

TOLL BROTHERS, INC. v. BETHEL PLANNING & ZONING COMMISSION.

2006 Ct. Sup. 19414

No. HHB CV 03 0523881 S

Connecticut Superior Court

Judicial District of New Britain at New Britain

October 19, 2006

MEMORANDUM OF DECISION

A. WILLIAM MOTTOLESE, JUDGE TRIAL REFEREE.

In this affordable housing appeal, governed by the terms of Section 8-30g of the General Statutes, the Bethel Planning and Zoning Commission (hereinafter "the commission") denied the plaintiff's application for approval of a set aside development as that term is defined in subsection 6 of that statute. The development calls for construction of 129 townhouse units in 24 separate buildings on 22 acres of undeveloped land just east of the Danbury city line. The property is located in the R-10 zone where the principal permitted use is single-family dwellings on 10,000 square foot lots. The land contains four wetland areas, steep slopes and rock ledges. It is served by public water supply and the public sewer system is within reach by an extension of an existing sewer main. Portions of the property lie within flood lines established by the Federal Emergency Management Agency ("FEMA"). 6.48 percent of Bethel's housing stock qualifies as affordable under Section 8-30g. Bethel has no affordable housing regulations. The Commission denied the application on July 30, 2003 assigning several reasons for its denial. This appeal followed.

Aggrievement

The parties have stipulated that the court may incorporate by reference the facts found in the companion inland wetlands appeal entitled *Toll Brothers, Inc. v. Bethel Inland Wetlands*

Commission, HB-CV-03-0523880 S concerning aggrievement. The court hereby adopts and incorporates by reference the facts concerning the plaintiff's status as an aggrieved party in that case and accordingly finds the plaintiff aggrieved in this case by virtue of its status as a contract purchaser of the property involved in this appeal. *Goldfeld v. Planning and Zoning Commission*, 3 Conn. App. 172, 177 (1985).

The Commission's Decision

The commission denied the application on the grounds that denial was necessary to protect substantial public interests in health, safety and other matters which the commission may legally consider and that such public interests clearly outweigh the need for affordable housing and cannot be protected by reasonable changes to the development. Section 8-30g(g)(1)(A)(B) and (C). It assigned eight reasons for the denial.

In an affordable housing appeal, the court must engage in a two-step process. First, the court must assess whether the commission has shown, pursuant to Section 8-30g, that its decision is supported by sufficient evidence in the record. *Quarry Knoll II v. Planning and Zoning Commission*, 256 Conn. 694, 727 (2001).

"Sufficient evidence' in this context mean[s] less than a preponderance of the evidence, but more than a mere possibility. The zoning commission need not establish that the effects it sought to avoid by denying the application are definite or more likely than not to occur but that such evidence must establish more than a mere possibility of such an occurrence. Thus, the commission is 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 application were

granted] and concerning the probability that such harm would in fact occur." *Christian Activities Counsel, Congregational v. Town Council*, 249 Conn. 566, 585 (1999).

Step two of the process requires the court to review the commission's decision with respect to the remaining three prongs of Section 8-30g(g), namely subsections (1)(A)(B) and (C) independently, based upon its own scrupulous examination of the record.

"Therefore, the proper scope of review regarding whether the commission has sustained its burden of proof, namely that: its decision is based upon the protection of some substantial public interest; the public interest clearly outweighs the need for affordable housing; and there are no modifications that reasonably can be made to the application that would permit the application to be granted — requires the court, not to ascertain whether the commission's decision is supported by sufficient evidence, but to conduct a plenary review of the record in order to make an independent determination on this issue." *River Bend Associates, Inc. v. Zoning Commission*, 271 Conn. 1, 24 (2004).

In making this assessment the court does not become a fact finder, de novo. The commission remains the fact finder. But the process requires a mixed factual and legal determination, the legal components of which are subject to plenary review by the trial court. In asserting its independence in the review process the court cannot be influenced by the commission's judgment but must make its own judgment by weighing the record evidence.

With these principles as guidance each reason will be subjected to the two-part exercise.

The Commission's Reasons

While eight reasons were assigned for denial, there is unanimous agreement that the

principal reason is reason number 1, namely the failure of the plaintiff to obtain approval of the Bethel Public Utilities Commission [fn1] (hereinafter "BPUC") for sewer service. Because this reason will require the most extensive analysis and discussion it will be reserved for last.

Reason Two

This reason breaks down into three parts: (a) extensive blasting of rock has the potential to cause harm to adjacent properties; (b) the applicant's proposed use of a rock crusher during site preparation is not permitted by the zoning regulations; and (c) the applicant's plan calls for locating 28 housing units at the base of the most severe cuts, 20 of which are earmarked as affordable.

(a) There is evidence that an area the size of a football field (100 by 53.5 yards) would be blasted to a depth of almost 40 feet and that parts of this area are located within fifty feet of existing homes. However, there also is uncontradicted evidence that the plaintiff has devised adequate protections to protect nearby residences from harm. There is no evidence whatsoever in the record that there is more than a mere possibility of harm which is likely to occur to these residences. Nor has that harm been quantified. *Kaufman v. Danbury Planning and Zoning Commission*, 232 Conn. 122, N.162 (1995).

