FILED

AUG 17 2021

HARTFORD J.D.

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| DOCKET NO.: HHD-LND-CV-18-6097370S | : | SUPERIOR COURT |
| 500 NORTH AVENUE, LLC | : | J.D. OF HARTFORD |
| v. | : | AT HARTFORD |
| TOWN OF STRATFORD ZONING COMMISSION, ET AL. | : | AUGUST 17, 2021 |

MEMORANDUM OF DECISION ON PLAINTIFF'S APPEAL OF THE COMMISSION'S DENIAL OF ITS AFFORDABLE HOUSING APPLICATION AFTER REMAND

The plaintiff commenced this appeal on May 30, 2018, pursuant to General Statutes § 8-30g, regarding the denial of its affordable housing application (application) by the Town of Stratford Zoning Commission (commission) for the development of 795 James Farm Road in Stratford. The court allowed the plaintiff to be substituted by the new owner of 795 James Farm Road, JRB Holding Company LLC, and to continue this appeal. After a hearing on November 21, 2019, the court issued its decision remanding the matter back to the commission. In its memorandum of decision, dated January 29, 2020, the court found that the commission failed to meet the requirement that it issue a collective statement on the record and engage in the four-part test required under § 8-30g (g). The commission reconsidered the application and provided notice to the court. The court heard argument on October 16, 2020, regarding the commission's denial of the application on remand. A supplemental record was filed on November 9, 2020. On May 17, 2021, the court heard supplemental argument concerning the plaintiff's appeal.[1] After

[1] At the May 17, 2021 hearing, the court asked for the parties to clarify the record. (ROR, Exh. 57.c, p. 712.) Plaintiff's counsel also explained that it had not submitted its application under the defendant's special case regulations and that any reference to special case was meant to refer to meeting agenda items that listed its application as a special case application. Plaintiff's counsel for the first time indicated it was submitting a final site plan, which contradicts the counsel's prior references to the site plan as a "conceptual site plan," including in its e-mail dated November 17, 2017. (ROR, Exh. 26, p. 87.) While there was much discussion of whether the site plan submitted was conceptual or final, the court treats the application as a conceptual site plan given the proposed amendment requires a final site plan to be submitted after a zone change

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consideration, the court reverses the commission's decision, and approves the plaintiff's application with modifications and conditions.

## I
## STATEMENT OF FACTS

The plaintiff's first application in 2015 concerned the construction of a seventy-two unit affordable housing development pursuant to § 8-30g on a 4.6 acre portion of 795 James Farm Road. To accomplish this, the plaintiff filed three separate submissions with the commission. The proposal, in part, called for a 700 feet by 20 plus feet high retaining wall to be built at the base of a steep hill to retain 35,000 cubic yards of fill. The first application was denied by the commission causing the plaintiff to file a modified application. The modified application was also denied, causing the plaintiff to appeal to the Superior Court, which was dismissed on July 16, 2018. See *500 North Avenue, LLC* v. *Zoning Commission*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6061118-S (July 16, 2018, *Radcliffe, J.*) (*500 North I*), cert. denied, Appellate Court, Docket No. PAC-18-0004 (October 31, 2018). The court, *Radcliffe, J.*, found that in addition to other reasons, there could be no reasonable modification to the retaining wall, which required a "recommended distance, twice the height of the wall or forty (40) feet, contained in the manufacturer's specifications and recommendations (ROR 110)." Id.

In November 2017, the plaintiff filed a new application with the commission, seeking approval of a § 8-30g project on the same land located at 795 James Farm Road. The plaintiff

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approval. (ROR, Exh. 24, p. 14); cf. *Landmark Development Group, LLC* v. *Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-06-4016813-S (October 31, 2011, *Frazzini, J.*) (court remanding application to zoning commission to approve conceptual site plan conditioned upon applicant subsequently demonstrating in its preliminary or final site plan under amended regulations that zoning commission's concern regarding public water and sewers can be met).The court has evaluated this application as it was submitted: (1) a petition for a zone change; (2) a proposed textual amendment to the town's zoning regulations; and (3) an affordability plan.

submitted an application for an affordable housing development, which included the following: (1) a proposal to amend the zoning regulations to add a new section 28 for an affordable housing development known as Julia Ridge Apartment Zone (JRAZ) at 795 James Farm Road, consisting of fifteen acres, which complied with § 8-30g; (2) a petition to change the zone from RS-1 to JRAZ; and (3) an affordability plan for Julia Ridge for a set aside development consisting of 116 units. This application was similar to the earlier applications filed by the plaintiff and included a 700 feet long by 28 to 30 feet tall gravity block retaining wall, requiring approximately 35,000 cubic yards of fill.

The commission conducted a public hearing on the application on February 27, March 28, and April 25, 2018. (Return of Record [ROR], Exhibit [Exh.] 57.a, 57.b and 57.c, pp. 591-713.) The sessions consisted of a presentation by the plaintiff and its experts; a presentation by the defendants[2] and their experts; and, finally, a rebuttal by the plaintiff. Expert testimony and documentary evidence were introduced in support of and in opposition to the application, which consisted of at least four engineers, three soil scientists, an architect, and police and fire experts. After concluding the public hearing, on May 9, 2018, the individual members of the commission discussed the application and denied it, without providing a collective statement on the record for the denial. (ROR, Exh. 57d, pp. 714-30.)

On remand, the commission held a special meeting to reconsider the plaintiff's application for the development of 795 James Farm Road. (Second Supplemental Return of Record, Docket Entry No. 166 [November 9, 2020].) The commission's members voted to affirm its May 9, 2018 denial of the application for a special case approval to construct a 116-unit

[2] All references to the defendants are to the commission and the intervening party defendants, which consists of the town of Stratford (town), Judith Kurmay, Cathleen Martinez, and Concerned Citizens Group of Stratford, Inc. (CCGS).

affordable housing project, pursuant to § 8-30g, on a property located in a RS-1 zone. The denial letter, dated September 24, 2020,[3] provided the following reasons, which include a specific citation to the record for each reason and the names of commissioners who ascribed to the particular reasons, as follows:

1. The applicant has not submitted a completed Special Case application, per §5.4 of the Zoning Regulation, for a complete review to be conducted by the Zoning Commission. The applicant has chosen to ignore this provision that outlines the affordable housing application process in the Town of Stratford.
   Evidence:
   ROR page 97-101. Zoning Commission Planning Staff Review by J. Habansky
   *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
2. The application is incomplete, as the petitioner has not submitted the application for a Special Case application.
   Evidence:
   ROR pages 97-101. Zoning Commission Planning Staff Review by Jay Habansky
   *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
3. The proposed development is inconsistent with the Town of Stratford's 2013 Plan of Conservation and Development.
   Evidence:
   ROR pages 97-101. Zoning Commission Planning Staff Review by Jay Habansky
   ROR pages 108. Planning Commission Unfavorable Recommendation Letter
   *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
4. The proposed development is inconsistent with the Forest Management Plan for the Town of Stratford's Roosevelt Forest.
   Evidence:
   ROR page 329. Written testimony of Steven Danzer, Ph.D, Soil Scientist/Professional Wetland Scientist
   *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
5. The proposed development would be detrimental to the public health and safety for residents and the surrounding ecosystem/wetlands.

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[3] The denial letters as to the proposal for a text amendment, the petition for a zone change from RS-1 to JRAZ, "the special case application," and the application for review of erosion and sediment control plans, all dated September 24, 2020, are contained in a Notice of Compliance filed by the commission on September 29, 2020. (Docket Entry # 159.)

