

DOCKET NO. HHD-CV-14-6054388-S	:	SUPERIOR COURT
	:	
BERWICK FAIRCHILD & ASSOCIATES, LLC	:	JUDICIAL DISTRICT OF HARTFORD
	:	
v.	:	LAND USE LITIGATION DOCKET
	:	
TOWN PLANNING & ZONING COMMISSION OF THE TOWN OF FAIRFIELD	:	OCTOBER 21, 2015

MEMORANDUM OF DECISION

The plaintiff, Berwick Fairchild & Associates, LLC (Berwick Fairchild), appeals from the decision of the defendant, the Town Plan and Zoning Commission of the Town of Fairfield (commission), denying the plaintiff's proposed zoning regulation amendments, special permit, and coastal site plan applications for an affordable housing development. The plaintiff is the owner of property known as at 110 Berwick Avenue and 145 Fairchild Avenue in Fairfield. The proposed development would consist of thirty-three two-bedroom units to be built on 0.45 acres located at the terminus of Berwick and Fairchild Avenues. The commission conducted public hearings on April 8, April 22, June 10, and June 17, 2014. On August 12, 2014, the commission voted to deny the applications for a zoning amendment, a special permit and a coastal site plan. On August 22, 2014, the commission sent a notice of decision to Berwick Fairchild. The plaintiff commenced this appeal, pursuant to General Statutes § 8-30g, by service of process on the commission on August 29, 2014. The court heard oral argument, and received evidence on aggrievement, on July 21, 2015.

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The court finds that the plaintiff submitted an affordable housing application, consisting of an application for special permit and coastal site plan, that was denied by the commission. Pursuant to § 8-30g (f), the plaintiff is aggrieved. The court also finds that the plaintiff, as owner of the subject property, is aggrieved by the denial of its proposed zoning regulation amendments.

Standard of Review

Review of an affordable housing appeal is governed by § 8-30g. Section 8-30g (g), in relevant part, provides: “Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1) (A) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development If the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it.”

“[I]n conducting its review in an affordable housing appeal, the trial court must first determine whether the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but

not necessarily a likelihood, of a specific harm to the public interest if the application is granted. If the court finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determine independently whether the commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Citation omitted; internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission*, 271 Conn. 1, 26, 856 A.2d 973 (2004).

"The foregoing determinations present mixed factual and legal determinations, the legal components of which are subject to plenary review [T]he planning and zoning commission remains the finder of fact and any facts found are subject to the 'sufficient evidence' standard of judicial review." (Internal quotation marks omitted.) *Eureka V, LLC v. Planning & Zoning Commission*, 139 Conn. App. 256, 266, 57 A.3d 372 (2012).

"The record must establish more than a mere possibility of harm to a substantial public interest The record must contain evidence as to a quantifiable probability that a specific harm will result if the application is granted Mere concerns alone do not amount to sufficient evidence to support the denial of an affordable housing application pursuant to § 8-30g (g)." (Citations omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc. v. Zoning Commission*, 130 Conn. App. 36, 58, 21 A.3d 926, cert. denied, 303 Conn. 909, 32 A.3d 962 (2011).

The Proposed Development

The location and elevation of the project site were the topics of much discussion at the public hearings. The 0.45 acre site abuts Interstate 95. Berwick and Fairchild Avenues provide the only access to the property. The open ends of Berwick and Fairchild Avenues intersect with Kings Highway, a very busy road with two lanes in each direction. The subject project site is in close proximity to the Rooster River, is situated within the 100-year flood boundary, and has been designated as a Special Flood Hazard Area by the Federal Emergency Management Agency (FEMA). The applicant proposed to build an elevated three story building with ground level parking under the building. The first floor apartments would have a minimum elevation of twenty-three feet. The proposal consisted of thirty-three two-bedroom apartment units, with each floor having eleven units. Ten of the apartment units would be deed restricted for affordable housing units. The site plan provided for thirty-nine parking spaces and two handicapped spaces. The proposed setbacks were ten feet to the street, four and one-half feet on the side, and three feet to the rear.

