DOCKET NO. CV-15-6052216-S	:	SUPERIOR COURT
78 OLIVE STREET PARTNERS	:	J.D. OF NEW HAVEN
V	:	AT NEW HAVEN
CITY OF NEW HAVEN BOARD OF ALDERS, ET AL	:	MAY 12, 2016

MEMORANDUM OF DECISION

This is an appeal from a decision of the City Board of Alders granting a petition which amended New Haven's Zoning Map thereby changing the zoning designation of a 2.59 acre parcel located at 87 Union Street from general business (BA) to Central Business Residential (BD-1). 87 Union is the contract purchaser and submitted to map change to the Board. The defendant describes the property as being "bounded by Union Street to the west, Olive Street to the east, a portion of Fair Street to the South and property known as 630 Chapel Street to the north. The property is adjacent to existing BD-1 areas to the west and to the north.

The appeal raises a variety of claims:

> "(a) The Petition fails to meet the requirements and standards in the Special Act, Charter, and New Haven Zoning Ordinance.
>
> (b) The decision of the City Plan Commission giving a favorable recommendation to the Petition to amend the Zoning Map was arbitrary, contrary to the evidence, is not supported by reasonable or substantial evidence, and does not find a basis in fact or law.
>
> (c) The decision of the Board of Alders adopting the Map Amendment is contrary to the evidence, not supported by reasonable or substantial evidence, and does not find a basis in fact or law.

(d) The Commission has abrogated its authority and responsibility under the Special Act, Charter, and Zoning Ordinance to plan for and zone in the interests of the community as a whole.

(e) The Board abrogated its authority and responsibility under the Special Act, Charter, and Zoning Ordinance to zone in the interests of the community as a whole.

(f) Parcel by parcel rezoning represented by the Commission's recommendation and the Board's approval is antithetical to comprehensive planning and transforms the use of zoning districts into a flexible zoning tool conventionally within the province of planned development districts but without any of the standards and safeguards that are required as a concomitant to such regulatory flexibility.

(g) The adopted Map Amendment is not in accordance with the comprehensive plan of the City of New Haven or the Comprehensive Plan of Development of the City of New Haven.

(h) The decisions of the Commission and of the Board are the product of bias and predetermination.

(i) In their turn, the City Plan Commission and the Board, through its Legislation Committee, failed to conduct a fair hearing or to respond to questions raised by members of the public, including the Plaintiff.

(j) The Map Amendment constitutes illegal spot zoning.

(k) The Map Amendment constitutes illegal contract zoning.

(l) The Map Amendment violates the uniformity requirement and results in increased congestion in the streets.

(m) Notice is fatally defective.

(n) The rezoning represents an inappropriate use of the BD-1 Zoning District that has at its core adaptive reuse of historic structures, infill construction and coherent mixed use, neighborhood oriented development."

1.

In a well briefed argument the plaintiff addresses these claims to which the defendants also make well reasoned responses. But before these claims can be addressed by the court the plaintiff must show that the court has jurisdiction to address them - in other words that the plaintiff is an aggrieved party and therefore has standing to advance its arguments and secure a decision from the court on the substantive issues raised. "Upon appeal (a zoning appellant) must establish his (her or its) aggrievement and the court must decide whether (the appellant) has sustained the burden of proving that fact", *I.R. Stich Associations* v. *Town Council*, 155 Conn. 1, 3 (1967). As the court said in *Abel, et al* v. *Planning and Zoning Commission of the Town of New Canaan, et al*, 297 Conn. 414, 437 (2010): "It is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. If a party is found to lack (aggrievement), the court is without subject matter jurisdiction to determine the cause", quoting from *Soracco* v. *William Scotsman, Inc.*, 292 Conn. 86, 91 (2009), cf. *Stauton* v. *Planning Commission*, 271 Conn. 152, 157 (2004) and *Lucas* v. *Zoning Commission*, 130 Conn. App. 587, 595 (2011) which interpreted *Stauton* to say that the Supreme Court held that since, for example, the plaintiffs were not statutorily aggrieved "the trial court should not have considered the merits of the appeal".

Section 8-8(b) of the general statutes provides that any person aggrieved by a decision of listed land use agencies, commissions, or city entity making a land use decision may appeal to the Superior Court. Subsection (1) of the statute defines an "aggrieved person" as anyone aggrieved by a decision of one of these entities and goes on to say that aggrieved person "includes any person owning land that abuts or is within a radius of one hundred feet of any portion of the land involved

in the decision of the board" (i.e. one of the entities previously described). (Emphasis by court.) The use of the word "includes" indicates there are two types of aggrievement which establish the right of an appellant to claim it is an aggrieved person - classical aggrievement and statutory aggrievement which is referred to in the just quoted statutory language.

As noted, a plaintiff on a land use appeal has the burden of proving aggrievement *Beckish* v. *Manafort*, 175 Conn. 415, 419 (1978). In a zoning appeal "the trial court hears no evidence, except on on the issue of aggrievement", *Kyser* v. *Zoning Board of Appeals,* 155 Conn. 236, 247 (1967).

Classic aggrievement was the traditional basis to appeal a land use decision and the burden was on the appellant to prove it. The court will now discuss the legislative enactment that gave a statutory right to appeal.

The Court in *Caltabiano* v. *Planning and Zoning Commission*, 211 Conn. 662 (1989) set forth what elements must be proven to establish classical aggrievement and discusses the heavy burden on a party who claims this type of aggrievement. At page 668 the court stated that before the legislature gave a statutory right of appeal "a person appealing from (a land use decision) had, then as now an arduous burden to allege and prove so-called classical aggrievement. In order to prove classical aggrievement appellants from a zoning decision 'are required to establish . . . that they had a specific, personal interest in the subject matter of the decision as distinguished from a general interest such as is the concern of all members of the community and that they were specially and injuriously affected in their property or other legal rights . . . Mere generalizations and fears do not prove that an appellant is an aggrieved person."

The court went on to say that it was in light of these "formidable barriers" to access to the courts for zoning matters that the intention behind creating a statutory right to appeal was to be understood. The court then said: "We conclude that the legislature presumed as a matter of common knowledge that persons owning property within close proximity to a projected zoning action would be sufficiently affected by the decision of zoning agency to be entitled to appeal that decision to the court. Giving such a right to the narrow class of abutters and those owning property within 100 feet of the land would not unduly enlarge the class of those entitled to appeal such a decision. On the other hand the delay difficulty and expense of proving classical aggrievement would be eliminated." 211 Conn. at pages 668-669.[1]

(a)

The court will first discuss the plaintiff's claim that it is statutorily aggrieved and on that basis has a right to appeal from the action of the defendant. The subject of this appeal regards an amendment of the City's zoning map of a property located at 87 Union Street in New Haven. The amendment changed the designation of that parcel from General Business (BA) to Central Business - Residential (BD-1). The plaintiff who contests the legality of the amendment owns property at 78 Olive Street located to the north of the 87 Union Street property. The 78 Olive Street property does not abut the 87 Union Street parcel. It is also true and not disputed that no part of the 78 Olive Street parcel is within 100 feet of the 87 Union Street parcel which parcel is the subject of the amendment which the plaintiff argues was illegal, improper, and violated the City's zoning

[1] Thus as noted in *Lucas* v. *Zoning Commission*, 130 Conn. App. 587 (2011): "A statutorily aggrieved person need not have sustained any injury, id. page 594.

regulations. As noted before the court can address the merits of the plaintiff's position on the legality of the amendment, however, the court must determine if the plaintiff can be said to be aggrieved by the decision, that is, has standing to raise the substantive claim.

