STATE OF CONNECTICUT
SUPREME COURT

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S.C. 18089, 18091

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TOWN OF BRANFORD

VS.

THOMAS SANTA BARBARA, ET AL.
(S.C. 18089)

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NEW ENGLAND ESTATES, LLC

VS.

TOWN OF BRANFORD, ET AL.
(S.C. 18091)

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# BRIEF OF APPELLANT, TOWN OF BRANFORD

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TO BE ARGUED BY:

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II. Did the failure to appeal from the denial of the application to build affordable housing operate as a waiver of any claim that the commission improperly denied the application? (pp. 34-35)

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## OVERVIEW

These consolidated appeals challenge the decision of the trial court (Cremins, J.) that just compensation for 77 acres of undeveloped, denuded land resembling a strip mine, mostly in an industrial zone, and next to a landfill, should be based on residential development. In 2004, the Town of Branford took the land, part of which lies in a coastal zone, by eminent domain. The Town filed a compensation statement for $1.167 million. The owners and a developer that held an option to purchase the land challenged the amount of compensation. The trial court concluded that the highest and best use of the property was for residential development and valued it at $4.6 million.

The crucial decision as to the highest and best use of the property is erroneous. At the time of the taking, 70 acres of the property was in an industrial zone that did not permit residential use. Because the Branford Planning and Zoning Commission (PZC) twice denied requests to change the zoning, the record is insufficient to support a decision that it was reasonably probable that the zoning change necessary for residential development of the property would be granted.

The primary basis for the claim that a zone change would occur is that the developer would have prevailed on an appeal of the PZC's denial of an affordable housing application, given the burden on commissions to justify their decisions in such matters. But in this case, reversal of the denial was not reasonably probable. Because the land was zoned for industrial use and did not permit residential use, the PZC was not required to grant the application. Review of the reasons that the PZC provided for the denial shows that several public policy considerations—including contamination on the site and from the neighboring landfill, drainage and storm water issues, site restoration, the lack of a wetlands permit, and adverse impacts on coastal resources—justify the commission's action. Any one reason is sufficient to support the denial for affordable housing. The record therefore does not support the court's conclusion that the highest and best use is residential development. A new trial on valuation is necessary.

## STATEMENT OF FACTS AND PROCEEDINGS

On January 5, 2004, the clerk of court issued a certificate of taking to the Town of Branford for the 77-acre parcel, known as 48-86 Tabor Drive in Branford. The certificate of taking stated that taking the property served the public purpose of "investigating, remediating, monitoring and using [the property] for a public purpose commensurate with its condition," and provided for fair and reasonable compensation in the amount of $1,167,800.00. (App. at A193). The owners, Thomas Santa Barbara, Jr., and Frank Perrotti, Jr., and the developer, New England Estates, LLC (NEE), which held an unrecorded and unexercised option to purchase the property, each challenged the statement of compensation in the Superior Court, claiming that it was inadequate. (R. , )

At the time of the taking, 70 of the 77 acres of the site were zoned as IG-2 industrial (R. ), a classification that does not permit residential development. Branford Zoning Regs. §§ 24.1 & 24.2 (App. at A20). The northern portion of the property borders an active railway line, and the southwestern portion abuts the Branford landfill. (R. ) The present landfill site consists of 39 acres. Santa Barbara testified that he owned and managed the landfill from 1984 to 2004. (Tr. 6/26/07 a.m. at 22, 26, 31, 32). The landfill contains and accepted industrial waste, household hazardous substances, and sludges.[1] Small businesses and residences border the remaining sections. (PZC Dec. at 8-9).[2] Formerly, the

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[1] Eight acres accepted mixed solid waste, consisting of paper, garbage, regular swill garbage, tin cans, and bottles until approximately 1991 when it reached its capacity at 50' in height. (Tr. 6/26/07 a.m. at 32, 33).

[2] The parties stipulated as to what would have constituted the records of the decisions of the Planning & Zoning Commission (PZC) and the Inland Wetlands Commission (IWC) had NEE appealed from the decisions of those agencies. (Pls' Ex. 1). The trial court (Cremins, J.) directed the parties to submit as plaintiff's exhibit 2 the decision and record of the PZC in which it denied the application of New England Estates, LLC, to develop affordable housing pursuant to Conn. Gen. Stat. § 8-30g. The application actually concerned three applications: an application to create a "Housing Opportunity District"; an application for a zone change; and a Coastal Area Management Review. Like the PZC, this brief will treat these three applications as one. Similarly, the court ordered the submission of the decision and record of the IWC as plaintiff's exhibit 3.

This brief will refer directly to the PZC decision as such and to the exhibits before the PZC by their number in the zoning hearing preceded by "PZC." References to the tran-

parcel was mined as a sand and gravel site and is denuded of much of its topsoil. (R. )

At the time of the taking, Santa Barbara and Perrotti owned the parcel, which they had purchased at a foreclosure auction in the early 1990s for $2.11 million. In 2001 they entered into an option agreement with NEE in which NEE agreed to pay a monthly sum for the right to purchase the parcel for $4.75 million (R. ), raised by the time of the taking to $4.85 million. (Tr. 6/26/07 a.m. at 57). NEE had no obligation ever to purchase it and could have walked away from the deal if it did not get all the approvals it wanted from state and local authorities. (Tr. 6/25/07 p.m. at 91). The unrecorded and unexercised option agreement was in effect at the time of the taking as a result of extensions.[3] (See R. )

After entering into the option agreement, NEE pursued a series of applications to develop the property for residential use but failed to obtain the necessary approvals and permits. First, NEE submitted an application for 268 market-rate units to the Branford Inland Wetlands Commission (IWC) and the Planning & Zoning Commission (PZC). (Tr. 6/25/07 p.m. at 5, 15, 17, 18, 64; see R. ). While the former granted a permit, the latter denied NEE's application in November 2002. (PZC Ex. 7). NEE filed an appeal to the Superior Court (R. ), but later withdrew it. In May 2003, NEE submitted a new application to the PZC, this time including affordable housing pursuant to Conn. Gen. Stat. § 8-30g. (See R. ) This proposal increased the number of units by over thirty percent to 354 and eliminated the proposed golf course that had been part of NEE's previous application. (R. ).

In June 2003, NEE withdrew that application and submitted a third one—this time proposing a 354-unit affordable-housing project that included a golf course. (R. ) At the same time, NEE submitted to the IWC an application for what it characterized as a "minor modification" of the permit it had granted in 2002. (PZC Dec. at 16; PZC Ex. 19 at 1).

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scripts of the zoning hearings will be preceded by "PZC." References to IWC proceedings will be identified likewise. The PZC decision appears in the appendix at A116-A151.

[3] There is no issue in this brief as to NEE's standing to recover on the unrecorded option because the judgment was less than the option price.

Before the IWC issued a decision on the modification application, the PZC warned NEE that a new IWC application may be required. (See PZC Dec. at 18; PZC Ex. 19 at 1). NEE refused to submit a new application to IWC, insisting that the request for a "minor modification" was sufficient and further refused to participate in the subsequent IWC meeting. (PZC Dec. at 16-18). In August 2003, the IWC denied NEE's application, concluding that a new application was necessary. (See IWC Ex. 24; App. at A191). The IWC expressed concern, inter alia, about information learned subsequent to the original wetlands application regarding the impact of pollutants on the property. (*Id.*)

Meanwhile, in July 2003, the Town voted to authorize the taking of the property for public purposes by condemnation. (See R. ) NEE subsequently filed a 42 U.S.C. § 1983 action seeking damages and injunctive relief challenging the Town's July 2003 vote authorizing the taking of the property by eminent domain. (R. ) On August 25, 2003, the trial court (Arnold, J.) issued a temporary restraining order to enjoin the Town from condemning the property. (R. )

A hearing for a temporary injunction in that case took place later in 2003. On December 15, 2003, the court (DeMayo, J.T.R.) denied relief, finding that the Town acted in good faith and that NEE was unlikely to prevail on the merits. (R. ) Judge DeMayo determined that "there is no equitable factor weighing in favor of the plaintiff." (R. )

> Thus, the sole claim to be weighed against the town's equitable claims is that the plaintiff stands to lose a business opportunity.
>
> On the other hand, the potential for serious contamination involves the health of residents in the area. There is the potential for litigation if purchasers of homes become victims of pollution. In summary, this project has the potential to cause serious physical and financial distress to the present and future residents and taxpayers of the town of Branford.

(R. ) NEE filed an "Emergency Motion for Review" with the Appellate Court and an application pursuant to Conn. Gen. Stat. § 52-265a. Both were denied. (See App. at A86).

