NO. CV 08 4019546S	:	SUPERIOR COURT
CHRISTOPHER STEFANONI AND MARGARET STEFANONI	:	
	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
PLANNING AND ZONING COMMISSION OF THE TOWN OF DARIEN	:	FEBRUARY 16, 2012

MEMORANDUM OF DECISION

The plaintiffs, Christopher and Margaret Stefanoni, appeal from an October 28, 2008 denial of an application for an affordable housing permit (General Statutes § 8-30g), and associated applications, rendered by the defendant planning and zoning commission of the Town of Darien (the commission).

The record shows as follows. In August 2007, the plaintiffs purchased[1] two building lots, comprising 20,377 square feet in the aggregate, or 0.4678 acre, on the southwest corner of the intersection of West Avenue and Leroy Avenue in the R 1/5 Zone in the downtown area of Darien, Connecticut. The site had been owned by the Connecticut Light & Power Company, or its affiliated entities, for approximately 65 years, from 1937 to 2002, during which time it was used as an electric distribution

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[1] The plaintiffs offered into evidence a copy of a deed, conveying title to the site to them. Plaintiff's exhibit 1. The plaintiffs are aggrieved under § 8-8(a)(1).

substation. (Return of Record (ROR), Item #1.) Other than the substation equipment and fixtures, the site has never been improved.

In May 2008, the plaintiffs filed with the commission an application seeking the following approvals relating to the site:

> (1) approval of land filling, excavation and earth removal pursuant to Darien Zoning Regulation ("Reg") 850;
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> (2) approval of site plan pursuant to Reg. 1020;
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> (3) amendments to Zoning Regulations and Zoning Map; and
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> (4) affordable housing pursuant to General Statutes § 8-30g (collectively the "Application").

(ROR, Item #3, pp. 15-16.)

The application proposed the development of the site to permit construction of a 3-story, multi-family residential structure, consisting of 16 dwelling units and 24 parking spaces. Half of the residential units were located on each of the second and third floors of the proposed building, and all of the parking spaces were located on the ground floor of the structure within its foundation. (ROR, Item # 72, Site Plan, revised to 8/19/08.) Each unit included two bedrooms and one bathroom. The average size of the units was approximately one thousand square feet. The total interior area of the building was given as 35,575 square feet. The units were to be restricted to occupancy by the "elderly," i.e., 62 years and older, as a consequence of which the minimum parking requirements were

less than would otherwise govern.

The application was the subject of four public hearings before the commission during the summer of 2008. The primary presenters were Margaret Stefanoni and Barry Hammons, a licensed professional engineer and surveyor. They were assisted by other professionals, such as Michael Stein, the architect who designed the project, and David Spear, a traffic engineer.

The commission engaged two professional consultants to review the application:

> Frederick P. Clark Associates, Inc., Planning and Transportation Consultants, represented by Michael Galante, to review the plaintiffs' traffic study and site plan; and
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> Tighe and Bond, Consulting Engineers and Environmental Consultants, represented by Joseph Canas, P.E., to review the plaintiffs' stormwater retention and drainage plans.

The commission voted to deny the plaintiffs' application on October 28, 2008. Several reasons were stated. (ROR, Item #87, pp. 11-12.) One basis for the commission's decision was that the plaintiffs had not submitted a phase II environmental report. On October 6, 2011, the court remanded the matter to the commission to determine whether the plaintiffs' report, now available, resolved this ground of objection to the application. At a meeting of the commission on November 22, 2011, the commission determined this ground of its decision was now "deleted." The parties returned to court on January 13, 2012. The commission relied on two of the reasons,

previously expressed on October 28, 2008, for its denial of the application: (1) the proximity of the proposed structure to both West and Leroy Avenues, and (2) the density of the building in regard to its acreage.

In *River Bend Associates, Inc.* v. *Zoning Commission*, 271 Conn. 1, 856 A.2d 973 (2004), the court set forth the standard for judicial review of an agency's decision regarding an affordable housing application under General Statutes § 8-30g. "[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. General Statutes § 8-30g (g).[2] 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

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

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*, supra, 271 Conn. 26. As noted, the commission bears the burden of proof on these issues.