(b) According to the commission, Section 118-44(F)(2) of the Bethel Zoning Regulations prohibits the use of rock crushers on this site. The commission argues that Section 118-44 which governs excavation, filling and removal of earth materials is not really a zoning regulation because rock crushing is not a residential activity or function. The court rejects this argument. Section 8-30g(2) defines "affordable housing application" as "any application made to a commission in

[fn1] The Bethel Public Utilities Commission (BPUC) is the water pollution control authority in the Town of Bethel pursuant to Section 7-246 of the General Statutes

connection with an affordable housing development" (emphasis added). Section 8-30g(4) includes a zoning commission within the definition of "commission." 8-30g is not limited in its application to zoning regulations but would embrace any regulation enacted by a zoning commission. In addition, it deals with applications made to planning and zoning authorities. It is immaterial whether the application runs counter to the zoning regulations. All that is required to invoke the application of the statute is that an application be made to a zoning commission. *Kaufman v. Zoning Commission*, 232 Conn. at 140. Moreover, it is apparent that the Bethel Planning and Zoning Commission administers Section 118-44 as part of its zoning regulations. The fact that the provision governs a land use other than traditional features such as lot size, density, etc., makes no difference. A similar argument was rejected by the Appellate Court in *Wisniowski v. Planning Commission*, 37 Conn. App. 303, 311-15 (1995). This reason fails as a matter of law.

(c) Finally, the commission does not explain why the location of 28 homes at the base of these slopes compromises protection of a substantial public interest. To be sure homeowner safety is a substantial public interest. But there is no evidence that the siting of these homes as proposed will subject them to any harm, quantifiable or not. The commission's concerns are conjectural and not factual.

Reason Three

"The addition of 129 units on the heavily traveled Reservoir street will add substantial traffic to an already congested area of narrow streets and substantial roads." The basis for this statement is the belief, predicated on the testimony of a traffic expert, that the introduction of 800 vehicle trips per day that would be generated by this development, will accelerate the need for costly capital

improvements to the roads that immediately serve the development. Both the plaintiff's and the defendant's experts agreed that the level of service on these roads is presently satisfactory and would remain satisfactory after completion of the project. Contrary to the commission's finding, there is no evidence of traffic congestion which will be aggravated to the point where it will reach an unacceptable level of service. In fact, the Danbury Town Planner advised that traffic on Mountainville Road which connects to Reservoir Street contains "relatively high traffic volumes which will be exacerbated by the development." The state of "exacerbation" was never quantified into a specific future problem but remained vague and generalized. See, *Mackowski v. Planning and Zoning Commission*, 59 Conn. App. 608, 617 (2000). On the contrary, the State Traffic Commission, in the course of its review of the project, determined that anticipated traffic volumes are minor. Undeniably, safety to the traveling public is a substantial public interest. Moreover, it is within the purview of a planning and zoning commission to anticipate the need for future highway improvements and to plan for them. But there is no evidence in the record that the addition of these housing units will produce any harm to traffic safety conditions or cause congestion in the streets. Avoiding acceleration of future highway improvements for which there is no need either before or immediately after the project is completed is simply not a public interest that the commission is entitled to protect in the context of affordable housing. Nor is guarding against the need to do so at some unspecified future time a protectable public interest. Nor is avoidance of such improvements by maintaining the present zoning classification a public interest worthy of protection in the face of an affordable housing application. If the record contained specific engineering proposals for improvements which the expert and the commission had in mind, and which are anticipated by some date in the future, the commission easily could have ordered reasonable changes to the development

pursuant to Section 8-30g(2)(g)(i)(C), but it does not.

The record contains letters from neighbors raising issues of traffic safety. Each of them constitutes a generalized statement of concern but collectively fail to quantify the harm that they sought to protect against. The record reveals that traffic accidents have occurred on the service highways but no expert opined whether that experience was excessive or not or was predictive of future accident experience. *Mackowski v. Planning & Zoning Commission*, supra.

Lastly, the commission's brief mentions the claimed inadequacy of site lines. While neighbors may have complained about this condition, the commission did not assign this as a reason for denial. The court may not go beyond the reasons expressly articulated by the commission. *RYA Corp. v. Planning and Zoning Commission*, 81 Conn. App. 658, 675 (2005). In any event, adequate site lines can always be achieved by the imposition of a reasonable condition to approval of the site plan.

Reason Four

The siting of 40 units partially within the flood plain creates potential for danger from flooding, thus requiring flood insurance in order to qualify for disaster relief from the Federal Emergency Management Agency (FEMA).

The record reveals that there is a distinction between a flood way and a flood hazard line. The former marks the areas exposed to primary flood waters based on historical flood data while the latter delineates a limit within which homeowners must purchase flood insurance if they wish to qualify for disaster relief from FEMA in the event of a flood.

While the Commission appeared to recognize this distinction it nevertheless substantially

equates the flood way which presents a genuine threat of harm with the flood hazard limit which presents only a one percent per year threat of harm (100-year flood). So, while as a general proposition, protection of life and property from flood is without question a substantial public interest, protection from a 100-year flood, viz: a flood that has only a one percent likelihood of occurrence, though a protectable public interest is not a substantial [fn2] public interest entitled to protection within the meaning of Section 8-30g.

