DOCKET NO. CV-15-6053885-S	:	SUPERIOR COURT
78 OLIVE STREET	:	J.D. OF NEW HAVEN
V	:	AT NEW HAVEN
NEW HAVEN CITY PLAN COMMISSION, ET AL	:	MAY 12, 2016

MEMORANDUM OF DECISION

This is an appeal from the decision by the defendant commission giving its approval of Special Permit and Site Plan Applications for the property at 87 Union Street. Previously the property had been rezoned from BA (General Business) to BD-1 (Central Business District). This later decision is subject to an appeal in CV 15-6052216 which is currently pending. In this appeal, CV 15-6053885, the claim is made that the Commission's decisions approving the Site Plan and Special Permit represent a "failure to enforce the standards of the New Haven Zoning Ordinance . . . in its administrative review" . . . and "were arbitrary and illegal" in any event.

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

(a)

The court will first discuss the plaintiff's claim that it is statutorily aggrieved. As noted in CV 15-2052216 when the court addressed the issue of statutory aggrievement, the plaintiff owns property at 78 Olive Street. Its property does not abut 87 Union Street and no part of 78 Olive Street is within 100 feet of the 87 Union Street parcel which was the subject of the special permit and site plan application. The statutory aggrievement issue in CV 15-6052216 (appeal from BD-1 map amendment for subject property) is the same issue as that issue presents itself in this appeal. The court adopts by reference its discussion in CV 15-6052216 wherein it found that no claim for statutory aggrievement could be made, see page 6 through page 20 up to subsection (b).

The plaintiff makes the same arguments here for statutory aggrievement as it made in CV 15-6052216 but adds two new observations which the court will now try to address.

(1.)

First it is necessary to quote from the plaintiff's brief where the point is made that the 87 Union Street properties and the 630 and 673 property "are inextricably linked" and thus because the plaintiff's property is within 100 feet of the Chapel Street properties statutory aggrievement is established because the "record is replete with references by city representatives and the applicant to the role the Comcast amendments and underlying research for those amendments and approvals play in serving as a basis for these approvals".

The plaintiff refers to ROR6, the Traffic Impact Study for 87 Union Street, which states at page 1 that "data collection was conducted at these locations in January 2015 and by others in September 2014 as part of a separate development planned at 630-640 and 673 Chapel Street". But this quote must be put in context. In the same paragraph but before it, it states: "This study evaluates how Union Fair (87 Union Street) will impact the adjacent roadway network . . . Seven key intersections in the vicinity of the site were analyzed for this study". After the quote the paragraph goes on to state that "the field observations and data collected at these intersections were used to evaluate the potential impacts caused by the proposed development and make recommendations to mitigate any impacts caused by the proposed development and make recommendations to mitigate any impacts and improve operating conditions. The analysis presented in this study indicates there is adequate capacity on the area roadway network to accommodate the Union Fair development and the intersections analyzed will continue to operate at acceptable levels of service (emphasis by court). Data collected, in other words, was used to discuss traffic impact caused by 87 Union Street only as the underlinings make clear.

This is further underlined when one considers a quote from page 9 of the report which the plaintiff refers to: "Recent count data obtained in September 2014 at part of the traffic study prepared by Milone and Mac Brown, Inc. for a new residential and retail development at 630-640 and 673 Chapel Street were used with concurrence from the City of New Haven Traffic, Transportation, and Parking Department at the following intersections: Union Street at Chapel Street; Olive Street at Chapel Street; Olive Street at Wooster Street; State Street at Chapel Street. In other words, the Union Street and Spinaker (Chapel Street) developments are inextricably

linked". But only five of the previously referred to intersections are mentioned in that specific paragraph of the report - on the same page 9 just above the quoted language it states "manual turning movement and vehicle classification counts were conducted in January 2015 to determine the 2015 peak-hour traffic volumes at the following intersections (the missing two intersections) as part of this study: Union Street at Fair Street; Union Street at Water Street. "A cursory inspection of the maps introduced into evidence indicates that these intersections have nothing to do with traffic flow in front of Chapel Street and the Spinaker properties. Of course data obtained from Chapel Street as to traffic could be useful in making a traffic study as to traffic impact of a development on property adjacent to other property facing Chapel Street but that does not mean the conclusions at to traffic impact for such property dictated findings to be made on an adjacent property located on a different street with different traffic flow. If that were not so why examine separately traffic flow at Olive Street and Water Street and Union Street and Fair Street? Could the findings be of some relevance - of course. But that cannot translate into statutory aggrievement on an inextricably linked theory. Nowhere is it pointed out in the lengthy traffic study in CV 15-6053885 that the traffic impact consequences or concerns for 87 Union Street are the same for the Chapel Street properties.

