DOCKET NO.: LND-CV-23-6167031-S	:	SUPERIOR COURT
BAYWING, LLC	:	JUDICIAL DISTRICT OF HARTFORD
VS.	:	LAND USE LITIGATION DOCKET AT HARTFORD
WILTON WATER POLLUTION CONTROL AUTHORITY	:	MAY 24, 2024

MEMORANDUM OF DECISION

Plaintiff Baywing, LLC, appeals a decision by defendant Town of Wilton Water Pollution Control Authority (defendant) denying plaintiff's application to: (1) connect to the Town of Wilton sewer system along Route 7; (2) construct an extension of the sewer system from Route 7 underneath Cannon Road to reach the property and beyond; and (3) allocate sewer use capacity for the intended use of the property.

Plaintiff's application was the first of several municipal permits required to convert a single-family residential property known as 19 Cannon Road ("the property") into a multifamily development with seventy units, a portion of which would be preserved for moderate-income households. The property is in the Cannondale Village area of Wilton, just west of the railroad station, and identified in the town's plan of conservation and development (POCD) for sewer expansion. In 2011, defendant approved a similar sewer connection/extension application by the owner of property at the railroad station for a mixed-use redevelopment; however, the developer did not pursue the approvals.

Plaintiff's design and engineering for its proposed extension, and its engineer's calculation of the impact of the proposed redevelopment on Town sewer system capacity, were modified significantly during the application process as required by defendant's engineering staff, comprised of the town engineer and an outside engineering firm, Wright-Pierce, hired to

consult for the town engineer. As a result, plaintiff expanded the sewer design for the property to be capable of extension to the railroad station and properties to the east of the railroad that were approved in 2011 but have never connected to the sewer. Plaintiff also supplemented the engineering specifications of the extension to handle the future discharge from these properties, estimated as more than double that of plaintiff, in addition to plaintiff's own discharge.

Such changes necessarily increased the allocation of sewer capacity that plaintiff requested in its application beyond that needed for redevelopment of plaintiff's property alone—to one that plaintiff calculated, in combination with the single other actual user in the area, to take up 90 percent of the existing pipe's capacity on Route 7.

This calculation represented far more than the estimated and actual flows from plaintiff and the other user—a percentage that might be reached, if at all, only over time and in a measured and measurable manner based on future, hypothetical approvals by defendant. No other owner was seeking to expand the town's sewer system in the Cannon Road or train station area, and defendant's consultants had acknowledged the capacity issue as local, meaning that enlarging the existing pipe, at about half a mile in distance, where it connects to a twenty-four-inch pipe, would solve the capacity issue.

Defendant denied plaintiff's application based on the opposing views of its technical staff, expressed for the first time at the final meeting, on two principal issues:

First, on January 12, 2023, staff advised and the commission adopted the position, that a 90 percent theoretical capacity was "too high" and violated a "policy" articulated then for the first time in the denial as against total capacity for that single feeder pipe (not system) "somewhere" above 75 percent.

Second, defendant adopted the view that plaintiff's proposed contract of shared

responsibility with the town and bonded indemnity for maintenance and repair of the extension until more properties are connected was "bad engineering practice." This view was also articulated for the first time at the last meeting, and despite the text of its own regulations to allow such agreements as well its past practice—including its 2011 approval over the same stretch of Cannon Road—and the collective experience of the engineering and legal professionals, including defendant's counsel, who spoke at the meeting.

In this appeal the court must decide whether defendant's denial of plaintiff's application for these reasons was supported by substantial evidence in the record or whether it was arbitrary, unreasonable or an abuse of defendant's discretion. For the reasons discussed, the court sustains plaintiff's appeal because defendant's decision was not supported by substantial evidence and was arbitrary.

I Facts

A. Background and Procedural History

1. The Parties and the Property

Defendant is the town agency authorized under General Statutes §§ 7-245 et seq. to oversee and administer Wilton's public sewer system. Defendant has adopted certain "Rules and Regulations, as Amended through August 9, 2017" (regulations) for sewer connections, use, and its oversight of the town sewer operations, cost, and maintenance. (Return of Record [ROR, 729 -57.[1])

Wilton's existing sewer system is supported via agreement to feed into the sewage

[1] The court cites directly to the consecutive, Bates stamped numbers on each page of the return of record. The return of record is found in Docket Entry ## 107.00-108.00.

treatment facility of the City of Norwalk. (ROR, 118.) Under the agreement, Norwalk has the right to receive notice about, and to review, proposed connections in Wilton that will impact sewer discharges to Norwalk's sewer system. (ROR, 7.)

