

NO. HHB CV 10-6007515-S : STATE OF CONNECTICUT
MARK C. COEN : SUPERIOR COURT
v. : JUDICIAL DISTRICT OF NEW BRITAIN
LEDYARD ZONING COMMISSION : OCTOBER 19, 2011

Memorandum of Decision

The plaintiff, Mark C. Coen, has filed this appeal from the decision of the defendant, Ledyard zoning commission (commission), denying the plaintiff's application to construct a three family dwelling that would include one affordable housing unit. For the following reasons, the court reverses the commission's decision and remands the case with directions to grant the application subject to specific conditions.

I

A

The undisputed procedural history of the case can be briefly summarized. The plaintiff is the owner of an approximately one acre parcel of property at 83 Inchcliffe Drive, which is located in the southwest part of Ledyard. The property slopes sharply downhill from Inchcliffe Drive, which it borders on the east, to Smith Pond, which forms its western boundary.

SUPERIOR COURT

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On or about April 26, 2010, the plaintiff submitted an application to the commission, pursuant to General Statutes § 8-30g, to construct a structure at the property containing three one bedroom apartments, one of which would be an affordable housing unit.¹ The commission held public hearings on the application on July 8 and August 12, 2010. The commission met for deliberations on September 9 and 15. On the latter date,

¹ General Statutes § 8-30g (a) (1) defines “[a]ffordable housing development” as a “proposed housing development which is (A) assisted housing, or (B) a set-aside development. . . .” These terms are defined as follows. “Assisted housing” means “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. . . .” General Statutes § 8-30g (a) (3). A “set-aside development” means “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, where such income is less than or equal to eighty per cent 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 per cent 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 per cent 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 per cent of the median income. . . .” General Statutes § 8-30g (a) (6).

As used in title 8 of the General Statutes, which includes § 8-30g et seq., “affordable housing” means “housing for which persons and families pay thirty per cent or less of their annual income, where such income is less than or equal to the area median income for the municipality in which such housing is located, as determined by the United States Department of Housing and Urban Development.” General Statutes § 8-39a.

the commission voted unanimously to deny the application and adopted a twelve page collective statement of reasons for denial. (Return of Record (ROR), 5i.)

The plaintiff has appealed.²

B

General Statutes § 8-30g (g) provides the legislative standard for judicial review of appeals in affordable housing cases.³ In *River Bend Associates, Inc. v. Zoning Commission*, 271 Conn. 1, 26, 856 A.2d 973 (2004), our Supreme Court interpreted this standard to impose the following obligation on trial courts reviewing these cases: “[T]he trial court must first determine whether the decision from which such appeal is taken and

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As the owner of the property and the applicant for commission approval, the plaintiff has standing to take this appeal.

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Section 8-30g (g) provides as follows: “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 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.”

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.) The Court also noted that the commission bears the burden of persuading the trial court to uphold its decision. *Id.*, 25 n.14. See also *Christian Activities Council, Congregational v. Town Council*, 249 Conn. 566, 576, 735 A.2d 231 (1999) (“the scope of judicial review under § 8-30g [c] requires the town, not the applicant, to marshal the evidence supporting its decision and to persuade the court that there *is* sufficient evidence in the record to support the town’s decision and the reasons given for that decision.”) (emphasis in original).

II

The commission’s brief on appeal consolidates the commission’s reasons for denial into five categories: Coastal Management Act concerns, parking area and sight

line issues, lack of subdivision approval, lack of recreational space, and lack of need for affordable housing. The court addresses these categories in turn.

A

There is no dispute in this case that the property lies within a coastal boundary, ultimately draining into the Thames River, and is therefore subject to the provisions of the Connecticut Coastal Management Act (CMA). See General Statutes §§ 22a-90 - 22a-111. The commission's initial concern was that the plaintiff had not addressed compliance with the CMA. While the commission cannot point to any specific binding authority requiring an affordable housing application to show compliance with the procedural aspects of the CMA, it is undoubtedly true that the substantive basis of the CMA is among the matters that the commission may legally consider in evaluating the application. See *Landmark Development Group v. East Lyme Zoning Commission*, Superior Court, Judicial District of New Britain, Docket No. CV05-4002278 (February 2, 2008, *Prescott, J.*).

