Office of Legislative Research
Research Report
November 9, 2015
2015-R-0268

# CASES TRIED UNDER THE AFFORDABLE HOUSING LAND USE APPEALS PROCEDURE FROM 2008 TO 2015

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## ISSUE

Identify cases tried under the Affordable Housing Land Use Appeals Procedure (CGS § 8-30g) from 2008 to 2015. Summarize any in which the court sustained a municipality's rejection of a developer's application.

## SUMMARY

The Affordable Housing Land Use Appeals Procedure ("the procedure") requires municipalities to defend their decisions rejecting affordable housing development applications or approving them with costly conditions. In traditional zoning appeals, the developer must convince the court that the municipality acted illegally, arbitrarily, or abused its discretion. The procedure instead places the burden of proof on municipalities.

Using Westlaw, we identified 24 cases that were tried under the procedure between 2008 and 2015. In three of these cases, the court sustained a municipality's rejection of an affordable housing development application.

In a majority of the remaining cases, the court ruled for the developer and remanded the case to the municipality with instructions to reconsider certain issues or approve the application subject to specified conditions. In a few of the remaining cases, the court explicitly required the municipality to approve the application as submitted. And in one case, the court sustained the municipality's decision to approve an application with certain conditions (see Ridgefield, 2013).

Below, we briefly (1) summarize the three cases sustaining a municipality's rejection of an application and (2) describe the remaining cases in Table 1. Due to time constraints, we do not fully analyze all legal arguments and the cases' procedural histories.

## THE PROCEDURE

Developers can use the procedure to contest a municipality's decision on an affordable housing development application in a municipality (1) where fewer than 10% of the housing units are affordable, based on certain statutory criteria or (2) that has not qualified for a moratorium. (A municipality may qualify for a four-year moratorium from the procedure each time it shows it has added a certain number of affordable housing units since the last census.) The proposed development must include affordably priced units, as required by law.

For courts to uphold planning and zoning decisions rejecting affordable housing development applications or approving them but with costly conditions, municipalities must meet certain criteria. First, a municipality must prove that the record contains sufficient evidence to support its decision. Next, it must meet one of two sets of conditions.

Under the first set, it must convince the court that:

1. the decision was necessary to protect substantial public interests in health, safety, or other matters the commission may legally consider;
2. these interests clearly outweigh the need for affordable housing; and
3. they cannot be protected by making reasonable changes to the proposed development.

Under the second set, the municipality must prove that the proposed development is (1) receiving no government funds (i.e., that the affordable units are not "assisted housing") and (2) located in an industrial zone that does not permit residential uses.

Courts have a wide range of options in responding to developers' appeals. In addition to sustaining or rejecting an appeal, a court can remand a case to the municipality for further consideration or require it to approve an application subject to certain conditions.

## DECISIONS SUSTAINING DENIALS SINCE 2008

### *Forest Walk, LLC v. Middlebury Planning and Zoning Commission, 2008 WL 5156480 (2008)*

The developer in this case applied to the Middlebury Planning and Zoning Commission for an amendment to the zoning regulations, a zone change, and a site plan approval related to the construction of 286 residential units that would include affordable housing. The commission denied the applications citing numerous reasons, including lack of water and sewer service, downstream flooding, inadequate fire safety, wetlands and watercourses protection, and environmental and safety risks stemming from the development's density. The developer appealed to Superior Court.

The court held that there was sufficient evidence on the record to support only Middlebury's determination that there was no feasible plan for providing septic or sewer facilities for the development. The court noted that it is settled law that a commission may reject an application if the proposed development will not have adequate septic or sewer facilities. The court further noted that under the Connecticut Supreme Court's ruling in *River Bend Associates, Inc. v. Simsbury Planning Commission*, 271 Conn. 41 (2004), an authority's denial of a sewer application is, by itself, a valid reason for denying an affordable housing development application, if the development requires sewer service.

