

CONNECTICUT CONFERENCE OF MUNICIPALITIES
MUNICIPAL LAW: AN ANNUAL CHECKUP

UPDATE ON LAND USE LAW¹

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I. SUFFICIENCY OF EVIDENCE TO SHOW ADVERSE IMPACTS – NEED FOR EXPERTS

- A. Cornacchia, et al. v. Environmental Protection Commission of the Town of Darien, 109 Conn.App. 346 (2008) - Homeowner appealed from a decision by the Darien inland-wetland commission denying their application for a permit for a swimming pool in the upland review area. The homeowner had an expert who offered his professional opinion that there would be no adverse impact. The commission had no expert, although it did have an in-house staff person provide an opinion with regard to the issue. Citing River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission, 269 Conn. 57 (2004), and other recent cases, the Appellate Court reversed the trial court decision, finding no substantial evidence in the record to justify a finding of likely adverse impact. The Appellate Court reasoned that general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence to justify a finding that an adverse impact is likely. This decision, following prior decisions, makes the standard for finding adverse impacts more stringent.

II. RELIGIOUS USES

- A. Cambodian Buddhist Society of Connecticut v. Planning & Zoning Commission, 285 Conn. 381 (2008)
1. *Prior Case Law on the Issue:* Grace Community Church v. Planning & Zoning Commission, 42 Conn.Supp. 256 (1992). Court reverses denial of

¹ Thanks to Charles Andres, Esquire, Chair of the CBA Planning and Zoning Section, for his original draft of this outline.

special permit application to build church in a residential zone, holding that the finding of a negative traffic impact could not be properly supported by the evidence in the record. The Court suggested that the review was subject to a higher level of judicial review because the agency's action implicated federal and state constitutional freedom of religion issues.

2. *Facts:* Cambodian Buddhist Society (“Society”) purchased a 10-acre site in Newtown located in a farming and residential zone where places of religious worship were permitted by special exception. The Society applied for a 7,618 sq. ft. building with 148 off-street parking spaces. The zoning commission denied the application, in part, due to a finding of inconsistency with the neighborhood. On appeal, the Society argued that there was no support in the record for denial of the special permit and a RLIUPA violation.
3. *Court’s Holding:* The denial of the special permit was affirmed. The Court found that there was substantial evidence that the proposed activity would disrupt the neighborhood character and harmony so that it would substantially impair neighborhood property values. Additionally, the Court found that wells and septic systems would pose health and safety hazards.
4. *RLUIPA:* It provides that “no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution...(a) is in furtherance of a compelling governmental interest; and (b) is the least restricted means of furthering that compelling government interest. 42 U.S.C. § 2000cc(a)(1) (2000). RLUIPA does not apply to neutral, generally applicable, land use regulation with public health and safety intent. Thus, the Act does not apply if the regulations treat religious activities in the same manner as secular activities, so long as the regulations are not applied in a discriminatory manner. With regard to RLUIPA, the Court found that the commission’s concerns were not motivated by religious bigotry but by considerations that would apply equally to any proposed use of the property.

III. SPOT ZONING

- A. Gaida, et al. v. Planning & Zoning Commission of Shelton, 108 Conn.App. 19 (2008) (Petition for certification pending) The Gaidas owned land located largely in a light industrial zone with a small residential component. Access was required over the residential land, which the regulation prohibited. The zoning enforcement officer issued a cease and desist order to stop earth work and to remove commercial equipment. The commission then rezoned the Gaidas’ land to all residential without providing any policy rationale for the changing the small area to residential, especially considering the fact that other similarly situated properties were not affected. Additionally, the overall zoning scheme of the area

was a mix of industrial, commercial and residential. The owners appealed, but the trial court dismissed the appeal. The Appellate Court then reversed the trial court decision and remanded it back with directions. The Court found that the amendment to the zoning map was spot zoning.