While awaiting the court's decision on injunctive relief, during which time the Town was enjoined from taking the property, the PZC held hearings in September, October, and

November 2003 on NEE's third application for a residential development on the property. (PZC Dec. at 3-4). The PZC considered extensive testimony and received voluminous evidence from the applicants, the town planner, planning consultants, environmental consultants, officials from the Department of Environmental Protection (DEP), licensed environmental professions, the Town's landfill engineers, municipal officers, and others. (See Pls.' Ex. 2). After a full hearing, on January 8, 2004, the PZC denied the application for affordable housing in a comprehensive memorandum of decision.

The PZC denied the application for several significant reasons: environmental concerns due to the proximity of the landfill and contamination issues on the site; significant drainage and storm water problems due to the unique condition of the stripped land; site restoration concerns; and concerns expressed by the IWC. (PZC Dec. at 7-24). The PZC concluded that the property was zoned for industrial use and did not permit residential use and that the project would have several adverse impacts on the coastal environment. (PZC Dec. at 25-26). No one appealed the PZC's January 8, 2004 decision and, although NEE did appeal the IWC's denial to the Superior Court, it later withdrew it. (App. at A101-A115).

On December 18, 2003, the Town filed a notice of condemnation for public purposes and statement of compensation in the amount of $1,167,800. NEE and the owners filed separate applications, later consolidated, for review of the statement of compensation in the Superior Court. (R. ) The only issue at trial was the value of the land and the option.

At trial, the owners presented one appraiser, R. Bruce Hunter, and NEE presented another, Richard A. Michaud. Hunter assumed that, at the time of the taking, the property would have all approvals in place for a multi-family residential development. Based on this assumption and using the sales comparison approach, Hunter testified that the value of the 268-unit market-project was $6.2 million and the value of the 354-unit affordable-housing project was $6.1 million. (R. ; Tr. 6/26/07 a.m. at 139-40; Tr. 6/26/07 p.m. at 10-11).

Michaud also assumed that NEE would obtain all necessary approvals for its 354-unit affordable housing development. (Tr. 6/26/07 p.m. at 84, 90-91; Pls' Ex. 8A (Michaud

Appraisal) at 34). Unlike Hunter, Michaud further assumed that the required approvals would be obtained within one year of the taking date. (R. ; Pls' Ex. 8A at 4, 34). Using the sales comparison and cost of development approaches, Michaud valued the property at $6.5 million. (R. ; Tr. 6/26/07 p.m. at 85). The development approach considered the profits and income generated from sales of hypothetically built units. (Pls.' Ex. 8A at 37).

After the trial and inspection of the property, the court (Cremins, J.) concluded that its highest and best use was residential, rejected the testimony of the Town's appraiser, who found that the highest and best use was open space and the value of the property was $770,000, and found just compensation to be $4.6 million. (R. )

## ARGUMENT

I. THE COURT'S CONCLUSION THAT THE HIGHEST AND BEST USE OF THE LAND WAS FOR RESIDENTIAL DEVELOPMENT WAS IMPROPER.

The trial court erroneously concluded that the property could be developed as residential property. As the court found that the property was zoned for industrial use (R. ), NEE and the owners needed to show that a zone change was reasonably probable. Because the record demonstrates as a matter of law that NEE could not have prevailed on an appeal of its affordable housing application, which was its best hope for obtaining a zone change, there is insufficient evidence to sustain this crucial conclusion. Nor does the record contain any other evidence from which the court could reasonably conclude that a zone change was reasonably probable. The error in this crucial conclusion vastly inflated the valuation of the property. Accordingly, a new trial is necessary on the value of the land under the zoning existing at the time of the taking.

**Standard of Review**: Whether NEE would have succeeded on its appeal of the denial of its affordable housing application is a question of law subject to plenary review. *Carr v. Planning & Zoning Comm'n*, 273 Conn. 573, 596 (2005). Whether NEE would have succeeded in convincing the Town to change its zoning regulations is a question of fact subject to clear error review. *Commissioner of Transportation v. Rocky Mountain, LLC*, 277 Conn.

696, 729 (2006) (noting that fair market value of property is a question of fact).

Well established principles govern resolution of this appeal:

> The amount that constitutes just compensation is the market value of the condemned property when put to its highest and best use at the time of the taking. . . . In determining market value, it is proper to consider all those elements which an owner or prospective purchaser could reasonably urge as affecting the fair price of the land . . . . The fair market value is the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use. . . . The highest and best use concept, chiefly employed as starting point in estimating the value of real estate by appraisers, has to do with the use which will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate. . . . In determining its highest and best use, the trial [court] must consider whether there was a reasonable probability that the subject property would be put to that use in the reasonably near future, and what effect such a prospective use may have had on the property's market value at the time of the taking. . . .

*Northeast Ct. Econ. Alliance, Inc. v. ATC Partnership*, 272 Conn. 14, 25 (2004) (citations, internal quotation, and first alteration omitted); *Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 65-66 (2007).

In valuing the land that is taken, lost business profits are considered as follows:

> The many takings cases decided by this court over the years establish that, although elements of takings such as lost profits or personal property are not independently compensable because they do not constitute real property, the value of such elements nevertheless may be considered in determining the fair market value of the land.

*Rocky Mountain, LLC*, 277 Conn. at 711-12; see also *id.* at 731-33. Where the owner shows that a market exists for a going concern or contemplated project on the site, the court considers the effect of such project on the value of the land. For example, in *Laurel, Inc. v. Comm'r of Transportation,* 180 Conn. 11, 39-43 (1980), a market existed for partially built condominiums and therefore future profits were included in the award.

Finally, land is valued as it is zoned on the date of the taking. *Lynch v. West Hartford*, 167 Conn. 67, 74 (1974); see *Budney v. Ives*, 156 Conn. 83, 88-89 (1968). Where the owner can show that a zoning change affecting the value of the land is reasonably probable, such evidence may be considered in assessing the value of the property. *Lynch*, 167 Conn. at 74 (while no zoning change application was pending, town had not objected to in-

dustrial use in residential zone and appraisers testified that zone change was likely); *Budney*, 156 Conn. at 90 (strong likelihood of rezoning). However, a mere remote possibility is an inadequate basis to find a zone change. *Id.* at 88. "Wishful thinking, optimistic conjecture, speculation, rumor and unfounded prognositications do not furnish a proper basis for finding that a litigant has proved the reasonable probability of a future change in zone." *Id.* at 89-90; see also *New London v. Picinich*, 76 Conn. App. 678, 688-90 (condemnor's future use found too speculative), cert. denied, 266 Conn. 64 (2003).

Here, the trial court concluded that the highest and best use of the property was residential despite its finding that 70 acres of the site were zoned for industrial use at the time of the taking. (Br. 2, 16). At trial, NEE and the owners contended for highest and best use as residential on two theories. First and primarily, they asserted that, under the standards for affordable housing set forth in § 8-30g, it was reasonably probable that the Superior Court would have reversed the PZC's 2003 rejection of NEE's third application. Second, they claimed that it was reasonably probable that residential use would be permitted by the PZC pursuant to their 2002 application. Given that in the 15 months surrounding the taking, the town had twice rejected NEE's applications to change the property to residential zoning (once to build market-rate housing, once to build affordable housing), any determination that a zone change would occur necessarily rests on speculation.

NEE's best chance of obtaining a zoning change was through its affordable housing application because of the burden zoning commissions face in defending their decisions on such applications. Because NEE as a matter of law cannot show that it would have prevailed on its appeal of the denial of its affordable housing application, NEE and the owners cannot establish a reasonable probability of a future zoning change. Accordingly, the court's conclusion of residential use is clearly erroneous and a new trial is required.

### A. NEE and the Owners Cannot Establish that NEE Would Probably Have Succeeded on Its Appeal of the Denial of Its Affordable Housing Application.

Three independent grounds exist to affirm the PZC's denial of the affordable housing

application, and the record contains sufficient evidence to sustain the factual findings on each. First, because the proposed development was located in an industrial zone that did not include "assisted housing" as defined in § 8-30g, the PZC properly denied the application under § 8-30g(g)(2). Second, as § 8-30g(g)(1) requires, the denial was necessary to protect public health, safety, and other interests, these interests outweighed the need for affordable housing in Branford, and changes to the plan would not protect the public interest. Specifically, environmental issues arising from the site's proximity to an active landfill, problems with the proposal's plans for drainage and storm water control, restoration of the practically denuded site, and the denial of the inlands wetlands permit all present important reasons for the PZC's decision, although any one of these reasons suffices to sustain it. Third, the development was located in an area subject to the Coastal Management Act, which itself identifies important public policy concerns that the legislature required the PZC to consider. As NEE cannot show that it would have received approval of its affordable housing proposal, it cannot establish a zone change with reasonable probability.