Plaintiff has an option to purchase the 2.16 acre lot located in a residential zone (R2-A) in the Cannondale Village area in close proximity to the Cannondale Train Station. (ROR, 132.) The property contains a single-family residence, most recently used as an office, and has always been served by a private in-ground septic system. (ROR, 132, 150.)

Cannon Road itself and the area around the train station, including the property, are shown on the town's comprehensive wastewater collection system plan, updated to March 2015, to be located just south and east of the north terminus of the sewer system, which runs south along the west side of Route 7. (ROR, 146.) Wilton's POCD designates the "Cannondale Node" as a "Sewer Growth Area," where sewer extensions "should be considered on the fringes of existing sewer service areas in order to support the development goals of [the POCD]." (ROR, 118-19.)

2. 2011 Approval

In June 2011, defendant approved a sewer extension sought by Cannondale Properties, LLC, for a mixed residential and retail use redevelopment for Cannondale Village on the east side of the railroad. (ROR, 173-218.) This sewer extension ran along the same path as that proposed by plaintiff, beginning farther east at Cannondale Village, then underneath the railroad tracks and west on Cannon Road, to connect to the sewer in Route 7. (ROR, 200.) Due to rising elevation from east to west, the extension in 2011 was similar to plaintiff's here, meaning designed as a force main from a pump station to an elevation peak, and then as a gravity line down the west portion of Cannon Road to the existing eight-inch sewer main along Route 7.

(ROR, 173, 186, 200.) This sewer extension was never installed nor, upon belief, was the development pursued.

Cannondale Village's 2011 application materials and defendant's June 8, 2011 meeting minutes approving it show approval of a sewer extension with an estimated discharge of 11,827 gallons per day ("gpd").[2] (ROR, 179.) Similar to what plaintiff sought and agreed to in the present application, the approval included conditions of approval that costs of installation were to be paid by the applicant, responsibility for maintenance would be divided between the town for the gravity line and the applicant for the force main and pump station, and the developer would post a cash indemnity bond to secure performance of its maintenance obligations. (ROR, 217-18.)

3. February 2022 Application

In February 2022, plaintiff submitted to defendant essentially the same application for sewer extension, connection, and capacity approvals for the same redevelopment as those sought and proposed in the application that is the subject of this appeal. (ROR, 165-71.) The defendant referred the application to the Wilton Planning and Zoning Commission (commission) for its review under General Statutes § 8-24, when an extension of the sewer on town-owned land is proposed. (ROR, 86.) Before the commission issued its advisory opinion, plaintiff withdrew its application on March 28, 2022. (ROR, 124-25.)

Plaintiff's withdrawn application is relevant to this appeal for several reasons: First,

[2] This calculation in 2011 was based on a standard for residential use of only 100 gpd per bedroom; (ROR, 178); a third less than the 150 gpd per bedroom standard used in 2022 in the current application. (ROR, 169.) The court notes that, if the capacity calculation in 2011 had used the 150 gpd standard, the total proposed flow for Cannondale Village would have been 16,027 gpd, a volume slightly higher than plaintiff's proposed flow of 15,300 gpd.

plaintiff's engineers at LandTech used the same engineering analysis then as they did in this application, to show both the estimated discharge flows for the property and that its impact on the eight-inch sewer pipe in Route 7 did not exceed the pipe's capacity. (ROR, 170.)

Second, LandTech then sought input from the town engineer, who in a response on February 8, 2022, required that the estimated flows calculation for the 2011 extension to Cannondale Village be included with those for the property, "to determine if the existing 8 [inch] pipe has capacity." (ROR, 170-71.) LandTech complied in a letter with a revised calculation dated February 23, 2022; (ROR, 166-69); in which it explained that "[t]he pumping rate of 80 gpm cited in the [2011] approved Cannondale Village calculations . . . [ROR, 189] was used in the calculations." (ROR, 168.)

Third, LandTech's revised pipe capacity calculation, showing plaintiff's estimated flows, increased by an equivalent but theoretical amount from the "[2011] Cannondale Village pump station design," and combined with the existing flows from an assisted living facility also using the pipe, demonstrated that total design flow would be .14 cfs less than the .75 cfs capacity of the 8-inch pipe.[3] (ROR, 169.) LandTech, therefore, concluded that the "existing 8 [inch] pipe can

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[3] The actual calculation in the last iteration of LandTech's sanitary sewer pipe capacity memorandum, which became the starting point of subject application, was as follows:

"115.3 gpm [existing flow] + 80 gpm [plaintiff] + 80 gpm [Cannondale Village] = 275.3 gpm total flow.