The question presented is given the above quoted statement as to the location of 87 Union Street, which was the subject of the amendment can the court make a finding of statutory aggrievement when the statute defines an aggrieved person as "any person owning land that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board." The purpose and language of the statute must be examined to answer this question.

As indicated the case of *Caltabiano* clearly defines the purpose the legislature sought to achieve when it passed the statute containing this language. This requires an interpretation of the statutory language that is used. In *State* v. *Courchesne*, 262 Conn. 537 (2003) the court set forth the controlling guidelines for statutory interpretation. The court said the process to be used for interpreting the meaning of statutory language starts with the words themselves, the legislative history and circumstances leading to the passage of the statute and "the legislative policy it was designed to implement". Id. p. 577. The court went on to say "we do not end with the language. We recognize that the purpose or purposes of the legislation and the context of the language, broadly understood, are directly relevant to the meaning of the language of the statute". Id.

The court then added all of this does not mean that in a given case the courts should not follow the plain meaning of the language that is, the meaning that, when the language is considered without reference to any exratextual sources of its meaning, appears to be the meaning and that appears to preclude any other likely meaning" - in a case such as that "the more strongly the bare

text supports such a meaning, the more persuasive the extratextual sources of meaning will have to be in order to yield a different meaning". Id. pp. 577-578.

To sum up, *Courchesne* said that in interpreting statutory language a court should start with the language of the statute but "in doing so we attempt to determine the range of plausible meanings, and, if possible, narrow the range to those that appear most plausible. We do not, however, end with the language. We recognize further, that the purpose or purposes of the legislation, and the context of the language, broadly understood, are directly relevant to the meaning of the language of the statute", 262 Conn. page 577.

Applying these principles the court is not aware of any extratextural factors, such as specific references in the legislative history and the parties have not presented any such information that would help solve the problem of the appropriate application of the language of § 8-8(b) to the specific question presented by this case as regards the existence or non-existence, per the statute, of statutory aggrievement.

The issue then becomes, given the language of Section 8-8(b) and its purpose - to eliminate the burden of proving classical aggrievement for a "narrow class of abutters and those owning property that abuts or is within one hundred feet of any portion of the land involved in a decision which is objected to - do the fact of this case and the location of 87 Union Street, the Comcast properties at 630 and 673 Chapel Street and the location of the plaintiff's property relative to the Comcast property (within 100 feet) give the plaintiff the right to claim statutory aggrievement regarding the decision to change the 87 Union Street designation from BA to BD-1 even though its property does not abut 87 Union Street and is not within one hundred feet of that property. As

Courchesne said, would recognizing the plaintiff's claim of statutory aggrievement in this case be a plausible application of the statutory language and/or would it lead to an interpretation of the language of § 8-8(b) which is not plausible given its purpose and would, in fact, defeat that purpose.

The plaintiff's argument is set forth in its brief. The court will set out that argument. In its complaint a City Advisory Report dated September 17, 2014, which was adopted by the Commission and Legislation Committee of the Board, describes the 87 Union Street party "as located between Union Street to the west, Olive Street to the east, a portion of Fair Street to the south and property known as 630 Chapel Street to the north". As noted the plaintiff in effect must concede that its property does not abut nor is it within 100 feet of the 87 Union Street property which is the subject of this appeal. But the essence of the claim of statutory aggrievement lies in the following statement in the plaintiff's brief:

> "The City Plan Report 1496-01 cites the Commission's and Board's recent map change for the properties at 630 and 673 Chapel Street adjacent to the Subject as "evidence" of the appropriateness of the Map Amendment for the Subject Property (Complaint ¶ 10); As has been noted throughout this Brief, the Record is replete with references by City representatives and the Applicant to the role the Comcast Amendments serve as a basis for this Amendment. The Plaintiff's property is adjacent to and within 100 feet of these Chapel Street properties which is "land involved in the decision" as a result of the City's reliance on its prior action as a basis for the current action (Complaint ¶ 20)." (Emphasis by court)

Let us repeat the language of § 8-8(b) - an aggrieved person "includes any person owning land that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board". The Chapel Street (Comcast) property owners would be "aggrieved" since their property abuts 87 Union Street. If the Comcast property was within the 100 foot radius of 87

Union Street - they would still be aggrieved. The question before the court is can 78 Olive Street piggy back itself into the matter since it abuts the Comcast properties or is within 100 feet of it. At least to the court, this seems to be a linguistically odd interpretation of the language of §8-8 (b).

And what does the word "involved" contemplate? What if the Comcast properties did not abut 87 Union Street and were not even within one hundred feet of 87 Union Street but they had received a BD-1 classification and in its subsequent decision giving that same classification to 87 Union Street the zoning authority relied heavily on their grant of BD-1 status to the now far distant (hypothetically) Comcast properties - could the plaintiff claim statutory aggrievement if they abutted or where within one hundred feet of this hypothetically located Comcast property? Why not, if the word "involved" is interpreted in the way the plaintiff suggests? Could other properties abutting the hypothetically relocated Comcast properties or within one hundred feet thereof also claim statutory aggrievement status? What would that do towards accomplishing the limited *Caltabiano* purpose of § 8-8(b). More to the point perhaps, would all of this not suggest the word "involved" referred only to the land (here 87 Union Street) which is the subject of the zoning action?

What if in a situation such as this a BD-1 designation had not been given to the Chapel Street properties but in the hearing on the 87 Union Street designation the reasons for the denial of BD-1 designation for Chapel Street were referred to in the record and the Commission or Board hearing the matter distinguished 87 Union Street from the Chapel Street properties, giving its detailed reasons but saying 87 Union Street presents a different situation and a BD-1 classification is appropriate? Would the Chapel Street property decision and reason therefore still allow a claim

by entities like 78 Olive Street to claim aggrievement? That the Chapel Street property was "involved" in the 87 Union Street action does not dictate, hypothetically, that the decision as to one property - Chapel Street - had to result in the same final result in both cases.

It will not do, at least in the Court's opinion, to say the court is speculating about hypotheticals that do not exist in this case - here the Chapel Street property got a BD-1 rating just as 87 Union Street eventually did etc. The interpretation advanced by the plaintiff must be considered in all the possible situations that could be presented under that interpretation to determine whether that interpretation is "plausible".

There is no appellate case addressing the precise issue now before the court involving as it does a plaintiff who owns land abutting a parcel which received a zone change shortly before the zone change for property abutting this first parcel on which a zone change was granted and which the plaintiff claims is a basis for statutory aggrievement.[2]

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[2] *Bernard* v. *Town of Greenwich Planning and Zoning Commission*, X05 CV01-0182856 S (2001, *Rogers, J.*) is not factually on point but is authority for applying the restrictive reading to the concept of statutory aggrievement set forth in *Caltabiano*. *Bernard* goes beyond just deciding, as this plaintiff argues, whether the claim that certain roads leading to a clubhouse concerning which the zoning authority permitted an application to renovate the facility could be considered as beneficially owned by the plaintiff residential property owners, thus giving them the statute of statutorily aggrieved parties. It also concluded that, apart from the beneficial ownership claim, the fact that the zoning authority considered the usage the roads would have as a result of the application as to traffic, safety, parking emergency vehicle access does not provide a basis for statutory aggrievement. The plaintiffs in that case argued because of the consideration so given and because they owned land abutting those roads they were statutorily aggrieved. The trial court rejected that argument, citing *Caltabiano*, saying "there is absolutely no indication that the court would extend this interpretation to also include other land that was discussed at the hearing as possibly being affected by the decision."