1. *Plenary Review Applies to Affordable Housing Appeals.*[4]

The affordable housing statute, Conn. Gen. Stat. § 8-30g, establishes the scope of judicial review of the PZC's decision. Subsection (g) provides, in pertinent 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 complied before such commission, that (1)(A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development, or (2)(A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses, and (B) the development is not assisted housing, as defined in subjection (a) of this section.

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[4] This brief discusses the coastal site review separately, see *infra* at 24-31, because of the competing legislative policies at issue.

The first sentence of this subsection requires the reviewing court to determine, as a threshold matter, that sufficient evidence exists to sustain the decision. *Quarry Knoll II Corp. v. Planning & Zoning Comm'n*, 256 Conn. 674, 723 (2001). "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." *Carr*, 273 Conn. at 596 (citations and internal quotations omitted). Under this standard, the PZC remains the fact-finder and the Court reviews facts for sufficient evidence. *River Bend Assocs., Inc. v. Zoning Comm'n*, 271 Conn. 1, 24 (2004). "Sufficient evidence" is a lesser burden for the PZC than "substantial evidence." *Kaufman v. Zoning Comm'n*, 232 Conn. 122, 149-53 (1995). If the court finds sufficient evidence on any one reason, the Town can satisfy its remaining burden either under § 8-30g(g)(1) for any one of the following reasons: (i) environmental concerns, (ii) drainage and storm water control, (iii) site-restoration concerns, or (iv) IWC matters; or under § 8-30g(g)(2) because the site lies primarily in an industrial zone.

The same scope of review under the first sentence applies to denials of applications to locate affordable housing in industrial zones. See *JPI Partners, LLC v. Planning & Zoning Bd.*, 259 Conn. 675, 691 (2002) (finding "no principled reason for distinguishing between what were then subdivisions (1) and (2) of § 8-30g(c) with regard to the board's obligation [to state the reasons for its decision on the record]"). The PZC must show by sufficient evidence that the proposed development lies in an industrial zone and does not include assisted housing. Then the Court conducts plenary review of the zoning regulations. If the industrial provision applies, the Court's analysis ends there.

If the industrial provision does not apply, the second sentence of § 8-30g(g) requires the reviewing court to conduct plenary review of the record to weigh whether the public interest outweighs the affordable housing project and whether reasonable changes can address the public interest concerns. *Carr*, 273 Conn. at 596-97. Because the review is on the record, this Court and the trial court have the same standard of review. *Id.* at 597. If

any *one* of the PZC's many reasons mentioned above satisfy the burden set out in § 8-30g(g), the decision must be affirmed. *Christian Activities Council, Congregational v. Town Council*, 249 Conn. 566, 594 (1999) (en banc).

2. *The Property Is Zoned for Industrial Use and the Proposal Does Not Meet the Exception for Assisted Housing.*

Section 8-30g(g)(2) provides, in pertinent part, that the PZC must prove that

> (A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses, and (B) the development is not assisted housing, as defined in subsection (a) of this section.

As NEE did not claim that its proposal included assisted housing as defined in the statute, the only question is prong (A) of subdivision (2).

a. Sufficient Evidence Exists to Support the Findings as to the Industrial Zoning.

The location of the property in an industrial zone supports the PZC's denial. As the court found, about 70 of the 76.91 acres of the subject property are located in the General Industrial District No. 2 (IG-2.) (PZC Dec. at 23). Shirley Rasmussen, the Town planner, explained that most of the property had been zoned industrial since 1956 (PZC Tr. 10/2/03 at 52). This is sufficient evidence to sustain the factual foundation of the PZC's decision.

b. The Zoning Regulations Prohibit Residential Development in IG-2.

Review of the pertinent zoning regulations shows that the industrial provision set forth in § 8-30g(g)(2) applies here. The Branford Zoning Regulations provide, in pertinent part, that IG-2 is "intended to be used for heavy commercial and industrial development . . . . Further development of . . . residential uses will be inconsistent with their purpose and the purpose of the districts. Any residential construction would occur under conditions unfavorable for residential occupancy." Branford Zoning Regs. § 23.12 (App. at A18). At the time of NEE's application, IG-2 permitted the "letting of rooms and/or furnishing board in a dwelling unit to a total of not more than four persons." *Id.*, Sched. A-8 (App. at A23). However, "if dwellings are prohibited in the district, such use may be located only in a lawfully existing dwelling unit." (PZC Dec. at 23). Thus, existing rooming houses were grand-

fathered in and no new residential units that would include roomers were permitted. Because, the vacant land here has no residential housing, the grandfathered exception did not apply. Thus, the plain language of the relevant zoning regulations prohibits residential use.

3. *The PZC Decision Was Necessary to Protect Substantial Public Interests.*

If this Court reaches subsection (1),[5] it must determine whether sufficient evidence supports the underlying findings and then conduct a plenary review of the record on the three statutory prongs—the protection of a substantial public interest, whether affordable housing outweighs this interest, and whether reasonable changes are possible. § 8-30g(g)(1); *Carr*, 273 Conn. at 596-97. Although the Town need only prevail on one of its reasons for the decision to be sustained, *Christian Activities Council, Congregational*, 249 Conn. at 594, several substantial public interests warranted denial of NEE's application.

a. Sufficient Evidence Supports the PZC's Findings.

While "evidence of a mere possibility of harm does not constitute sufficient evidence that a substantial public interest is threatened for purposes of § 8-30g(g)," a commission may satisfy its burden of showing a threatened pubic interest by identifying specific harms. *River Bend Assocs., Inc.*, 271 Conn. at 32. To overcome this burden, the commission must identify specific harms and may not rely merely on generalized concerns. Thus, in *River Bend Associates*, this Court rejected a conclusion that soil contamination on tobacco fields posed a substantial risk to public health where the consultants did not identify the particular harm at issue, the extent of the likely harm, or the likelihood that such harm would come about at all, and the commission failed to explain why the proffered remediation plan was inadequate. *Id.* at 31-32.

By contrast, the record here is replete with the specifics found lacking in *River Bend Associates*. As explained below, the PZC identified a plethora of environmental problems on the site that rendered the property unsuitable for residential development. (PZC Dec. at

[5] If the Town prevails under the bright-line test under § 8-30g(g)(2), the Court need not reach whether the Town also prevails on the independent grounds under § 8-30g(g)(1).

8). Hazards posed by drainage and storm water control, site restoration concerns, and the lack of an inland wetlands permit presented additional problems. (PZC Dec. at 14-19). Sufficient evidence exists to support the PZC's decision on all of these findings.

(i) *Environmental Concerns*

The PZC determined that the site was not suitable for residential development because the project posed "serious risks to the health and safety of the residents of the proposed units." (PZC Dec. at 7). The PZC was concerned about the impact of a neighboring landfill on the site; potential contamination on the site itself, which had not been properly identified and evaluated; and the lack of proper criteria for remediating the site and assessing risks to the environment and to public health. (*Id.* at 12).

The property abuts the current Branford landfill, which in turn abuts the former Branford landfill. (PZC Ex. 16 at 1; PZC Tr. 10/2/03 at 11-12). Peg Hall, the solid waste director for the Town, explained that while the EPA regards these two properties as one landfill, DEP regards them as two landfills. (PZC Tr. 10/2/03 at 11-12.) The landfill is a low-priority federal Superfund site. (*Id.* at 17). In concluding that the landfill posed a hazard to residents of the project, the PZC cited the testimony of several witnesses, including: Hall; David Hurley, an environmental engineer for Fuss and O'Neil, which conducted an extensive study of the landfill; long-time Branford resident Kurt Schwanfelder, a mechanic who serves on the Representative Town Meeting; and Jim Monopoli, the Director of the East Shore Health District. (PZC Dec. at 7-8). The PZC heard testimony from David Bramley of Triton Environmental on behalf of NEE. (*Id.* at 3). The PZC also cited a recommendation from Dave McKeegan of the DEP that the site should serve as a buffer for the landfill. (*Id.* at 7).