"275.3 ÷ 448.8 = .61 cfs." (ROR, 169.)

The court is mindful that the flow of 80 gpm for the Cannondale Village properties does not exist. After the 2011 approval, the extension was not built and these properties were not connected. Further, any connection to add flow in the future cannot occur without application to and approval by the defendant. Thus, while this added flow may serve as a "buffer" or "cushion" in the town engineer's analysis "to determine if the 8 [inch] pipe has capacity," as initially explained by him; (ROR, 171); it cannot be included as part of the estimated flows from the proposed redevelopment of the property in a proper analysis of plaintiff's application.

accommodate the flow without surcharge, even if both pump stations discharge at the same time." (ROR, 169.)

Fourth, the town engineer also commented in his February 8, 2022 letter to LandTech that defendant would require plaintiff to be responsible for maintenance of the force main "from the property to the gravity sewer line," meaning for the pump station and force main in Cannon Road from the property to the peak in Cannon Road. (ROR, 171.) LandTech responded on behalf of plaintiff that it would agree to this. (ROR, 168.)

Fifth, on March 2, 2022, Ralph Kolb, senior engineer for the Norwalk WPCA, responded by email to the engineer that Kolb had reviewed plaintiff's plans and had "no comments" on plaintiff's application. (ROR, 447.)

B. Plaintiff's Application

On September 1, 2022, plaintiff applied to connect to the public sewer system in Wilton under §§ 2 and 3 of defendant's regulations. (ROR, 736-37.) In order to connect, plaintiff also applied to extend the sewer from the sewer main in Route 7 to its property at 19 Cannon Road, a distance of about 300 feet, and to be allocated a specific portion of the sewer system's total capacity to handle the estimated sewage that the proposed development would generate. (ROR, 146.)

LandTech provided a new sewer pipe capacity analysis for the proposed development and sewer extension. (ROR, 150-64.) First, using the standard for residential use of 150 gpd per bedroom, LandTech calculated the proposed flow for plaintiff's proposed seventy residential units at full occupancy to be approximately 15,300 gpd. (ROR, 150-51.) Second, LandTech

measured the sewer flow for the other principal user, an assisted living facility, discharging into the eight-inch sewer main on Route 7. (ROR, 150-51.) This flow, added to plaintiff's own proposed flow, converted to cfs, yields a "total design flow" that is then compared to the maximum capacity of the 8-inch pipe on Route 7, determined to be .75 cfs, to assess the capacity of the pipe into which the proposed extension would connect.[4]

LandTech prepared the capacity calculation in the new application following the same methodology and engineering that was required by the town engineer in early 2022 in connection with the application that plaintiff withdrew. (ROR, 151, 169-71.) Thus, LandTech submitted a proposed total design flow of .61 cfs, comprised of the estimated flow of 80 gpm (.175 cfs) for the theoretical 2011 Cannondale Village extension, the same estimated flow for plaintiff's redevelopment of 80 gpm (.175 cfs), and the actual measured flow of 115.3 gpm (.26 cfs) for the assisted living facility. (ROR, 151.) Without the theoretical component, plaintiff's real total design flow would have been .445 cfs. This is significant.

Plaintiff explained in the narrative that its calculation of proposed flow used in the capacity analysis was purposely conservative for the additional reason that it assumed maximum occupancy and maximum use, i.e., two people in each bedroom, and did not show any gradual increase from a lower number either based on actual sewage generation or on the vacancy of units. (ROR, 132.)

[4] As a third aspect of analysis, referring to a recent study of the public sewer system's ability to accommodate a larger development on Route 7 (Wilton Meadows), LandTech's report explained that discharge from plaintiff's proposed redevelopment could be accommodated by the existing public sewer system. (ROR, 150, 152- 64.) As will be discussed, defendant did not challenge at any time this conclusion of capacity, as distinct from the capacity of the eight-inch pipe on Route 7 into which the extension was proposed to flow.

1. Application Acceptance and § 8-24 Referral to the Commission

At defendant's meeting on September 14, 2022, the application was accepted, and a brief presentation was made by counsel for plaintiff. (ROR, 519-36.)