In her typically thorough fashion counsel for the plaintiff however, amplifies why in her opinion an examination of the record makes it clear that the earlier decision to grant BD-1 status to the Comcast properties was "involved" in the decision to grant a BD-1 designation to 87 Union Street in that it was basis for the 87 Union Street decision and part of a parcel by parcel zone change policy which ignored the need for zoning decisions that should be made in accordance with a comprehensive plan. Basically the plaintiff argues in its brief at page 11: "As has been noted throughout this brief, the Record is replete with references by City representatives and the Applicant to the role of the Comcast Amendments serve as a basis for this Amendment "(i.e. BD-1 status) for 87 Union Street".

The court has examined the record in regard to the plaintiff's just stated claim as to how the word "involved" used in the Section 8-8(1) is to be interpreted. Mr. Plass of the Office of Legislative Services sent a letter to the Legislative Committee of the Board of Alders wherein he said Attorney Segaloff, counsel for the defendant, requesting a rezoning of the 87 Union Street parcel from BA to BD-1. Plass goes on to say "The reasons for this rezoning are same (as those presented for a similar rezoning request for 630 Chapel Street) . . ." to enable denser residential use and mixed use with easy access to transit". In the court's opinion that's the general template referred to throughout the record when the applicant or city representatives refers to the zone change granted to the Comcast properties. (ROR2). In a letter Attorney Segaloff wrote to the President of the Board of Alders and attached Petitions to effect the desired zone change and the reasons for it the attorney makes no reference to the Comcast rezonings, and this is also true of the petitions submitted seeking that goal, ROR3.

ROR5 consists of two letters from Alders to the Legislation Committee; only one references to the Comcast rezoning and that Alder merely said that as she said with regard to the Comcast proposal, the 87 Union Street proposal will not create too much density - this comparative observation cannot easily be turned into a statement supporting the notion that the Comcast action was the basis or determinant factor in the later approval of the BD-1 rezoning for 87 Union Street.

In ROR14 which is a New Haven City Plan Commission Advisory Report extolled the benefits of BD-1 districts which "has led to a move to expand the boundaries of such districts for this type of development" - no mention of the Comcast rezoning is made.

In the presentation made to the Legislation Committee of the Board of Alders on October 9, 2014 (ROR26) Attorney Segaloff made general comments to the effect that the requested zone change for 87 Union Street will lend vitality to the area and would facilitate connections between transportation and places of employment.

He went on to say, after describing how 87 Union Street provides easy access to the downtown area, that "the next part of the zone change is the appropriateness of changing a parcel relative to the adjacent zone". He usesd a map to note "To the south is the BA zone which our site is currently zoned. To the north, BD-1 for the former Comcast building and the parking lot just north of Chapel Street and BD-1 heading across the train tracks and State Street, so our parcel is really a continuation of the BD-1 to take you from dense urban to smaller scale mixed use to eventually high medium and possibly low density residential, so we're actually taking an existing zone that is adjacent to the parcel and expanding it and allowing the current BD-1 for the Chapel Street properties to connect that to Downtown".

ROR18 is a series of articles entitled "Best Practices in Transportation Demand Management". It was apparently available to the zoning authorities involved in deciding whether the BD-1 application for 87 Union Street was appropriate. In the upper right corner of each presentation on various topics the words "Seattle Urban Mobility Plan" appear - the Comcast properties, of course are not mentioned. One of the articles is entitled "Best Practices. Land Use Management and Urban Design" with a further heading of "Planning for Low - Traffic Neighborhoods". The opening paragraph of the article reads as follows:

> "Transportation-efficient development is characterized by high density and mixed and uses, access to frequent transit service, and opportunities for short pedestrian and bicycle trips to a rich mix of desired destinations. Mixing housing and even employment with other services and retail opportunities allows residents to make necessary daily and weekly trips without using a car. Land use policy impacts transportation, sustainability and public health as a properly designed community encourages walking and biking while reducing the need to drive for daily needs. Local governments such as the City of Seattle can encourage transportation-efficient development with comprehensive neighborhood planning that includes parking strategies, design guidelines, and incentive programs. To achieve the maximum benefit, new residential density should be focused in areas with the greatest access to transit service, and coordinated with new transit investments."

In a similar vien is ROR19 entitled "Higher-Density Development - Myth and Fact" written by the Urban Land Institute. The article notes that the traditional two parent household is in decline and "single-parent households, single-person households, empty nesters, and couples without children make up the new majority of American households and they have quite different real estate needs. These groups are more likely to choose higher density housing in mixed density communities that offer vibrant neighborhoods over single family houses far from the community care". ROR20 entitled "Active Living Ramsey County" also lists the advantages of higher density

and mixed used development - it may reduce traffic congestion and encourage transit use providing pedestrian friendly environments and "nearby work and recreational environments".

These articles were preceded by ROR14 in the record which is a submission entitled "2014 Economic Development Downtown Housing Report". It noted that the "supply of housing in the downtown rental market is perceived to be disproportionately lower than the current and forecast demand" and clearly espoused such development characterizing policies that hindered it as "barriers".

In ROR26 Attorney Segaloff made comments to the Legislation Committee which referred to the BD-1 designation for the Comcast property but placed it in the broader context of the desirability of a continuation of the BD-1 zoning from a BD-1 zone in downtown across the railroad tracks and eastward across from State Street. In effect he said if 87 Union Street received a BD-1 designation it would continue the BD-1 designation from the BD-1 zone across State Street to 87 Union Street and then to the adjacent Comcast properties which had received a BD-1 designation prior to the granting of such a classification to 87 Union Street. He said "our parcel is a continuation of the BD-1 to take you from dense urban (i.e. downtown) to smaller scale mixed use to eventually high, medium and low density residential". He emphasized this "connectivity to downtown promotes the ability to walk to transit points (i.e. State Street railroad station) and to walk to Downtown occupational destinations and again we would fall into a transitional zone".

The Director of the City Planning Department basically made the same presentation to the Legislation Committee. She said 87 Union Street "has the potential to play a very unique

functional role in the creation of a high density transit orientated corridor running along both sides of (the) Metro North Line between Water and Grove Street".

Alder Marchand put the foregoing into context when he referred to and said he approved of the City's ongoing desire to attract people to move to the Downtown area. He based the idea of "more residential development Downtown". That was the basis of his support for the BD-1 designation for 87 Union Street.

The resolution in ROR28 of the Board of Alders approving the BD-1 designation for 87 Union Street referred to the application as changing the property "from the existing General Business (BA) district to be part of the adjacent Central Business - Residential District (BD-1) which abuts the parcel along the opposite side of Union Street".

The alders approved the zone change after the following "whereas" clause:

> "WHEREAS, the Board of Alders finds the requested rezoning is in accord with the Comprehensive Plan of Development for the City of New Haven as such rezoning will promote job creation and business investment; will promote development which is consistent with the uses of neighboring properties; will promote appropriate infill of under-utilized parcels of land adjacent to the Central Business-Residential district and within the City's designation of downtown; will continue the recommended conversion of land bordered by Union Street in the west, Olive Street to the east, Water Street to the south, and Chapel Street to the north from General Business to mixed-use; and will promote appropriate transitions between the high density development of the central business districts and the medium density development of abutting residential neighborhoods; and"

The approval occurred on November 6, 2014.