Hurley testified that DEP would not permit a landfill next to a residential development because "[i]t would be too close to residents. It would be incompatible land use." (PZC Tr. 11/6/03 at 36). A letter from McKeegan to Hall confirmed this point by urging towns "to establish an appropriate buffer zone in order to mitigate impacts the landfill may have on adjacent properties." (PZC Ex. 10; App. at A152). Hurley explained that the landfill contains

industrial waste, household hazardous substances (paint, paint cans, fuels), and sludges. (PZC Tr. 11/6/03 at 10, 50). Hall also testified that added contaminated soil, which she explained was "not hazardous, it's not clean, it's the stuff in between," was brought into the landfill as a cover. (PZC Tr. 10/2/03 at 15). She explained that the contaminated soil may contain hydrocarbons, gasoline, oils, arsenic, PCBs, lead, cadmium, and volatile organic (hydrocarbon) compounds, commonly called VOCs. (*Id.*) The witnesses stated that rainwater percolating through the landfill creates a leachate that contaminates groundwater and can persist for decades. (PZC Tr. 9/4/03 at 74 (test. of Bramley); PZC Tr. 11/6/03 at 9-11 (test. of Hurley); see *id.* at 88 (test. of Monopoli)).

At least one monitoring well on the landfill, the one closest to the subject property, contained VOCs. (PZC Ex. 30 at Table 4; PZC Tr. 11/6/03 at 14 (test. of Hurley)). Hurley explained that VOCs do not readily dissolve in water and tend to escape into the atmosphere. (*Id.* at 11). VOCs can be particularly toxic, and can enter structures, such as houses, through the foundation. (*Id.* at 11-12). VOCs are particularly worrisome because they escape into basements and soil much like radon. (PZC Ex. 31 at 3; App. at A168.) Fuss & O'Neill explained that the shallow water table would mean that VOCs had to travel only a short distance before reaching a foundation. (*Id.*) Monopoli testified that humans, particularly children, could be exposed to VOCs by touching or ingesting contaminated soil or by breathing VOCs that are released into the air. VOCs pose health risks such as skin irritation, asthma, and cancer. (PZC Tr. 11/6/03 at 88-89.) The PZC concluded that changing the property to residential use would "heighten human exposure to potential contamination" because of the continuous occupation of the property. (PZC Dec. at 10).

Hurley also testified the landfill generates methane through the decomposition process. Methane can explode at concentrations greater the five percent. (PZC Tr. 11/6/03 at 15-17; PZC Ex. 31 at 4-5; App. at A169-A170). Hall testified that at the border between the landfill and the subject property, methane measured four to five percent. (PZC Tr. 10/2/03 at 21). Although methane currently vents into the air, once the landfill is closed, methane

will vent through the soil and could migrate through utility tunnels into buildings. If the gas is trapped in buildings, it could become concentrated enough to explode. (PZC Tr. 11/6/03 at 15-17, 26 (test. of Hurley)). NEE's consultant, Bramley, testified that he did not investigate methane migration but interpreted the reports of others. (PZC Tr. 9/4/03 at 93-94). He stated that the only way methane would be a problem was if the Town did not comply with DEP regulations in capping the landfill. (PZC Tr. 11/6/03 at 112-13). The PZC concluded that methane was a significant risk about which NEE appeared "singularly unconcerned." (PZC Dec. at 10). Bramley's testimony amply supports this finding.

There was evidence of potential contamination on the property itself. The area was mined for gravel, and dumping occurred on the site. Schwanfelder testified that large pieces of old equipment used to dig gravel were scrapped on the site. From his experience in the automotive business, he knew that this equipment contained "diesel fuel, hydraulic oils. Oils that are used for cooling electrical systems at that vintage time did contain PCBs." (PZC Tr. 11/6/03 at 74). An environmental assessment from 1995 noted "[e]mpty and partially filled 55-gallon drums[,] [s]everal abandoned fuel and hydraulic tanks[,] [c]onstruction debris and trash piles consisting of old furniture and TV sets" on the site. (PZC Ex. 33, Tab 3, p.1). Fuss & O'Neil, which had been monitoring the landfill for over 15 years, noted that the on-site contamination on the property had not been adequately investigated (PZC Ex. 31 at 5-7) and provided a summary of the VOCs and petroleum hydrocarbons in the soil on the subject property. (PZC Ex. 30 at Table 2).

The record before the PZC reveals that NEE had not adequately addressed these environmental issues. Triton's Bramley acknowledged that the standards upon which he relied to find the site safe dated from 1996 and noted that DEP was considering revising the volatilization formula. Further, he had not collected samples on the site itself to determine whether past activities contaminated the area. (PZC Tr. 9/4/03 at 93-94).

Although NEE presented evidence that the site was suitable for residential development, the PZC expressly found that "Fuss & O'Neill's observations and characterizations of

the Parcel to be substantially more credible than those of the Triton witnesses." (PZC Dec. at 12). As an example of the lack of credibility of NEE's witnesses, the PZC noted that Bramley said that the groundwater at the property was not affected by a leachate plume (PZC Tr. 9/4/03 at 93), only to have another Triton employee, Carter Glezen, acknowledge that a plume containing VOCs did exist under the property (PZC Tr. 11/06/03 at 112). (PZC Dec. at 13). Because the PZC is the fact-finder under the scope of review set forth in § 8-30g(g), *River Bend Assocs., Inc.*, 271 Conn. at 24, determinations of credibility remain with it. See *Konigsberg v. Board of Alderman*, 283 Conn. 553, 582 (2007).

The foregoing discussion and other evidence in the record amply demonstrates that sufficient evidence exists to support the PZC's finding that the adjoining landfill, with its attendant problems of leaching and methane migration, and the potential contamination on the site itself render the property unsuitable for residential development.

(ii) *Drainage and Storm Water Control*

The PZC found that NEE had not adequately addressed drainage issues on the site, which the Commission found had been stripped of all soils and "resemble[d] a strip mine." (PZC Dec. at 14-16; see PZC Ex. 34; App. at A176). In a memorandum dated October 1, 2003, the town engineer, Stephen B. Dudley, identified various problems with the drainage plan. (PZC Ex. 12; App. at A153-A154). For example, two of the biofilter/mitigation areas would drain into the ground yet the plan included no calculations as to the permeability of the soil. One of the basins consisted of merely a depression, and backup elevations indicated that it would overtop and flood Tabor Drive. The plan did not account for tidal influences. Analysis of storage capacity was lacking for most of the basins. The plan called for removal of material in some areas that would place the basins below high tide or in the water table. Infiltration galleries would have to be adjusted in the field for bedrock, but the plan did not include the depth to the bedrock or the water table or calculations regarding the ability of the soil to accept water. Further, the plan failed to include details as to the construction of each drainage installation. (*Id.*) Similarly, the DEP noted in a letter dated

October 28, 2003 that "few if any soil borings [were] taken where gallery systems are proposed," and "no permeability tests were conducted" for the plan. (PZC Ex. 45). When NEE finally responded to the PZC's June 2003 request for more information, the details supplied were inadequate because they relied on "assumptions concerning site conditions, not upon actual site investigations." (See PZC Dec. at 13; PZC Ex. 39).

Both DEP and the IWC require that soil be able to absorb the first inch of rainwater. (PZC Ex. 19 (IWC letter 9/25/03), Ex. 54 (9/16/02 DEP letter to PZC); App. at A187). Although the town engineer stated that testing should take place during the wet months from February to May (PZC Tr. 12/4/03 at 15), the DEP noted on the coastal site review that NEE submitted only one test from that period. These tests revealed areas of shallow bedrock, shallow groundwater, and dense to very dense soil. (PZC Ex. 45 at 2). The DEP noted that "there were few if any soil borings taken where gallery systems are proposed" nor were permeability tests conducted. Although the DEP stated that suitable soil conditions for galleries may exist on the site, further testing was necessary. (*Id.* at 1-2.) Thus, NEE failed to supply sufficient actual data for the PZC to evaluate whether the drainage plan would handle the runoff on the site. (PZC Dec. at 14).

When pressed for further details on these concerns, NEE was not responsive: "General details on infiltrators are provided . . . final design is not required until filing of CTDEP stormwater discharge permit." (PZC Ex. 39, Tab 5E, at 3). The information the PZC sought was required by the Branford Zoning Regulations § 31.4.2.7 (App. at A36-A37), and even if NEE might have been able to correct the deficiency, the lack of information prevented the PZC from formulating conditions to address the drainage issues. (PZC Dec. at 14). This is sufficient evidence of unresolved drainage issues.