Moving to the third prong of the four-prong analysis required by subsection (g), even if this reason were necessary to protect a substantial public interest, the need to protect against a 100-year storm clearly does not outweigh the need for affordable housing in Bethel. [fn3]

Reason Five

This reason deals with four separate subjects, the first three of which will be considered together.

- (a) Play areas for children;
- (b) snow storage;
- (c) guest parking

Comparing this development with another affordable housing development called Lexington Meadows, the commission determined that each of these features is inadequate based upon its

[fn2] The term "substantial" is not defined in the statute. Webster's New World Dictionary, Second College Edition, at 1420, defines it as "of considerable worth or value."

[fn3] The court notes that Section 8-2(1) of the General Statutes which prohibits certain development in a flood plain was not in fact in existence at the time that the commission acted.

apparently unfavorable experience with the same features at Lexington Meadows. Notably, the Commission fails to point to any provision of its own zoning regulations which governs the size and quantity of these features. The record is totally lacking in any evidence to support the claim that any or all of these features need enlarging in order to protect a substantial public interest. In any event, they are physical features which lend themselves to regulation by means of an appropriate condition of approval (reasonable changes to the development). They certainly do not constitute grounds for denial either individually or collectively. Their inadequacy certainly does not outweigh the need for affordable housing in Bethel.

(d) Development adjacent to wetlands and flood plains is contrary to sound planning principles. Once again drawing on its unfavorable experience with Lexington Meadows the commission is saying that it does not wish to make the same mistake twice. Whatever validity that planning principle may have in conventional zoning it has no validity in an affordable housing appeal where no substantial, protectable public interest has been identified. Although the public has an interest in monitoring erosion and sedimentation prevention measures both during and after construction, there is nothing in the record to suggest that such measures will not be taken by the plaintiff. Adherence to "sound planning principles" protects a value preference, not a substantial public interest.

Reason Six

Inadequacy of emergency access. There is sufficient evidence that the emergency access driveway off Reservoir Street may not be adequate to permit the safe ingress and egress of emergency vehicles, especially fire trucks. Specifically, there is insufficient turning radius. While

facilitating safe and expeditious access of emergency vehicles to the site is undeniably a substantial public interest worthy of protection, it is hardly necessary to deny an affordable housing application because the site plan fails to do so. Numerous alternatives come to mind which could be employed to accomplish the same goal, viz: the commission could require as a condition of approval (reasonable change to the development) that the accessway be widened, reconfigured, relocated, etc., a design feature that can be changed on the site plan. Under these circumstances the failure of the plaintiff's site plan to include acceptable emergency access hardly outweighs the need for affordable housing in Bethel.

Reason Seven

The applicant's refusal to "phase" the project. This reason is based on the plaintiff's refusal to develop the site in phases, thereby reducing the amount of exposed earth to the particular phase under construction. The commission was concerned that stripping the entire construction site of vegetation and exposing the earth would create a potentially serious problem of erosion and sedimentation control with the possible effect of damage to an adjacent wetland.

Once again, protection of wetlands from damage caused by erosion and sedimentation constitutes a substantial public interest which the commission is entitled to protect by the imposition of strict controls through the appropriate use of the instrument of conditional approval. It is not necessary to deny the application in order to protect the wetlands from sedimentation infiltration. Contrary to the commission's claim at page 26 of its brief in chief, the commission did not assign denial of a wetlands permit by the wetlands commission as a reason for its denial of the affordable housing application. Moreover, any possible harm which might result from unavoidable

sedimentation and erosion on the facts of this case does not outweigh the need for affordable housing in Bethel.

Reason Eight

The affordability plan does not meet with the commission's approval. There are two reasons for this. (i) failure to offer affordable housing units on a pro rata basis with the market rate units. At oral argument the plaintiff stated that it would willingly incorporate pro rata construction and location of affordable units within its revised plan, so this can be assured through the imposition of an appropriate condition of approval. (ii) voiding of the affordability restriction required by Section 8-30g(a)(6) in the event of foreclosure by an institutional lender. The commission is correct that such a provision would defeat the affordable nature of the development and would be contrary to Section 8-30g(a)(6). Such a provision must be eliminated from the applicant's affordability plan but unless the plaintiff refuses to do so it is not grounds for disapproval. It is rather grounds for modification (a reasonable change).

Point #2 — Bethel does not need affordable housing because the percentage of affordable housing units in the town as defined in Section 8-30g(k) and as accepted by the Commissioner of Economic and Community Development, namely 6.8%, does not present a clear or a fair picture of the actual number of affordable homes in the town and Bethel surpasses other Fairfield County towns in this regard. A similar methodology used by West Hartford to assess the need for affordable housing within its community was emphatically rejected by our Supreme Court five years earlier in *West Hartford Interfaith Coalition, Inc. v. Town Council*, 228 Conn. 498, 518-21 (1994).

In support of this conclusion the commission made several findings which it claims are

factual. For example, it stated that Bethel has the lowest per capita income "of all the towns" and that median home prices for 2002 and 2003 "are the lowest." Assuming that there is factual support for these assertions in the record, they are highly irrelevant and outside the scope of the commission's responsibility.

