MEMORANDUM

TO: Town Plan & Zoning Commission

FROM: Community Development Staff

DATE: March 17, 2023

RE: 51 Krieger Lane Site Plan Review (Set-Aside Application)
CONTINUED from February 21, 2023 Public Hearing to March 21, 2023

On February 21, 2023, the Town Plan and Zoning Commission (TPZ) opened the public hearing for a proposed Site Plan Approval under CGS 8-30g. Per Connecticut General Statues (CGA) 8-7d, the TPZ has 65 days from the receipt of the application (November 15, 2022) to either approve, modify and approve, or deny the application. An initial extension was issued to February 21, 2023, and a second extension was issued to March 21, 203, using 62 of the allotted 65 days for extensions.

During the February 21st public hearing, the TPZ requested further information from the Town Attorney. The attorney has responded to the information requested from the TPZ and Community Development staff in the attached letter, dated March 14, 2023. This letter includes information regarding a second Site Plan application filed for the site under CGS 8-30g for an "assisted" affordable housing project, received February 21, 2023. The "assisted" project will be calendared for public hearing on April 18, 2023.

At a Special Meeting of the Architectural and Site Design Review Committee (ASDRC) on March 16, 2023, the committee conducted a second design review, including review of façade and planting revisions recommended at their February 21, 2023 meeting. As a result, the committee forwards a favorable recommendation to the TPZ, with the following design guidance:

1. Introduce light shelves to all windows on the south elevation of the building.
2. Substitute a subtly contrasting gray tone panel in place of the highly contrasting dark panels presented.
3. Substitute the proposed beech trees proposed for the corners of the building with Little Giant arborvitae.
4. Convert the three parallel parking spaces on the north side of the lot into a landscaped area.
5. Substitute the wild flower mix proposed on the east lot line with an evergreen ground cover, such as blue rug juniper or with grass lawn.

The ASDRC made further comments for the consideration of the TPZ, including:

- In the professional opinion of the architects and landscape architects of the Committee, the recommended modifications to this application will not have a substantial adverse impact on the viability of the affordable housing development or the degree of affordability of the affordable dwelling units in this set-aside affordable housing development.
- The ASDRC recommends that the applicant return to the committee to confirm adherence to all design related conditions of approval set by the TPZ in a Site plan approval.
- The ASDRC strongly recognizes that the proposed design is appropriate for this location and context only and is not reflective of the architectural character that would normally be positively recommended on other sites or locations in Glastonbury.

The Motion passed [5-1-0] with one abstention from Mr. Branse. Mr. Flinchum was present as a Zoom participant but unable to join the discussion or the vote due to technical difficulties.

Attachments:

Town Attorney Letter, dated March 14, 2023
Updated Applicant Materials (including design reviewed by ASDRC)

HALLORAN SAGE

MEMORANDUM

To: Glastonbury Town Planning & Zoning Commission
From: Halloran Sage
Re: Proposed Affordable Housing Application on Krieger Lane
Date: March 14, 2023

I. OVERVIEW

At the public hearing of February 21, the Commission requested that our office provide supplemental briefing of the issues addressed in our letter dated February 6, 2023. Commission staff also requested the applicant provide additional information in furtherance of reviewing the second project application. At the public hearing we provided an analysis of three (3) Superior Court cases addressing the industrial zone exemption in Conn. Gen. Stat. § 8-30g, *Jordan Properties, LLC v. Old Saybrook Zoning Comm'n*, 2003 WL 22708952 (Tanzer, J., Conn. Super. Ct. Oct. 31, 2003); *Baker Residential, L.P. v. Berlin Plan. & Zoning Comm'n*, 2008 WL 4378684 (Cohn, J., Conn. Super. Ct. Sept. 10, 2008); and *Garden Homes Mgmt. Corp. v. Plan. & Zoning Comm'n of Town of Oxford*, No. 2009 WL 4282204 (Pickard, J., Conn. Super. Ct. Nov. 3, 2009). In response to Attorney Alter's accusation that we "cherry picked" the quotations, we have attached the full text of all three decisions to this memorandum so that you can see that they fully support the advice we provided in our letter.

Additional research has revealed two more superior court cases addressing the industrial zone exemption, including one of which was affirmed by the Appellate Court. The opinion of each case is also attached to this memorandum. In *Sixty Five Marsh Hill Rd., LLC v. Orange Plan & Zoning Comm'n*, 2019 WL 2096651 (Berger, J., Conn. Super. Ct. Feb. 19, 2019), the Superior Court held that the industrial zone exemption applied to a light industrial zone even when residential uses were permitted in the light industrial zone via an overlay. The applicant proposed a mixed commercial/affordable housing development in light industrial zone. The town's transit-oriented design district ("TODD") overlay permitted residential developments in the light industrial zone, provided the application complied with the overlay criteria. The plaintiff argued that the affordable housing industrial zone exemption did not apply because the commission's regulations provided for the TODD as an overlay district to the light industrial zone. A year prior, the commission granted a zone change from light industrial to the TODD that allowed a 200-unit residential facility to be constructed on an adjoining parcel. The court rejected the plaintiff's argument holding: "the regulations expressly forbid residential uses in the LI-2 zone, the property is in the LI-2 zone and the plaintiff did not apply for a zone change to the TODD zone." *Id.* at 7.

In *Jag Cap. Drive, LLC v. E. Lyme Zoning Comm'n*, 2014 WL 7714338 (Chon, J., Conn. Super. Ct. Dec. 23, 2014), *aff'd*, 168 Conn. App. 655 (2016) the commission attempted to use the industrial zone exemption to justify its denial of an affordable housing application in its light industrial zone. The court held that the commission failed to establish compliance with the second element of the industrial zone exemption, that the zone does not permit residential use, when East

Lyme's zoning regulations allowed convalescent homes by special permit in the light industrial zone. The Court determined that a convalescent home is a "residential use" for purposes of the industrial zone exemption. *Id.* at *5.

You will see that plain language of the statute and the analysis by the Superior Court judges in each of those five decisions support our opinion to you. Each judge analyzed the permitted uses in the town's "industrial" zone, and then compared those uses to those in the zone where the affordable housing development was proposed. That is precisely the approach that we took and, as noted by Attorney Hope, Glastonbury's Planned Industrial Zone and Planned Commerce Zone differ in only a single use category. It is for that reason that we concluded that the Planned Commerce Zone is a zone that is "zoned for industrial use" and is thus not eligible for set-aside affordable housing development. The fact that existing dwellings are permitted does not change the fact the no new residential use is permitted in this zone. Connecticut law requires that any preexisting residential dwelling in an industrial zone be treated as a lawful nonconforming use. Please note that 8-30g does not state that the zone must include "overwhelmingly industrial uses" or "exclusively industrial uses" or "must contain large numbers of existing industrial uses." It simply says that the zone must be "zoned for industrial use." The Planned Commerce Zone is such a zone.

II. ANALYSIS OF LEGISLATIVE HISTORY REGARDING PUBLIC 95-280

In order to assist the Commission, we have attached relevant portions of the legislative history of Public Act 95-280, § 1 which added the industrial zone exemption to Conn. Gen. Stat. § 8-30g in 1995. The legislative history of P.A. 95-280 does not specifically describe the applicability of the industrial zone exemption to an industrial zone with nonconforming residential uses already present therein. However, the legislative history does provide testimony supporting the underlying policy for prohibiting affordable housing applications in industrial zones.

- Representative Fritz testified that towns have a strong economic interest in prohibiting residential uses in the industrial zone and also noted safety concerns arising from residences being located in close proximity to industrial uses. *See* 38, H.R. Proc, Pt. 16, 1995 Sess., p. 259-260, "[t]his is a very important amendment....What this would do is to guarantee or make sure that industrial land or industrial zone which is a very high priority in terms of a tax base would not be turned into residential. Also, it is important to note, that industrial zone...is not the proper place to put affordable housing. It's often an areas of contaminants, it's often an area of very busy traffic, there's an issue of public safety. Madam Speaker, I would suggest that this amendment for legislative intent is...very necessary in the case presently pending."

- Representative Simmons commented that the public act provides flexibility for towns to maintain existing industrial zones while allowing the town to permit residential uses via a zone change, if desired. *See* 38, H.R. Proc, Pt. 16, 1995 Sess., p. 262, " I understand [P.A. 95-280] would protect properties that are zoned industrial, but which at the same time would allow a municipality to convert that zoning if the municipality so decided."

- Representative Nardello suggested that permitting residential uses in an industrial zone may be inconsistent with a town's comprehensive plan of development. *See* 38, H.R. Proc, Pt. 16, 1995 Sess., p. 266, "I rise in support of this amendment. I think it' s very important that when a town plans, has a longstanding plan of development which includes industrial use...that industrial land be allowed to stay as such, and they not be forced to change it to a residential zone."

- Representative Flaherty made clear that the purpose of the industrial zone exemption was to prohibit applicants from proposing affordable housing in zones that do not permit residential uses. *See* 38, H.R. Proc, Pt. 16, 1995 Sess., p. 5 "[Public Act] does not allow for- profit developers to use the Act when making application for a zone change from an industrial zone that does not permit residential use."

- Representative Dimeo explained that sensitive residential uses are incompatible with heavy industrial uses. *See* 38, H.R. Proc, Pt. 16, 1995 Sess., p. 263-264, "[y]ou would have to locate these in such an area that is somewhat remote from existing residential areas so that they would not be disrupted by the activities that would take place in an industrial park where many of these activities go on for a twenty-four hour a day basis with traffic being one of the objectionable. But let me say that traffic is used more often than it should be as a negative. But the type of traffic is important and we're talking about heavy truck traffic. We're talking about instances of development of industrial parks where in some cases the uses of the land are not conducive....Let's also consider that in the development of these industrial parks we are now loosing [sic] that industrial land. Certainly, why, we must ask ourselves, can we not find suitable residential properties in which we should be building these residential facilities, that's where they should be located."

III. THE APPLICANT HAS NOT DEMONSTRATED THAT IT IS PROPOSING "ASSISTED HOUSING"

The applicant argues that if the proposals in its second application received February 21, 2023 constitutes "assisted housing," as defined in Conn. Gen. Stats. § 8-30g(a)(3), the industrial exemption does not apply. We agree. However, we have not seen evidence presented that this application qualifies as assisted housing. "Assisted housing" is defined as:

> housing which is receiving, or will receive, financial assistance under any governmental program for the construction or substantial rehabilitation of low- and moderate-income housing, and any housing occupied by persons receiving rental assistance under chapter 319uu or Section 1437f of Title 42 of the United States Code;

The applicant indicates that it has requested financial assistance from the Connecticut Department of Housing. However, the response from that Department states that "[p]lease be aware that this is not a financial commitment at this time." That statement proves that at this point in time the

application does not involve housing that "is receiving, or will receive" financial assistance from the Department. Any such financial assistance is purely speculative at this time.

The applicant suggests that the Commission approve the application subject to a condition that such financial assistance be obtained. That is like asking a zoning commission to approve a use that is not allowed in the zone subject on the condition that the zoning regulation be amended in the future to allow that use. The zone change comes first, and then the use application. This applicant can seek a zone change to allow affordable housing in the Planned Commerce Zone. Such a request would seek a legislative decision from the Commission on which we do not make any recommendation or comment.

The fact is that, as of this date, the Connecticut Department of Housing has not approved any financial assistance for the subject development and there is no evidence demonstrating that such financial assistance is reasonably likely to occur in the future. To disregard the industrial zone exemption absent such evidence would deviate from the general rule that an application cannot be approved contingent on action by some other public agency unless that action is reasonably likely to occur. The Supreme Court in *Gerlt v. Plan. & Zoning Comm'n of Town of S. Windsor*, 290 Conn. 313 (2009) reiterated such rule when it determined that a commission's unconditional approval of a site plan application was valid because substantial evidence supported the fact that the Town was reasonably likely to grant easements which were an integral part of the applicant's site plan application. In clarifying the appropriate standard of judicial review, the court explained "[i]t is clear that, when an approval is unconditional, the factual assumptions on which the approval is premised, including the reasonable probability of a required action by another agency, must be supported by substantial evidence in the record at the time of the approval. When an approval will not be operative until a specific action occurs, however, there is no need to establish on the record that the action probably will occur because there is no risk to the public interest if the action does not occur." *Id.* at 326.

In this case, the applicant is requesting the commission approve a zoning application for a use that is only lawful in the subject zone if the CT Department of Housing (or some other government agency) approves grant money for the project. There is no evidence that such grants will be approved.

IV. THE COMMISSION CANNOT APPROVE THE APPLICATION EVEN IF IT IS COVERED BY THE INDUSTRIAL ZONE EXEMPTION.

Attorney Alter also argued that, even if the exemption applied, the Commission could still approve the application filed by his client.[1] He did not cite and legal authority for that proposition and we cannot find support for that position either. A zoning commission is not authorized to permit a use not authorized under zoning law simply because its members may think it is good idea. Conn. Gen. Stat. § 8-2i, Inclusionary Zoning, does authorize local zoning commissions to "by regulation . . . implement inclusionary zoning regulations, requirements, or conditions." However, Glastonbury has not adopted such regulations, and our predecessor Town Attorney (Shipman & Goodwin) issued a legal opinion to the effect that the Town could not implement

[1] Attorney Alter also questioned the procedure by which our legal opinion was requested. As noted at the public hearing, the request originated with the Town Manager, as is typical.

inclusionary zoning requirements in the absence of such a regulation. We will not revisit that legal opinion. New residential uses are not permitted in the Planned Commerce Zone and we do not see how the Commission could ignore that and approve the pending application.

Zoning regulations must be applied uniformly. *See* Conn. Gen. Stat. § 8-2. The uniformity requirement applies unless a statute or caselaw states otherwise. *See MacKenzie v. Plan. & Zoning Comm'n of Town of Monroe*, 146 Conn. App. 406, 426 (2013) "[n]o administrative or regulatory body can modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statute specifically grants it that power."

In the context of affordable housing applications, Conn. Gen. Stat. § 8-30g simply shifts the burden of proof from the applicant to the commission. If the property is an industrial zone, does not allow for residential uses, and is not an application for assisted housing, the commission has satisfied its burden to deny the application. There is no case suggesting a commission can ignore the industrial zone exemption and permit a set-aside affordable housing application within an industrial zone that does not permit residential uses. In another context where there is an affordable housing application proposed in a nonindustrial zone, the commission has the burden of demonstrating a public health/safety concern in order to deny the application. In such a case, noncompliance with zoning regulations by itself would not serve as a basis for denial unless the commission demonstrates that enforcement of that particular regulation is necessary to address a legitimate public health and safety issue. *See Wisniowski v. Plan. Comm'n of Town of Berlin*, 37 Conn. App. 303, 317-318 (1995) "[i]nstead of simply questioning whether the application complies with... regulations...under § 8–30g, the commission considers the rationale behind the regulations to determine whether the regulations are necessary to protect substantial public interests in health, safety or other matters."

Conn. Gen. Stat. § 8-30g has a limited application of changing the standard of review when it denies affordable housing applications. When the applicable standard relates to the public health and safety prong of the statute, it prohibits the commission from denying an affordable housing application for noncompliance with regulations that do not directly implicate any public health and safety matter. But when the applicable standard relates to an application that does not propose assisted housing in a location zoned for industrial uses but not residential uses, the statute does not authorize it to ignore those regulations. A commission that ignores the industrial zone exemption and approves a set-aside application in an industrial zone is at serious risk of a court reversing its decision.

V. THE DESIGNATION OF AN AFFORDABLE HOUSING APPLICATION AS A SET-ASIDE DEVELOPMENT OR ASSISTED HOUSING IS RELEVANT FOR THE LIMITED PURPOSE OF CONSIDERING THE APPLICABILITY OF THE INDUSTRIAL ZONE EXEMPTION.

The rules governing appeals for set-aside and assisted living applications are generally the same. The relevant statutory provisions refer to set-aside and assisted living applications collectively as "affordable housing developments." *See* Conn. Gen. Stat. § 8-30g(a)(1) defining "affordable housing applications" as "a proposed housing development which is (A) assisted housing, *or* (B) a set-aside development." Similarly, affordable housing applications are defined

as "any application made to a commission in connection with an *affordable housing development*...."

The statute provides a general rule governing affordable housing application appeals, "any person whose affordable housing application is denied, or is approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development or the degree of affordability of the affordable dwelling units in a set-aside development, may appeal such decision pursuant to the procedures of this section." Conn. Gen. Stat. § 8-30g(f). The statute governs the appeals procedures for affordable housing application appeals including the proper method of serving the commission, the timeframe by which appeals need to be commenced, the burden of proof, and special authority of remand to consider alternatives that would address legitimate public health and safety concerns.

The statute imposes the burden of proof to the commission in any appeal arising under Conn. Gen. Stat. § 8-30g. Specifically, it provides that, "the burden shall be on the commission to prove, based upon the evidence in the record...that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record." Conn. Gen. Stat. § 8-30g(g). This rule shifts the burden of proof, which in traditional land use appeals rests on the plaintiff to demonstrate the commission's decision was illegal.

The statute provides two ways the commission may satisfy its burden of proof. The first applies uniformly to denials of set-aside and assisted housing applications and states that the commission's decision will not be disturbed if it can establish that:

> (A) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider;
>
> (B) such public interests clearly outweigh the need for affordable housing; *and*
>
> (C) such public interests cannot be protected by reasonable changes to the affordable housing development. Conn. Gen. Stat. § 8-30g(g).

The second one pertains to property zoned for industrial uses and applies only to set-aside affordable housing applications. In order to sustain its burden under the second test, a commission must demonstrate that "(A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses; and (B) the development is not assisted housing." Conn. Gen. Stat. § 8-30g(g). (emphasis added).

The Superior Court in *Jag Cap. Drive, LLC v. E. Lyme Zoning Comm'n*, 2014 WL 7714338 (Conn. Super. Ct. Dec. 23, 2014), *aff'd*, 168 Conn. App. 655 (2016) summarized that section as requiring that "a town must prove three things to apply the industrial zone exception as follows: (1) that the area is zoned for industrial use, (2) the area does not permit residential use, and (3) that the proposal is not for assisted housing." *Id.* at *5. It appears the application before the commission meets all three elements, the commission should therefore apply the exemption.

ATTACHMENTS

2003 WL 22708952
Only the Westlaw citation is currently available.

Superior Court of Connecticut,
Judicial District of New Britain.

JORDAN PROPERTIES, LLC et al.,
v.
OLD SAYBROOK ZONING COMMISSION.

No. CV0105088915.
|
Oct. 31, 2003.

Attorneys and Law Firms

Berchem, Moses & Devlin PC, Milford, for Jordan Properties LLC and Jandim Realty Co Inc.

Branse & Willis LLC, Glastonbury, for Old Saybrook Zoning Commission.

Opinion

TANZER, J.

***1** The plaintiffs, Jordan Properties, LLC (Jordan) and Jandim Realty Co., Inc. (Jandim), appeal from the decision of the defendant, Old Saybrook Zoning Commission (commission), approving an affordable housing application but conditioning such approval on the satisfaction of sixteen conditions. The plaintiffs also appeal from the commission's subsequent denial of an amended application, submitted in response to the sixteen conditions.