Prior to the date of approval of the BD-1 zoning designation for 87 Union Street, the applicant through its attorney, referred to the designation of the Comcast property but primarily in the context of a BD-1 designation extending from the BD-1 property to the west of 87 Union Street

and to the Comcast property to the north, see ROR49. The only reference to the Comcast property is in a proposed "act of the board of alders" attache d to ROR49 wherein it is proposed that the BD-1 zone change would "continue the recommended conversion of land bordered by Union Street to the west, Olive Street to the east, Water Street to the south and Chapel Street to the north from General Business to mixed use". ROR49 was a petition sent to the Board of Alders prior to the November 6th approval of the BD-1 designation for 87 Union Street.

In a September 17, 2014 packet of documents submitted to the City Plan Commission some two months before the Alders approval of the 87 Union BD-1 designation, the applicant submitted the following introductory document which again made passing reference to the Comcast properties in the context of other general benefits of the proposal in light of the general goal of increasing residential density in the downtown area and land adjacent thereto.

"ZONE CHANGE SUPPORTING CHARACTERISTICS

- EXTENDS THE BD-1 DISTRICT WITHIN THE DOWNTOWN NEIGHBORHOOD BOUNDARY AND CONNECTS TO ABUTTING BD-1 DISTRICT TO THE NORTH
- SITE DESIGNATED AS COMMERCIAL MIX USE IN COMPREHENSIVE PLAN OF DEVELOPMENT
- PROMOTES TRANSIT ORIENTED DEVELOPMENT
- PROMOTES WALK TO WORK DEVELOPMENT
- TRANSITION ZONE FROM DOWNTOWN AREAS TO MEDIUM DENSITY RESIDENTIAL IN WOOSTER SQUARE
- EXCEED THE MINIMUM RECOMMENDED ZONE CHANGE SIZE OF 1 ACRE PER ZONING ORDINANCE"

The City Plan Commission held a hearing on the application for BD-1 designation on September 14, 2014. At the hearing a Mr. Petra representing the applicant did say the BD-1 request was "consistent" with the recent approval of that designation for the Comcast property. An engineer for the applicant said there are similar characteristics between the 87 Union Street and the Comcast property. But he then went on to repeat a dominant theme in the record when he used maps to show that an approval would extend the BD-1 designation from the BD-1 zone to the west of 87 Union Street and fill in the gap between that property and the Comcast property which had previously received a BD-1 designation. At the actual hearing Mr. Marchand said that approval of a BD-1 designation for 87 Union Street made him "feel better about the parcel just to the north of it" - Chairman Mattison chimed in "True, true". Marchand then went on to say... "it makes that swatch (sic) of BD-1 from downtown, along chapel Street, to all of down to Water Street seem more continuous and less ragged in some ways". The Plan Commission approved the change of designation to BD-1 for 87 Union Street.

Interestingly ROR56, 1496-01, is part of the record and was prepared on September 17, 2014 and signed off by Mr. Mattison the chairman of the Plan Commission. It is entitled New Haven City Plan Commission Advisory Report and was forwarded to the Board of Alders. It puts the approval of the designation by the Alders in November 2014 and the discussion leading up to it in context. In the Advisory Report it states:

> "Location: proposed amendment represents an eastward expansion of the existing Ninth Square BD-1 District and an extension to the south from 630 and 673 Chapel Street (Comcast property) which was recently rezoned from BA to BD-1."

It then went on to say "Approval of this proposal, if properly managed, reinforce a connective element between the Ninth Square (downtown) and Wooster Square first established with the rezoning of 630 and 673 Chapel Street that could benefit both areas". Of course the Chapel Street parties are "involved" in this eastward expansion of BD-1 districts but they are only a part of that envisaged expansion and not, standing alone, the genesis of the BD-1 approval of the BD-1 map amendment for 87 Union Street.

In the court's opinion the record makes clear why statutory aggrievement cannot be found even given the plaintiff's suggested interpretation of the word "involved" in § 8-8(1) of the statute and even more to the point, why that interpretation should not be accepted as opposed to a purely geographic designation of "land involved in the decision" for purposes of establishing aggrievement.

It is a fair reading of the record to say that the entities involved in the decision at issue in this case and reports or studies made part of the record supported the general idea of the desirability of BD-1 districting for downtown areas and areas adjacent to downtown that would border residential zones - rightly or wrongly the court might add, but again the problem is one of standing. It is also true that although, as noted, there are several references to the just granted BD-1 designation just granted to the Comcast properties with some comments to the effect that the reasons for granting BD-1 classification for the 87 Union Street property are the same as those that prompted that earlier designation for the Comcast property, those comments must be viewed in a larger context - that is, the entire record.

Comments made by members of the Plan Commission, in the resolution of the Alders in approving the BD-1 87 Union Street classification and other references in the record evince strong support for BD-1 classification for BD-1 from properties across the State Street tracks, to the east of Union Street and up to Wooster Square.

In other words the motivating force for the BD-1 classification for 87 Union Street was not the fact, historically speaking, that BD-1 classification was recently given to the Comcast properties. The point of both designations is that both parcels would be part of a BD-1 designation for a broad classification of properties as BD-1 stretching from close to the green to the Worcester Street area - thus leading to a transition zone from downtown, which has a BD-1 classification for a parcel across from the tracks and west of Union Street, to the Worcester Street area.

To look at the problem from another perspective, given the plaintiff's interpretation a "land involved in the decision", on the basis of this record, why could not a downtown landowner bordering the BD-1 zone across the tracks and just to the west of the Union Street parcel also argue he or she is aggrieved because their property borders that downtown BD-1 zone which could be said to be even more or at least just as involved in the change of zone classification decision of 87 Union Street to BD-1.

The foregoing observation indicates that the result of the plaintiff's interpretation of "involved in the decision" aggrievement status could be given to a much broader class of landowners not contemplated by the "narrow" class of abutters and property owners within one hundred feet of any land subject to action by the zoning authorities to relieve them of the burden

of showing classical aggrievement which was the purpose of the legislature's enactment of the statutory aggrievement language.

Finally to return to a strictly linguistic analysis of the definition of aggrieved person set forth in Section 8-8(1) of the general statutes it states, as noted previously, "'aggrieved person' includes any person owning land in this state that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board." The phrase referring to a person "owning land that abuts" is necessarily modified to make any sense by the words "any portion of the land involved in the decision. Here the land that is abutted to give aggrievement status commonsensically can only refer to 87 Union Street - an aggrieved party can be someone owning land abutting that property.

The plaintiff's interpretation of the word "involved" in the statutory language defining an aggrieved person as a person who can also be aggrieved if he or she owns land that "is within a radius of one hundred feet of any portion of land involved in the decision of the board" would change the modifying language's meaning that states for both categories (abutters and one hundred foot radius parties) the reference is to "land involved in the decision" - i.e. the same land. In the court's opinion at least, the statutory language itself does not permit the plaintiff's argument so that the court is constrained to conclude statutory aggrievement cannot be found.