As was done in February 2022, defendant voted to refer the application to the commission, under § 8-24, to review the extension of the town sewer system from Route 7 along Cannon Road,to the property and to issue an advisory report as to whether the proposal was consistent with the goals and objectives of the POCD. (ROR, 238, 536-37.)

On October 24, 2022, the commission reviewed plaintiff's proposed sewer extension and returned a "negative report" memorandum dated October 25, 2022, to defendant. (ROR, 248-49.) The memorandum listed nine reasons, principally related to the increased density that plaintiff proposed in a single-family residential zone and to the fact that the commission had not completed a study anticipated by the POCD for the "Cannondale Node" area.

2. November 3, 2022 Meeting

Shortly before defendant's meeting on November 3, 2022, the town engineer provided letters to plaintiff and defendant members with engineering comments on plaintiff's proposal. (ROR., 240-41.) These communications had not been provided to plaintiff in advance of the meeting and the meeting was spent principally with the town engineer explaining the items he and Wright-Pierce, an independent engineering firm hired by the town, had listed. The town engineer asked, but could not answer, whether the eight-inch sewer main in Route 7, in its present configuration, would be at full capacity if plaintiff's application was granted and thus act as a "restrictor" to future owners and uses connecting to it, or whether future connections would require that the eight-inch pipe be replaced with a larger pipe. (ROR, 569.) Counsel for plaintiff responded that plaintiff would respond to the capacity question at the next meeting but observed

that the timing and nature of future development is speculative, and asked how one could preserve any aspect of capacity to meet something not known. (ROR, 575.)

Next, the chair of defendant asked "why [discharge flow for] Cannon[dale] Village is being included," because "it was approved . . . [but] never filed or pulled or declined, or whatever." (ROR, 580-81.) The town engineer stated only that "they were included because they did come to the WPCA at one point . . . . [B]ut because that eight-inch line is just a pinch point. . . I have to include what was approved but just not built yet." (ROR, 581.) The commission's counsel stated his belief that the approval "had a time limit on it." (ROR, 582.).

Counsel for plaintiff explained that the inclusion of estimated flow for the 2011 unbuilt extension was requested by the town engineer in commenting on the analysis in the earlier application that plaintiff withdrew in March 2022. Further, counsel stated that "the issue came up was that approval from you [in 2011] still in existence and we said no." (ROR, 583.). The chair agreed that "it's my expectation that we don't have any obligation" and directed town counsel to "clarify at the next meeting" whether defendant's 2011 approval was still valid.[5] (ROR, 584.)

Plaintiff's engineer and counsel briefly addressed other items in the town engineer's and Wright-Pierce's correspondence. The LandTech engineer agreed to the recommendation made by Wright-Pierce; (ROR, 244); to use the full allocation of capacity in the approval for the assisted living facility to connect, rather than the actual, lower discharge that it generated, which

[5] The record does not indicate that the question of the validity of the 2011 approval was ever answered or that the approval was ever extended or transferred. The only mention was that counsel for defendant said in the January 12, 2023 meeting, in response to a member's question about how defendant could require the Cannondale Village entity that received the 2011 approval to tie in to plaintiff's re-designed pumping station, if approved, that the entity would "have to come back for a modification anyway." (ROR, 634.)

plaintiff had measured in the sewer main on Route 7. (ROR, 584-85.)

Finally, in discussing the town engineer's comment; (ROR, 240); about how to ensure maintenance and repair when a privately-owned pump station and force sewer main discharges to a public sewer main, the LandTech engineers stated that such situations exist and are typically addressed in a formal agreement between owner and town, examples of which could be provided. (ROR, 579.) The town engineer stated that one situation did exist in the town where a privately-owned pump station discharges to a public force main. (ROR, 585-86.)

Before adjourning, it was agreed that plaintiff could submit a comprehensive response to the town engineer's comments at a second meeting, and plaintiff consented to the full extension of sixty-five days allowed by law, to January 20, 2023, so that LandTech could respond after meeting with the town engineer and Wright-Pierce. (ROR, 589.)

Thereafter, LandTech met with the town engineer and Wright-Pierce on or about December 1, 2022. Defendant's next meeting was noticed for January 12, 2023.

3. December 22, 2022 Landtech Memorandum

Plaintiff submitted to defendant a memorandum prepared by LandTech, dated December 22, 2022, entitled "19 Cannon Road Sanitary Sewer Pipe Capacity," in which LandTech stated, "[w]e met on 12/01/22 to discuss the technical aspects of the development . . . [and] . . . have revised our evaluation of the capacity of the Wilton Sanitary sewer and the design of the physical sewer extension requested." (ROR, 283.) The memorandum also attached a "Revised Pipe Capacity Calculation"; (ROR, 287); and plans showing these revisions.[6] (ROR, 288-90.)