On September 18, 2000, Jordan applied to the commission for a Certificate of Zoning Compliance and for approval of a site plan in conjunction with the proposed construction of a multi-family housing development to be known as "Saybrook Commons." ("Application") Saybrook Commons was proposed to consist of 216 units to be located on an 11.97 acre parcel of land situated on North Main Street, Old Saybrook, Connecticut and owned by the plaintiff, Jandim. [1]

Prior to opening the matter for public comment, the commission held hearings on the site plan application on October 2, 2000, October 16, 2000 and November 6, 2000. The commission subsequently held public hearings on the application on November 13, 2000 and November 20, 2000. On December 4, 2000, the commission voted to approve the Application but limited their approval by imposing sixteen conditions. [2] Notice of the commission's decision was duly published in the *Hartford Courant* on December 12, 2000.

On December 26, 2000, Jordan submitted an amended application pursuant to General Statutes § 8-30g(d), now subsection (h). This amended application modified several aspects of the original application by incorporating several of the sixteen conditions articulated by the commission. The commission held public hearings on the amended application on January 16, 2001, January 22, 2001 and February 7, 2001. On February 7, 2001, at the close of the public hearings, the commission upheld its prior determination, essentially affirming each of the conditions with which the plaintiffs had not already. Notice of this decision was duly published in the *Hartford Courant* on February 16, 2001.

On February 28, 2001, the plaintiffs appealed from both the commission's December 4, 2000 denial of the original Application and its February 7, 2001 denial of the amended application. On appeal, the plaintiffs challenge ten of the sixteen conditions. [3] The plaintiffs allege that the ten conditions have a substantial adverse impact on both the viability of Saybrook Commons as an affordable housing development and the degree of affordability of the dwelling units, in violation of § 8-30g. The plaintiffs seek an order sustaining their appeal and directing the commission to set aside the ten conditions or, in the alternative, an order directing the commission to grant the amended application.

JURISDICTION

General Statutes § 8-30g(c), now subsection (g), establishes the appeals procedure for affordable housing applications. Section 8-30g(a)(2) defines an affordable housing application as "any application made to a commission in connection with an affordable housing development by a person who proposes to develop such affordable housing." The Application for site plan approval and the amended application for site plan approval satisfy the statutory definition of an affordable housing application, the provisions of § 8-30g govern the present appeal. CITE HERE

AGGRIEVEMENT

***2** "[P]leading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an administrative appeal." (Internal quotation marks omitted.) *Harris v. Zoning Commission,* 259 Conn. 402, 409, 788 A.2d 1239 (2002). "A person does not become aggrieved until the zoning authority has acted, and the question of aggrievement is a jurisdictional one for the court ... To be entitled to an appeal, the plaintiff [s][are] required to allege and prove that [they are] aggrieved by the decision of the commission ... The fundamental test by which the status of aggrievement ... is determined encompasses a well-settled twofold determination. First, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision ... Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected." (Citations omitted; internal quotation marks omitted.) *Quarry Knoll II Corp. v. Planning & Zoning Commission,* 256 Conn. 674, 702, 780 A.2d 1 (2001). "Aggrievement is an issue of fact ... and credibility is for the trier of the facts ... Conclusions are not erroneous unless they violate law, logic or reason or are inconsistent with the subordinate facts." (Internal quotation marks omitted.) *Id.,* at 703.

The owners of property that is the subject of an application may prove aggrievement by testimony at the time of trial; *Winchester Woods Associates v. Planning & Zoning Commission,* 219 Conn. 303, 308, 592 A.2d 953 (1991); or "by the production of the original documents or certified copies from the record." (Internal quotation marks omitted.) *Quarry Knoll II Corp. v. Planning & Zoning Commission, supra,* 256 Conn. at 703.

Jandim alleges that it "is the owner of certain undeveloped real property situated on North Main Street in the Town of Old Saybrook"; and that it is aggrieved by the decision because the property it owns is the subject of the application. At the hearing, held on October 1, 2002, Jandim introduced two warranty deeds demonstrating, to the court's satisfaction, that it owns the subject premises. Jandim has successfully demonstrated a specific, personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole to support a finding of aggrievement.

"The interest which supports aggrievement need not necessarily be an ownership interest in real property." R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice 2 Ed. (1999) 32.5, p. 538. A contract purchaser of the property that is the subject of the application possesses an interest tantamount to ownership and, thus, has standing to appeal a decision on the application. See *Shapero v. Zoning Board,* 192 Conn. 367, 376-77, 472 A.2d 345 (1984); see also *R & R Pool & Home, Inc. v. Zoning Board of Appeals,* 43 Conn.App. 563, 569-70, 684 A.2d 1207 (1996), rev'd on other grounds 257 Conn. 456, 778 A.2d 61.

***3** Jordan alleges that it "has entered into an agreement with Jandim Realty whereby Jordan Properties has a contract to purchase the premises;" and that it is aggrieved by the commission's decision both because it is the contract purchaser of the subject premises and the applicant for site plan approval. In addition to being the applicant, Jordan, at the hearing, held on October 1, 2002, introduced a contract to purchase the premises demonstrating, to the court's satisfaction, that at all relevant times it was a valid contract purchaser of the premises. Jordan has successfully demonstrated a specific, personal and legal interest in the subject matter of the decision, to support a finding of aggrievement.

In addition to demonstrating their specific personal and legal interests in the subject matter of the decision, the plaintiffs are also required to demonstrate that they have been injured by the decision. "Any person whose affordable housing application is denied or is approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development or the degree of affordability of the affordable dwelling units in a set-aside development, may appeal such decision pursuant to the procedures of this section." Section 8-30g(f)

The plaintiffs have sufficiently demonstrated a possibility that the conditions imposed had a substantial adverse impact on the viability of the affordable housing development and on the degree of affordability of the affordable dwelling units. At trial, the plaintiffs introduced expert testimony as to the nature and extent of the adverse financial impact of the conditions on the project. This evidence included a "pro

forma" analyzing the construction costs of implementing the sixteen conditions and projecting profit returns in view of these added costs. The pro forma and the expert testimony adduced at the hearing demonstrate, to the court's satisfaction, that the plaintiffs are aggrieved because the conditions have a substantial adverse impact on the viability of the affordable housing development.

It is the conclusion of this court, therefore, that the plaintiffs have satisfactorily demonstrated aggrievement.

TIMELINESS AND SERVICE OF PROCESS

The commission's decision denying the plaintiffs' original application was published on December 12, 2000. The plaintiffs then filed their amended application on December 26, 2000. The date of publication of the decision denying the amended application was February 16, 2001. The plaintiffs commenced their appeal on March 1, 2001, by service of process upon the town clerk of Old Saybrook and the chairman of the commission. The plaintiffs filed a timely appeal upon the proper parties. [4]

SCOPE OF JUDICIAL REVIEW

The scope of judicial review of a planning and zoning commission's decision on an affordable housing application is set forth at § 8-30g(g), which provides that: "Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1)(A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development, *or* (2)(A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses, and (B) the development is not assisted housing, as defined in subsection (a) of this section. If the commission dos not satisfy the burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it." (Emphasis added.) [5]

***4** This provision reveals two different burdens of proof for appeals brought pursuant thereto. Subpart (1) applies to traditional affordable housing appeals and subpart (2) applies to affordable housing appeals that seek to locate housing in an area zoned for industrial use. Under both alternatives, the burden is on the commission first to cite the reasons for their decision; JPI: and to demonstrate that the "reasons cited for such decision are supported by sufficient evidence in the record." See § 8-30g(g). Second, "[t]he commission *shall also have the burden to prove* " one of two things: if it is a traditional affordable housing appeal, the commission must satisfy the three-pronged test set forth in parts (1)(A)(B) and (C). If the application seeks to place housing in an area zoned for industrial use, the commission must only satisfy the two-pronged test set forth in parts (2)(A) and (B).

In the present case, if the commission establishes the applicability of the industrial zone exemption, it must only show that the reasons it cited are supported by sufficient record evidence. If, however, the industrial zone exemption does not apply, the commission must satisfy the heightened burden of proof set forth in part (1) of the statute.

As the industrial zone exemption is determinative of the commission's burden of proof and the scope of this court's review, its applicability must be determined at the outset. General Statutes § 8-30g(g)(2), [6] the industrial zone exemption, sets forth a less stringent burden of proof than that set forth in § 8-30g(g)(1). The commission asserts that this exemption applies to the plaintiffs' applications and, therefore, that its burden of proof is limited to demonstrating that (1) its decision is supported by sufficient evidence, (2) the applications sought to locate affordable housing is an area which is zoned for industrial use and which does not permit residential uses and (3) the development is not assisted housing.

The commission asserts, and the record reflects, that the premises is located in a B-2 Shopping Center Business District. The Commission takes the position that this appeal is governed by the industrial use exemption because the area for which the plaintiffs seek approval for its affordable housing is zoned for industrial use.

The argument fails. The Application does not locate affordable housing in an area which is zoned for industrial use. Turning to the zoning regulations of the Town of Old Saybrook, we find that they specifically designate in Article IV-Industrial Districts-the town's two industrial zones. The subject area is not located in either. Rather, it is located in a B-2 zone which is expressly designated as a "Shopping Center Business District" under Article III-Business and Maritime Districts.

The commission argues, however, that the industrial use exception applies because the B-2 zone permits industrial uses, that is, some of the same uses permitted in the Industrial Districts. According to the town's zoning regulations, the B-2 district permits various commercial and business uses. The commission argues that because some of the uses permitted in the B-2 zone are "industrial in nature" and, in fact, overlap many of the uses permitted in the town's two industrial zones, the industrial zone exemption should apply to the plaintiffs' applications. The commission further asserts that the B-2 zone does not permit residential uses and that the development is not assisted housing, as that term is defined in subsection (a) of § 8-30g.

***5** This court is not persuaded. While many of the permitted uses in the Industrial District and the B-2 District overlap, [7] the fact that two different zones permit some of the same uses or attributes does not mean that the two zones are interchangeable or wholly congruent. This court is mindful of the proposition that "all squares are rectangles, but not all rectangles are squares." It is the differences in the permitted uses, not the similarities, that are important. Indeed, what would set one zone apart from another if not the allowance in one of uses prohibited in others. Both the I-1 and I-2 zones permit uses that the B-2 zone expressly prohibits, for example: painting, plumbing, electrical, sheet materials, carpentry, wood-working, blacksmith, welding and machine shops (See § 41.1.5 and § 32.3.2,) and warehousing and wholesale businesses; building contractors' businesses and storage years; lumber and building materials businesses; freight and materials trucking terminals and businesses; bus terminals; commercial storage, sale and distribution of fuel. (See § 41.1.3 and § 32.3.5.)

In assessing whether the B-2 zone falls within the industrial zone exemption, this court is mindful of the legislative purpose behind the affordable housing land use appeals statute which is to "encourage and facilitate the much needed development of affordable housing throughout the state"; *JPI Partners, LLC v. Planning and Zoning Board,* 259 Conn. 675, 689, 791 A.2d 552 (2002)); and that, as a remedial statute, section § 8-30g "must be liberally construed in favor of those whom the legislature intended to benefit." (Internal quotation marks omitted.) *Kaufman v. Zoning Commission,* 232 Conn. 122, 140, 653 A.2d 798 (1995). If this court were to adopt the broad interpretation of § 8-30g(g)(2) advanced by the commission and expand the exemption to include not only "areas zoned for industrial use" but also areas in which permitted uses overlap with areas zoned for industrial use, it would thwart the important purposes of the statute to promote the development of affordable housing. It is an established and long-held rule that statutory exceptions are to be strictly construed. *Conservation Commission v. Price,* 193 Conn. 414, 424 (1984); *Kulis v. Moll,* 172 Conn. 104, 110 (1976). See also, *State v. AFSCME,* 257 Conn. 80, 93 (2001).

This court concludes that the B-2 Shopping Center Business District is not "an area zoned for industrial use" and that the industrial zone exemption is not applicable to the plaintiffs' applications. As such, this appeal is governed by § 8-30g(g)(1), and the commission must satisfy that section with respect to each of the reasons it cites for imposing the ten challenged restrictions.

As a predicate addressing the merits of this appeal, the court finds, and it is undisputed by the parties, that the Town of Old Saybrook is seriously lacking an adequate supply of affordable housing and, indeed, is well below the 10% goal set by the statute. In a report dated April 11, 2000, the Connecticut Department of Economic and Community Development determined that 1.93% of the town's housing stock was affordable. That dire need, informs, as it must, any plenary review conducted by this court.

***6** First, however, pursuant to § 8-30g(g), the commission must demonstrate that the reasons it cites for imposing each of the ten challenged conditions are supported by sufficient evidence in the record. If the commission meets the initial burden of proof that there is sufficient evidence in the record to support its reason for imposing each condition, the trial court then undertakes a plenary review of the record to determine whether: "(A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development." Section 8-30g(g)(1). It is important to underscore that under

subparagraphs (A), (B), and (C) of the statute, "the court must review the commission's decision independently, based upon its own scrupulous examination of the record." *Quarry Knoll II Corp. v. Planning and Zoning Commission, supra,* 256 Conn. at 727.

It is well settled that, while a zoning commission does not have to make its findings in perfect language, the reasons it gives for acting on an affordable housing application must be the collective reasons cited by the commission at the time it took its formal vote on the application, rather than reasons that later might be culled from the record. See *Mackowski v. Planning and Zoning Commission,* 59 Conn.App. 608, 615, 757 A.2d 1162 (2000). In the present case, only the commission's collective reasons for the conditions, given in its decision-making sessions and contained in the resolutions dated December 4, 2000 and February 7, 2001, will be considered. As stated previously, the burden is initially on the commission to demonstrate that the decision from which such appeal is taken and the reasons cited by such decision are supported by sufficient evidence. See § 8-30g(g). If the reasons assigned by the commission are not supported by sufficient evidence, the court need not consider them further. The "sufficient evidence" threshold has been defined as "less than a preponderance of the evidence, but more than a mere possibility ... [T]he zoning commission need not establish that the effects it sought to avoid [by imposing the condition] are definite or more likely than not to occur, but ... such evidence must establish more than a mere possibility of such occurrence ... Thus, the commission was required to show a reasonable basis in the record for concluding [as it did]. The record, therefore, must contain evidence concerning the potential harm that would result if the [condition was not imposed] ... and concerning the probability that such harm in fact would occur." (Citation omitted; internal quotation marks omitted.) *Christian Activities Council, Congregational v. Town Council,* 249 Conn. 566, 585, 735 A.2d 231 (1999), superseded by *Quarry Knoll II Corp. v. Planning & Zoning Commission, supra,* 256 Conn. at 674.

***7** Each of the ten challenged conditions will be separately addressed.

CONDITION 1: Building Materials

The commission imposed the following restriction: "The materials as identified in the plans submitted shall be utilized in the final construction, and no substitutions shall be permitted without the express approval of the Commission." The commission was referring to certain surface materials including wood siding, trim, and cedar shingles, natural stone foundation walls and small-lite windows. In support of its imposition of this condition, the commission asserted that the materials identified in the plaintiffs' plans "provide significant visual enhancements to the finished product" and are "essential elements to the overall sense of community and history both in Old Saybrook and in the new residential community which the applicant seeks to create."

Building and Site Materials

In a January 22, 2001 report, Point One, the commission's architects, expressed concern that some of the building materials had been changed from the plaintiffs' original application and that the new materials "will not be consistent with the traditional residential construction found throughout the town of Old Saybrook" and "may reduce the sense of pride that the residents feel towards their residential community."

This condition is not supported by sufficient evidence in the record. In support of the condition, the commission provided only vague statements about how the recommended materials would provide "visual enhancements" and an "overall sense of community and history" to the development. The commission has failed to explain how these purely aesthetic considerations pose a specific hazard to a substantial public interest in health, safety of other legitimate concerns, nor does the commission quantify the likelihood of any such harm. See *Christian Activities Council, Congregational v. Town Council, supra,* 249 Conn. at 585. There is no evidence in the record that the materials proposed by the plaintiffs are in any way inferior to the ones recommended by the commission or that this condition is otherwise supported by a reasonable basis in the record. Purely aesthetic concerns, without any identified connection with a substantial public interest, do not withstand scrutiny under § 8-30g(g).

The commission's recommendation with respect to building materials is not supported by sufficient evidence in the record.

CONDITION 2: Recommendations of Commission's Architects and Planners

The commission imposed the following restriction: "The site, buildings, parking areas, driveways, pedestrian circulation,

and all other applicable elements of the plan shall be revised in accordance with the recommendations contained in the reports of the Commission's architects and planners." This condition encompasses various general recommendations made by the town's architectural consultant, Point One Architects, in a report to the commission dated November 13, 2000: The report included recommendations about the scale and proportion of the development, site lighting, building materials, landscaping, public space and pedestrian and vehicular circulation. While the plaintiffs' amended application incorporated many of the recommendations, the commission's denial of the amended application stressed that the plaintiffs "[have] not moved toward the recommended *density, no remediation of the heights of the buildings to conform to town existing policy, pedestrian access to Main Street and the existing Old Saybrook Shopping Center* has not been addressed." (Emphasis supplied).

***8** In a report compiled in response to the plaintiffs' amended application, dated January 22, 2001, Point One addressed the recommendations with which the plaintiffs had not yet complied and advised the commission as to why compliance of each was still necessary. The recommendations of Point One are in most instances general, vague and non-specific. Nonetheless, the report of Point One, as it relates to those areas of concern expressed by the commission-density, no remediation of the heights of the buildings to conform to town existing policy, pedestrian access to Main Street and the existing Old Saybrook Shopping Center-will be addressed and evaluated separately.

a. Scale and Proportion

In its January 22, 2001 report, Point One addressed the scale and proportion recommendations that had not been incorporated into the plaintiffs' amended application. Of particular concern to Point One was the height and width of the proposed buildings. They stated that "[t]he gable end wall proportions have not been modified as suggested in our previous report, *these elevations are still not proportionally pleasing.* A steeper roof pitch and/or details at the end walls should be incorporated to reduce the overall scale and improve the proportions." (Emphasis added.)

This recommendation is not supported by sufficient evidence in the record. The commission has failed to explain how the scale and proportion of the buildings as proposed by the plaintiffs poses a specific harm to a substantial public interest in health, safety or other legitimate concerns, nor does the commission quantify the likelihood of any such harm. See *Christian Activities Council, Congregational v. Town Council, supra,* 249 Conn. at 585. While Point One's report does reference concern about the building elevations not being "proportionally pleasing," this is a purely aesthetic consideration and, as discussed previously, such concerns do not withstand § 8-30g(g) scrutiny if they are not tied to a legitimate public interest. The commission has failed to pinpoint the harm it was seeking to avert by imposing this restriction and there is no evidence that this recommendation is otherwise supported by a reasonable basis in the record.

It is the conclusion of this court, therefore, that the recommendation of the commission with respect to scale and proportion is not supported by sufficient evidence in the record.

b. Pedestrian and Vehicular Circulation

In its January 22, 2001 report, Point One expressed concern that the amended application "does not address the issue of pedestrian circulation along North Main Street or from the housing complex to the Saybrook Shopping Center" and that a "[s]afe means of pedestrian circulation should be provided along these areas."