- B. Roundtree, et al. v. Planning & Zoning Commission of the City of Bridgeport, et al., 2007 Conn. Super. LEXIS 2258 (2007 WL 2570349) (August 14, 2007; Radcliffe, J) - The Court held that the commission engaged in spot zoning when it changed a zone to accommodate a request to build a new office. The zone change was from a residence to an office/retail regional district and covered an area of two-thirds of an acre. The Court found that the zone change was spot zoning because it involved a change affecting a small area that did not harmonize with the comprehensive municipal plan.
- C. On the other hand, in Konigsberg, et al. v. New Haven Board of Aldermen, et al., 283 Conn. 553 (August 14, 2007), the Supreme Court affirmed the general rule that zoning agencies had substantial discretion in the performance of the legislative role of amending zoning ordinances and a zoning map. The opinion reversed the Trial Court's decision which found that New Haven's Board of Aldermen engaged in spot zoning when it re-zoned a 2.5 acre parcel of property in a residential area to allow for the construction of a public school. The Supreme Court rejected the spot zoning argument, finding that re-zoning a portion of the 2.5 acre parcel so that the entire parcel would become part of an existing zone did not constitute illegal spot zoning.

IV. NOTICE OF PUBLIC HEARING

- A. In Gaida, et al. v. Planning & Zoning Commission of Shelton, supra, the court rejected the property owner's claim that the commission failed to publish proper notice of a public hearing for a zone change.
1. *Facts:* The commission scheduled a public hearing on January 27, 2004 and had published the required two notices. The meeting was cancelled due to inclement weather and a special meeting for the public hearing was rescheduled for February 5, 2004. The notice of cancellation and the notice of special meeting were both dated January 27, 2004. The commission also published notice of the rescheduled meeting.
 2. *Court's Holding:* The Trial Court had concluded that the commission was exempt from the notice requirements of Conn. Gen. Stat. § 8-7(d) because the zone change was self-initiated. The Appellate Court disagreed with this reasoning but found that the notice was adequate because Conn. Gen. Stat. § 8-7(d) does not require the publication of additional notices when the public hearing is continued or rescheduled, and the notice was properly published for the initial public hearing. The Court noted that the public hearing was rescheduled on the same day the original meeting was cancelled [apparently by staff]. Although the commission published notice of

the rescheduled meeting, the court held that the additional notice was not necessary.

V. AFFORDABLE HOUSING

- A. AvalonBay Communities, Inc. v. Wilton Planning & Zoning Commission, 103 Conn.App. 842 (2007). The planning and zoning commission denied text amendment, map amendment, and site plan applications filed under the Affordable Housing Appeals Act, Conn. Gen. Stat. § 8-30g. The Trial Court sustained the developer's appeal, and the Appellate Court affirmed that decision. The Court notes that the record was insufficient to support denials based on traffic gaps, inadequate recreational space and bus stop safety concerns. The Court found that the commission did not, as required by Conn. Gen. Stat. § 8-30g, present evidence as to the extent of harm posed by its stated safety concerns or the probability of such harm if the plaintiff's applications were granted. The case was remanded to the commission with directions to approve the application.
- B. Landmark Development Group v. East Lyme Zoning Commission, 2008 Conn. Super. LEXIS 3001 (2008 WL 544646) (February 2, 2008; Prescott, J.) - This case involved an application to construct 352 units of housing, 232 as market-rate condominiums and 120 units as affordable housing rental units. The property consisted of 236 acres in East Lyme. Applications included text and map amendments and site-specific development. The commission denied the application and the court upheld the denial. The denial was based on reasons relating to the preservation of open space, inconsistency with the Coastal Management Act, and unavailability of water and sewer.
- C. Baker Residential Limited Partnership v. Berlin Planning & Zoning Commission, 2008 Conn. Super. 4378684 (September 10, 2008; Cohn, J.) - This decision discusses the industrial zone exception to the affordable housing statute, 8-30g(g)(2), which was utilized to deny an affordable housing application. Such exception allows for upholding of denials if the application would locate affordable housing in an area which is zoned for industrial use, which zone does not permit residential uses, and if the development is not assisted housing as defined in the statute. This application sought to locate affordable housing "under the Office Technology (OT) zone that is listed under the industrial zone category in the town's zoning regulations." The OT zone allowed business or professional offices, corporate office complexes, laboratories, research facilities, design centers, and farms. The OT zone also allowed by special permit day care, health clubs, hotels, wholesaling and distribution uses, and other specific uses. The applicant argued that this was not a "traditional" industrial zone. The commission maintained that these uses allowed emerging, modern industrial uses. The Trial Court engaged in a plenary review and agreed with the commission. The Trial Court noted the legislative policy supporting the preservation of industrial zones (i.e., safeguarding a large tax base) and the importance of a more modern view of

industrial uses. The applicant's appeal was dismissed and the denial upheld. As of this writing, the status of any potential appeal of this case is unknown.

