DOCKET NO. LND-CV-15-6064232-S	:	SUPERIOR COURT
LANDMARK DEVELOPMENT GROUP LLC, ET AL.	:	JUDICIAL DISTRICT OF HARTFORD LAND USE LITIGATION DOCKET
V.	:	
EAST LYME ZONING COMMISSION COMMISSION	:	OCTOBER 22, 2022

MEMORANDUM OF DECISION

I

This is an appeal by the plaintiffs, Landmark Development Group LLC and Jarvis of Cheshire LLC, of decisions by the defendant, the East Lyme Zoning Commission (commission), on the plaintiffs' applications for a zone change and a preliminary site plan related to a proposed affordable housing development on their 236 acre parcel on Calkins Road in East Lyme. On September 18, 2018, this court issued a memorandum of decision denying a motion to dismiss filed by the intervenors, Connecticut Fund for the Environment, Save the River–Save the Hills, Inc., and Friends of Oswegatchie Hills Nature Preserve, Inc. As summarized by the court previously: "This is the latest chapter between the developer, Landmark Development Group, LLC, and the town of East Lyme involving a proposed affordable housing development pursuant to General Statutes § 8-30g on property adjacent to Calkins Road in East Lyme. See, e.g., *Landmark Development Group* v. *East Lyme Zoning Commission*, Superior Court, land use litigation docket at Hartford, Docket No. LND-CV-06-4067311-S (October 31, 2011, *Frazzini, J.*)[1]; *Landmark Development Group* v. *Water & Sewer Commission of the Town of East Lyme*,

[1] This appeal was transferred to the Land Use Litigation Docket after disposition as there were several related cases on the docket at that time.

Superior Court, land use litigation docket at Hartford, Docket No. LND-CV-15-6056637-S (July 6, 2016, *Cohn, J.T.R.*) (62 Conn. L. Rptr. 693), aff'd, 184 Conn. App. 303, [194 A.3d 1241, cert. denied, 330 Conn. 937, 195 A.3d 385] (2018). In 2011, the court, *Frazzini, J.*, remanded a zone change decision by the defendant, the East Lyme zoning commission (commission), and ordered it to adopt zoning regulations governing affordable housing. *Landmark Development Group* v. *East Lyme Zoning Commission*, supra, Superior Court, Docket No. LND-CV-06-4067311-S.

"The parties evidently drafted the regulations and the commission allegedly adopted them as § 32.9 of the zoning regulations of East Lyme (regulations). On March 4, 2015, the plaintiffs . . . reapplied for a zone change and included a preliminary site plan. After a public hearing, the commission rendered an approval with numerous conditions on August 20, 2015. The plaintiffs argue that [the conditional approval] amounts to a denial. The commission's decision, in relevant part, states that '[t]he change of zone shall apply only to that portion of the Applicant's Property that is located within the East Lyme Sewer Service District . . . .' Notice of the decision was published in the New London Day on August 27, 2015.

"On September 11, 2015, the plaintiffs commenced this appeal alleging the following in paragraphs nineteen and twenty of their amended complaint: 'On March 4, 2015, [the plaintiffs] applied to the [commission] for approval of a zone change of 123.02 of its 236 acres to AHD [Affordable Housing District], and for a Preliminary Site Plan showing, within the 123 AHD, a minimum of 87 acres where residential structures would be prohibited, and a maximum of 36 acres where residential buildings would be permitted.

"'The purpose of these applications was to designate and conform the "macro" infrastructure elements of future site development, that is, maximum residential development area and the minimum acreage to be preserved. For this reason, [the plaintiffs] submitted a conceptual plan showing 840 units in 24 buildings within the 36 acres, rather than a detailed, engineered site plan. In addition, because the Preliminary Site Plan was not an application for construction approval, Landmark was not required to apply for an inland wetlands permit.' In the plaintiffs' prayer for relief, they seek, among other things, for the '[c]ommission [to] be ordered to approve Landmark's 2015 zoning applications, so as to: a. Rezone the entirety of Landmark's 123.02 acres property to AHD, as applied for in March 2015; and b. Approve Landmark's Preliminary Site Plan application dated March 2015, subject only to such reasonable conditions as the Court [determines] based on the administrative record . . . .'

"On November 3, 2015, the intervenors . . . moved to dismiss the appeal on the grounds of lack of subject matter jurisdiction based upon lack of ripeness. The intervenors argue that the commission's conditional approval was not a final judgment, but merely a temporary and nonbinding action." (Footnotes omitted.) This court denied the motion stating, "Under General Statutes § 8-8g (f), '[a]ny person whose affordable housing application is denied, or is approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development or the degree of affordability . . . may appeal such decision . . . .' See *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, 228 Conn. 498, 511, 636 A.2d 1342 (1994) (interpreting § 8-30g as encompassing related legislative zone changes)."