[6] While plaintiff responded to each of defendant's technical comments in the October correspondence, from this meeting on, the principal issues in discussion between LandTech and the town engineer were (1) establishing responsibility for the repair and maintenance of the sewer extension and pump station while it serves only plaintiff and (2) the capacity of the eight-

LandTech responded to the comments about the force main engineering, with a redesign of the proposed sewer extension, to provide a single sewer force main and pump station capable of serving not only the property but also properties in Cannondale Village east of the railroad. LandTech revised the engineering of the force main with increased pipe velocity and a higher discharge rate, to reach the elevation peak on Cannon Road, then by a gravity main to connect under Route 7 to the eight-inch public sewer main.

The redesigned single pump station was designed to be deeper underground so that future discharge flows from properties to the east could reach it by gravity flow, and then be pumped west through the four-inch force main up the incline on Cannon Street. (ROR, 288-90.) The redesign also included a feature approved by defendant in 2011, of two holding tanks for emergency storage of wastewater for up to twelve hours if the force main was blocked or failed to operate. (ROR, 288.) LandTech explained that, while the engineering and surveying needed for connections by properties east of the property were provided in its plans, any connection would be built in the future by and at the expense of owners or entities seeking to connect. (ROR, 283.)

The revised pipe capacity calculation LandTech provided reflected the engineering modifications, but still concluded that "the sewer system in place [on Route 7] has the capacity to accept the discharge from [unknown] future development [east of the railroad]." (ROR, 286.) It accounted for infiltration and inflow at an agreed rate of .01 cfs. (ROR, 285, 287.) In place of the estimated flow of .80 gpm for the unbuilt 2011 Cannondale Village development discharged through a separate pump station and force main, the greater velocity and higher discharge rate

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inch pipe segment of the sewer main along Route 7 north of Wilton High School, to which the extension, if approved, would connect.

described above made a single force main able to serve all properties connecting to the eight-inch sewer main on Route 7 from Cannon Road, with a consistent flow of .26 cfs.[7] Also, the calculation used the full discharge allocation of .40 cfs from the approval of the assisted living facility in place of the actual flow measured by plaintiff, of 115.3 gpm, or .26 cfs. (ROR, 287.)

LandTech's memorandum also set forth plaintiff's responses to the town engineer's questions about ownership and maintenance and repair obligations for the extension. First, LandTech proposed that the force sewer main and gravity sewer main in the public right of way and roads be town owned, and that the pump station on plaintiff's property be privately owned by plaintiff or its successor for as long as plaintiff's property was the only connection to the extension. (ROR, 283-84.) Second, LandTech stated that, as a condition of approval by defendant of plaintiff's application, plaintiff would enter into a written agreement, on terms acceptable to the town, to be responsible for all costs of maintenance, repair, and access to the sewer force main and private pump station, and, further, to provide a cash bond in an amount and on terms satisfactory to the town, from which the town would be made whole for any costs that it incurred for repair or maintenance of the sewer extension. (ROR, 283-84.)

In sum, LandTech's design changes responded in full to the concerns expressed by the town engineer and Wright-Pierce. The revised pipe capacity calculation yielded a total existing and proposed design flow of .67 cfs, meaning that capacity exited for plaintiff's proposed use,

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[7] Unlike the earlier pipe capacity calculation; (ROR, 151); which showed plaintiff's use alone at 80 gpm (.175 cfs), the revised design for a single force main created a higher flow rate consistently at .26 cfs for all users, at the higher velocity and discharge rate in the new design—features not needed for plaintiff's property alone. This higher capacity calculation flow rate does not differentiate plaintiff's known estimated flow from the property from those for unknown future users in the Cannondale Village properties proposed in 2011 and any others that might connect from the east. Nevertheless, anticipation of future connections unrelated to plaintiff's property creates a flow rate higher than whar plaintiff needs or what is ascribed to plaintiff's property alone.

and it total was less than the .75 cfs that the parties agreed was the maximum capacity of the eight-inch main in Route 7.