The Intervenors

The intervening parties, Mary A. Vargas, Ronald P. Magboo, Kathleen Magboo, and Jennifer Dunnaville (intervenors) reside on either Fairchild Avenue or Berwick Avenue, within 100 feet of the subject property. The intervenors, their counsel, and other residents all spoke at the public hearings. They provided testimony as to flooding, parking, and traffic issues in the surrounding neighborhood of the proposed project.

Reasons for Denial of Special Permit and Coastal Site Plan

In acting upon the plaintiff's applications, the commission first addressed the proposed zoning amendments. The court chooses to first discuss the commission's decisions on the special permit and the coastal site plan applications. The decision of the commission is contained a six page letter to plaintiff's counsel dated August 22, 2014. The commission denied the special permit and coastal site plan and stated the following findings:

"1. There is sufficient evidence in the record to support a finding that the proposed development would pose substantial risks to public interests in health and safety. The increase of traffic and inadequate on-site parking and the threat of flooding as described above, create these risks.

"2. Those public interests outweigh the need for affordable housing.

"3. The record does not contain any evidence that provides the basis for reasonable conditions of approval that can be made to protect those public interests." (Return of Record [ROR], exh. 42, Bates no. [p.] 742.)

The court must first determine if the stated reasons for denial of the application are supported by sufficient evidence in the record.

Increase in Traffic

In the letter of decision, the commission stated: "Based on testimony, when vehicles are parked on the street and are also queued at the stop signs at the Kings Highway intersections, the road width would be 1 ½ cars wide." (ROR, exh. 42, p. 740.) Thereafter, the commission referred to the following evidence in the record. The chief of police testified that the queuing at the stop signs at the intersection of Berwick and Fairchild Avenues with Kings Highway created blockades

for emergency apparatus getting down the street. (ROR, exh. 25, pp. 370-87.) Photographs showing a ladder fire truck on Berwick Avenue and Fairchild Avenue were submitted at the April 22, 2014 hearing. (ROR, exh. 62, pp. 1039-60.) A town Traffic Safety Unit representative, Officer Frank Dimarco, stated that there presently exists extensive street parking because of the residential density on Berwick and Fairchild Avenues. He also stated that additional parking and traffic volume from the proposed development would increase the potential to delay emergency vehicles and increase queuing delays. (ROR, exh. 17, p. 109.) In addition, Town Engineer William Hurley expressed concerns about the increased delay at the Berwick Avenue and Fairchild Avenue intersections. (ROR, exh. 19, p. 128.).

The plaintiff's traffic expert, Michael Galante, opined that the Fairchild Avenue and Berwick Avenue intersections would be safe and able to accommodate emergency vehicles. It is apparent from the record that, in this case, Galante did not impress the commission with his credibility. At the April 8, 2014 public hearing, Galante reviewed his initial report (ROR, exh. 91, pp. 896-966) and discussed the level of service at the Berwick Avenue and Fairchild Avenue intersections. The level of service changed with the morning and afternoon traffic. The report showed the present, pre-project, levels of service for Berwick Avenue was D and E and for Fairchild Avenue, E and F.¹ The report also showed the average per vehicle delay at the intersections. The report indicated that presently, in the afternoons, vehicles on Fairchild Avenue turning left or right onto Kings Highway have a delay of 143.2 seconds, which creates a queue

¹ Table 6 of the traffic report (ROR, exh. 91, p. 939) contains the following note. "ITE publication for Traffic Access and Impact Studies for site development *A Recommended Practice* indicated that Level of Service ratings of A to D are normally considered acceptable for intersections (Level C or better is considered desirable). Levels of Service E and F are normally undesirable."

length of 98 feet. The report also indicated that, after construction of the project, the afternoon delay for vehicles turning left or right from Fairchild Avenue would be 202.2 seconds and create a queue length of 127 feet. (ROR, exh. 91, p. 939.).