Point #2.2 and 3 — these reasons are equally irrelevant to the commission's responsibility under the statute. Real property tax assessments and the number of building permits issued in 2000 and 2001 for so called "in-law" apartments are simply not entitled to consideration by the commission when it performs its statutory function of assessing need. In the West Hartford case, the defendant-zoning authority argued that the trial court should have considered evidence of existing housing that did not meet the statutory definition of affordable housing but was nevertheless "affordable." In particular, the defendant contended that the trial court should have considered statistical evidence demonstrating that at the time of the plaintiff's hearing before the defendant, there were at least 60 residential units listed on the market in West Hartford for less than \$147,500 and 37 housing units listed with an asking price below \$99,000. Additionally, the defendant argued that the trial court should have considered evidence that the defendant's membership had personal knowledge of various efforts on the part of West Hartford to promote affordable housing in the town. In disagreeing with that argument the court stated ". . . there is no support in the statute or its legislative history for the defendant's position. Section 8-30g(a) [now § 8-30g(a)(1)] explicitly limits the definition of affordable housing to 'assisted housing' or deed restricted housing. Further, Section 8-30g(f) and (g) [now § 8-30g(K)] provides specific exemptions from the statute's appeal procedure. Because the 'evidence' offered by the defendant does not comport with the statutory definition of 'affordable housing' it satisfies neither statutory exemption. Consequently, when weighing the need

for affordable housing the trial court correctly refused to consider the defendant's evidence of low cost housing and of private efforts to encourage its development." Id. at 520.

Thus, the commission's effort to weigh the need for affordable housing against the perceived damage to the public interest is inherently defective because one of the two elements of the equation, namely need, is based upon a faulty understanding of the elements which comprise the need.

Point #2.4 — during the proceeding before the commission, its staff recommended that the commission consider enacting a density bonus regulation pursuant to Section 8-2 which might be acceptable to the plaintiff. Because the plaintiff expressed no interest in the proposal the commission assigned that negativity as a grounds for denial of the application. It appears to the court that in doing so, the commission seeks to hold the plaintiff responsible for its failure to enact such regulations although it has had the power to do so since 1988, the effective date of the enabling legislation. (Section 8-2g.) The court notes that not only does Bethel have no density bonus regulation, it has no affordable housing regulations of any sort. This is so notwithstanding the fact that the Bethel plan of development of 1997, acknowledges at page 40 that "406 units [are needed] to meet the State mandate of 10% of the municipal housing stock being affordable." Thus, the planning component of the commission appeared, at least in 1997, to recognize its legal responsibility to plan for the eventual satisfaction of its statutory mandate. Again, at page 42 the commission recommended that it "examine the feasibility of allowing a density bonus." There is no evidence that it has ever done so.

One would expect that a zoning commission would be guided by its plan of development especially when the planning and zoning commission are one and the same. *Motts Realty Corp. v. Town Planning and Zoning Commission*, 152 Conn. 535, 538 (1965). So, at least since 1997 when

the commission seemed to recognize its affordable housing responsibility, the zoning component of the commission has never enacted any kind of affordable housing regulation. Such failure is an abdication of the commission's responsibility under Section 8-2(a) to "promote housing choice and economic diversity in housing, including housing for both low and moderate income households."

Bethel's steadfast unwillingness to meet its statutory obligation when coupled with its improper insistence upon including non qualified housing units in the equation for assessing the need for affordable housing leads inevitably to the perception that the commission's denial of plaintiff's application was motivated by some exclusionary purpose based on economic status, natural origin or perhaps even race. As this court warned in *Nichols v. Killingly*, No. 94-0540477 J.D. Hartford/New Britain, June 5, 1995 (*Mottolese, J.*). "Where a reason given for denial of an affordable housing application is based upon a land use plan . . . which fails to include a program for eventual satisfaction of the zoning authority's statutory obligation to zone for affordable housing, that reason is immediately suspect and must be scrutinized very carefully by the court."

Point #2.5 — Underlying every reason for denial assigned by commission is its disapproval of the density of the development because it is the density on the site that the commission claims creates the problems with the various public interests which it identifies. Accordingly, the commission requested that the plaintiff reduce the size of the development and sought economic justification from the plaintiff for holding to the 129 units.

Zoning to control density is clearly a proper goal for a zoning commission under Section 8-2 and constitutes a substantial public interest in an ordinary case. In an ordinary case, issues of density are fairly debatable. *Lurie v. Planning and Zoning Commission*, 160 Conn. 295, 309 (1971). Coupled with the power to zone for density is the concomitant duty to adopt regulations to

"encourage the development of housing opportunity . . . consistent with soil types, terrain and infrastructure capacity, for all residents of the municipality and the planning region in which the municipality is located." Section 8-2(a). This language has been interpreted by our Supreme Court not only to be mandatory but also broad in scope. *Builder's Service Corporation v. Planning and Zoning Commission*, 208 Conn. 267, 305 (1998).

The plaintiff proposes over two and one-half times the density permitted under current zoning, namely, 129 versus 49 units. 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. In 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.