4. Defendant's January 12, 2023 Meeting

The day before defendant's scheduled meeting, the town engineer sent to plaintiff a memorandum addressed to defendant, dated January 10, 2023; (ROR, 275-77); attaching another Wright-Pierce letter dated January 6, 2023; (ROR, 278-81); each addressing the design revisions and comments in LandTech's December 22, 2022 memorandum. The town engineer's memorandum set forth ten "Technical" and six "General" "Sanitary Sewer Related Items," and Wright-Pierce in its letter set forth six "Changes Needed for Approval to Connect." As to LandTech's revised capacity calculation of .67 cfs, the town engineer and Wright- Pierce observed that .67 cfs was at or near 90 percent of the 8-inch pipe's capacity of .75 cfs, and that "any future development beyond this application will likely require upgrades to the existing 8 [inch] pipe on Route 7." (ROR, 276, 279.)

While the town engineer distanced himself in his letter from any suggestion that he had agreed to what LandTech proposed in its January 22, 2022, neither he nor Wright-Pierce criticized LandTech's work or the accuracy of its flow and capacity calculations, nor did they recommend in these letters that defendant deny plaintiff's application, or cite to any policy or practice that would require denial.

In response, counsel for plaintiff sent an email to the town engineer at 1:37 p.m. on January 12, 2023, to state that plaintiff would accept nineteen of the twenty-two items listed in the memorandum and letter without need for comment or discussion. (ROR, 300.) Of the remaining three items, the one relating to the split public and private ownership of force main and pump station was addressed by counsel as follows: "[Plaintiff] will accept whatever the

WPCA and your office decide is better." (ROR, 300.) Counsel then stated, "This leaves [two issues] which are the same and deal with potential future capacity need. We will be prepared to discuss this at the hearing." (ROR, 300.)

The meeting on January 12, 2023, began with the plaintiff's counsel reminding defendant that Norwalk WPCA had received the proposed extension plans and specifications in March, and had no comment in response. (ROR, 609.) The LandTech engineer then explained the design changes made after discussions with the town engineer and Wright-Pierce, and the calculation of 90 percent capacity for the 8-inch pipe described in the December 22, 2022 memorandum. (ROR, 610-13.) He stated that the single pump station and force main redesign would also serve the train station and properties near it that were anticipated to be served in defendant's 2011 approval, as the town engineer requested, without further impact on the capacity of the eight-inch pipe on Route 7. In response to a member's question how that is so, he stated "because the [pumping rates] stays the same . . . [and] it just pumps for a longer time each day" as the number of connections increase. (ROR, 618.)

Further, the LandTech engineer explained why the revised pipe capacity calculation for the eight-inch pipe in Route 7 was at 90 percent. First, he explained that the redesign urged by the town engineer to cover more properties, when combined with plaintiff's property into a single force main, called for increased discharge volume at higher velocity than what is needed for plaintiff's development alone and what was provided for in the earlier model. Second, he explained that the capacity calculation assumes that the assisted living facility is using its full discharge allocation, rather than its lesser actual discharge that plaintiff measured, a difference that raises the percentage of capacity. (ROR, 613-16.) Even with these theoretical and higher-than-actual use additions, he said that the 10 percent remaining capacity could yield connections

for up to thirty homes on Route 7 or to the west of Route 7. (ROR, 611.) He concluded, "I think there's agreement among all three engineers that it's a pretty safe analysis. I just didn't want to scare you into thinking that it's almost ready to overflow." (ROR, 613.)

The LandTech engineer also spoke briefly to the ownership issue for the force main and pump station for the period when only plaintiff would be using it before it would become "public." (ROR, 614-16.) He repeated that plaintiff would follow defendant's lead on the issue of ownership but explained that a private pump station on private property and public force main on public property was what has been done elsewhere, with a condition of approval for a written agreement and bond for any maintenance or repair work. (ROR, 616.)

Thereafter, the town engineer interrupted to articulate, for the first time, his opposition to plaintiff's application as to the issues of ownership and capacity. (ROR, 619-35.)

The town engineer began by denying that any consensus was reached with plaintiff's engineers, notwithstanding their consultations: "just because we threw out a thought or an idea to look at, it doesn't mean the town is in agreement." (ROR, 621.) He also stated that any agreement for maintenance and repair of the force main and pump station should be negotiated and in place prior to any approval by defendant. (ROR, 623 and 275-76.) He reasoned that potential engineering issues—clogs, electrical failure, call-before-you-dig—would have to be addressed, especially where the force main in the public way would likely be owned by defendant, but the pump station on private property would likely be owned by plaintiff. (ROR, 623.)

