeting tomorrow and they say: okay, we know that
13 the -- that 118 has been set-aside, we have a better way to
14 do it, and we'll get --

15 ATTY. HOLLISTER: I think what I just articulated would
16 give them that opportunity, but I don't --

17 THE COURT: What do you think about that --

18 ATTY. HOLLISTER: -- think that we should --

19 THE COURT: Mr. Zamarka?

20 That doesn't take away your discretion. It only makes
21 sure that, that 118 is locked aside for future development,
22 and if you want to take -- if the commission wants to take
23 the step to say: sorry, we think that's too high a number,
24 and we have a reason to believe that this project can go
25 forward with 75 and we'll show you how to do it, then you
26 can come back to court and the court will listen to you.
27 Maybe I'll agree with you.

1 ATTY. ZAMARKA: I think the -- I think the set-aside of
2 everything they're asking for takes, takes the commission's
3 discretion out of play to begin with.

4 THE COURT: Well, how about if we just say that it is
5 set-aside temporarily, preliminarily, pending how the
6 commission further its business? Is there something wrong
7 there?

8 Because, again, it doesn't take away what the intent of
9 the court was to give you a shot to do what is in your
10 commission's judgment the way to go here. It just stops
11 things at this point from being: okay, we'll throw another
12 number out. We'll throw another number out. We've got the
13 judgment from the appellate court that it was okay to look
14 at Gateway, and Gateway got X-amount. They -- that whole
15 issue is dead now.

16 The whole of issue whether Gateway's comparable, of
17 whether Gateway, um, was a connection problem as opposed to
18 an application. That whole issue is completely gone.

19 ATTY. ZAMARKA: I, I -- I disagree, Your Honor, because
20 that's part of what goes into the mix on remand that you
21 ordered the commission --

22 THE COURT: Mmm-hm. Yeah, but --

23 ATTY. ZAMARKA: -- to take into --

24 THE COURT: -- I'm talking about --

25 ATTY. ZAMARKA: -- account --

26 THE COURT: -- the appellate court, and the appellate
27 court did away with all that business.

1 They did away with the -- the idea that we couldn't
2 look at Gateway. That Gateway wasn't the same type of an
3 application and all that kind of stuff.

4 ATTY. ZAMARKA: That's true.

5 THE COURT: That's through. That's through, and it's
6 through appellate court. They have the right. I still
7 insist that you -- without cutting into your discretion, if
8 you want to, you can come up with a different number that
9 works through the court. I never once said that you
10 couldn't come up with a different number.

11 The only thing that I've been saying three times now is
12 that these numbers don't work, and if you want to come up
13 with a different number, that's okay; but you're going to
14 have to come into court with some kind of proof that this
15 will work on your numbers.

16 ATTY. ZAMARKA: And we have no choice but to take the
17 840 units as the starting point?

18 THE COURT: Yes.

19 ATTY. ZAMARKA: No matter whether that's 50 percent of
20 the Town's capacity or not?

21 THE COURT: Well --

22 ATTY. ZAMARKA: I'm, I'm just --

23 THE COURT: I --

24 ATTY. ZAMARKA: -- I'm just trying to understand, Your
25 Honor.

26 THE COURT: I'm saying that if you want to work it a
27 different way and say that they aren't applying for 850

1 units or not entitled to apply for 850 units, maybe that's a
2 starting point.

3 ATTY. ZAMARKA: If, if he do that, you know what
4 Attorney Hollister is going to say, Your Honor, that's the
5 water and sewer commission acting as a land use agency.

6 THE COURT: Well, why don't you tell your people that
7 850's -- or 840, whatever, is what's on the table and see
8 what they come up with.