Finally, there is nothing in Section 8-30g which authorizes the commission to demand economic justification for the number of units proposed in the development. Under subsection (b)(2) of the statute only the Commissioner of Economic and Community Development is empowered to adopt regulations regarding the affordability plan. The court notes that economic justification for the number of units in the development is not among the regulatory requirements. To permit a zoning authority to limit the size of an affordable housing development to that number of units which enables the developer to achieve a minimal, yet undefined profit margin, would constitute a

restriction having "a substantial adverse impact on the viability of the affordable housing development" in violation of subsection (f) of the statute.

Reason 1 — The applicant failed to obtain the necessary final approvals from the public utilities commission for approval of the plans and specifications for sewer service. Both parties agree that the affordable housing development was designed for connection to the municipal sewer system. The record shows that the plaintiff proposed no alternative method of sewage disposal. Therefore, availability of and access to the town sewer system is crucial to the project and therefore is clearly a substantial public interest that must be protected.

At the time the commission acted on the affordable housing application the BPUC had not taken formal action to approve or disapprove the plaintiff's application to connect to the system. Thus, the court is required to apply the principle first formulated in *Faubel v. Zoning Commission*, 154 Conn. 202 (1966) and repeated in a long line of decisions, including affordable housing decisions, such as *Kaufman v. Zoning Commission*, 232 Conn. 122 (1995) and *Riverbend Associates v. Zoning Commission*, 271 Conn. 1 (2004). This principle simply states that a zoning authority's action "which is dependent for its proper functioning on action by other agencies over which the zoning authority has no control cannot be sustained unless the necessary action appears to be a reasonable probability." In the context of an affordable housing appeal where the burden of proof is always on the zoning authority, the zoning authority must prove under Section 8-30g(b)(2)(g) that there is sufficient evidence in the record to establish that it is more than a mere possibility that such approval will not be forthcoming. *Christian Activities Council, Congregational v. Town Council*, 249 Conn. at 285. In other words, the Commission must show a reasonable basis in the record to support its conclusion that the sewer connection probably will not be approved by the BPUC. Unlike

a conventional zoning appeal the burden of establishing reasonable probability of attainment does not rest with the plaintiff. Indeed, in an affordable housing appeal unlike a conventional administrative appeal, "approval of necessary applications by coordinate municipal agencies should be presumed to be a probability in the absence of any evidence to the contrary." *Riverbend Associates v. Planning and Zoning Commission*, 271 Conn. at 59-60. [fn4] This court's initial inquiry must therefore be "what evidence is there in the record to the contrary?" As the court stated in its adjudication of the parties' motions to supplement the record, there is little if any evidence of either the likelihood or unlikelihood of such approval.

In an effort to determine from events which occurred subsequent to the commission's denial what the degree of probability of BPUC approval was at the time the commission acted, the court ordered that the record be supplemented by adding certain minutes of the BPUC's meetings at which the application was considered. The record as supplemented discloses the following evidence on the issue:

- (1) The plan of development shows the property located outside but adjacent to the existing sewer service area and not within the proposed sewer service area.
- (2) The BPUC has not designated any sewer service districts in the town of Bethel pursuant to Section 7-246(b) of the General Statutes.
- (3) Adjacent residential uses on the east on roughly 12,000 square foot lots are served by the municipal sewage system.

[fn4] This court interprets the creation of such a presumption by the Supreme Court as a reflection of its recognition of the obligation of all agencies of municipal government which are subject to the provisions of Section 8-30g to carry out earnestly and conscientiously the public policy of the state to increase the number of affordable housing units for its residents.

- (4) The 1997 plan of development envisions that all R-10 zoned land in the town will be served by public water and sewer.
- (5) The Bethel Director of Health, in a letter dated March 11, 2003, stated that that office had no objection to the project.
- (6) According to the plan of development the minimum lot size necessary to accommodate a septic system is six tenths of an acre (.6) acres or 26,136 square feet, thus implying that any R-10 lot on 10,000 square feet should be served by the municipal sewage system.
- (7) The BPUC retained L. Assard of the engineering firm of Heitkmp, Inc. as a consultant. After studying the plan for development of the project, Mr. Assard advised the BPUC as follows:
 - (a) "The capacity of the sewer in Reservoir Street and immediately downstream should be determined by meter entering an appropriate downstream manhole for a minimum two week period.
 - (b) Ownership of the sewage system needs to be clarified.
 - (c) Pressure testing specifications of the sewer lines and specifications for vacuum testing of manholes are not provided.
 - (d) Connection of the development should not be approved until these issues are resolved."
- (8) In order to perform the test specified in number 7, an advance flow meter was needed which did not arrive in time prior to completion of the commission's denial.
- (9) Minutes and correspondence from BPUC meetings held both before and after the commission's denial reveal:
 - (a) The items included in the consultant's (L. Assard) report must be addressed before