When counsel for plaintiff was invited to respond to the town engineer's comments, he first repeated that plaintiff would accept whatever terms defendant and the town sought in an agreement with plaintiff regarding maintenance and a bond. (ROR, 661-63.) He also said that it

was customary to make such a maintenance agreement a condition of approval, to be negotiated after all approvals were achieved and all issues known. (ROR, 661-63.) Defendant's attorney, when asked by the chair, agreed with counsel for plaintiff: "There's no reason that an approval can't be conditioned upon an acceptable agreement to be negotiated. . . . [T]owns are party to these all the time. They're negotiated post decision as a condition of approval. . . . [F]rom my perspective, that's not problematic."[8] (ROR, 676-77.)

Plaintiff's counsel explained that, given the lengthy approval path plaintiff faced for the property before other town agencies, a fully negotiated agreement at that point was "unrealistic" and "never happens." (ROR, 679-80.) He further pointed out that the town would be fully protected by a condition of approval requiring such an agreement with the details deferred "to a later day" because the system could not operate until an agreement was in place. (ROR, 680.)

As for the issue of capacity, the town engineer stated that the revised capacity calculation of 90 percent for the 8-inch pipe meant that the "pipe is full" and at a capacity level he was uncomfortable recommending.[9] (ROR, 643.) He did not disagree that there was still capacity for houses to connect even at 90 percent but stated that any future development—meaning not single houses—would require an upgrade of the 8-inch pipe on Route 7, and require "study." (ROR, 643-44.)

The town engineer did not explain why upgrade of the pipe, less than half a mile in length, was a problem, or could not be undertaken as contemplated by defendant's regulations and authorized by General Statutes § 7-246a (a). Nor did he acknowledge his requirements twice

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[8] The court notes that the ownership arrangement was not what plaintiff and the town engineer had previously discussed and what plaintiff had proposed.

[9] When given opportunity to respond, counsel for plaintiff began by stating that this meeting was the first time that anyone in plaintiff's team had heard this, much less that defendant had any policy regarding capacity.

to increase the capacity calculation that LandTech prepared. Rather, he addressed the capacity calculation as if it posed some danger that he did not specify. He stated that some towns have a maximum limit of 75 percent but acknowledged that Wilton did not have such a policy. (ROR, 644-45.) When a member asked him if there existed a "professional guideline" in support of his view, he did not cite to any, responding only "I would not go above 90 percent." (ROR, 645.)

The town engineer acknowledged that the existing flow in the 8-inch pipe on Route 7 was only attributable to the assisted living facility, and that its .40 cfs approval allocation, is fully 53 percent of the pipe's capacity. Thus, the inclusion of the combined estimated flows for plaintiff and unrelated, unbuilt properties east of plaintiff raises the total design flow to .67 cfs, or 90 percent of the pipe's capacity. (ROR, 648-49.) The town engineer did acknowledge that because the assisted living facility's actual use, measured in the pipe by plaintiff, was less than its approved allocation, his use of 53 percent capacity overstates the actual percentage of the pipe's capacity for which the assisted living facility alone accounts.[10] (ROR, 649.)

A member asked the town engineer "how confident" he was that the capacity was at 90 percent, and not higher. (ROR, 647.) He responded with an explanation about "pump curve" and "range of flow," and again, did not address the methodology of the calculation, with estimates of non-existent flow added to the flow of both plaintiff and the assisted living facility. (ROR, 647-48.) Another member of defendant asked him, if he could not recommend 75 percent maximum capacity for the 8-inch pipe because "it's not in the policy," and whether defendant

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[10] The capacity calculation for the assisted living facility's allocated flow is .40 cfs ÷ .75 cfs = 53 percent. (ROR, 287.) Its actual flow is .26 cfs ÷ .75 cfs = 35 percent. Thus, use of the allocated flow to the assisted living facility provided a "cushion" of .14 cfs (19 percent) over the actual use in LandTech's revised calculation. Adding in .01 cfs for infiltration and inflow, the difference in total design flow between the measured actual discharge rather than the allocated capacity for the assisted living facility is that between .52 cfs (69 percent) and .67 cfs, (90 percent) of the pipe's capacity, a difference of 21 percent of the pipe's capacity (ROR, 287.)

had control over such policy determinations. (ROR, 650.) The town engineer responded, "Yes. So tonight you're voting on that." (ROR, 650.)