(iii) *Site Restoration Concerns*

Because the site had been virtually denuded (see PZC Ex. 34 ("The job the developer faces is akin to that faced by someone seeking to restore an area that has been strip-mined"); App. at A176), it was undisputed that NEE needed to bring in substantial amounts

of soil to replace that which had been removed. Initially, NEE's consultant, Jeffrey Gordon, testified that between 300,000 and 500,000 cubic yards of material was necessary (PZC Tr. 9/4/03 at 90), but NEE's counsel later "corrected" this testimony to reduce this figure to only 60,000 cubic yards. (PZC Ex. 29). The PZC was not required to credit NEE's backpedaling. See *Konigsberg*, 283 Conn. at 582. The town engineer explained that it would take 30,000 truckloads to bring in 450,000 cubic yards of material. (PZC Tr. 10/2/03 at 33-34).

The PZC engaged an environmental consultant, Penelope Sharp, who reviewed NEE's site-restoration plan and identified numerous problems with it. (PZC Ex. 34 (Sharp letter 10/31/03); App. at A176). Sharp noticed that the grading in the plan did not change significantly from the existing site, which meant digging out existing soil and replacing it with natural soils. (*Id.* at 2; App. at A177). She questioned whether the material that NEE planned to import would support the proposed plantings because natural soil takes centuries to form. (*Id.* at 2-3; App. at A177-A178.) Because the plan called for 743 trees and none of the proposed species would likely survive in unspecified material that might only be six inches deep, the need for at least three feet of proper soil was significant. Sharp also noted that some of the property included the tidal basin, yet the plan proposed salt-intolerant species. (*Id.* at 3-4; App. at A178-A179).

In his November 6, 2003 report, the town engineer identified substantial problems with the planned methods for restoring the site, such as specific process for blending existing and organic materials, the equipment needed to do the work, the timing, and addressing unsuitable material on site. (PZC Ex. 50; App. at A183). He also believed that the staging areas for material were too far from the work areas to be reasonable. (*Id.*)

The foregoing evidence amply support's the PZC's conclusion that the plan for restoring the denuded site had significant flaws.

(iv) *Inland Wetlands*

Because NEE failed to obtain an inland wetlands permit, the PZC referred the matter to the IWC. (PZC Ex. 18). The September 25, 2003 IWC report stated that NEE's attorney

indicated that "he believed the proceeding was not legal and that he and the applicant would not participate in the hearing, submitting no additional materials or comments." (PZC Ex. 19 (IWC letter 9/25/03)). NEE's counsel also indicated his objection in an e-mail to the Town's attorney to any further reports by IWC after the August denial of its application. (PZC Ex. 29). The IWC therefore could only review the materials the Town submitted along with the materials from NEE's earlier application. (PZC Ex. 54 (IWC letter 9/25/03)).

The IWC's review identified several concerns: (1) that NEE would need to show that it could meet the requirement that the soil absorb the first inch of rainwater; (2) that any underground pollution would not become hydraulically connected to the wetlands or discharged into surface waters; (3) the source, distribution, and phasing of fill brought onto the property; and the effect that substantial fill would have on water quality. (*Id.* at 2).

In addition to the IWC's concerns, the limited review by IWC was problematic because NEE's Gordon claimed at the last night of hearings that "there is no tidal wetlands on the site." (PZC Tr. 11/6/03 at 129). If that was so, then the scope of the inland wetlands was greater and the effects of the plan on those additional wetlands were unreviewed by the IWC. Additionally, the evidence discussed above concerning the shallow water table and the leacheate plume presented additional concerns for the IWC. The IWC's concerns, the lack of sufficient review by the IWC, and NEE's lack of cooperation are sufficient to support the PZC's decision that it should deny the application.

The Town has demonstrated that in all four areas[6] it would have sustained its burden under the sufficiency prong of § 8-30g(g).

b. The Public Interest in the Health, Safety, and Environmental Concerns Outweighs the Need for Affordable Housing.

The record contains ample evidence concerning the housing stock available in Branford and the need for affordable housing in Branford. Citing the 2000 Census Bureau re-

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[6] A fifth substantial interest, the Coastal Site Review, is discussed infra at 24-31.

port, the PZC noted that 31.7% of owner-occupied units in Branford were valued at or below the affordable price of $149,999 (PZC Ex. 36, attach. F), while NEE's sales price on their application for the affordable units was up to $155,569. (PZC Ex. 79 Tab 8, at 8). The PZC further noted that while multi-family units increased significantly in the 1970s and 1980s, few moderately priced detached, single-family units were built in that period. (PZC Ex. 36 at 1). NEE never requested a zone change to permit single-family units.

Although only 3.98% of Branford's housing is deed-restricted affordable housing (*id.* at 2), 30% of Branford housing is affordable under HUD guidelines for families making 80% or less of area median income, and 19% is affordable for those families making 60% or less of area median income. (PZC Dec. at 19-20). The median price of condominiums in 2003 was $145,700, about $10,000 less than the proposed pricing of units in the project. (*Id.* at 18-19; PZC Ex. 36 at 1, attach. B). NEE's proposed contribution to affordable housing in Branford was limited and is outweighed the Town's substantial public interests.

i. *Environmental Concerns*

The record demonstrates that placing housing next to a landfill poses serious risks to public health, as shown by DEP's position against placing landfills next to existing housing developments. Indeed, taking property next to landfills to create buffer zones is a proper exercise of the powers of eminent domain. See *Scotland County v. Johnson*, 131 N.C. App. 765, 773 (1998) (use of land as buffer zone to landfill was a public use).

The concerns are substantial: leachate radiating from the landfill will likely contaminate groundwater; some of the contamination includes VOCs, which can escape into the air and cause asthma and cancer; methane from the landfill can escape into buildings and reach explosive levels; and significant questions remain concerning prior contamination on the property itself. Residential use of the property substantially increases the exposure to these risks given the increased amount of time of occupation on the property. Unlike *River Bend Associates*, 271 Conn. at 32, the risks to human health here are specific and not speculative. Furthermore, Branford is not in great need of the multi-family affordable hous-

ing NEE proposed, especially where the median price of existing condominiums in Branford was $10,000 less than NEE's affordable units. On this record, the substantial risk to public health and safety posed by exposure to toxic chemicals and methane explosions clearly outweighs the need for the affordable housing NEE proposed.

ii. *Drainage and Storm Water Control*

NEE's failure to provide for sufficient drainage and storm water control is also a substantial public interest concern. The absence of adequate drainage can cause flooding. Runoff from developed land can include fertilizers, herbicides, pesticides, and motor vehicle fluids that can adversely affect the ecosystem. The PZC sought information from NEE concerning the details for drainage, but NEE responded with information based on *assumptions* about the site, not investigation of actual site conditions. The refusal to provide this information precluded the PZC from evaluating the existing plan and formulating reasonable changes. The PZC cannot be expected to bear the burden of proposing reasonable alternatives if the applicant refuses to supply the necessary information.

iii. *Site Restoration Concerns*

The Town has a substantial public interest in seeing that the site—which was virtually strip-mined—is sufficiently restored to sustain vegetation. Besides addressing the aesthetics needed to make the units attractive to buyers, thereby ensuring a successful development, trees and plantings play an important role in preventing erosion and absorbing and filtering contaminants. Because most of the soil was removed, NEE would have to import substantial amounts of organic material. NEE's consultant initially indicated that as much as 500,000 cubic yards would be needed, but NEE's lawyer later stated that only 60,000 cubic yards was necessary. (PZC Ex. 54 (9/26/03 letter from Hollister); App. at A190).

Restoring the site is a substantial interest for Branford because of the environmental and aesthetic concerns, while the need in Branford for the kind of affordable housing NEE proposed is not substantial. Because NEE's proposal was inadequate, and because NEE failed to provide sufficient information from which the PZC could formulate a reasonable

alternative, the PZC properly denied NEE's application.

iv. *Inland Wetlands*

The lack of a proper inland wetlands permit provides another public interest that outweighs the need for affordable housing in Branford. The IWC report is not binding on the PZC but should receive "due consideration" from the PZC. *Carr*, 273 Conn. at 599. In *Carr*, the zoning commission improperly assumed that the denial of the permit categorically outweighed the need for affordable housing, thus failing to engage in the weighing process contemplated by Conn. Gen. Stat. § 8-26. *Carr*, 273 Conn. at 599. Here, the record shows PZC recognized its responsibility to weigh the lack of a permit and concluded that the issues raised by the IWC outweighed the need for affordable housing.

First, the IWC agreed with the DEP that the soil needed to absorb the first inch of rain water. NEE did not show that it met this requirement. Second, NEE failed to show that pollution from the site would not disperse into the wetlands. Third, NEE's process for filling the property with organic material and its resulting effect on the wetlands was not at all clear. Protecting the environment, including wetlands, is a substantial public interest. The failure of NEE to address these concerns clearly outweighs the need for the proposed affordable housing. NEE's failure to provide requested information prevented the PZC from formulating reasonable alternatives. The PZC properly denied the application on these grounds. See *Carr*, 273 Conn. at 590 (holding that withdrawal of wetlands application in the absence of on-going negotiations could be a proper basis to deny the application).

c. Reasonable Changes to the Proposal Were Not Possible.