Evidence:
ROR pages 656 – 660. Testimony of Sigrun Gadwa, Soil Scientist/Professional Westland Scientist, Rema Ecological Services
*In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

6. The proposed development would do irreversible damage to the surrounding wetlands and the flora and fauna within that ecosystem.
   Evidence:
   ROR pages 577- 581. Written testimony of George T. Logan, MW, PWS, CSE and Sigrun N. Gadwa, Rema Ecological Services
   *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
7. The applicant has not submitted an application to the Inland Wetlands and Watercourses Commission (IWWC) for a review of potential impacts on surrounding wetlands.
   Evidence:
   ROR pages 682 – 683. Remarks by Attorney / Senator Kevin C. Kelly citing legal opinion by Assistant Town Attorney John Florek and *Green v. Ridgefield Planning and Zoning Commission.*
   *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
8. The proposed development would create irreversible, long-term degradation of the Roosevelt Forest, Cemetery Brook and the surrounding wetlands.
   Evidence:
   ROR pages 577- 581. Written testimony of George T. Logan, MW, PWS, CSE and Sigrun N. Gadwa, MS, PWS of Rema Ecological Services
   ROR pages 656 – 661. Testimony of Sigrun Gadwa, Soil Scientist/ Professional Wetland Scientist, Rema Ecological Services
   *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
9. The magnitude of the proposed development would create traffic issues, which would impede emergency response times, impede access to local properties, and disrupt local traffic flows. This would pose as a risk to public health and safety.
   Evidence:
   ROR page 621. Testimony of Robert Smith.
   ROR page 631 – 637. Testimony of Lieutenant David Gugliotti, Stratford Police Department Traffic Division
   *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
10. The applicant has failed to satisfy the Special Case criteria identified in §20 of the Zoning Regulations.
    Evidence:
    ROR 97-101. Zoning Commission Planning Staff Review by Jay Habansky
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

11. The proposed development, more specifically the 30'tall retaining wall, would present a clear public danger to residents, children and emergency first responders. This danger would be increased in the event of inclement weather.
    Evidence:
    ROR page 297-301. Engineering Review by STV Incorporated
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
12. It is questionable whether the proposed retaining wall would support any large equipment, including fire apparatus responding to emergencies on site.
    Evidence:
    ROR page 284- 290. Engineer's Report by Rene Basulto, PE of Robson Forensic
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
13. There is concern regarding the availability of sufficient water to fight fires in the event there is a fire on site.
    Evidence:
    ROR page 291. Map of Fire Hydrants
    ROR page 615. Testimony of Brian Lampart, Fire Marshal
    ROR page 684. Testimony of Thomas Velky
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
14. The stormwater retention system is located too close to the structural components of the proposed retaining wall, compromising the structure integrity of the entire site.
    Evidence:
    ROR page 650. Testimony of Tim Casey, PE of STV Incorporated.
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
15. The applicant has provided insufficient information regarding the entire stormwater control system, which will create unsafe conditions that will compromise the structural integrity of the entire site.
    Evidence:
    ROR page 653. Testimony of Tim Casey, PE of STV Incorporated.

    In reviewing the decision of May 9, 2020, Commissioners added additional reasons for denial enumerated below:

16. The site lacks adequate sidewalks, there is no access to public transportation, and there are no current plans by transportation providers to serve the site. The Commission felt that the traffic study was unreasonable in its assumptions and projected volume of traffic.
    Evidence:
    ROR pages 505-507. Letter to Attorney Joseph Kubic from Greater Bridgeport Transit Authority (GBTA)

*In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

17. There are no easements in the plan that would allow access or apparatus to the foot of the retaining wall for purposes of maintenance, repair or rescue.
    Evidence:
    ROR page 563. Map denoting Eversource easement
    ROR page 681. Discussion between Attorney Joseph Kubic and Commissioner Silhavey
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
18. In order to provide enough fill and material to build up the site, a multi-month long process of constantly trucking in material would be required creating massive traffic and potentially damaging James Farm Road. Estimate was 36,000 cubic yards of fill requiring 7,200 dump truck arrivals and departures from the site.
    Evidence:
    ROR page 678 – 680. Testimony of Richard Ezyk, Professional Engineer
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
19. The dangerous grade of 10% that exceeds the International Building Code maximum of 5%.
    Evidence:
    ROR page 188. Transcript of 500 North Avenue, LLC v. Gary Lorenston, Planning and Zoning Administration, et al before Hon. Dale Radcliffe, Judge.
    ROR page 284 – 290. Engineer's Report by Rene Basulto, PE of Robson Forensic
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
20. If approved, the development would only add a small number of affordable units to Stratford's housing stock while actually decreasing the total percentage in town. Stratford has a significant amount of "naturally affordable" housing, although it may not meet the statutory definition for various reasons.
    Evidence:
    ROR pages 662 – 664. Statement of Attorney/Senator Kevin C. Kelly.
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
21. This application if approved would constitute spot zoning.
    Evidence:
    ROR page 717. Discussion by Commissioner Henrick.
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
22. Punctures in the geosynthetic fabric would compromise the structural integrity and allow water to seep through.
    Evidence:
    ROR 652-655. Testimony of Tim Casey PE STV Incorporated.

ROR 297-301. Engineering Review by STV incorporated
*In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

23. Hydrostatic pressure (build up of water behind the wall) could compromise the wall's structural integrity.
    Evidence:
    ROR 642-655. Testimony of Tim Casey PE STV Incorporated
    ROR 297-301. Engineering Review by STV Incorporated
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
24. Evidence in the record from 2018 is sufficient to support the above findings.
    Evidence:
    ROR Entire Record.
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
25. The potential risks to public health and safety outweigh the need for affordable housing in Stratford.
    Evidence:
    ROR Entire Record.
    ROR pages 662 – 664. Statement of Attorney/Senator Kevin C. Kelly.
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
26. Emergency access to the site could be impeded should firetrucks need to be rerouted. Response time was estimated to grow from 1:47 to 4:23.
    Evidence:
    ROR Pages 523-531
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*
27. The project had been given an unfavorable recommendation by the Stratford Planning Commission.
    Evidence:
    ROR pages 97-101. Zoning Commission Planning Staff Review by Jay Habansky
    ROR page 108. Planning Commission finds Text Amendment inconsistent with POCD
    *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

The text amendment denial letter incorporated six of the reasons provided above. The denial letter for the petition for a zone change incorporated all twenty-seven reasons provided above and also indicated: "The proposed [t]ext [a]mendment and [s]pecial [c]ase applications have been denied, thus [JRAZ] does not exist in the [zoning regulations] of the Town of

Stratford, and the application is thereby rendered moot." The denial letter concerning sediment and erosion control plans provided the following: "The proposed [t]ext [a]mendment, [z]one [c]hange and [s]pecial [c]ase applications have been denied, thus no application for a [r]eview of [e]rosion and [s]ediment [c]ontrol shall be considered at this time."

In this appeal, the town of Stratford (town), Judith Kurmay, Cathleen Martinez, and Concerned Citizens Group of Stratford, Inc. (CCGS) (collectively, intervening defendants), have all appeared as intervening defendants pursuant to General Statutes § 22a-19. Kurmay, Martinez, and CCGS raise the additional defense of collateral estoppel, which shall be considered after all the overlapping reasons for the denial are considered by the court.

## II
## LEGAL STANDARD

Section 8-30g (f) provides, in relevant part: "[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 of the affordable dwelling units in a set-aside development, may appeal such decision pursuant to the procedures of this section. . . ." Additionally, § 8-30g (g) provides, in relevant part: "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 . . . . If the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it."

In an application made under § 8-30g, the traditional burden of proof is shifted to the land use board to show that its determination is supported by sufficient evidence in the record. In denying an affordable housing application, the board must show that its decision was (1) based upon the protection of one or more substantial public interests; (2) that the cited public interest clearly outweighs the need for affordable housing in the municipality; and (3) that there are no reasonable modifications that could be made to the proposal that would permit the application to be granted. *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 727, 780 A.2d 1 (2001) (*Quarry Knoll*). The zoning commission cannot rely on general concerns, but must point to evidence showing a quantifiable probability that a specific harm would result if the application is granted. *AvalonBay Communities, Inc.* v. *Zoning Commission,* 130 Conn. App. 36, 58, 21 A.3d 926, cert. denied, 303 Conn. 909, 32 A.3d 962 (2011).

"[S]ufficient evidence standard is not a burden of persuasion, which ordinarily requires the finder of fact to have a specific level of certainty, but, instead, is a standard of judicial review, the function of which is to allocate decisionmaking authority between the decision maker and the reviewing court. . . . [T]he zoning commission remains the factfinder, as in a traditional zoning case . . . . Thus . . . the burden of proving facts is not imposed on a finder of fact. . . . [A]lso . . . the sufficient evidence standard of judicial review applie[s] to all four prongs of [§ 8-30g (g)]." (Citations omitted; emphasis omitted; footnote omitted;

internal quotation marks omitted.) *River Bend Associates, Inc.* v. *Zoning Commission*, 271 Conn. 1, 23-24, 856 A.2d 973 (2004).