Middlebury determined that there would be inadequate septic or sewer facilities based on two facts: (1) the developer's attorney admitted that an on-site septic system was unfeasible and (2) the appropriate public body (the Middlebury Water Pollution Control Authority) had already denied a sewer application because of Middlebury's policy of (a) not extending sewer service to new areas and (b) protecting groundwater recharge in a municipality with many private wells.

Because the court found the evidence supported one of Middlebury's reasons for denying the application, it dismissed the developer's appeal.

### *Baker Residential, L.P. v. Berlin Planning and Zoning Commission, 2008 WL 4378684 (2008)*

The developer in this case applied to the Berlin Planning and Zoning Commission for an amendment to the zoning regulations, a zone change, and a site plan approval related to the construction of 384 residential units that would include affordable housing. Berlin denied the applications citing the law's "industrial zone exception." The property on which the developer proposed the development was zoned as

"Office Technology" (OT) and listed under the industrial zone category in Berlin's zoning regulations.

Before the commission, the developer argued that the OT zone (1) was not a traditional industrial zone and (2) permitted residential uses, namely hotels, farmhouses, and conversion of older buildings to residential use. The developer also noted that .33 acre of the 64.82-acre parcel was in a residential zone. Berlin presented evidence showing that (1) the OT zone was designed to accommodate emerging industrial uses, (2) hotels were not considered a residential use, (3) farmhouses were not specifically authorized, and (4) no buildings on the subject parcel were eligible for conversion.

The trial court upheld the commission's determination that the exception applied, as the (1) area to be developed was zoned for industrial use and did not permit residential use by right or special permit and (2) proposal was not for assisted housing (the latter point was uncontested). The court further noted that the legislature intended to allow municipalities to "protect their industrial development plans and safeguard a large tax base from forced conversion." The court did not find compelling the developer's argument that because the zoning regulations allowed a 30-foot extension of the .33 acre's use into the OT zone, residential uses were thus permitted in the OT zone.

### *Landmark Development Group v. East Lyme Zoning Commission, 2008 WL 544646 (2008)*

The developer in this case applied to the East Lyme Zoning Commission for approval related to the construction of 352 residential units that would include affordable housing. The commission denied the application citing, among other reasons, lack of water and sewer service, incompatibility with open space preservation goals, lack of motor vehicle access, and adverse impacts on the environment. The developer appealed to Superior Court.

The trial court held that there was sufficient evidence on the record to support several of East Lyme's determinations. It noted that "the public policy of encouraging the development of affordable housing must yield in light of the unique and important environmental setting of the property sought to be developed." First, the court held that the public interest in preserving the site as open space outweighed the need for affordable housing, given the unique nature of the site and the lengthy history of preservation efforts with regard to the parcel. Second, it held that even with modifications, the development would be inconsistent with the criteria and policies of the Coastal Management Act (CGS § 22a-90 et seq.) because of the specific nature of the site and the planned density. Third, it held that the

development did not have adequate water and sewer facilities to serve it, and ensuring these facilities exist outweighs the need for affordable housing.

(Please note: there are several cases, some still pending, concerning this developer and parcel. With regard to this parcel, the developer has submitted several zoning amendments, requests for a zone change, and site plans (see Table 1).)

## OTHER DECISIONS FROM 2008 TO 2015

Table 1 lists cases tried under the procedure from 2008 to 2015. It excludes the three cases summarized above.