9 Isn't there a -- isn't there, uh, someone who has the
10 -- Mr. Kargl. Somebody that's an engineer. Tell him to
11 come up with a number that works that let's the project go
12 forward from a sewer approval, not what happens in the
13 planning & zoning commission. As Mr. -- excuse me -- Mr.
14 Hollister said, there's so many different factors. There's
15 water, there's density, there's runoff, there's, um --
16 whatever the site plan restrictions are. There's tons of
17 them out there, and they just don't include sewer -- or they
18 do include sewer, but that's the only thing we're after now.

19 So if they want to continue -- I just don't see why
20 they're fighting the -- the sewer part of it should be easy.
21 It should be just based upon the capacity and the size of
22 the units being applied for. How could they have less than
23 118? Maybe they can. Maybe a hundred would do it. Who
24 knows, but I don't know yet. That's what I'm after.

25 I'd like to see -- this 118 figure, if I set it aside,
26 is absolutely "not" the final word on this. It just like
27 setting it aside in a lockbox so that if there's another

1 huge development two blocks away that needs the other half
2 of the capacity of the town, you can't then say: well, see
3 we told you. There's no room for -- there's no room for
4 *Landmark* here because we gave it all away.

5 ATTY. ZAMARKA: So then the court's remand order still
6 stands, and the -- and the directions to the commission on
7 remand still stand?

8 THE COURT: Yes. However, in order to get to that
9 point, you have to come up with a figure and it has to work.
10 It may not work. That's going to be the right of you and
11 the plaintiff to decide. If you want to come up -- it's up
12 to you.

13 If you don't want to stick with 118, come up with
14 another number that you think works for the size of the
15 project and the court will consider it.

16 ATTY. ZAMARKA: So when the court said, further but not
17 completely foreclosed, that meant give them everything to
18 make -- give them everything they need to make the
19 project work as is --

20 THE COURT: Yes.

21 ATTY. ZAMARKA: -- no matter what?

22 THE COURT: Yes, to make it work. That doesn't mean
23 that it, um -- that they don't have the discretion. They
24 have the -- and looking at what the appellate court said,
25 based upon what they've done in the *Gateway* case, it has to
26 be: the board may not settle on a figure for capacity that
27 would completely foreclose the development of the

1 plaintiffs' project. So, yes, you have that right. You
2 have the right to say that they're asking for too much, but
3 it also, at the same time, it has to work.

4 So if -- again, if you want -- I, I completely agree
5 with the statement of the plaintiff that the approval of
6 *Landmark's* 2012 application to set-aside 118,000 conditioned
7 on receipt of the preliminary site plan which will determine
8 the actual allocated -- allocation should be the order.

9 However, I think if the commission still wants to go
10 ahead and do less than that, they certainly have the right
11 to do that provided they come back to court and say: change
12 that number and here's what it will be based upon, and then
13 they can, um, object and say that's a -- again, that's a
14 number that doesn't work because we've got proof that it
15 doesn't work, and maybe they -- they say you admitted that
16 it doesn't work other than 118. I don't know where that is,
17 but they'd have to prove it.

18 ATTY. ZAMARKA: How does this work procedurally, Your
19 Honor?

20 THE COURT: Well, I'm going to order that -- as I said,
21 that the application -- that the judgment enter to set-aside
22 118,000 gallons per day conditionally -- conditionally.
23 That's all. Then the -- then the agency can do what it
24 wants.

25 If they want to accept that conditionally and drop the
26 whole matter and let it go ahead through the site plan
27 process, that's one thing. If they don't, and they want to

1 say that that's too high a number and we've got another way
2 of looking at it so that the project can succeed, but this
3 118 figure is too high, then let them come up with a number
4 and have some proof behind it of how it works, and then
5 we'll go forward from there. The option is in your hands.

6 Again, I think it's your discretion. If you feel that
7 that's too high a number, the court can't tell you how to go
8 about your business. But at the same time -- I think
9 throughout all of this runs -- both this court and the
10 appellate court -- that there was another project that got
11 quite a bit of capacity. That there was no difference
12 between the two projects. That the -- that it was okay to
13 admit that evidence and that, therefore, this 14,000 was too
14 low. And it can't be a number between 14 and 118, and it
15 can't be that the judges can't force us to put a sewer in
16 there. I mean that's not true.

