

DOCKET NO.: HHD-CV-19-6115394-S : SUPERIOR COURT
 HOUSING AUTHORITY OF THE : JUDICIAL DISTRICT OF HARTFORD
 TOWN OF BRANFORD, ET AL., : LAND USE DOCKET
 V. :
 TOWN OF BRANFORD PLANNING : October 8, 2020
 AND ZONING COMMISSION :

DOCKET NO.: HHD-CV-20-6122425-S : SUPERIOR COURT
 HOUSING AUTHORITY OF THE : JUDICIAL DISTRICT OF HARTFORD
 TOWN OF BRANFORD, ET AL., : LAND USE DOCKET
 V. :
 TOWN OF BRANFORD PLANNING : October 8, 2020
 AND ZONING COMMISSION :

MEMORANDUM OF DECISION

I. INTRODUCTION AND BACKGROUND

This appeal arises from an effort by the plaintiffs, Housing Authority of the Town of Branford (BHS), property owner and applicant, and Beacon Communities, Inc. (Beacon), an affordable housing management company and co-applicant, to obtain approval from the respondent, Branford Planning and Zoning Commission (Commission), for a proposed redevelopment of Parkside Village, an existing, affordable, multi-family housing complex in Branford. Following a history of applications, submissions and hearings dating back to 2016, the plaintiffs' project was approved by the Commission by a vote of three-to-two, but with conditions that the plaintiffs challenge.

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The existing Parkside Village is a fifty unit, age and income restricted development built in the early 1970s and located on some 5.02 acres on South Montowese Street in the Town of Branford (Town). Abutting BHS's property to the rear, away from South Montowese Street, is property owned by the Town, including a park containing baseball fields known as Sliney Fields. BHS entered into an agreement with Beacon to redevelop Parkside Village and, during 2016, filed an application for a Planned Development District containing a building of seventy-five housing units. Funding for the redevelopment was proposed to come primarily from the federal Low Income Housing Finance Authority and the development would qualify as assisted housing. The initial plan faced significant, public opposition and was withdrawn. Return of Record (ROR) App. #17-9.4, Exhibit 1. Thereafter, the applicants, in cooperation with the Town, conducted a search for a location for the development. The search concluded that the existing, 5.02 acre site on South Montowese Street was the most suitable. Supplement to ROR, 10/5/17 Transcript (Tr.), pp. 12-13. A new set of applications was submitted in September, 2017, proposing a sixty-seven unit building. ROR, App. # 17-9.4, Exhibit 1.

As site planning was underway during 2017, it was discovered, apparently to the surprise of both the Town and BHS, that a portion of the Town's Sliney Fields public park was actually on property owned by BHS and that several parking spaces used by residents of Parkside Village were actually on Town property. ROR, App. #17-9.4, Exhibit 1. The plaintiffs and the Town reached an agreement under which BHS would convey some 21,720 square feet of its property that had long been used as a portion of Sliney Fields to the Town, and the Town would convey some 8,251 square feet of Town property that has been used for parking by Parkside Village residents to BHS. Id.

A driveway known as Sliney Road runs along the northwest edge of the BHS property from South Montowese Street to the Town's Sliney Fields. Id. The portion of the driveway closest to South Montowese Street is entirely on BHS property. Although not dedicated as a public street, it has been used by the public to access Sliney Fields from South Montowese Street, without objection from BHS. The driveway provides the only direct vehicle access to Sliney Fields.

As part of its redevelopment proposal, BHS and Beacon agreed to repave and regrade parking spaces along the northwestern boundary of the Parkside Village property, accessible via Sliney Road, for public use in connection with Sliney Fields. They also agreed to grant the Town formal permission for the public to continue to use the portion of Sliney Road on BHS property to access Sliney Fields. See ROR, App. #17-9.4, Exhibit 124, p. 12. The redevelopment plan would move all parking for Parkside Village residents and visitors to a new parking lot that would be accessed directly from South Montowese Street. Sliney Road would be used only to access the repaved and regraded public parking for Sliney Fields. See Supplement to ROR, pp. 605, 739 of 1206.