Our Supreme Court "has defined 'sufficient evidence' in this context to mean less than a preponderance of the evidence, but more than a mere possibility. . . . [T]he zoning commission need not establish that the effects it sought to avoid by 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 occurrence. . . . Thus, the commission [i]s 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 was granted] . . . and concerning the probability that such harm in fact would occur." (Citation omitted; internal quotation marks omitted.) *Christian Activities Council, Congregational* v. *Town Council*, 249 Conn. 566, 585, 735 A.2d 231 (1999) (*Christian Activities Council*). "Notably, [the court in *Christian Activities Council*] also has indicated that the sufficient evidence standard imposes a lesser burden than the substantial evidence standard." (Internal quotation marks omitted.) *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, 162 Conn. App. 678, 696, 136 A.3d 24 (2016), (*Brenmor*), aff'd, 326 Conn. 55, 161 A.3d 545 (2017).

"The substantial evidence standard has been described as one that is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . Because the sufficient evidence standard applicable to affordable housing appeals impose a *lesser* burden than substantial evidence, that burden is minimal. A land use agency simply must establish that something more than a mere theoretical possibility of harm to the public interest exists." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id.

"[T]he trial court must conduct a plenary review of the court . . . and make an independent determination that denial of the affordable housing application (A) . . . 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 . . . . Thus . . . these are not factual determinations, but mixed factual and legal determinations, the legal components of which are subject to plenary review. . . . In other words . . . the commission remains the finder of fact and any facts found are subject to the sufficient evidence standard of judicial review. . . . [A]pplication of the legal standards set forth in § 8-30g (g) (1) (A), (B) and (C) to those facts is a mixed question of law and fact subject to plenary review." (Citations omitted; internal quotation marks omitted.) *River Bend Associates, Inc.* v. *Zoning Commission*, supra, 271 Conn. 24-25.

"Where a zoning [commission] has stated its reasons for its actions, the court should determine only whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the authority was required to apply under the zoning regulations. . . . The zone change must be sustained if even one of the stated reasons is sufficient to support it." (Internal quotation marks omitted.) *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, 228 Conn. 498, 513, 636 A.2d 1342 (1994) (*Interfaith*); see also *Mackowski* v. *Planning & Zoning Commission*, 59 Conn. App. 608, 618, 757 A.2d 1162 (*Lavery, C. J.*, dissenting), cert. granted, 254 Conn. 949, 762 A.2d 902 (2000). "[O]ur Supreme Court has cautioned against exalting form over substance in contemplating the adequacy of such decisions . . . . Rather, we must recognize that the

commission is composed of laymen whose procedural expertise may not always comply with the multitudinous statutory mandates under which they operate. . . . We must be scrupulous not to hamper the legitimate activities of civic administrative boards by indulging in a microscopic search for *technical infirmities* in their actions. . . . Affording a degree of latitude is particularly appropriate in the context of affordable housing appeals, where -- unlike traditional zoning appeals -- the reviewing court is not empowered to scour the record in search of a proper basis for the agency's decision." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Brenmor*, supra, 162 Conn. App. 692.

"In summary . . . in conducting its review in an affordable housing appeal, the trial court must first determine whether the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. . . . 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." (Citation omitted; internal quotation marks omitted.) *River Bend Associates, Inc.* v. *Zoning Commission*, supra, 271 Conn. 26.

In short, "the court first determines whether the [c]ommission has met its burden of proof that the decision is supported by sufficient evidence in the record. Having done this, the court not the [c]ommission, then weighs whether the [c]ommission has met its burden of proof, that the

decision is necessary to protect substantial public interests which clearly outweigh the need for affordable housing and which cannot be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) *Quarry Knoll*, supra, 256 Conn. 723-24.

## III
## DISCUSSION

### A
### AGGRIEVEMENT

"Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words, statutorily aggrieved, or is classically aggrieved. . . . [Statutory] [s]tanding concerns the question [of] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (Internal quotation marks omitted.) *Handsome, Inc.* v. *Planning & Zoning Commission*, 317 Conn. 515, 525, 119 A.3d 541 (2015). "Standing is not a technical rule intended to keep aggrieved parties out of court . . . . Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *R & R Pool & Home, Inc.* v. *Zoning Board of Appeals*, 43 Conn. App. 563, 569-70, 684 A.2d 1207 (1996).

"[T]he fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as

a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision . . . ." (Internal quotation marks omitted.) *New England Cable Television Assn., Inc.* v. *Dept. of Public Utility Control*, 247 Conn. 95, 103, 717 A.2d 1276 (1998).

The court finds that JRB Holding is an aggrieved party as the current property owner. See *Quarry Knoll*, supra, 256 Conn. 705. None of the parties dispute that JRB Holding is the current property owner, although the defendants argue that the manner in which it became the owner (by foreclosure) should have some significance. The court has found no distinction between an owner through foreclosure or any other means and finds that JRB Holding is both statutorily and classically aggrieved as the owner of the property at issue.

B

PROCEDURAL DISPUTE AND IMPROPER REASONS FOR DENIAL

*1. Failure to Comply with Zoning Regulations and Special Case Regulation*

On remand, the letter from the commission provided its collective reasons with citations to the record, including the plaintiff's failure to submit a completed special case application for a complete review by the commission. The plaintiff contends a special case application is not required and specifically indicated to the commission that it was not submitting a final site plan under the town's special case regulations. The commission argues that the plaintiff must comply with all its regulations for a special case application. This stated reason by the commission is misplaced.

As a § 8-30g affordable housing application, the standards for approval or denial are clearly provided and governed by the statute. "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. . . . Instead of simply

questioning whether the application complies with [the affordable housing subdivision] regulations . . . the commission considers the rationale behind the regulations to determine whether the regulations are necessary to protect *substantial* public interests in health, safety or other matters." (Emphasis in original.) *Wisniowski* v. *Planning Commission*, 37 Conn. App. 303, 317-18, 655 A.2d 1146 (1995). In other words, "[e]ssentially, every subdivision application must be approved unless there is a justifiable reason to deny the application. The commission must look at the rationale behind its regulations to determine if there is a substantial interest, outweighing the need for affordable housing, that must be protected by the denial of an application." Id., 318.

"Failing to comply with a zoning regulation that is directed to protect public health and safety may satisfy the sufficient evidence requirement under § 8-30g (g). . . . The commission, however, must still demonstrate that denying an application on the basis of a failure to comply with a certain zoning ordinance is necessary under § 8-30g (g). . . . Noncompliance with a zoning regulation alone is not enough to support a commission's denial of an affordable housing development application under § 8-30g (g)." (Citations omitted; emphasis omitted.) *Autumn View LLC* v. *Planning & Zoning Commission*, 193 Conn. App. 18, 39, 218 A.3d 1101, cert. denied, 333 Conn. 942, 218 A.3d 1048 (2019).

In the present case, the commission had affordable housing regulations and special case regulations in effect at the time of the plaintiff's application. It maintains that failure to comply with those regulations requires denial of the plaintiff's affordable housing application. The court holds that the plaintiff's failure to comply with the town's regulations is still insufficient to meet the commission's burden under § 8-30g (g). Specifically, the record is devoid of any evidence that a specific harm to the public interest would occur if the commission granted the plaintiff's

application despite the plaintiff's noncompliance with the town's zoning regulations. Moreover, even if the commission was able to show that compliance with its special case regulations was necessary, the record does not establish how compliance was necessary to protect an identified public interest and that such public interest outweighed the need for affordable housing, or that the public interest could not be protected by reasonable changes. Accordingly, those reasons pertaining to the plaintiff's noncompliance with the town's special case regulations[4] are inadequate bases to support the commission's denial of the plaintiff's application.

2. *Naturally Affordable Housing and the Town's Lack of Need of Affordable Housing*

The commission stated the following as a reason to deny the plaintiff's application: "If approved, the development would only add a small number of affordable units to [the town's] housing stock while actually decreasing the total percentage in town. [The town] has a significant amount of 'naturally affordable' housing, although it may not meet the statutory definition for various reasons." The plaintiff argues that the town provided the same reason in *Thompson* v. *Zoning Commission*, Superior Court, judicial district of Fairfield, Docket No. CV-99-0494184-S (January 11, 2000, *Mottolese, J.*) (26 Conn. L. Rptr. 318), which was rejected by the court.

The defendant in *Interfaith,* supra, 228 Conn. 498, proffered similar argument as the commission in the present case. "The defendant [in *Interfaith*] argue[d] that under [§ 8-30g (g)][5] when weighing the need for affordable housing in [the municipality] against the substantial

[4] Specifically, they are numbered as reasons one, two, and ten in the defendant's September 24, 2020 letter to the plaintiff's counsel titled "RE: 795 James Farm Road – Special Case Application." (Commission's Notice of Compliance, Docket Entry No. 159, pp. 7-10 [September 29, 2020].)

