DOCKET NO. LND CV-17-6078400-S	:	SUPERIOR COURT
COALITION TO SAVE EASTON	:	LAND USE LITIGATION DOCKET
v.	:	AT HARTFORD
EASTON PLANNING AND ZONING COMMISSION, ET AL.	:	OCTOBER 3, 2019

DOCKET NO. LND CV-17-6078536-S	:	SUPERIOR COURT
SADDLE RIDGE DEVELOPERS, LLC, ET AL.	:	LAND USE LITIGATION DOCKET
v.	:	AT HARTFORD
EASTON CONSERVATION COMMISSION, ET AL.	:	OCTOBER 3, 2019

MEMORANDUM OF DECISION

I

For more than a decade, the codefendants, Saddle Ridge Developers, LLC, as developer and Silver Sport Associates, Ltd. Partnership, as owner (collectively, Saddle Ridge), have sought to develop a 110 acre parcel known as "Easton Crossing" in Easton.[1] The property is bounded by Sport Hill Road, Silver Hill Road, Cedar Hill Road and Westport Road. (Return of Record

[1] The total property area is 124 acres, but 14 acres have been set aside for a horse farm leaving 110 acres for development. (Return of Record [ROR], Item 21.) As the property is in a rural suburban area, there is no public transit service in the vicinity. (ROR, Item 157, p. 3.) The nearest public water service is 1.4 miles away and there are no public sanitary sewers in Easton or within five miles of the property. (ROR, Item 157, p. 3.)

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[ROR], Item 157, p. 3.) It contains a six acre pond and a major belt of wetlands extending from the northwest corner of the parcel to the southwest corner. (ROR, Item 157, p. 3.) The parcel lies on two public water supply watersheds owned by Aquarion Water Company. (ROR, Item 157, p. 3.) As stated in the commission's modified resolution of approval, "[t]he easterly portion of the Site drains via Patterson Brook to the Easton Lake Reservoir about 1.4 miles to the east and the remainder of the Site drains via Ballwall Brook to the Aspetuck Reservoir which is about two miles to the west." (ROR, Item 157, p. 3.)

In 2008, Saddle Ridge applied for a twenty-one lot subdivision on the parcel to develop large, market rate homes on at least three acre lots. In 2010, Saddle Ridge submitted applications to the Easton conservation commission (agency), which acts as the inland wetlands and watercourses agency for the town, and to the Easton planning and zoning commission (commission) to construct ninety-nine units on the parcel under General Statutes § 8-30g. These applications were denied and Saddle Ridge appealed in *Saddle Ridge Developers, LLC* v. *Conservation Commission,* Superior Court, land use litigation at Hartford, Docket No. LND CV-11-6038947-S, and *Saddle Ridge Developers, LLC* v. *Planning & Zoning Commission,* Superior Court, land use litigation at Hartford, Docket No. LND CV-11-6038949-S. On January 25, 2016, this court dismissed these appeals based upon significant concerns of degradation of the wetlands and water quality in the adjacent reservoirs. Id. Specifically, this court held that the commission had "proven that its [denial] was necessary to protect the public's interest in safe drinking water." Saddle Ridge's petition for certification was denied on June 2, 2016.

Meanwhile, in 2014, Saddle Ridge submitted a revised application (2014 agency

application) to the agency to develop forty-eight homes and twenty apartments under § 8-30g. The agency conditionally approved Saddle Ridge's application and Saddle Ridge appealed the conditions in *Saddle Ridge Developers, LLC* v. *Conservation Commission,* Superior Court, land use litigation docket at Hartford, Docket No. LND CV-15-6058139-S (2015 agency appeal). This appeal is still pending on this docket and the agency has filed a motion to dismiss. The 2014 application to the commission was denied on January 15, 2015,[2] and Saddle Ridge did not appeal.

On September 23, 2016, Saddle Ridge filed the present application[3] (2016 commission application) presumably to rectify the commission's concerns with the 2014 commission application. (ROR, Item 21.) In the 2016 commission application, Saddle Ridge seeks to construct thirty single family homes and eighteen duplexes of which 30 percent of the units, i.e., nine homes and eleven duplexes, would be deed restricted pursuant to § 8-30g. (ROR, Item 21.) Saddle Ridge did not submit, however, a new application to the agency. This is the main issue of the present appeal.

During the administrative process involving the 2016 commission application, the plaintiff,

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[2] The commission denied the application because it found that the accessory apartments did not comply with the "comparable size and workmanship" provision in General Statutes § 8-2g (a) (1).

[3] Saddle Ridge submitted six applications to create a new zoning district and for subdivision and site plan approvals pursuant to General Statutes §§ 8-3, 8-26 and 8-30g. The six applications include: (1) amending the zoning regulations to establish a planned housing opportunity district (HOD); (2) amending the map to designate the subject property under the new district; (3) amending the subdivision regulations; (4) approving the proposed subdivision; (5) approving the subdivision under § 8-30g; (6) approving the site plan. (ROR, Item 157, p. 2.) For ease of reference, the court refers to all of them as the 2016 commission application herein.

the Coalition to Save Easton, intervened pursuant to General Statutes § 22a-19.[4] (ROR, Item 41.) After a public hearing, the commission conditionally granted the 2016 commission application on March 13, 2017. (ROR, Item 157.) The decision was published in the Easton Courier on March 23, 2017. (ROR, Item 139.)

On April 5, 2017, and April 6, 2017, the plaintiff commenced an appeal. *Coalition to Save Easton* v. *Planning & Zoning Commission*, Superior Court, land use docket at Hartford, Docket No. LND CV-17-6078400-S (plaintiff's appeal). The plaintiff alleges that the commission acted illegally, arbitrarily and abused its discretion in conditionally approving Saddle Ridge's application by, among other things, relying on the recommendations of the commission's expert, Michael J. Bartos, Jr., of Land-Tech Consultants, Inc., to incorporate conditions from the

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[4] Section 22a-19 provides: "(a) (1) In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

"(2) The verified pleading shall contain specific factual allegations setting forth the nature of the alleged unreasonable pollution, impairment or destruction of the public trust in air, water or other natural resources of the state and should be sufficient to allow the reviewing authority to determine from the verified pleading whether the intervention implicates an issue within the reviewing authority's jurisdiction. For purposes of this section, 'reviewing authority' means the board, commission or other decision-making authority in any administrative, licensing or other proceeding or the court in any judicial review.