At the April 8, 2014 public hearing, members of the commission expressed concern about the additional one minute delay caused by the project, and the queuing of vehicles at the intersection. In response, Galante told the commission to disregard his report because it did not accurately reflect the actual intersection wait times. Thereafter, at the April 22, 2014 meeting, Galante told the commission that since the last public hearing his office conducted observations of vehicles exiting Fairchild Avenue in the afternoon. He stated that the observed vehicle delay was 26.6 seconds. (ROR, exh. 25, p. 304.) In their letter of decision, the commission specifically found: “[Galante’s] abandonment of the original report in favor of the revised report is troubling to the Commission and the Commission finds therefore the traffic testimony to lack credibility.” (ROR, exh. 42, p. 740.).

It is obvious that the commission found the testimony pertaining to increased traffic at the King’s Highway intersections, and the problems for emergency vehicle access, to be credible, and also apparent that the commission did not accept Galante’s contrary opinions. “[A]n administrative agency is not required to believe any witness, even an expert” witness. (Internal quotation marks omitted.). *Kaeser v. Conservation Commission*, 20 Conn. App. 309, 316, 567 A.2d 383 (1989). “In *Kaufman v. Zoning Commission*, 232 Conn. 122, 156-57, 653 A.2d 798 (1995), our Supreme Court stated: ‘Although the commission would have been entitled to deny an application because it did not believe the expert testimony, however, the commission had the burden of showing evidence in the record to support its decision not to believe the experts — i.e., evidence which

undermined either the experts' credibility or their ultimate conclusion.'" (Emphasis omitted.) *King's Highway Associates v. Planning & Zoning Commission*, 114 Conn. App. 509, 523, 969 A.2d 841 (2009). In this case, Galante's own contrary report and statements undermined his credibility in the eyes of the commission. Furthermore, the statements of the chief of police, Officer Dimarco, and Town Engineer Hurley support the commission's findings regarding traffic congestion.

The increase in traffic, and the resulting congestion at the Kings Highway intersections, is not speculative. Galante's original report quantified the additional intersection delays from the project. The report stated the project would add almost a one-minute delay to an already undesirable Level F intersection. The statements of Chief of Police McNamara and Officer DiMarco as to problems of access for emergency vehicles constitute substantial evidence in the record to support denial of the application based upon traffic concerns.

On-Site Parking

The commission related the on-site parking provided in the proposed project to its effect on existing street parking. Town Engineer Hurley stated that the proposed development, with forty-one parking spaces for thirty-three two-bedroom units, did not contain enough parking. This amounted to less than 1.25 spaces per two bedroom unit. It was his recommendation that there should be two parking spaces for each two bedroom unit. (ROR, exh. 19, p. 127.) James Wendt, Assistant Planning Director, shared the same concerns as the engineering department. Wendt noted that a similar apartment building being constructed on Fairchild Avenue used a parking ratio of 1.25 parking spaces per bedroom. Under such a ratio, he calculated that the proposed project needed 82.5 spaces for the 66 proposed bedrooms. (ROR, exh. 19, p. 129.)

The commission concluded that the proposed project would likely result in additional on street parking. It relied on statements from the police chief that there is presently heavy usage of on-street parking which make it challenging for emergency vehicles to access the neighborhood. The commission found that the increased need for on-street parking would exacerbate this issue. The commission also found that this was “a public safety issue directly related to the number of parking spaces proposed.” (ROR, exh. 42, p. 741.).

The court does not find there is substantial evidence in the record to support a denial of the application on the basis of inadequate on-site parking. In reaching this conclusion, the court has considered two factors. First, it appears from the record that numerous cars already park on Berwick and Fairchild Avenues. The record does not show how any additional vehicles from the project, which most likely would not have available on-street parking spaces, would create a public safety issue. For example, the record does not establish there is a problem with double-parking on the streets that would impede the access of emergency vehicles. Second, the result of potentially inadequate parking at the project is that vehicles will have to park in areas away from Berwick and Fairchild Avenue. Such a situation does not create “more than a theoretical possibility of a specific harm to the public interest.” See *Autumn View, LLC v. Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. LND-CV-13-6043869-S (December 23, 2014, *Berger, J.*) (insufficient parking not a valid reason to deny affordable housing application).