The PZC concluded that reasonable changes were not possible to the project because it was unsuitable for residential development. (PZC Dec. at 22). First, because NEE sought to develop the Tabor site only, selecting another site was not an option. Second, the land abuts a landfill and nothing in the record suggests a feasible solution to the problems of leachate, VOCs, and methane. Cf. *River Bend Assocs.*, 271 Conn. at 32 (noting that complying with remediation regulations would address the commission's concerns in

that case). That DEP would not permit a landfill to be sited next to a residential property underscores the lack of adequate remedial measures in this case. It is difficult to see what measures would prevent these risks. Appropriately, the PZC's environmental consultant expressed skepticism that NEE's plan to create soil would succeed.

The lack of detailed information from NEE hampered the PZC in its search for reasonable changes. NEE failed to provide information on soil permeability, the quality of groundwater leaving the site, or the effects of the high water table and the tidal wetlands. (PZC Tr. 10/2/03 at 29-30). Despite a request to do so, NEE did not provide a map needed to complete the process showing whether the wetlands were tidal or inland. (*Id.* at 83.) The search for reasonable changes cannot occur in a vacuum. The legislature did not intend to absolve applicants from their burden of providing the necessary information,

The PZC doubted whether the project was economically viable without any changes whatsoever. (PZC Dec. at 22 n.19). The town engineer estimated that the project would cost $72.6 million and that total revenues would be approximately $75.3 million. This estimate would yield a profit of about $2.6 million or 3.63% return on development costs. The town engineer noted that reviewing NEE's figures would have been preferable but NEE had not supplied this information. (PZC Ex. 13). The PZC sought additional information regarding the financial viability of the plan. (E.g., PZC Ex. 27 (9/15/03 letter to NEE counsel)). When the PZC noted the lack of financial information at the hearing, NEE's counsel stated:

> You know exactly why that is. We're under the gun. The Town of Branford is trying to take this property by eminent domain. I'm not going to give you the economic data for this project in this context, because even if this were just affordable housing you're not entitled to it. Anyway, as I told Attorney Bellamy, you're not getting it.

(PZC Tr. 11/6/03 at 141; see also PZC Ex. 39, Tab 5E, at 12 (responding "Not pertinent" to a question concerning the estimated cost of the golf course)).

The information available to the PZC did not bode well for the financial viability of the project. According to NEE's application, the affordable units would sell for up to $155,569. (PZC Ex. 79, Tab 8, at 7-9). NEE's counsel represented that the market-rate units would

sell for $240,000 to $250,000. (PZC Tr. 9/4/03 at 29). Thus, the market-rate units would have to subsidize the affordable units by at least $100,000 per unit. (See *id.* at 30). Given the razor-thin margins, it was likely that any reasonable changes would undermine the economic viability of the project.

For these reasons, the record reasonably supports the PZC's conclusion that no reasonable changes would salvage NEE's proposal.

4. *The Town Would Have Prevailed Because of the Mandates of the Coastal Management Act.*

Even if the Town would not otherwise have prevailed under either § 8-30g(g)(2) or the three prongs of § 8-30g(g)(1), NEE cannot show that it would have successfully appealed the PZC's decision on the Coastal Site Review. The town engineer noted that western third of the site is within the coastal area. (PZC Ex. 14; App. at A159).

The Coastal Management Act (CMA), Conn. Gen. Stat. §§ 22a-90 through 22a-113c, seeks to preserve scarce coastal resources. § 22a-92; see *Vartuli v. Sotire*, 192 Conn. 353, 364 (1984), overruled on other grounds by *Leo Fedus & Sons Construction Co. v. Zoning Bd. of Appeals*, 225 Conn. 432 (1993). In broad strokes, the legislative goals and policies of the act set forth in § 22a-92 that apply to municipal planning and zoning commissions address development in coastal areas in a manner consistent with protecting the environment, particularly tidal wetlands. Any zoning changes affecting land within the coastal boundary must be consistent with this section. § 22a-106(e).

The PZC must consider whether the adverse impacts from the coastal development are acceptable, and the burden of proof is on the applicant. § 22a-106(a). In determining the acceptability of any adverse impacts, the PZC must consider the characteristics of the site, the beneficial and adverse effects on coastal resources, and the policies set forth in § 22a-92. § 22a-106(b). The applicant must demonstrate that the proposal is consistent with the policies articulated in § 22a-92. § 22a-106(c).

No appellate decision addresses the interrelationship between the CMA and the af-

fordable housing statute. Judge Prescott offered this observation when deciding an affordable housing appeal that contained a coastal site review.

> It is true that affordable housing applications are not among the zoning commission proceedings that are explicitly denominated in § 22a-105(b) as requiring coastal site plan approval. As discussed at length above, an affordable housing application seeking approval of a specific plan of development may not fall squarely within the traditional proceedings that are conducting by zoning commissions, particularly if the proposal does not conform to existing zoning regulations. On the other hand, an affordable housing application will usually contain an implicit request for a zone change as to use, thereby implication § 22a-104(e), which requires that the zoning agency consider the criteria and policies of the CMA in its decision. In any event, given the critical policies outlined by the CMA, it is inconceivable that the legislature would have intended that affordable housing projects be exempt from coastal site plan review, particularly since such affordable housing projects typically propose high-density development with the attendant environmental risks that such development entails.

*Landmark Development Group v. East Lyme Zoning Comm'n*, 2008 WL 544646, at *15 (Conn. Super. Feb. 2, 2008) (citation omitted) (App. at A65).

Judge Prescott did not reach the question of whether the more rigorous standard of review of affordable housing appeals applied to the coastal site review component of the application in that case as the reasons were sufficient under the standard set forth in § 8-30g(g). *Id.* at *15 n.11 (App. at A78). It is necessary here, however, to harmonize the competing interests set forth in these two statutory schemes.

General principles of statutory construction govern resolution of the interplay between the CMA and § 8-30g(g). First, the legislature is presumably aware of existing law and enacts new statutes so as to create a consistent body of law. *Board of Educ. v. State Bd. of Educ.*, 278 Conn. 326, 337 (2006). The CMA was enacted in 1978. P.A. 78-152. Thus, when the legislature enacted § 8-30g in 1989, P.A. 89-311, it presumably intended that the statute would operate harmoniously with the CMA.

Further, "[w]hen general and specific statutes conflict they should be harmoniously construed so the more specific statute controls." *Longley v. State Employees Retirement Comm'n*, 284 Conn. 149, 177 (2007) (citations and internal quotations omitted). As between affordable housing and general zoning laws, § 8-30g is more specific. *Wisniowski v.*

*Planning Comm'n*, 37 Conn. App. 303, 314, cert. denied, 233 Conn. 909 (1995). As between the CMA and general zoning laws, this Court has held that the specific time frames set forth in the zoning statutes also govern the CMA. *Vartuli*, 192 Conn. at 363.

A different conflict exists here in that § 8-30g(g)(1) refers to matters "the commission *may* legally consider" (emphasis added), while the CMA provides that the PZC "*shall* determine whether or not the potential adverse impacts of the proposed activity on both coastal resources and future water-dependent development are acceptable." § 22a-106(a). In other words, while the PZC may permissibly consider the usual concerns that arise in zoning matters, see Conn. Gen. Stat. § 8-2, the PZC *shall* consider the specific criteria set forth in the CMA. The reasoning of *Vartuli* leads to the conclusion that the specific requirements of the CMA trump the more general consideration of public policy in affordable housing appeals.

A related conflict is that § 8-30g places the burden on the PZC in affordable housing appeals to justify its reasons, while the CMA places the burden of justifying the proposal on NEE. § 22a-106(c). Once again, given the specificity of the CMA and the reasoning of *Vartuli*, it is logical to conclude that the burden the CMA imposes on applicants to justify their proposal trumps the burden that § 8-30g places on zoning commissions to justify their denial of a proposal. Even if it does not, this Court should adjust the nature of its plenary review. Given the applicant's burden under § 22a-106(a), the plenary review of the record should put the burden of persuasion on the applicant concerning any adverse coastal impact the development may have. At the very least, the Court should take a less skeptical view of the Town's reasons for denial based on its coastal site review. By doing so this Court will better balance the important, and in this case competing, legislative policies regarding affordable housing and preservation of scarce coastal resources.