This recommendation as to the original application is supported by sufficient evidence in the record. In support of this condition, the commission cited the dangerous circulation patterns created in the original application and the resulting adverse impact on public safety. See *Christian Activities Council, Congregational v. Town Council, supra,* 249 Conn. at 585. Point One's original report, dated November 13, 2000, discussed several specific concerns including that the plan required residents to cross through roads, lawns and parking areas because of a lack of appropriate sidewalks and crossing hazards resulting from the absence of crosswalks at busy intersections. As illustrated in the Review Comment Response of the plaintiff's engineering Consultant, Langan, the modified plan responded to many of these concerns by moving the Community Center building to a more central location and modeling the parking, vehicular and pedestrian circulation on the Point One suggestions. The Commission's Traffic Consultant, Robert J. Bass found the modified plan acceptable as to site circulation for pedestrians and autos. There was also agreement to address the recommendations as reflected in the January 30, 2001 report of Hesketh and Associates reflecting the representations of Steven Mitchell at the January 22, 2001 hearing before the commission as to the off-site improvements including a sidewalk on the east side of North Main Street, replacement of a traffic signal and

handicap access and markings. The commission, therefore, did not establish a reasonable basis in the record for imposing this condition on the modified plan.

CONDITION 3: Recommendations of Commission's Civil and Traffic Engineers

***9** The commission imposed the following restriction: "All recommendations contained in the reports of the Commission's civil and traffic engineers shall be incorporated into the revised plans." While the amended application incorporated many of the engineers' recommendations, the commission maintained, in its denial of the amended application, that "the recommendations as to pedestrian access, handicap intersection access, and center median replacement, are still [a] concern of the commission and need to be incorporated into the revised plans."

Traffic safety represents a substantial public interest that must be protected, and, indeed, there were numerous recommendations of the civil and traffic engineers which the commission sought to impose on the original application. There is, however, insufficient evidence to support this condition on the application as modified. Robert Bass of Milone & MacBroom, Inc., the commission's traffic consultant, submitted two reports to the commission, one evaluating the plaintiffs' original application and suggesting twelve changes, and the other evaluating the amended application and suggesting six additional changes not previously raised. Some of these recommendations duplicate the commission's conditions as to the traffic island (Condition # 9), discussed *infra,* and pedestrian and vehicular circulation (Condition # 2), discussed *supra.* Other recommendations appear to have been abandoned by the traffic engineers entirely. As previously indicated, Mr. Bass found the site circulation for pedestrians and automobiles acceptable in the modified plan. Additionally, the applicant agreed to make off-site improvements including a sidewalk on North Main Street and replacement of a traffic signal. Mr. Bass was of the opinion that the plaintiffs should be required to make off-site improvements to remedy existing deficiencies at Stage Road. However, before the commission, Mr. Bass agreed with Steven Mitchell, the plaintiff's consultant, that those off-site improvements which had previously been proffered in connection with an unrelated application for the same site, were not necessary because of the reduced traffic generated by the instant application.

CONDITION 4: Environmental Remediation

The commission imposed the following restriction: "The site shall be remediated to the appropriate standard for residential uses, and, prior to the issuance of a Certificate of Zoning Compliance, the applicant shall produce the certification of the Connecticut Department of Environmental Protection [indicating] that such remediation has been completed in accordance with applicable Connecticut General Statutes and Regulations of Connecticut State Agencies.

This condition is not supported by sufficient evidence. An environmental site assessment, conducted by environmental consultant Phase II, makes clear that there are no environmental concerns at the site. The Phase II report constitutes authoritative evidence that remediation is not necessary. In its brief, the commission points out that "even the commission members stated that there is no present contamination." Furthermore, the plaintiffs have stated that they fully intend to comply with all applicable environmental laws. The commission has failed to identify what substantial public interest it seeks to protect by requiring remediation when the record demonstrates that there are no immediate environmental concerns. See *Christian Activities Council, Congregational v. Town Council, supra,* 249 Conn. at 585. As such, there is no reasonable basis in the record for imposing this condition.

CONDITION 5: Noise Attenuation and Acoustic Insulation

***10** The commission imposed the following restriction: "The applicant shall install noise attenuation berms or barriers along the northerly side of the site which shall be sufficient, in the opinion of the Commission's Industrial Hygienist, to shield the residential buildings from unreasonable noise impacts resulting from railroad operations, including times when the windows of the dwelling units are open. All buildings shall be acoustically insulated to the generally accepted standard for residential properties in close proximity to industrial or high-output noise generators. All buildings shall be centrally air conditioned, as well as heated. There shall be no window air conditioners."

There is insufficient evidence to support a finding that noise levels at the site would have and adverse impact on the public health and safety of the residents. Nonetheless, in their amended application, the plaintiffs attempted to address this

concern and proposed an 8′ tall, board-on-board fence on a 3′ landscaped berm along the entire property line adjacent to the railroad tracks. Although Point One initially recommended a solid landscaping fence it did not make any recommendation as to the height. Yet, another consultant recommended a 6′ fence. Subsequently, Point One opined that the proposed fence 8′ fence "will provide little if any noise attenuation for the residential units" and that the amended application does not specify whether there will be "acoustically insulated construction for the units nearest the tracks."

While the ongoing presence of railroad noise implicates a substantial public interest in the health, safety and the quality of life of the residents of the development, the evidence is not sufficient for the imposition of vague conditions that the berms "shall be sufficient, in the opinion of the Commission's Industrial Hygienist" and that all buildings shall be acoustically insulated "to the generally accepted standard for residential properties in close proximity to industrial or high-output noise generators." There was no evidence other than the conclusory statement of Point One as to why the commission rejected the 8′ berm proposed by the plaintiffs in the amended application. Further, there is no requirement in the regulations that would require acoustically insulated construction for any units, including "units nearest the tracks." In fact, the modified plans relocated the units which had been adjacent to the tracks, and the nearest building is over 100 feet from the railroad line. The is insufficient evidence to conclude that the 8″ fence on a 3′ berm is insufficient and no evidence as to what would be sufficient. There is no regulation requiring the *imprimatur* of the Commission's Industrial Hygienist; and central air-conditioning is included for all units.

CONDITION 7: EMF Warning

The commission imposed the following condition: "The applicant shall provide a written warning, in letters not less than 16 point in type, as follows: 'Portions of this site are adjacent to the AMTRAK railroad corridor, which generates Electric Magnetic Fields (EMF) as high as 500 mG within the railroad right of way, and lesser readings up to 200 feet from the edge of that right of way. Although there are no known health effects or residential standards for EMF, the United States Department of Environmental Protection recommends prudent avoidance and keeping exposure as low as possible .' No building shall be located within 200 feet of the tracks."

***11** This condition is not supported by sufficient evidence in the record. The commission has failed to explain how this condition is necessary to protect a substantial public interest in health, safety or other legitimate concerns, nor has the commission qualified the likelihood of harm to this interest. See *Christian Activities Council, Congregational v. Town Council, supra,* 249 Conn. at 585. The commission has not identified any known health effects of EMF exposure. Indeed, a report compiled by TRC Environmental Corporation reveals that: "the effects [of EMF] have not been clearly demonstrated [but] *there is a suspicion* that EMF exposure may be linked to certain cancers." (Emphasis added.) While this report does recommend avoidance because of a suspicion of a potential harm, it acknowledges that the effects of EMFs "have not been clearly demonstrated." Furthermore, the record is devoid of any evidence that EMF measurements were ever taken at the proposed site. Vague and generalized warnings that are not tied to a specific, quantifiable harm do not amount to sufficient evidence and the commission's assertion that EMFs pose a threat to future residents of the development is not otherwise supported by a reasonable basis in the record.

It is the conclusion of this court, therefore, that the commission's condition with respect to the EMF warning is not supported by sufficient evidence in the record.

CONDITION 8: Density

The commission imposed the following condition: "The development shall be reduced by 48 units, and they shall be those located in the buildings closest to the Amtrak railroad line." Even though the plaintiffs' amended application relocated two buildings containing 24 units that were closest to the Amtrak line and even though it also reduced the number of units by 12, down to 204 from 216 in the original application, the commission continues to require the plaintiffs to reduce density to 168 units.

This condition is not supported by sufficient evidence. The commission has failed to demonstrate how the density of the proposed development poses a specific hazard to a substantial public interest in health, safety or other legitimate concerns nor has the commission identified or qualified the likelihood of any such harm. See *Christian Activities Council, Congregational v. Town Council, supra,* 249 Conn. at 585. A zoning agency may not deny an affordable housing application because it does not comply with the town's zoning regulations. *Wisniowski v. Planning Commission of the Town*

of Berlin, 37 Conn.App. 303, 313 (1995). It is well settled that a generalized statement about density, without being tied to any potential public harm, is not sufficient and does not withstand § 8-30g(g) scrutiny. See *Smith-Groh v. Planning and Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 01 0506781 (January 28, 2002, Eveleigh, J.) (determining that commission's general concern about traffic density, absent specific evidence demonstrating the impact of the increased density on public safety, is not a valid reason). The Fire Marshall approved both the original and modified proposals. There is no evidence in the record that the density of the proposed development has any adverse impact on public health or safety. The commission appears to have relied on a market analysis that concludes that this proposal is not feasible and that reducing the number of units would render the plan less unfeasible, an analysis that was presented to this court during the aggrievement hearing. The court does not find that analysis or that conclusion credible. This condition is not supported by a reasonable basis in the record.

CONDITION 11: Height of Buildings

***12** The commission imposed the following condition: "No building shall exceed a height of 35 feet." Both the plaintiffs' original and amended applications proposed the ridge of all housing units to be at 38 feet.

This condition is not supported by sufficient evidence in the record. The commission has failed to explain how the plaintiffs' proposed 38′ high buildings pose a specific hazard to a substantial public interest in health, safety or other legitimate concerns. See *Christian Activities Council, Congregational v. Town Council, supra,* 249 Conn. at 585. While the height of the buildings was addressed in the reports of Point One, the reasons provided for limiting height were purely aesthetic in nature and not tied to any specific harm to a substantial public interest. This condition is similar to the commission's condition regarding scale and proportion of the buildings and, as stated previously, these aesthetic considerations do not withstand scrutiny under § 8-30g(g).

CONDITION 12: Raised Traffic Island

The commission imposed the following restriction: "The plan shall be modified to include a raised island in North Main Street, comparable to that used along Main Street, and not a painted median area as proposed by the applicant during the pendency of this application; and sidewalks shall be constructed to connect with Main Street." While the plaintiffs did agree to provide a raised traffic island rather than painted median as initially proposed; the plaintiffs take issue with the requirement that the island shall be "comparable to [the island] used along Main Street." The plaintiffs assert that this requirement is based on the commission's preference that the island be constructed of granite rather than asphalt and that the commission is without the authority to specify building materials for their aesthetic and decorative value.

To the extent that this condition is intended to require the use of certain materials in the construction of the island, it is not supported by sufficient evidence in the record. The commission has failed to explain how the plaintiffs' choice of building materials poses a specific hazard to a substantial public interest in health, safety or other legitimate concerns nor has the commission quantified the likelihood of any such harm. See *Christian Activities Council, Congregational v. Town Council, supra,* 249 Conn. at 585. There is no evidence in the record that the plaintiffs' proposed materials are inferior to others or that they have any impact on the functionality of the traffic island. As discussed previously, purely aesthetic concerns, without any identified connection to a substantial public interest, do not withstand scrutiny under § 8-30g(g).

It is the conclusion of this court, therefore, that the commission's condition with respect to the materials to be used in the traffic island is not supported by sufficient evidence in the record.

CONDITION 15: Noncompliance of Adjacent Parcels

***13** The commission imposed the following restriction: "The property shall not include any portion of the Burger King property which would create any nonconformity, or increase any existing nonconformity, for such Burger King site." This condition addresses the commission's concern that the development will render certain adjacent parcels nonconforming. The commission notes that this condition is only relevant if the plaintiffs are seeking to "force another lot into noncompliance If the plaintiffs are not intending to do this, then there is no issue. The fact that the plaintiffs felt obligated to appeal the condition could suggest that there *is* a need to violate the [zoning] regulations on the adjacent parcel." (Commission's 4/25/02 Brief, p. 18.)

This condition is not supported by sufficient evidence in the record. The commission appears to misunderstand the nature of its statutory burden under § 8-30g(g) which provides, in relevant part: "[T]he *burden shall be on the commission to prove* ... that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record ." (Emphasis added.) The commission cannot impose a condition that is contingent upon or only becomes relevant upon the plaintiffs' taking certain actions in the future. By imposing a contingent condition, the commission inappropriately shifts the burden to the plaintiffs to refute their intention to take such actions. The statutory language makes clear that the commission must demonstrate that the reasons cited for its condition are supported by the record as it currently exists. There is no evidence in the record that the plaintiffs intend to force other lots into noncompliance or that they otherwise intend to violate the town's zoning regulations. Nonetheless, if the adjacent lot is somehow rendered non-compliant because of a transfer of a portion to Jordan, the public interest can be protected by the zoning enforcement powers of the Town.

It is the conclusion of this court, therefore, that the commission's condition with respect to noncompliance of adjacent parcels is not supported by sufficient evidence in the record.

CONCLUSION

For the foregoing reasons, this court concludes that the contested restrictions imposed by the Commission in connection with its approval of the site plan for affordable housing are not supported by the evidence. Accordingly, the appeal is sustained and the Commission is directed to approve the Amended Application for Affordable Housing for Saybrook Commons, as modified by this decision, that is *without* conditions 1, 2, 3, 4, 5, 7, 8, 11, 12, and 15.

All Citations

Not Reported in A.2d, 2003 WL 22708952

Footnotes

1 In connection with the proposed development, the plaintiffs also submitted an application for an amendment to the town's zoning regulations to provide for an "Affordable Housing Development District." This application was also denied and is now the subject of a related appeal bearing Docket No. CV 01 0508892.

2 The commission imposed the following sixteen restrictions. (Although in the approval the restrictions are numbered 1-17, inclusive, there is no 13.):

> 1. The materials as identified in the plans submitted shall be utilized in the final construction, and no substitutions shall be permitted without the express approval of the Commission.
>
> 2. The site, buildings, parking areas, driveways, pedestrian circulation, and all other applicable elements of the plan shall be revised in accordance with the recommendations contained in the reports of the Commission's architects and planners.
>
> 3. All recommendations contained in the reports of the Commission's civil and traffic engineers shall be incorporated into the revised plans.
>
> 4. The site shall be remediated to the appropriate standard for residential uses, and, prior to the issuance of a Certificate of Zoning Compliance, the applicant shall produce the certification of the Connecticut Department of Environmental Protection [indicating] that such remediation has been completed in accordance with applicable Connecticut General Statutes and Regulations of Connecticut State Agencies.

5. The applicant shall install noise attenuation berms or barriers along the northerly side of the site which shall be sufficient, in the opinion of the Commission's Industrial Hygienist, to shield the residential buildings from unreasonable noise impacts resulting from railroad operations, including times when the windows of the dwelling units arc open. All buildings shall be acoustically insulated to the generally accepted standard for residential properties in close proximity to industrial or high-output noise generators. All buildings shall be centrally air conditioned, as well as heated. There shall be no window air conditioners.

6. No building shall be less than fifty (50#) feet from the propane tank on the adjacent property, or such additional distance as the Old Saybrook Fire Marshall reasonably shall require in the interests of the safety of the occupants of this proposed community. In addition, the applicant shall incorporate into the final plans all recommendations contained in the Fire Marshall's report.

7. The applicant shall provide a written warning, in letters not less than 16 point in type, as follows: "Portions of this site are adjacent to the AMTRAK railroad corridor, which generate Electric Magnetic Fields (EMF) as high as 500 mG within the railroad right of way. Although there are no known health effects or residential standard for EMF, the United States Department of Environmental Protection recommends prudent avoidance and keeping exposure as low as possible." No building shall be located within 200 feet of the tracks.

8. The development shall be reduced by 48 units, and they shall be those located in the buildings closest to the Amtrak railroad line.

9. No garage units shall be used for storage, nor shall they be rented out to any individual(s) other than the occupant of the apartment to which the garage is assigned.

10. The affordable housing units shall be distributed throughout all buildings and all floors, and there shall be no greater number of affordable housing units on the third floor than on either of the lower two floors, considered individually, in any building.

11. No building shall exceed a height of 35 feet.

12. The plan shall be modified to include a raised island in North Main Street, comparable to that used along Main Street, and not a painted median area as proposed by the applicant during the pendency of this application; and sidewalks shall be constructed to connect with Main Street.

14. Lighting plans shall be revised to eliminate areas without illumination, and to avoid light spillover onto any adjoining property.

15. The property shall not include any portion of the Burger King property which would create any nonconformity, or increase any existing nonconformity, for such Burger King site.

16. There shall be no Certificate of Zoning Compliance until the Old Saybrook Water Pollution Control Authority has approved a construction and maintenance bond or other method of assuring the long-term viability of the community effluent disposal system, and the Connecticut DEP has granted a permit for the construction of such system.

17. The revised plans and other documentation shall be submitted for final review and approval by the Commission prior to the issuance of a Certificate of Zoning Compliance. Final construction plans for a Building Permit, and the actual construction, shall be in strict conformity with the plans approved by the Commission.

3 Conditions 6 (Separation from Propane Tank), 9 (Storage in Garages), 10 (Distribution of Affordable Units), 14 (Approval by WPCA), and 17 (Final Review by Commission) are either not contested or were resolved as a result of the proposed modification.

4 Section 8-30g( ), now subsection (f), provides that appeals involving an affordable housing application shall proceed in conformance with the provisions of § 8-8. General Statutes § 8-8(b) provides, in pertinent part, that an "appeal shall be commenced by service of process ... within fifteen days from the date the notice of the decision was published as required by the general statutes."

There is, however, an exception to the traditional rule that appeals must be filed within fifteen days from the date of publication of the notice of decision. Section 8-30g(d), now subsection (h), provides, in pertinent part, that

> [f]ollowing a decision by a commission to reject an affordable housing application ... the applicant may, within the period for filing an appeal of such decision, submit to the commission a proposed modification of its proposal responding to some or all of the objections or restrictions articulated by the commission, which shall be treated as an amendment to the original proposal. The filing of such a proposed modification shall stay the period for filing an appeal from the decision of the commission on the original application ... Within the time period for filing an appeal on the proposed modification as set forth in sections 8-8, 8-9, 8-38, 8-30, or 8-30a, as applicable, the applicant may appeal the commission's decision on the original application and the proposed modification in the manner set forth in this section ...

5 Though the amendment that changed the text of § 8-30g(g) to incorporate this burden of proof was effective on October 1, 2000, this act, No. 00-206, § 1(g) of the 2000 Public Acts, was determined to be a clarifying statute and, therefore, has retroactive effect and applies to the present matter even though the affordable housing applications were filed on September 18, 2000. See *Quarry Knoll II Corp. v. Planning & Zoning Commission, supra,* 256 Conn. at 701.

6 P.A. 95-280 amended Subsection (c) to add (2)(A) and (B), a provision placing the burden of proof on the commission to show that the application would locate affordable housing "in an area which is *zoned for industrial use* and which does not permit residential uses, and (B) the development is not assisted living." The amendment was intended to preserve the significant tax base a town derives from industrial zones.

7 Both zones permit the manufacture, processing or assembly of goods (see §§ 41.1.1 and 32.1.6), public utility substations and telephone equipment buildings (see §§ 41.1.11 and 32.1.8), water supply reservoirs, wells, towers, treatment facilities and pump stations (see §§ 41.1.12 and 32.1.9), office buildings for business and professional establishments, banks and other financial institutions and medical and dental clinics (see §§ 41.1.2 and 32.1.1), hotels and motels (§§ 41.1.7 and 32.1.13), stores and other buildings and structures where goods are sold or service is rendered primarily at retail (see §§ 41.1.9 and 32.1.1).