17 So I mean that's how I'm going to leave it. Is it --
18 is that clear enough or --

19 ATTY. HOLLISTER: Yes, Your Honor.

20 THE COURT: -- um, is there something more anybody
21 wants to add on this?

22 ATTY. ZAMARKA: You had mentioned that you weren't
23 going to set this aside indefinitely. That it would be for
24 a temporary --

25 THE COURT: Completely --

26 ATTY. ZAMARKA: -- amount of time?

27 THE COURT: -- temporary.

1 ATTY. ZAMARKA: Does that -- does that have a figure
2 attached to it, Your Honor, in terms of how long? I mean
3 your --

4 THE COURT: Well, you've got meetings. Right? You've
5 got a meeting coming up?

6 ATTY. HOLLISTER: The suggestion was until there's a
7 decision on preliminary site plan approval. That, that's
8 the benchmark, which is in front of Judge Berger.

9 THE COURT: If I give them the right, though, to come
10 up with a different figure --

11 ATTY. HOLLISTER: Oh, well, I --

12 THE COURT: -- then, then I think I have to say that
13 it's pending the decision of the board on how --

14 ATTY. HOLLISTER: -- the way --

15 THE COURT: -- to proceed.

16 ATTY. HOLLISTER: -- the way you articulated the order,
17 yes, we would understand if they felt there was a different
18 basis and they came back to you, that could be -- it could
19 be modified, but the -- if they accepted the set-aside
20 period, it would be until we finish the land use process in
21 front of Judge Berger?

22 THE COURT: Yes.

23 ATTY. HOLLISTER: Yes.

24 THE COURT: Does that make it clear?

25 ATTY. ZAMARKA: Yes.

26 THE COURT: All right. Okay. Thank you.

27 (This matter concluded 10:50:55 AM and Court

1 adjourned).

2 * * * * *

3 No: HHD-LNDCV15-6056637 : SUPERIOR COURT

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

6 v. : AT NEW BRITAIN, CONNECTICUT

7 EAST LYME WATER and December 10, 2018
8 SEWER COMMISSION

9
10 C E R T I F I C A T E

11
12 I hereby certify that of the foregoing pages are a true and
13 correct transcription of the audio recording of the
14 above-referenced case, heard in Superior Court, Judicial
15 District of New Britain, New Britain, Connecticut, before the
16 Honorable Henry S. Cohn, JTR, on the 10th day of December 2018.

17
18 Dated this 17th day of December 2018, in New Britain,
19 Connecticut.

20
21
22
23
24 Donna L. Peluso,
25 Court Recording Monitor
26
27



TSH

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

January 8, 2019

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

Re: Proposed Guidelines for § 7-246a Applications

Dear Chair Nickerson and Commission Members:

As you know, we represent Landmark Development. This letter comments on the proposed guidelines for processing applications filed under General Statutes § 7-246a. We have commented on several sections and objected to several others.

First, the reference to the General Statutes in the draft is wrong. We assume the Commission intends to address General Statutes § 7-246a(a)(1), not § 7-246a(1).

We object to the Commission's proposal *per se* for two reasons: (a) § 7-246a(a)(1) is a state statute, which the Commission is not authorized to rewrite or revise with provisions contrary to court decisions; and (b) the Commission has a set of existing Regulations, but does not state any intent whether this § 7-246a(a)(1) proposal will repeal or supersede parts of those Regulations. Thus, at most, the current proposal should be called a "guideline."

Second, the opening paragraph states the intent as being "to ensure that there is adequate capacity for all customers." In fact and in law, the purpose of allocating sewer capacity is to ensure that available capacity is allocated in compliance with priority categories and established procedures, or similar wording. All sewer "customers" do not have equal rights to sewer

capacity. For example, an owner whose land is within the mapped district, who can connect to an installed line or approved extension, and who seeks capacity that is not currently used by or committed to others, has a right to capacity upon application, and a superior right to others who do not meet these criteria. Thus, if the Commission intends its proposal to be binding, it is proceeding illegally and should withdraw its proposal.