**Table 1: Other CGS § 8-30g Cases Since 2008**

| *Municipality (year)* | *Units in Development* | *Municipal Action* | *Court Action* |
|---|---|---|---|
| **Darien (2012)** | 16 | Denial | The trial court sustained the developer's appeal; the municipality's stated reasons for the denial (its proximity to a busy intersection and the building's density) did not meet the public interest exception (*Stefanoni et al. v. Planning and Zoning Commission of the Town of Darien*, 2012 WL 753797). |
| **Darien (2012)** | 30 | Approval with conditions | The trial court (1) approved the municipality's restrictions regarding emergency access and fire safety; (2) reversed the commission's restrictions regarding stormwater management, building height, and parking; and (3) remanded the matter to the municipality to consider a modification of the driveway access (*Stefanoni et al. v. Planning and Zoning Commission of the Town of Darien*, 2012 WL 5476918). |
| **East Haven (2014)** | 102 | Denial | The trial court partially ruled for the developer. It sustained the developer's appeal as to several reasons for the municipality's denial, but remanded the case to the municipality on issues related to stormwater management; the court directed the municipality to (1) schedule a meeting with the developer to discuss these issues and (2) allow the developer to respond to a report by the municipality's outside consultant (*Autum View, LLC v. East Haven Planning & Zoning Commission*, 2014 WL 7714346). |

Table 1 (continued)

| ***Municipality (year)*** | ***Units in Development*** | ***Municipal Action*** | ***Court Action*** |
|---|---|---|---|
| **East Lyme (2011)** | 840 | Denial as to request for zoning amendment and approval of the preliminary site plan; partially granted zone change | 1. Regarding the proposed zoning amendments, the trial court remanded to the municipality with instructions to adopt amendments to the zoning regulations (a) consistent with the court's opinion and (b) incorporating the developer's proposed amendments, except for the proposal concerning the methods by which the municipality could require certain information.<br>2. Regarding the developer's request for a zone change, the court held that there was evidence to support the municipality's decision not to approve a zone change for the whole parcel, but noted the possibility of amendments to the zoning regulations making rezoning possible, and thus remanded.<br>3. Regarding the municipality's grant of a partial zone change, the court held that because the commission rejected the site plan, partial rezoning was an unreasonable modification to the application, and thus remanded to the municipality with direction to rescind the partial rezoning unless it subsequently approved a site plan submitted by the developer.<br>4. Regarding the site plan, the court remanded to the municipality with instructions for it to approve a conceptual site plan conditioned on the developer subsequently complying with certain requirements in its preliminary or final site plan application (*Landmark Development Group, LLC et al. v. East Lyme Zoning Commission*, 2011 WL 5842576). |
| **East Lyme (2014)** | 60 | Denial | The trial court ruled for the developer; it rejected the municipality's assertion of the industrial site and public interest exceptions (e.g., safety concerns due to a nearby industrial accident the prior year). The court remanded the case to the municipality with instructions to approve the application subject to reasonable conditions (*JAG Capital Drive, LLC v. East Lyme Zoning Commission*, 2014 WL 7714338). |
| **Fairfield (2012)** | 12 | Denial | The trial court ruled for the developer. It concluded that while the municipality established a substantial public safety concern (traffic) as a possibility, it did not prove that the risk clearly outweighed the need for affordable housing. It required the municipality to approve the developer's application (*Landco Holdings LLC v. Fairfield Town Plan and Zoning Commission*, 2012 WL 1624245). |

Table 1 (continued)

| ***Municipality (year)*** | ***Units in Development*** | ***Municipal Action*** | ***Court Action*** |
|---|---|---|---|
| **Fairfield (2015)** | 95 | Denial | The trial court ruled for the developer and rejected the municipality's assertion of the public interest exception. The court reversed the municipality's decision, remanded the case, and directed (1) all parties to consider the developer's alternative plans for creating a second access way and (2) the developer to obtain approval from the Water Pollution Control Authority as a condition of the plan's overall approval (*Garden Homes Management Corp. et al. v. Fairfield Town Plan and Zoning Commission*, 2015 WL 5977716). |
| **Ledyard (2011)** | 3 | Denial | The trial court ruled for the developer and remanded the case to the municipality with direction to approve the application on the condition that the developer meet certain requirements (e.g., install a guardrail at the back of the driveway, use pervious pavers for the parking area) (*Coen v. Ledyard Zoning Commission*, 2011 WL 5307400). |
| **Lisbon (2014)** | 19 | Denial | The trial court ruled for the developer; it rejected the municipality's argument that the project did not comply with its road ordinances or the State Fire Prevention Code. The court remanded the case to the municipality with instructions to approve the application (*Brenmor Properties, LLC v. Lisbon Planning & Zoning Commission*, 2014 WL 3715028). |
| **Milford (2011)** | 28 | Approval with conditions | The trial court ruled for the developer, which had appealed two of the seven conditions specified in the approval. The court ruled that the conditions on a 10-foot setback and access roads did not meet the public interest exception.<br><br>The trial court remanded to the municipality with direction to reconsider the application in a manner consistent with the court's decision (*Ninety Heenan Drive LLC v. Planning and Zoning Board of the City of Milford*, 2011 WL 4031174). |