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

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

> 1. The statute is remedial, and its purpose is to assist property owners in overcoming local zoning regulations that are exclusionary or provide no real opportunity to overcome

arbitrary or local limits, and to eliminate unsupported reasons for denial. . . .

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

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

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

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

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

(Citations omitted.) *Juniper Ridge Associates* v. *Wallingford Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV 02 0518845

(March 8, 2004, *Eveleigh, J.*).

"The narrow rigorous standard of § 8-30g dictates that the commission cannot deny an application on broad grounds such as noncompliance with zoning." *Wisniowski* v. *Planning Commission*, 37 Conn. App. 303, 314, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 981 (1995). In *Wisniowski*, the Appellate Court held that § 8-30g allowed the plaintiffs to seek subdivision approval for affordable housing without first seeking a zone change.[3] Id., 318. In reaching this decision, the court ruled that nonconformity to zoning is not per se a reason to deny an affordable housing application. Id., 317. The court reasoned that "[t]he legislature did not intend zoning nonconformity to block an affordable housing subdivision application." Id. Rather, "[i]nstead of simply questioning whether the application complies with [the zoning] 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." (Emphasis in original.) Id., 317-18.

The rule that the commission must consider the rationale behind the regulations to determine whether the regulations are necessary to protect substantial public interests was

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[3] "In 2000, however, the legislature amended the statute to require an affordable zoning applicant to submit draft zoning regulations [that will govern the affordable dwelling units] in support of its application." *River Bend Associates* v. *Zoning Commission*, supra, 271 Conn. 6 n.2.

applied in *Mackowski* v. *Zoning Commission*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 96 334661 (October 22, 1998, *Belinkie, J.*), rev'd on other grounds, 59 Conn. App. 608, 757 A.2d 1162, cert. granted, 254 Conn. 949, 762 A.2d 902 (2000) (appeal withdrawn September 21, 2001). In *Mackowski*, the commission rejected a forty-three unit apartment building for senior citizens for six reasons. Two of those reasons were based on local zoning regulations. The first reason was for "technical zoning deficiencies regarding the lot lines for this development." The second reason involved specific zoning violations of the proposed building, which included exceeding the standards for lot coverage, density and height.[4] Citing *Wisniowski*, the court explained that "Section 8-30g does not allow nonconformance, by itself, as a reason to deny an affordable housing application." Id. The court found that the commission failed to indicate "specifically how these zoning violations would injure a substantial public interest." Moreover, "[u]nder traditional zoning review, such violations might be sufficient to deny a special permit, but under the affordable housing appeals statute, the commission is limited to considering adverse impacts on substantial public interests." Id.

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[4] "The maximum density for a residential building on this property is 10 units, and the building should cover no more than 17.5% of the lot, with a height of no more than 26 feet. The proposed building contains 43 units, with a lot coverage of 18% and height of 33 feet. The parking regulations in section 12.5.2 of the regulations require two parking spaces per unit, but the proposal only makes room for 66, and also violates the setback requirements in sections 12.7.2 and 12.11." *Mackowski* v. *Zoning Commission*, supra, Superior Court, Docket No. CV 96 334661.

The *Mackowski* court concluded that these two reasons failed "to state a legitimate basis for denying the application because the commission did not have evidence before it that the violations of the zoning regulations implicate a substantial public interest in health and safety as required by General Statutes § 8-30g (c) (2)." Id.

"Public interest" does include traffic safety. Nevertheless, "[w]hile courts have recognized that traffic safety constitutes a substantial public interest, they have required that a Commission demonstrate no[t] only that those concerns are legitimate, but also that they outweigh the needs for affordable housing." *Landworks Development, LLC* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV 00 0505525 (February 8, 2002, *Eveleigh, J.*). The Appellate Court discussed the requirement that the substantial public interest must outweigh the need for affordable housing in the context of zoning regulations in *Town Close Associates* v. *Planning & Zoning Commission*, 42 Conn. App. 94, 679 A.2d 378, cert. denied, 239 Conn. 914, 682 A.2d 1014 (1996).