the BPUC will approve. (Exhibit 105), P. 1033

- (b) Since Bethel's municipal sewage flows to Danbury's sewage treatment plant this project could require Bethel to purchase additional capacity from Danbury. (Meeting of 10-4-04.)
 - (c) The capacity of the Bethel sewage system must be determined. (Minutes of 11-8-04.)
 - (d) The developer may be required to eliminate inflow and infiltration of storm water from the sewage system equal to its proposed flow. (Meeting of 10-4-04.)
 - (e) Although there is a sewer main in Reservoir Street it does not extend to this property. (Meeting of 11-8-04.)
 - (f) Inflow infiltration fees may have to be levied to compensate for the increased load on the sewer system. (Meeting of 11-8-04.)
 - (g) The applicant (plaintiff) was instructed to come back before the BPUC after obtaining planning and zoning commission approval and after it has submitted a site plan. (Meeting of 4-4-05.)
- (10) No one involved in the processing of the sewer permit, professional or not, recommended against it.
- (11) While site plan approval by the planning and zoning commission appears to be a condition precedent to BPUC approval, (Minutes of 4-4-05.) Section 118-23 of the Bethel Zoning Regulations requires as a condition precedent to site plan approval by the commission that a sewer permit be obtained from the BPUC.
- (12) The plaintiff has not obtained BPUC approval to date despite the passage of time.
- (13) The BPUC is not subject to the provisions of Section 8-30g.

(14) A decision of the BPUC denying the permit is subject to appeal to the Superior Court pursuant to Section 7-246a of the General Statutes.

From this, the defendant argues (i.) that the court should infer probable denial by the BPUC because to date, the plaintiff still has not obtained its permit notwithstanding the passage of time, and (2) even if the permit were granted such action would be subject to review and approval as a municipal improvement by the planning and zoning commission pursuant to General Statutes § 8-24, and if granted, by the legislative body of the municipality. Of the numerous factors mentioned above only numbers (12) and (13) tend to militate against a finding of reasonable probability of approval. This court rejects the defendant's invitation to infer probability of disapproval from the mere passage of time for several reasons. First, until the present appeal is resolved, the plaintiff cannot meet the condition precedent for approval set down by the BPUC on April 4, 2005 by submitting a site plan approved by the planning and zoning commission. Until the site plan is approved, the plaintiff is unable to advise the BPUC of the number, size and location of the units to be served by the sewer connection, all of which are essential to the BPUC's deliberations. Next, each of the three sets of minutes which the court ordered into the record contain positive emanations from which the plaintiff could derive encouragement. Finally, there may be bona fide strategic planning reasons why the plaintiff would not want to press its application while the project is in litigation, not only with respect to the present case but also with respect to the companion inlands/wetlands appeal.

While it is true that the BPUC is not subject to the procedure provided for in Section 8-30g, its actions are nevertheless subject to appeal in the same manner as any other land use agency utilizing Section 8-8. In such an appeal its discretion in denying the permit would be reviewable to assure that it was "exercised under the law and not contrary thereto and must not arbitrary, vague or

fanciful but legal [regular]. [Furthermore,] "it is questionable whether [a water pollution control authority] can arbitrarily refuse to extend sewers just to prevent development otherwise authorized and a denial of an extension would have to be based on topographical or engineering considerations, the terms of a sewer ordinance, a prior scheduled for specific sewer extensions, or similar standards." *Avalon Bay Communities, Inc. v. Sewer Commission*, 270 Conn. 409, 433, n. 26 (2004). Such a principle would apply with even greater force to an affordable housing development.

The second argument which the defendant advances, which is based on Section 8-24, would require the defendant acting in its planning capacity, to approve a sewer extension as a municipal improvement. Assuming without deciding that the connection of this development to the municipal sewer system would trigger the application of Section 8-24, the defendant's disapproval, unlike that of the BPUC is itself subject to the provisions of Section 8-30g. Moreover, by the express terms of the statute the Bethel legislative body would only become involved, if at all, upon a disapproval of the proposal, not an approval. This argument does nothing to buttress the defendant's thesis that the sewer connection is not reasonably probable of attainment.

While the process of assessing a record to determine whether an essential approval by a coordinate municipal agency is reasonably probable of attainment is an inexact science, there are certain principles which guide a trial court's approach to the issue. In *National Associated Properties v. Planning and Zoning Commission*, 37 Conn. App. 788, 800 (1995) our Appellate Court rejected the planning and zoning commission's claim that an applicant in an affordable housing case must have approval from the water pollution control authority prior to seeking a zone change. The court stated "Section 8-30g does not list any order in which these applications must be brought and we will not read into the statute a requirement that a zone change application cannot be

approved without prior approval from the water pollution control authority." So, as a matter of law, the requirement in Section 118-23 of the Bethel zoning regulations which mandates BPUC approval of a connection to the municipal sewage system and production of evidence of the permit prior to approval of a site plan by the commission, can have no application in the present case. Therefore, failure to comply with Section 118-23 cannot provide a basis for denial of the affordable housing application.