Here, the commission relies on a letter from James Cowen, a soil scientist, stating that the proposed parking lot and handicap access for the structure are "reasonably likely to result in adverse impacts to Smith Pond and associated wetland damage due to erosion & sediment and degradation of water quality due to contaminant loading." These comments arguably establish that "there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is

granted.” (Internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission*, supra, 271 Conn. 26.⁴

The plaintiff responds with two items from the record. First, the office of Long Island Sound programs (OSLIP) of the department of environmental protection submitted a letter in which it stated, in August, 2010, that it found the proposed zoning text amendments “consistent” with the CMA. These proposed amendments specifically called for a three family dwelling in what otherwise would be a single family residence zone. (ROR, 1x.) The OSLIP added, however, that it recommended pervious surfaces for parking areas to allow for on-site infiltration of stormwater. (ROR, 5e.)⁵ It also added a concern that, on waterfront lots, “new structures should be sited as to continue to allow the public some views of the water from public streets and ways.” (ROR, 5e.)

Second, the plaintiff cites the approval of the Ledyard inland wetlands and watercourses commission (IWWC). In March, 2006, the IWWC approved the plaintiff’s application for a “single-family home in proximity to wetlands.” It found that there was “no better location, little reduction in capacity of wetlands.” (ROR, 1g.) In March, 2010, the IWWC considered a proposed change to the application to widen the driveway for

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However, these comments came under a section in Cowen’s letter labeled “Wetland Permit as amended March 16, 2010,” and not under the section referring to the CMA.

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Due to a typographical error, the department’s letter stated “impervious,” but the department later corrected the letter to read “pervious.” (ROR, 5e.)

additional parking. The IWWC unanimously approved this change by construing it as being within the scope of the original permit approval. (ROR, 1i.)

These conditional approvals, coming as they do from governmental agencies charged with protecting waterways such as Smith Pond, carry decisive weight. Although the commission responds that pervious pavers for the parking area, which the OSLIP recommended, become clogged over time, the plaintiff, at oral argument, agreed to the imposition of an additional condition to clean the pavers consistent with manufacturer's recommendations. With those conditions, the court no longer sees the commission's denial as "necessary to protect substantial interests" grounded in the CMA. (Internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission*, supra, 271 Conn. 26.

The OSLIP did express concern, which the commission relies upon, that development would unduly restrict views of Smith Pond. While the photographs reveal that the view of the pond from Inchcliffe Drive is pleasant, there is no claim that the view is of particular statewide significance. (ROR, 8y.) In any event, construction of the proposed dwelling would not unduly restrict views of the pond. The specifications reveal that the structure would be 36 feet by 26 feet horizontally, and approximately 40 feet high. (ROR, 1l.)⁶ There would be little or no impairment of the pond view for persons

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The specifications actually show the height as 42 feet, but the commission deemed the height to be 40 feet, perhaps based on the proposed text amendments or the plaintiff's

traveling to the location from the south, west, or east. From the north, views of the pond would diminish until one traveled completely past the dwelling. (ROR, 1ee.) But the town currently classifies the lot as an R-20 high density residential district, which permits single family residences up to 35 feet in height. (ROR, 5i, p. 2; 8k; 9, p. 9-1.) Thus, the structure would add only five feet to the restriction of the view that the town currently tolerates. Further, the plaintiff has cut the trees on the property, allowing for a better view of the pond than from the property to the north, which has not been cleared. (ROR, 8y.) Thus, on the whole, construction of the proposed dwelling would not significantly impair views of Smith Pond. In short, the commission has not proven that approval of the proposal would impair substantial concerns arising from the CMA.

B

The commission next raised misgivings about the proposed parking area and the impact of the development on sight lines. The proposed parking area contained parking for only four automobiles. There was conflicting evidence as to whether four spaces were sufficient for a three-apartment complex or whether seven spaces were more appropriate. (ROR, 1s, 8w.) The plaintiff's response is that, even if more than four spaces were sometimes necessary, cars could park on Inchcliffe Drive.

response to questions. The court will therefore rely on that figure. (ROR, 1e; 1l, 1v, p. 2; 5i, p. 2.)