Thereafter,[2] the commission filed the return of record on April 17, 2019, and the commission and the intervenors filed their briefs on May 24, 2019. On March 12, 2021, the plaintiffs filed their brief. On April 26, 2021, the commission and the intervenors filed their reply briefs. The court heard oral argument on June 30, 2021.

II

The parties have stipulated that the plaintiffs are the owners of the subject parcel and have continued to own the property during this litigation. The commission maintains that the plaintiffs are not aggrieved because the commission's decision did not deny the application and was not "approved with restrictions which have an adverse impact on the viability of the affordable housing development or the degree of affordablity of the dwelling units in a set aside development" as required by General Statutes § 8-30g (f). To the extent the commission's density regulation, § 32.4.3, may limit the number of units,[3] and the parties have not agreed that the regulation would not apply to a final site plan, or that certain conditions will be imposed on the final site plan, including but not limited to the accessway to the parcel, the plaintiffs are

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[2] The commission filed its answer and special defense on November 3, 2015.

[3] According to the draft regulations, which are attached as Exhibit A to the plaintiffs' memorandum in opposition to the intervenors' motion to dismiss (Docket Entry # 114.00), § 32.4.3 of the proposed amendments to the East Lyme Zoning Regulations (regulations) provides: "Multi-Family Unit Density: The maximum number of multi-family dwelling units permitted on any lot shall be as follows:

"1 bedroom: 5,445 square feet/unit (8 units/acre)

"2 bedrooms: 7,260 square feet/unit (6 units/acre)

"3 or more bedrooms: 8,712 square feet/unit (5 units/acre)

"On lots to which public sewer and water facilities are not available, the maximum density of multi-family dwelling units shall be one unit per ten thousand (10,000) square feet of land."

aggrieved. General Statutes § 8-30g (f).

III

On or around August 20, 2015, the commission conditionally approved the plaintiffs' zone change application and preliminary site plan. (Return of Record [ROR], PH 13.) The plaintiffs appeal alleging that the conditional approvals are equivalent to denials. In the commission's brief, it argues that the conditions do not amount to denials. Specifically, it points out that the conditions "do not mandate [that the plaintiffs] do or provide anything that was not already required for the [preliminary site plan] or will be required for [their final site plan]."

Additionally, the intervenors assert that the appeal is not ripe because § 32.9[4]

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[4] Section 32.9 of the draft regulations, entitled "General Provisions," provides: "An application for designation as an [Affordable Housing District (AHD)] may be initiated in three ways: (i) a conceptual site plan in accordance with General Statutes [§] 8-30g; or (ii) an application for approval of a Preliminary Site Plan ('PSP'); or (iii) an application for approval of a Final Site Plan ('FSP'). The Commission shall have the discretion to hold a public hearing on an application for approval of a PSP and/or on an application for approval of a FSP. An application for designation as an AHD cannot be approved without an approved FSP.

"32.9.1 PRELIMINARY SITE PLAN: The purpose of a PSP is to require the submission to the Zoning Commission of information sufficient to allow it to evaluate a development plan . . . under the standard of § 8-30g, and to allow an applicant to defer, until approval is granted, completion of details and specifications that will define what is to be built but are not essential to § 8-30g analysis. Therefore, a PSP submitted with an application to rezone an eligible parcel or parcels of land as an AHD shall contain the following:

"32.9.1.a An A-2 property line survey.
"32.9.1.b Topographical contours at ten (10) foot intervals.
"32.9.1.c Location of wetlands, watercourses, and slopes in excess of twenty-five (25) percent.
"32.9.1.d General layout of all proposed buildings and structures.
"32.9.1.e Areas proposed for open space and/or recreational purposes.
"32.9.1.f Sewage disposal and water supply locations and system, ownership, operation, and maintenance.
"32.9.1.g Preliminary storm water management plan;

of the East Lyme Zoning Regulations (regulations), drafted in response to Judge Frazzini's decision in *Landmark Development Group* v. *East Lyme Zoning Commission*, supra, Superior Court, Docket No. LND-CV-06-4067311-S, requires certain environmental information that was not included in the plaintiffs' applications, particularly information on coastal, stormwater and

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"32.9.1.h	Coastal zone resources information.
"32.9.1.i	Traffic impact statement or report.
"32.9.1.j	Preliminary design plans for all proposed buildings and structures.
"32.9.1.k	A table showing the number of units and number of bedrooms for each unit.
"32.9.1.l	An Affordability Plan containing all of the documents and information required by General Statutes Section 8-30g.
"32.9.1.m	A list of all coordinate permits and approvals needed by the applicant before beginning construction.
"32.9.1.n	Soil types from the New London County Soil Survey.
"32.9.1.o	A statement describing any impact on public health and safety, including emergency services.