(2.)

Also the plaintiffs contention that it is statutorily aggrieved because its property lies within 100 feet of the Chapel Street property and that property was "involved" in the decision to grant a BD-1 map amendment to the 87 Union Street property is further underlined by the fact, the defendant argues, that the City Plan Advisory Report, 1502-03 issued in connection with the Site

Plan application in this case refers in its background section to the City Plan Report 1496-01 issued in connection with the Map Amendment which is the subject of the appeal in CV 15-6052216. The plaintiff argues that CPC 1496-01 "contains numerous references to the recent approval of another map amendment, at 630 and 673 Chapel Street changing these properties from BA to BD-1 zoning designations and references CPC report 1493-02 issued in connection with certain text amendments adopted contemporaneously with the remapping of the properties, citing those actions as evidence of the appropriateness of the subject property on Union Street as the BD-1 zoning district". CPC 1502-03 and 1502-10 rely on CPC 1496-01 which the City Plan Commission identified as "evidence" of the appropriateness of the map amendment for Union Street which give rise to the Special Permit and Site Plan approvals.

Let us examine CPC 1496-01 which is ROR56 of CV 15-2052216. True, as the plaintiff maintains CPC 1496-01 contains references to the Chapel Street properties but those references must be put in context. On the first page the following paragraph appears:

> "The proposed amendment represents both an eastward expansion of the existing Ninth Square BD-1 District and an extension to the south from properties at 630 and 673 Chapel Street which were recently rezoned from BA to BD-1. Currently the majority of properties located on the west side of the Metro North line running parallel to Olive Street are either in a BD or BD-1 District while those on the east side of the tracks back to Olive (with the exception of 630 and 673 Chapel) are located in a BA District. To the direct east of this BA District (and this property) is a Medium-High (RM-2) Residence District most of which is part of the Wooster Square Historic District."

At the top of the second page it says: "Approval of this proposal (map amendment to BD-1 for 87 Union Street) may, if properly managed, reinforce a connective element between the Ninth Square (downtown area) and Wooster Square First established with the rezoning of 630 and 673

Chapel Street that could benefit both areas". From this perspective the BD-1 classification for the Chapel Street properties was not the lodestar driving the BD-1 map approval - both properties, 87 Union Street and the Chapel Street properties, were part of an envisaged extension from BD-1 properties to the west of the State Street railroad tracks and thus to the west of both the Union Street and Chapel Street properties to the Wooster Square area.

In this regard ROR20 of the record in this case is a sign off to the Corporation Counsel's Office by Ms. Gilvary "Re CPC Report 1502-10 Special Permit for 87 Union Street of February 18, 2015". The second page is a list representing "Records for City Plan Commission 1502-10: 87 Union Street Special Permit". One of the items listed is "2. Special Permit Application and Narrative with Attachments dated January 22, 2015". This application is Exhibit A to Special Permit and is dated "1-22-15". Exhibit A is entitled "Narrative and Compliance with Zoning Ordinance Requirements". There is no mention of 630 or 673 Chapel Street and at paragraph e on page a comment is made consistent with the court's comments as to CPC 1496-1 where it states:

> "e. The proposed development is designed with be a compatible part of the transition between central Downtown and Wooster Square. The development provides compatible transition in terms of architectural style, bulk and height, and outward orientation to the street. The development will be "built to the street" in keeping with surrounding development, but will also create a plaza along Olive Street at the intersection of Wooster Street, thus extending the Wooster Street restaurant district toward Downtown. The project also improves pedestrian circulation by creating a pedestrian walkway between Olive Street and Union Street along the Fair Street boundary."

Leaving aside all the foregoing verbiage let us return to a simpler linguistic analysis regarding the plaintiff's claim for statutory aggrievement based on its location of less than 100 feet from the Chapel Street property. Section 8-8(1) says that "'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" (emphasis by court). It does not say "'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 land involved in a decision of the board." The word "the" particularizes the word "land" to mean that property that is subject to the zoning action and the word "involved" refers back to the property which is the subject of the zoning action.

The court does not find statutory aggrievement for the immediately foregoing reasons and for the reasons stated in its decision in CV 15-6052216.