"(b) In any administrative, licensing or other proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect as long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."

approved 2014 agency application, which are the subject of the 2015 agency appeal.[5] Additionally, the plaintiff alleges that the commission erred by failing to refer the 2016 commission application to the agency and by approving septic systems in violation of a municipal ordinance.

On April 7, 2017, Saddle Ridge also commenced an appeal challenging the commission's conditions of approval. *Saddle Ridge Developers, LLC* v. *Planning & Zoning Commission*, Superior Court, land use litigation docket at Hartford, Docket No. LND CV-17-6078536-S (Saddle Ridge's appeal). The Coalition to Save Easton filed a notice of intervention on June 19, 2017, which the court granted on June 20, 2017. On March 12, 2018, the commission approved a "modified resolution of approval" that resolves the issues between Saddle Ridge and the commission obviating the need to litigate Saddle Ridge's appeal. On April 23, 2018, the parties filed a joint stipulation in which they agree that the plaintiff's and Saddle Ridge's appeals

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[5] In the commission's modified resolution of approval, it, in relevant part, stated: "6. The Commission retained the services of a consultant, Michael J. Bartos, Jr., P.E. of LandTech. Mr. Bartos has carefully analyzed this Application and issued reports to this Commission with his conclusions. Mr. Bartos has concluded that, with the addition of his multiple conditions, and with proper maintenance and oversight by the owners and Homeowners Association, and, if necessary, the Town of Easton, protection of the public water supply watershed area and other natural resources will be secured.

"7. The Commission is also aware of the fact that should the Commission deny these Applications, and should a court overturn the Commission's denials, the multiple conditions and safeguards recommended by Mr. Bartos and LandTech, and incorporated herein, will not be imposed. The Commission believes that the incorporation of these conditions and proper enforcement and oversight are essential to the protection of the watershed and environment in general. Further, Mr. Bartos concludes that this Application does not present a greater threat to the Public Water Supply Watershed area than the previously-approved 2009 subdivision plan for twenty-one lots." (ROR, Item 157, p. 4.)

are consolidated and that the modified resolution is the operative decision of the commission.[6] (ROR, Item 157.)

The stipulation does not resolve, however, the plaintiff's appeal. On July 12, 2018, the commission filed the return of record. The plaintiff filed its brief on September 14, 2018, the commission and Saddle Ridge filed their briefs on November 21, 2018, and the plaintiff filed its reply brief on December 18, 2018. A motion for permission to supplement the record was filed on December 18, 2018, and granted by the court on April 16, 2019.

The court began to hear the appeal on January 8, 2019, at which time the court asked the commission to go back to the proper authorities regarding the applicable septic system ordinance. Motions to supplement the record with these materials were filed on April 9, 2019, and on April 29, 2019, and granted on May 1, 2019. The court heard final argument on June 5, 2019.

II

Saddle Ridge and the commission argue that the plaintiff is not aggrieved based upon lack of standing because the plaintiff raises "technical noncompliance claims" not related to environmental matters. They further assert that the plaintiff has not alleged unreasonable pollution in excess of a regulatory scheme.

"Section 22a-19 (a) makes intervention a matter of right once a verified pleading is filed

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[6] As discussed herein, the agency disagrees with the commission about aspects of the commission's 2016 approval and the stipulation. On page two of the agency's motion to dismiss in the 2015 agency appeal (pleading # 108.00), it argues "[t]hat modified resolution of approval has not been reviewed or approved by the [agency], nor was the [agency] privy to or involved in any way with the 2016 [commission] application, the appeal, the agreement or the negotiation of the terms of the modified resolution." This court takes judicial notice of the 2015 agency appeal. See *Carpenter* v. *Planning & Zoning Commission*, 176 Conn. 581, 591, 409 A.2d 1029 (1979) ("it was well within the power of the trial court to take judicial notice of court files of other suits between the same parties").

complying with the statute, whether or not those allegations ultimately prove to be unfounded. We have declared that the statute 'permits any person, on the filing of a verified pleading, to intervene in any administrative proceeding for the limited purpose of raising environmental issues.' . . . In *Mystic Marinelife Aquarium, Inc.* v. *Gill*, 175 Conn. 483, 490, 400 A.2d 726 (1978), we concluded that one who filed a verified pleading under § 22a-19 (a) became a party to an administrative proceeding upon doing so and had 'statutory standing to appeal for the limited purpose of raising environmental issues.'" (Citation omitted.) *Red Hill Coalition, Inc.* v. *Town Plan & Zoning Commission*, 212 Conn. 727, 734, 563 A.2d 1347 (1989).

"An intervenor pursuant to § 22a-19 has standing to bring an appeal from an agency's decision only to protect the natural resources of the state from pollution or destruction. . . . In addition, § 22a-19 grants standing to intervenors to raise only those environmental concerns that are within the jurisdiction of the particular administrative agency conducting the proceeding into which the party seeks to intervene." (Citation omitted; internal quotation marks omitted.) *Finley* v. *Inland Wetlands Commission*, 289 Conn. 12, 34-35, 959 A.2d 569 (2008).

"[T]he mere allegation that a defendant has failed to comply with certain technical or procedural requirements of a statute imposing environmental standards does not, in and of itself, give rise to a colorable claim of unreasonable pollution under the [Connecticut Environmental Protection Act (CEPA)]. . . . A claim that the defendant has violated the substantive provisions of such a statute, however, may give rise to an inference that the conduct causes unreasonable pollution. . . . Thus, [t]he cases wherein we have permitted standing under § 22a-19 have involved circumstances in which the *conduct* at issue in the application before this court allegedly would cause direct harm to the environment. " (Citation omitted; emphasis in original; internal quotation

marks omitted.) *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 712-13, 99 A.3d 1038 (2014).

In the present case, the plaintiff's petition for intervention; (ROR, Item 41); and paragraph seven of the plaintiff's complaint set forth the alleged unreasonable pollution. These allegations all pertain to impairment of watercourses, wetlands and reservoirs, among other things. (ROR, Item 41.) As discussed further in this memorandum of decision, this alleged pollution may have been subject to review by the agency if it had the opportunity to review the 2016 commission application. In light of this and because the plaintiff undisputedly intervened in the administrative proceedings under General Statutes § 22a-19; (ROR, Item 41); the court finds that the plaintiff is aggrieved. See *Finley* v. *Inland Wetlands Commission*, supra, 289 Conn. 25-26 ("[t]his court repeatedly has held that a person who intervenes in an administrative proceeding pursuant to § 22a-19, and who is aggrieved by the agency's decision, is entitled to appeal from that decision pursuant to the statutory provisions governing appeals from the decisions of that particular agency").