(b)

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In the alternative the plaintiff argues it has standing under the concept of classic aggrievement. The court will try to review the case law on this area especially as it relates to the

present issues before the court. Quoting from an earlier case the court said in *Pond View LLC* v. *Planning & Zoning Commission*, 288 Conn. 143 (2008): "Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the (controversy), as opposed to a general interest that all members of the community share . . . Second, the party must also show that the (alleged conduct) has specially and injuriously affected that specific personnel and legal interest", id. page 156, also see *Harris, et al* v. *Zoning Commission*, 259 Conn. 402, 410, 414 (2002).

The question becomes what is the standard of proof required to establish classical aggrievement? The court will first discuss that question and then try to discuss in a general way some of the issues raised by this case.

As said in *Bongiorno Supermarket, Inc., et al* v. *Zoning Board of Appeals*, 266 Conn. 531, 542-543 (2003): . . . "In order to prevail on the issue of aggrievement, 'the trial court must be satisfied, first, that the plaintiff alleges facts which, if proven, would constitute aggrievement as a matter of law, and, second, that the plaintiff proves the truth of those factual allegations. . .'"; see cases dealing with the issue of classic aggrievement which evaluated evidence introduced at trial to determine whether the second prong of the classical aggrievement test was met, *Nizzando* v. *State Traffic Commission, et al*, 55 Conn. App. 679, 687 (1999); *Hall, et al* v. *Planning & Zoning Commission*, 181 Conn. 442, 445 (1980); *Tucker* v. *Zoning Board of Appeals*, 151 Conn. 510, 515 (1964); *McDermott, et al* v. *Zoning Board of Appeals*, 150 Conn. 510, 513 (1963) (error in not considering facts presented on issue of aggrievement).

But in *Town of Wallingford* v. *Zoning Board of Appeals*, 146 Conn. App. 567, 575-576 (2013) the court said:

> "Finally, as to the quality and quantum of evidence required to establish aggrievement, an appellant need not establish his or her interest and harm with certainty, but rather, may satisfy the requirement of aggrievement by credible proof that the subject activity has resulted in the possibility of harm to his or her specific personal and legal interest. Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected . . . A fair reading of relevant decisional law makes it clear, nevertheless, that proof of a possibility of specific harm is not the same as mere speculation regarding harm . . . Although one may establish aggrievement by establishing the possibility of harm, mere speculation that harm may ensue is not an adequate basis for finding aggrievement."

Thus, in *Goldfisher* v. *Connecticut Sitting Council*, 95 Conn. App. 193 (2007) the plaintiff challenged the approval of a cellular communications tower near his property. He argued that his unique view across the Moodus Reservoir of a tree line with foliage and vegetation would be lessened by the construction of the tower. The trial court rejected the claim as speculative and the Appellate Court upheld the trial court. The plaintiff put on the testimony of an expert appraiser who said that the view offered by the location of the plaintiff's property would have "positive influences on the value of the plaintiff's property . . . and in all likelihood or probability, there would be a diminution of value of the plaintiff's property if the tower was constructed". This testimony was rejected as speculative because the expert presented no empirical data to support his opinion and did not conduct his own investigation but relied on the report of another nontestifying appraiser. The defendant's appraiser testified the tower would not have a negative impact on the value of the plaintiff's property. The court noted the defendant's expert "Unlike the testimony offered by the plaintiff's expert . . . based his opinion on historic data gleaned from similar towers

constructed in other towns and the impact of these towers on the values of surrounding properties". Id. page 200.

It should be noted, that under the classic aggrievement test a plaintiff appealing the actions of a local zoning authority cannot advance a classic aggrievement position by showing that . . . "the action complained of would permit the operation of a business in competition with its business", *Whitney Theater Company, Inc.* v. *Zoning Board of Appeals*, 150 Conn. 285, 287-288 (1963), cf, *The Connecticut Post Limited Partnership* v. *State Traffic Commission*, 28 Conn. L.Rptr. 252 (*Hodgson, J.*, 2000); *Windsor Locks Associates* v. *Planning & Zoning Commission*, 90 Conn. App. 242, 247 (see footnote 7), 2005. On the other hand the court in *Goldfisher* v. *Connecticut Sitting Council, et al.*, 95 Conn. App. 193, 198 (2000) did say that: "We have recognized that 'an economic interest that is injuriously affected may afford a basis for aggrievement . . . as long as the economic deprivation is not speculative". See for example *Lewis* v. *Planning and Zoning Commission of Town of Ridgefield*, 62 Conn. App. 284, 295-296 (2001). And more to the point it is also true that "The mere fact that one is a competitor does not disqualify him (her or it) from being an aggrieved person", *McDermott* v. *Zoning Board of Appeals*, 150 Conn. 510, 514 (1963).

Prior to 1967 when Section 8-8 was amended to permit statutory aggrievement as a basis to provide standing to appeal decision by a zoning authority, classic aggrievement had to be established. Under this concept as Fuller points out in Section 32:5, page 168 of Volume 9B of

Land Use and Practice in the Connecticut Practice Series: ". . . mere proximity (to the subject property in a zoning matter) is insufficient to prove classical aggrievement"[3].

Fuller then goes on to say however, that: "Obviously there is a better chance of proving aggrievement for property owners near the land involved in the appeal, but they may be unable to meet the first part of the aggrievement test because the effect on them is no different than upon others in the municipality (such as from increases in traffic on the local streets), or the second part of the test, a special injury to themselves from the agency's decision."

When a claim of increased traffic congestion or hazards is involved, the cases do not seem to be uniform in their approach. In *Bright* v. *Zoning Board of Appeals*, 149 Conn. 698 (1962) the Zoning Board approved the second application of the defendant to use certain property for a clubhouse, golf course and a swimming pool. The trial court upheld a finding of classic aggrievement for homeowners in a Residential A district whose property in one instance was 150 feet from the proposed use and three other property owners whose property was between 400 to 650 feet away. The facility would be "open to the public", there would be a parking area 120 to 130 feet wide, the golf course "would be floodlighted from approximately twenty-seven light poles, each about thirty feet high, nine of the poles would carry three floodlights each and eighteen would carry two floodlights each". The second application for the facility was approved for the variance requested in this residential setting and the board graciously added a condition that the lighting

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[3] Fuller cites *Walls* v. *Planning & Zoning Commission*, 176 Conn. 425, 476 (1979); *Kyser* v. *Board of Appeals, 155 Conn. 236 (1967); Vose* v. *Planning & Zoning Commission*, 171 Conn. 480, 484 (1976).

would be directed away from the residences and no overnight guests would be allowed into the clubhouse. The trial court made no special finding of aggrievement but the appellate court held the record established what was classic aggrievement - the plaintiff homeowners were aggrieved because the decision of the board affected them directly or in relation to a specific personal interest as distinguished from a general interest. The trial court found as to the aggrievement issue that the facility in a residential area would reduce property values and create traffic hazards. The Appellate Court agreed.

McDermott v. *Zoning Board of Appeals*, 150 Conn. 510 (1963) held that the trial court erred in concluding that a gas station owner had no standing to appeal the granting of a certificate approving the location of a gas station 150 feet from the plaintiff's gas station on the other side of the street. The trial court reasoned the plaintiff could not claim aggrievement because his property's value would be depreciated in value. The appellate court noted that merely because one is a business competitor "does not disqualify him from being an aggrieved person for other valid reasons", id. p. 514. The appellate court reversed the trial court's finding that the plaintiff, McDermott, had no standing because of a lack of aggrievement. It noted that evidence was introduced by the plaintiff that the proposed station would be located on a curve approximately across the avenue from (McDermott's) gas station, that the traffic on the avenue is extremely heavy now and that another gasoline station would increase the already existing congestion and create more cross traffic", id. p. 513.