A related concern is the sight line from the driveway looking north. There was also conflicting testimony on this point. The commission relies on testimony that the sight line distance is 154 feet. (ROR, 7a, p. 78). The plaintiff measured the distance at 196 feet. (ROR, 1ee; 5i, p. 6.) In either event, the sight line is less than the 250 feet provided in a town ordinance for roads, such as Inchcliffe Drive, with speed limits of 25 mile per hour. (ROR, 5g; 5i, p. 6.)

The commission concedes that enforcement of the driveway ordinance is outside of its jurisdiction, but maintains that the ordinance is significant because it sets a relevant safety standard. Although this argument is plausible, it is the commission's burden to prove a substantial interest in public safety. The only evidence to which the commission points is a letter from a traffic engineer who states that the sight distance does not meet the requirements of the ordinance and that approval of the site plan may encourage the construction of other driveways in the zone with insufficient sight lines. (ROR, 8w.) The letter does not explicitly detail any safety problems. Further, the record reveals that the residence to the immediate north, which lies at the end of a hairpin turn and was apparently built before the enactment of the driveway ordinance, has a sight line from its driveway that the plaintiff measured as 121 feet. (ROR, 1ee.) There is no evidence of any accident record or that the town has taken any precautionary action such as posting warning signs. In sum, the evidence does not meet the commission's burden of proving an actual safety concern stemming from the current proposal.

The plaintiff's suggestion that cars that did not find a space in its proposed driveway could park on Inchcliffe Drive might, however, diminish these sight lines if cars parked to the north of the driveway. An appropriate condition, therefore, would be for the plaintiff to prohibit residents of his property from parking north of the driveway. The plaintiff also consents to the removal of two trees in the town right of way to the north, if the town approves, to improve sight lines further. The town would also be free to post signs warning of the driveway or prohibiting parking north of it. With these conditions and suggestions, and based on the existing record, it is not necessary for the commission to deny approval of the project in order to protect public safety.⁷

C

In Ledyard, there are separate zoning and planning commissions. The planning commission has sole jurisdiction over applications for subdivision approval. The defendant commission asks the court to make it a condition that the planning commission approve the project to determine its overall suitability.

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The commission expressed the concern in its decision about the steepness of the proposed driveway, both for cars backing out into the road and for cars that might slide from the back end of the driveway in icy weather down the slope toward Smith Pond. (ROR, 5i, pp. 5-6.) At oral argument, the plaintiff referred to a topographical map to show that, with fill material, there will be a relatively modest drop off in the driveway of approximately four feet from front to back over a horizontal distance of approximately forty feet. (ROR, 1f.) The plaintiff also consents to a condition of approval, for safety purposes, of requiring a guardrail at the back of the driveway.

It is not clear why such a condition is appropriate. The commission appropriately concedes that a § 8-30g application is not subject to subdivision regulations. See *Wisniowski v. Planning Commission*, 37 Conn. App. 303, 317, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 981 (1995) (“Section 8-30g does not allow a commission to use its traditional zoning regulations to justify a denial of an affordable housing application, but rather forces the commission to satisfy the statutory burden of proof.”). In any event, the plaintiff does not own any of the surrounding property and has no plans to subdivide the parcel in question. Further, the defendant commission has already fully considered the project’s overall suitability. The affordable housing act requires the submission of an application to a “commission,” but not to multiple branches of a town’s planning and zoning commission system. See *id.*, 311-18 (application submitted to planning commission need not be submitted to zoning commission.)⁸ Therefore, the court declines to include the requested condition.

D

The commission next contends that the proposed plan did not provide a safe area for outdoor enjoyment, especially for children. This concern does not justify the denial

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Section 8-30g (a) (4) defines “Commission” to mean “a zoning commission, planning commission, planning and zoning commission, zoning board of appeals or municipal agency exercising zoning or planning authority. . . .” Thus, submission to either a zoning commission or a planning commission meets the statutory reference to “[a]ny person filing an affordable housing application with a commission”

of an affordable housing application unless children or others would be exposed to “dangerous conditions as a result of inadequate recreational space.” *Avalon Bay Communities, Inc. v. Planning & Zoning Commission*, 103 Conn. App. 842, 850, 930 A.2d 793 (2007). There is no evidence of that here. On the contrary, while there is apparently little flat recreational space, the commission overlooks the unique aspect of the property, which is that it borders Smith Pond. The pond provides a valuable resource for recreational fishing, boating, and ice skating. Therefore, there is no merit to the commission’s concern.