III

A

As a threshold matter, the parties disagree as to the burden of proof in this appeal Saddle Ridge maintains that this appeal involves an affordable housing application, and, therefore, the plaintiff has the burden of proof under § 8-30g (g).[7] This court does not agree.

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[7] 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

In *Christian Activities Council, Congregational* v. *Town Council*, 249 Conn. 566, 575-76, 735 A.2d 231 (1999), the court outlined the difference between affordable housing appeals and traditional zoning appeals. "First, an appeal under § 8-30g (b) may be filed only by an applicant for an affordable housing development whose application was 'denied or [was] approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development or the degree of affordability of the affordable dwelling units. . . .' Thus, where the town has granted such an application, either outright or without imposing such restrictions, there is no appeal under § 8-30g (b)." Id. In dicta, the court stated: "This does not mean, however, that the provisions of § 8-30g preclude a traditional zoning appeal by a different aggrieved person. Subsection (e) [now subsection (i)] of § 8-30g specifically provides that '[n]othing in this section shall be deemed to preclude any right of appeal under the provisions of sections 8-8, 8-9, 8-28, 8-30, or 8-30a.' It does mean, however, that it is only when an unsuccessful applicant appeals under § 8-30g (b) that the appeal triggers the special provisions regarding the scope of judicial review provided by § 8-30g (c)." Id., 576 n.8.

In the present case, the court is addressing the allegations of the plaintiff's appeal and the plaintiff is not the unsuccessful applicant. Thus, § 8-30g (g) does not apply and the plaintiff must sustain the traditional burden for land use appeals.

B

"It is axiomatic that the review of site plan applications is an administrative function of a

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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 . . . ."

planning and zoning commission. . . . When a commission is functioning in such an administrative capacity, a reviewing court's standard of review of the commission's action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion." (Citation omitted; internal quotation marks omitted.) *Gerlt* v. *Planning & Zoning Commission*, 290 Conn. 313, 322, 963 A.2d 31 (2009).

"It is [also] axiomatic that a planning commission, in passing on a [subdivision] application, acts in an administrative capacity and is limited to determining whether the plan complies with the applicable regulations. . . . The commission is entrusted with the function of interpreting and applying its zoning regulations. . . . The trial court must determine whether the commission has correctly interpreted its regulations and applied them with reasonable discretion to the facts. . . . The plaintiffs have the burden of showing that the commission acted improperly. . . . The trial court can sustain the [plaintiff's] appeal only upon a determination that the decision of the commission was unreasonable, arbitrary or illegal. . . . It must not substitute its judgment for that of the . . . commission and must not disturb decisions of local commissions as long as honest judgment has been reasonably and fairly exercised." (Internal quotation marks omitted.) *200 Associates, LLC* v. *Planning & Zoning Commission*, 83 Conn. App. 167, 171-72, 851 A.2d 1175, cert. denied, 271 Conn. 906, 859 A.2d 567 (2004).

"Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . It is for the courts, and not administrative

agencies, to expound and apply governing principles of law." (Internal quotation marks omitted.) *Anatra* v. *Zoning Board of Appeals*, 307 Conn. 728, 737-38, 59 A.3d 772 (2013).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Tayco Corp.* v. *Planning & Zoning Commission*, 294 Conn. 673, 679, 986 A.2d 290 (2010).

IV

The main issue is whether the commission illegally approved the 2016 commission application by not waiting for a report from the agency on the 2016 plan. The plaintiff argues that the commission violated General Statutes §§ 8-3 (g) (1) and 8-26 (e) in granting the 2016 commission application because Saddle Ridge did not submit an application to the agency based upon the 2016 plan. The plaintiff further asserts that the commission had no statutory authority to act as the agency by inserting conditions from the 2014 agency application in its conditional approval of the 2016 commission application. Saddle Ridge and the commission do not dispute that Saddle Ridge did not file an application with the agency, but, rather, they maintain that a new agency application was not required because the 2016 plan and the 2014 plan are not substantially

different.

During the processing of a land use application, change and modification in response to critiques and evaluations are common. See *Carr* v. *Planning & Zoning Commission*, 273 Conn. 573, 589, 872 A.2d 385 (2005) ("[w]e note that it is not uncommon for an applicant to withdraw and resubmit several revisions of a wetlands application over the course of a proceeding in an attempt to address the wetlands agency's concerns"). The failure to file a wetlands application with the agency does not necessarily mean that a zoning application must automatically be denied. Id., 599 ("[T]he report of a conservation commission is not binding on a planning and zoning commission in reaching a decision on an ordinary subdivision application. Rather, a planning and zoning commission need only give 'due consideration' to a conservation commission's report. See General Statutes § 8-26."). Nevertheless, failure to file an application with an agency could be grounds for a zoning commission to deny an application. Id., 590 ("[i]f an applicant simply fails to submit a wetlands application . . . then the zoning commission reasonably could render a decision denying the subdivision plan on the ground that the applicant had not complied with a statutory requirement").

This does not mean, however, that the commission can ignore the essential statutory role of the agency to review the potential impact of a project on the wetlands. Specifically, General Statutes § 8-3 (g) (1), in relevant part, provides: "If a site plan application involves an activity regulated pursuant to sections 22a-36 to 22a-45, inclusive, the applicant shall submit an application for a permit to the agency responsible for administration of the inland wetlands regulations not later than the day such application is filed with the zoning commission. The commission shall, within the period of time established in section 8-7d, accept the filing of and

shall process, pursuant to section 8-7d, any site plan application involving land regulated as an inland wetland or watercourse . . . . The decision of the zoning commission shall not be rendered on the site plan application until the inland wetlands agency has submitted a report with its final decision. In making its decision, the commission shall give due consideration to the report of the inland wetlands agency and if the commission establishes terms and conditions for approval that are not consistent with the final decision of the inland wetlands agency, the commission shall state on the record the reason for such terms and conditions. A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning or inland wetlands regulations. . . ."

Similarly, General Statutes § 8-26 (e), in relevant part, provides: "If an application involves land regulated as an inland wetland or watercourse . . . the applicant shall submit an application to the agency responsible for administration of the inland wetlands regulations no later than the day the application is filed for the subdivision or resubdivision. The commission shall, within the period of time established in section 8-7d, accept the filing of and shall process, pursuant to section 8-7d, any subdivision or resubdivision involving land regulated as an inland wetland or watercourse . . . . The commission shall not render a decision until the inland wetlands agency has submitted a report with its final decision to the commission. In making its decision the commission shall give due consideration to the report of the inland wetlands agency and if the commission establishes terms and conditions for approval that are not consistent with the final decision of the inland wetlands agency, the commission shall state on the record the reason for such terms and conditions. . . ." Further, General Statutes § 22a-42 (c), in relevant part, provides that "the board or commission authorized by the municipality or district, as the case may be, shall

serve as the sole agent for the licensing of regulated activities."