In the early stages of the plaintiffs' effort to develop a new Parkside Village, the Town Fire Marshal raised concerns about access to the proposed new building for emergency vehicles. ROR App. # 17-9.4, Exhibit. 29, pp. 15-16. As the applicants were preparing their application a plan, supported by the Branford Parks and Recreation Department, to construct a new driveway or roadway from Melrose Avenue to Sliney Fields emerged. The proposed roadway would cross Town land adjacent to the closed Indian Neck School and connect to Sliney Fields and the planned, repaved and regraded public parking area behind the Parkside Village property. This plan was viewed by many as advantageous to the Town because it would improve what is now

problematic access to Sliney Fields and mitigate existing drainage and parking problems.¹ The plan would also provide emergency vehicle access to the proposed new Parkside Village development to address the Fire Marshal's concerns.

What the parties have referred to as the Melrose Avenue Access proposal was approved unanimously by the Town Planning & Zoning Commission on September 7, 2017. ROR 19-2.4, No. 20, pp. 65-66. Shortly thereafter, BHS and Beacon filed three applications relating to their proposed redevelopment of Parkside Village: A site plan/coastal site plan, a proposed amendment to the Branford zoning regulations to create the Parkside Assisted Housing District, and an application to re-zone Parkside Village to the new proposed housing district. The applications incorporated the proposed Melrose Avenue Access roadway as an additional point of emergency vehicle access, in addition to the main entrance and parking area of the proposed new building, to Parkside Village I. The applicants recognized that the Melrose Avenue Access plan, which was perceived as offering public benefits apart from supporting a second point of emergency vehicle access to Parkside Village, would require approval from Branford's Representative Town Meeting (RTM).

¹ The administrative record is unclear as to who first suggested the plan to construct a road or driveway from Melrose Avenue. The plaintiffs assert that the plan was first hatched by Town Parks and Recreation officials, who were eager to improve access to and parking for the public using Sliney Fields. The Commission challenges that assertion. During a public hearing on November 16, 2017, Commission Chairman Andres stated that the Town presented the Melrose Avenue Access as a needed improvement apart from the Parkside Village proposal. Supplemental ROR, p. 326 of 1206. Regardless of who first raised it, the record is clear that the Town Parks and Recreation Department supported it. During a September 7, 2017, Commission meeting, the Town's Recreation Director described problems with access to the Town ballfields, drainage, and parking. He noted that the plan would add fifty parking spaces, including six handicapped spaces. ROR App. # 19-2.4, Exhibit 20, p. 66. The record is also clear that current access to and parking for Sliney Fields, which now requires the use of Sliney Road and BHS property, is widely viewed as problematic, including by members of the Commission. See, e.g., Supplement to ROR, pp. 326, 745-747.

Notwithstanding the Commission's apparent endorsement of the Melrose Avenue Access, a staff report prepared for the Commission's October 19, 2017, meeting expressed hesitation about reliance on that access to address the Commission's requirement, based on the Fire Marshal's input, of additional emergency vehicle access to the redeveloped Parkside Village. The Town Engineer noted the need for a completed design, cost estimates, and funding for the roadway. The Town Planner expressed the view that there would need to be an easement or other arrangement in place to assure that access from Melrose Avenue would continue to be available. ROR App. # 17-9.4, Exhibit 29.

In January, 2018, the Commission voted three-to-two to approve the applications, with a condition that there be additional emergency vehicle access to the rear of the property via the Melrose Avenue Access plan. Although the applications were approved by majority three-to-two vote, the Commission concluded that a supermajority, four-to-one, vote was required to approve the rezoning proposal because a protest petition had been filed pursuant to General Statutes § 8-3 (b). Therefore, the Commission deemed the applications failed. ROR App. # 17-9.4, Exhibit 124. The applicants appealed.