An interesting case is *Walls, et al* v. *Planning and Zoning Commission*, 176 Conn. 475 (1979) where a subdivision application was granted and adjoining property owners appealed. The

appeal was taken under Section 8-28 of the general statutes which, at the time the appeal was brought, was operative. The court noted that under Section 8-28 as opposed to Section 8-8 which applied to zoning appeals an abutting owner, as the plaintiffs on the case before it, had to prove aggrievement. The court in deciding whether aggrievement was proven by the plaintiffs applied the two pronged classic aggrievement test as used in Section 8-8 appeals. In deciding the plaintiffs had not established aggrievement the court looked at the subordinate facts found by the trial court in denying aggrievement status existed. The Supreme Court noted that the plaintiffs' testimony "related only to issues of traffic. They expressed 'concern', 'fear' and 'apprehension' that the subdivision approval might result in increased traffic; no specific evidence was offered, however, to support those fears. The (trial) court found that unsubstantiated fears of the plaintiffs did not establish aggrievement and concluded that 'the plaintiffs failed to show that they had a specific, personal and legal interest in the subject matter of the decision (of the commission) as distinguished from a general interest such as is the concern of all members of the community and that they were specifically and injuriously affected in their property or other legal rights." The Supreme Court agreed saying: "It is a well-established principle that mere generalizations and fears such as those about which the plaintiffs testified at the hearing do not establish aggrievement". Id. pp. 476-478. (Citing in addition to two other cases *Tucker* v. *Zoning Board of Appeals*, 151 Conn. 510 (1964).

The *Walls* case underlines the principle that under the classic aggrievement test its two prong requirement must be neutrally applied and not be watered down by using the close proximity issue as a means to elevate generalized fears or apprehensions about traffic contention, reduction

in property values etc. in such a way as to avoid a factual basis in the application of the two pronged classic aggrievement test. This is not to say proximity has no bearing on the appropriate application of the two prong test for classical aggrievement but it cannot be used as a reason or excuse to avoid deciding whether factually the requirements of that test have been met.

The court will finally discuss two other cases dealing with traffic congestion and traffic hazards as a basis for classic aggrievement. In *Tucker* v. *Zoning Board of Appeals of Town of Bloomfield*, 151 Conn. 510 (1964) there was an appeal from the defendant's granting permission for construction of a service station. The plaintiff homeowners lived 1000 feet from the subject property which is on the corner of Blue Hills and Maplewood Avenues. The plaintiff's home was on Wade Avenue which intersects Blue Hills Avenue. The court upheld the trial court's finding that aggrievement had not been established noting that traffic on Blue Hill Avenue "is heavy at times" making it difficult to cross. The court also noted that heavy traffic conditions was caused by roads feeding into Blue Hills Avenue including a major connector to I91.

The court further noted that in 1961 15 percent of reported accidents in Bloomfield occurred on a one mile stretch of Blue Hills Avenue within which the property approved for the gas station is located. The plaintiffs stated that on medical advice they walked past the subject property three or four times a week and the husband drives past the corner on which the station is to be located daily. The court simply stated that based on these facts the trial court did not err in finding aggrievement had not been established[4].

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[4] Note that *Tucker*, as previously noted, was referred to as supporting the reasoning of the court in *Walls* v. *Zoning Commission*, supra which found each of classic aggrievement for abutting

Bongiorno Supermarket, Inc., et al v. *Zoning Board of Appeals of the City of Stamford*, 266 Conn. 531 (2003) is an interesting and more recent case. It involved an appeal from the granting of a permit to the defendant supermarket. The plaintiffs operated a used car dealership and also operated their own supermarket in the vicinity of the property for which the permit had been granted. The *Bongiorno* used car dealership was approximately 428 feet from the subject property, the *Bongiorno Supermarket* was approximately 841 feet from the subject property.

The plaintiffs appealed the granting of the permit claiming in the trial court they were classically aggrieved and alleging the proposed site development would cause increased traffic, traffic hazards and traffic congestion on roads in the immediate vicinity of the plaintiff's properties.

The court first noted that:

> "An evidentiary hearing was held, at the conclusion of which the trial court made several findings of fact pertaining to the potential traffic impact that have not been challenged in this appeal. The trial court examined "[t]he specific problem identified by the plaintiffs [as] the amount of traffic at the intersection of West Avenue, the street on which Bongiorno's is located, and U.S. Route #1, also known as West Main Street and as the Post Road", and found that "this intersection, which is currently causing delay for motorists, will become more crowded and cause more delay". The court remarked that the plaintiffs had acknowledged that 59 percent of Bongiorno's customers do not use the intersection at issue, "but, rather, gain access to the store by other roads." The court also credited evidence produced by the defendants that even those patrons who tend normally "to use that intersection avail themselves of alternate routes when traffic problems occur. Significantly, the court neither quantified the increase in traffic nor articulated how much longer it would take Bongiorno's customers to get through the intersection during peak weekday or weekend hours." Id. page 535.

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owners under § 8-28.

The court then reviewed cases relied on by the plaintiff, *McDermott* v. *Zoning Board of Appeals*, supra, and *Bright* v. *Zoning Board of Appeals*, supra. Of *McDermott* it said the court held the trial court should not have dismissed the appeal merely because it found the plaintiff was a competitor of the proposed gas station. As to *Bright* the *Bongiorno* court said: "No specific reference was made to the issue of traffic as a basis for the aggrievement determination. Therefore, *Bright* provides little guidance on the issue of traffic as a basis for aggrievement other than to recognize that an increase in traffic can provide a source for determination of aggrievement.

In the case before it the *Bongiorno* court upheld the trial court's finding that the plaintiffs had not shown classic aggrievement and said:

> "The trial court in the present case recognized that traffic *could* be the predicate for a determination of aggrievement, but whether traffic congestion in the vicinity of a parcel of land is sufficient to meet the test depends on the facts and circumstances of each case. In this case, the trial court identified the crowded intersection of West Avenue and Route 1 and noted its location on the north side of Interstate 95 as being "a quarter mile or so from the plaintiffs' properties." The court further noted that Interstate 95 separates the defendants' property from the plaintiffs' properties. Against this factual background, the court did not make a finding that the plaintiffs' specific and personal interests would suffer an adverse traffic impact as a result of the defendants' proposed supermarket. Rather, at most, the court found that the subject intersection will become more congested for *everyone* passing through it, including, but not limited to, those customers of the plaintiffs who choose not to use alternate routes. As noted by the court, this delay will affect the plaintiffs' customers in the same manner as it affects all members of the general ** public who use the intersection. Therefore, the interest in this delay belongs to the general public as well as to the plaintiffs' customers on whose behalf the plaintiffs can not act. See *Stamford Hospital* v. *Vega*, 236 Conn. 646, 657, 674 A.2d 821 (1996) ("[i]n general, a party does not have standing to raise rights belonging to another"). Moreover, this added congestion was not quantified in terms of delay, and the trial court never found that any such delay would be substantial. Therefore, the court's findings merely reflect that the plaintiffs owner property near an intersection that will be more congested as a result of the defendants' *proposal. Accordingly, the court properly determined that any specific

personal and legal interest the plaintiffs had in the subject matter had not been specially and injuriously affected by the board's decision affirming the decision to grant the defendants' application for a permit." Id. 543-544.

ii

The court will now try to apply these general principles to determine whether the requirements of establishing classical aggrievement have been met. In this case at the trial of this appeal the plaintiff did not present any evidence to support its claim of classical aggrievement so the court must examine the record in order to decide whether it has been shown.