In interpreting these statutes, the Appellate Court has held: "The zoning commission must give the wetlands commission report due consideration. We do not read this as a statutory mandate that the zoning commission's decision be based on the wetlands report. To afford due consideration is to 'give such weight or significance to a particular factor as under the circumstances it seems to merit, and this involves discretion.'. . . It entails 'giving such thought or weight to a fact as it merits under all the circumstances of the case.'. . . There is no question that the term due consideration requires the zoning commission to do more than simply receive the wetlands report and give it passing notice."[8] (Citations omitted.) *Arway* v. *Bloom*, 29 Conn. App. 469, 479-80, 615 A.2d 1075 (1992), appeal dismissed, 227 Conn. 799, 633 A.2d 281 (1993).

Yet, the referral process was not meant to give the wetlands agency veto power over a proposed subdivision application if the land to be subdivided contains inland wetlands. See *Thoma* v. *Planning & Zoning Commission*, 31 Conn. App. 643, 651, 626 A.2d 809 (1993) ("[u]ltimate authority over approval of a subdivision rests with the commission, and any regulation that abrogates this authority is invalid"), aff'd, 229 Conn. 325, 640 A.2d 1006 (1994) (per curiam). Indeed, "the report of a conservation commission is not binding on a planning and zoning commission in the affordable housing context, where the burden is on the planning and

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[8] The court also stated: "While Public Act No. 87-533 was intended to coordinate the roles of the zoning and wetlands commissions, it was not intended to make those decisions interdependent. When the zoning commission receives a copy of the 'report' prepared by the wetlands commission, it is not required to review (or await judicial review of) the validity or invalidity of that commission's final decision as a precursor to rendering its own decision." *Arway* v. *Bloom*, supra, 29 Conn. App. 479.

zoning commission to weigh the potential harm to the wetlands against the town's need for affordable housing and to provide persuasive legal and policy reasons that the subdivision application should be denied." *Carr* v. *Planning & Zoning Commission*, supra, 273 Conn. 599.

Saddle Ridge maintains that the 2016 commission application only addresses non-wetland issues. Both it and the commission argue that the 2016 commission application contains the same regulated activities as those in the approved 2014 agency application and thus Saddle Ridge was not required to submit a new application to the agency.[9] In Bartos' report to the commission, he, in relevant part, stated: "The two sets of drawings are nearly identical. The basic lot layout, storm water management system, erosion control plan and road network are substantially the same. The configuration of affordable housing has changed from houses with affordable apartments to standalone affordable houses and duplex affordable houses. Lots with duplex houses have pervious driveways and parking areas. There are no new regulated activities. We do not believe that the minor changes to the plans require revision of any of the approval conditions set forth in the Conservation Commission permit." (ROR, Item 36.b, p. 2.)

This is further buttressed by the testimony of Ted Hart of Milone & MacBroom at the November 28, 2016 public hearing. He stated: "The storm water management system remains the same, except we do not have the additional two acres of impervious coverage that we had added to that 2014 plan, so we reduced the amount of impervious coverage, but we have the same storm water management system. The basins are designed for a greater amount of impervious coverage

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[9] In the 2015 agency appeal, the agency filed a motion to dismiss arguing that the appeal was moot. *The agency's position is different from that of the commission herein*; the agency asserts that the approved 2014 agency application is no longer operative. Saddle Ridge counters that the 2015 agency appeal is not moot because the 2016 commission application, as modified, contains the same regulated activities as those included in the approved 2014 agency application.

and, therefore, greater runoff, which is a conservative approach.

"The proposed road designs have not changed from the previous 2014 design. The roads are 24 feet wide, with all the utilities underground.

"The proposed lots have not changed. They range in size from one acre to 2.5 acres. The proposed open space remains the same, at 42.5 acres." (ROR, Item 145, p. 15.)

Comments submitted by the state department of public health also indicate that the 2016 plan did not "vary significantly" from the 2014 plan. (ROR, Item 4.) Further, the plaintiff's soil scientist, Michael Klein, of Environmental Planning Services, Inc., in a letter dated December 12, 2016, stated: "The design of the roadway network and the drainage system in general, and the stormwater management measures in particular, remains largely unchanged from prior applications for development of that site that I have previously reviewed. It is unclear how much impervious area is proposed; the September 9, 2016 Drainage Narrative submitted by MMI, Inc., the design engineer, refers to 'effective impervious coverage' and 'impervious area,' without distinguishing between them. At best, there may be a slight reduction. MMI notes that there are minimal site plan changes, and that while the runoff curve numbers will change slightly, the watershed areas and times of concentration remain unchanged. Therefore MMI concludes that the stormwater management design can remain unchanged. Based on my review of 2014 and 2016 plans, it appears that the lot layout, grading, and drainage plans are largely identical." (ROR, Item 47, pp. 1-2.)

Nevertheless, Klein does not agree that the 2014 and 2016 plans are identical. In the same December 12, 2016 letter, he also stated: "In summary, the engineering analyses by Trinkaus, GHD and Aquarion Water Company conclude that the September 8, 2016 plans do not

meet the [state department of energy and environmental protection (DEEP)] criteria for residential development in a public water supply watershed. Significant data in support of the design also are lacking and the application does not contain sufficient data to demonstrate that it will conform to the CT DEEP Stormwater General Permit for Construction and Dewatering Wastewaters. Absent such a showing, there is a reasonable likelihood of unreasonable pollution of the wetlands and waters of the state. Because these wetlands and watercourses drain into Easton and Aspetuck Reservoirs, this pollution represents a threat to public health and safety." (ROR, Item 47, p. 2.)

Moreover, in a January 2, 2017 letter, he further explained: "As I noted in my December 22, 2016 letter, the current plans are not identical to those reviewed by the Conservation Commission in 2014. The current plans, while similar in many respects, also differ in numerous ways from the 2014 plans. Some of the differences are associated with activities proposed in the upland review areas of the site, and all of the differences occur in areas that drain to wetlands or watercourses. Finally, the 2016 plans do not meet the conditions of the 2014 Conservation Commission approval." (ROR, Item 81.)