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2008 WL 4378684

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Britain.

BAKER RESIDENTIAL LIMITED PARTNERSHIP
v.
BERLIN PLANNING AND ZONING COMMISSION.

No. CV064012368S.
|
Sept. 10, 2008.

Attorneys and Law Firms

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Opinion

HENRY S. COHN, Judge.

***1** This is an appeal by the plaintiff, Baker Residential Limited Partnership (Baker), from an October 5, 2007 decision by the Town of Berlin Planning and Zoning Commission (commission) denying the plaintiff's unified affordable housing application.

Baker is the contract purchaser of a 64.82-acre parcel of land (property) located off the Berlin Turnpike in the Town of Berlin. Baker proposes to develop this land into a 384-unit residential community with thirty percent of the units to be sold to low and moderate-income residents under the Affordable Housing Act. On May 24, 2006, Baker filed three applications with the commission regarding the proposed development: a text amendment to the zoning regulations to create a Housing Opportunity District (HOD); a rezoning of the property to the HOD zone; and a site plan for the residential community. (Return of Record (ROR) at 1-4.)

The property is currently zoned under the Office Technology (OT) zone that is listed under the industrial zone category in the town's zoning regulations. The OT zone permits the following uses:

a. Business or professional offices, excluding medical offices.

b. Corporate office complexes, including offices, training facilities, outdoor equipment storage, service facilities and other related uses.

c. Laboratories, research facilities, design centers and other similar professional uses.

d. Farms, subject to section XI.C

(ROR at 131, Am. § VII A). The OT zone also permits the following uses by special permit:

a. Child day care centers, subject to section XI.H.

b. Health or fitness clubs, gymnasiums, tennis or racquet clubs.

c. Hotels, or hotel conference centers.

d. Manufacturing, provided that, along with wholesale and distribution uses, these uses are less than 50 percent of the total GFA of each building.

e. Wholesaling and distribution uses, provided that, along with manufacturing uses, these uses are less than 50 percent of the total GFA of each building.

f. Manufacturers showroom.

(ROR at 131, Am. § VII A.)

The commission's special counsel advised both the commission and Baker in advance of the hearings on the application that the industrial zone exception found in General Statutes § 8-30g(g)(2) may apply to Baker's applications. [1] (ROR at 47.) Special counsel further advised the commission that it could make a determination on the industrial zone exception alone as a "threshold matter" rather than the traditional three-part analysis under § 8-30g(g)(1). Under the statute, a town must prove three things to apply the industrial exception: (1) that the area is zoned for industrial use, (2) the area does not permit residential use, and (3) that the proposal is not for assisted housing. As the parties agree that Baker's proposal is not for assisted housing, the commission considered only the first two requirements.

The commission held three public hearings on the threshold matter. The first hearing was held on September 7, 2006, and

was continued to September 14, 2006. At the second hearing, the issue was continued to October 5, 2006 where both the commission and the plaintiff called witnesses regarding the applicability of the industrial zone exception.

***2** At the hearing, Baker presented expert testimony from Mr. Donald Poland, who appeared on behalf of Planimetrics, a consulting firm that Baker hired to assist in preparing and presenting its applications to the commission. Mr. Poland testified that the property was not in an area zoned for industrial use because the OT zone was not a traditional industrial zone. (ROR at 146, p. 46-49.) Further, Mr. Poland argued that the area permitted residential uses, namely hotels, farmhouses, and conversion of older buildings for residential use. (ROR at 146, p. 49-55.) Additionally, Attorney Pearson, representing Baker at the hearing, pointed out that .33 acres of the property is in the R-43 Residential zone, further establishing that residential uses are permitted in the subject area. (ROR at 146, p. 129.)

The special counsel presented testimony from its own expert, Ms. Valerie Ferro, a certified planner who had previously assisted the commission with planning and zoning matters. (ROR at 146, p. 69.) Ms. Ferro testified that the OT zone is an industrial zone designed to accommodate new, emerging industrial uses. (ROR at 146, p. 76.) On whether the area permits residential uses, Ms. Ferro stated that hotels are not considered a residential use under the zoning regulations; farms houses are not specifically authorized by the regulations; and there are no buildings in the subject area eligible for conversion to residential use. (ROR at 146, p. 71-74.)

At the conclusion of the hearing, the commission voted to deny all three applications and adopted the following findings relevant to the issues in this appeal:

> 2. The commission finds that the substantial evidence in the record demonstrates that the unified Baker Application would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses and that the proposal is not for assisted housing, as the last factor is conceded by the applicant. These findings were collectively stated by the Commission prior to the close of the public hearing and are herein restated.
>
> 4. The Commission collectively finds that the industrial zone exemption as described in Connecticut General Statutes Section 8-30g(g)(2) applies to the land that is the subject of the Baker Applications which were submitted pursuant to Section 8-30g of the Connecticut General Statutes
>
> 5. The Commission specifically finds that the evidence and testimony of Mr. James Mahoney, Ms. Valarie Ferro and, in part, Mr. Donald Poland established that the OT Zone is industrial and contains no residential uses. The Commission is not persuaded by additional testimony provided by Attorney Robin Pearson, Donald Klepper-Smith and certain parts of the testimony of Donald Poland, or by their written documentation, attempting to establish that the Industrial Exemption does not apply.
>
> 6. The Commission is cognizant of the need for affordable housing in Berlin but has determined that the industrial exemption should apply to this land in order to further protect and preserve industrial land in the spirit and intent of General Statutes Section 8-30g(g)(2).

***3** (ROR at 126; 127; 128; 146, p. 141-64.) Baker appeals from this decision, specifically the findings that the area is zoned for industrial use and does not permit residential uses. [2]

The parties disagree over the standard of review for an appeal under § 8-30g(g)(2). "The language of this section reveals alternate burdens of proof for appeals brought pursuant to the act. Under either alternative, the burden is on the commission to first show that the reasons cited for such decision are supported by sufficient evidence in the record. Second, the commission *shall also have the burden to prove* one of two things: either that its decision satisfies the three-pronged test set forth in parts (1)(A), (B) and (C) or that the application meets the two-pronged test set forth in parts (2)(A) and (B)." (Internal marks omitted, emphasis in original.) *Jordan Properties LLC v. Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 01 0508891S (March 6, 2003, Tanzer, J.) [34 Conn. L. Rptr. 248]. However, that section does not specify the appropriate standard of review for whether the commission has met its second burden of proof. The commission argues that the sufficiency of the evidence test should apply to both burdens while Baker argues that the second burden permits the court to undertake a plenary review of the evidence on the record.

The language of the statute and Superior Court cases indicate that a plenary review is appropriate. The first burden requires the commission to show that there is sufficient evidence in the record to support the commission's decision. The second burden requires the commission to prove to the court that, based on the evidence record, the industrial zone exception

applies. This language implies that the court's review of the evidence relating to the application of the industrial zone exception is plenary. There are several Superior Court cases that support this. *Jordan Properties, LLC v. Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 01 0508891S (October 31, 2003, Tanzer, J.); *Wilson v. Planning and Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 98 492224 (July 9, 2003, Shortall, J.); *JPI Partners, LLC v. Planning and Zoning Board,* Superior Court, Docket No. CV99 0499081S (April 9, 2001, Frazzini, J.), rev'd. on other grounds, 259 Conn. 675, 791 A.2d 552 (2002). In each of these cases, the court conducted its own plenary analysis of the evidence in the record and did not limit itself to a sufficiency of the evidence test. In light of the language of the statute and prior decisions, this court will conduct a plenary review of the record to determine whether the industrial zone exception applies in this case.

The first issue on appeal is whether the area in question is zoned for industrial use. The commission claims that the meaning of "industrial use" should include more modern industrial uses like those permitted in the OT zone. Baker disagrees and asserts that only traditional industrial uses like factories or production facilities qualify for the exception. The resolution of this issue will turn on the meaning of "zoned for industrial use" under § 8-30g(g)(2).

***4** General Statutes § 1-2z requires that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Whether the plain meaning of "industrial use" would encompass modern or only traditional industrial uses is not clear from the language of the statute. Nor does the statute provide a definition for the phrase in question.

The commission argues that the town's interpretation based on its zoning regulations should receive some deference because of the wide latitude granted to local governments to regulate land use. See General Statutes § 8-2. Further, the commission asserts that "Zoning must be sufficiently flexible to meet the demands of increased population and evolutionary changes in such fields as architecture, transportation and redevelopment. The responsibility for meeting these demands rests, under our law, with the reasoned discretion of each municipality acting through its duly authorized zoning commission." *Malafronte v. Planning and Zoning Board,* 155 Conn. 205, 209-10, 230 A.2d 606 (1967).

The strict reading of "industrial use" as proposed by Baker would undermine the discretion granted to towns in regulating land use. At the commission hearing, Ms. Ferro testified about the nature of Berlin's development plan that resulted in the creation of the OT zone. That plan was based on a detailed development study that indicated the need for new and emerging industrial uses rather than "big belching smoke stacks" that are not customarily developing in that area. (ROR at 146, p. 76.) Berlin's OT zone is designed to take advantage of Berlin's "strong position in the marketplace" for these new industrial uses. (ROR at 146, p. 76.) If the industrial zone exception were interpreted to apply only to traditional industrial uses, a town's ability to accommodate these emerging industries could be undermined by forced conversion of these new industrial zones to residential uses.

Few cases have considered the industrial zone exception and none of them have defined the phrase in question. However, one such case provides support for the commission's argument that the town's zoning decisions are persuasive, if not dispositive, in an analysis under the industrial zone exception. The question in that case was whether a business district permitting some industrial uses would qualify as being "zoned for industrial use." *Jordan Properties, LLC v. Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 01 0508891S (October 31, 2003, Tanzer, J.). Of primary concern to the court was whether the area was *zoned* industrial. The court held that an area located in a business zone could not qualify for the exception because it was not designated as an industrial zone under the town's zoning regulations. The court was not persuaded by the commission's argument that the area nonetheless should be considered zoned for industrial use because of the several industrial uses permitted in the business zone.

***5** The commission's interpretation is also consistent with the legislature's original purpose in enacting the exception. According to the court in *JPI Partners, LLC,* "the legislature has explicitly identified a clear public interest, protecting industrial zones not permitting residential uses from affordable housing development that would drain their potential industrial development." *JPI Partners, LLC v. Planning and Zoning Board, supra.* Moreover, "[a] frequently stated reason in committee hearings and on the legislative

floor that year for adopting the industrial zone exception was that affordable housing developments being located in industrial zones were depriving municipalities of needed tax base industrial zones." *Id.* Baker argues that, because this is a statutory exception to remedial act, the court must narrowly construe the exception in favor of those who the act was intended to benefit. *Paupuck Development Corp. v. Conservation Commission,* 229 Conn. 247, 256 n. 11, 640 A.2d 70 (1994). "[W]hen a statute creates an exception to a general rule, it is to be construed strictly and its language is not to be extended beyond its evident intent." *State v. Anderson,* 220 Conn. 400, 404, 599 A.2d 738 (1991). However, the evident intent of the legislature was to provide towns an alternative to the traditional three-part analysis under § 8-30g(g)(1) so that towns could protect their industrial development plans and safeguard a large tax base from forced conversion. A construction of the exception that permits a town to include more modern industrial uses in its industrial zones as part of a long-term development plan is consistent with the purpose of the exception.

Even if the industrial zone exception did not apply to modern industrial uses, some of the uses in the OT zone can be considered as traditional industrial uses. The OT zone allows manufacturing, wholesale, and distribution by special permit. While Baker argues that these uses are not primary uses because they are limited to less than fifty percent of the floor area of a building, this limitation does not detract from the industrial nature of the use. In addition, corporate equipment storage and service facilities are permitted in the OT zone as well as laboratories, research facilities and design centers. These uses are not permitted in commercial zones. However, they are permitted in other industrial zones further establishing the industrial nature of the OT zone. (ROR at 131.)

The zoning regulations establish that the OT zone is zoned industrial. The OT zone permits both modern and traditional industrial uses and the court finds that the area is "zoned for industrial use" under § 8-30g(g)(2).

The second issue is whether the area permits residential use. The commission asserts that Berlin's zoning regulations are permissive. Section IV.A.2 of the regulations provides that "Any use not specifically permitted by right or by special permit in a zoning district by these regulations shall be deemed to be prohibited within such district." (ROR at 131.) Further, § II.A.2 of the zoning regulations states that the word "shall" is "mandatory and not discretionary." (ROR at 131.) Read together, these sections clearly bar any residential uses in the OT zone because that zone does not permit such uses by right or by special permit. Baker argues that, despite the permissive zoning scheme, there are four exceptions where residential uses are permitted in the OT zone. The court will address each in turn.

***6** First, Baker argues that the area permits residential uses because § XI.D of the zoning regulations permits the conversion of pre-1950s industrial and educational buildings to residential use in any zoning district by special permit. (ROR at 131.) Baker has conceded that there are no such buildings eligible for conversion on the property in question. Even so, Baker argues that because the regulations permit such a conversion, the area permits residential uses and the industrial zone exception cannot apply. The court is not persuaded because Baker's argument is entirely theoretical, no such conversion is possible on the property in question. Because there are no buildings eligible for conversion in the area where Baker seeks to place affordable housing, the conversion provision of the zoning regulations effectively does not apply in this situation.

Second, Baker argues that the OT zone permits residential uses because hotels-residential in nature-are permitted by special permit in the OT zone. However, the zoning regulations do not support this argument because they exclude hotels from the definition of residence. Section II.B. of the zoning regulations defines a "residence" as "[a] dwelling unit or group of dwelling units." (ROR at 131.) The definition of "dwelling unit" states that it "shall not be deemed to include motel, hotel, roominghouse or tourist home." (ROR at 131.) At common law, a hotel is a place that typically provides only short-term accommodations to transients in exchange for compensation. *Independence v. Richardson,* 117 Kan. 656, 232 P. 1044 (Kan.1925); *Moyer v. Board of Zoning Appeals,* 233 A.2d 311 (Me.1967); *Waitt Const. Co. v. Chase,* 197 A.D. 327, 188 N.Y.S. 589 (N.Y.A.D. 1 Dept.1921); *Appeal of Wellsboro Hotel Co.,* 336 Pa. 171, 7 A.2d 334 (Pa.1939). There is a regular turn over of guests, the hotel provides regular cleaning services and conference areas, and guests are limited in their ability to customize their quarters. In this respect, a hotel in the OT zone would be more of a business supporting the needs of the industries in the area rather than a residence.

Baker's third example is farmhouses. Baker argues that because farms are permitted in the OT zone, then farmhouses must be allowed as well. The commission responds that the

zoning regulations do not allow residential uses as part of agricultural uses. The definition of "farm" in the regulations does not include a farmhouse and there is nothing in the regulations that indicates that a farmhouse is permitted as part of a farm. (ROR at 131.) Baker also argues that a majority of farms in Berlin currently have farmhouses. However, whatever Berlin may have permitted regarding farms in the past is irrelevant when there is nothing in the current regulations that expressly permits farmhouses to be included as part of a farm in the OT zone.

Fourth, Baker points out that .33 acres of the subject property is in the R-43 residential zone. When a lot lies in more than one zoning district, § IV.9 of the zoning regulations permits the use of one district to be extended into the other district by not more than 30 feet. (ROR at 131.) Because this is an example of where a residential use may be permitted in the OT zone, Baker asserts that the industrial exception cannot apply. But this 30-foot extension is *de minimus* in relation to the rest of the 64.82-acre property. To say that such a tiny extension into the OT zone proves that the area in general permits residential uses would be to read the industrial zone exception too narrowly. [3]

***7** The court finds the town has proven that the area does not permit residential uses. There is sufficient evidence in the record to support the commission's findings. The town has met its burden of proving to the court that, based on the evidence in the record, the area is zoned for industrial use and does not permit residential uses. There is no claim that this is an application for assisted housing. Therefore, the court finds that the industrial zone exception in § 8-30g(g)(2) applies to the Baker applications. The appeal is dismissed.

All Citations

Not Reported in A.2d, 2008 WL 4378684, 46 Conn. L. Rptr. 309

Footnotes

1 The portion of the statute relevant to this appeal reads: "Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1)(A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development, or (2) (A) *the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses, and (B) the development is not assisted housing, as defined in subsection (a) of this section.*" (Emphasis added.)

2 Baker introduced exhibits 1 and 2 (purchase and sale agreements) at a hearing for a related matter before the court (*Baker Residential Limited Partnership v. Inland Wetlands and Water Courses Commission,* Superior Court, judicial district of New Britain, Docket No. 07 4012830S July 16, 2008, Cohn, J.) establishing aggrievement for both cases.

3 The commission also argues as a special defense that Baker did not properly submit an application before the commission seeking to extend the residential use into the OT zone because proper notice was not given. The court does not reach this claim because, whether or not the application was properly submitted, the court finds the commission has met its burden in proving that the industrial zone exception applies.

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Britain.

GARDEN HOMES MANAGEMENT CORPORATION et al.
v.
PLANNING AND ZONING COMMISSION OF the TOWN OF OXFORD.

No. HHBCV074015729S.
|
Nov. 3, 2009.

Attorneys and Law Firms

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Welch Teodosio Stanek & Blake LLC, Shelton, Leclairryan a Professional Corporat, New Haven, for Planning and Zoning Commission of the Town of Oxford.

JOHN W. PICKARD, Judge.

I. Facts and Procedural History

***1** The plaintiffs, Garden Home Management Corporation and Third Garden Park Limited Partnership, appeal from decisions of the defendant, Planning and Zoning Commission of the Town of Oxford ("Commission") denying applications for: 1) a text amendment to the Zoning Regulations of the Town of Oxford, 2) an amendment to the zoning map to rezone the plaintiffs' property, and 3) an application for a zoning permit and for site plan approval for the development of 113 mobile manufactured dwellings. Garden Homes Management Corporation is the managing partner of Third Garden Park Limited Partnership. The parties filed lengthy briefs and engaged in oral argument. The court made a site visit with the attorneys on April 24, 2009.

The plaintiffs own 40.7 acres of undeveloped land in Oxford ("the property"). The property is bounded by Hurley Road to the south, Donovan Road to the east and Oxford Airport Road to the north. Oxford Airport Road is a state-controlled limited access highway which provides access to the Oxford Airport. There is a substantial inland-wetland area which divides the property into two buildable sections. One section, known as Oxford Commons East, is proposed to have 14 units, all of which will have access to Donovan Road from a single interior road. Another section, known as Oxford Commons West, is proposed to have 99 units, all of which will have access to Hurley Road from a single interior road.

Article 9A of the zoning regulations and the zoning map locate the property in the Corporate Business Park District ("CBPD"). The CBPD was established in 2000 by removing 440 acres from the existing 2,400-acre Industrial District. Most of the site is old agricultural fields. The surrounding CBPD area is undeveloped, except for Hurley Farms Business Park to the south across Hurley Road, and the regional airport to the east. The land remaining in the Industrial Zone is largely undeveloped. However, there are single-family homes scattered along virtually every roadway in the airport vicinity.

The applications for amendment of the Regulations and the zoning map would create a new residential district and would rezone the property from the existing CBPD to the new residential district. The plaintiffs filed their applications pursuant to C.G.S. § 8-30g, the Affordable Housing Appeals Act. The plaintiffs proposed to set aside 30% (35 of the 113) units as "affordable" units as set forth in § 8-30g.