E

The next statutory factor to examine is “whether the risk of such harm to such public interests [from the proposal] clearly outweighs the need for affordable housing” (Internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission*, *supra*, 271 Conn. 26. The preceding discussion has established that the plaintiff’s proposal would not significantly harm public interests. The commission’s response, however, is that there is no need for affordable housing in Ledyard. This objection is based largely on the testimony of a real estate agent who told the commission that, if there is any need for housing in Ledyard, it is for more expensive rather than inexpensive rental units. (ROR, 7a, p. 94.)

The affordable housing act provides for an exemption from zoning regulations and a shifting of the burden of proof on appeal in favor of developers constructing

affordable housing in communities with under ten percent of their housing stock deemed “affordable.” See note 1 supra.⁹ As of 2008, only about 3.37 per cent of Ledyard’s housing stock qualified as affordable housing. (ROR, 1m, p. 3.) This figure is well below the ten per cent safe harbor benchmark. The town, to its credit, has drafted an affordable housing strategy manual. (ROR, 1m.) But based on all this evidence, the court finds that there is a need for affordable housing in Ledyard.

The difficulty in the case, however, is that the plaintiff’s proposal provides for only one affordable housing unit and thus does little to address the need for affordable housing in Ledyard. The case is essentially a de minimus battle in which the proposal imposes minor burdens and confers minimal benefits. In this unusual situation, however,

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See also General Statutes § 8-30g (k), which provides in pertinent part as follows: “Notwithstanding the provisions of subsections (a) to (j), inclusive, of this section, the affordable housing appeals procedure established under this section shall not be available if the real property which is the subject of the application is located in a municipality in which at least ten per cent of all dwelling units in the municipality are (1) assisted housing, or (2) currently financed by Connecticut Housing Finance Authority mortgages, or (3) subject to binding recorded deeds containing covenants or restrictions which require that such dwelling units 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 income, where such income is less than or equal to eighty per cent of the median income, or (4) mobile manufactured homes located in mobile manufactured home parks or legally-approved accessory apartments, which homes or apartments are subject to binding recorded deeds containing covenants or restrictions which require that such dwelling units be sold or rented at, or below, prices which will preserve the units as housing for which, for a period of not less than ten years, persons and families pay thirty per cent or less of income, where such income is less than or equal to eighty per cent of the median income.

the court must give the benefit of the doubt to the affordable housing developer. The standard of proof is the stringent one of whether “the risk of such harm to such public interests *clearly outweighs* the need for affordable housing.” (Internal quotation marks omitted; emphasis added.) *River Bend Associates, Inc. v. Zoning Commission*, supra, 271 Conn. 26. The burden of proof is on the commission. See *Christian Activities Council, Congregational v. Town Council*, supra, 249 Conn. 576. The court concludes that the commission has not met this burden.

F

Finally, the court must consider 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. The court has already addressed this issue and has included several conditions in its final order.

III

Accordingly, pursuant to General Statutes § 8-30g (g), the court reverses the defendant commission’s denial of the plaintiff’s application and remands the case to the commission with direction to grant the application on the condition that the plaintiff:

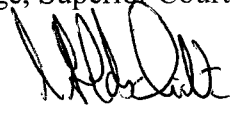
- 1) use pervious pavers for the parking area in accordance with its site plan and clean the pavers consistent with manufacturer’s recommendations;
- 2) install a guardrail at the back of the driveway;
- 3) prohibit residents of his property from parking north of the driveway;

and 4) remove two trees in the town right of way to the north, if the town approves, to improve sight lines. The town would also be free to post signs warning of the driveway or prohibiting parking north of it.

It is so ordered.

(Schuman, J)

Carl J. Schuman
Judge, Superior Court

 Court Officer
Stephen Goldschmidt