"32.9.2 FINAL SITE PLAN: An application for FSP approval shall contain all of the information required for a PSP, as well as any additional information that may be required for site plan applications under Section 24 of these Regulations. An application for FSP approval shall also demonstrate that (a) public water and sewer can serve the entire development, or (b) community septic and water can serve the entire development, or (c) a combination of public and onsite or community water and waste disposal can serve the entire development.

"32.9.3 DECISIONS ON SITE PLAN APPLICATIONS: If the applicant submits an application for approval of a PSP in connection with an application for designation of an AHD, the Commission shall either approve, approve with modifications, or deny said PSP at the time it acts on the proposed AHD designation. If the PSP is approved, or approved with modifications, the applicant shall file an application for approval of an FSP, which application shall include all information required under Section 24 of these Regulations for a site plan application. If the FSP conforms to the PSP as approved, and includes all information required by section 24 of these Regulations, the Commission shall approve the FSP. If the applicant submits an application for approval of an FSP in connection with an application for designation of an AHD without having first obtained PSP approval, the Commission shall either approve, approve with modifications, or deny said FSP at the time it acts on the proposed AHD designation."

wetlands impacts. In the intervenors' brief at page thirteen, they distinguish a conceptual site plan from a preliminary site plan. Additionally, the intervenors argue that the court may delay exercising its jurisdiction under the doctrine of primary jurisdiction until the commission renders its decision on the final site plan. See *Cianci* v. *Connecticut Council for AFSCME*, 8 Conn. App. 197, 201, 512 A.2d 232 (1986) ("Typically, the creation of [an administrative] agency means the addition to the legal system of a new lawmaking and law applying authority, with no explicit subtraction from the previously-existing power of courts. . . . In such cases, the doctrine of 'primary jurisdiction' dictates that the dispute be directed to the board so as to take advantage of the board's specialized skills and procedures." [Citation omitted; footnote omitted; internal quotation marks omitted.]); see also *Sharkey* v. *Stamford*, 196 Conn. 253, 256, 492 A.2d 171 (1985) ("[p]rimary jurisdiction is applied in order to ensure that an orderly procedure will be followed, whereby the court will ultimately have access to all the pertinent data, including the opinion of the agency" [internal quotation marks omitted]). In response, the plaintiffs assert that they provided all the required information and that the conditions placed upon the zone change, including the reduction in acreage, are ultra vires, premature and speculative.

General Statutes § 8-30g (b) (1), in relevant part, provides that "[a]ny person filing an affordable housing application with a commission shall submit, as part of the application, an affordability plan which shall include . . . (E) draft zoning regulations, conditions of approvals, deeds, restrictive covenants or lease provisions that will govern the affordable dwelling units." Further, § 8-30g (c) provides: "Any commission, by regulation, may require that an affordable housing application seeking a change of zone include the submission of a *conceptual site plan*

describing the proposed development's total number of residential units and their arrangement on the property and the proposed development's roads and traffic circulation, sewage disposal and water supply." (Emphasis added.)

In the present case, the parties drafted § 32.9 to include a preliminary site plan application process pursuant to Judge Frazzini's memorandum of decision in *Landmark Development Group* v. *East Lyme Zoning Commission*, supra, Superior Court, Docket No. LND-CV-06-4067311-S. This preliminary site plan process as defined by the regulation differs from a conceptual site plan under § 8-30g (c).[5] That difference has brought us to the current impasse.

The plaintiffs attempted to use the preliminary site plan to avoid the expenditure of large sums of money. The commission sought to obtain specific information through the preliminary site plan about the proposal focusing in large part on any environmental impacts of the project. It subsequently found that there was insufficient information concerning the location of the