While the applicant's appeal of the protest petition was pending, the RTM voted overwhelmingly, eighteen to six, to deny the easement needed to permit the construction of the Melrose Avenue Access. ROR App. # 19-2.4, Exhibit 6. The administrative record does not shed any light on the reasons for the RTM's denial. Although the Superior Court later sustained the applicant's appeal of the protest petition and effectively reinstated the Commission's majority approval of the plaintiffs' applications, the applicants could not satisfy the Commission's condition of additional emergency vehicle access via Melrose Avenue in light of the RTM's rejection of the Melrose Avenue Access plan.

In February 2019, the applicants submitted a revised site plan. To address the Fire Marshal's requirement for emergency vehicle access in light of the rejection of the Melrose Avenue Access, they proposed widening Sliney Road and improving it to fire lane standards to provide emergency vehicle access to the rear of the proposed Parkside Village. The revised plan showed space for an emergency vehicle pullover and again proposed regraded and repaved public parking for Sliney Fields, accessed by the improved Sliney Road on BHS property. See ROR App. # 19-2.4, Exhibits 1-13. These changes were described as "Phase I improvements." ROR App. # 17-9.4, Exhibit 124. The Fire Marshal preferred the Sliney Road plan to the Melrose Avenue Access plan, and the Commission ultimately approved the plan that included the Phase I Improvements, again by a three-to-two vote. But the Commission added a new set of conditions. New condition 5.c required the applicants to obtain from the Town a deed restriction or equivalent legal instrument prohibiting any building or physical modifications to the Phase I improvements on Town property that would impede emergency vehicle access without the approval of the Fire Marshal, the Police Chief and the Town Counsel. The Commission also added condition 5.d, requiring the applicants to provide a similar deed restriction or equivalent legal instrument prohibiting modifications on property of BHS that would impede emergency vehicle access. ROR App. # 19-2.4, Exhibit 59.

The plaintiffs requested clarification of several of the conditions included in the Commission's approval. On August 14, 2019, the Commission responded, through counsel, clarifying several conditions. The Commission left unchanged conditions 5.c and 5.d. ROR App. # 19-8.11, Exhibit 7. The Commission's counsel explained the rationale underlying condition 5.c:

“This condition is necessitated by the fact that the applicant has proposed that emergency services use Town property to both access and serve the proposed building in the event of emergency, and there needs to be explicit assurance that these areas will be available and maintained for emergency services for the life of the facility.” Id.

After receiving the Commission’s response, the plaintiffs submitted an application to modify the site plan and the Commission’s conditions by removing the requirement for a deed restriction or similar instrument and proposing, in lieu of conditions 5.c and 5.d, a condition that would prohibit modifications to the Phase I improvements, including the emergency vehicle pullover, without the approval of the Commission. The applicants asked that the Commission consider, in the alternative, moving the emergency vehicle pullover entirely onto BHS property or eliminating the emergency pullover entirely. ROR App. # 19-8.11, Exhibit 1-2.

In its resolution dated November 21, 2019, the Commission approved the proposal to move the emergency vehicle pullover entirely onto BHS property, but did not accept the plaintiffs’ alternative plan to eliminate the pullover. The Commission modified condition 5.c to require a legally binding agreement prohibiting the Town or any successors from constructing any building or physical modifications to the newly-defined “Emergency Vehicle Operations Area” - consisting of the emergency vehicle pullover and the Phase I improvements – that would impede access by emergency vehicles or personnel. The Commission modified condition 5.d to require a similar agreement applicable to the BHS property within the newly-defined “Emergency Vehicle Operations Area.” ROR, App. # 19-8.11, Exhibit 28. The Commission describes these modifications as simple clarifications. The plaintiffs describe them as effecting a “wholesale change” because, they argue, the area covered by condition 5.c was expanded far beyond the

Commission's prior resolution. The plaintiffs' appeal is from the Commission's November 21, 2019, resolution.²