The Commission held a public hearing which extended over four evenings during the summer and fall of 2006. During the hearing, the Commission received verbal, written, and documentary evidence from the plaintiffs, the public, and from the Commission itself. In a 62-page memorandum dated February 1, 2007 the Commission denied the applications. First, the Commission decided that the Industrial Use exception to the affordable housing statute applied to the applications. Accordingly, the Commission reviewed the applications in conformance with normal zoning standards and set forth its reasons for denial. The Commission then reviewed the applications again as if they were entitled to be treated as affordable housing applications and concluded that they should be denied under those standards as well. In February 2007 the plaintiffs filed a "resubmission application" with the Commission. A public hearing lasting three evenings was held in May and June 2007. Additional evidence was received. On September 20, 2007 the Commission again denied the applications, this time

in a 63-page decision. The Commission followed the same format used in the original decision by first deciding that the applications failed to qualify for treatment under affordable housing standards, but then reviewing the applications under those standards as well as normal standards. This appeal followed. The plaintiffs appeal only the decision denying the resubmission applications, not the original denial.

***2** The reasons for appeal are that the Commission's decision does not satisfy its burden of proof under C.G.S. § 8-30g(g) in that the reasons for denial, a) are not supported by substantial evidence in the record, b) are not based upon substantial interests in public health and safety or other matters that the Commission may legally consider, c) do not clearly outweigh the need for affordable housing in Oxford; and d) could have been addressed by reasonable changes to the Application.

The CBPD permits the following uses:

4.1 Business or corporate offices

4.2 Research and development facilities, including laboratories

4.3 Data processing facilities

4.4 Manufacturers showrooms and sales offices

4.5 Printing and publishing services

4.6 Broadcast and media production facilities

4.7 Manufacturing and assembly, if conducted entirely within a building. The CBPD also permits the following uses by special exception:

5.1 Wholesale and Distribution uses provided that they are a component of a corporate or business office or manufacturing use.

5.2 Warehouses, providing that they are a component of a corporate or business office or manufacturing use.

5.3 Restaurants, excluding drive through facilities

5.4 Hotels.

5.5 Child day care facilities.

5.6 Health and fitness clubs.

5.7 Schools-Colleges, universities, technical, trade, vocational, and business. The Regulations also permits bed and breakfast accommodations by special exception in any district provided they are located in the home of the owner/operator.

Article 9 of the Regulations creates the Industrial District from which the CBPD was removed in 1999-2000. The Industrial District permits:

2.1 Wholesale & Distribution.

2.2 Manufacturing and Assembly when conducted entirely within a building.

2.3 Warehousing and storage only in conjunction with manufacture and assembly or other permitted use.

2.4 Broadcast and media production.

2.5 Banks and financial institutions.

2.6 Business, Professional & Corporate Offices

2.7 Aviation Facilities.

2.8 Printing, publishing, blueprinting & similar reproduction.

2.11 Temporary lodging when done in conjunction with corporate training as an accessory use to an industrial use. Such temporary lodging shall be for a maximum of ten days within any calendar month, as an accessory use.

The Industrial District creates the following uses by Special exception:

3.1 All uses with a gross floor area of 50,000 square feet or greater.

3.2 Outdoor manufacture or assembly.

3.3 Monument and stone cutting.

3.4 Garden supply centers, and nurseries.

3.5 Government Buildings.

3.6 (Deleted).

3.7 Lumber and Building supply storage and sales.

3.8 Restaurants.

3.9 Sale of alcoholic beverages.

3.10 Veterinary hospitals.

3.11 Undertaker establishments, crematories and funeral parlors.

3.12 Child day care center.

***3** 3.13 Cat-washes.

3.14 Medical offices.

3.15 Commercial/Recreational Facilities.

3.16 Garages and Filling Stations.

3.17 Heavy Equipment sales, storage and rental.

3.18 Public Parking Lots.

3.19 Gas powered generating facilities.

3.20 Drive through facilities of permitted uses or uses permitted by special exception.

3.21 Retail uses when accessory to a manufacturing or other principal use.

3.22 Contractor's yards.

II. Aggrievement

Aggrievement is a jurisdictional question and is a prerequisite to maintaining an appeal. *Winchester Woods Associates v. Planning and Zoning Commission,* 219 Conn. 303, 307, 592 A.2d 953 (1991). In affordable housing appeals, as in traditional zoning appeals, the plaintiff has the burden of establishing aggrievement. *Trimar Equities, LLC v. Planning & Zoning Board,* 66 Conn.App. 631, 638-39, 785 A.2d 619 (2001). C.G.S. § 8-30g(f) provides that any person whose affordable housing appeal is denied may appeal. In addition, "owners of property that is the subject of an application are aggrieved, and the plaintiffs may prove aggrievement by testimony at the time of trial." *Winchester Woods Associates v. Planning and Zoning Commission, supra,* at 308, 592 A.2d 953. The plaintiffs are aggrieved as the owners of the property which is the subject of their applications denied by the Commission.

III. Standard of Review

Judicial review of a planning and zoning decision on an affordable housing application is governed by C.G.S. 8-30g(g). That section provides:

> (g) Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall have the burden to prove, based upon the evidence in the record compiled before the commission, that (1)(A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development, or (2)(A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses, and (B) the development is not assisted housing, as defined in subsection (a) of this section. If the Commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it.

"[In conducting its review in an affordable housing appeal, the trial court must first determine whether 'the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record.' General Statutes § 8-30g(g). Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted. If the court finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determine independently whether the commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted .) *Carr v. Planning & Zoning Commission,* 273 Conn. 573, 596-97, 872 A.2d 385 (2005), or whether the application would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses, and the development is not assisted housing.

***4** C.G.S. § 30g(g) "reveals two different burdens of proof for appeals brought pursuant thereto. Subpart (1) applies to traditional affordable housing appeals and subpart (2) applies to affordable housing appeals that seek to locate housing in an area zoned for industrial use. Under both alternatives, the burden is on the commission first to cite the reasons for their decision, and to demonstrate that the reasons cited for such decision are supported by sufficient evidence in the record. Second, the commission shall also have the burden to prove one of two things: if it is a traditional affordable housing appeal, the commission must satisfy the three-pronged test set forth in parts (1)(A)(B) and (C). If the application seeks to place housing in an area zoned for industrial use, the commission must only satisfy the two-pronged test set forth in parts (2)(A) and (B)." (Internal quotation marks and citations omitted.) *Jordan v. Old Saybrook Zoning Commission,* Superior Court, Judicial District of New Britain at New Britain, Docket No. 0110508891 (October 31, 2003).

"In the present case, if the commission establishes the applicability of the industrial zone exemption, it must only show that the reasons it cited are supported by sufficient record evidence. If, however, the industrial zone exemption does not apply, the commission must satisfy the heightened burden of proof set forth in part (1) of the statute. As the industrial zone exemption is determinative of the commission's burden of proof and the scope of this court's review, its applicability must be determined at the outset. C.G.S. § 8-30g(g)(2), the industrial zone exemption, sets forth a less stringent burden of proof than that set forth in § 8-30g(g)(1)." *Id.* The language of the statute, and the Superior Court cases which have considered it, indicate that the appropriate standard of review for whether the commission has met its second burden of proof is plenary review. *Baker Residential Limited Partnership v. Berlin Planning and Zoning Commission,* Superior Court, Judicial District of New Britain at New Britain, Docket No. 06 4012368 (September 10, 2008) [46 Conn. L. Rptr. 309].

IV. The Need for Affordable Housing

The record demonstrates that the Town of Oxford has a substantial need for affordable housing. Oxford falls below the "safe harbor" established by C.G.S. § 30g(k) for towns having at least 10% of all their dwelling units qualify as affordable under the formula established by that section. In Oxford, the percentage of dwelling units qualifying as affordable is only 1.1%, ranking Oxford near the bottom of Connecticut's 169 municipalities.

The record reveals that Oxford has done little or nothing to address the need for affordable housing. Since 1991, C.G.S. § 8-2 has required all municipalities to adopt zoning regulations that "promote housing choice and economic diversity in housing, including housing for both low and moderate income households." The Oxford regulations do not contain any provisions which seriously address this requirement.

V. Discussion

A. The Reasons for Denial

***5** The Commission cited several reasons for denying the plaintiffs' applications. In accordance with the standard of review set forth above, the court must first determine whether the record contains sufficient evidence to support the reasons cited by the Commission for its decision.

1. Set Aside Development

The first issue which must be addressed is the Commission's argument that the application does not come within the definition of a "set aside development" in C.G.S. § 8-30g(a), and thus is not an "affordable housing application." That section defines an affordable housing development as assisted housing or a set-aside development. This project is not assisted housing.

A set-aside development is defined as "a development in which not less than thirty per cent of the dwelling units will be conveyed by deeds containing covenants or restrictions which shall require that, for at least forty years after the initial occupation of the proposed development, such dwelling units shall be sold or rented at, or below, prices which will preserve the units as housing for which persons and families pay thirty per cent or less of their annual income ..." The Commission argues that there must either be a sale or a rental-but not a combination of the two-in order to qualify.

Here, the applicant proposed to sell the dwellings and rent the land where the building is located. The Commission claims that the combination of sale and rental does not qualify. This argument must be rejected because it is not based upon a fair reading of the language of § 30g(a). I can see nothing in the language of the definition of a set-aside development which would disqualify the sale and rental scheme proposed by the plaintiffs, provided that the Affordability Plan accounts for the sales price and the rent so that it qualifies as affordable under the statute and the regulations of the Department of Economic and Community Development. The Affordability Plan properly treats the manufactured homes as sale units with the paid rent included in monthly expenses. The plaintiff's explanation of the calculations employed in the Plan convinces the court that the Plan complies with the statute and the regulations. For this reason, the Commission's decision that the plaintiffs' applications do not constitute a set-aside development is not supported by sufficient evidence in the record.

2. Industrial Use Exemption

Next, the Commission argues that because of the industrial use provision in C.G.S. § 8-30g(g)(2)(A), the proper standard of review is as a traditional application rather than as an affordable housing application. That sub-section provides an exception to the burden-shifting required for affordable housing applications generally: burden-shifting does not apply to land that is "located in an area which is zoned for industrial use and which does not permit residential uses." Therefore, in order to apply the industrial use exception, the Commission was required to prove (1) that the area is zoned for industrial use, and (2) the area does not permit residential use. The plaintiffs contend that the Commission has not proven either element. The parties agree that the court's review of this issue must be plenary.

***6** In its decision, the Commission determined that the CBPD was zoned for industrial use by finding that some of the uses permitted in the district are industrial uses. The Commission relied upon evidence from the Commission's professional planner, Brian Miller, that the CBPD includes industrial uses and does not permit residential uses. Mr. Miller pointed to "manufacturing and assembly, if conducted entirely within the building," research and development facilities, data processing facilities, manufacturers' showrooms and sales offices, printing and publishing services, and broadcast and media production facilities as uses permitted, as of right, which are industrial in nature. Mr. Miller referred to the history of the CBPD which was created out of the Industrial Zone for the purpose of implementing higher quality design standards but was not a significant departure from the planned uses of that zone. He also referenced the 1900 update of the Plan of Conservation and Development which specifically recommended the creation of a Corporate Business Park District to implement the goal of corporate office, research and development and high quality light manufacturing uses for the area west of the airport. Mr. Miller stated that: "Contemporary zoning practice recognizes that a range of complimentary uses are needed in industrial zoning districts. Most communities have more than one industrial zoning district, with a 'light industrial district' having higher design standards and more limited uses. The Corporate Business Park District essentially serves as Oxford's light industrial district."

The plaintiffs argue that the CBPD is not identified in the regulations as an industrial zone; it is identified as a business park zone. Oxford has an Industrial Zone from which the CBPD was removed in 2000. The plaintiffs argue that the uses permitted in the CBPD are business uses, not industrial uses. They see no overlap with the uses permitted in the Industrial Zone. They contend that the industrial use exemption must be narrowly construed because it is a an exemption from a remedial statute, that the Commission's interpretation of its own regulations is not entitled to deference, and every

inference must be made in favor of applying § 8-30g and against the exemption.

There is no specific appellate authority to guide the court in applying the industrial use exemption. However, there are two Superior Court cases which have been cited by the parties. In *Jordan v. Old Saybrook Zoning Commission,* Superior Court, Judicial District of New Britain at New Britain, Docket No. 010508891 (October 31, 2003), Judge Tanzer refused to apply the industrial use exemption to property located in a B-2 Shopping Center Business District despite the commission's arguments which are similar to the arguments made by the Commission in this case. Although the court agreed with the commission that some of the uses permitted in the B-2 zone overlapped with some of the uses permitted in Old Saybrook's two industrial districts, it determined that the fact that two different zones permit some of the same uses does not mean that the two zones are interchangeable. It is the differences in the permitted uses, not the similarities, that are important. In support of this proposition, Judge Tanzer pointed out several uses which were permitted in the industrial zones but not in the business zone. She also stated that: "In assessing whether the B-2 zone falls within the industrial zone exemption, this court is mindful of the legislative purpose behind the affordable housing land use appeals statute which is to encourage and facilitate the much needed development of affordable housing throughout the state, and that, as a remedial statute, § 8-30g must be liberally construed in favor of those whom the legislature intended to benefit. If this court were to adopt the broad interpretation of § 8-30g(g)(2) advanced by the commission and expand the exemption to include not only areas zoned for industrial use but also areas in which permitted uses overlap with areas zoned for industrial use, it would thwart the important purposes of the statute to promote the development of affordable housing. It is an established and long-held rule that statutory exceptions are to be strictly construed." (Internal quotation marks omitted; citations omitted.) *Id.* Therefore, the court concluded that the B-2 Shopping Center Business District was not an area zoned for industrial use and that the industrial zone exemption was not applicable to the plaintiff's applications.

***7** The second Superior Court case to have considered the industrial zone exemption is *Baker Residential Limited Partnership v. Berlin Planning and Zoning Commission,* Superior Court, Judicial District of New Britain at New Britain, Docket No. 06 4012368 (September 10, 2008), decided by Judge Cohn. In that case the plaintiff sought to develop an affordable housing project in the Office Technology (O.T.) zone which was listed in the Berlin Zoning Regulations under the industrial zone category. The commission found that the area of the application was zoned for industrial use and applied the industrial use exemption. Judge Cohn agreed with Judge Tanzer that the court must conduct a plenary review of the record to determine whether the industrial zone exemption applies. Judge Cohn also agreed with Judge Tanzer that the town's own decision regarding the designation of the zone in question is "persuasive, if not dispositive." In the *Jordan* case, the Old Saybrook Zoning Commission had not categorized the B-2 Shopping Center zone as an industrial zone. In the *Baker* case, the Berlin Planning and Zoning Commission had categorized the O.T. zone as an industrial zone. Judge Cohn stated, "The zoning regulations establish the O.T. zone is zoned industrial." He also agreed with the plaintiff that the O.T. zone permits both modern and traditional industrial uses. Therefore, he found that the area is zoned for industrial use. The facts in the present case are distinguishable from those in that case.

In this case, the Commission does not categorize the CBPD as an industrial use. It acted to create the CBPD in 2000 and to remove the CBPD from the Industrial District in 2000. It could have established the CBPD as a second industrial zone but it decided not to do so. Although the Commission is correct that labels are not determinative, they are important, particularly where they were written by the Commission. Further, although the CBPD permits some uses which might be considered modern industrial uses, they are the exception to the business uses which predominate. In contrast, the Industrial Zone permits uses which are predominantly although not exclusively industrial in nature. I agree with Judge Tanzer that it would thwart the important purposes of the affordable housing statute to promote the development of affordable housing if the Commission were permitted to consider the CBPD as zoned for industrial uses despite removing it from the industrial zone and categorizing it as a business zone which permits only a few uses which might be considered industrial.

Although I generally agree with Judge Tanzer's analysis, I also agree with Judge Cohn's position that § 8-30g(g)(2) is not an exception to a remedial statute but is really an alternative to the three-part analysis under C.G.S. § 8-30g(g)(1). Therefore, the language of § 8-30g(g)(2) does not need to be given a narrow construction. But, even without a narrow construction, I do not find that the language of § 8-30g(g)(2) applies to the facts of this case. The CBPD is simply not an industrial zone; it is a business park zone. I agree with the

plaintiffs that if the Commission's reasoning were adopted, every zoning commission could undermine § 8-30g merely by inserting a few potential industrial uses into every non-residential zone. For the reasons given above, the court finds that the applications would not locate affordable housing in an area zoned for industrial use.

***8** The second prong of the industrial use exemption test requires a finding that the area of the proposed development does not permit residential uses. But, because of the court's finding that the area is not zoned for industrial use, the court does not need to consider the issue of whether the CBPD permits residential uses.

In summary, the Commission's decision that the industrial use exception applies to the plaintiffs' applications is not supported by sufficient evidence in the record. Consequently, if sufficient evidence exists for any of the other reasons for denial, the court will conduct a plenary review of the record and determine independently whether the Commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, and whether the risk of such harm to such public interest clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development.

3. Oxford Plan of Development, Regional Plan of Development and Policy of American Planning Association.

The next reason for denial given by the Commission is that the proposed rezoning is inconsistent with the goals in the Comprehensive Plan of Development, the Regional Plan of Development and the policy advocated by the American Planning Association. The 1999 update for the Plan of Conservation and Development recommends that the area of the project serve as a site for "modern, growing businesses and industries." It encourages "the development of Airport Access Road as a 'high tech' boulevard, in line with attractive, contemporary buildings housing emerging, growing businesses." The 1998 Central Naugatuck Valley Regional Plan for the towns in that area, including Oxford, identified the Industrial/CBPD area as a major economic area and recommends guiding economic development activities in this area. The Policy Guide on Manufactured Housing published by the American Planning Association recommends that manufacturing be allowed in residential zoning districts. The Commission claims that the location of manufactured homes in the CBPD is inconsistent with each of these.

This argument must fail because even if these recommendations and policies amount to sufficient evidence, and even if they rise to the level of a substantial public interest in health and safety, the Commission has failed to sustain its burden of showing that they outweigh the need for affordable housing. The need for affordable housing is clear and powerful; the recommendations of the Comprehensive Plan of Development, the regional Plan of development and the recommendations of the American Planning Association are advisory only. See, e.g. *Dutko v. Planning and Zoning Bd. of City of Milford,* 110 Conn.App. 228, 954 A.2d 866, (2008) There are Superior Court cases cited by the plaintiffs which hold that a town plan cannot serve as the basis for the denial of an affordable housing application. See, e.g. *TCR New Canaan, Inc. v. Planning and Zoning Commission,* Superior Court, Judicial District of Hartford-New Britain, at Hartford, Docket No. 94050477 (June 9, 1995).

4. Impact Upon the Overall Economic Development

***9** Next, the Commission argues that the proposed rezoning would have a detrimental impact upon the overall economic development within the Industrial/CPBD area. The Commission phases it this way: "The approval of this application would remove a large parcel of land directly from any potential for economic development. It would also have an adverse impact upon potential CBP use of other properties within the District by undermining demand for adjacent Industrial/CBP properties, thereby reducing job growth and growth in the Town's Grand List." There was testimony from experts and lay witnesses about these adverse impacts as well as an adverse impact upon Oxford's pending application for foreign trade zone designation in its CBPD and Industrial Districts. The Commission's planner, Brian Miller, testified about the detrimental impact of locating a residential development in the midst of the CBPD. Donald Klepper-Smith, an economist, testified that Oxford would suffer a permanent loss to job growth and to the town's grand list if the property were to be rezoned to residential.