Thus, while it may not be necessary to do so, the Town can show that the record contains sufficient evidence to support the PZC's findings that the development would have adverse effects on coastal resources and that NEE failed to demonstrate that its proposed

development was consistent with legislative policies of the CMA. The record further shows that the substantial public interest of protecting coastal resources outweighs the need for this affordable housing project and that no reasonable alternative exists.

a. Sufficient Evidence Exists of Potential Adverse Impacts.

The PZC conducted a coastal site plan review pursuant to § 22a-106 and concluded that the adverse impacts on coastal resources were unacceptable. (PZC Dec. at 26). The PZC identified five areas in which the project was inconsistent with coastal policies: filling, grading, and building construction will occur on streams on the site (see PZC Ex. 20 at 2; App. at A164); the substantial amount of fill proposed would lead to erosion and pollution of coastal waters (see PZC Exs. 12, 14, 50, 51; App. at A153, A159, A181, A185); flawed drainage system posed various problems such as reduction of salinity in adjacent waters, stagnant ponds in other locations, and flooding of the site and road (see PZC Exs. 12, 20, 50; App. at A154, A163); the number of units and the golf course exceeded what the land could sustain given its denuded state (see PZC Exs. 20, 50 (describing problems with site restoration plan) & 51 (discussing problems with restoring soil adequate for planting plan); App. at A163, A181, A185); and the plan would conflict with other uses in the area such as the landfill and the railroad tracks. (PZC Dec. at 25).

The evidence before the PZC sufficiently supports these findings. Particularly troubling is the amount of fill that would be needed to restore the site. A staff report before the PZC based on a review of the proposal noted that "[f]illing, grading and construction of buildings will take place in and around in-site streams." (PZC Ex. 20 at 2; App. at A164). Because of the absence of proper erosion controls, importing sufficient fill to cover the area with four feet of soil "will result in significant erosion and sedimentation, with consequent pollution of coastal waters and wetlands on and adjacent to the site." *Id.* The town engineer's report emphasized the importance of detailing erosion and sediment control but noted that the lack of details concerning these issues and the golf course. (PZC Ex. 14 at 3-4; App. at A161-A162).

Concerning drainage, the town engineer reported that the plan had no calculations concerning "the permeability of the soils and the length of time for this accumulated water to enter the ground." (PZC Ex. 12 at 2; App. at A154). The PZC could reasonably infer inadequate permeability would lead to runoff of freshwater into the tidal waters, thereby altering the salinity. The engineer also detailed the problems with some of the proposed filter basins that appeared to be below the high tide line and into the water tables. Because the water collected in these basins could not drain, stagnation would result. The report also noted that these basins would collect runoff from construction and from the proposed golf course. (*Id.*) It is reasonable to infer that such runoff could include chemical fertilizers, pesticides, engine oil, or other pollutants.

Peter Kaminsky of the Branford Conservation and Environment Commission echoed these concerns, noting that "retension basins will be hydrologically influenced by tidal waters and the Branford River . . . . This indicates a close hydrological influence [which] suggests that chemicals could find their way into these wetlands areas." (PZC Tr. 11/6/03 at 78, 80). Despite NEE's claimed attempts to reduce chemical runoff from the golf course, "[t]he management plan submitted with the earlier application for developing the site still calls for the use of several highly toxic compounds under some conditions." (*Id.* at 82). He noted that "paved surfaces and lawn in the residential area of the development constitute another source of chemicals finding their way into coastal wetlands and rivers." (*Id.*)

As for the ability of the site to support the project, the October 2, 2003 staff report noted that "[t]he site has been severely degraded, having been excavated to a depth of 10 to 15 feet below natural grade." (PZC Ex. 20 at 2; App. at A164). Two reports from the town engineer in November 6, 2003, detailed problems with the site restoration plan. For example, the plan to blend existing materials and fill with compost lacked the specific detail required to provide "a viable soil product." The plan failed to include critical details regarding the equipment necessary and the timing of the fill. (PZC Ex. 50 at 3; App. at A183). The second report by the town engineer noted that it was "highly questionable" that the soil

plan would support the proposed landscaping. That report also observed that the site contains bedrock and rubble that could not be amended to produce fertile soil and insufficient information existed as to the location of these items. (PZC Ex. 51; App. at A185). This evidence amply supports the PZC's conclusion that the site could not support the project.

The PZC expected numerous adverse impacts: degraded water quality through pollution, altered salinity, or altered temperature; degrading circulation patterns; degraded natural erosion patterns; degrading drainage patterns; destruction of wildlife and fish; and degrading tidal wetlands. (PZC Dec. at 25-26). It is not a large leap to infer that improper drainage, for instance, would dilute the salinity of the water into which it drained. (See PZC Tr. 10/2/03 at 85 (noting that excessive flow of fresh water impacts marine life) (test. of Rasmussen)). Nor does it take expert analysis to conclude the land would not support the project when the landscaping expert expressed serious doubts that the fill would support the proposed landscaping. Sufficient evidence supports the PZC's findings.

b. The Public Interest in Protecting Coastal Resources Outweighs the Need for this Affordable Housing Project.

Section 8-30g(g)(1)(A) requires the PZC and the reviewing court to consider "substantial public interests in health, safety, or other matters which the commission may legally consider." The CMA *must* be considered when evaluating a proposed affordable housing project within the coastal boundary. Changes made to zoning in coastal areas must be consistent with the policies set forth in § 22a-92 and the criteria established by § 22a-102 regardless of whether the municipality has established a specific conservation plan for the zone. § 22a-104(b). The PZC must undertake a coastal site review for all coastal site plans that seek a special exception or a variance. § 22a-105(a). Moreover, the zoning statutes are replete with references to coastal resources. See, e.g., § 8-2(b) (requiring shoreline towns to consider the ecosystem of Long Island Sound when enacting regulations); § 8-3(k) (providing for separate zoning districts for waterfront users as defined in § 22a-93); § 8-3b (requiring reports of regional planning agencies along the shoreline to in-

clude findings regarding the effect of a proposal on the ecosystem); § 8-23(d)(2) (municipal development plans for shoreline communities must be consistent with the CMA). Clearly, protecting coastal resources is an important legislative public interest.

To underscore the importance of protecting coastal resources, the legislature has placed the burden on the applicant to demonstrate that the project meets the requirements of the act. Section 22a-106(c) provides:

> Any persons submitting a coastal site plan as defined in subsection (b) of section 22a-105 *shall* demonstrate the adverse impacts of the proposed activity are acceptable and *shall* demonstrate that such activity is consistent with the goals and policies in section 22a-92.

(Emphasis added.) Here, NEE did not demonstrate that its proposal was consistent with the CMA. Instead, serious problems regarding site restoration, drainage, and the impact of up to half a million cubic yards of fill pose a significant risk to the coastal environment.

The record shows that NEE's proposal would have adverse impacts on coastal resources. Substantial fill and the runoff from the project would degrade water quality by introducing pollutants such as nutrients and suspended solids, as well as fertilizer, which is known to increase algae, altering oxygen levels. Introduction of substantial amounts of fresh water lowers the salinity of the tidal waters, altering the ecosystem. The significant changes resulting from these problems would harm wildlife and fish by altering their native habitat. Erosion of the proposed fill would lead to sedimentation, again with a substantially adverse effect on the environment. These are substantial public policies issues that the CMA underscores and that NEE has not resolved. By contrast, Branford has a good stock of affordable housing like NEE's project. The environmental harm to coastal waters that would result from the project outweighs the need for affordable housing in Branford.

c. Reasonable Changes Are Not Possible.

The simplest change—moving the project to a different site—was not possible, as NEE wanted to develop this particular parcel. Other changes to the plan are not possible either because NEE refused to provide sufficient information from which the PZC could as-

sess alternatives. The mandate to search for reasonable alternatives does not exist in a vacuum, and NEE's refusal to provide the necessary information is certainly a legitimate consideration for the PZC. In another context, this Court has recognized that a refusal to file proper applications constitutes a reason to deny an affordable housing proposal. See *Carr*, 273 Conn. at 590 (applicant's withdrawal of wetlands application without plans to file a revised application would be sufficient reason to deny application because of noncompliance with statute). A refusal to comply with regulations is akin to a refusal to provide the information necessary to assess the viability of a project in that the commission in both instances lacks the ability to assess and modify the plans to address public interest issues.

Even absent critical information from NEE, the record demonstrates that reasonable changes were not possible. The largest obstacle is the state of the property, which was virtually strip-mined. Restoring the site required up to a half million cubic yards of fill. The potential for substantial runoff into the tidal waters is obvious. The state of the land also poses insurmountable drainage problems because of the presence of bedrock and high water tables. These facts make clear that reasonable changes to the plan were not possible. Accordingly, the PZC properly denied the application on this ground.