VI. REGULATION OF ADULT USES

- A. VIP of Berlin, LLC v. Town of Berlin, 287 Conn. 142 (2008); *see also*, VIP of Berlin, LLC v. Town of Berlin, 50 Conn. Super. 542 (July, 11, 2007; Shapiro, J.) - Supreme Court affirms trial court decision rejecting VIP's claim that a town ordinance regarding licensing of sexually-oriented businesses was *ultra vires* and unenforceable.
1. *Facts*: VIP claimed that the ordinance establishing separation of distances for adult-oriented businesses was a legal enactment that could only be adopted as a zoning ordinance rather than as a municipal ordinance.
 2. *Court's Holding*: In a *per curiam* opinion, it affirmed the Trial Court's decision, which found that there was overlapping authority between the town legislative body and the planning and zoning commission to adopt regulations on this subject matter. The Trial Court had held that Conn. Gen. Stat. § 8-2(a), the Zoning Enabling Act, and the more general authority granted to a legislative body to adopt ordinances to "regulate the mode of using any buildings," Conn. Gen. Stat. § 7-148(c)(7)(A)(ii), are not mutually exclusive but provide overlapping sources of authority to regulate the use of buildings. The trial court further held that the inclusion of a location restriction in the municipal ordinance regulating the operation of a "sexually-oriented business" is not pre-empted by the existence of a zoning ordinance containing a similar location restriction for "adult uses."

VII. OFF-SITE IMPROVEMENTS

- A. 229 Post Office Road, LLC v. Enfield Planning & Zoning Commission, 2007 Conn. Super. LEXIS 2576 (2007 WL 3043591) (October 1, 2007; Bentivegna, J.) - The Court found that the planning and zoning commission wrongly denied a site plan application to expand a commercial building in a business district on the basis of off-site traffic congestion. The Court cited the precedent set in Pansy Road, LLC v. Town Plan and Zoning Commission of the Town of Fairfield, 283 Conn. 369 (2007), in which the Supreme Court held that a commission does not have legal authority to deny a subdivision application because of offsite traffic congestion. The Court held that Pansy Road, LLC still applied even though it involved a subdivision application. "Although the Court in Pansy Road, LLC, considered the issue in the context of a...commission's ruling on a subdivision application, rather than a site plan application, the court relied heavily on its previous decision in TLC Development, Inc., 215 Conn. 527 (1990), an appeal arising from the denial of a site plan application."