[5] Throughout this paragraph, because the affordable housing statute contemplated by the court in *Interfaith* is not the current statutory language and the subsection numberings are different, such discrepancies were modified to reflect the current statutory language.

public interests advanced by the defendant as reasons for denying the plaintiff's application, the trial court should have considered evidence of existing housing that did not meet the statutory definition of 'affordable housing' but was, nevertheless, 'affordable.'" (Footnote added.) Id., 520. Rejecting the defendant's argument, the court reasoned: "[T]here is no support in the [affordable housing] statute or its legislative history for the defendant's position. Section 8-30g (a) explicitly limits the definition of 'affordable housing [development]' to 'assisted housing' or ['a set-aside development']. Further, [§ 8-30g (k) and (*l*)] provide specific exemptions from the statute's appeals procedure. Because the 'evidence' proffered 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 . . . ." Id., 520-21.

Similarly, the reason provided by the commission in the present case regarding "naturally affordable" housing in denying the plaintiff's application does not exempt the town from the requirements of § 8-30g. "Section 8-30g applies if less than 10 percent of the dwelling units in the municipality meet the statutory criteria for affordable housing." *Garden Homes Management Corp.* v. *Planning & Zoning Board*, Superior Court, judicial district of Hartford, Land Use Docket, Docket No. CV-15-6059519-S (April 8, 2016, *Berger, J.*); see General Statutes § 8-30g (k). Here, the 2017 Affordable Housing Appeals List has the town listed under its nonexempt municipalities category with only 6.21 percent of the town's housing stock qualified as affordable housing. (ROR, Exh. 56.b.4, pp. 134-37.) Therefore, the town fails to meet the 10 percent threshold and is subject to the provisions of § 8-30g.[6] Because the evidence proferred

[6] The commission does not offer any basis to exempt the town from the definitions under § 8-30g. In fact, pages 662 through 664 of the return of record, which it cites as support for its

[commission] does not comport with the statutory definition of 'affordable housing,'"; (internal quotation marks omitted) *Interfaith,* supra, 228 Conn. 521; the town is not eligible for an exemption under either § 8-30g (k) or (l). Accordingly, the commission has failed to prove that its decision is supported by sufficient evidence in the record.

*3. Inconsistencies with the POCD and FMP*

The commission pointed to the proposed affordable housing development's inconsistencies with the town's Plan of Conservation and Development (POCD) and with the Forest Management Plan for the town's Roosevelt Forest (FMP), as reasons to deny the plaintiff's application. The plaintiff contends that the court can require multifamily use irrespective of the POCD and that the proposed development does not have to be consistent with the surrounding area. A town plan of development, sometimes referred to as a master plan, is adopted pursuant to General Statutes § 8-23. *AvalonBay Communities, Inc.* v. *Orange*, 256 Conn. 557, 573, 775 A.2d 284 (2001). Our Supreme Court "repeatedly has recognized that a town plan is merely advisory. . . . The purpose of the [town] plan is to set forth the most desirable use of land and an overall plan for the town. . . . The development plan is the planning commission's recommendation on the most desirable uses of all land within the community, including all public and private uses from street layouts to industrial sites. . . . Because the overall objectives contained in the town plan must be implemented by the enactment of specific regulations, the plan itself can operate only as an interpretive tool." (Citations omitted; internal quotation marks omitted.) Id., 574-76.

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assertion, shows that the town concedes that it does not meet the municipality requirement of 10 percent for affordable housing under § 8-30g.

"Enjoying such status, the plan constitutes a public interest which deserves to be protected and promoted. . . . However, § 8-30g is a remedial statute which must be liberally construed in favor of those whom the legislature intended to benefit . . . . Moreover, if an affordable housing application may not be denied because it does not comply with the underlying zoning of the area [as held in *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 312], a fortiori, the application cannot be denied because it is not consistent with a plan of development and conservation . . . ." (Citations omitted; emphasis omitted.) *Dakota Partners, Inc.* v. *Plan & Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-18-6103767-S (August 28, 2019, *Mottolese, J.T.R.*). In the present case, the court relied on the planning and zoning office staff comments, dated January 10, 2018. (ROR, Exh. 32, pp. 97-101.)[7]

The FMP is similar to the POCD, and it appears to be merely advisory. The defendants do not offer any basis to find otherwise. Because the record does not contain a copy of the FMP, the court is precluded from properly reviewing this reason for denial. Therefore, insufficient evidence supports the commission's decision to deny on the basis of inconsistencies with the FMP.

*4. Unfavorable Recommendation from the Stratford Planning Commission*

The commission cites to an unfavorable recommendation from the Stratford Planning Commission (planning commission) as a reason to deny the plaintiff's application. The record

[7] The record does not contain a copy of the POCD thereby preventing the court form evaluating whether and how the application is inconsistent with the POCD. See *Hillcrest Orchards, LLC* v. *Conservation Commission*, Superior Court, judicial district of New Britain, Docket No. CV-08-4016248-S (March 6, 2009, Prescott, J.) (*Hillcrest Orchards*). Even if the record included a copy of the POCD and the evidence was sufficient to meet the first prong of § 8-30g (g), a plenary review of the record shows insufficient evidence to prove that "the decision is necessary to protect substantial public interests which clearly outweigh the need for affordable housing and which cannot be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) *Quarry Knoll*, supra, 256 Conn. 724.

contains a copy of the planning and zoning office staff comments, dated January 10, 2018 and a copy of the February 21, 2018 recommendation letter from the planning commission to the zoning commission. The commission, however, fails to prove how the planning commission's unfavorable recommendation requires the commission to deny the plaintiff's application "to protect substantial public interests in health, safety or other matters which the commission may legally consider." General Statutes § 8-30g (g) (1) (A). The court cannot find any provision in the town's zoning regulations or anywhere else in the record that precludes the commission from approving an affordable housing land use application without a favorable recommendation from the planning commission. Moreover, the record does not establish that "there is more than a mere theoretical possibility . . . of a specific harm to the public interest if the application is granted." *River Bend Associates, Inc.* v. *Zoning Commission*, supra, 271 Conn. 26.

5. *Spot Zoning*

The commission asserts that the plaintiff's application, if approved, would constitute spot zoning. The plaintiff again points to *Thompson* v. *Zoning Commission*, supra, 26 Conn. L. Rptr. 318, to maintain that the defendant's argument on such basis was unsuccessful in that case. The court first notes the purpose of zoning, including in the affordable housing context. "The purpose of zoning is to serve the interests of the community as a whole, and one of those interests is to provide adequate housing. A change of zone predicated on such an interest, if otherwise consistent with the accepted principles of zoning, is a reasonable exercise of the board's discretionary powers." *Malafronte* v. *Planning & Zoning Board*, 155 Conn. 205, 212, 230 A.2d 606 (1967). "The zoning power of a municipality may properly be exercised to achieve the goal of access to affordable housing in order to meet present and prospective needs." *Brennick* v. *Planning & Zoning Commission*, 41 Conn. Supp. 593, 598, 597 A.2d 346 (1991).

Our appellate courts have spoken on the applicability of the general rule on uniformity in the affordable housing context. "A general rule requiring uniform regulations serves the interests of providing fair notice to applicants and of ensuring their equal treatment. . . . It is not necessary to apply such a rule [when] the interests served by the rule would not be adversely implicated by granting the zone change on the condition that the new zone be used only for affordable housing." (Citations omitted.) *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 147, 653 A.2d 798 (1995). "The requirement of uniformity of § 8-2 docs not militate against the grant of a specific exception to a general zoning requirement so long as the exception is reasonable and for the general community benefit rather than for the benefit of a single landowner. . . . Clearly, affordable housing legislation is for the benefit of the entire community, as well as for that of the state." (Citation omitted; footnote added; internal quotation marks omitted.) *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 315.

"The very same reasoning applies to the principle of spot zoning." *Thompson* v. *Zoning Commission*, supra, 26 Conn. L. Rptr. 320. "[S]pot zoning is the reclassification of a small area of land in such a manner as to disturb the tenor of the surrounding neighborhood. . . . Two elements must be satisfied to constitute spot zoning. . . . First, the zone change must concern a small area of land. Second, the change must be out of harmony with the comprehensive plan for zoning adopted to serve the needs of the community as a whole." (Citation omitted; internal quotation marks omitted.) *Konigsberg* v. *Board of Aldermen*, 283 Conn. 553, 591-92, 930 A.2d 1 (2007).