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[5] In this court's memorandum of decision on the motion to dismiss at footnote 7, it noted, "The conceptual site plan is a common sense land use tool providing for staged planning and early review and benefits all parties by allowing for a determination of whether a proposed project is feasible without the expenditure of great sums of money by the developer and of substantial amounts of time and money by town staff and town volunteers as well as residents interested in the review process." The conceptual site plan is akin to the general plan of development noted by the court in *Gerlt* v. *Planning & Zoning Commission*, 290 Conn. 300, 304, 963 A.2d 24, 26-27 (2009) ("[T]he director of planning for South Windsor, explained that '[t]he purpose of the general plan is to provide for commission approval at an early stage in the planning of a project before [extensive] engineering is completed. This is beneficial to both [the applicant] and the commission as [the applicant] will receive the commission's input in reaction to a development proposal and the commission can have meaningful input into a project design. For these reasons the amount of detail required is minimal, however, the commission does have to be satisfied that [there is] enough information to make an informed decision. . . . A full site plan of development that is in conformance with the approv[ed] general plan would have to be submitted and approved by this commission. The site plan would include all of the engineering details as well as final building design, final site layout.'")

wetlands, coastal zone resource and stormwater management.[6] The commission approved, however, the preliminary site plan with conditions that the plaintiffs must supply that data in their application for a final site plan.

The crux of the issue now becomes the legal effect of a preliminary site plan. In *Gerlt* v. *Planning & Zoning Commission*, 290 Conn. 300, 310-11, 963 A.2d 24 (2009), the court addressed the issue of "whether the commission was authorized to render an advisory approval of a general plan of development [under the applicable zoning regulation] that was premised on subsidiary decisions and conditions that, although not binding on the commission or [the applicant], could not be revisited by any interested party during subsequent site plan proceedings under § 8-3 (g)." The court held that under the applicable regulation "any decisions made during those proceedings must be preliminary and nonbinding not only with respect to the commission and the developer, but also with respect to any interested parties who participate in subsequent proceedings on a site plan application." Id., 311.

While *Gerlt* is not precisely on point here, it is persuasive as to whether the commission and the plaintiffs are bound by the preliminary site plan or the commission's conditional approval. Section 32.9.3, in relevant part, provides that "[i]f the PSP is approved, or approved with modifications, the applicant shall file an application for approval of an FSP, which application shall include all information required under Section 24 of these Regulations for a site plan

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[6] The commission also found that there was insufficient information on sewage disposal, but this is presumably no longer an issue as a result of the Appellate Court's decision in *Landmark Development Group LLC* v. *Water & Sewer Commission*, supra, 184 Conn. App. 318. After which, the trial court, *Cohn, J.T.R.*, held additional hearings and approved the plaintiffs' request for 118,000 gallons per day. *Landmark Development Group, LLC* v. *East Lyme Water & Sewer Commission*, Superior Court, supra, Docket No. LND-CV-15-6056637-S (December 10, 2018).

application. . . ." See footnote 4 of this memorandum of decision. Thus, under the explicit language of the regulation, a final site plan application is required.[7]

The plaintiffs' application for the preliminary site plan constituted an application made to the commission in connection with an affordable housing development. See *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, supra, 228 Conn. 508. Essentially, the commission found that the preliminary site plan lacked sufficient information for a full review.[8] The conditions

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[7] "[Z]oning regulations are legislative enactments . . . and therefore their interpretation is governed by the same principles that apply to the construction of statutes." (Citation omitted.) *Wood* v. *Zoning Board of Appeals*, 258 Conn. 691, 699, 784 A.2d 354 (2001). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Tayco Corp.* v. *Planning & Zoning Commission*, 294 Conn. 673, 679, 986 A.2d 290 (2010).

[8] The commission also found that there are substantial public interests in, among other things, the protection of the coastal management zone and the wetlands and watercourses on the property. (ROR, Item PH-13.) The recognition of these substantial public interests is not new as to the proposed development. In *Landmark Development Group LLC* v. *East Lyme Zoning Commission*, supra, Superior Court, Docket No. LND-CV-06-4067311-S, 2011 WL 5842576, at *26, the court, *Frazzini, J.*, held: "The record here contains considerable evidence regarding potential environmental harm that could result from approving the site application, adopting the proposed regulations, or rezoning the entire property. The East Lyme Harbor Management/ Shellfish Commission letter stated that 'one of the major concerns identified in the Upper Niantic River Planning Unit is poor water quality. Future development, particularly of Oswegatchie Hill, could intensify water quality problems.'. . . The letter explained that nitrogen overloading from land runoff 'is a direct consequence of development in the watershed' and 'has led to die-offs in the eelgrass beds, which serve as a refuge for juvenile marine animals.' A letter from a scientist responsible for supervising marine ecological studies associated with the Millstone Power Station wrote that the loss of eelgrass population resulting from declining water quality due to nutrient inputs from residential septic systems and fertilizer use has had broad impact on the declines in once abundant species that rely on eelgrass meadows for nursery and feeding habits, including finfish and bay scallops. A 2004 letter from [the state department of environmental protection

in the commission's decision require the plaintiffs to supply information, including that required by § 32.9.1.c, g and h,[9] and are appropriate in the commission's consideration of an application for a final site plan. Simply supplying that information will not conclude the process because the commission must then evaluate the final site plan application applying the standards of § 8-30g