In *Town Close*, the defendant denied the plaintiff's affordable housing application, in part, because the application did not comply with the defendant's own affordable housing regulations. Id., 97. In reversing the defendant's decision, "the trial court determined that maintaining the integrity of [the defendant's] own affordable housing regulations did not outweigh the need for affordable housing." In upholding the trial

court's decision, the Appellate Court concluded that "the language of § 8-30g requires the commission to prove that the interests to be served by the enforcement of its zoning regulations outweigh the need for affordable housing." Id., 103.

The issue of sight lines was addressed in *Old Farms Crossing Associates Ltd. Partnership* v. *Planning & Zoning Commission*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV 95 0547862 (June 11, 1996, *Mottolese, J.*).[5] In *Old Farms Crossing*, the court rejected the defendant's argument that the sight line was substandard. The court stated: "The commission had before it two very different standards applicable to this intersection. It had the minimum standard required by the Connecticut Department of Transportation for design of intersections . . . and the desired optimum standard . . . . [T]he plaintiff's design for the modification to the intersection exceed[ed] the Connecticut Department of Transportation standard. . . . [T]he sight line [was going to] be 13 to 14 feet behind the required reference line which falls above the minimum [10 feet] required by the Department of Transportation but below the 20 feet

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The issue of sight lines was also considered briefly in *AvalonBay Communities, Inc.* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV 04 0527391 (September 12, 2005, *Munro, J.*), aff'd, 103 Conn. App. 842, 930 A.2d 793 (2007). In that case, the defendant argued that "the sight distance to the north falls below the 'State's desired sight distance . . . [which] 'point[s] to the potential for safety concerns.'" Id. The court rejected this argument because the statement was not "sufficient evidence to show more than a theoretical possibility of a safety risk associated with this design." Id.

stated by that Department to be desirable." Id.

The court reasoned that "[w]hile it cannot seriously be disputed that the Avon Planning and Zoning Commission has a public interest in promoting traffic safety by the most effective means available to it, it is open to question whether that public interest rises to the level of substantiality required under Section 8-30g (c) (2). However lofty its goal may have been, this court holds that in the circumstances of this case the requirement that a traffic intersection adhere to optimal rather than minimal acceptable standards is not a substantial public interest which a zoning commission is entitled to protect under Section 8-30g (c) (2).[6] It is significant in the court's view that the commission engaged in no discussion of whether the minimum standard[7] as opposed to the optimum standard would have been sufficient to protect the public interest in traffic safety, nor is there anything in the record to indicate how the need for one standard but not the other would have outweighed the need for affordable housing. The commission has failed to satisfy its burden of proof under Section 8-30g (c) (1) (2) or (3)." Id.

Wisniowski suggests that there is no need to consider whether the defendant is

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The circumstances before the court in *Old Farms Crossing* was a proposal for forty-five housing units on 11.4 acres of land in the R-40 zone, which permitted multi-family development of four units per acre by special exception.

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Here the plaintiff raised the DOT standards that were not as rigorous as the commission's own regulations.

trying to protect the interest it deems optimal, instead of the minimum standard it is entitled to protect under § 8-30g (g) (1) (A). Rather, the defendant need only consider "the rationale behind the regulations to determine whether the regulations are necessary to protect substantial public interests in health, safety or other matters." *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 318. This indicates that the defendant cannot simply hide behind its regulation, but there is no need to compare its regulation to other alternative standards. A zoning regulation is a permissible element in the zoning commission meeting its burden to deny affordable housing if the commission examines the rationale behind the regulation to determine whether the regulation is necessary to protect a substantial public interest in health, safety or other matters and whether this substantial public interest outweighs the need for the affordable housing.

The commission, to show substantial public interest, first relies on a statement in a July 28, 2008 letter of its traffic engineer that the projected sight distances will have "a significant negative impact on the safety of [the West-Leroy] intersection." (ROR, Item # 42, p. 4). This statement was also made at the September 4, 2008 public hearing. (ROR, Item # 81, p. 57).