5. *Conclusion as to § 8-30g*

The trial court's residential highest and best use conclusion cannot be sustained on the probability of the NEE's success in that appeal. The foregoing shows there are many ways NEE could have lost its § 8-30g appeal, any one of which is fatal.[7]

**B. NEE and the Owners Cannot Establish that NEE Would Probably Have Succeeded Before the PZC in Getting the Zone Changed to Residential.**

Concerning the second theory of NEE and the owners, namely, that the industrial-zone regulations were likely to be changed to permit residential development, they submitted nothing but wishful thinking. Approximately 70 of the acres had been zoned for indus-

[7] Moreover, NEE would have had to win outright because the expert testimony was based on approval of a particular development plan.

trial use in the General Industrial District No. 2 Zoning District ("IG-2") since 1956. The municipal agencies charged with overseeing the Town's land development gave no indication that they would change the property's land use restrictions to permit residential use of the property. In fact, the opposite was true. Although the PZC had granted permission to build a condominium complex on the property over fifteen years prior to the taking (see R. ), it had recently denied similar applications—one for affordable housing in 2003 and the other for market housing in 2002 (Defs' Ex. O)—in the fifteen months years surrounding the taking date.

The IWC also had denied an application seeking residential use of the property just six months prior to the taking. (IWC Ex. 24; App. at A191). Indeed, in the months just prior to the taking, the PZC *at NEE's request* amended the Zoning Regulations to eliminate the former 2002 Planned Development District designation, which might have provided a vehicle for obtaining a zone change. (PZC Exs. 76, 77).

The record makes it quite clear why it was wishful thinking that the Town would probably allow residential development: this property consists of denuded land adjacent an active landfill. The record demonstrates that the Branford Zoning Regulations prohibited residential use of the property at the time of the taking and further that it clearly was not reasonably probable that the Branford Zoning Regulations would be changed from industrial use. At the end of the day, the record does not support a reasonable probability that residential development would be permitted for either affordable or market-rate residential housing in the long-established industrial zone. Any contrary finding is clearly erroneous.

### C. The Testimony of the Appraisers Does Not Support the Conclusion as to Residential Use.

The testimony of the appraisers does not change the result. At trial, Hunter and Michaud explained that they had assumed, as the basis for their appraisals, that the land was used for NEE's proposed housing development. Based upon that assumption, they appraised the property at between $6.1 million and $6.5 million.

Expert opinion must be based on reasonable probabilities, not conjecture. *Aspiazu v. Orgera*, 205 Conn. 623, 632 (1987).

> Where in the opinion of the appraiser the property is not, on the date of the taking, being put to its highest and best use, it is incumbent upon the appraiser to provide the trier with sufficient evidence from which it could conclude that it is reasonably probable that the land to be taken would, but for the taking, be devoted to the proposed use by a prudent investor in the near future.

*Tandet v. Urban Redevelopment Comm' n*, 179 Conn. 293, 299 (1979).

As shown above, the record does not support a conclusion that the necessary zoning change was reasonably probable. Thus, the underpinning for the appraisers' opinions is unsound, rendering their testimony meaningless.[8]

**D. The Error Was Harmful.**

The remaining question is whether the improper conclusion concerning highest and best use "would likely affect the result." *Desrosiers v. Henne*, 283 Conn. 361, 366 (2007). "The highest and best use conclusion *necessarily* affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable." *United Technologies Corp. v. East Windsor*, 262 Conn. 11, 25-26 (2002) (emphasis added). Here, the court's valuation based on residential development equals about $60,000 per acre. Even though the judgment of $4.6 million is significantly less than the appraisers' numbers, which exceeded $6 million, the judgment is unsupported by the evidence for parcels without residential approval.

The court discussed Hunter's and Michaud's comparables extensively. (R. ) Hunter had eight comparables, but numbers 1, 5, and 7 had all approvals in place. He also placed much less weight on number 8 because it involved an apartment complex. The per-

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[8] The lack of objection to this testimony does not transform it into probative evidence.

> Evidence admitted without objection remains evidence in the case subject to any infirmities due to any inherent weaknesses. . . . If the evidence has no probative force, or insufficient probative value to sustain the proposition for which it is offered, the want of objection adds nothing to its worth and it will not support a finding.

*Marshall v. Kleinman*, 196 Conn. 67, 72 (1982) (citations and internal quotations omitted).

acre valuations of the other four, rounded to the nearest thousand dollars, are as follows:

2. $16,000 (Monroe)
3. $14,000 (North Branford) (for the raw and unapproved land sale)
4. $36,000 (Avon) (for partial approval)
6. $26,000 (Farmington/New Britain) (before § 8-30g approval)

Michaud used six comparables, but numbers 1, 2, 4, and 6 (2, 4, and 6 were the same as Hunter's 1, 7, and 5) had all approvals in place and 5 was the same as Hunter's 8. That leaves only 3, which is the same as Hunter's 3, at $14,000.

The evidence submitted by the appraisers, absent a conclusion that the highest and best use was residential, could not have supported a valuation anywhere near $60,000 per acre. The court's ruling was harmful and requires reversal.

## II. NEE AND THE OWNERS HAVE WAIVED THEIR RIGHT TO CLAIM THAT THEY WOULD HAVE PREVAILED ON A § 8-30g APPEAL

**Standard of Review**: Although waiver is normally a question of fact, where resolution of the claim turns on pleadings and not testimony, review is plenary. *C.R. Klewin Northeast, LLC v. Bridgeport*, 282 Conn. 54, 86 (2007).

In Issue I, the Town has assumed arguendo that NEE and the owners can now claim that they would have won an affordable housing appeal even though they never filed one. Ordinarily the Town's condemnation would appear to moot such an appeal, but this is no ordinary case. In the § 1983 action, S.C. 18132, NEE and the owners have claimed, thus far successfully, that the property was wrongfully taken.

Had NEE and the owners, even after the taking, pursued permanent mandatory injunctive relief and succeeded either here or the § 1983 action, they plainly would have been entitled to have the property returned. *Pequonnock Yacht Club, Inc. v. Bridgeport*, 259 Conn. 593 (2002). That holding demonstrates that the Town's condemnation by itself did not moot an appeal. Rather its viability would simply have had to await the fate of any prayer for injunctive relief. Having failed to file an appeal pursuant to § 8-30g, they have waived their right in this case to claim that they would have won such an appeal. "Waiver is

the intentional relinquishment or abandonment of a known right or privilege." *C.R. Klewin Northeast, LLC*, 282 Conn. at 87 (citation and internal quotations omitted).

III. THE IMPROPER LEGAL OPINION OF NEE'S EXPERT THAT THE § 8-30g DENIAL WAS REVERSIBLE ERROR SHOULD HAVE BEEN EXCLUDED.

**Standard of Review**: Review is plenary. *State v. Saucier*, 283 Conn. 207, 218 (2007).

Attorney Mark K. Branse testified on behalf of NEE as an expert witness in zoning law. (Tr. 6/26/07 a.m. at 93-94, 101-02; App. at A91-A92). Over objection, Branse testified that the trial court would have reversed the denial of the § 8-30g application. (*Id.* at 102, 108-09; App. at A92, A98-A99).

A witness may not provide an opinion on Connecticut law. *Webster Bank v. Oakley*, 265 Conn. 539, 551 n.10 (2003), cert. denied, 541 U.S. 903 (2004) Cf. *Updike, Kelly & Spellacy v. Beckett*, 269 Conn. 613, 652 n.30 (2004) (testimony amounted to improper legal opinion). By testifying that the PZC's reasons for its denial of NEE's affordable housing application lacked merit, Branse opined on the likely result under Connecticut law of NEE's appeal. That is a pure issue of law. *West Hartford Interfaith Coalition, Inc. v. Town Council*, 228 Conn. 498, 507 (1994). The applicability of the industrial zone exemption is also a legal question. The court improperly admitted Branse's testimony.

Branse's testimony was harmful. He said that had a final decision been reached, reversal was all but guaranteed. (Tr. 6/26/07 a.m. at 100-102, 109). The court's improper admission of Branse's testimony affected its highest and best use determination and the result of the trial. See *United Technologies Corp.*, 262 Conn. at 25. The improper evidentiary ruling requires reversal of the judgment.

## CONCLUSION

The judgment should be reversed and a new trial should be ordered on the value of the property at the time of the taking based on the zoning at the time of the taking.

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