In the present case, even if the fifteen-acre parcel in question meets the first element, the plaintiff's proposed development cannot be deemed to constitute spot zoning as a matter of law. Not only is the proposed development in an area where approximately 123 developed properties

exist, albeit producing a substantially greater density than that found in the area; (ROR, Exh. 26, 56.f.4, pp. 337, 582); but "providing affordable housing does not just benefit an applicant, it benefits a town, a region, a state." *TCR New Canaan, Inc.* v. *Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-384353 (March 5, 1992, *Berger, J.*) (6 Conn. L. Rptr. 91, 102) *(TCR)*. The court is further persuaded by the following proposition from *TCR*: "Zoning changes affording special treatment to encourage the construction of multifamily residences in cities with housing shortages promote the public welfare and do not constitute spot zoning." (Internal quotation marks omitted.) Id. The commission has failed to prove sufficiency of evidence that a specific harm to a substantial public interest would occur if it approved the application. Even if the court could determine that sufficient evidence exists—which it cannot—the commission has yet to prove that denying the plaintiff's application is necessary to protect substantial public interests in health and safety that clearly outweigh the need for affordable housing and that cannot be protected by reasonable modifications to the proposed development.

*6. Inadequate Sidewalks and Lack of Access to Public Transportation*

The commission provides the following as bases to deny the plaintiff's application: inadequate sidewalks and public transportation accessibility issues. "A commission is not entitled to reject an application on the basis of the mere possibility of harm or generalized concerns." *Garden Homes Management Corp.* v. *Town Plan & Zoning Commission*, 191 Conn. App. 736, 755, 216 A.3d 680, cert. denied, 333 Conn. 933, 218 A.3d 594 (2019). Moreover, "[s]uch generalized concerns cannot support a determination that the commission's decision was necessary to protect the public interest or that the harm outweighed the town's documented need for affordable housing." *Brenmor*, supra, 162 Conn. App. 706. Here, the record is devoid of any

evidence as to the specificity, severity, and probability of harm that would result if no public sidewalks were constructed or if no public transportation were to serve the area. Even if sufficient evidence supported the commission's decision, the commission has yet to satisfy its burden on the other three prongs of § 8-30g (g).

7. *Sufficient Evidence to Support Findings; Potential Risks Outweigh Need for Affordable Housing*

The court briefly notes that reasons 24[8] and 25[9] in the commission's September 24, 2020 letter are improper. Reason 24 merely paraphrases the first prong of § 8-30g (g), which provides: "[T]he 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." Likewise, reason 25 merely paraphrases § 8-30g (g) (1) (B), which provides in relevant part: "The commission shall . . . have the burden to prove, based upon the evidence in the record compiled before such commission, that [substantial public interests in health, safety or other matters which the commission may legally consider] clearly outweigh the need for affordable housing . . . ." It is inadequate for the commission to merely state its burden of proof; the commission must satisfy its burden. Furthermore, reasons 24 and 25 are legally insufficient because they merely recite legal conclusions. Cf. *Office of Chief Disciplinary Counsel* v. *Miller*, 335 Conn. 474, 509, 239 A.3d 288 (2020) (legal conclusions unsupported by factual allegations are insufficient to plead proper special defense). Accordingly, reasons 24 and 25 are improper grounds for denial.

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[8] Reason 24 provides: "Evidence in the record from 2018 is sufficient to support the [commission's] findings."

[9] Reason 25 provides: "The potential risks to public health and safety outweigh the need for affordable housing in [the town]."

C

FAILURE TO WEIGH IDENTIFIED PUBLIC INTERESTS AGAINST NEED FOR AFFORDABLE HOUSING AND WHETHER REASONABLE CHANGES COULD NOT BE MADE

The decision of the commission and the various reasons provided shows no indication that the commission engaged in the kind of contemplation required in the last two critical steps under § 8-30g (g). In reviewing the commission's decision on remand, there is an absence of evidence of consideration of how any of the identified public interests outweigh the need for affordable housing or whether the identified public interest could be protected by reasonable changes. In the September 24, 2020 denial letter, the commission adds as a reason that "[t]he potential risks to public health and safety outweigh the need for affordable housing in [the town]." In support, the commission cites to the entire record. The municipal planning and zoning commission, rather than the affordable housing land use applicant bears the burden of proving that no reasonable modifications to a proposed development exist. *Quarry Knoll*, supra, 256 Conn. 733. The plain language of § 8-30g (g) requires that the municipal planning and zoning commission consider reasonable changes: "The *commission* shall . . . have the burden to prove, based upon the evidence in the record compiled before such commission, that . . . *such public interests cannot be protected by reasonable changes to the affordable housing development* . . . ." (Emphasis added.) General Statutes § 8-30g (g). "To fulfill its burdens under [§ 8-30g (g) (1) (C)] . . . the commission was required to show only that, on the basis of evidence in the record, it reasonably could have concluded that the public interests could not be protected by reasonable changes to the size of the zone, the density of the zone or the specific designs presented." (Internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 137 n.11.

Courts that have addressed the requirement of the commission to consider reasonable modifications have set forth guidelines to be followed by the commission. The court in *River Bend Associates, Inc.* v. *Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV-00-505223-S (December 27, 2002, *Shortall, J.*), rev'd in part by 271 Conn. 1, 856 A.2d 973 (2004), determined that it was not sufficient for the commission to make generalized statements that reasonable changes could not be made to the affordable housing development plan. The court explained that it is necessary for the commission to explain why the public interest cannot be protected by reasonable changes. Id. Furthermore, the court in *Hillcrest Orchards,* supra, Superior Court, Docket No. CV-08-4016248-S, concluded that the commission failed to sustain its burden under § 8-30g with respect to a proposed stormwater management system. The court remanded the plaintiff's modified affordable housing application to the commission because there was never a discussion in the record by the commission as to whether reasonable changes could be made to the grading of the system nor as to why a recommendation by the town engineer to construct an additional berm to contain stormwater runoff could not have been added as a reasonable condition to approval. The court in *Novella* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-00-050146-S (May 9, 2001, *Axelrod, J.*), stated that "except in the case of a site specific reason for the substantial public interest that would be harmed by the proposed affordable housing development, the commission must also address in writing subsection [(C) of § 8-30g (g) (1)] as to why the public interest cannot be protected by reasonable changes to the affordable housing development." In *T & N Associates* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-98-0492236-S (November 9, 1999, *Holzberg, J.*), the court remanded the plaintiff's applications to the commission and specifically found that "the commission has

failed to demonstrate that there is sufficient evidence in the record to support a finding that the substantial public interests in adequate water, sewer and drainage systems cannot be protected by reasonable changes in the plan." See also *Rinaldi* v. *Zoning & Planning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-94-533603-S (January 4, 1995, *Leheny, J.*) (remanding for consideration of reasonable changes under what is now § 8-30g [g] [1] [C]); see also *Nucera* v. *Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-97-0568039-S (August 3, 1998, *Axelrod, J.*) (concluding that public interest can be protected by conditioning approval upon plaintiff receiving approval from city's water pollution control authority to connect into city's sewage and storm drainage system).

"[T]he key purpose of § 8-30g is to encourage and facilitate the much needed development of affordable housing throughout the state." *Interfaith*, supra, 228 Conn. 511. While "[t]he action of the commission should be sustained if even one of the stated reasons is sufficient to support it"; (internal quotation marks omitted) *DeBeradinis* v. *Zoning Commission*, 228 Conn. 187, 199, 635 A.2d 1220 (1994); the court cannot find that the commission engaged in the full analysis required with respect to each reason provided. Similar to the modified proposal in *Hillcrest Orchards*, the proposal in the present case is for a larger project at the same property and as in *Hillcrest Orchards*, there simply was no discussion of whether reasonable modifications would address the concerns. Instead, there was a clear indignation expressed that the plaintiff submitted a modified proposal that included more units, and the commission seemed to infer lack of reasonableness of the proposal due to its size. The scale of a project can be an appropriate factor in considering the effects on the other public interests involved. However, that naturally raises the question of whether the commission considered whether a smaller scale

development would address the concerns expressed while still allowing the development to proceed. Here, the record is absent of any such discussion or analysis.

