

Judge says East Lyme Commission must reconsider sewage capacity for Oswegatchie Hills development

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Published July 25, 2016

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East Lyme — A state Superior Court judge has ordered the town's Water and Sewer Commission to reconsider the sewage capacity it would allow a proposed residential development in the Oswegatchie Hills.

In the July 6 appeals court decision in Hartford Superior Court, Judge Henry S. Cohn called the commission's allocation of 14,434 gallons per day "excessively low" and remanded the issue to the commission.

Landmark Development of Middletown has been requesting sewage capacity for a proposed residential complex with 840 units, some of them affordable housing, as it pursues local approvals for the plan.

Over more than a decade, Landmark has filed several zoning applications, as well as subsequent appeals, while seeking to develop land in the Oswegatchie Hills.

In 2014 The Water and Sewer Commission approved a 14,434-gallon sewage capacity for the development, after Landmark appealed the commission's earlier decision to deny allocating 118,000 gallons per day to Landmark.

Glenn Russo, the president of Landmark Development, said in a statement that: "This victory in court has been a long time coming. This ruling refutes and overrules the Sewer Commission's actions to prevent our development plan from moving forward."

He said he now hopes "to put the sewer issues behind us and proceed with our zoning site plan and coordinate permits."

[Landmark is appealing the Zoning Commission's decision last year](#) to conditionally approve a preliminary site plan and rezoning application. [The conditions placed by the commission include](#) that the developer must obtain a permit from the Inland Wetlands Agency and provide information on the proposal's potential effects on the environment and coastline while, or before, submitting a final site plan.

First Selectman Mark Nickerson, the chairman of the Water and Sewer Commission, said the commission followed the judge's rules when calculating the 14,434-gallon capacity.

He said the commission and town attorneys will review the case and decide whether or not to appeal.

The court is not ordering the town to grant Landmark the full 118,000 gallons it requested, he said, but aspects of the decision are unclear and raise "more questions than answers," he said.

An executive session regarding Landmark is [on the agenda of Tuesday's Water and Sewer Commission meeting](#).

In the memorandum of decision, Cohn called the 14,434-gallon allocation "an abuse of discretion" that the commission must remedy.

"Although the Board is not required to grant the plaintiffs their request for 118,000 gallons per day, the capacity figure of 14,434 gallons per day is insufficient in view of the present remaining capacity of at least 200,000 gallons per day, and in view of the 160,000 gallons per day that was approved for Gateway," he wrote.

During the case, the judge had granted Landmark's requests to submit some additional information related to the Gateway apartment project near I-95, over the town's objections.

In court documents, Landmark argued that the Gateway development shows the town has "ample" sewage capacity for the Oswegatchie Hills proposal.

The town argued the differences between Gateway's sewer permit application and Landmark's sewer capacity application, according to court documents.

"In reconsidering the allocation of the sewer capacity, the Board must comply with applicable sewer statutes, regulations, and ordinances, and the Board should take into account the demands of the plaintiffs' sewer project and the effect on remaining capacity," Cohn wrote in his decision.

"Nevertheless, the Board must provide the plaintiffs with sufficient capacity to further the development of their project, and, as such, the Board may not settle on a figure for capacity that would completely foreclose the development of the plaintiffs' project," he wrote.

Mike Dunn, director of land acquisition for the Friends of the Oswegatchie Hills Nature Preserve, which is intervening in the sewer case along with Save the River-Save the Hills, said the groups are watching closely for what the town decides to do and would likely appeal, if the town does.

He said they are confident that after all appeals are resolved, the court will find, as in previous case law, that "towns have wide discretion to manage sewer resources."

The friends group and Save the River-Save the Hills, along with the Connecticut Fund for the Environment, have intervened in the appeal case Landmark brought against the Zoning Commission's conditional approval of the site plan. The case was transferred last December to Hartford Superior Court.

The town had revised in 2012 its affordable housing zoning regulations, after a Superior Court judge in an appeal case brought by Landmark ordered that the town review the regulations.

Disagreeing with the sewer case decision, Roger Reynolds, legal director for the Connecticut Fund for the Environment — [an organization that formed, along with the two other environmental groups, a coalition against developing the hills by the Niantic River](#) — said the town should use its remaining sewage capacity to mitigate existing nitrogen issues.

"We think the town has wide discretion on how to use their very limited sewer capacity, and we think it should be used to help the environment and not harm the environment," Reynolds said.

Meanwhile, [Nickerson and Russo had signed a memorandum of understanding in May 2015](#) to try to find an alternative land to swap for Landmark's tract in the hills. No announcement about a specific property has been made since then.