In *Blaker v. Planning and Zoning Commission*, 212 Conn. 178, 481 (1999), a non-affordable housing case, the Fairfield planning and zoning commission attached a condition to its approval of a change of zone and special permit to allow the construction of 89 condominium units in the Southport section of the town. That condition necessitated an approval to traverse wetlands from the Fairfield Conservation Commission. The plaintiff claimed the condition invalidated the approvals because the Commission conditioned its approval on future action by a coordinate town agency over which the planning and zoning commission had no control and whose final decision could not be predicted. The court responded as follows: "In *Lurie v. Planning and Zoning Commission* . . . we held that `where an exception or special permit is granted and the grant is otherwise valid except that it is made reasonably conditional on favorable action by another agency or agencies over which the zoning authority has no control, its issuance will not be held invalid solely because of the existence of any such condition.' . . . Our holding was intended to achieve greater flexibility in zoning administration by avoiding stalemates between a zoning authority and other municipal agencies over which it has no controls. *Id.* Nowhere did we intimate, therefore, that, in order to be valid, conditional approval requires evidence that the other agency will act favorably on the future request. Such a holding in the present case would require evidence of the

probability of future approval before the conservation commission has had an opportunity to review the site plans as revised. Further, it would be contrary to the policy of allowing a planning and zoning commission `to make the first move and the decision as to the conditions under which it would approve the issuance of a permit . . . This is so even though the project may subsequently fail to materialize because one or more of the conditions has for any reason not been met.' Id. We conclude therefore that the phase `reasonably conditional' in Lurie contemplates giving the other agency, over which a planning and zoning commission has no control, the opportunity to review the revised plans, thereby furthering the goal of cooperative action among municipal agencies, and that the record need not indicate whether the conservation commission is likely to approve the revised site plans." *Blaker v. Planning and Zoning Commission*, 212 Conn. at 482-83 (1989). (Emphasis added.)

In *Kaufman v. Zoning Commission*, supra, the Danbury Zoning Commission denied the plaintiff's affordable housing application and gave as one of its reasons that "the increase in traffic and the detrimental effect on fire safety would make an adverse situation." The trial court acknowledged the adverse situation but in its remand order conditioned approval of the affordable housing application upon approval of certain road improvements by the city planning commission. The zoning commission challenged the trial court's action because there was no evidence in the record that the planning commission would approve the road improvements. The Supreme Court rejected that argument. Because the record in the present case is similarly silent and because the rationale of the court is instructive, it is helpful to quote at length from the opinion of the court. "The commission bases its argument on *Faubel v. Zoning Commission*, 154 Conn. 202 (1966) in which, on somewhat similar facts this court held that a change of zone which is dependent for its

proper functioning on action by other agencies and over which the zoning commission has no control cannot be sustained unless . . . the necessary action appears to be a probability." *Id.*, 211. This holding reflects the policy concern that in the face of evidence of impending harm to the public interest, zoning commissions should not grant zone changes without assurances, in the record, that preventive steps will be taken to minimize the risk of harm. See also *Brustein v. Zoning Commission*, 151 Conn. 101, 105 (1963); *Luery v. Zoning Board*, 150 Conn. 136, 145 (1962); *Whalen v. Town Plan and Zoning Commission*, 146 Conn. 323, 326-27 (1959); *Gordon v. Zoning Board*, 145 Conn. 597, 603-04 (1958).

The concerns that underlay *Faubel* do not however, control the decision in this case if the commission has the authority to grant the application for a new zone on the condition that the planning commission approves, and the plaintiff makes the necessary road improvements. If the roads are not built, the existing zone will continue in place, and the public interest in traffic control will remain protected. If the roads are built, on the other hand, the public interest in traffic control will not be adversely affected. In other contexts therefore, we have allowed zoning commissions to approve a proposed development project on the condition that the applicant take other action even when the other action required another agency's approval, and even when there was no evidence that the other agency will act favorably on the future request. *Blaker v. Planning and Zoning Commission*, 212 Conn. 471, 482 (1989); *Lurie v. Planning and Zoning Commission*, 160 Conn. 295 (1971).

The commission maintains, nevertheless, that it is not empowered conditionally to grant this zone change application because in our prior cases, the conditional zoning approvals that we allowed did not involve zone changes. The commission argues, further, that even if it had been empowered

conditionally to grant the zone change to protect the public interest. It also was empowered simply to deny the zone change to protect those interests. In the context of an application to build affordable housing, however, we agree with the trial court that, on the present record, the conditional granting of a zone change was not only authorized but required.

"As long as a conditional zone change approval protects the public interest in traffic control, a proposition that the commission does not contest, such an approval advances the legislative purpose of encouraging the construction of affordable housing. Public officials are expected to cooperate in helping [affordable housing] [to] be locate[d] in their community . . .but it is hardly reasonable to expect that a highway authority or a traffic authority would make the necessary expenditures without knowing that when such work was completed the . . . zoning commission would approve and permit the project which the work was designed to make possible, nor, logically, should the commission grant an unconditional permit for a project when in its judgment the project was impermissible unless off-site work were done. In such circumstances it is entirely reasonable and logical that the . . . zoning commission which is entrusted with large powers . . . should be the agency to make the first move and the decision as to the conditions under which it would approve the [project]. This is so even though the project may subsequently fail to materialize because one or more of the conditions has for any reason not been met. *Lurie v. Planning and Zoning Commission*, supra 160 Conn. 306-07." *Kaufman v. Zoning Commission*, 232 Conn. At 162-65 (alternate citations omitted; emphases added; internal quotation marks omitted).