If the Commission intends to proceed, there are critical questions. First, does the Commission intend that all applications for any amount of sewer capacity will be required to follow these guidelines? Will the type of "administrative approval" of the Gateway sewer capacity that the Superior Court criticized as inequitable be permitted?

Next, there is no recognition in the proposal that the town sewer system is a public utility, or that capacity allocations will be handled with recognition of this status.

What methodology will the Commission and staff use to determine the town's overall "available" capacity? This is a critical foundation step. For example, average daily flow, not peak flow, should be used, and capacity available should not be calculated on a case-by-case basis.

Next, does the Commission intend to consider the entire 468,000 GPD allocated to the State almost 30 years ago, a substantial part of which has never been used and never will be, to be off-limits to applicants?

With these preliminaries, comments on / objections to individual sections are stated below:

Guidelines / Regulations	Comments / Objections
I. <u>Application</u> . An application, pursuant to General Statutes § 7-246a(1), for determination of adequacy of sewer capacity related to a proposed use of land, shall be submitted to the East Lyme Water and Sewer Commission ("Commission") and shall include all of the following:	No comment.
1. A class A-2 survey of the property to be developed, showing the general layout of the proposed use of land;	Why is an A-2 boundary survey needed for a sewer capacity application?

Guidelines / Regulations	Comments / Objections
2. Proof that the applicant owns the property to be developed, or has the right to develop the property, and	No comment.
3. Documentation supporting the amount of capacity being requested.	No comment.
a. Documentation related to a proposed residential development shall include the number of residential units, the numbers of bedrooms per unit, and the methodology used in calculating the amount of capacity being requested.	No comment.
b. Documentation related to a proposed non-residential or commercial development shall include the methodology used in calculating the amount of capacity being requested, and any special circumstances (i.e. the type of sewage being treated, design specifications, etc.) that would affect the amount of capacity being requested.	No comment.
c. The Commission reserves the right to request from an applicant such other information that it deems necessary.	Objection to the open-ended "as necessary."
II. <u>Duration.</u>	
1. The initial duration of an allocation of sewer capacity shall be 12 months from the expiration of the appeal period of such allocation (the "Initial Allocation Period").	A 12 month duration is untenable. Allocations should be valid for 10 years total, to be consistent with state law on the validity of site plans, <i>see</i> General Statutes § 8-3(i), unless the project does not go forward. It is understood that a sewer applicant must in good faith apply for other necessary land use approvals.

Guidelines / Regulations	Comments / Objections
2. Before the expiration of the Initial Allocation Period, the applicant shall (1) apply for all necessary land use approvals for the proposed use of land, and (2) provide proof of all such applications to the Commission.	A 12 month duration is untenable. Allocations should be valid for 10 years total, to be consistent with state law on the validity of site plans, <i>see</i> General Statutes § 8-3(i), unless the project does not go forward. It is understood that a sewer applicant must in good faith apply for other necessary land use approvals.
3. When the Commission receives proof that the applicant has applied for all necessary land use approvals, as set forth above, the Initial Allocation Period shall be extended for a period not to exceed 18 months from the expiration of the appeal period of the applicant's last land use approval; provided, however, that such period shall be not more than 4 years from the date of the initial allocation. The Commission may extend an allocation of sewer capacity beyond 4 years if it determines, in its sole discretion, that good cause exists.	A 12 month duration is untenable. Allocations should be valid for ten years total, to be consistent with state law on the validity of site plans, <i>see</i> General Statutes § 8-3(i), unless the project does not go forward. It is understood that a sewer applicant must in good faith apply for other necessary land use approvals.
4. If the amount of sewer treatment capacity needed by an applicant decreases during the land use approval process, the applicant shall notify the Commission immediately.	Objection. Should say "shall promptly reduce the allocation received."