VIII. SUBDIVISIONS

- A. Town of Groton v. Mardie Lane Homes, LLC, 286 Conn. 280 (2008) - The court held that the granting of a mortgage by a subdivision developer on lots within an approved subdivision does not constitute a “conveyance” within the meaning of a statute requiring that a town require a bond be posted to secure completion of roads and other general improvements upon automatic expiration of a subdivision approval. *See*, Conn. Gen. Stat. § 8-26c(c). The developer had obtained a subdivision approval but had not completed the “work” within five years as required by Conn. Gen. Stat. § 8-26c(c). The commission determined that the approval had expired and recorded a formal notice of subdivision expiration on the land records. Although no lots had been conveyed to “consumers,” interests had been conveyed through foreclosure actions, mortgages and/or mechanic’s liens. The developer and the interested parties argued that the town was required to call a bond because the statutory language requiring that if “lots had been conveyed” during the five-year period, the town “shall call a bond...to the extent necessary to complete the bonded improvements and utilities required to serve those lots...” Conn. Gen. Stat. § 8-26c(c). The opinion held that the granting of a mortgage did not constitute a conveyance within the meaning of this statute but did not address the more general question of whether the acquisition of title in a foreclosure action constitutes a “conveyance” within the meaning of the statute.
- B. Brenton v. Fairfield Town Plan & Zoning Commission; Hess v. Fairfield Town Plan & Zoning Commission; and Munson Builders, Inc. v. Fairfield Town Plan & Zoning Commission, 2008 Conn. Super. LEXIS 247 (2008 WL 441829) (January 31, 2008; Radcliffe, J.) - The Court struck four conditions of a subdivision approval for a three-lot subdivision that contained a historic home, which was the oldest home in Fairfield and which had been built by a captain who had served in the Pequot War of 1637. The commission’s approval included conditions that the applicant grant a deed restriction in favor of the town prohibiting the demolition of the historic dwelling in perpetuity and that the historic district commission would have authority to approve all future architectural changes to the dwelling. The Court found that the subdivision regulations do not include historical criteria, so the conditions were therefore beyond the authority of the commission’s authority under the subdivision regulations.
- C. Sovereign Ridge, LLC v. Cromwell Planning & Zoning Commission, 2008 Conn. Super. LEXIS 1026 (2008 WL 2039229) (April 22, 2008; Holzberg, J.) - The Court reverses a commission’s denial of a two-lot subdivision. The lots had frontage on two different roads, but the layout showed a common driveway serving both lots. The commission apparently denied the application because it desired the development to connect the two roads (although this is not clearly stated in the decision). The Court reversed the denial because the application conformed with the regulations and each lot had sufficient frontage, even though access to one of the lots would be via a driveway on the adjoining lot.

IX. MISCELLANEOUS

- A. Ziebell v. Stock, 2007 Conn. Super. LEXIS 3223 (2007 WL 4634050) (December 4, 2007; Ripley, J.) - The Court dismissed a claim that a cease and desist order to remove a nonconforming deck with a hot tub violated the Americans with Disabilities Act. Ziebell claimed that he had a disability which was alleviated by use of a hot tub and he had constructed the deck to provide a space for it as well as a roof to provide better access and protect the hot tub in the winter. The Court found that while the Americans with Disabilities Act requires the public entity to make reasonable accommodations, such accommodations do not require the board or commission to provide a waiver of zoning regulations. *NOTE:* In another opinion from Judge Ripley, on September 3, 2008, Mr. Ziebell was ordered to pay a civil penalty of \$2,500 pursuant to Conn. Gen. Stat. § 8-12.
- B. Animal Adoption, Inc. v. Zoning Board of Appeals, 2008 Conn. Super. LEXIS 368 (2007 WL 4634050) (February 11, 2008; Owens, JTR) - A cease and desist order was upheld against an adoption center with 119 animals. The Court found that having 119 cats and dogs constituted a change of use from the prior kennel, where the owner bred 10-15 poodles and kept approximately 15-30 dogs on-site.
- C. Weston I, LLC v. Town of Weston, 2008 Conn. Super. LEXIS 259 (2007 WL 4635050) (February 4, 2008; Downey, J.) - The Superior Court held void a provision in a local zoning ordinance terminating permitted nonconforming uses which “cease” for more than six months on the grounds that it conflicts with provisions in Conn. Gen. Stat. § 8-2, which prohibits regulations from terminating nonconforming uses without considering the property owner’s intent.
- D. Ostrager v. Town of Hebron Planning & Zoning Commission, 2007 Conn. Super. LEXIS 2115 (2007 WL 463050) (August 2, 2007; Vacchelli, J.) - The court reversed the decision of a commission where a commissioner who had missed a meeting did not become adequately familiar with the record and where this vote was needed in supplying a super majority vote for a zone change. Although the commissioner reviewed the clerk’s notes and records, and the meeting minutes, there was no audible tape or transcript of the public hearing. The Court recognized that some cases have held that a member can become familiar with a record without listening to a tape or reviewing a transcript but found that critical information was not included in the records that the commissioner did review; and that the commission, therefore, was not sufficiently acquainted with the record.

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