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(DEP), now the state department of energy and environmental protection] stated that the second application, for fewer units than the present one but inside the coastal management and conservation areas, 'would allow for inappropriately intensive development . . . in an area incapable of supporting intensive development without significant environmental consequences. The subject site is characterized by both shallow depth-to-bedrock and steep slopes which . . . would mandate significant alterations of the site to provide suitable land for road access, septic systems or water and sewer service, and inhabited structures. Such alteration of this natural area and associated runoff would significantly impact coastal resources and water quality along the river. Such a development would also cause sedimentation and erosion, nitrogen loading, and impacts on submerged aquatic vegetation, finfish, shellfish and wildlife on the site and in the Niantic River and Latimer Brook.'. . . A letter from the DEP on this application stated that Landmark had not provided all the information that DEP had requested to conduct its review of the proposal pursuant to General Statutes § 22a-104 (e). DEP thus recommended to the commission that it deny the proposed regulations and zone change because of the potential adverse impact on on-site and adjacent coastal resources as well as constraints posed by on-site conditions including steep slopes, exposed bedrock, shallow depth to bedrock and high erosion potential in proximity to the Niantic River. . . . This and the other evidence before the commission surely established that the potential for environmental harm is more than theoretical. There is no doubt that such potential environmental damage is a substantial public interest that the commission may consider." (Citations to the record omitted.)

[9] As discussed at the June 30, 2021 oral argument, several subsections of § 32.9.1 are quite vague. For instance, § 32.9.1.h calls for "Coastal zone resources information" and § 32.9.1.i asks for "Traffic impact statement or report." While it is conceivable that the commission and, in this case, the plaintiffs could arrive at an understanding of exactly what is required under those and other sections, it is also possible, as demonstrated here, that such understanding might not be achieved. See *Sonn* v. *Planning Commission*, 172 Conn. 156, 162, 374 A.2d 159 (1976) ("Vague regulations which contain meaningless standards lead to ambiguous interpretations in determining the approval or disapproval of different subdivisions. Adequate, fixed and sufficient standards of guidance for the commission must be delineated in its regulations so as to avoid decisions, affecting the rights of property owners, which would otherwise be a purely arbitrary choice of the commission; such a delegation of arbitrary power is invalid."). At any rate, the information sought by the commission, while appropriate for a final site plan, is not that envisioned by a conceptual site plan. The preliminary site plan process should be revised.

(g), including as to any reduction of acreage. Thus, the commission's conditional approval of the preliminary site plan is of no moment: it neither approved nor denied the application or even mandated anything. Presuming the plaintiffs supply all of the necessary information, the application for the final site plan will be evaluated under § 8-30g (g) to determine whether the project can be safely constructed in compliance with General Statutes § 22a-19 and our environmental laws.

As to the rezoning application, § 32.9 provides that "[a]n application for designation as an AHD cannot be approved without an approved [final site plan]." See footnote 4 of this memorandum of decision. In the present case, there is no approved final site plan and the questions and considerations applicable to the preliminary and final site plans still exist as to rezoning.

Finally, as noted previously, the commission is required to evaluate affordable housing applications under § 8-30g (g). It is apparent from the commission's decision on the preliminary site plan application that it did not have sufficient information to consider fully whether the public interests clearly outweigh the need for affordable housing development and whether the public interests cannot be protected by reasonable changes to the plaintiffs' affordable housing development. General Statutes § 8-30g (g). Hence, the commission's conditional approval of the plaintiffs' preliminary site plan was not inappropriate; such a decision may–although not always–result in a remand. Consequently, as suggested by the intervenors, the court will stay the appeal pending action by the commission, which has primary jurisdiction; see *Cianci* v. *Connecticut Council for AFSCME*, supra, 8 Conn. App. 201, so the plaintiffs may now supply the commission with the necessary information for it to consider a final site plan and a rezoning. This stay should

not be interpreted as a victory for the commission or a defeat for the plaintiffs. Rather, the court interprets the preliminary site plan application process as an enhanced conceptual plan during which comments have been received for the next application phase. In conformance with § 32.9.3, the process moves to a final site plan. See footnote 4 of this memorandum of decision.

Accordingly, this court stays the matter and remands the appeal to the commission for further review of the plaintiffs' final site plan application and rezoning.

/s/ 080096
Berger, J.T.R.