Table 1 (continued)

| ***Municipality (year)*** | ***Units in Development*** | ***Municipal Action*** | ***Court Action*** |
|---|---|---|---|
| **Milford (2015)** | 23 | Denial | The trial court ruled for the developer, reversing the municipality's decision to deny the applications. The court determined that the municipality did not provide sufficient evidence for it to deny the applications based on traffic safety, noncompliance with the local Plan of Conservation and Development, or the local conservation commission's opinion (*Colberg, LLC v. Planning & Zoning Board of City of Milford*, 2015 WL 4965666). |
| **Newtown (2010)** | 26 | Denial | The trial court ruled for the developer.<br><br>1. Although the municipality was justified in denying the application based on the developer's inability to obtain a permit for a sewer connection, it lost the ability to rely on this rationale because the trial court, in a concurrent case, sustained the developer's appeal with respect to the sewer connection permit.<br><br>2. The trial court ruled that the public interest exception was not met by the municipality's claim that the developer's proposed regulations did not provide for aquifer impact review as the public interest could be protected by reasonable changes to the regulations.<br><br>3. Lastly, the trial court ruled that although the developer's affordable housing units were not of comparable size and workmanship to the market rate units, this defect could be addressed by reasonable changes to the application.<br><br>It remanded the case to the municipality with instructions to approve the application subject to modifications to the application and proposed regulations (*Dauti Construction LLC v. Planning and Zoning Commission of the Town of Newtown*, 2009 WL 1814500).<br><br>The Appellate Court affirmed (125 Conn. App. 665). |

Table 1 (continued)

| ***Municipality (year)*** | ***Units in Development*** | ***Municipal Action*** | ***Court Action*** |
|---|---|---|---|
| **North Haven** *(and East Haven at the trial court level)* **(2010)** | 396 | Denial | The trial court ruled for the developer and directed both North Haven and East Haven to grant the developer's amended application on the condition that the developer obtain sewer connection approval from North Haven (*CMB Capital Appreciation, LLC v. North Haven Planning and Zoning Commission v. East Haven Planning and Zoning Commission,* 2009 WL 2035240).<br><br>North Haven appealed. The Appellate Court upheld the trial court's decision, rejecting North Haven's claims, among other, that (1) it was ordered to approve the application conditionally in the absence of evidence that the condition would occur and (2) there was inadequate provision for emergency services (*CMB Capital Appreciation, LLC v. North Haven Planning and Zoning Commission*, 124 Conn. App. 379 (2010)). |
| **North Haven (2014)** | 76 | Denial | The trial court ruled for the developer. The court (1) remanded the municipality's denial of the proposed amendment to the zoning regulations and directed it to consider a modified proposal and (2) reversed its denial of the site plan application. The court concluded that the municipality did not establish that public safety concerns, including traffic, emergency access, and density concerns, existed and outweighed the need for affordable housing (*Lexington Properties, LLC v. Planning & Zoning Commission of Town of North Haven*, 2014 WL 2854006). |
| **Oxford (2009)** | 113 | Denial | The trial court ruled for the developer and remanded the case to the municipality with direction to approve the application subject to reasonable and necessary conditions (e.g., a full second access road and additional parking). It also directed the municipality to approve an amendment to the zoning regulations and zoning map to rezone the developer's property (*Garden Homes Management Corporation et al. v. Oxford Planning and Zoning Commission*, 2009 WL 4282204). |
| **Oxford (2015)** | 124 | Denial | The trial court sustained the appeal and remanded to the municipality with instructions to further evaluate three traffic safety issues and the enforcement of an on-street parking ban. It specifically granted the municipality discretion in determining whether to eventually grant or deny the developer's site plan application (*Garden Homes Management Corp. v. Planning and Zoning Commission of Town of Oxford*, 2015 WL 5315170). |