Admittedly, inadequate parking would be inconvenient for tenants at the proposed project, but it is not a public safety issue. It must be emphasized that the parking for vehicles from the

project is a different issue than the vehicle traffic generated by the project, and its effect on the Kings Highway intersections. The former is not public safety issue, the latter, as discussed above, is.

Flooding in the Area of the Project

In the August 22, 2014 letter of decision, the commission made the following statements regarding flooding.

“The staff report on the Coastal Site Plan application indicates a concern for evacuation during conditions of flooding of the nearby Rooster River. The commission received testimony and photos for the record concerning past flooding events.

“It is certain that this development will flood from time to time. This site is situated within the 100-year flood boundary. It is designated a “Special Flood Hazard Area “by the National Flood Insurance Program which is managed by FEMA. This area is defined as the area that will be inundated by a flood event having a 1% chance of being equaled or exceeded in any given year.

“The town of Fairfield’s Engineering Dept. has been studying the threats of flooding in this area for years. Storm events, combined with the adjacent Rooster River have resulted in flash flood events. Example of these events in April, 2006 and August, 2012 are described in submitted incident reports.

“The record includes nine incident reports describing response activities which required wide-scale response from fire, police, public works and utility companies between 2006–2012.

“An April, 2006 storm required the evacuation of 30–35 people. The flooding caused several hundreds of thousands of dollars of damage to approximately 60 houses and businesses.” (ROR, exh. 42, p. 739.).

Prior to this application being filed, the plaintiff submitted an application for an inland wetland permit to the Fairfield Conservation Commission, which was approved with conditions.

The permit approval contains the following statement.

“[T]he site is located in a flood prone area with low-lying frequently flooded uplands on-site, an inland watercourse detention basin across the street on Berwick Avenue, and tidally-influenced Rooster River (a.k.a. Ash Creek) across the street on Fairchild Avenue. This site is at the bottom of the 11 square-mile Rooster River watershed located between Fairfield and Bridgeport. This watershed contains homes, businesses, and roads in the Kings Highway East area that are periodically flooded due to the encroachment and obstruction of floodplain storage and conveyance area by development, highway (e.g., I-95), and railroad, culverts. Further, increased urban watershed development in Fairfield and Bridgeport has simultaneously increased storm water runoff and decreased flood storage in the upstream watershed. *Convergence of these elements in the project area: increased upstream runoff, decrease floodplain storage, and decreased floodway discharge—has produced a significant flood problem in the area that is becoming increasingly severe.*” (Emphasis added.) (ROR, exh. 104, p. 1249.)

The Coastal Area Management Site Plan Review, conducted by Town Coastal Planner Joseph E. Bienkowski, contains the following statements.

“The site lies in a AE elevation 16.0' flood zone based on the 1988 North American Vertical Datum (N.A.V.D.) criteria. The lowest habitable floor elevation is proposed at 23.0' above mean sea level. The lot elevation varies from a high of approximately 11.0' along Fairchild Ave to a low of 8.0' at Berwick Ave.

“Vehicles being used to evacuate this complex in a flood event would have to travel for approximately one fifth of a mile to escape the flood waters. Flood depths along the lowest points of Fairchild Ave and Berwick Ave will reach 7' and 9' respectively during the base flood event creating at best a very hazardous evacuation dilemma. Flood depths of up to 8' will be experienced at the southwest side of the buildings' parking lot.

“At thirty three two-bedroom dwelling units on less than ½ acre, this proposal is obviously extremely dense especially considering that it lies well within the Coastal Special Flood Hazard Zone and Regulatory Floodway.