*1. Traffic Concerns and the Magnitude of the Construction's Effect on Traffic, Including on Emergency Access*

The defendants' concerns that the magnitude of the development and the increase in traffic on roads with additional cars on the site could potentially decrease the ability of emergency service providers to provide adequate service to the town residents, "could not support a denial of the plaintiff's application because these concerns established only a theoretical possibility, not necessarily a likelihood, of harm to the public interest." *CMB Capital Appreciation, LLC* v. *Planning & Zoning*, 124 Conn. App. 379, 399, 4 A.3d 1256 (2010) (*CMB*), cert. granted, 299 Conn. 925, 11 A.3d 150 (2011).[10] "[C]ourts have rejected town concerns regarding traffic generated by a proposed development where those concerns are based on potential safety issues or concerns." *Landworks Development, LLC* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-00-0505525-S (February 14, 2002, *Eveleigh, J.*). "Furthermore, while traffic problems and related safety concerns can be a valid reason for a denial . . . there must be more than a traffic increase, and either traffic congestion or an unsafe road design at or near the entrances and exits from the site." (Internal quotation marks omitted.) *CMB*, supra, 399. "The mere fact that a proposal will generate increased traffic volume is not, in itself, an indication that such traffic will result in undue hazard . . . or congestion; to determine whether the proposal will result in undue hazard . . . or congestion, [the court] review[s] the record as to the proposal's projected impact on traffic conditions." (Internal quotation marks omitted.) *American Institute for Neuro-Integrative*

[10] The appeal was withdrawn after the Supreme Court granted certification.

*Development, Inc.* v. *Town Plan & Zoning Commission*, 189 Conn. App. 332, 343, 207 A.3d 1053 (2019). "[T]he significance of the impact should not be measured merely by the number of additional vehicles but by the effect that the increase in vehicles will have on the existing use of the roads. An increase of 100 vehicles per hour may have a negligible impact at one time or location and a ruinous impact at another time or location." *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 434, 941 A.2d 868 (2008).

The record indicates that traffic issues are already a town-wide concern, not specific to the proposed development in question. A traffic operations engineer stated: "I observed long queues and significant traffic delays at some of [the major intersections] during a weekday peak hour of traffic, *which indicate existing traffic deficiencies at the locations*." (Emphasis added.) (ROR, Exh. 56.d.48, pp. 519-20; see also ROR, Exh. 56.d.51, p. 529 [fire department noting its test drives were not performed during rush hour traffic, "which does provide higher density traffic back-ups" at certain intersections].) Some town residents expressed similar concerns regarding traffic delays at various points of intersection. (ROR, Exh. 57.a, pp. 624-25.) In fact, one town resident observed that "[t]raffic on James Farm road is already horrific . . . ." (ROR, Exh. 49, p. 117.) Also, a traffic study showed that motor vehicles near the proposed development already far exceed the posted speed limit of 25 miles per hour (MPH). (ROR, Exh. 56.d.18, p. 280.) On the basis of the foregoing evidence, the court "conclude[s] that the commission's denial of the plaintiff's . . . application on the basis of traffic and safety concerns is not supported by sufficient evidence." *CMB*, supra, 124 Conn. App. 398.

Our Appellate Court, in an affordable housing case, has held: "[W]ith respect to concerns about emergency response time to the development, the evidence in the record reveals that there is no state standard for emergency response time and that any potential problem with emergency

response time is not specific to the development in question, but rather was a town-wide concern . . . . The length of emergency response time, which was a town-wide concern, was not a valid basis for the commission's denial of the plaintiff's application." *CMB*, supra, 124 Conn. App. 398. In the present case, the record is absent as to any evidence on the state standard for emergency response time. Although the evidence shows that one's chance of survival decreases with every passing minute, such evidence does not establish that the supposed increase in response time violates any law or fails to meet any standard.

Although the evidence shows that one's chance of survival could depend on the emergency response time; (ROR, Exh. 57, p. 555); the fire department's drive test evaluation unnecessarily assumed that emergency vehicles cannot access the direct route because of added vehicles on the road, contributed by the development. (ROR, Exh. 56.d.51, pp. 528-29.) As discussed previously, the evidence shows that interruptions in traffic flows are already an existing concern in the town and that any potential traffic increases caused by the development are speculative. Moreover, the plaintiff has addressed the issue of fire department's access to the development by modifying its plan to provide two driveways, instead of one, including a fire department access road, on James Farm Road. (ROR, Exh. 58.a, p. 732.) While there was evidence regarding the weight limitation for the heaviest fire truck to be supported and possible insufficient turning radius, the commission's concerns can be properly addressed by approving the application on the condition that the plaintiff receives the fire marshal's approval that all fire trucks in the town fire department's possession can be maneuvered freely on any road on the site. (ROR, Exh. 56.f.5, pp. 583, 694.)

*2. The Danger and Structural Integrity of the Retaining Wall and Lack of Safety*

As to reason 17,[11] the court finds insufficient evidence, as the record is devoid as to why an easement would be necessary. Analyzing a very similar issue, the court in *Nizza* v. *Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-93-0526193-S (August 2, 1994, *Leheny, J.*), held: "There was no evidence provided as to what maintenance of the retaining wall would involve nor of the type of equipment required to maintain the wall. No commission member expressed sufficient knowledge about retaining walls to contribute any expertise. . . . The commission could have suggested or asked for reasonable changes to the plan under [§ 8-30g (g) (1) (C)]." (Citation omitted.) Moreover, the commission failed to discuss or seek reasonable modifications, according to the record before the court.

As to reasons 11,[12] 12,[13] 22,[14] and 23,[15] sufficient evidence supports the commission's denial of the plaintiff's application. An engineering review of the development displays concerns that settlement and stormwater discharge will weaken and deteriorate the retaining wall (wall). (ROR, Exh. 56.d.23, pp. 299-300.) There is ample evidence of experts predicting a high likelihood of failure of the wall. (See, e.g., ROR, Exh. 56.d.20, pp. 289-90.) The evidence indicates that steep slopes of certain driveways in conjunction with the wall's proximity to the fire department access road led some experts to doubt whether and how the wall will support the

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[11] Reason 17 provides: "There are no easements in the plan that would allow access or apparatus to the foot of the retaining wall for purposes of maintenance, repair or rescue."

[12] Reason 11 provides: "The proposed development, more specifically the 30 [feet] tall retaining wall, would present a clear public danger to residents, children and emergency first responders. This danger would be increased in the event of inclement weather."

[13] Reason 12 provides: "It is questionable whether the proposed retaining wall would support any large equipment, including fire apparatus responding to emergencies on site."

[14] Reason 22 provides: "Punctures in the geosynthetic fabric would compromise the structural integrity and allow water to seep through."

[15] Reason 23 provides: "Hydrostatic pressure (build up of water behind the wall) could compromise the wall's structural integrity."

weight of fire apparatus. (ROR, Exh. 56.d.20, 56.d.50, pp. 286-90, 524.) Given the discussion surrounding the geosynthetic fabric of the wall; (ROR, Exh. 57.b, 57.d, pp. 650, 671-72, 725); and the height of the wall; (ROR, Exh. 56.d.50, p. 524); the commission's decision is, all in all, supported by sufficient evidence to satisfy the first prong of § 8-30g.

While some experts indicated that the wall, as designed, would fail, there was no consideration of the ability to design it so it would not fail or not cause the issues that were raised. The court in *Novella* v. *Planning &. Zoning Commission*, supra, Superior Court, Docket No. CV-00-050146-S, found that an inadequate design of a retaining wall that lacks supporting calculations or construction sequence, is not a valid reason for denial. Our Supreme Court has held: "To fulfill its burdens under [§ 8-30g (g) (1) (C)] . . . the commission was required to show only that, on the basis of evidence in the record, it reasonably could have concluded that the public interests could not be protected by reasonable changes to the size of the zone, the density of the zone or the *specific designs presented.*" (Emphasis added; internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 137 n.11.

In the present case, the plaintiff's civil engineer explained that certain tasks had not been completed yet because they were typically done during the building permit process. (ROR, Exh. 44, 56.b.11, 56.f.5, 57.c, pp. 111, 239, 585, 696.) Such tasks include conducting borings, testing structural fill, and submitting a final wall design. (ROR, Exh. 56.f.5, 57.c, pp. 585, 696; Plaintiff's Brief, Docket Entry No. 120, pp. 18-19 [February 15, 2019].) When the plaintiff reaches the building permit phase and seeks a permit, borings and the final wall design will be done at that time. (ROR, Exh. 56.f.5, 57.c, pp. 585, 696.) The plaintiff's retaining wall manufacturer described in detail its plan to work with an engineer to properly install the wall and to ensure that all applicable provisions of the building code are followed. (ROR, Exh. 57.c, pp.