In an October 9, 2014 letter to the Legislation Committee of the Board of Alders counsel for the plaintiff refers to New Haven Charter Article XIII, § 2c which states zoning regulations must conform to the comprehensive plan of the city and among other things "shall be designed to lessen congestion in the streets". Counsel states there is no evidence this or other mandates in the subsection have been achieved. In fact "Olive Street is already impacted by traffic congestion and no definite improvements have been identified to ameliorate that condition though the addition of regulation that permits 200 or more dwelling units, unprecedented density in the location, will exacerbate existing problems". The letter has two exhibits attached to it. One is a final report entitled: "Southeast Downtown Circulation Study - New Haven". One of its own is said to be to "define existing mobility or congestion problems". The report is largely concerned with the extension of Fair Street to Olive Street and Wooster Street. Fair Street lies to the immediate west of 87 Union Street. The report does not specifically state there is traffic congestion on Olive Street or Chapel Street. It states that "motorists using George Street (a down street) will have a benefit

on the Fair Street extension". And such an extension will bring about "a reduction in delay and travel time when Fair Street is extended to Olive and Wooster Street".

But the locus of any improvement in average delay and travel time is not identified "let alone any statistics or observations on actual congestion of Olive Street or when it would occur if at all. This is no criticism of the study itself it just underlines that its purpose was to evaluate potential benefits, costs, and impacts associated with re-opening Fair Street to improve traffic and pedestrian circulation in the Wooster Square area". Keeping in mind that the "study area" defined in a diagram included in the report is defined as a site between Chapel Street and Water Street (north to south) and Olive Street and Union Street (east to west) which is the exact location of the Comcast property and 87 Union Street, the report says on page 24 at paragraph 7: "A number of existing land uses in the project area are currently vacant and therefore, provide an opportunity to the City for future re-development" - the type of re-development is not defined but the comment does not suggest an overriding concern for traffic congestion on Olive Street.

A second exhibit represents the result of a request for accident reports from the New Haven Police Department as to accidents at the intersection of Olive and Chapel Street. That intersection is just to the north on Olive Street of 87 Union Street. There was also a request as to accidents occurring at the intersection of Chapel and State Street.

To start with the accident report for Olive and Chapel Streets it covers a period from January 7, 2011 through and including May 21, 2014. This comes to a total of 40 months and two weeks. There are 59 entries but 10 of them are for evasion of responsibility so that there is a total of 49 accidents at this intersection. All of this translates into a little more than one accident a

month. The results are even more interesting if we assume rush hours are between 7:30 a.m. and 9:30 a.m. and between 3:30 p.m. and 6:30 p.m. Only 30 accidents occurred in those time periods.

The statistics for the State and Chapel intersections show 82 accidents from January 15, 2011 through May 25, 2015, a period of approximately 40 months. Even including accidents a few minutes under or over the assumed rush hour figures the court found 39 accidents. This assumes the relevance of the State and Chapel Street intersection figures to the issue at hand - it is two blocks down from the Olive and Chapel Street intersection and 87 Union Street is somewhat to the south of this intersection. No traffic study was presented interpreting these documents was submitted let alone addressing the issue of congestion presently or which would be engendered by a BD-1 designation for the Union Street property assuming that on this issue the proposed use of the property for residential units can be considered.

Of interest is ROR12 in the record which is entitled "New Haven Economic Development Downtown Housing Report" and was prepared in the summer of 2014.

As part of the discussion of Downtown Housing 87 Union Street was discussed; it said the proposed subject property would consist of "325 market rate studios, one, two - and three bedroom apartments, as well as townhouses and ground floor retail on Olive Street". Elsewhere in the report it said 75% of the units in the "downtown" area "were studios or 1 bedrooms. According to some of the interviewed experts, the high prevalence of these units reflects the strong demand from single professionals and college students in the downtown area". At a later point in the report it states "Demand for housing in New Haven is primarily driven by two key demographics: (1) graduate students and young professionals between ages 28-35 which comprise over 70% of the downtown

market and (2) empty nesters above the age of 55 who wish to be a walking distance from downtown". All of this could be viewed as a supportable reflection on de minimus traffic generation which would result from a BD-1 classification of the 87 Union Street property.

ROR17 was a document prepared by the American Planning Association. On page 2 it states: "Traffic Congestion. Mixed Use zoning (see BD-1 definition) can reduce the peak hour congestion paralyzing urban areas across the nation. It provides the tools necessary to areas where people have the opportunity to work, shop, and socialize near their homes. By increasing opportunities to combine trips; mixed uses can reduce the vehicle miles traveled by residents of the community.

This must all be considered in light of a comment in ROR18 which makes the common sense observation at page 7D3 to the effect that: "Residents of lower density areas add significantly to traffic congestion on downtown streets when they drive into the city. This travel is a particularly important contributor to congestion during peak commute hours. By creating more transportation - efficient housing opportunities inside its borders, the city can decrease overall regional travel demand, and decrease auto travel into and out of the center city". The same points are made in a document from the Urban Land Institute. Higher Density Development, Myth and Fact, ROR19, also see ROR20, another planning document which states, commonsensically, that higher density and mixed use "may assist in reducing traffic density" because it tends to reduce reliance on automobiles given nearby work and recreational activities".

Mr. Onderko, an engineer, spoke in behalf of the 87 Union Street zone change. He noted that from the proposed location it's a 3 minute walk to State Street, nine minutes to City Hall and

seven minutes to the Ninth Square, downtown New Haven. Yale is right beyond the green for students and teaching personnel. A Mr. Bogardus also employed by the Langan Engineering Company testified at the September 17, 2014 meeting of the New Haven City Plan Commission and he also noted that the ability to walk to work exists for people employed at Yale and Yale New Haven Hospital. He also made the point that a BA zone which was the existing designation for 87 Union Street would have similar traffic generation properties as a BD-1 zone saying at one point . . . "if there is a traffic issue (it) really isn't associated with the zone change for this parcel" (87 Union Street). This is of course a generalization but a BA zone does provide for a variety of business activities and no traffic studies were introduced by the plaintiff to allow a comparative analysis of traffic generation.

The court does agree that observations in the record about the nearness of this project to the State Street Station and the Union Station carry the concept of Transportation Orientated Development (T.O.D.), in certain respects, may not be quite on point. As far as suburban residents are concerned, for many of them there are substations to the Shoreline East trains which go to the State Street location and Union Station in Branford, Madison and beyond to the east and a substation in West Haven. These people could access these rail lines without moving to 87 Union Street or the Comcast properties.

But the point remains that to access job sites in downtown New Haven and Yale facilities the walk to work or school and studies is an attractive option for people who would be interested in 87 Union Street residential facilities thus avoiding commuting from other areas of the city or areas outside the city to access these sites adding traffic to New Haven's streets.

In that sense a comment by a Wooster Street area resident who spoke at the October 9, 2014 Legislation Committee hearing misses or at least does not address the foregoing point. She said if you have a car you are likely to leave your apartment and get in the car and drive somewhere rather than walk. Why is that so given the closeness of the 87 Union Street property to work sites, cultural sites, and dining facilities? And would these apartment travelers not be making these hypothetical trips at least in large part during non-peak hours.