“Fairfield’s singular documented flood fatality since at least the Great New England Hurricane of 1938 occurred on nearby Halley Avenue in April of 2006.” (Emphasis added.) (ROR, exh. 13, p. 90.).

As the commission noted, the intervenors and others presented testimony at the public hearings as to recent flood events and the problems they caused. The intervenors also submitted numerous exhibits related to flooding and traffic in the area. (ROR, exhs. 96-126, pp. 1205-1332.)

The court finds there is substantial evidence in the record to support the commission’s determination to include flooding as a reason to deny the application.

Plenary Review

From a plenary review of the record, the court determines that the decision to deny the application based, in part, upon increased traffic and flooding was necessary to protect substantial public interests in health and safety, and that those public interests clearly outweighed the need for affordable housing in Fairfield. Furthermore, the court finds that such public interests cannot be protected by reasonable changes to the proposed development.

As noted above, the increase in traffic and the resulting congestion at the Kings Highway intersections is not speculative. Because the project abuts Interstate 95, only the Kings Highway ends of Berwick and Fairchild Avenues are open. The intersections are already at an undesirable level of service and the project will cause increased delays for vehicles entering onto Kings Highway. The longer delays will increase the length of vehicle queues at the intersections; this situation creates traffic congestion.

“[T]raffic problems and related safety concerns can be a valid reason for a denial . . . there must be more than a traffic increase, and either traffic congestion or an unsafe road design at or near the entrances and exits from the site.” *CMB Capital Appreciation, LLC v. Planning & Zoning Commission*, 124 Conn. App. 379, 399, 4 A.3d 1256 (2010), cert. granted, 299 Conn. 925, 11 A.3d 150 (2011) (appeal withdrawn September 15, 2011), quoting R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (3d Ed. 2007) § 51:7, pp. 185-86. The court finds that the Kings Highway intersections are near the entrances to the subject project. “The conditions which might make an intersection unsafe are many and varied. No one standard could ever be adopted to cover adequately all future cases. Judgment and experience must be applied in each instance, and an administrative agency such as the defendant may act upon its own knowledge and observation, as well as the evidence presented to it at a hearing.” *Blakeman v. Planning Commission*, 152 Conn. 303, 307-308, 206 A.2d 425 (1965), citing *Jennings v. Connecticut Light & Power Co.*, 140 Conn. 650, 675, 103 A.2d 535 (1954).

The commission found that this congestion would impact the ability of emergency vehicles, such as fire trucks, to access the site. This situation is exacerbated because there is no secondary access to the site. The traffic congestion and the related public safety issue of access for emergency

vehicles constitute a valid reason for denial of the application. The commission has therefore sustained its burden to show that its denial of the application based upon traffic congestion was necessary to protect substantial public interest in safety.

The defendants are obviously aware of the flooding problem at property, which is why they have elevated the first floor approximately thirteen feet above ground level. They remind the court that construction of residential structures in the floodplain is not prohibited by law or regulation. In the case of *United Progress, Inc. v. Planning & Zoning Commission*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-92-0513392-S (March 4, 1994, *Berger, J.*), the applicant made the same point, however the court found the goals of the Coastal Management Act, General Statutes § 22a-90 et seq., applicable here, to be relevant and significant:

“The applicant further argues and in fact, the Commission concedes, that there is no federal, state, or municipal prohibition against residential construction within a V-zone. While this may be true, it still would not alter the fact that the Commission must consider the goals, policies, and adverse impacts defined in the [Coastal Management Act] when it reviews a coastal site plan and makes its decision. Flood hazards and the associated dangers are specified throughout the [Coastal Management Act, see, e.g., General Statutes §§ 22a-92 (A) (5), 22a-92 (b) (2) (F), and 22a-92 (b) (1) (E)], and must be considered in order to determine whether or not a site plan is consistent with the [Coastal Management Act]. Certainly the potential dangers to life and property must be recognized as an adverse impact of siting residential development in a severe flood hazard zone Connecticut has clearly recognized the validity of land use restrictions to control flood hazards. *Vartelas v. Water Resources Commission*, 146 Conn. 650, 153 A.2d 822 (1959). Indeed, regulation may in many instances result in prohibition. *Shorehaven Golf Club, Inc. v. Water*