Moreover, in *Kaufman* the plaintiff-developer, even after obtaining his affordable housing approval from the defendant commission, was required to obtain additional approvals from the following agencies over which the zoning commission had no control: (1) environmental impact

commission (for a wetlands permit), (2) planning commission (for subdivision and road approval), (3) building department (for construction permit), (4) health department (for handicapped accessibility certification), and (5) engineering department (for road, sewer and drainage permits). The court supported approval of the affordable housing application by the defendant conditional upon approvals by these other agencies. *Id.* at 140. What is particularly noteworthy about the court's endorsement of such a procedure is that of the five agencies mentioned only the planning commission is subject to the provisions of 8-30g. In fact, disapproval by agencies numbered (3), (4) and (5) are not subject to judicial review by direct appeal at all.

Thus, unlike agencies 3, 4 and 5 above whose determinations are not appealable to the Superior Court, the action of the BPUC in the present case is directly appealable. This is particularly important because in the framework of affordable housing where vetting of the project is subject to substantial public interest considerations, the BPUC might be motivated to consider Bethel's affordable housing needs in the exercise of its discretion, especially in light of our Supreme Court's reminder in *Kaufman* that "public officials are expected to cooperate" in helping to locate affordable housing in their community.

It is significant that our case law supports the notion that conditional approval is appropriate where the coordinate municipal agency has expressed no position on the application. However, where the agency has expressed opposition such approval would be inappropriate. In fact no decision was found which held that it was inappropriate to grant conditional approval where the coordinate agency was silent on the issue. See, e.g. *Gordon v. the Zoning Board*, 145 Conn. 321 (1958); *Whalen v. Planning & Zoning Commission*, 146 Conn. 321 (1959); *Lueny v. Zoning Board*, 150 Conn. 136 (1962); *Faubel v. Zoning Commission*, 154 Conn. 202 (1966); *Lurie v. Planning and Zoning Commission*, 160 Conn. 295 (1971);

Wilson v. Planning & Zoning Commission, 162 Conn. 19 (1971); *Jarvis Acres, Inc. v. Zoning Commission*, 163 Conn. 41 (1972); *Blazer v. Planning & Zoning Commission*, 212 Conn. 471 (1989); *Vaszauskas v. Zoning Board Of Appeals*, 215 Conn. 58 (1990); *Kaufman v. Zoning Commission*, 232 Conn. 122 (1995); *River Bend Associates, Inc. v. Zoning Commission*, 271 Conn. 1 (2004); *River Bend Associates, Inc. v. Planning Commissioner*, 271 Conn. 41 (2004); *Carpenter v. Planning and Zoning Commission*, 176 Conn. 581 (1979).

The above analysis leads this court to conclude that the present case falls somewhere between *Kaufman* and *River Bend* (271 Conn. 41 (2004)). In the latter case, the court held that the affordable housing application for subdivision approval was properly denied because the water pollution control authority had denied the plaintiff's application for a sewer connection. The court reasoned that the planning commission could not conditionally approve the subdivision application on WPCA approval because it was not reasonably probable that the sewer connection would be approved and the subdivision plan could not be implemented without the sewer connection. Again, in *River Bend Associates, Inc. v. Zoning Commission*, 271 Conn. at 19, a companion case involving an affordable housing application seeking site plan approval to correspond with the subdivision, the court held that "once the planning commission denied the subdivision application, the zoning commission could not be ordered (by the court) to approve the site plan application because there was no reasonable probability that the subdivision on which the site plan was premised could be approved."

In these cases the court recognized a dichotomy of fact patterns between the *River Bend* and the *Kaufman* scenarios. This court concludes that the present case is more like *Kaufman* than *River Bend*.

Overall, the commission has failed to sustain its burden of proving that there is sufficient evidence in the record to support its implicit finding that the plaintiff probably would be unable to obtain its necessary approvals from the BPUC. To paraphrase the court in *Lurie v. Zoning Commission*, supra at 306-07, "The project may subsequently fail to materialize because the condition has for any reason not been met." (Emphasis added.) At the same time, the condition must be narrowly tailored and limited in duration so that finality may be reached within a reasonable period of time. Accordingly, the court reverses the decision of the Commission and revises the decision so as to grant the plaintiff's application subject to the following conditions.

1. Pursuant to Section 7-246a of the General Statutes the plaintiff shall present to the BPUC a site plan in accordance with this decision within 30 days of this date.
2. If the BPUC denies the application then the condition will not have been met and the project will fail for that reason. The court notes that under Sec. 7-246a the BPUC is under a statutory obligation to make its decision within 65 days, with a possible extension of another 65 days. This is a reasonable time within which to meet the condition.
3. Such reasonable improvements to the intersection of Reservoir Street and Route 53 as will bring the intersection beyond the "threshold point" in the judgment of the town department having jurisdiction and ultimately the commission.
4. Redesign of the emergency access road off Reservoir Street to make it adequate for emergency vehicles.
5. Sedimentation and erosion controls as specified by an engineer acceptable to the commission.
6. Elimination of the provision in the affordability plan which would permit voiding of

the affordability restriction in the event of foreclosure by an institutional lender.

7. Offer for sale or rent of affordable units pro rata with the market rate units.
8. Appropriate measures in the judgment of the commission to protect adjacent properties from the effect of blasting operations.
9. Such other conditions as the commission deems appropriate as long as they are reasonable and do not adversely affect the viability of the affordable housing plan.

The appeal is remanded to the commission for the sole purpose of fashioning the specific contours of conditions numbered 3, 4, 5, 8 and 9.