The commission draws support for its traffic engineer's conclusion from several record sources. The commission's regulations, §§ 221 and 363, provide that in a corner lot there is to be a thirty-foot buffer prohibiting structures or vegetation greater than three

feet in height. The zoning enforcement officer, in a July 24, 2008 memorandum, gave as a rationale for these regulations that motorists, bicyclists, and pedestrians would be placed at risk by the lack of clear visibility. In the revised site plan, a portion of the building would be constructed within the thirty-foot buffer. A building would be a more serious problem than vegetation. (ROR, Item # 64). A commission member noted that there are times when people travel quickly into the intersection trying to reach the train station on time. (ROR, Item #83, p. 8).

Ms. Stefanoni noted in rebuttal that the sight line rule has not been uniformly enforced. There was a hedge across from the intersection that exceeded three feet. In addition the sight line regulation was the one applied to residential districts, while a different regulation applied to business districts. (ROR, Item # 81, p. 136). The plaintiffs' traffic engineer relied on the state DOT visibility standards to conclude that the project did not violate sight line criteria. He also noted that the hedge across from the project exceeded the visibility regulations of the commission. (ROR, Items ## 35, 51).

It is clear from the discussion above that neither the commission's regulations nor the DOT standards are controlling here. The test is whether substantial safety concerns outweigh the need for affordable housing. The commission has not met this test. There is just too much speculation by the commission's witnesses on what effect the building would have on the intersection, and no analysis beyond the rationale of the commission's

regulations. Neither its expert nor the zoning officer studied the current volume of pedestrian traffic due to the train station, or the nearby park, or the local business center in rendering their opinions on safety. They did not analyze the visibility due to the presence of a railroad bridge near the intersection. The plaintiffs' evidence from their traffic engineer was that the intersection, while congested, was not seriously below standard and could tolerate the additional traffic that construction would bring. (ROR, Items ## 35, 51).

"There 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." (Emphasis added.) *AvalonBay Communities, Inc.* v. *Planning & Zoning Commission*, 103 Conn. App. 842, 853-54, 930 A.2d 793 (2007).

The second reason raised by the commission is that constructing the building in the available lot will raise a density issue, disallowed by General Statutes § 8-2 and the

commission's regulations. The plaintiffs' project "was at the limit."[8] (ROR, Item 81, p. 27). On the other hand, in one of the earliest of the affordable housing cases, our Supreme Court declared that even if density is a consideration under § 8-30g, there must also be substantial evidence that "those problems 'clearly outweigh[ed] the need for affordable housing . . . .'" *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, supra, 228 Conn. 515-16.

The rationale for the *West Hartford* holding was given in *Toll Brothers, Inc.* v. *Bethel Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV 03 0523881 (October 19, 2006, *Mottolese, J.*): "Since the enactment of Section 8-30g in 1988, experience shows that increased density is an inherent element of every affordable housing application. Indeed, it is highly unlikely that it would be otherwise. So, preserving the density specified in the zoning regulations or proposed in a plan of development and conservation is not a substantial public interest in and of itself that warrants protection in an affordable housing case. It is only when increased density creates more than a mere possibility of harm to identified public interests and there is sufficient evidence in the record to support it, that density will prevail over the need for affordable housing." See also *Landworks Development, LLC* v. *Planning & Zoning*

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[8] This statement was made by the plaintiffs' expert. He also stated that he was satisfied that the project "made sense." (ROR, Item #81, p.24).

Commission, supra, Superior Court, Docket No. CV 00 0505525 ("Speculation and vague concerns for density are not enough.").

Other than tables in the commission's briefs showing that the plaintiffs' project is more dense than other commission-approved structures in Darien, there is no evidence of the harm that will occur or why this harm outweighs the need for affordable housing. Both the plaintiffs and the commission have recognized at the hearing the need for affordable housing at this location. As Judge Mottolese stated in *Toll Brothers*, "[i]n this case, the record does not contain sufficient evidence that insistence upon a density based value preference is necessary to protect any public interest in the municipality."

The court has considered the reasons for denial of the plaintiffs' applications that the commission relied upon in its oral argument to this court.[9] Since the commission has not met its burden under § 8-30g (g), the plaintiffs' appeal is sustained.

Henry S. Cohn, Judge

[9] The commission at oral argument stated that the other reasons set forth in its October 28, 2008 statement of reasons for denial had been resolved or were no longer relied upon.