(b)

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In the alternative the plaintiff argues it has standing under the concept of classic aggrievement. 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); *Ha ll, 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 merely 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); but as noted in its decision in CV 15-6052216 a competitor is not barred from establishing classical aggrievement merely because of its status as a competitor. *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 qualify 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"[1].

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

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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).

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, on the issue of classic aggrievement, when a defendant, whose property is close to a site, receiving a favorable zoning decision, appeals that decision.

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 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 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 for 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).

This 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.

Now the court will discuss 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[2].

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.

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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 owners under § 8-28.

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 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."

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 **891 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' *544 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."

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.

Under the heading of classical aggrievement the plaintiff argues in its brief that because traffic and pedestrian movement issues raised by the proposed development were not resolved prior

to the commissions approval of the Special Permit and Site Plan applications "the resulting congestion and safety issues will affect and impair plaintiff's access to its property and directly affect traffic operations for its tenants". The plaintiff goes on to similarly argue that "The open conditions of approval on the City Plan Report (ROR11) undermine a conclusion that the traffic impacts and safety issues associated with high density development represented by the development have been resolved prior to the Commission's approval (RE11)".

In the court's opinion at least, these positions conflate an argument on the merits of Commission's actions and the plaintiff's obligation to establish aggrievement on appeal apart from the foregoing observations on the validity of the Commission's actions which go to the merits of the appeal.

The plaintiff, however, does raise issues of traffic congestion and safety and impairment of access and egress from its property as a result of this development which the plaintiff argues satisfy both prongs of the classical aggrievement standard.

The court will first make some preliminary observations. In this case the defendant secured the services of a traffic consultant or engineer, Langan, for the purposes of its presentation of these applications for approval. As Fuller says: "Where a project generates a significant volume of traffic or abuts a highway system with existing traffic congestion a traffic engineer should be retained. . . . The traffic engineer studies existing and projected traffic volumes during the day and particularly peak hours in the morning and evening rush hours, and the extent to which traffic from the proposed project will affect existing traffic patterns," *Land Use Law and Practice*, Vol. 9, Connecticut Practice Series, § 15:7 at pages 502-503. At section § 14:15, pp. 490-491 Fuller says:

"The applicant will usually have a traffic expert analyzing traffic congestion, traffic volume (both at peak and off peak hours), intersection design, and traffic control devices. In large projects with significant opposition, the opponents will often have their own traffic expert, while the agency, usually a zoning commission, may compare and rely upon the reports of the traffic consultants for the parties, it may hire its own traffic consultant to review or do an independent study of the proposal. In large projects analyzing the traffic impact is critical. There may be differences of opinion between traffic experts depending on who hired them, but most of them are objective, try to solve problems and are not anti-developmental". In this matter the plaintiff did not hire its own traffic consultant and said through counsel "we have no intention of impugning the traffic report . . . In many respects we are relying on the traffic report", (i.e. the traffic report being referenced being the one presented into evidence by the plaintiff). Indeed counsel pointed out that *State Library* v. *FOIC, et al*, 240 Conn. 824 (1997) held on the issue of determining whether classical aggrievement has been established that a trial court can examine the whole administrative record, id. pp. 830-831.

Of course the fact that the plaintiff did not retain its own traffic consultant has no bearing, standing alone, on whether classical aggrievement has been established.

The traffic report submitted by the defendant is voluminous - over two hundred pages in length. The conclusion reached rely on the detailed traffic volume and traffic pattern studies and is itself over twenty pages in length. The plaintiff does not challenge the general methodology used by the defendant's traffic expert but as will be discussed, does question, for example, some of the

assumptions relied on to establish traffic volume and observations this inspires as to waiting times for entry into traffic patterns.

Another general observation should be made. The plaintiff raises issue on behalf of its classical aggrievement argument about the burden the project will have on automobile entry into and departure from its 78 Olive Street property which rents out one hundred and fifty four units. The plaintiff maintains this will be a burden for the plaintiff (presumably owner and employees of owner) and its tenant.

However, apart from references made to the defendant's traffic report and general argument no testimony from any tenant was offered as to the present traffic volume and safety concerns as a basis for arguing added traffic from the proposed project will aggravate the traffic situation already presented for tenant occupants. The only evidence offered was the testimony of Ms. Jeanne Mauri who has been the property manager for PMC Property Group of which 78 Olive Street is one of its properties.