In light of what the commission and Saddle Ridge perceive to be the similarities of the 2014 plan and the 2016 plan, they rely on *Vine* v. *Planning & Zoning Commission*, 122 Conn. App. 112, 998 A.2d 226 (2010). In *Vine*, the applicant sought to build a dwelling house and a kennel, but eliminated the house in the modified plans leaving only the kennel in the exact same location on the lot as in the original plans. Id., 117. The court rejected the argument that "§ 8-3 (g) requires that a zoning commission notify the corresponding wetlands commission of all changes and receive secondary approval from the wetlands commission before approving a

modified site plan." Id., 118. The court held that "[s]uch a procedural mandate is not supported by the plain language of § 8-3 (g), nor is there legal authority to support this proposition." Id. It concluded that "[t]he record reflects that the zoning commission discussed the wetlands commission's prior approval and determined that removing the dwelling house from the site plan would not affect the property's wetlands. Accordingly, the zoning commission gave due consideration to the wetlands commission report, as is required by § 8-3 (g)." Id., 119.

In *Irwin* v. *Planning & Zoning Commission*, 45 Conn App. 89, 92, 694 A.2d 809 (1997), rev'd on other grounds, 244 Conn. 619, 711 A.2d 675 (1998), the court held: "The only change from the previous application was that the lot lines were moved so that the two lots to be accessed by the common driveway now both qualified as interior lots, thus making the use of the common driveway proper according to the regulations. The wetlands impact did not change." In dicta, the court noted: "With respect to the effect on the parcel's wetlands, the applications were identical. The chairman of the conservation commission wrote, in a letter to the chairman of the zoning commission, that the plaintiff's new subdivision plan did not affect the previous approvals and permit. Thus, no new application was required. We agree with the plaintiff that, given the circumstances, the letter from the conservation commission was adequate to satisfy the requirements of General Statutes §§ 8-3c and 8-26." Id., 92 n.4.

Unlike *Vine* and *Irwin*, this is, however, not an appeal involving a relatively small adjustment to a simple application. Nor is it a situation as in *Carr* v. *Planning & Zoning Commission*, supra, 273 Conn. 600-603, in which an application was modified during the review process with no concomitant need to refile with the wetlands agency.

Indeed, *Irwin* points to the precise issue in the present case–the agency should be given

the opportunity to determine whether the 2014 and 2016 plans significantly differ in terms of regulated activities and wetland impacts. In *Arway* v. *Bloom*, supra, 29 Conn. App. 474-75, the court discussed in detail the legislative history establishing the coordinated review process for developers seeking site plan and subdivision approval on land containing wetlands: "No. 87-533 of the 1987 Public Acts, which added the final decision language to the zoning statutes, was denominated 'An Act Concerning the Inland Wetlands and Watercourses.' The goal of the act was to strengthen the inland wetlands law. . . . One way it accomplished this was by 'establish[ing] a coordinated timetable for planning and zoning and inland wetland decisions.'. . . Representative Thomas S. Luby, who summarized the bill containing the final decision language, stated, 'My understanding is that it is important that an applicant under this Bill not, for example, fill in any wetland as a result of obtaining a [wetlands] permit prior to obtain[ing] the approval of the other land use commissions. That also requires within a certain [amount] of time, that an application be filed with the Wetlands Commission and it delays the action . . . of the other commissions until there is action by the Wetland Commission.'. . .

"Public Act No. 87-533 also added language to General Statutes § 22a-42a (d) to the effect that '[n]o person shall conduct any regulated activity within an inland wetland or watercourse which requires zoning or subdivision approval without first having obtained a valid certificate of zoning or subdivision approval, special permit, special exception or variance or other documentation establishing that the proposal complies with the zoning or subdivision requirements adopted by the municipality pursuant to chapter 124 to 126, inclusive, or any special act.'

"The coordinated approval process would require an applicant to file wetlands and zoning

applications simultaneously. In fact, Public Act No. 87-533 amended the language of General Statutes (Rev. to 1985) § 8-3 (g) to require that, if a site plan application involves a regulated activity, 'the applicant shall submit an application for a permit to the agency responsible for administration of the inland wetlands regulations not later than the day such application is filed with the zoning commission.'

"The history of Public Acts 1987, No. 87-533 indicates that the legislature's main concern at the time was simply to coordinate the approval processes of the zoning and wetlands commissions, so that a developer would not proceed with activities affecting an inland wetland before obtaining all necessary permits. The act strengthened the existing protections afforded by the wetlands law, which has, since its enactment in 1972, specified that 'no regulated activity shall be conducted upon any inland wetland and watercourse without a [wetlands] permit.' General Statutes § 22a-24a (c). There is no indication that the legislature was attempting to make the zoning commission either a rubber stamp or a review board for the wetlands commission, or to alter in any way either commission's respective jurisdiction or the statutory time limits for rendering each decision." (Citations omitted; footnote omitted.)

The *Arway* court continued: "General Statutes § 8-26 provides in part that if an application for subdivision or resubdivision 'involves land regulated as an inland wetland or watercourse under the provisions of chapter 440, the applicant shall submit an application to the agency responsible for administration of the inland wetlands regulations no later than the day the application is filed for the subdivision or resubdivision. The [planning] commission shall not render a decision until the inland wetlands agency has submitted a report with its final decision to such [planning] commission. In making its decision the [planning] commission shall give due

consideration to the report of the inland wetlands agency.' This final decision and due consideration language in § 8-26 was added by No. 77-545 of the 1977 Public Acts. The history of that act indicates the language was, according to Representative Janet Polinsky, 'designed to keep a developer from . . . dangling in the winds between a wetlands agency and a planning commission. If the proposed subdivision site is located on land regulated under the inland wetlands statutes, the applicant would file a copy of his application with the agency enforcing the inland wetlands and watercourse regulations within ten days of filing with the planning commission unless the wetland agency had already reviewed this application. This way the applicant would not, as some have, go all through the subdivision procedure, get his approval and then find he could not get a building permit because he failed to get approval from the wetlands agency.'"[10] Id., 476-77.