The plaintiffs argue, in opposition, that the considerations raised by the Commission amount to fiscal zoning which is illegal in Connecticut, even in traditional zoning cases. The plaintiffs have cited several Superior Court cases in support of this proposition. The Commission has cited *United*

Progress, Inc. v. Borough of Stonington Planning and Zoning Commission, Superior Court, Judicial District of Hartford-New Britain, at Hartford, Docket No. 920513392 (March 4, 1994), for the proposition that the protection of industrial land can rise to the level of a substantial public interest in health and safety which can outweigh the need for affordable housing. That case, decided by Judge Berger, rests upon facts which are much different from those here. The Borough of Stonington is a very small historic area on a peninsula. Situated among the many historic homes is one small parcel of industrial land which was the former site of a Monsanto factory. The applicant in that case sought to convert the property to residential use with an affordable housing project. The court found that the need to preserve this one industrial parcel was a substantial public interest which outweighed the need for affordable housing. The Borough had only 3.9% of the total housing units qualify as affordable housing but Judge Berger noted that there were 352 multi-family units, 193 of which were rented for less than $750 per month, within the upper limit of the affordable housing definition. So, the borough had a need for affordable housing but not nearly as dire as Oxford's need. More importantly, Oxford, unlike the borough, has significant other land zoned for industrial use. There are still nearly 2000 acres remaining in the industrial zone and nearly 400 more acres in the CBPD. Finally, the parcel had for many years been the site of a factory. The site in this case had been a farm. Therefore, the *United Progress* case decision is factually distinguishable and cannot be used as persuasive precedent.

***10** The court finds that even if the financial considerations raised by the Commission amount to sufficient evidence, and even if they rise to the level of a substantial public interest in health and safety, the Commission has failed to sustain its burden of showing that they outweigh the need for affordable housing. My plenary review of the Commission's evidence reveals that it is based upon speculative assumptions about the probability of industrial growth. The evidence, particularly from Mr. Klepper-Smith, is entitled to some weight, but not nearly as much as the Commission gave it. On the other hand, the need for affordable housing is not speculative at all. It clearly outweighs the economic concerns of the Commission.

5. Inconsistency with Waterbury-Oxford Airport Plans

The commission found that concerns about noise from the airport were sufficient to deny the plaintiffs' applications. The court has reviewed the evidence on this point and finds that the Commission's concerns are overblown. The evidence is that the planes taking off from and approaching the airport do not fly over the subject property. The noise study commissioned by the Connecticut Department of Transportation indicates that the subject property lies outside the area which would receive dangerous levels of noise. Further, the Commission has approved other residential developments in recent years which receive at least as much noise from the airport. Finally, the fact that child day care facilities and schools are permitted in the CBPD by special exception runs counter to the Commission's claim that residential uses will cause health and safety concerns. My plenary review of the record does not reveal that the concern for noise rises to the level of a substantial interest in health or safety.

6. Site Plan Issues

The Commission articulated eleven "concerns" with the site plan which were raised by the expert testimony from the town engineer, traffic consultant, fire chief, and/or planning professionals. The plaintiffs argue that the court should disregard these concerns in its review because they do not believe that the Commission has properly briefed these concerns by citing or reviewing the record evidence, explaining the harm or unsafe condition which may result from each concern, or explaining why these concerns clearly outweigh the need for affordable housing. Therefore, the plaintiffs argue that the Commission has abandoned these concerns as denial reasons. In answer to this argument, the Commission says: 1) it agrees that these concerns could be addressed by reasonable changes; and that 2) it did address these issues in its brief and by incorporating the Commission's lengthy decision and record references as an appendix to its brief.

It is true that the Commission's use of an appendix could be viewed as a way to exceed the page limit on the initial brief. The Commission also used its reply brief to amplify arguments which could have been made in the initial brief. The plaintiffs urge the court to consider that all of the Commission's arguments made in this fashion have been abandoned. Although the court is tempted to follow the plaintiffs' advise, some of the Commission's "concerns" about the site plan raise important health and safety issues which deserve to be considered by this court. These concerns will be addressed in order.

***11** The Commission found that the development would exacerbate an unsafe traffic condition on Bristol-Town Road by increasing two-way traffic in a narrow 16' wide road where the stopping distance is limited, thereby increasing the likelihood of accidents and reducing safety. The 99 units in Oxford Commons West will have their sole access and egress on Hurley Road. To the west, Hurley Road soon crosses into Southbury where it is known as Bristol-Town Road. The Town of Southbury and the Commission's traffic consultant both opined that the present road is narrow, presents safety issues, and that added traffic will exaggerate the safety problems. The plaintiffs argue that this issue has been addressed by an amendment to the site plan to require that all traffic exiting the site by Hurley Road to turn left, following Hurley Road to Donovan Road to Oxford Airport Road. This refinement prevents outgoing traffic from using Bristol-Town Road. Also, the Hurley-Donovan-Airport Roads route will be widened and repaved. The Commission expressed concern that this refinement may not prove to be effective in preventing left turns onto Hurley Road and would only address exiting traffic, not traffic entering the site, especially during the afternoon commuting time.

My own review of the record does not lead me to conclude that the Commission's safety concerns amount to a substantial public interest which clearly outweighs the need for affordable housing. Even if they did, these concerns can be handled by reasonable conditions which address the Commissions' concerns. After all, the Commission desires to reserve this land for business uses which could present even more difficult traffic issues, especially with large trucks. The Commission should impose reasonable conditions, just as it would have done if the plaintiffs had proposed a business use.

The second health and safety concern also involves access to the site. The Commission found that the portion of the project containing 99 units known as Oxford Commons West will have only one entrance and that there should be two distinctly separate routes, each located as remotely from the other as possible. The expert evidence on this point is conflicting. The plaintiffs rely upon their expert who testified that the plans were safe and in accordance with national standards, provided that there were an emergency access which could be used by emergency vehicles. The site plan shows an emergency strip [1] from Oxford Access Road to the corner of the closest dead-end road within the development. The testimony at the hearing was that this strip would gated to prevent normal access and egress but could be opened by emergency personnel. The site plan review of the plaintiffs' fire safety expert, Joseph Versteeg, dated April 18, 2007 specifically states: "The provision of a remotely located secondary access roadway ensures access to the site in the unlikely event the primary entrance route is blocked. The alternative plan depicting an emergency access roadway likewise ensures access to the site in the unlikely event of a blockage." The Commission's own experts opined that a second access road, not just an unpaved emergency entrance, is critical for safe and efficient access and egress.

***12** In opposition to the Commission's experts, the plaintiffs argue that the entrance on Hurley Road will be divided by islands which will separate the entering and existing traffic, making it more difficult to block. However, the Commission's expert opines that this layout does not provide sufficient geometry to be considered anything other than a single access. My own review of the record leads me to conclude that a single access point for the 99 units in Oxford Commons West presents a serious health and safety issue which clearly outweighs the need for affordable housing. Affordable housing units should be just as safe as any other form of housing. The emergency access proposed by the plaintiffs is inadequate to safeguard the residents from the danger of one entrance being blocked. The reliance upon the proposed emergency entrance is insufficient. The use of this access would be subject to confusion and to human error in the event of a real emergency. This issue could be resolved with a condition that requires the plaintiffs to provide a full second access point which is separated from the access on Hurley Road. [2]

The next health and safety concern of the Commission involves inadequate internal traffic circulation and inadequate turning radii to permit fire trucks to turn in the hammerheads on the dead end roads. There are 9 dead-end roads with hammerhead turnarounds at the end of each. Although the plaintiffs revised their plan to increase the size of the hammerheads, the Commission's expert as well as the Oxford Fire Department opined that they were still too cramped to permit large fire trucks to execute efficient 3-point turns, even assuming that there are no cars parked in the hammerheads and that there are no snow piles which infringe on the paved roadway. The Commission's engineering expert, David Nafis, is also of the opinion that despite the increase in size of the hammerheads, they are still not large enough for the SU-30 fire truck to turn around. This concern ties in with the next concern expressed by the Commission which deals with inadequate parking. [3] The Commission's expert believes that the lack of parking at the units may lead people to park in the

hammerheads. Since the interior roads and hammerheads will be private, the town will have no authority to enforce parking restrictions. Although the plaintiffs dispute the Commission's findings, my own review of the record is in accord with that of the Commission. The design of the dead-end streets and the lack of space to park at the units will undoubtedly lead to improper parking in places which will make it very difficult for fire trucks to maneuver. I agree with the Commission's view that these are health and safety deficits in the site plan which clearly outweigh the need for affordable housing. However, these concerns can be handled with reasonable conditions which would require the amendment of the site plan to eliminate these internal traffic deficiencies.

***13** The Commissions had other health and safety concerns as well, including inadequate provision for snow removal and unacceptable erosion and drainage on the west side of the property. My own review of the record reveals that these concerns rise to the level of health and safety risks which clearly outweigh the need for affordable housing, but that each could be easily addressed with reasonable conditions.

VI. Remedy

The court sustains the appeal and remands this matter to the Commission and orders it to approve the text amendment to the Zoning Regulations and the amendment to the zoning map, and to approve the site plan and zoning permit applications subject to reasonable and necessary conditions, not inconsistent with this decision, for: 1) a full second access road which is separated from the access on Hurley Road; 2) additional parking; 3) redesign of the hammerheads at the ends of the interior streets to permit fire trucks to make efficient turns; 4) snow removal in the hammerheads; and 5) erosion and drainage on the west side of the property.

All Citations

Not Reported in A.2d, 2009 WL 4282204, 48 Conn. L. Rptr. 743

Footnotes

1 The final revision of the site plan calls for this strip to 16 feet wide, at a maximum grade of 12% and to have a surface of "PVC pavers with topsoil and grass."

2 The record reflects that the plaintiffs' position at the June 7, 2007 hearing was that they believed it was preferable to have a second access-way and had applied to the Connecticut Department of Transportation for permission to provide a full access-way onto Oxford Airport Road, or, in the alternative, an emergency means of access. There is a letter of denial in the record from DOT, both for full access and for emergency access, based upon reasons which are not analyzed in this appeal. In any event, the record reflects that the plaintiffs claim to have withdrawn their application to DOT before action was to be taken by DOT. Therefore, the plaintiffs claim that the letter of denial from DOT "must be regarded as an advisory statement as to what would have happened had the application been pursued, rather than a denial per se."

3 The site plan calls for one or two-car garages for parking plus spaces for two cars in the driveways.

2019 WL 2096651

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford, Land
Use Litigation Docket at Hartford.

SIXTY FIVE MARSH HILL ROAD, LLC
v.
ORANGE PLAN AND ZONING COMMISSION

LNDCV176082593S
|
February 19, 2019

Berger, J.T.R.

I

***1** The plaintiff, Sixty Five Marsh Hill Road, LLC, appeals the denial by the defendant, the Orange Town Plan and Zoning Commission (commission), of an application for a special permit for an affordable housing development under General Statutes § 8-30g. The plaintiff sought to develop its 3.03-acre property at 65 and 69 Marsh Hill Road and 0 and 15 Salemme Lane in Orange as a mixed use development of commercial and residential components in a light industrial district (LI-2) zone. (Return of Record [ROR], Item 13, p. 74; [1] Item 65.) The commission held a public hearing on February 21, 2017, March 21, 2017, April 4, 2017, and April 18, 2017, and denied the application on May 2, 2017. (ROR, Item 39; Items 73.a-73.d; Supplemental [Supp.] ROR, Pleading [Pl.] #107.00, Item 72.e.) Notice of the decision was evidently published on May 9, 2017, in the *New Haven Register*. (ROR, Item 43.)

On May 23, 2017, the plaintiff filed a proposed modification to the application under General Statutes § 8-30g(h). [2] (ROR, Item 43.) The commission held a public hearing on the modified application on July 18, 2017, and August 1, 2017, and voted to deny the second application on August 15, 2017. (Supp. ROR, Pl. #106.00, Items 73.f-73.g; Supp. ROR, Pl. #107.00, Item 65; Item 72.h.) In the denial, the commission found that the plaintiff's application did not fall under § 8-30g as it contained mixed uses. (Supp. ROR, Pl. #107.00, Item 65.) It also found that the industrial use exemption of General Statutes § 8-30g(g)(2)(A) applied because the application proposed a residential use on property in an industrial zone and the Orange Zoning Regulations (regulations) did not allow residential use in the LI-2 zone. (Supp. ROR, Pl. #107.00, Item 65.) Notice of the decision was apparently published on August 24, 2017. (ROR, Item 66.)

***2** On the same date, the plaintiff commenced this appeal alleging that the commission's reasons for denial are illegal, arbitrary and in abuse of its discretion. The commission filed the return of record on March 14, 2018, and filed supplemental returns of record on April 6, 2018, and on June 27, 2018. The commission filed its brief on June 29, 2018, the plaintiff filed its brief on September 17, 2018, and the commission filed its brief in reply on October 25, 2018. The court heard the appeal on October 31, 2018.

II

Before this court on October 31, 2018, the plaintiff introduced four deeds, without objection, demonstrating ownership of the subject properties. Exhibits 1-4. Additionally, Frank M. Dilieto, the managing partner of the plaintiff, testified that the plaintiff owned the property and was the applicant throughout the administrative proceeding and owns the property presently. Therefore, this court found that the plaintiff was aggrieved. See General Statutes § 8-30g(f) ("[a]ny person whose affordable housing application is denied ... may appeal such decision pursuant to the procedures of this section"); see also *Handsome, Inc. v. Planning & Zoning Commission*, 317 Conn. 515, 527, 119 A.3d 541 (2015) ("[i]t is well established that a party may be aggrieved for purposes of appeal by virtue of its status as a property owner").

III

The plaintiff's proposed development, to be known as Marsh Hill Station, includes 23,641 square feet of commercial or office space with a residential component of sixty apartments of which 30 percent, or eighteen units, would be set aside as affordable housing under § 8-30g. (ROR, Item 5.) Two buildings would have four and one-half stories with underground parking, commercial space on the first floor and residences on the three floors above. (ROR, Item 74.) According to the modified plans, the plaintiff proposed that the commercial space would perhaps be occupied by offices,

restaurants and a gym. (Supp. ROR, Pl. #106.00, Item 73.f, pp. 29-32.)

In the commission's denial of the plaintiff's application, the commission gave two reasons for its denial: (1) § 8-30g did not apply to the plaintiff's mixed use application, and (2) the industrial use exemption of § 8-30g(g)(2)(A) would apply. Specifically, the commission found: "The Affordable Housing Statute does not address uses other than residential uses, and the retail/restaurant uses contemplated by the Modified Application are not permitted in the LI-2 zone. Consequently, the Applicant's attempt to classify its application for a mixed use development as an Affordable Housing Application is an improper attempt to bootstrap non-permitted commercial uses to a [§]8-30g application ... The Commission concludes that the Applicant has filed an improper Affordable Housing Application. The Applicant cannot avail itself of the benefit of Section 8-30g scrutiny and review when it is clear that the commercial uses proposed by the Modified Application are prohibited in the LI-2 zone."[3] (Supp. ROR, Pl. #107.00, Item 65, pp. 8-9.)

The commission also found that "substantial evidence in the record demonstrates that the property which is the subject of the Modified Application is located in an area which is zoned for industrial use and which does not permit residential uses. Furthermore, as the Applicant conceded, it is not seeking approval for assisted housing. Consequently, the "industrial use exemption" set forth in ... General Statutes [§]8-30g(g)(2)(A) applies. The Modified Application does not conform to the Zoning Regulations as it seeks approval for uses which are not permitted in the LI-2 zone." (Supp. ROR, Pl. #107.00, Item 65, pp. 7-8.)

A

***3** The threshold issue is whether § 8-30g applies to the plaintiff's mixed use application. The plaintiff argues that the statute does not prohibit mixed uses or commercial uses. The commission counters that there is no language in § 8-30g indicating legislative intent to include any uses other than residential.

"Issues of statutory construction raise questions of law, over which we exercise plenary review ... When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature ... In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Citation omitted; internal quotation marks omitted.) *Dauti Construction, LLC v. Planning & Zoning Commission,* 125 Conn.App. 665, 677, 10 A.3d 92 (2010), cert. denied, 300 Conn. 924, 15 A.3d 630 (2011).

In § 8-30g(a)(2), "affordable housing application" is defined as "any application made to a commission in connection with an affordable housing development by a person who proposes to develop such affordable housing." In § 8-30g(a)(1), "affordable housing development" is defined as "a proposed housing development which is (A) assisted housing, or (B) a set-aside development." "Set-aside development" is defined as "a development in which not less than thirty percent of the *dwelling units* will be conveyed by deeds containing covenants or restrictions which shall require that, for at least forty years after the initial occupation of the proposed development, such *dwelling units* shall be sold or rented at, or below, prices which will preserve the units as housing for which persons and families pay thirty percent or less of their annual income, where such income is less than or equal to eighty percent of the median income. In a set-aside development, of the *dwelling units* conveyed by deeds containing covenants or restrictions, a number of *dwelling units* equal to not less than fifteen percent of all *dwelling units* in the development shall be sold or rented to persons and families whose income is less than or equal to sixty percent of the median income and the remainder of the *dwelling units* conveyed by deeds containing covenants or restrictions shall be sold or rented to persons and families whose income is less than or equal to eighty percent of the median income." (Emphasis added.) General Statutes § 8-3g(a)(6).

"Dwelling" is defined as "a shelter (as a house) in which people live."[4] Merriam-Webster's Collegiate Dictionary (10th Ed. 1999). It does not connote an industrial or commercial use. Thus, the clear and unambiguous language of the statute only applies to applications to develop residential uses.

Additionally, interpreting § 8-30g to apply to mixed uses may lead to an absurd result as illustrated by *Cortese v. Planning & Zoning Commission of the Town of Greenwich,*

Superior Court, judicial district of New Britain, Docket No. CV-00-0505690-S (September 5, 2002, Munro, J.).[5] If § 8-30g were interpreted to allow for mixed uses, a commission would be required to apply the statute in its review of permits to construct or enlarge industrial or commercial uses if developers included an affordable dwelling unit. Such an interpretation is not what the legislature intended.

***4** The court is mindful that "the statute's legislative history reveals that the key purpose of § 8-30g is to encourage and facilitate the much needed development of affordable housing throughout the state." *West Hartford Interfaith Coalition, Inc. v. Town Council,* 228 Conn. 498, 511, 636 A.2d 1342 (1994). In *West Hartford Interfaith Coalition,* the court held that "[a]part from requiring that an application be made in connection with an affordable housing development proposal, the statute contains no exceptions or qualifications limiting the definition of an affordable housing application to certain types of applications to zoning commissions." *Id.*, 508-09. The court construed "the language of § 8-30g to apply to every type of application filed with a commission in connection with an affordable housing proposal."[6] *Id.*, 509.

Nevertheless, there is a difference between types of applications versus types of uses. "The legislative history indicates that the legislature intended to accomplish th[e] goal [of encouraging and facilitating affordable housing throughout the state] by creating specific legislation that affects only affordable housing applications, not the overall zoning scheme. Therefore, *applications that do not fit into the definition of an affordable housing application are not affected by § 8-30g.*" (Emphasis added; internal quotation marks omitted.) *JAG Capital Drive, LLC v. East Lyme Zoning Commission*, 168 Conn.App. 655, 670, 147 A.3d 177 (2016).