702-704.) Moreover, grade level would have to conform to the requirements under the state building code, as will be discussed subsequently in this memorandum in a section titled "Dangerous Grade Level."

In its brief, the plaintiff admits that the town engineer would have to approve the retaining wall's design before a building permit is issued. (Plaintiff's Brief, Docket Entry No. 160, p. 8 [October 13, 2020].) It further acknowledges that the wall design would have to be designed and certified by a structural engineer. (Id.; see also ROR, Exh. 57.c, pp. 700, 705.). The town's engineer, in fact, indicated that certain steps would have to be taken in order to ensure that the retaining wall is properly designed and built to avoid any structural issues. (ROR, Exh. 56.d.23, pp. 298-301.) Accordingly, it is reasonable for the court to order the commission to conditionally approve the application, especially in light of the plaintiff's admissions and suggestions. As suggested in its brief, the plaintiff should perform test borings, and an independent engineer's approval of the structural fill used is required. The plaintiff should obtain approval from the town engineer, a certification from a structural engineer, and any other structurally related and necessary approvals, permits, and certifications in accordance with the state regulations, the town regulations, and applicable codes.

*3. Stormwater Retention System and Hydrostatic Pressure Impacting Wall*

The defendant indicates that the storm water retention system is inadequate and that it will cause the wall to fail. Yet, the town's own expert provided that some changes could alleviate the concerns. The engineering review by STV indicates that certain studies should be done to ensure the wall is properly built – not that the wall could not be safely built. (ROR, Exh. 56.d.23, pp. 298-301.) The report provides that "[p]reliminary [b]orings should be performed to provide subsurface information to supplement the design of the wall regarding the bearing capacity,

settlement estimates, and stability analysis for the foundation of the wall." (ROR, Exh. 56.d.23, p. 299.) The manufacturer of the wall suggested that a way to reduce the effect of water on the wall system was to place any infiltration systems away from the wall by a distance of at least twice the height of the wall. (ROR, Exh. 56.d.31, p. 461.) Although the evidence is sufficient to support the commission's decision as to the first two prongs of § 8-30g (g), the commission does not satisfy its burden of proof under § 8-30g (g) (1) (C) because there was no discussion or consideration of reasonable changes by the commission.

After reviewing the record, the court remands the matter back to the commission to approve the application with the following conditions: (1) approval from the town engineer with regard to the structural walls is required. (Plaintiff's Brief, Docket Entry No. 160 [October 13, 2020].); and (2) an independent engineer shall be hired and paid for by the plaintiff. (ROR, Exh. 57.c, p. 692; Plaintiff's Brief, Docket Entry No. 120, p. 22 [February 15, 2019].) The independent engineer should oversee the construction process to ensure that the plaintiff maintains proper soil and erosion control and that the stormwater management system is adequate to protect Roosevelt Forest. While overseeing the construction process, the engineer should give consideration to all suggestions, recommendations, and concerns expressed in the record, including but not limited to, the environmental concerns caused by a potential release of toxins and other harmful particles into protected lands or waters.

*4. Water Sufficiency in the Case of Fires*

The deputy chief of the Stratford Fire Department testified about the fire hydrant locations and that the closest hydrant would be one third of a mile away from the site. (ROR, Exh. 57.a, 57.b, pp. 614-15, 643.) In response, the plaintiff's engineering expert testified that additional fire hydrants will be placed on or near the site because the fire marshal's approval is

required. (ROR, Exh. 57.c, pp. 694-95.) The expert also discussed how he will work with the water company to determine the fire hydrants' water pressure and that he will put a fire pump if the pressure is inadequate. The fire marshal even agreed with the plaintiff's experts that one-hour fire-rated walls with a full sprinkler system would be sufficient. (ROR, Exh. 57.a, pp. 611-14.) Under such circumstances as here, conditional approval is reasonable. The commission shall approve the application with the condition that the plaintiff obtains approval from the fire marshal that the development is in compliance with all applicable regulations, ordinances, and codes, including fire codes.

*5. Increased Risk of Fire*

The commission argues in its March 5, 2019 reply brief that the development will increase the risk of fire to Roosevelt Forest. (Commission's Reply Brief, Docket Entry No. 123, pp. 4-5 [March 5, 2019].) It relies on evidence in the memorandum prepared by CCGS's expert. The comments by CCGS's expert on increased risk of fire due to "the inherent" time lag involved in containing structural fire, and an increase in human activities near the forest (ROR, Exh. 56.d.26, 57.b, pp. 328, 666), are speculative and raise nothing more than a theoretical possibility of harm. See *Brenmor*, supra, 162 Conn. App. 696. Moreover, the fire marshal testified that it would be unlikely that a fire at the development would get out of control and spread to Roosevelt Forest. (ROR, Exh. 57.b, p. 648.) Therefore, the commission has failed to meet the first prong of § 8-30g (g).

*6. Dangerous Grade Level*

The experts offer conflicting evidence as to the actual proposed grade of the development. The defendants' experts were concerned that the proposed grade exceeds 5 percent, which the record suggests is a standard followed by the town pursuant to the state's

building code, at least on parts of the site. (ROR, Exh. 56.d.20, 57.b, pp. 288, 290, 638.) The plaintiff's experts disputed this fact and maintained that the grade does not exceed 5 percent anywhere on the site. (ROR, Exh. 56.f.5, 57.a, 57.c, pp. 583, 611, 694.) The cited reason is supported by sufficient evidence in the record. Also, the commission's concerns are supported by sufficient evidence as to steep grade's potential adverse impact on substantial public interests of health and safety of the community. (ROR, Exh. 57.b, pp. 648, 680, 683.)

After conducting a review of the record, the court, however, determines that the commission has failed to meet its burden of proof that such substantial public interests cannot be protected by reasonable conditions on the development. The record lacks any evidence that the commission considered reasonable changes or conditions to the plan to comply with the building code. Because the plaintiff's experts expressed confidence that the project is feasible without exceeding 5 percent grade throughout the site, it would be reasonable for the court to require approval with a condition that the grade of the slope not exceed a 5 percent maximum. (See Commission's Brief, Docket Entry No. 116, p. 15 [(January 22, 2019].)

*7. Effect on Wetlands, Cemetery Brook and Roosevelt Forest*

The commission's collective statement provides the following reasons: (1) The proposed development would be detrimental to the public health and safety for residents and the surrounding ecosystem/wetlands; (2) The proposed development would do irreversible damage to the surrounding wetlands and the flora and fauna within that ecosystem; (3) The applicant has not submitted an application to the Inland Wetlands and Watercourses Commission of the Town of Stratford (IWWC) for a review of potential impacts on surrounding wetlands; and (4) The proposed development would create irreversible, long-term degradation of Roosevelt Forest,

Cemetery Brook and the surrounding wetlands.[16] All of the reasons here presume failure of the retaining wall as provided in the plaintiff's proposal, which would cause irreversible damages to the wetlands, Cemetery Brook, Roosevelt Forest and the surrounding area. The issues of the retaining wall were already discussed. With respect to the detrimental effect on the wetlands, considerable evidence in the record is devoted to potential harm to the wetlands to satisfy the first prong of § 8-30g (g).

In discussing the vote on the plaintiff's application, one of the commissioners specifically acknowledged that "[i]t has not gone for review for the inland/wetlands commission, inland/wetlands and watercourses commission . . . . And without that input it is nearly impossible for the zoning commission to determine what impacts or threats the proposed development may have on the surrounding ecosystem and public interest." (ROR, Exh. 57.d, p. 729.) Such sentiment was shared by CCGS' expert: "The wetland boundary submitted on the survey lacks sufficient detail to be verifiable . . . . [A]ny conclusions regarding the limits of the [u]pland [r]eview [a]rea are . . . premature." (ROR, Exh. 56.d.26, p. 326.)