In *AvalonBay Communities, Inc.* v. *Zoning Commission*, 130 Conn. App. 36, 65-66, 21 A.3d 926, cert. denied, 303 Conn. 909, 32 A.3d 962 (2011), the Appellate Court observed a procedurally similar situation as in the present case. The court stated: "When the plaintiff filed the 2008 site plan with the commission in the present case, it did not file a new application for a wetlands permit with the wetlands agency. The plaintiff claimed that it was not required to do so

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[10] Before this court on January 8, 2019, counsel for Saddle Ridge argued that it was not required to file another application with the agency *and* that it did not want to incur the expense and delay of agency review. Additionally, counsel for both the commission and the agency concede that Saddle Ridge cannot commence construction *without* the agency's approval. Given this concession and the legislative process detailed in *Arway* providing for coordinated review, Saddle Ridge's argument regarding expense and delay is somewhat perplexing. If the 2014 and 2016 plans do not significantly differ, as asserted, filing an application with the agency would have been more efficient and eliminated the major issue here which would have brought Saddle Ridge that much closer to commencing construction of this affordable housing development.

because the 2001 and 2008 site plans did not differ with respect to regulated wetland activity and stormwater management.[11] At the time the plaintiff submitted its 2008 site plan to the commission, it filed a report prepared by its professional engineer, which included these supporting calculations, stating that the 2008 plan made no change to the 2001 plan with respect to the wetlands or the brook." Id. Over the applicant's objection, the town requested that the commission refer the matter to the agency to determine whether the 2008 site plan was more similar to the 2001 or a 2004 wetlands plan. Id., 66. Ultimately, the agency concluded that there were no significant differences in wetlands impacts between the 2004 and 2008 plans. Id.

Unlike *AvalonBay*, the commission in the present case asked for the agency's comments, but the agency declined to issue a report as Saddle Ridge had not submitted an agency application. (ROR, Item 10.) In fact, the agency requested that the commission leave the "public hearing open pending [the agency's] input." (ROR, Item 10.)

The agency's chair, Dori Wollen, submitted comments in her individual capacity to the commission concerning the differences in the applications. She testified: "As noted before, the Conservation/Inland Wetlands Agency ('Conservation') has yet to render an opinion due to the lack of receiving a formal application from the developers. The developers continue to claim that there is no new wetland impact and therefore the 2014 Conservation permit remains valid. However, until we know the extent of the regulated activities we cannot determine their impact. This issue was last discussed at our meeting on November 15, 2016 which prompted my letter referred to above." (ROR, Item 83, p. 1.) Additionally, she queried: "[T]he permit was 'based on a wetland impact of 48 homes, 20 of which would include affordable housing units. No other use

[11] It is noted that Saddle Ridge's counsel represented the developer in *AvalonBay*.

was considered.' Now, the current application, as we have been told consists of 30 single family homes and 18 duplexes with two units each for a total of 66 units. On a unit basis this is a 38% increase, without any new wetland impact?" (ROR, Item 83, p. 1.) She questioned: "The limit of disturbance on the approved plans shall be established on all of the lots prior to construction, in accordance with the limit of disturbance lines noted on Map SE-1, dated August 4, 2014, and last revised October 30, 2014 with a distinct boundary material approval by the [wetlands enforcement officer] . . . By now, these maps are obsolete, there are more units proposed, so is the developer arbitrarily changing those lines without any input and/or confirmation of Conservation? Since when has the developer been authorized to act on behalf of Conservation?" (ROR, Item 83, pp. 1-2.) Moreover, she averred: "The fact alone that additional erosion control measures have been recommended by LandTech tells you that the current plans are NOT the same as the ones approved in 2014, i.e., what prompted the need for additional erosion controls?" (ROR, Item 83, p. 2.) She concluded: "[W]hile I understand the developers' assertion that the current proposal does not have new wetland impact, it is Conservation's statutory responsibility to confirm the same."[12] (ROR, Item 83, p. 2.)

While these comments were made in Wollen's individual capacity, the agency's July 10, 2018 memorandum of law in support of its motion to dismiss in the 2015 agency appeal (pleading # 108.00) underscores her comments. On pages two and three, the agency argues: "The plan that the [agency] reviewed and conditionally approved was abandoned by [Saddle Ridge] after it was denied by the [commission] on January 15, 2015. The new 2016 [commission] application, however similar as it may be to the 2014 [commission] application, is not the same

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[12] Wollen testified similarly at the public hearing. (ROR, Item 148, pp. 91-96.)

plan. It may be that the [agency] would have approved the new plan; it may be that the [agency] would have approved the plan with conditions; it may be that the [agency] would have denied the plan; it may be that conditions at the subject property have changed; it may be that the current [agency] may have concerns that the 2014 [agency] did not have. The point is that by not appearing before the [agency], [Saddle Ridge has] not given the [agency] the opportunity to make a determination about wetland and watercourse impacts."

On page four, the agency continues: "[I]t is within the [agency's] jurisdiction and authority to determine if the 2014 plan and the 2016 plan will result in identical impacts to the wetlands and watercourses, not [Saddle Ridge's]. [Saddle Ridge is] not in a position, nor [does it] have the statutory right, to make that decision unilaterally. The [agency] is charged with making decisions where regulated activities are involved. [Saddle Ridge has] declared that review is not necessary because the proposed 2016 activities are so similar to the 2014 regulated activities that the [agency] does not have to review the 2016 plan. To use a colloquial phrase, *that's not [Saddle Ridge's] call.*" (Emphasis in original; footnote omitted.) This court agrees.

First, nothing in the statutes or the case law gives Saddle Ridge the right to refuse to comply with the review process established by our legislature or to determine unilaterally that the 2014 and 2016 plans do not significantly differ.[13] To the contrary, §§ 8-3 (g) (1) and 8-26 (e) are unambiguous about the requirement to submit an application to the agency for its comments on a quintessential environmental concern, i.e., impact to "an indispensable and irreplaceable but fragile

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[13] The Commission's counsel stated at the January 3, 2017 public hearing that he asked Saddle Ridge's counsel "weeks ago if he would take this application in some form to the Conservation Commission, so I want to state that on the record. He's not prepared to do that." (ROR, Item 148, p. 101.)

natural resource."[14] See *Tayco Corp.* v. *Planning & Zoning Commission*, supra, 294 Conn. 679. Additionally, the statutes are clear that the commission shall not render a decision until the agency has submitted a report with its final decision. See *Weinstein* v. *Inland Wetlands Agency*, 124 Conn. App. 50, 55-56, 3 A.3d 167 ("Section 8-26 concerns the submission of subdivision plans to the commission. It provides that if an application involves land regulated as an inland wetland or watercourse, then an applicant shall submit an application to the agency responsible

