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ORIGINAL

Re: Holley Place Project – Feasible and Prudent Alternatives

Dear Chuck:

At your request I have further researched the issue of whether the Commission may appropriately consider off-site alternatives in addressing the Intervenors' § 22a-19 claims. In my opinion, the Commission, in considering all relevant surrounding circumstances and factors of the Holley Place project, must consider off-site alternatives when making its decision on the Applicant's special permit application.

General Statutes § 22a-19 provides, in relevant part, the following:

> (a)(1) In any administrative . . . or other proceeding, and in any judicial review thereof made available by law . . . any person . . . 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.
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> . . .
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> (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.

(Emphasis added.)

As the position statement of the Intervenors explained, the preservation of historic resources and character is within the scope of the natural resources that § 22a-19 is designed to protect. See United Progress, Inc. v. Borough of Stonington Plan & Zoning Comm'n, No. CV 92-0513392S, 1994 WL 76803, at *19 (Conn. Super. Ct. Mar. 4, 1994) ("Recently our Supreme Court concluded that public health and safety includes the protection of the environment which in turn, includes historic preservation."). The position statement further stated that the facts and expert testimony in the record demonstrate that the approval of the special permit application at issue is likely to unreasonably destroy or impair the character of the Lakeville National Register Historic District, for two reasons. First, it is undisputed that the construction of the proposed building will result in the destruction of Bicentennial Park. Second, the report of the Intervenors' architectural historian Rachel Carley shows that the proposed building is neither "in keeping" with nor of a design that complements the existing character of its neighborhood.

Because the Intervenors have shown that the proposed activity is reasonably likely to cause unreasonable impairment and destruction of the public trust in the natural resources of the state, the Commission, pursuant to § 22a-19, may not approve the special permit application if, "considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with reasonable requirements of public health, safety and welfare." Quarry Knoll II Corp. v. Plan. & Zoning Comm'n of Town of Greenwich, 256 Conn. 674, 735 (2001) (emphasis in original) (noting that § 22a-19(b) "explicitly provides that the agency, or the commission in this case, will consider, in the face of unreasonable pollution, whether there is a feasible alternative.").

Our Appellate Court, in Grimes v. Conservation Comm'n of Town of Litchfield, addressed whether a commission was required to consider a feasible and prudent alternative of adjoining but separate property (i.e., an off-site alternative). 49 Conn. App. 95, 102–04 (1998), cert. denied, 247 Conn. 903 (1998). The statutory analysis of the feasible and prudent alternative addressed by Grimes was under Chapter 440 of the General Statutes for Wetlands and Watercourses (specifically, General Statutes § 22a-41) and not Chapter 439 as to the Department of Energy and Environmental Protection (which includes § 22a-19). The Grimes analysis nevertheless remains relevant and applicable to the Holley Place project, as the statutory objective of § 22a-41 is analogous to the statutory objective of § 22a-19. See Goss v. Town of Guilford Inland Wetlands, No. CV 92-0327006 S, 1992 WL 347150, at *7 (Conn. Super. Nov. 16, 1992) (providing that "the main objective of § 22a-19 and 22a-41 is the preservation of natural resources.").

In Grimes, the plaintiff, an owner of property abutting the applicant's property, argued that the commission should have considered the applicant's adjoining but separate property, also owned by the applicant, as a "feasible and prudent alternative" to the applicant's proposed plan, because General Statutes § 22a-41 provides that "the commissioner shall take into consideration all relevant facts and circumstances, including but not limited to" the six statutory factors. Grimes, 49 Conn. App. at 102 (emphasis in original). The court noted that a commission's consideration of adjoining land is permitted "when such land is relevant." Id. at 103. The court went on to state that "[i]f . . . the commission is considering a proposal, the development of which will have a significant impact on the wetlands and watercourses, then consideration of adjoining land would be relevant in preserving and protecting the wetlands and watercourses and in determining whether a feasible and prudent alternative exists." Id. (emphasis added). The court, however, held that the commission in that case was not required to consider the off-site alternative because the court found that the proposed development would not have a significant impact on wetlands or watercourses. Id. at 104.

The logical corollary to the holding of Grimes is that where, as the Intervenors argue, the proposed activity on the subject property will cause the aforementioned unreasonable impacts, the Commission must consider available off-site alternatives. The Commission's consideration of off-site alternatives is also warranted because General Statutes § 22a-19(b), like § 22a-41, provides, in relevant part, that "no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect as long as, considering all relevant circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare." (emphasis added). The Commission's consideration of the Town of Salisbury's other proposed sites for affordable housing, like the Pope Property and 414 Millerton Road as suggested by the Intervenors' planning expert Brian Miller, is "relevant" as those properties are: (1) owned by the Town as is the proposed site; (2) proposed by the Salisbury Affordable Housing Commission as sites that are under active consideration for affordable housing developments; and (3) identified by Brian Miller as potentially suitable alternative sites for the project. Therefore, the Commission must consider the off-site alternatives when making its decision on the special permit application.

The court in Grimes additionally declined to interpret General Statutes § 22a-41 to require the commission in that case to consider adjoining land because "[i]f [the court] required the commission to consider whether the applicant's adjacent land contained a feasible and prudent alternative, then the plaintiff would be allowed to dictate where an applicant can develop land even when the commission is satisfied that the subject property does not interfere with the wetlands and watercourses." Grimes, 49 Conn. App. at 104.

This rationale, however, does not apply in the present matter concerning a § 22a-19 intervention as "[b]y its plain terms, General Statutes § 22a-19(b) requires the consideration of alternative plans only where the commission first determines that it is reasonably likely that the project would cause unreasonable pollution, impairment or destruction of the public trust in the natural resource at issue." Paige v. Town Plan & Zoning Comm'n of Town of Fairfield, 235 Conn. 448, 462 (1995) (emphasis added). Unlike General Statutes § 22a-41(a) which sets out six statutory factors for consideration of a commission, a commission's § 22a-19(b) consideration of a feasible and prudent alternative is triggered only when the commission first determines that the proposed activity is reasonably likely to cause unreasonable pollution, impairment or destruction of the public trust in the natural resources of the state (i.e., a commission's determination under § 22a-19(a)). In other words, unlike the concern expressed in Grimes' additional rationale for its decision, a commission's consideration of off-site alternatives under § 22a-19(b) would not allow § 22a-19 intervenors to dictate where an applicant can develop when the commission is satisfied that the subject property is not likely to cause unreasonable pollution, impairment or destruction of the public trust in the natural resources of the state. A commission should be required to consider off-site alternative, on the other hand, when it determines that the proposed activity is reasonably likely to cause such impact. Therefore, because the Intervenors have demonstrated such unreasonable impact, the Commission must consider off-site alternatives when making its decision on this special permit application.

Please let me know if you have any questions.

Very truly yours,

CRAMER & ANDERSON, LLP

By _____
Daniel E. Casagrande, Esq., Partner

DEC/smc
cc: Christopher Smith, Esq.