As the plaintiff's proposal undisputedly includes nonresidential uses, it does not fit into the definition of an affordable housing application and the § 8-30g review process does not apply. See *id.* In denying the plaintiff's application, the commission cited § 383-67(A) of the regulations which prohibits dwellings in the LI-2 zone. (ROR, Item 75, p. 822; Supp. ROR, Pl. #107.00, Item 65, p. 5.) Therefore, the commission properly denied the application. See *Fedus v. Zoning & Planning Commission,* 112 Conn.App. 844, 850, 964 A.2d 549 ("when acting in an administrative capacity, a zoning commission's ... function is to determine whether the applicant's proposed use is one which satisfies the standards set forth in the regulations and statutes" [internal quotation marks omitted]), cert. denied, 292 Conn. 905, 973 A.2d 104 (2009).

B

The commission's second reason for denying the plaintiff's application is based on the industrial use exemption of § 8-30g(g)(2)(A). The plaintiff argues that the exemption is not applicable because the commission's regulations provide for a transient oriented design district (TODD) as an overlay district to this LI-2 zone.[7] In 2016, the commission granted an application for a zone change to the TODD that allowed a 700-car parking garage, a 200-unit residential facility and 20,000 square feet of commercial space on an adjoining parcel owned by the Orange Land Development, LLC.[8] (ROR, Item 13, p. 75.) The plaintiff asserts that the creation of the TODD and the approval of the Orange Land Development application is fatal to the commission's denial of the plaintiff's application based upon the industrial zone exemption.[9] The commission counters that it properly denied the plaintiff's application under the industrial zone exemption because the plaintiff did not apply for a zone change to the TODD and its property is in an LI-2 zone that does not allow residential uses under the regulations.

***5** In the commission's decision, it found the following: "The Orange Zoning Map depicts the TODD as an overlay zone which is an area designated as 'Potential Transit Development Area.' Accordingly, properties in the designated area *may* qualify for the TODD. It is not an existing zone. The TODD regulations, which are found in [§§]383-215 through 383-220 of the [regulations], set forth a comprehensive and rigorous process,[10] which requires an applicant to apply for a zone change in order to establish a TODD. Once the zone change for a TODD is approved, property that formerly was in the LI-2 zone becomes part of the new TODD, which is its own, separate zone." (Emphasis in original.) (Supp. ROR, Pl. #107.00, Item 65, p. 6.)

***6** General Statutes § 8-30g(g)(2)(A), in relevant part, provides: "Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove ... [that] the application which was

the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses ... if the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it."

In the present case, the commission must prove two things under the statute: (1) the area is zoned for industrial use and (2) the area does not permit residential use. *Baker Residential, L.P. v. Berlin Planning & Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV-06-4012368-S (September 10, 2008, Cohn, J.) (46 Conn. L. Rptr. 309, 310). "[I]f the commission establishes the applicability of the industrial zone exemption, it must only show that the reasons it cited are supported by sufficient record evidence. If, however, the industrial zone exemption does not apply, the commission must satisfy the heightened burden of proof set forth in part (1) of [§ 8-30g(g)]. As the industrial zone exemption is determinative of the commission's burden of proof and the scope of this court's review, its applicability must be determined at the outset. General Statutes § 8-30g(g)(2)." *Jordan Properties, LLC v. Old Saybrook Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV-01-0508891-S (October 31, 2003, Tanzer, J.).

This court does not agree with the plaintiff that the commission opened the door to affordable housing in the LI-2 district simply by providing for the TODD and approving another development in it. [11] In amending § 8-30g to create the industrial exemption, "the legislature has explicitly identified a clear public interest, protecting industrial zones not permitting residential uses from affordable housing development that would drain their potential industrial development." *JPI Partners, LLC v. Planning & Zoning Board of the City of Milford,* Superior Court, judicial district of New Britain, Docket No. CV 99-0499081-S (April 9, 2001, Frazzini, J.) (29 Conn. L. Rptr. 524, 529), rev'd on other grounds, 259 Conn. 675, 791 A.2d 552 (2002). "[T]he evident intent of the legislature was to provide towns an alternative to the traditional three-part analysis under § 8-30g(g)(1) so that towns could protect their industrial development plans and safeguard a large tax base from forced conversion." *Baker Residential, L.P. v. Berlin Planning & Zoning Commission, supra,* 46 Conn. L. Rptr. 312. In *Baker Residential,* the court held that industrial zone exemption applied as the regulations did not allow a residential use and the land was in an industrial zone. *Id.,* 313.

Here, the commission found and the record demonstrates that the subject property is in a LI-2 zone. [12] (ROR, Item 5, p. 23; Item 30, p. 70; Supp. ROR, Pl. #107.00, Item 65, p. 4.) As previously stated, § 383-67(A) of the regulations does not allow residential uses in the LI-2 zone (ROR, Item 75, p. 822); and the plaintiff undisputedly did not apply to change the property's zone to the TODD zone. Therefore, assuming arguendo that the application falls under § 8-30g, the commission properly found that the industrial exemption applies. [13] (ROR, Item 75, p. 820.)

***7** In sum, the plaintiff's mixed use concept seems to be meritorious, realistic and appropriate for its location and zone. [14] Nevertheless, § 8-30g does not apply to mixed uses. [15] Additionally, the regulations expressly forbid residential uses in the LI-2 zone, the property is in the LI-2 zone and the plaintiff did not apply for a zone change to the TODD zone. Therefore, substantial evidence supports the commission's denial. For these reasons, the plaintiff's appeal is dismissed.

All Citations

Not Reported in Atl. Rptr., 2019 WL 2096651, 68 Conn. L. Rptr. 385

Footnotes

1 The items in the record are not consistently paginated. For ease of reference, the page numbers refer to the overall page number in the electronically filed document. For example, pleading #105.00 contains most of the return of record and has 922 pages. Thus, the court will refer to pages 1 through 922. This will also

apply to the two supplements to the return of record that will be referred to as supplemental return of record, pleading #106.00, and supplemental return of record, pleading #107.00.

2 Section 8-30g(h), in relevant part, provides: "Following a decision by a commission to reject an affordable housing application ... the applicant may, within the period for filing an appeal of such decision, submit to the commission a proposed modification of its proposal responding to some or all of the objections or restrictions articulated by the commission, which shall be treated as an amendment to the original proposal ... The filing of such a proposed modification shall stay the period for filing an appeal from the decision of the commission on the original application. The commission shall hold a public hearing on the proposed modification if it held a public hearing on the original application and may hold a public hearing on the proposed modification if it did not hold a public hearing on the original application ... Within the time period for filing an appeal on the proposed modification as set forth in section 8-8, 8-9, 8-28 or 8-30a, as applicable, the applicant may appeal the commission's decision on the original application and the proposed modification in the manner set forth in this section. Nothing in this subsection shall be construed to limit the right of an applicant to appeal the original decision of the commission in the manner set forth in this section without submitting a proposed modification or to limit the issues which may be raised in any appeal under this section."

3 The decisions denying both applications are essentially the same. (ROR, Item 42; Supp. ROR, Pl. #107.00, Item 65.)

4 "Dwelling unit" is also defined in § 383-14 of the regulations as "[a] building or part of a building designed for occupancy, or so occupied by one family. Accommodations occupied for transient lodging in a hotel or a motel shall not be considered to be a dwelling unit." (ROR, Item 75, p. 794.)

5 As support for the plaintiff's argument, it cites to *Cortese*. In *Cortese,* the court stated, "The legislature, in all of its amendments of the affordable housing legislation, has never imposed a minimum number of units, nor a prohibition on a mixed use application for a § 8-30g housing development. Accordingly, this court should not read a minimum requirement or a restriction on use of the property where it has not been implied by the legislature." *Id.* Nevertheless, the court also observed, "The commission denied the applications primarily because they perceived it as an attempt to bootstrap an illegal expansion of a nonconforming use through the construction of an affordable housing unit that would be set in a commercial environment inappropriate to its residential character. Further it found it unhealthful for the residents. The affordable unit was to be placed over the garage where nine fuel oil trucks were to be serviced, parked, repaired and dispatched." *Id.* The court concluded, "Essentially, the unit sought for affordable housing was an excuse by the Applicant to avail itself of the benefit of § 8-30g scrutiny and review when it knew that its otherwise commercial application had been and would likely be again looked upon unfavorably. The court finds this an abuse of the purposes and goals of the affordable housing legislative scheme." *Id.*

6 Typically, this has been construed to allow for zone changes related to affordable housing proposals. See, e.g., *Wisniowski v. Planning Commission,* 37 Conn.App. 303, 314-15, 655 A.2d 1146 ("Whichever zoning authority is asked to deal with the application, a zone change will necessarily be embodied in the application, either as to use, or as to bulk, as is the case here. If no zone change were involved, there would be no need for an application for affordable housing. An application may not be rejected just because it involves a zone change"), cert. denied, 233 Conn. 909, 658 A.2d 981 (1995).

7 Section 383-215(A) provides: "The purpose of the Transit Oriented Development District is to create a high density mixed use, transit oriented development adjacent to a Metro North Rail Station. It is further the intent to provide a range of housing, businesses and services specifically geared towards commuters and users of the railroad, designed in an aesthetically pleasing, environmentally conscious and pedestrian scaled manner." (ROR, Item 75, p. 916.)

Additionally, Section 383-217, entitled "Permitted uses," provides:

A. Retail uses, including retail banks, subject to the following:

(1) All retail uses shall be supportive of the principal land uses within the TODD, including the railroad station, offices, hotels and multi-family residential uses.

(2) The retail uses shall be designed to primarily serve the market of railroad station commuters, residents of the multi-family dwellings within the TODD, employees of the offices and/or hotels within the TODD, and guests of the hotels within the TODD. This shall be illustrated by size, type and signage of the proposed retail uses.

(3) No retail uses shall exceed 5,000 square feet of building area.

(4) All retail uses shall be within a building used primarily for one of the other permitted uses.

(5) All retail uses shall be oriented to a public or private street, or other public space.

B. Indoor restaurants and other food and beverage service establishments where customers are served only when seated at tables or counters and all of the customer seats are located within an enclosed building or outdoor area attached to the indoor dining area.

C. Business and professional offices, including medical offices.

D. Railroad transit stations.

E. Structured parking.

F. Multi-family residential units subject to the following conditions:

(1) No unit shall contain more than two bedrooms.

(2) No units shall be located on the ground floor of a structure.

(3) There shall be a maximum of 250 units.

(4) Multi-family residential units shall only be permitted in conjunction with the development of office, hotels or other similar uses. There shall be a minimum of 1,000 square feet nonresidential use for each residential dwelling unit. The Commission may require the phasing of development to assure that the minimum nonresidential development occurs prior to the residential development.

G. Hotels with accessory restaurants and/or conference centers. (ROR, Item 75, p. 917.)

8 According to the commission's decision, there was a moratorium on applications for zone changes to the TODD at the time of the plaintiff's applications. (Supp. ROR #107.00, Item 65, p. 7.) Even if the plaintiff had applied for a zone change to the TODD after the expiration of the moratorium, the cap of § 383-217(F)(3) of the regulations would apparently have been construed to limit residential units to 250 in the TODD zone. (ROR, Item 75, p. 917; Supp. ROR, Pl. #106.00, Item 73.f, pp. 38-40.) As Orange Land Development was already developing 200 units, the plaintiff would have only been able to develop 50 units instead of 60.

9 Indeed, counsel before the commission argued that his "whole argument ... is, that the creation of the TODD overlay creates a situation that negates the exemption under [§]8-30g for prohibition of residential use." (Supp. ROR, Pl. #106.00, Item 731, p. 92.)

10 Section 383-220 provides:

> A. Informal consideration. It is recommended that, prior to the submission of a formal application for approval of a Transit Oriented Development District, the applicant review with the Commission and its staff in preliminary and informal manner any proposal for a TODD.
>
> B. Petition. A petition for a change of zone for the establishment of a Transit Oriented Development District shall be submitted to the Commission in writing and shall be signed by the owner or owners of all parcels within the proposed district, in accordance with the provisions of § 383-210, and shall be accompanied by the following:
>
> [Amended 11-19-2013]
>
> (1) Statement. A written statement specifying the proposed uses of the area, special design considerations and features, architectural guidelines and themes, and how the proposal is consistent with the purpose of the Transit Oriented Development District.
>
> (2) Conceptual plan. A conceptual plan shall be presented to the Commission showing the general intent of the proposal. The following information shall be presented in enough detail to allow the Commission to determine if the plan is in the spirit of the Zone's intent.
>
> (a) Location and size of property, including a boundary map and a map showing the project site in the context of the surrounding area.
>
> (b) Existing topographic grades of the property, shown in accordance of a minimum of five-foot intervals.
>
> (c) Location of proposed buildings, roads, parking areas and structures, open space areas, including proposed general grading characteristics.
>
> (d) Plans for the construction of a rail station including funding sources.
>
> (e) General building and parking layout.
>
> (f) Proposed area and square footage of the proposed buildings and uses.
>
> (g) Concept plan for uses to be proposed which may not necessarily include specific tenants.
>
> (h) General vehicular and pedestrian circulation showing all proposed public and private drives, walking paths, sidewalks, and means of traffic calming and/or pedestrian safety.
>
> (i) Proposed public areas such as parks, lawn areas and recreational facilities.
>
> (j) Landscaping and lighting plans showing areas of existing mature trees, all existing and proposed surface water resources, proposed landscaping treatments, proposed open space and recreational areas, and detail of proposed pedestrian-scaled lighting fixtures to be used.
>
> (k) General streetscape and architectural design or theme, with exterior elevations, perspective drawings and descriptive information regarding building materials and exterior finishes.
>
> (3) Tentative construction timeline and phasing plan.
>
> (a) Existing and proposed utility plan.

(b) Proposed grading of the property in a general concept, including the proposed amount of material which would be added, removed, and/or relocated on the property.

(c) Traffic impact analysis, which describes the potential impact of the proposed uses on public roads, and, if needed, includes recommended improvements to such roads; and the adequacy and efficiency of the proposed internal circulation system. The Commission may request that the traffic impact be analyzed as to individual components of the overall plan.

(4) Application fee. Fees shall be paid to amend the Zoning Map as set forth in § 270-1 of the Town Code with an additional fee for site plan as set forth in this section to be paid at the time of submission of detailed development plans once the Commission determines the concept plan is acceptable.

C. Review of concept plan.

(1) After the application submission has been deemed complete for the establishment of a Transit Oriented Development District, the Commission shall review the application for completeness of submission, and may require additional information. The complete application shall be reviewed at a public hearing and during this review may hold meetings with the petitioner and require additional information. The Commission shall hold a public hearing on the application.

(2) After the public hearing, the Commission may disapprove or give approval to the concept plan or approval subject to modifications. Approval of the concept plan shall not constitute final approval of the Transit Oriented Development District and shall simply authorize the submission of site plans setting forth in detail the specifics of the proposed development and showing any modifications specified by the Commission.

D. Site plan. A site plan and application shall be submitted to the Commission as required by Article XIII of the Zoning Regulations. In addition to the plans required by Article XIII of the zoning regulations, the following shall also be submitted:

(1) A pedestrian circulation plan showing safe, illuminated means of circulation throughout the site. Proposed material for pathways will be presented on a detail plan. This plan shall also incorporate locations for secure bicycle racks.

E. Criteria for approval of site plan. The Commission may approve the site plan only after the Commission finds that the site plan is consistent with the approved concept plan and any other requirements included within its approval. (ROR, Item 75, pp. 920-21.)

11 It is emphasized that the *only* evidence that residential uses are allowed in the LI-2 is the approval of the Orange Land Development application in the TODD zone.

12 The plaintiff argues that the zoning map purports to show the area in which this property is located as LI-2 and "TODD eligible." (ROR, Item 64.) The plaintiff also asserts that the town's assessor cards indicated that the property is within the "LI-2 TODD" classification. (ROR, Item 60.)

13 Under § 383-65, the permitted uses in the zone LI-2 zone are:

A. Manufacture, processing or assembling of goods.

B. Laboratories for research, testing and development; printing and publishing establishments.

C. Office buildings for business and professional establishments, excluding those establishments which primarily provide services to customers and clients on the premises.

D. Warehousing of goods or materials manufactured on the same lot or warehoused for distribution and sale or resale and wholesale business.

E. Freight and materials trucking businesses when clearly accessory and subordinate to another permitted use on the same lot.

F. Repairing and servicing of motor vehicles when clearly accessory and subordinate to another permitted use on the same lot.

G. Public utility substations, telephone equipment buildings and switching stations; water supply pump stations and storage facilities; public utility transmission lines; public utility maintenance facilities.

H. Buildings and facilities of the Town of Orange, State of Connecticut, and federal government, excluding corporate or proprietary uses unless otherwise permitted above.

I. Railroad rights-of-way and storage sidings.

J. Signs as provided in Article XIX.

K. Accessory uses customary with and incidental to any aforesaid permitted use, provided such accessory uses are located on the same lot with the use to which they are accessory; such uses may include, but are not limited to, off-street parking and loading spaces, and eating, recreation and auditorium facilities primarily for persons employed on the lot and not open to the general public. (ROR, Item 75, p. 820.)

14 The commissioners described the plaintiff's proposal as "great," "fantastic," "lovely," "nice" and "beautiful." (Supp. ROR, Pl. #106.00, Item 73.f, pp. 69, 74-75.) Counsel now agree that the Orange Land Development proposal will not be going forward. The record reflects that Orange has less than 2 percent affordable housing (ROR, Item 11, p. 53); and that the plaintiff noted during the administrative process that further affordable housing development outside of the TODD zone is virtually impossible given existing zoning, affordable housing developments, infrastructure and the regulatory scheme. (Supp. ROR, Pl. #106.00, Item 73.f, pp. 41-44.) Thus, the plaintiff's proposal may have been one of the few ways to provide more affordable housing stock in Orange.

15 The language of § 8-30g demonstrates no intention by the legislature to address anything other than residential uses given a Euclidean zoning regime. It may be time for more flexibility as zoning has evolved since *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). See, e.g., *Farmington-Girard, LLC v. Planning & Zoning Commission of the City of Hartford,* Superior Court, land use litigation docket at Hartford, Docket No. LND CV-14-6055443-S (September 11, 2017, Berger, J.) (discussing in footnote that form-based zoning uses "physical form [rather than separation of uses] as the organizing principle for the code" that "are keyed to a regulating plan that designates the appropriate form and scale [and therefore, character] of development, rather than only distinctions in land-use types"), on appeal, Docket No. A.C. 41601; see also *Malafronte v. Planning & Zoning Board,* 155 Conn. 205, 209-10, 230 A.2d 606 (1967) ("Zoning must be sufficiently flexible to meet the demands of increased population and evolutionary changes in such fields as architecture, transportation and redevelopment ... The responsibility for meeting these demands rests, under our law, with the reasoned discretion of each municipality acting through its duly authorized zoning commission" [citations omitted]).

End of Document

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of Hartford.

JAG CAPITAL DRIVE, LLC
v.
EAST LYME ZONING COMMISSION.

No. HHDLNDCV136044284S.
|
Dec. 23, 2014.

Attorneys and Law Firms

Shipman & Goodwin LLP, Hartford, for Jag Capital Drive, LLC.

Waller Smith & Palmer PC, New London, for East Lyme Zoning Commission.