In any event in the September 17, 2014 hearing before the City Plan Commission there was little mention of the traffic issue apart from some comments by Mr. Bogardus and no comments from opponents of the zone change. The October 9, 2014 hearing before the Legislation Committee had one observation by an opponent to the zone change but apart from some general observation by engineers in favor of the zone change there was no mention by Board members or the lawyer representing the plaintiff of the traffic congestion or traffic hazard issue. Also as previously noted no traffic study was before the Legislation Committee or Plan Commission or part of the record except for the accident reports on the Olive Street - Chapel Street and State Street - Chapel Street intersections.

As regards traffic congestion and traffic hazards it certainly is true, per the first prong of the classical aggrievement, test that they can constitute a legal grounds for aggrievement. But this record indicates fears of traffic congestion and hazards are based on speculation and do not indicate such problems are a possibility, if the latter word is to have any practical meaning and can exist in a linguistic world which also includes the word speculation. Secondly, the record does not establish that any traffic problems presented based on either speculation or possibility would

harmfully affect the plaintiff differently than it would any member of the community so that it could be said that the plaintiff was specially injured.

It should be noted that on the traffic issue, in its brief the plaintiff refers to the Comcast property, saying, that the approval of BD-1 status for that property cumulatively with BD-1 status for 87 Union Street "cumulatively" adds to "the already traffic congested, safety challenged Olive Street" and thus "adversely impacts plaintiff and its tenants, including in their ingress and egress from its property".

Again this position, given the bare boned record, is speculative and the accident reports submitted on the Olive - Chapel Street intersection hardly show a particularly hazardous travelway due to congestion or any other factor. Frankly from the record as to this case the court is not absolutely sure where the ingress and egress points are in reference to the plaintiff's property. The plaintiff states they are on Chapel Street and especially on Olive Street. But what are the times and amounts of this ingress and egress in relation to any expected congestion on and traffic hazards as a result of these BD-1 approvals - is it constant, does it change depending on time of day or rush hours during the day?

In its reply brief the plaintiff in arguing classical aggrievement on the basis of traffic congestion and traffic hazards and dangers to pedestrians as a result of these traffic factors states "the plaintiff has alleged and will prove" these assertions and "will provide evidence at trial" to support its claims regarding adverse traffic consequences resulting from this BD-1 designation. But at the hearing on the appeal no evidence was provided and therefore the plaintiff and court must rely on the record to make and evaluate these assertions.

In addition to the traffic issue as a basis for the classical aggrievement claim the plaintiff makes another claim. In paragraph 21 of the complaint the plaintiff argues that the City's remapping policies which led to the BD-1 classification of 87 Union Street "erodes and overwhelms the existing context of the plaintiff's historic building adjacent to the National Register of Historic Places Wooster Square, diminishes property values . . ." In its initial brief the plaintiff states further that its property at 78 Olive Street which is located in a BA and itself listed on the National Register of Historic Places. In its reply brief the plaintiff cites among its injuries "the urbanization of the scale against Plaintiff's historic property".

This position of the plaintiff must be put in context. The plaintiff's building and the lot represented by 87 Union Street, prior to its BD-1 designation, were located in a Business A - General Business District. The definition of each district and their functioning in the New Haven Zoning Ordinances are defined as follows:

"Article v. Business and Industrial Districts

Section 41: Business and Industrial Districts

Business A Districts - General Business

> These districts serve several functions. They provide central concentrations of convenience goods and services for one or more neighborhoods, supplemented by more scattered stores for such goods and services within the neighborhoods provides for under a special provision of the regulatory for residence districts. They provide comparison shoppers goods, specialty goods, amusements and numerous services for less than a city wide market and they also provide locations for small businessmen with a city wide market who cannot operate in the downtown area. The predomenant purpose of all these functions is retail trade.

Business D-1 Districts - Central Business/Residential

> These districts include appropriate downtown areas which have concentrations of historic structures suitable for residential and commercial use. This district concentrates residential use at high density mixed with acturties that have both a city wide and district wide function: small stores offering comparison shopper's goods specialty stores, business services, offices and entertainment uses. The use of land is intensive, but respects the historic character of existing historic structures: It is the purpose of these regulations to encourage preservation of existing historic structures, conversion of existing structures to residential use, high intensity of use and to exclude activities that have a negative effect upon the proper functioning of National Register Historic Districts or the larger downtown."

The range of business activities in both BA and BD-1 districts is quite large and were considered compatible aesthetically and functionally with the Wooster Square area which as the maps submitted in the record show is an area of generally small residences surrounding a park area. The plaintiff's historic building is rented out to scores of tenants and is located in a large brick building. It is certainly not substantially less massive in scale than residential buildings that could be erected in BD-1 districts. Even assuming the plaintiff's property has a more limited fronting on Olive Street than what would be permitted by the BD-1 amendment to 87 Union Street, aerial pictures of the plaintiff's property in the record indicate it is bordered on its south side by a large parking lot with numerous cars parked therein at the time the pictures were taken. It is difficult to see how it could be said that the BD-1 designation of the 87 Union Street property erodes and overwhelms the plaintiff's property per se or in any way does so in a way more than the plaintiff's property vis a vis the immediately adjacent Wooster Square area. In fact the plaintiff's property is directly across Olive Street from that immediate area whereas 87 Union Street is to the south beyond the Olive Street - Chapel Street intersection. It in fact faces Wooster Street which is to the

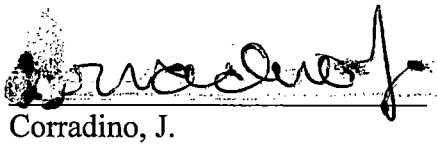
south of Chapel Street. It is also true that amendments to BD-1 properties bordering residential districts like RM2 Wooster Square have been passed, prior to the action taken on 87 Union Street, to reduce maximum permitted floor area (FAR) and maximum height of buildings to 70 feet for the specific purpose of "the introduction of BD-1 high density mixed use development (see BD-1 districts) into areas adjacent to residential neighborhoods with minimized impact on those neighborhoods", ROR14. The court cannot ascertain from the photos in the record the height of the plaintiff's building but it has substantial height even if not 70 feet.

Another observation should be offered. The court has confirmed by its own examination of the record that as to 87 Union Street the defendant's comments in its brief are correct: "An existing warehouse building and asphalt surface parking now cover virtually the entire property (R49). A cement wall extends along the Olive Street frontage to the south of the existing building creating a visual barrier dividing the property from the Wooster Square area to the east. Given that a reasonable argument cannot be made that aesthetically and historically the replacement of the present uses under the BA designation to BD1 for 87 Union Street gives rise to a classic aggrievement argument.

Finally the court would observe no evidence was introduced at the hearing of this matter nor is there any support in the record that property values of properties in the Wooster Square area would be reduced by the BD-1 designation - given what is on 87 Union Street now common sense indicates they might be increased. As to the plaintiff's property considered alone, no evidence was introduced that its value would decline - that might result from new rental properties being erected but that delves into competitor interests which cannot form the basis of a classical aggrievement

claim. As far as the historical nature of the plaintiff's building that would exist apart from its residential use.

For the foregoing reasons the appeal is dismissed.



Corradino, J.
Judge Trial Referee