The plaintiffs challenge condition 5.c and 5.d. They argue that the requirement that they obtain legally binding agreements from the Town, which would act through the RTM, is pretextual and was imposed at the behest of the RTM as a strategy to defeat their fair housing proposal. They argue that such agreements are unnecessary to public safety because: 1. The record establishes that the main entrance, driveway and parking lot of the proposed new development meets all fire and other code requirements; 2. That emergency vehicles are authorized to drive anywhere and so there is no need for a binding agreement to ensure their access via Sliney Road, even if a second point for emergency vehicle access were required; 3. That the assertion that, absent a binding agreement prohibiting it, the Town might obstruct access to Sliney Fields, which has been used by the public for many years, is "completely speculative."

II. DISCUSSION AND ANALYSIS

a. Standing

Under General Statutes § 8-30g (f), "[a]ny person whose affordable housing application is denied, or is approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development . . . may appeal such decision pursuant to the procedures of this section." "It is well settled that [p]leading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an administrative appeal. It is [therefore]

² The plaintiffs filed an appeal, Docket No. CV-19-6115394S, from the Commission's June 12, 2019, resolution, while they were awaiting a response to their request for clarification of that resolution. That appeal has been consolidated with, and as a practical matter is subsumed by, the plaintiffs' appeal from the Commission's November 21, 2019, decision, Docket No. CV-20-6122425S. This decision applies to both appeals.

fundamental that, in order to have standing to bring an administrative appeal, a person must be aggrieved. Standing [however] is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented.” (Internal quotation marks omitted; internal citations omitted.) Bongiorno Supermarket, Inc. v. Zoning Bd. of Appeals of City of Stamford, 266 Conn. 531, 537–38, 833 A.2d 883, 887–88 (2003).

“The fundamental test by which the status of aggrievement ... is determined encompasses a well-settled twofold determination. First, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision.” (Internal quotation marks omitted.) Quarry Knoll II Corp. v. Planning & Zoning Commission, 256 Conn. 674, 703, 780 A.2d 1 (2001).

There is no dispute that BHS, as owner of the subject property and as applicant, and Beacon, as applicant and, by contract, the intended developer of the property, have specific, personal and legal interests in this dispute. The record also makes clear that the interests of BHS and Beacon have been injuriously affected by the Commission’s decision. Although the Commission granted the application, it imposed conditions that threaten to inflict substantial, adverse impacts on the viability of the proposed development. To comply with the Commission’s conditions, the applicants must obtain approvals from the RTM, which previously, and by a wide margin, denied

the Melrose Avenue Access proposal that resulted in the failure of the plaintiff's prior application, notwithstanding the apparent public benefit of that proposal as perceived by the Town's Parks and Recreation officials, among others. In addition, the record reflects the hostility of at least one member of the RTM to the development generally, based on his asserted sense of the preferences of his constituent Town citizens. Supplement to Return of Record, p. 553 of 1206. While these facts do not conclusively establish that the Commission's conditions would cause the development to fail, they are sufficient to establish more than a remote possibility of such a result. "Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected." (Internal quotation marks omitted.) *Quarry Knoll II Corp. v. Planning & Zoning Commission*, supra, 256 Conn., 702. The history of the plaintiffs' efforts to develop affordable housing in Branford since 2016, including their pursuit of three appeals, amply demonstrates that the plaintiffs have a direct and substantial interest in this appeal and will vigorously represent that interest to ensure that the court's decision is "forged in hot controversy." *Bongiorno Supermarket, Inc. v. Zoning Bd. of Appeals of City of Stamford*, supra, 266 Conn., 537-38. The plaintiffs are aggrieved under General Statutes § 8-30g (f) and therefore have standing to prosecute this appeal.

b. The Merits

General Statutes § 8-30g governs affordable housing appeals. Section 8-30g (g) 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 reasons cited for such decision are supported by sufficient evidence in the record. The commission also shall 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 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 may legally 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).” (Citation 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). “Sufficient evidence in the context of § 8-30g (g) is less than a preponderance of the evidence, but more than a mere possibility. . . . [T]he zoning commission need not establish that the effects it sought to avoid by denying the application are definite or more likely than not to occur, but that such evidence must establish more than a mere possibility of such occurrence.” (Internal quotation marks omitted.) *Autumn View, LLC v. Planning & Zoning Commission*, 193 Conn. App. 18, 38, 218 A.3d 1101, cert. denied, 333 Conn. 942, 218 A.3d 1048 (2019).

i. Is The Commission’s Decision Supported By Sufficient Evidence?

