Journey to the Legal Horizon

Appellate Court decision on affordable housing proposal
within public water supply watershed:
Eureka V, LLC v. Planning and Zoning Commission,
139 Conn. App. 256 (2013)

Note: *This column addresses concerns within the purview of conservation commissions: the protection of drinking water quality by the limiting the density of residential development. Inland wetlands commissions are cautioned not to extrapolate sentences or holdings from this case, because the decision very much reflects the statutory language of the affordable housing appeals act -- which is not applicable to wetlands and watercourses agencies.*

In November the Connecticut Appellate Court issued its ruling affirming that a substantial risk to drinking water supplies can outweigh the need for affordable housing. However, the Ridgefield planning and zoning commission went too far in its prohibition of any residential development in the public water supply watershed, when the evidence supplied by the potentially affected water company and state agencies recommended a restriction of 1 residential unit per 2 acres. The zoning commission's prohibition of sewers or septic systems in the watershed was improper because it was based only on generalized fears and speculation.

In *Eureka V, LLC v. Planning and Zoning Commission,*139 Conn. App. 256 (2013)[i], the applicant, Eureka V, LLC ("Eureka") sought amendments to the zoning regulations and the zoning map in preparation to build, based on a conceptual plan, 509 residential units (1, 2, and 3-bedroom townhouse units), with 30% of the units to be affordable housing. Sixty-seven acres of the 153 acre parcel are located within the watershed for the Saugatuck Reservoir. Eureka sought to rezone the property from a corporate development district to a housing opportunity development zone. After days of public hearing, the planning and zoning commission ("commission") adopted an "overlay zone" that limited development to a density of 1.9 units per acre of land within the zone, required all units to be supplied with municipal water and sewer system, and prohibited any line from crossing in watershed areas. That had the effect of limiting the non-watershed portion of the Eureka project to a density of 1.9 units/acre while prohibiting development in the watershed area -- since the residential units would be required to have sewers, but sewers would be prohibited in the overlay zone.

As is allowed by the affordable housing statutes, Eureka came back with a modification to its conceptual plan: 1) allow the units to be connected to either sewers or septic systems, 2) limit development in the watershed area to 1 unit/acre (resulting in 2.6 units/acre for overall project), and 3) a reduction from 509 units to 389 units. The commission approved 2 units/acre in the non-watershed area and denied the rest of the modification.

On appeal to the superior court (trial court), the court concluded that the commission's decision to limit density and to prohibit sewers in the non-watershed area was arbitrary and was not necessary to protect a substantial public interest. The court upheld the commission's prohibition of any residential units in the watershed as necessary to protect the public water supply.

Unlike in any other land use appeal, the burden of proof in an affordable housing appeal is on the commission.[ii] Supreme Court precedent sets out that the reviewing 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."[iii] If that is established, the court must independently, without deference to the agency decision, review the record and determine if the denial was "necessary."

The Appellate Court stated that "any substantial risk to the public's legitimate interest in maintaining safe and healthy drinking water certainly could outweigh the need for affordable housing."[iv] The Appellate Court pointed to the statutes that authorize zoning commissions to consider protections for drinking water supplies. The commission received conflicting opinions from the experts for the applicant and the commission itself. The commission permissibly sided with the opinions issued by the water company and the state department of public health. The water company relied on a DEP guidance document that included the limit of 1 unit/2 acres to protect drinking water quality.

The Appellate Court quoted extensively from the letter of DPH supervisor of the water protection unit, Lori Mathieu. Eureka's proposed zoning changes, in her words, had "the potential to increase the risk to public health due to the high density residential land use."[v] Ms. Mathieu relied on the 2005 Plan of Conservation and Development which incorporated the decades-long policy of 1 residential unit/2 acres. She concluded: "Use of minimum sustainable lot sizes of two or more acres should adequately protect public drinking water supplies while allowing community growth."[vi]

Based on these experts the Appellate Court affirmed the trial court's ruling that there was sufficient evidence in the record for the commission's determination that the granting of the applications "would present more than a mere theoretical possibility of a specific harm to the public's substantial interest in maintaining a safe and healthy drinking water supply."[vii]

However, the Appellate Court did not uphold the commission's total prohibition of building in the watershed area. Since Lori Mathieu of DPH stated in her letter that 1 unit per 2 acres is protective of water quality, further restriction wasn't necessary. The statutory standard is higher than reasonable: is the restriction necessary?

As for the prohibition of sewers through the public water supply watershed -- the Appellate Court said no. The water company's opposition to sewers "is based on generalized fears and 'guidance documents' and is inconsistent with the [commission's] treatment of all other watershed property in Ridgefield."[viii] Pointing to a similar case, the Appellate Court concluded that there wasn't evidence of the potential harm that would occur or the probability that it would occur.

There are two noteworthy matters. One, the state plan of conservation and development is in the process of being revised and reissued by the General Assembly. The draft proposed by the Office of Policy and Management omits all of the protective language which DPH relied on in its letter sent to the commission. While the revision process is not complete, if the new version of the state Plan of Conservation and Development omits the 1 unit/2 acre language, will

the DPH continue to write letters opposing development that has greater density? While it is difficult to predict future court action, it seems that the letter from DPH was of more importance than a guidance document (the state plan of conservation and development).

Finally, reliance on a guidance document without on-the-ground facts or other support is not likely to provide the evidence necessary to bolster an agency action. This is the second case this year from the Appellate Court in which the court disavowed reliance on guidance documents. In the earlier case, a wetlands appeal referring to the 2002 Guidelines for Soil Erosion and Sediment Control, the court stated: "although they [the guidelines] may contain a set of beneficial recommendations, non-adherence does not in itself imply a likelihood of adverse impact on wetlands."[ix] Guidance documents do not constitute standards that have the force and effect of law, nor do they constitute expert opinion for a specific outcome. Experts may refer to guidance documents, but better be prepared to substantiate their opinions with other knowledge.

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[i] You can read the case on the Judicial Website at: http://www.jud.ct.gov/external/supapp/Cases/AROap/AP139/139AP559.pdf . Or go to: www.jud.ct.gov, click on Opinions, click on Appellate Court Archives, click on 2012, scroll down to "published in the Connecticut Law Journal of 11/27/12, click on the case.

[ii] The Appellate Court decision lays out the statutory framework in a particularly readable manner. *Eureka V, LLC v. Planning and Zoning Commission,*139 Conn. App. 256, 264-65 (2013).

[iii] *Eureka V, LLC v. Planning and Zoning Commission,*139 Conn. App. 256, 266 (2013), citing *River Bend Associates, Inc. v. Zoning Commission*, 271 Conn. 1, 26 (2004).

[iv] *Eureka V, LLC v. Planning and Zoning Commission,*139 Conn. App. 256, 271 (2013).

[v] *Eureka V, LLC v. Planning and Zoning Commission,*139 Conn. App. 256, 274 (2013).

[vi] *Eureka V, LLC v. Planning and Zoning Commission,*139 Conn. App. 256, 274 (2013).

[vii] *Eureka V, LLC v. Planning and Zoning Commission,*139 Conn. App. 256, 274 (2013).

[viii] *Eureka V, LLC v. Planning and Zoning Commission,*139 Conn. App. 256,276 (2013).

[ix] *Estate of Casimir Machowski v. Inland Wetlands Commission*, 137 Conn. App. 830 (2012)