The same member commented in response that 90 percent "just seems like a scary number," and asked again, "is this policy in writing . . . that we don't have a limit?" (ROR, 651.) The town engineer replied, "It doesn't say in our regulations . . . . I don't want you to think 90 [percent] is a good number . . . [because] you still have 10 [percent] to allow someone else. Ninety percent makes me nervous and 90 percent is the most I would even suggest but other towns require less." (ROR, 651.) He did not explain why. When pressed further as to "the basis" in engineering for this view and for why other towns have a specific policy for less than 90 percent capacity, the town engineer again did not respond except to mention range of flow and infiltration and inflow issues. (ROR, 652.)

The chair stated, "[T]his one property is getting all the development and the other folks don't get the opportunity to develop unless they take on a much larger cost burden. So I think if we think about if there's capacity for . . . 70 units . . . . I'm struggling . . . with the equity piece of it, that some of the other properties aren't going to have that opportunity at the same cost basis as this property... because, you know, there using up what is likely all the available capacity," and asked if this was relevant to the decision-making. (ROR, 674.) Counsel for defendant replied that "it's relevant if you think it's relevant," and went on to state that defendant has broad discretion so long as it was not arbitrary, illegal or an abuse of discretion. (ROR, 674-75.) He stated, "in this case where [the town engineer] is certainly concerned about the capacity issue, I don't think it's out of the realm of a topic that you can certainly consider." (ROR, 675.) Again, neither the town engineer or counsel mentioned the theoretical and added flows in Landtech's analysis or plaintiff's view in this explanation.

The discussion shifted back to the private and public ownership, described previously, but then returned to capacity when one member asked the town engineer how to get the capacity calculation below 90 percent. (ROR, 681.) His response did not mention that he had directed the calculation methodology to include theoretical and added flows, as counsel for plaintiff had tried to explain. Rather, he stated only that either the pipe must get upgraded or "applicant has to reduce their flows." (ROR, 681-82.) Two members then asked whether the reduction in the size of the proposed development would get capacity below 90 percent. (ROR, 683-84.). The town engineer answered in the affirmative, because less bedrooms would yield less discharge, causing the pump for the force main to switch on less often, and reducing the times that the extension would discharge into the pipe and the number of times it would be at 90 percent capacity. (ROR, 684.)

In response to further questions about ownership, the town engineer repeatedly opined that it would be "bad practice" for the Town not to own both the force main and pumping station, because they are connected and "complete control" is desirable for maintenance and repair, especially when the sewer serves more than one property. (ROR, 685-86.) He did not explain why or what in his experience or training had led him to this view. He also said that it would be bad practice for the Town to own both when the sewer only serves one property, but that the private owner should not own the force main. (ROR, 686-87.) Even though this was acceptable to plaintiff, he stated, "I don't think you can solve that by just an agreement that will get done later. That isn't good engineering practice." (ROR, 687.) The LandTech engineer disagreed that an agreement could not work. (ROR, 687.)

Two members then asked whether defendant could assess plaintiff more based on a pump station only serving one property. Specifically, it was asked whether defendant had "discretion

to charge more money and also if we did have discretion would it make Town Engineer feel better from the policy perspective that we are owning a station that serves one property?" (ROR, 688.) The town engineer replied that there was no "fee formula to say give us X amount of dollars and we'll maintain the pump station or we'll take ownership of [it]," and then discussed his opposition to shared ownership of an extension serving one property. (ROR, 688-89.) At least one member commented that the town engineer was not responsive to the members' questions, but none of the members, or the chair, pressed for more clarity in his response. (ROR, 690.)

There then followed several comments from members, about how they would vote, many of them repeating the town engineer's concern about 90 percent capacity. However, the defendant agreed, on advice of its counsel, in response to counsel for plaintiff's comment that the town engineer's views had never been expressed before, that defendant would hold a further meeting on January 19, 2023, to allow counsel time to prepare a decision resolution and plaintiff to respond. (ROR, 704-705.) Specifically, counsel for defendant stated, "Technically, you know, this isn't a public hearing the way it's set up in planning and zoning but you're keeping the hearing open or you're keeping the meeting open and I would, you know, once the resolution here's what I would propose. Once a resolution is drafted and sent out to members of the Authority that [plaintiff's counsel] also get a copy of it and then if he has any comments at that meeting on the 19th, he as the applicant would be able to make them." (ROR, 704.)

5. Defendant's January 19, 2023 Meeting and Denial Resolution

On January 18, 2023, plaintiff had not received a draft resolution and counsel provided to defendant a written memorandum thanking it for scheduling a further meeting, proposing conditions of approval to resolve the ownership issue of the sewer pipe and pump station and to