The Commission’s decision to require that the applicants obtain a legally binding agreement from the Town prohibiting the Town from constructing any building or physical modifications on Town property that would impede emergency vehicle access via Sliney Road to the proposed regraded and repaved driveway and parking area for Sliney Fields is based on the recommendations of the Town Fire Marshal. The Commission’s decision to require the applicants to provide a similar agreement with respect to their own land was based on those same recommendations. The Fire Marshal advised the Commission that a second route of access, in addition to the proposed development’s parking lot and main entrance off of South Montowese

Street, was necessary for emergency services access in the event of a building fire at the proposed Parkside Village. The Fire Marshal opined that such a fire could require deployment of multiple fire apparatus and that access to the rear of the proposed building for such vehicles to stage and turn around was necessary to protect the safety of building residents.

The applicants dispute that a second point of access to the proposed new building for emergency vehicles is necessary. They point to the analyses of their fire expert, who explained that the main entrance and parking lot of the proposed new development, along with other fire safety features, provide sufficient access to satisfy all requirements of the Connecticut Fire Safety Code and the Connecticut Fire Prevention Code. ROR App. # 17-9.4, Exhibit 16; ROR App. # 19-2.4, Exhibit 52; ROR App. # 19-8.11, Exhibit 18. None of the Town Fire Marshal's several communications to the Commission expressed disagreement with that point or identified any fire code shortcomings in the proposal. Nevertheless, from the early stages of the underlying proceedings the Fire Marshal consistently asserted his opinion that a second point of access, to the rear of the proposed new building, was necessary to ensure the safety of building occupants in the event of a catastrophic fire.

The applicants do not dispute that, to the extent that a second emergency vehicle access is necessary for public safety, their proposal to provide that access via Sliney Road would require emergency vehicles to drive onto the Town property. The Commission reasoned that, while the involved areas of Town property are currently "open to the public and traversable by emergency vehicles[,] . . . there is no obligation on the Town (or any future successor in interest) to maintain the Town Property in its current condition" ROR App. # 19-8.11, Exhibit 28, p. 5 of 10. The Commission concluded that a binding agreement prohibiting the Town and any successor owner from modifying the area in a way that would impede emergency vehicle access was,

therefore, necessary to ensure that the area of the Phase I Improvements and what it defined as the Emergency Vehicle Operations Area, would remain traversable by emergency vehicles.

ROR App. # 19-8.11, Exhibit 28, pp. 5-9 of 10.

The record is devoid of evidence of the likelihood that the Town will, at some point in the future, transfer title to Sliney Fields or the adjacent Town property to a third party, or will construct a building or other structure that would impede emergency vehicle access to Sliney Fields. To the extent that anything in the record bears on the issue, it supports an inference that such a change is unlikely. For example, the applicants' proposal includes the applicants' undertaking to repave and regrade the parking area for Sliney Fields, and to formalize BHS's agreement to continue to permit the public to access Sliney Fields via Sliney Road, across BHS property. In addition, although the Melrose Avenue Access proposal was rejected by the RTM, the record reflects that it was supported by Town Parks and Recreation officials because it would improve public access to Sliney Fields. E.g., ROR App. # 19-2.4, Exhibit 20, p. 66. Members of the Commission recognized, during public hearings, the public benefit of improved access to and parking for Sliney Fields. E.g., Supplement to ROR, pp. 326, 745-47. No Commissioner, Town staff person, or member of the public suggested that there was any reason to expect the Town to abandon Sliney Fields or to erect barriers that would prevent public access to Sliney Fields via Sliney Road. The Commission's decision granting the application with conditions recognizes that the emergency vehicle access that the Town Fire Marshal opined is necessary to protect public safety is available now and would continue to be available under the applicants' proposal, absent some unanticipated change in the Town's use of Sliney Fields. ROR App. # 19-8.11, Exhibit 28. To conclude that the record suggests that there is more than a theoretical possibility