Table 1 (continued)

| ***Municipality (year)*** | ***Units in Development*** | ***Municipal Action*** | ***Court Action*** |
|---|---|---|---|
| **Ridgefield (2012)** | 389 | Approval with conditions | The trial court largely ruled in favor of the developer but upheld the condition banning building in watershed land (*Eureka V, LLC v. Ridgefield Planning and Zoning Commission*, 2010 WL 4609391).<br><br>The developer appealed the prohibition. The Appellate Court reversed, holding that the municipality failed to meet its burden of showing that the conditions were necessary to protect the public interest in maintaining a healthy water supply. The Appellate Court remanded the case and directed the municipality to approve the proposal subject to reasonable terms and conditions in regard to the watershed portion of the property (139 Conn. App. 256). |
| **Ridgefield (2013)** | 14 | Approval with conditions | The developer appealed the conditions imposed in the modified application, including (1) conducting a groundwater mounding analysis and (2) paying certain fees for a Planning and Zoning Commission consultant to review the study. The trial court ruled in favor of the municipality holding that, among other things, the condition requiring the analysis was necessary to protect the public interest in health and safety (*Eppoliti Realty Co., Inc. v. Ridgefield Planning and Zoning Commission*, 2013 WL 6510893). |
| **Southington (2009)** | 214 | Denial | With respect to the developer's modified zoning amendment, zone change, and site plan applications, the trial court ruled for the developer, finding that the municipality failed to prove that conditional approval of the modified application could not alleviate the municipality's various public health and safety concerns. It remanded the case to the municipality with direction to grant the application subject to necessary and reasonable conditions. (The court dismissed the developer's suit concerning its initial application. The modified applications addressed many of the municipality's concerns with the initial application (*Hillcrest Orchards, LLC v. Southington Conservation Commission*, 2009 WL 864603)). |
| **Sterling (2015)** | 10 | Approval with conditions | The developer appealed five out of 15 conditions, mainly concerning financial obligations and notice requirements. The trial court ruled for the developer and directed the municipality to modify the conditional approval to remove the five conditions (*Sterling Trails, LLC v. Sterling Planning and Zoning Commission*, 2015 WL 2035544). |

Table 1 (continued)

| ***Municipality (year)*** | ***Units in Development*** | ***Municipal Action*** | ***Court Action*** |
|---|---|---|---|
| **Stratford (2011)** | 130 | Denial | The trial court ruled partially in favor of the municipality and remanded the case, ordering the municipality to specify the changes needed to protect health and safety (specifically, fire safety concerns due to inadequate emergency access) (*AvalonBay Communities, Inc. v. Stratford Zoning Commission*, 2004 WL 1925945).<br><br>Both parties appealed, and the state Supreme Court sent the case back to the municipality, which again denied the developer's application. The developer appealed for a second time to the trial court, which ruled for the developer on an environmental issue but dismissed the appeal on public safety grounds (2009 WL 2961291).<br><br>Both parties cross-appealed the decision. The Appellate Court ruled for the developer, concluding, among other things, that there was insufficient evidence to support the commission's denial of the application on the basis of public safety concerns. The Appellate Court also denied the zoning commission's and municipality's cross appeals (the town council had intervened in the case on an environmental issue). The court remanded the case to the trial court, directing it to approve the developer's application (130 Conn. 36). |

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