Resources Commission, 146 Conn. 619, 625, 153 A.2d 444 (1959).” *United Progress, Inc. v. Planning & Zoning Commission*, supra, Superior Court, Docket No. CV-92-0513392-S. In this case, the commission acknowledged that “even though the building is raised, the residents would still need to be evacuated and vehicles on site will need to be moved in a flood event.”

The coastal area management site plan review specifically found that flood depths along Fairchild and Berwick Avenues will reach 7 to 9 feet and will create “at best a very hazardous evacuation dilemma.” Flooding at this site is not a theoretical possibility, but in fact, is a somewhat regular occurrence. The defendants do not dispute that the record contains evidence of significant flooding at the project site in 2006 and 2012. The Conservation Commission noted that the site “is located in a flood prone area with low-lying frequently flooded uplands on site. . . . Convergence of these elements in the project area . . . has produced a significant flood problem in the area that is becoming increasingly severe.”

The intervenors submitted into the record numerous photographs showing flooding conditions in the area. (ROR, exh. 85, pp. 1113-1168.) It is apparent from the record that the flooding occurs with little notice, which creates a “flash flooding” situation. See, e.g., testimony of Police Chief McNamara (ROR, exh. 25, p. 393). When flooding occurs, the area must be evacuated. Residents and emergency personnel are at risk during evacuation efforts. It is undisputed by the plaintiffs that flooding, and the consequent threat to property, is a substantial interest that the commission may consider. See *Forest Walk, LLC v. Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-02-0518161-S (November 13, 2008, *Frazzini, J.*) (“[t]here is no doubt that flooding, and the consequent threat to life and property, is a substantial public interest that the commission may consider”).

Considering the evidence in the record, the commission has sustained its burden to establish that a denial based upon flooding concerns was necessary to protect substantial interests in health and safety.

The court concludes that the public health and safety issues of traffic congestion and flooding at the site clearly outweigh the need for affordable housing. It is undisputed that there is a need for affordable housing in Fairfield. The proposed project consists of thirty-three two-bedroom apartments, which would include ten affordable housing units. The commission considered the risks to public safety of the residents at the proposed project, and the residents of the Berwick Avenue/Fairchild Avenue area. There is a public safety risk from the expected flooding at the property and the need for emergency personnel to evacuate residents from the area. There is also a public safety risk from the fact that the Kings Avenue intersections are presently at an undesirable level of service, which will be made worse by the project. This level of service will result in congestion, which will impede the access of emergency vehicles to the area. These risks to prospective occupants of the project, and the other residents in the area, clearly outweigh the need to create ten affordable housing units.

The “policy underlying affordable housing appeals includes the discouragement of obstacles which are not of substantial importance to public health and safety.” *CBM Capital Appreciation, LLC v. Planning & Zoning Commission*, supra, 124 Conn. App. 379. In this case, the flooding issues at the site and the problems of access for emergency vehicles to the site were substantial obstacles that could not be discouraged by the commission. In reality, not every project site will support every affordable housing project.

In arguing that the commission has not sustained its burden of proving that public safety issues outweigh the need for affordable housing, the defendant points to the fact that in 2012 the commission permitted a fifty-four unit affordable housing development at 130 Fairchild Avenue, directly across the street from the subject property. The development, known as Garden Homes, is situated in the floodplain of the Rooster River and lies within a special flood hazard area. The record here is replete with references to the Garden Homes development by the plaintiff, the commission, and the opponents of this project. It does not appear from this record that the Garden Homes project was completed and occupied when the public hearings on this application were held.