that the Town may transfer its Sliney Fields property to a third party or erect barriers to public access to the fields is, at best, a stretch.

The condition requiring that BHS provide a legally binding agreement, in type, format and content approved by Counsel, prohibiting any building or physical modifications to the portion of the Emergency Vehicle Operations Area on BHS property that would impede emergency vehicle access stands on at least slightly different footing. As noted above, the only direct vehicle access to the Town's Sliney Fields is via Sliney Road, a portion of which is owned by BHS. Unlike the Town, which now requires Sliney Road for public and emergency access to Sliney Fields, BHS will have no need to keep Sliney Road open and unobstructed under its site plan for the new Parkside Village. Currently, some Parkside Village residents access their buildings via Sliney Road and park along the edge of the property, near Sliney Fields. But the plan for the new Parkside Village provides expanded parking for all residents directly off of South Montowese Street and eliminates the resident parking behind the Village, near Sliney Fields. BHS has always permitted the public to traverse its property over Sliney Road to access Sliney Fields and the record makes clear that BHS is willing to commit to continuing to do so permanently. However, with the reconfiguration of access to and parking for Parkside Village, BHS has no need to use Sliney Road, other than to be a good neighbor. The Commission's decision to require that BHS keep the portion of Sliney Road that it owns open and accessible is supported by sufficient evidence.

The Commission has satisfied the first prong of the Section 8-30g test at least with respect to its condition 5.d requirement that BHS keep Sliney Road open and accessible. The court will address the second prong of the Section 8-30g test with respect to both of the challenged conditions.

ii. Does The Need For Conditions 5.c and 5.d Clearly Outweigh The Need For Public Housing?

The court's obligation is to "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 may legally consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Citation omitted; internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission*, supra, 271 Conn., 26.

The plaintiffs argue that the Commission's reasons for imposing conditions 5.c and 5.d are pretextual and imposed at the behest of the RTM to ensure that the Town's political body, free of the high burdens imposed on the Commission by Section 8-30g, will be able to prevent the redevelopment of Parkside Village. There is some support for that argument in the administrative record. For example, during a Commission meeting on January 18, 2018, one Commissioner suggested that the Commission could "use the law, for the example, to delay [the redevelopment]. Just to delay it. Time – passage of time is cost them money, and we know what's happed to other projects in this town when they get delayed too long, they go away." Supplement to ROR, p. 433 of 1206. During that same meeting, another Commissioner asked: "[I]s there any way we can use [fire safety] as a basis for denial." *Id.*, p. 451 of 1206. During a public hearing on the application on April 4, 2019, the Majority Leader of the RTM stated what he described as "the position of overwhelmingly majority of my constituents" He noted that the applicants proposed the Melrose Avenue Access as "a condition that the town must

approve . . . not you, not the neighbors. Now [the applicants want] to do an [end around]³, through the will of the people, and we think that's wrong." *Id.*, p. 553 of 1206.

Whether or not the Commission's imposition of the challenged conditions was sincere or pretextual because, the court concludes that the Commission has not met its burden to demonstrate the risk of such harm to the public interest intended to be mitigated by the conditions clearly outweighs the need for affordable housing.