The plaintiff asserts in its brief that it does not need to submit an application to the IWWC because the site does not contain wetlands and no "regulated activity" within the meaning of General Statutes § 22a-38 (13)[17] would occur at the site. (Plaintiff's Brief, Docket Entry No. 160, p. 6 [October 13, 2020].) It argues that the IWWC's jurisdiction is limited to the upland review area. (ROR, Exh. 56.b.5, 57.a, pp. 151-52, 592.) The plaintiff's proposed textual

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[16] Because the intervening defendants filed verified pleadings pursuant to § 22a-19, the commission was required to consider environmental issues pursuant to the statute's subsection (b).

[17] General Statutes § 22a-38 (13) provides: "'Regulated activity' means any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses, but shall not include the specified activities in [General Statutes § 22a-40]."

amendment to the zoning regulations even contains a section titled "Wetlands review," which provides: "Zoning Regulation 3.14 [which deals with waterbody, watercourse, wetland and coastal resource protection] shall not be applicable to the [development site] since there is no development within the upland review area." (ROR, Exh. 24, p. 16.)

"[Inland wetlands commissions] may regulate activities *outside of* wetlands, watercourses and *upland review areas* only if those activities are likely to affect the land which comprises a wetland, the body of water that comprises a watercourse or the channel and bank of an intermittent watercourse." (Emphasis added; internal quotation marks omitted.) *Unistar Properties, LLC* v. *Conservation & Inland Wetlands Commission*, 293 Conn. 93, 108 n.13, 977 A.2d 127 (2009). Our Supreme Court held that the municipal conservation and inland wetlands commission in *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, 296 Conn. 57, 74, 848 A.2d 395 (2004), was required to carefully consider "the precise impact that the plaintiffs' proposed activities will have on the wetlands and watercourses on the site and surrounding area." "Determining what constitutes an adverse impact on a wetland is a technically complex issue. . . . Inland wetlands agencies commonly rely on expert testimony in making such a finding." (Citation omitted.) Id., 78. Section 2.26 of the Stratford Inland Wetlands and Watercourses Regulations (wetlands regulations) provides in relevant part: "[IWWC] may rule that any other activity located within such upland review area or *in any other non-wetland or non-watercourse area* is likely to impact or affect wetlands or watercourses and is a regulated activity." (Emphasis added.) Stratford Inland Wetlands & Watercourses Regs., § 2.26. Because the IWWC has authority to determine what constitutes an adverse impact on wetlands and

watercourses—including brooks[18]—outside of upland review areas, the plaintiff's argument is without merit,[19] and the section on wetlands review in the plaintiff's proposed textual amendment to the zoning regulations is invalid.

With respect to Roosevelt Forest, as mentioned in a preceding paragraph, the reasons presumed that the retaining wall would weaken or fail. The court has already discussed the conditions that the commission may add to ensure the wall's safety. As to the reasons that relate to the flora and fauna, specifically Eastern Box Turtles, within the forest, the court finds insufficient evidence in the record to pass muster of the first prong of § 8-30g (g). Particularly notable is CCGS's expert relying on the letter from the state department of environmental protection to support his position that the turtles have been spotted in the area. (ROR, Exh. 56.d.26, 57.b, pp. 329, 666-67.) The letter, however, merely states that a survey could be conducted to see if the turtles are present. (ROR, Exh. 56.d.26, p. 336.)

In sum, the section on wetlands review in the plaintiff's proposed textual amendment shall be deleted in its entirety. The application should be approved on the condition that the plaintiff submit an application to and obtain approval from the IWWC with respect to its proposed activities on the site.

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[18] Section 2.35 of the wetlands regulations defines "[w]atercourses" to include brooks. Stratford Inland Wetlands & Watercourses Regs., § 2.35.

[19] The court notes that the commission has failed to prove that more than a theoretical possibility exists that there may be a specific harm to substantial public interests in Cemetery Brook. The court, however, recognizes that when the IWWC evaluates the site, it may evaluate the impact that the plaintiff's activities may have on Cemetery Brook, as brooks are within the IWWC's purview.

D
COLLATERAL ESTOPPEL CLAIM

The intervening defendants claim that the denial of the plaintiff's prior application warrants the denial of the current application on the basis of the principle of collateral estoppel.[20] It has been firmly established that the denial of one application does not necessarily bar a party from filing a second application regarding the same property. *Vine* v. *Zoning Board of Appeals*, 102 Conn. App. 863, 869-70, 927 A.2d 958 (2007). Additionally, a zoning board may grant a second application that has been substantially changed to obviate the objections raised in the original application. *Rocchi* v. *Zoning Board of Appeals*, 157 Conn. 106, 111, 248 A.2d 922 (1968). Moreover, "[d]espite the enhanced level of review that a court undertakes in an affordable housing appeal, as opposed to other administrative appeals, the court's role remains *to assess the evidence in the record.* Collateral estoppel, sometimes referred to as issue preclusion, prevents relitigation of issues or facts actually litigated and necessarily determined in a prior action. . . . Furthermore, [t]o invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding. . . . The facts and issues actually litigated and necessarily determined in the prior judicial appeals were the sufficiency of the records in those cases to sustain the commission's prior decisions. The court here must determine the adequacy of the evidence on a different record." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Landmark Development Group, LLC* v. *Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-06-4016813-S (October 31, 2011, *Frazzini, J.*).

[20] The commission did not take the position that the present application was barred on the basis of the principle of collateral estoppel.

The present application differs from the prior application in that this proposal concerns a fifteen acre parcel with 85 percent open space proposed. This application provides an additional access point into the property and changes the slope of the driveway from 10 percent to 5 percent. While the plaintiff proposes a large retaining wall again, the Versa-Lok Retaining Walls of New England representative testified that there are numerous walls of similar type product as that proposed for the retaining wall here, constructed throughout New England. The design of the building is different, and it allows fire trucks to have a bigger turning radius and flat level ground around the building itself. Overall, this application is sufficiently different from the earlier application, which was denied, and would not bar this appeal on the basis of collateral estoppel or res judicata. See *Landmark Development Group* v. *Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-05-4002278-S (February 2, 2008, *Prescott, J.*) (45 Conn. L. Rptr. 63, 68).

Some of the same concerns exist here as there were in *500 North I*, and evidence in the present record supports the defendants' concerns with these enumerated public interests. Nevertheless, the present record is absent of discussion regarding weighing each of these identified interests against the need for affordable housing and determining whether reasonable changes could protect the public interests, yet still allow the development to move forward. In fact, some expert testimonies upon which the commission relied, mentioned changes that could be made to make the development feasible and that further tests were needed, such as preliminary boring tests. Unlike *500 North I*, in which the commission clearly engaged in determining the ability to make reasonable changes to address the specific public interest in the wetlands, the decision and the record here contain no such analysis. See *500 North I*, supra,

Superior Court, Docket No. CV-16-6061118-S. The court, therefore, concludes that the plaintiff is not precluded from filing the present application.

## IV
## CONCLUSION

For the foregoing reasons, the court sustains the plaintiff's appeal and reverses the commission's denial of the plaintiff's application for conditional approval with the following modifications and conditions:

- The plaintiff shall seek and obtain the fire marshal's approval that all fire trucks in the town fire department's possession can be maneuvered freely on any road on the site.

-The plaintiff shall seek and obtain approval from the fire marshal that the development complies with all applicable regulations, ordinances, and codes, including fire codes.

- The plaintiff shall comply with the slope of the site, which shall not exceed the 5 percent grade maximum and compliance with all applicable codes shall be met.

- As to the retaining wall, the plaintiff shall seek and obtain approval from the town engineer with regard to the structural walls; a certification from a structural engineer; and any other structurally related and necessary approvals, permits, and certifications in accordance with the state regulations, the town regulations, and applicable codes. An independent engineer, hired and paid for by the plaintiff, shall oversee the construction process to ensure that the plaintiff maintains proper soil and erosion control and that the stormwater management system is adequate to protect Roosevelt Forest. While overseeing the construction process, the engineer shall give consideration to all suggestions, recommendations, and concerns expressed in the record, including but not limited to, the environmental concerns caused by a potential release of toxins and other harmful particles into protected lands or waters. Additionally, an independent engineer's approval of the structural fill used shall be required.

- Section 28.16 in the plaintiff's proposed textual amendment to the zoning regulations shall be deleted in its entirety. (ROR, Exh. 24, p. 16.) Inasmuch as the commission has raised the issue of an impact to the neighboring wetlands (even if there is none on-site), a submittal to the IWWC would be appropriate. See General Statutes § 8-3(g).

So ordered.

BY THE COURT

Hon. Rupal Shah