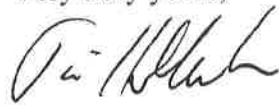
Guidelines / Regulations	Comments / Objections
5. If an applicant fails to apply for all necessary land use approvals as required herein, or fails to provide proof of such applications to the Commission before the expiration of the Initial Allocation Period, the sewer capacity allocated to the applicant shall lapse and be considered null and void. The Commission will notify an applicant in writing when an allocation has lapsed. The failure of the Commission to provide written notice in a timely manner shall not constitute or be construed as a waiver of the Commission's right to declare the lapsed allocation null and void.	Objection. A lapse procedure should only be specified if the 10 year minimum time line is adopted. Also, when does an allocation become "vested"? At preliminary site plan approval?
III. Reservation fee. A non-refundable reservation fee shall be paid to the Commission when an allocation of capacity is made. The fee shall be in the amount of 25% of the sewer benefit assessment of the property for which capacity has been granted, and shall be applied to the sewer benefit assessment.	Objection. No statutory authority for such a fee. Also excessive. In general, fees may only be charged to cover administrative costs incurred by the town.
IV. Public Hearing. The Commission may, in its sole discretion, hold a public hearing on any application. Any such public hearing shall be in accordance with the provisions of General Statutes 8-7d.	Objection to open-ended.
V. Criteria. In making a decision on an application the Commission may consider, without limitation, the following:	Objection to "without limitation." See other preliminary objections.

Guidelines / Regulations	Comments / Objections
Need for service in the proposed development area	Objection. An applicant determines what sewer capacity it needs. The WSC determines eligibility for capacity based on objective factors such as engineering.
Other pending applications and areas in town designated for sewer service	Objection. Future un-named, unquantified, speculative future needs should not be a factor; only documented allocations.
Pollution abatement and public health	Objection. Covered in detail by existing Regulations, and beyond General Statutes 7-246a(a)(1).
Limitations and policies for sewer service	Objection. Covered in detail by existing Regulations, and beyond General Statutes 7-246a(a)(1).
Local and state Plans of Conservation and Development	Objection. Sewer may not be used to control land use.
Effect of inflow and infiltration on available capacity	No comment.
Whether the proposed development area can be serviced by other means	Objection. Does this mean septic? Alternative treatment? The Sewer Commission governs sewers, not septic systems or ATMs.
Whether the proposed development area is within the East Lyme Sewer Service District	Objection. What does "within the East Lyme Sewer Service District" mean? Can Commission move a line to approve or deny an application?
Size of property proposed to be developed	Objection. Acreage is not relevant.
Remaining sewerred and unsewered land area of town	Objection. Irrelevant consideration.
Effect of the allocation on remaining capacity	Objection. See preliminary objections.

Mr. Mark Nickerson, Chair,
and Commission Members
January 8, 2019
Page 7

Guidelines / Regulations	Comments / Objections
Safe design standards of the East Lyme sewer system	Covered by existing Regulations.

Very truly yours,



Timothy S. Hollister

TSH:ekf

c: Bradford C. Kargl
 Mark S. Zamarka, Esq.
 Glenn Russo

EXH. C

EAST LYME WATER & SEWER COMMISSION
PUBLIC HEARING
Tuesday, JANUARY 8th, 2019
MINUTES

The East Lyme Water & Sewer Commission held a Public Hearing on January 8, 2019 at Town Hall, 108 Pennsylvania Avenue, Niantic, Connecticut on the Proposed Regulation Regarding Applications for Determination of Adequacy of Sewer capacity Pursuant to General Statutes 7-246a(1). Chairman Nickerson called the Public Hearing to order at 7:03 PM.