The record establishes that there is a need for affordable housing in Branford. The 2016 Affordable Housing Appeals List compiled by the Connecticut Department of Housing indicates that only 3.23 percent of Branford's housing qualified under the ten percent "Safe Harbor" provision of General Statutes § 8-30g (k). ROR App. # 17-9.4, Exhibit 29, pp. 2-3. The Commission asserted that the Town has "made progress in providing affordable units" and referenced, in support of that assertion, its own 2019 Plan of Conservation and Development and certain zoning regulation amendments designed to encourage development of affordable housing. ROR App. # 19-8.11, Exhibit 28, pp. 6-7. But even crediting those assertions, the Town falls far short of the statute's ten per cent safe harbor. The Commission's Appeal Brief does not address the Town's need for affordable housing, effectively conceding that the need exists.

The record falls well short of meeting the Commission's burden to show that the safety concerns on which it based the challenged conditions clearly outweigh the need for affordable housing. As noted above, nothing in the record contradicts the plaintiffs' expert's detailed explanation that the proposed building meets all fire code requirements and, in particular, that the

³ The transcript of the April 4, 2019, public hearing actually says "inground" rather than "end around," but it appears from the context that the speaker said, or at least intended to say, "end around."

proposed main entrance and parking lot for the building provides emergency vehicle and personnel access fully compliant with fire code requirements.

The record, and in particular the consistent advice of the Town Fire Marshal, certainly supports a conclusion that a second point of access, providing more direct access for fire apparatus to the rear of the proposed new building, would enhance the ability of fire and other personnel to respond to a catastrophic fire. But that access exists today, and apparently has existed for years, via Sliney Road. The Commission's conditions are based on the possibility that the Town might someday do something that would impair emergency vehicle access via Sliney Road, not only to Parkside Village, but also to the Town's own Sliney Fields. There is nothing in the record to suggest that there is any plan, proposal, or even a thought, to do anything of the kind. The Town Planner did not suggest that such an event would occur. Rather, in his October 3, 2019, memorandum to the Commission, he asserted that "one of the [staff's] responsibilities is to address the potential impact of proposed development whether that impact is likely to occur or not." ROR App. # 19-9.11, Exhibit 24.

The standard to be applied by the court is well-settled: "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)." (Citation omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc. v. Zoning Commission*, supra, 130 Conn. App., 58.

The Commission's resolution from which the plaintiffs' appeal does not reference any "evidence as to a quantifiable probability" that the Town will abandon Sliney Fields or build structures that would impede access to the fields, and the court found none in its thorough search

of the record. The lack of such evidence, combined with the record evidence that, even if emergency vehicle access via Sliney Road were somehow blocked, the proposed new building would meet all fire code requirements, demonstrates that the Commission has not met its burden. The record does not contain sufficient evidence to support the imposition of condition 5.c.

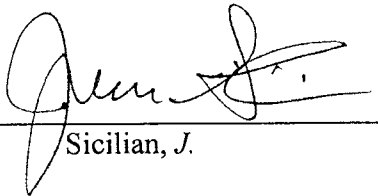
The Commission's insistence that the applicants negotiate an agreement acceptable to the Town's political body to ensure that the applicants do not impede emergency vehicle access across Sliney Road is also not supported by substantial evidence in the record. The Commission does not explain why such an agreement, as opposed to a unilateral undertaking by the applicants, is necessary to ensure continued access to Sliney Road. Whether, as the applicants argue, that the requirement for agreement from the RTM is designed to relieve the Commission of its substantial burden under General Statutes § 8-30g and leave the fate of the proposed development in the hands of the Town's political body, or not, the Commission has not sustained its burden to demonstrate that such a requirement is necessary to protect public safety needs that clearly outweigh the Town's need for affordable housing.

III. CONCLUSION

The appeal is sustained. The Commission is ordered to approve the applicant's site plan as revised to November 21, 2019, with Conditions 5.c and 5.d deleted, and the following condition imposed:

*The applicants are prohibited from making any physical modifications or alterations to the Phase 1 Improvements including the Sliney Field Access Road that would in any way impede access by emergency service personnel and vehicles without the written approval of the Commission, after consultation with the Fire Marshal and Town Police Chief.

So ordered.



Sicilian, J.