The record for the Garden Homes application is not before this court. The notice of decision in this case did state that “[t]he Commission is familiar with another [§] 8-30g development currently under construction directly across Fairchild Avenue from this proposal. That application was approved through a settlement.” It is obvious from the record that the commission considered the impact of the Garden Homes project on the general area of this project in its decision making process. (ROR, exh. 39, p. 677.) It is also reasonable to conclude that they considered the cumulative adverse effect of the subject project upon the Berwick Avenue/Fairchild Avenue area when they stated their reasons to deny the subject project.

In reviewing this decision of the commission in this case, the court can only look to the record of this case. General Statutes § 8-30g (g) provides in relevant part that “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. . . .” (Emphasis added.) The decision

of the commission in another case, with another record, is not determinative of the outcome of this appeal. The commission has sustained its burden to prove public safety interests outweighed the need for affordable housing at this site.

Reasonable Changes

Pursuant to § 8-30g (g) (1) (C), the commission has the burden of proving that the “public interests cannot be protected by reasonable changes to the affordable housing development” The commission specifically considered changes to the development during its August 12, 2014 executive session. Because of the issues presented by the development, the only possible change to the project was a drastic reduction in the number of bedrooms or units. In fact, the commission staff recommended that the project be approved with conditions, one of which was that the number of bedrooms be reduced to twenty-seven, which would result in thirteen two-bedroom units. (ROR, exh. 36, p. 636.) At the June 17, 2014 public hearing, when the plaintiff’s attorney was questioned about an approval allowing a fewer number of units, he stated that the record supported the number of units requested. (ROR, exh. 33, p. 590.)

The commission considered approving the application with fewer units, but ultimately concluded that there was not sufficient information in the record to support such an approval. As one commissioner stated, “[T]here isn’t evidence in the record which would support our finding for a specific number of units one way or the other having been reviewed by an engineer to say x number of units would be safe” (ROR, exh. 39, p. 730.) The commission has sustained its burden of proving that the public interests discussed above could not be protected by reasonable changes or conditions.

Zoning Amendments

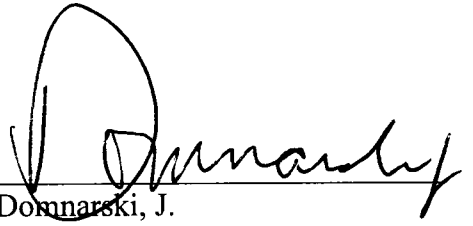
As part of the affordable housing application, the plaintiff filed an application to amend the zoning regulations and change the zoning district of the subject premises to allow construction of the proposed affordable housing project. The commission denied these applications because of the proposed density, concerns about health, welfare and safety of the neighborhood, and traffic congestion.

Although the proposed zoning regulation amendment and zone change were filed with the affordable housing development application, under the law it was not necessary for the plaintiff to amend the zoning regulations and change the zoning in order for the project to be approved. “[Z]oning compliance is not mandatory prior to approval of an affordable housing [site plan] application.” *Wisniowski v. Planning Commission*, 37 Conn. App. 303, 319, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 981 (1995). The plaintiff admits in its brief that the reason for requesting a text amendment and zone change was to avoid the development being classified as nonconforming. It is the plaintiff’s position that such conformity would be advantageous if the property were destroyed and in need of being rebuilt. The main focus of the plaintiff’s brief is the decision regarding the project itself, and it only briefly mentions the zoning changes.

The commission necessarily had to consider the plaintiff’s proposed zoning changes in conjunction with the plaintiff’s affordable housing application because they were “inextricably intertwined.” See *River Bend Associates, Inc. v. Zoning Commission*, supra, 271 Conn. 31. The same considerations that supported denial of the affordable housing applications, therefore, also supported denial of the zoning changes.

CONCLUSION

The commission has sustained its burden under § 8-30g as to its decision to deny the affordable housing and related applications for the plaintiff's proposed project. The appeal is dismissed.


Domnarski, J.