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

ALSO PRESENT: Attorney Mark Zamarka, Town Counsel
Joe Bragaw, Public Works Director
Brad Kargl, Municipal Utility Engineer

ABSENT: Dave Bond

FILED

Jan 15 2019 AT 10:25 AM/PM

Caum Hillm
EAST LYME TOWN CLERK

Public Hearing

- ♦ Proposed Regulation Regarding Applications for Determination of Adequacy of Sewer Capacity Pursuant to General Statutes 7-246a(1)

Chairman Nickerson called the Public Hearing to order at 7:03 PM and led the assembly in the Pledge of Allegiance.

Attorney Zamarka provided a synopsis of this event recalling that they had discussed a draft at their Special meeting on December 14, 2018. The legal basis comes from CGS 7-246a(1) with regard to how the application would be filed and the timeline of the 35 and 65 days as well as an extension of time. He noted that failure to make a decision on an application within the statutory time frame is potentially seen as 'deferred approval' so they would want to adhere to the statutory time frames. He reviewed the regulation (copy attached) stating that under the first section - Application that he would recommend adding that applications for consideration would be looking for over 5,000 gpd or have over 20 residential units - something that they had previously utilized. Under section two - Duration, he noted that there is a 15-day appeal period after the decision. Regarding the non-refundable reservation fee, he recommended that they should not include this as it places an undue burden on staff to figure what it would be while also having to act on other items with regard to the application. The 25% of the sewer benefit assessment further could be problematic. Also, with regard to the applications that are currently in the pipeline, he suggested that it would be prudent to request an extension of time upfront if they intend to hold a Public Hearing on them. Lastly, under Item v. - Criteria, he said that it is a starting point on what they may consider.

Mr. Nickerson then called upon the public for comments.

Attorney Harry Heller, place of business 736 Rte. 32 Uncasville, CT said that he represents Pazz construction who is one of the 'ticket holders' and that he has some proposed revisions to the proposed regulation. He passed out copies to the Commissioners (see copy attached) and proceeded to review the suggestions that he had for changes (see underlined items throughout). Under Duration - Item 3 he suggested that they separate the various scenarios as that would dictate how the time is calculated. Under Item 5 he said that he added language for clarity as the intent of the regulation is to make sure that development occurs and that they start substantial construction. He also added a proposed Item 6 allowing for the capacity to remain for the duration of the project - For example - 200 units may have a five to seven year construction process - so as long as the application is progressing they would want to make sure that the capacity allotment remains. Also, with regard to a Reservation Fee, he suggested that

if the application is approved that the fee be refunded. He said that if they do an application fee instead that they should note how it would be applied.

Mr. Nickerson noted that it seems a good point that they apply phasing to larger projects however a balance would have to be found as some projects start and just never finish.

Mr. Mingo said that regarding the reservation fee that he feels that having staff put in the hours necessary to process the applications that someone has to pay for that time that is spent.

Attorney Heller said that while he has not researched it that he feels that it is contingent on how the other land use agencies act on an application.

Attorney Matthew Ranelli, Shipman & Goodwin, place of business 1 Constitution Plaza, Hartford, CT said that he was standing in for Attorney Hollister who could not attend this evening. He submitted their comments on the proposed regulation (see copy attached) noting that they feel that the current proposal should be called a 'guideline'. Further, the sewer system is a public utility which was not mentioned. He noted and read their general comments with regard to the proposed regulations and then said that they had made comments on the individual sections in outline form and asked that they review them and utilize them during their discussion.

Mr. Nickerson asked if there were other comments.
Hearing none, he called for a motion -

****MOTION (1)**

Mr. Mingo moved to close the Public Hearing.

Mr. DiGiovanna seconded the motion.

Vote: 8 – 0 – 0. Motion passed.

Mr. Nickerson closed this Public Hearing at 7:42 PM and said that they would take a very brief break prior to the commencement of the Special Meeting.