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[14] General Statutes § 22a-36 provides: "The inland wetlands and watercourses of the state of Connecticut are an indispensable and irreplaceable but fragile natural resource with which the citizens of the state have been endowed. The wetlands and watercourses are an interrelated web of nature essential to an adequate supply of surface and underground water; to hydrological stability and control of flooding and erosion; to the recharging and purification of groundwater; and to the existence of many forms of animal, aquatic and plant life. Many inland wetlands and watercourses have been destroyed or are in danger of destruction because of unregulated use by reason of the deposition, filling or removal of material, the diversion or obstruction of water flow, the erection of structures and other uses, all of which have despoiled, polluted and eliminated wetlands and watercourses. Such unregulated activity has had, and will continue to have, a significant, adverse impact on the environment and ecology of the state of Connecticut and has and will continue to imperil the quality of the environment thus adversely affecting the ecological, scenic, historic and recreational values and benefits of the state for its citizens now and forever more. The preservation and protection of the wetlands and watercourses from random, unnecessary, undesirable and unregulated uses, disturbance or destruction is in the public interest and is essential to the health, welfare and safety of the citizens of the state. It is, therefore, the purpose of sections 22a-36 to 22a-45, inclusive, to protect the citizens of the state by making provisions for the protection, preservation, maintenance and use of the inland wetlands and watercourses by minimizing their disturbance and pollution; maintaining and improving water quality in accordance with the highest standards set by federal, state or local authority; preventing damage from erosion, turbidity or siltation; preventing loss of fish and other beneficial aquatic organisms, wildlife and vegetation and the destruction of the natural habitats thereof; deterring and inhibiting the danger of flood and pollution; protecting the quality of wetlands and watercourses for their conservation, economic, aesthetic, recreational and other public and private uses and values; and protecting the state's potable fresh water supplies from the dangers of drought, overdraft, pollution, misuse and mismanagement by providing an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology in order to forever guarantee to the people of the state, the safety of such natural resources for their benefit and enjoyment and for the benefit and enjoyment of generations yet unborn."

for administration of the inland wetlands regulations. It further provides that '[t]he commission shall not render a decision until the inland wetlands agency has submitted a report with its final decision to the commission,' to which report the commission shall give due consideration in making its decision. General Statutes § 8-26 (e). The plain language of § 8-26 is clear. It does not mandate that the agency take any specific action, nor does it specify any time frame. Rather, it requires the commission to wait for the local inland wetlands agency to submit a report before it renders a decision."), cert. denied sub nom. *107 Longshore Lane, LLC* v. *Inland Wetlands Agency*, 299 Conn. 903, 10 A.3d 520 (2010); *Landworks Development, LLC* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-00-0505525-S (February 14, 2002, *Eveleigh, J.*) ("The [agency] never received an application on the matter. Since the applicant has never applied for wetland permits associated with its 384-unit development plan, and no final decision from the local wetlands agency has been issued, the Commission was prohibited by . . . General Statutes § 8-3 from issuing site plan approval."). In the present case, there could have no due consideration by the commission as there was no agency report. See *Arway* v. *Bloom*, supra, 29 Conn. App. 480 ("the term due consideration requires the zoning commission to do more than simply receive the wetlands report and give it passing notice").

Second, the plaintiff, as a § 22a-19 environmental intervenor, has standing to raise these statutory violations. As noted by Wollen, "until we know the extent of the regulated activities we cannot determine their impact." (ROR, Item 83, p. 1.) General Statutes § 22a-42 (c), in relevant part, provides that "the board or commission authorized by the municipality or district, as the case may be, shall serve as the sole agent for the licensing of regulated activities." In the present case,

the body charged with determining the regulated activities and their impact, i.e., the agency, was unilaterally cut out of the legislative process by Saddle Ridge in violation of § § 8-3 (g) (1) and 8-26 (e). This gives rise to an inference that the conduct may directly contribute to unreasonably polluting or destroying the public trust in the water or other natural resources of the state. See *FairwindCT, Inc.* v. *Connecticut Siting Council*, supra, 313 Conn. 713-14 ("[T]he alleged deprivation of the plaintiffs' right to fundamental fairness could result in decisions by the council that did not give adequate consideration to environmental issues. It would be absurd to conclude that the plaintiffs had standing to intervene in the hearings before the council pursuant to § 22a-19 because they had made a colorable claim that the proposed projects would harm the environment, but they have no standing to claim that the council refused to provide them with a fair opportunity to present their claim. The right to a fundamentally fair hearing is implicit in the right to intervene pursuant to CEPA.").

In sum, Saddle Ridge's refusal to comply with the statutory requirements to file an application with the agency led to the commission not having a report by the agency in violation of §§ 8-3 (g) (1) and 8-26 (e).[15] Therefore, the court concludes that the commission was not

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[15] To be clear, it is the court's opinion that the agency should be the entity to determine in the first instance whether the regulated activities and impacts of two different plans significantly differ, except in the most de minimis of circumstances like *Vine* and *Irwin*. See General Statutes § 22a-42 (c) ("the board or commission authorized by the municipality or district, as the case may be, shall serve as the sole agent for the licensing of regulated activities"); see also *McKart* v. *United States*, 395 U.S. 185, 194-95, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969) ("[J]udicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise discretion or apply its expertise. . . . [N]otions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. . . . [I]t is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."); *Cannata* v. *Department of Environmental Protection*, 215 Conn. 616, 627, 577 A.2d 1017 (1990) ("Whether the plaintiffs' proposed activity . . . [requires] them to obtain a permit . . . and whether the plaintiffs' proposed

authorized to grant Saddle Ridge's 2016 commission application.

As a result, the court remands the matter under General Statutes § 8-8 (l) to the commission to refer the application to the agency for consideration as discussed herein. If the agency determines that the 2016 plan will not have a significantly different impact on the wetlands and watercourses than the 2014 plan and related decision, the commission would not need to take further action, other than as described in the next section of this memorandum of decision. If the

