

CONNECTICUT FEDERATION OF PLANNING
AND ZONING AGENCIES
QUARTERLY NEWSLETTER

Winter 2020

Volume XXIV, Issue 1

BOARD HAS DISCRETION TO NOT
CONDITIONALLY APPROVE
APPLICATION

A developer filed an application with a municipal water pollution control board for a sewer extension to service a proposed affordable housing development. At the public hearing on the application, the town's public works director testified that the sewage plant did not have enough capacity at that time but that needed repairs and improvements would, within 2-4 years' time, expand capacity to the extent that it could handle the additional flow from the proposed affordable housing development. The developer urged the board to approve its application with the condition that the development would only be built once the anticipated repairs and expansion to the sewage treatment plant were completed.

The board denied the application, finding that the sewage treatment plant did not have the capacity to service the proposed development and a conditional approval would violate long-standing policy and expose the town to risk. An appeal to court followed.

The court eventually ruled that since the application met all of the applicable specific standards in the regulations and the board had the authority to approve it conditionally as

proposed by the developer, the board was without discretion to deny it.

The matter was appealed to the Appellate Court by the board. This court agreed with the board's decision to deny the application on the basis that there was insufficient capacity to service the proposed development. In regard to a conditional approval, the appellate court stated that while the board had the authority to make a conditional approval, it had the discretion to not do so. The court also pointed out that the affordable housing statute 8-30g does not apply to an application filed with a WPCA. Thus, the board's denial did not have to be supported by a substantial public interest that outweighs the need for affordable housing. *Summit Saugatuck LLC v. Water Pollution Control Authority*, 193 Conn. App. 823 (2019).

WETLANDS PRESERVATION TOP
PRIORITY

An application for a permit to conduct a regulated activity was denied due to a finding that the planned construction of a dwelling would result in the destruction of wetlands. The proposed home would be built upon two small wetlands. While the applicant proposed to create a wetland of greater size than the two that would be lost, the court found that the Commission was correct to deny the application.

First, the developer failed to demonstrate there was no feasible and

Written and Edited by
Attorney Steven E. Byrne
790 Farmington Ave., Farmington CT 06032
Tel. (860) 677-7355
Fax. (860) 677-5262
attysbyrne@gmail.com
cfpza@live.com

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prudent alternative to his proposal. The record before the Commission actually contained an approval given to the prior owner of the parcel which showed that a dwelling could be built without the destruction of the wetlands.

Second, C.G.S. Sec. 22a-41(a)(4) provides a hierarchy of considerations for a wetlands commission to consider before approving a permit for a regulated activity, the first being to prevent the pollution of or damage to wetlands. The restoration or creation of wetlands is a much lower priority. The Commission's decision reflects this priority, preserving the existing wetlands rather than allowing their destruction and then replacement by a man-made wetland. *188 Westmont LLC v. Inland Wetlands & Watercourses Agency*, 68 Conn. L. Rptr. 209 (2019).

MIXED-USE DEVELOPMENT NOT
AFFORDABLE HOUSING

A denial of an application to construct a mix-use development was appealed under the Affordable Housing Act [C.G.S. Sec. 8-30g]. The application planned for the construction of office and retail space as well as residential housing, 30% of which would be set-aside as affordable as defined by the Act. The Commission denied the application in part because it believed it was not an affordable housing application. The court agreed.

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Attorney Steven E. Byrne
790 Farmington Ave., Farmington CT 06032
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cfpza@live.com

In reaching its decision, the court found that since the application contained nonresidential uses, it did not fit into the definition of an affordable housing application. *Sixty-Five Mile Marsh Hill Road LLC v. Planning & Zoning Commission*, 68 Conn. L. Rptr. 385 (2019).

ANNOUNCEMENTS

Lifetime Achievement Award and Length of Service Award

Nomination forms will be sent out later this month for these awards which will be presented to recipients at the Federation's annual conference. You should begin your process of finding worthy nominees now.

Workshops

At the price of \$180.00 per session for each agency attending, our workshops are an affordable way for your board to 'stay legal'. Each workshop attendee will receive a booklet which sets forth the 'basics' as well as a booklet on good governance which covers conflict of interest as well as how to run a meeting and a public hearing.

ABOUT THE EDITOR

Steven Byrne is an attorney with an office in Farmington, Connecticut. A principle in the law firm of Byrne & Byrne LLC, he maintains a strong focus in the area of land use law and is available for consultation and representation in all land use matters both at the administrative and court levels.

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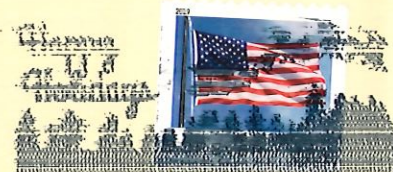
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2B Farmington Commons
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East Hampton Planning & Zoning Commission
Town Hall
20 East High Street
East Hampton, CT 06424

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LOSS OF NONCONFORMING
BUILDING IS A HARSHIP

An owner of property fronting on Long Island Sound applied for several variances so that he could rebuild a storm-damaged cottage located on the property. The property contained several other dwellings. The cottage was a legal nonconforming building, having been built in 1951 before any zoning regulations had been adopted for the town. Recently adopted zoning regulations required that buildings be constructed at a certain elevation in order to reduce the risk of flood damage and to comply with FEMA regulations.

This regulation, when applied to the nonconforming building, would result in the building height exceeding what was permitted by the zoning regulations. In addition, the building would need to be moved to a different location on the lot where the ground soil could support the new foundation. However, this new location was more conforming as to setbacks than the current location.

The zoning board found that the building height variance was justified due to the application of the building elevation requirements imposed in part by FEMA regulations and the decrease in nonconformity as to building location. An appeal to court was

dismissed, after which an appeal was heard by the State Supreme Court.

The State Supreme Court found that it was correct for the board to grant the building height variance because without it, the nonconforming cottage could not have been rebuilt. The loss of a property owner's right to a nonconforming building was viewed by the court as a confiscatory action. In order to prevent this unconstitutional taking of property, the granting of the variance was valid. It made no difference that the property as a whole could still be used as the location for 4 other dwellings – the owner of a legal nonconforming building has a constitutional right to its continued use. *Mayer-Wittmann v. Zoning Board of Appeals, 333 Conn. 624 (2019).*

SAVE THE DATE

The Federation will hold its Annual Conference on March 26, 2020 at the Aqua Turf Country Club in Plantsville CT. The event starts at 5:00 p.m. The program for the Conference will include a presentation on Amending the Affordable Housing Act to better achieve its goal of making housing affordable and not just be a tool for developers. A Flyer is included with this newsletter and registration materials announcing the event will be sent to all members next month.

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