Opinion

HENRY S. COHN, Senior Judge.

***1** The plaintiff, JAG Capital Drive, LLC, [1] appeals, pursuant to General Statutes § 8–30g(f), from a June 6, 2013 final decision of the East Lyme Zoning Commission (the commission), denying its March 28, 2013 application for approval of an affordable housing development.

The record shows as follows. The plaintiff's land is located in East Lyme. It consists of 24 acres, zoned LI, Light Industrial, adjacent on the north side to a small commercial/light industrial area served by a street called Capital Drive, ending in a cul-de-sac north of JAG's 24 acres. West of the plaintiff's property are wetlands, a stream, and the East Lyme/Old Lyme border. To the east are a single-family residential neighborhood and Camp Niantic, a seasonal campground. To the south is State Route 156, which in that location is called West Main Street. The plaintiff's property has frontage on Route 156/West Main. (See Return of Record, ROR, hearing Exhibit J.)

The plaintiff filed its initial application for site plan approval with the commission on August 7, 2012, consisting of 69 units, a proportion of which were to be affordable housing units under § 8–30g. (ROR, Exhibit Pre–A.) The units were to form a residential development to be known as "Rocky Neck Village," proposed as rental units with possible future conversion to common interest ownership. They were to be two-bedroom townhome-style units. (*Id.*) The town's wetlands commission had given its approval to the development in March 2011. (ROR, Exhibit 3.)

The commission held a public hearing on this application on February 7, 2013. The plaintiff's attorney and his designees explained the proposed site plan demonstrating that it would not cause any health or safety concerns, submitted a traffic report that had no safety concerns, entered favorable reports on stormwater and other environmental topics, and explained the inapplicability of coastal management zoning. The attorney also explained the difficulties that the plaintiff faced in marketing the property for light industrial use. (ROR, Transcript, Exhibit 43, pp. 5–6, 18–20, 22–27, 31, 44–49, 58, 62.)

The commission staff gave a presentation and the public spoke out, some favoring and others objecting to the site plan. There was also testimony from three business owners located in the LI zone of the application. Norman Birk, president of Birk Manufacturing, informed the commission that his company uses corrosive acids, liquid stainless steel and metal finishing techniques in the manufacture of circuit boards. (ROR, Exhibit 43, pp. 74–75.) It has an approval from the department of energy and environmental protection to treat wastewater on site. (*Id.*) In 2011, Birk Manufacturing experienced an industrial accident when bari-chloride and muriatic acid were mixed, creating dangerous chlorine gas. Federal, state and local agencies, including a hazardous materials team were called to the scene, a large portion of the industrial park was evacuated and two Birk employees were hospitalized. (*Id.*)

***2** Two other company executives also spoke at the public hearing. The first was Susan Speilman, owner of Salon Associates, also located on Capital Drive. Her company receives, stores and ships chemicals used in the salon industry, including bleach, aerosols and acetones. In 2011 she was visited by an FBI agent to explain that the type of chemicals at her site might make her business a terrorist target and to suggest means of safe storage. (*Id.*, at p. 78.) Richard Beck, owner of Embalmer's Supply Company on Capital Drive informed the commission that he stores embalming fluid and formaldehyde, a carcinogen, [2] on site. Evidence was taken of

industrial-sized truck traffic in the industrial park at all hours. (*Id.*, at pp. 81, 87.)

The plaintiff's attorney in reply stated to the commission that the project would be built in stages starting from Route 156. The only contact with Capital Drive would be the opening of an access road for water and other utilities. He also pointed out that the Birk Manufacturing incident had occurred inside the building, the longstanding proximity of the three businesses to the single-family residential neighborhood to the southeast, and during five to six months of each year, to Camp Niantic, a residential campground to the east and south of the plaintiff's parcel. He also noted the fact that the commission had approved the 38 Hope Street residential development in the LI zone in 2006, with an adjacent lumber yard with truck traffic and an active rail line. (*Id.*, at pp. 109; Exhibit C.)

On February 21, 2013, the commission met after the close of the public hearing. It concluded that the application should be denied on the ground that it was proposed in a Light Industrial District, under § 11 of its zoning regulations. [3] It was to be located in an area zoned for industrial use and in which residential uses were not permitted. The commission's resolution stated that it acted under the provisions of the affordable housing statutes that had an exemption for an "industrial zone." § 8–30g(g)(2)(A). (ROR, Exhibit 64.)

Notice of the denial of the plaintiff's application was published on March 14, 2013. (ROR, Exhibit 68.) On March 28, 2013, the plaintiff filed a resubmission pursuant to § 8–30g(h). (ROR Exhibit Pre–C.) The revised site plan (1) eliminated nine units closest to the existing uses in the LI zone as well as one building, (2) increased landscaped buffer between the industrial uses and the proposed homes to meet the East Lyme multi-family/affordable housing regulations, (3) reduced site coverage, (4) improved traffic access, (5) increased open space, and (6) decreased stormwater runoff. (ROR, Transcript, Exhibit 46, pp. 2–10.)

At a public hearing on May 16, 2013, a professional engineer, retained by the commission, suggested minor plan revisions, that were accepted by the plaintiff. (*Id.*, at p. 40.) The plaintiff provided documentation that the LI zone allowed for types of residential uses. (*Id.*, at pp. 12–32.) These documents included the commission's 1990 resolution approving Bride Brook convalescent home as a place where people would "reside" within the LI zone, along with its approvals of Sea Spray and 38 Hope Street as multi-family residential uses on parcels zoned LI.

***3** The plaintiff noted that Salon Enterprises, an operation discussed at the original public hearing, was a wholesale business, not a manufacturing facility; it conducts on-site classes for beauty parlor employees. As to Birk Manufacturing, the plaintiff showed that in the revised plan, Birk's building at its closest point is 360 feet from the corner of the nearest residential unit. The attorney for the plaintiff concluded that Birk did not expect future accidents. This was also confirmed by Mr. Birk. (*Id.*, at pp. 50–51, 82–83.) Birk and Spellman from Salon did express concern that the approval of the plaintiff's application could cause them to have to consider moving out of East Lyme to another location. (*Id.*, at pp. 51–52, 58.)

The commission voted at its June 6, 2013 meeting to deny the plaintiff's amended application. The commission adopted a resolution that states in part as follows: "Whereas, for the purposes of this Resolution, the Commission will address the Amended Application in two separate parts: (1) As an affordable housing application that would locate affordable housing in an area which is zoned for industrial use ... and (2) As an application for approval of an affordable housing development pursuant to General Statutes § 8–30g(g)(1)."

With regard to the "industrial use" exception, the commission found that the proposed development "would be located entirely in an area that is presently zoned Light Industrial ("LI") according to the East Lyme Zoning Map." It further found that the LI zone provided for industrial and commercial uses and did not permit residential uses in the zone. The commission had heard testimony from business owners in the zone on the industrial uses in the area, "including but not limited to, manufacturing processes, heavy truck travel and chemical manufacturing, storage and transportation."

It was resolved that the commission denied the amended application "to be located on Capital Drive at or near its intersection with Route 156 in East Lyme, for the reason that the development is located entirely in an area which is zoned for industrial use and which does not permit residential uses, and that the Application does not seek approval for assisted housing as defined in § 8–30g(a) of the General Statutes." (ROR, Exhibit 65.)

With regard to the general approval of an affordable housing development, there was both sufficient evidence and evidence

of the need to protect the public health and safety to support the commission's denial. The development was inconsistent with the town's plan of conservation and development. It was to be located in an LI zone with industrial uses, as stated above. There was an industrial accident of concern in the last year requiring evacuation of the area, drawing responses from hazardous materials teams, the department of energy and environmental protection and the federal EPA. There was a "quantifiable probability" of specific harm raising interests in public health and safety. "There is a necessity to protect the public that cannot be remedied by changes to the application and the risk of such harm to the public interests outweighs the need for affordable housing." (*Id.*)

***4** This appeal was subsequently filed. On July 15, 2014, the attorneys for the parties and the court conducted a view of the site. The group met at the cul-de-sac end of Capital Drive. Birk Manufacturing was to the left, as well as a parking lot and a small garden. Outside of Birk were two burning pots of some type. Salon Enterprises was to the right. There were a few other buildings in the cul-de-sac. There was no heavy truck traffic at the time of the viewing in mid-day. The court and the parties walked down a path into a wooded area. To the left along this path is Camp Niantic and to the right is an open space conservation area with the Four Mile River. The entry-way to the proposed project is about 400 feet from the cul-de-sac in the midst of the woods. At this point, the plaintiff proposes to place a gate and additional plantings. The court viewed the general area where the development is to be built. There were people making use of the trail into the woods for recreational activities. This trail is to serve as an emergency entrance and exit to the development. The parties returned to the cul-de-sac and drove out of Capital Drive to Route 156. The court observed the premises along Route 156, commercial in nature, the main entrance to the proposed development, and also the Bride Brook Nursing and Rehabilitation Center. Sea Spray was also viewable nearby.

Along with the view that the court conducted, the court ordered that the commission hold a further factual hearing on the "day to day operation" of Bride Brook. This order was based on Exhibit M which dated from 1989/1990 where a Bride Brook officer indicated that the center was functioning partly as a "rest home." The commission conducted a further hearing on September 18, 2014 at which an affidavit of Dianne Caristo–Gaynor, the administrator of Bride Brook, was introduced.

The affidavit, dated August 9, 2014, declared in paragraph 9 that the "second and third floors are home to 87 Long Term Care Residents." These residents are "expected to live at Bride Brook for the remainder of their lives. Some have lived here more than 15 years." In paragraph 10, the administrator stated the following indicia of the residents' residing in their "home." They have no other home; they are to live at Bride Brook indefinitely; they are registered to vote at Bride Brook; they receive mail at this address; they are considered in a residential community; they participate in the planning of their medical treatment; they are allowed to manage their personal financial affairs; they participate in social, religious, and community activities of choice; they have visits from family, friends and acquaintances; and they are treated with dignity and individuality, including privacy.

During the hearing, the zoning officer obtained testimony from the administrator of Bride Brook that the residents were closely supervised by nursing staff and a doctor on call. (Transcript, pp. 7, 14.) There were no kitchens in the individual units. (*Id.*, at p. 7.) The residents may leave the premises at will, but usually leave with relatives or in a Bride Brook van. (*Id.*, at p. 23.) The residents must be admitted to Bride Brook on medical orders, not just on their own application. (*Id.*, at p. 21.)

***5** The first question before the court is whether the commission met its burden in denying the plaintiff's application on the ground of the industrial zone exception. The language of § 8–30g(g) and cases indicate that the commission must show that there is sufficient evidence in the record to support the commission's decision. The second burden requires the commission to prove to the court that, based on the evidence of record, the industrial zone exception applies. This language implies that the court's review of the evidence relating to the application of the exception is plenary. There are several Superior Court cases that support this conclusion, involving the industrial zone exemption, including *Jordan Properties, LLC v. Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 01–0508891 (October 31, 2003); *Wilson v. Planning and Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 98–492224 (July 9, 2003) [35 Conn. L. Rptr. 165]; and *Baker Residential Limited Partnership v. Planning and Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 06–4012368 (September 10, 2008) [46 Conn. L. Rptr. 309]. In each of these cases, the court conducted its own plenary analysis of the evidence in the record and did not limit itself

to a sufficiency of the evidence test. In light of the language of the statute and prior decisions, this court will conduct a plenary review of the record to determine whether the industrial zone exception applies in this case.

Under the statute, a town must prove three things to apply the industrial zone exception: (1) that the area is zoned for industrial use, (2) the area does not permit residential use, and (3) that the proposal is not for assisted housing. The issue in this case is only whether the zoned area permits usages consistent with a residential use. That is why the court was particularly interested in the hearing conducted on remand concerning the Bride Brook facility. Bride Brook was approved in 1990 in the LI zone under a special permit for convalescent homes, as allowed by the commission's regulation § 1.2.7. [4]

This issue is not, it should be emphasized, whether Bride Brook, a combined nursing home and rest home, is a residential dwelling. See *Connecticut Light & Power Co. v. Overlook Park Heath Care, Inc.*, 25 Conn.App. 177, 180, 592 A.2d 505 (1991). Nor is the issue, as in the Superior Court decision of *JPI Partners, LLC v. Planning & Zoning Board,* Superior Court, judicial district of New Britain, Docket No. CV 99–0499081 (April 9, 2001) [5] [29 Conn. L. Rptr. 524] where the zoning regulations authorized the development by special permit of assisted living residential facilities for seniors. The *JPI* Superior Court held that these facilities were not residential, but similar to "continuing care facilities," and equivalent to a convalescent home.

Here by contrast, there is a factual record showing that there are 87 people who live, have individual and community activities and vote at Bride Brook. They consider it to be their legal residence. These are permanent residents in the zone in question, living a short distance from the proposed 60–unit residential development plan of the plaintiff. In *Glastonbury Affordable Housing Development, Inc. v. Town Council,* Superior Court, judicial district of Hartford, Docket No. CV 94–0543581 (September 4, 1996), the court sanctioned affordable housing, where the zoning regulations permitted a "range of population-intensive uses," including "a convalescent, nursing or rest home." This is also the situation here, based on the situation of the Bride Brook residents.

***6** *Baker Residential, LP v. Planning & Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV 06–4012368 (2008) does not hold otherwise. There the plaintiff argued that there were three residential uses in the zone: (1) a developer was authorized by a zoning regulation to convert industrial and educational buildings in the zone to residential use, (2) the regulation permitted hotels in the area, and (3) farms were permitted in the zone. The court rejected those arguments because there were no buildings in the area where a conversion to residential use was to take place, a hotel was found not to be a residence, as it has transients living there, and the fact that farms were allowed, did not indicate that farmhouses were also permitted. *Baker* never considered the factual record as in this case. The court therefore concludes that the industrial zone exception does not apply here and the first reason for the denial of affordable housing given by the commission cannot be sustained.

The second issue raised in the plaintiff's appeal concerns whether the commission met its burden under § 8–30g(g) that its decision was "necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider" and such public interests "outweigh the need for affordable housing." The commission's resolution claimed that there were safety hazards posed by the plaintiff's application, outweighing the need for affordable housing.

Our Supreme Court has set forth the standard for judicial review of this issue. "[T]he trial court must first determine whether the decision ... and the reasons cited for such decision are supported by sufficient evidence in the record ... Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted. If the court finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determine independently whether the commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission,* 271 Conn. 1, 26, 856 A.2d 973 (2004). In addition, "[t]he burden of proof established in § 8–30g is a specific, narrow standard that a commission must satisfy on appeal." *Wisniowski v. Planning Commission,* 37 Conn.App. 303, 313, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 981 (1995) (holding that noncompliance with zoning could not be used as a per se

reason to deny an application for affordable housing, but requiring the commission to look at the underlying rationale of the regulations to protect the public interest).

*7 Assuming that the commission satisfied the "sufficiency" test, the court's own independent review here demonstrates that the commission has failed to meet its burden of proof on health and safety, or that these concerns outweigh the need for affordable housing. The proof in the record is that there was a one-time incident at Birk Manufacturing, a visit at Salon Associates by an FBI representative to discuss hazardous chemicals and how to store them safely, and the testimony of an owner of an embalming supply company about carcinogenic chemicals on the premises. In addition, the court's view of the location of the industrially zoned area showed that it bordered on the rear access to the proposed affordable housing complex, some 400 feet away. The proposed main entrance is along Route 156. To the right of the proposed main entrance is a seasonal recreational vehicle camp, and there are businesses and restaurants along this route, as well as Bride Brook. At the time of the view, there was no vehicle activity, including trucks, on the cul-de-sac at Capital Drive that indicated a safety issue for affordable housing.

The court cannot find the reasons given by the commission enough to deny the plaintiff's application. The Appellate Court has directed that "[t]here must be a reasonable basis in the record for concluding that the denial was necessary to protect substantial public interests, which means that the record must contain evidence concerning the potential harm that would result if the site plan application were to be granted and evidence concerning the probability that such harm in fact would occur." *AvalonBay Communities, Inc. v. Zoning Commission,* 130 Conn.App. 36, 54, 21 A .3d 926, cert. denied, 303 Conn. 909, 32 A.3d 962 (2011). The lack of specifics undercuts the commission's decision: "The record must contain evidence as to a quantifiable probability that a specific harm will result if the application is granted." *AvalonBay Communities, Inc. v. Planning & Zoning Commission,* 103 Conn.App. 842, 853–54, 930 A.2d 793 (2007). See also *Eureka V., LLC v. Planning & Zoning Commission,* 139 Conn.App. 256, 275, 57 A.3d 372 (2012) (the commission "failed to meet the additional burden imposed by § 8–30g to prove that the modifications that it chose to adopt were necessary to protect that public interest").

In conclusion, the commission has failed to satisfy its burden of defending the reasons set forth in its resolution to reject the plaintiff's application. The appeal is remanded to the commission with a direction to approve the plaintiff's application, subject to reasonable conditions not inconsistent with approval.

All Citations

Not Reported in A.3d, 2014 WL 7714338

Footnotes

1 The court has reviewed the plaintiff's exhibit 1 and its attachments, submitted to the court at the hearing, to which the commission stipulated, and concludes that the plaintiff is aggrieved for purposes of this appeal.

2 Beck did not seem overly concerned about the presence of this "carcinogen" as he joked that he intentionally smelled it on occasion and had not suffered a cold in fifteen years. (*Id.*, at p. 87.).

3 LI LIGHT INDUSTRIAL DISTRICTS—GENERAL DESCRIPTION AND PURPOSE

A district suitable for heavy commercial and light manufacturing, oriented essentially to major transportation facilities. The purpose of this district is to provide areas for industrial and commercial uses in an open setting that will not have objectionable influences on adjacent residential and commercial districts.

11.1 PERMITTED USES—The following uses of buildings and/or land and no others are permitted subject to site plan approval in accordance with Section 24.

11.1.1 Light industrial or manufacturing uses which are not dangerous by reason of fire or explosion, nor injurious or detrimental to the neighborhood by reason of dust, odor, fumes, wastes, smoke, glare, noise, vibration or other noxious or objectionable feature as measured at the nearest property line.

11.1.2 Trucking Terminal.

11.1.3 Printing or publishing.

11.1.4 Warehouse and wholesale storage; self-storage warehouses.

11.1.5 Commercial nurseries, greenhouses and garden centers.

11.1.6 Office complex.

11.1.7 All related accessory uses customarily incidental to the above permitted uses ...

11.2 SPECIAL PERMIT USES—The following uses may be permitted when granted a Special Permit by the Zoning Commission subject to the Special Permit Requirements of Section 25.

11.2.1 Deli, coffee shop or cafeteria.

11.2.2 Private training facilities, trade and technical schools and facilities of higher learning.

11.2.3 Research, design and development facilities.

11.2.4 Health spas and gymnasiums, sports facilities and other commercial indoor recreations.

11.2.5 Hotels.

11.2.6 Contractor or trade services.

11.2.7 Convalescent homes.

11.2.8 Motor vehicle and heavy equipment repairers station.

11.2.9 Office and retail sales of industrial services ...

11.2.10 Adult Use Establishments ...

4 Two other nearby residential developments, "Sea Spray" and "38 Hope Street," were approved in 2005 and 2006 as Affordable Housing Districts.

5 This case was reversed on a point of appellate procedure. *JPI Partners v. Planning & Zoning Board,* 259 Conn. 675, 791 A.2d 552 (2002).

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