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use of their land is an 'agricultural or farming' use within [General Statutes] § 22a-349 . . . are factual determinations best left to the commissioner. This is precisely the type of situation that calls for agency expertise. Relegating these determinations to the commissioner in the first instance will provide a complete record containing the commissioner's interpretation of the relevant statutory provisions for judicial review. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise." [Internal quotation marks omitted.]); *Yorgensen* v. *Chapdelaine*, 150 Conn. App. 1, 12, 90 A.3d 305 ("*Aaron II* [*Aaron* v. *Conservation Commission*, 183 Conn. 532, 547, 441 A.2d 30 (1981)] and its progeny are clear that, in Connecticut, the first arbiter of the jurisdiction of a local inland wetlands and watercourses commission is the commission itself, and not a court, because 'the administrative requirement that one apply to the commission in order to determine if [her] application is one for an exempt use or operation under § 22a-40 (a) is, in and of itself, valid and is administratively necessary for the commission to discharge its function under the enabling statutes [of the Inland Wetlands and Water Courses Act, General Statutes § 22a-36 et seq.].'"), cert. denied, 314 Conn. 904, 99 A.3d 634 (2014); *Canterbury* v. *Deojay*, 114 Conn. App. 695, 708, 971 A.2d 70 (2009) ("Whether the defendants' planting . . . is considered 'farming' for the purposes of General Statutes § 22a-40 and § 4.1 of the regulations is not for us to determine. Such determination must be made by the commission in the first instance. The trial court cannot, nor by extension can we, make a finding that the defendants' actions could be considered farming without the commission first having considered the issue."); *Wilkinson* v. *Inland Wetlands & Watercourses Commission*, 24 Conn. App. 163, 167-68, 586 A.2d 631 (1991) ("[T]he [wetlands agency], like the [state department of environmental protection], must be given the first opportunity to determine its jurisdiction. Requiring the plaintiffs to apply for a permit is neither futile nor inadequate. If the [wetlands agency] finds that the plaintiffs' proposed use is exempt from regulation under General Statutes § 22a-40 (a) (1), the plaintiffs will be allowed to conduct their activities without a permit. If the commission determines that the plaintiffs' proposed use is not exempt, it must then decide whether to issue a permit.").

agency determines otherwise, then it will presumably issue a report in accordance with § § 8-3 (g) (1) and 8-26 (e). The commission must then reconsider the 2016 commission application in light of the agency's report. Any appropriate responsive decision will be reviewed by this court.

B

The plaintiff also argues that the commission's decision was improper because Saddle Ridge's proposed shared septic systems for the eighteen duplex units violates an ordinance prohibiting such community septic systems.[16] Specifically, according to the appendix to the plaintiff's brief (pleading # 125.00), § 405-1 of the Easton municipal code, in relevant part, provides that "[c]ommunity septic or sewage systems (defined as systems which serve more than a single dwelling unit) shall not be permitted anywhere within the Town of Easton."[17]

The commission did not address this issue in its original brief (pleading # 126.00). In Saddle Ridge's brief, it argues that the proposed septic systems meet the state department of public health requirements and that the plaintiff failed to identify any unreasonable pollution

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[16] The plaintiff brought up other wetland related concerns during the administrative process, e.g., sufficient information to determine impact on water quality. (ROR, Item 148, pp. 69-79.) It appears that at least some of those concerns were addressed in the commission's modified resolution which imposed additional requirements for the development of each lot. (ROR, Item 157, pp. 8-15.) Of course, these related issues and protective requirements may be reviewed by the agency. Again, had Saddle Ridge submitted an 2016 agency application, such issues would perhaps no longer be a concern.

[17] Additionally, § 405-2 provides that "[a]ll requirements for sewage disposal for residences within the Town of Easton shall be by the use of individual septic systems subject to the oversight of the Town Health Department."

resulting from the proposed systems.

The intervention petition indicates that the plaintiff was concerned about the proposed septic systems. (ROR, Item 41, p. 1.) During the public hearing, the town engineer commented that "[t]he duplex units should have separate septic systems . . . if not then who will make repairs if they fail." (ROR, Item 35, p. 3.) In the commission's modified resolution of approval, it found generally that the plaintiff did not prove the allegations of its intervention petition. (ROR, Item 157, p. 6.) In the conditions of the modified resolution, the commission stated that the site plan must "be approved by the Easton Health Department to ensure that the well and septic system are compliant with the public health code." (ROR, Item 157, p. 11.) The commission also required that "[e]ach residential septic tank shall be inspected and pumped out by a registered sanitarian, professional engineer or licensed contractor at least once per three years." (ROR, Item 157, p. 13.) The commission's modified resolution was, however, silent about the ordinance's application to the proposed systems.

Before this court on January 8, 2019, the court consulted with counsel about the need for further commission action and explanation on the applicability of the ordinance. In response, the commission supplemented the return of record (pleadings ## 135.00-137.00). It seems clear from the letters between the town sanitarian and the state that both the town and the state interpret a single residence building, regardless of whether it is a duplex or not, as a single dwelling unit for

purposes of the ordinance.[18]

Additionally, the commission's responsive supplement to the record (pleading # 135.00), in relevant part, states: "4. The Commission was aware of the Ordinance, as it had been discussed at previous applications by Saddle Ridge Developers LLC for this property.

. . . .

"9. We conclude that the Ordinance was never intended to apply to a single detached building unit. We believe our interpretation of the Ordinance is reasonable, and we did not believe at the time of our original deliberations that it was an obstacle or legal issue."

Furthermore, in a letter dated April 2, 2019 (pleading # 136.00), Christopher Michos, the Easton health director, and Polly Edwards, the Easton health officer, stated: "Dr. Michos and I sent a request to Matthew Pawlik, Sanitary Engineer with the Department of Public Health (DPH), for the state's opinion as to whether a duplex home served by an individual septic system is considered a community septic system. Mr. Pawlik is the supervising sanitary engineer for our local health department regarding sewage disposal systems and the interpretation and enforcement of the Public Health Code. We have attached our correspondence with Mr. Pawlik for your reference. The Easton Health Department is in concurrence with Mr. Pawlik and DPH that the septic systems serving the duplex units of Saddle Ridge do not meet the definition of 'community

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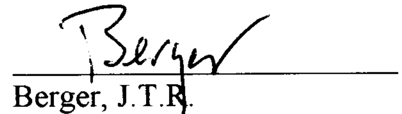
[18] Some evidence in the record seems to contradict this interpretation. (ROR, Item 106.) The plaintiff also points to § 2.1.6 of the Easton planning and zoning regulations which defines "dwelling," in relevant part, as "[a] single detached building used by one family . . . ."

septic systems' and therefore do not violate Ordinance 405."[19] In light of this, this court cannot hold that commission violated the ordinance by approving the proposed septic systems.

Accordingly, the plaintiff's appeal is remanded in part and denied in part. Notwithstanding paragraph seven of the joint stipulation, Saddle Ridge's appeal remains pending consistent with this memorandum of decision.



Berger, J.T.R.

[19] In a February 4, 2019 email to Edwards (pleading # 135.00), Pawlik stated: "A DEEP regulated community system is two SEPARATE residential buildings on a common sewage disposal systems. I routinely approve apartment buildings with multiple bedrooms as long as each apartment building is served by its own sewage disposal system." In a March 28, 2019 email to Edwards (pleading # 136.00), he further explained that "[a]s long each residential building is served by its own sewage disposal system it is not a community sewage system."