Respectfully submitted,

Karen Zmitruk,

Recording Secretary

(Items 1 - W & S Proposed, 2 - Attorney Heller comments & 3 - Attorney Ranelli comments attached)

APPLICATIONS FOR DETERMINATION OF ADEQUACY OF
SEWER CAPACITY PURSUANT TO GENERAL STATUTES §7-246a(1)

Sewage treatment for the Town of East Lyme is limited. Pursuant to an agreement with the City of New London and Town of Waterford, East Lyme is currently entitled to a maximum of 1.5 million gallons per day of sewer treatment capacity at the New London Regional Water Pollution Control Facility. In order to ensure that there is adequate capacity for all customers, the Commission adopts the following regulation for applications for sewer treatment capacity pursuant to General Statutes §7-246a(1).

- I. Application. An application, pursuant to General Statutes §7-246a(1), for determination of adequacy of sewer capacity related to a proposed use of land, shall be submitted to the East Lyme Water and Sewer Commission ("Commission") and shall include all of the following:
1. A class A-2 survey of the property to be developed, showing the general layout of the proposed use of land;
 2. Proof that the applicant owns the property to be developed, or has the right to develop the property, and
 3. Documentation supporting the amount of capacity being requested.
 - a. Documentation related to a proposed residential development shall include the number of residential units, the numbers of bedrooms per unit, and the methodology used in calculating the amount of capacity being requested.
 - b. Documentation related to a proposed non-residential or commercial development shall include the methodology used in calculating the amount of capacity being requested, and any special circumstances (i.e. the type of sewage being treated, design specifications, etc.) that would affect the amount of capacity being requested.
 - c. The Commission reserves the right to request from an applicant such other information that it deems necessary.

PHI ^{Wes} Proposed Regulation Wes 1/2/19 ^{Salem}

II. Duration.

1. The initial duration of an allocation of sewer capacity shall be 12 months from the expiration of the appeal period of such allocation (the "Initial Allocation Period").
2. Before the expiration of the Initial Allocation Period, the applicant shall (1) apply for all necessary land use approvals for the proposed use of land, and (2) provide proof of all such applications to the Commission.
3. When the Commission receives proof that the applicant has applied for all necessary land use approvals, as set forth above, the Initial Allocation Period shall be extended for a period not to exceed 18 months from the expiration of the appeal period of the applicant's last land use approval; provided, however, that such period shall be not more than 4 years from the date of the initial allocation. The Commission may extend an allocation of sewer capacity beyond 4 years if it determines, in its sole discretion, that good cause exists.
4. If the amount of sewer treatment capacity needed by an applicant decreases during the land use approval process, the applicant shall notify the Commission immediately.
5. If an applicant fails to apply for all necessary land use approvals as required herein, or fails to provide proof of such applications to the Commission before the expiration of the Initial Allocation Period, the sewer capacity allocated to the applicant shall lapse and be considered null and void. The Commission will notify an applicant in writing when an allocation has lapsed. The failure of the Commission to provide written notice in a timely manner shall not constitute or be construed as a waiver of the Commission's right to declare the lapsed allocation null and void.

III. Reservation fee. A non-refundable reservation fee shall be paid to the Commission when an allocation of capacity is made. The fee shall be in the amount of 25% of the sewer benefit assessment of the property for which capacity has been granted, and shall be applied to the sewer benefit assessment.

IV. Public Hearing. The Commission may, in its sole discretion, hold a public hearing on any application. Any such public hearing shall be in accordance with the provisions of General Statutes 8-7d.

V. Criteria. In making a decision on an application the Commission may consider, without limitation, the following:

Need for service in the proposed development area

Other pending applications and areas in town designated for sewer service

Pollution abatement and public health

Limitations and policies for sewer service

Local and state Plans of Conservation and Development

Effect of inflow and infiltration on available capacity

Whether the proposed development area can be serviced by other means

Whether the proposed development area is within the East Lyme Sewer Service District

Size of property proposed to be developed

Remaining sewerred and unsewered land area of town

Effect of the allocation on remaining capacity

Safe design standards of the East Lyme sewer system