The defendant's traffic report notes that 206 parking spaces are provided for in the 87 Union Street proposed building. The plaintiff's property is located at 78 Olive Street. Significantly the defendant's property is understandably labeled as being located on Union Street. Union Street is a two way street and runs parallel to Olive Street from Water Street to Chapel Street (see maps submitted in record). The cars exiting and entrancing the 87 Union Street location will do so on the Union Street side of the 87 Union Street project. There are no vehicle entry-exit points from the 87 Union Street project on to Olive Street. Cars exiting the Union Street project can go north on Union Street to Union Streets intersection which is Chapel Street. The report indicates there

is a traffic control signal at Union and Chapel. To travel north these cars can turn right on to Chapel Street and then turn left on to Olive Street which also has traffic control at Olive and Chapel. But they can also turn left and travel to Chapel's intersection with State Street where there is also traffic control and turn right to go north on State Street which also intersects with Grand Avenue further to the north. Cars exiting the subject property can also proceed to Fair Street and turn right or left on State Street.

Cars exiting the subject property can turn left and proceed to Water Street and either turn right or left on Water Street. Maps submitted indicate that if these vehicles turned left on Water Street they could proceed up to Franklin Street, take a left and travel to Wooster Street and then turn right on to the ramp leading to I95. The Union Street Water Street intersection does not have a signal.

Cars from the subject property, as noted, can turn right on Union Street to proceed to Chapel Street (signalized intersection) and proceed to Olive and Chapel Street (signalized) and then upon green go up to Chapel to Franklin, take a right to Franklin and Wooster Streets (signalized) and upon green turn immediately left on to the I95 ramp. They can also turn right on at Chapel and Olive and proceed to Water Street to either head east to Franklin or can make a left at Wooster and Olive Street to go east on Wooster Street to the I95 ramp.

These common sense observations only lend credence to the traffic report conclusions to the effect that the project itself would, even during peak am and pm traffic hours result in the addition of only a few vehicles exiting the subject property adding to traffic on Olive Street and the 78 Olive Street property. This would dictate the same result on traffic returning to the subject

property in the pm peak hours. These conclusions in the report are backed by numerous traffic studies. The plaintiff does not appear to question the validity of the traffic volume figures relied on in the report. The report based on the same in depth studies also concludes, after examining a total of seven intersections in the area surrounding the subject property, that "there is adequate capacity on the area street network to accommodate the new trips generated by Union - Fair and the study intersections will continue to operate at acceptable levels of service". At page 20 of the report the conclusion seems to be that apart from the Union - Fair Street location - traffic at the intersections studied "are expected to operate at their background levels of service". The level of service will only degrade for eastbound traffic on Fair Street because of planned safety features for pedestrian use.

In any event, in the court's opinion, it is not persuasive to point to Table 1 of ROR8 and argue that total new trips on adjacent roads by Langan's own admission will increase. Clearly this is so because a garage facility for 206 cars is contemplated. But these abstract figures must be considered in light of where cars exiting or entering the project will proceed to the adjacent roads and in light of the various roads they will use, their direction on those roads and how if at all, this traffic will affect 78 Olive Street tenants exiting or entering their parking lot on Crown Street or Chapel Street at its intersection with Union Street. Consideration of these factors is what has led Langan to conclude that "there is adequate capacity on the area street network to accommodate new trips generated by Union Fair and the study intersections (seven referred to previously) will continue to operate acceptable levels of service", page 21 of Traffic Impact Study, ROR6.

It should also be noted that in its report the Langan traffic study relied on data prepared for the new residential and retail development at 630-640 and 673 Chapel Street. The data for this study was obtained in September 2014 and studied several intersections, Union Street at Chapel, Olive Street at Chapel, Olive Street at Wooster, State Street at Chapel, Wooster Street at the Interstate 95 (I95) Northbound On-Ramp." Interestingly there is no suggestion in the report, the foregoing in fact suggests otherwise, that the 87 Union Street and Chapel Street projects taken together would cause unacceptable traffic problems or congestion.

There is another matter that should be considered on this issue which is mentioned in the January 15, 2015 Langan traffic study report. The Langan report stated that the 87 Union Street project's "close proximity to the State Street and Union Street train stations is expected to further limit the number of new vehicular trips on the adjacent street system. This transit - orientated development will provide an attractive option for potential residents wishing to use Metro-North, Shoreline East or local bus service to make regular trips without the need for an automobile. To account for the significant portion of trips expected to use these available transit options, a 20% T.O.D. (Transit-Orientated Development) credit has been applied to the combined adjusted retail and apartment trips generated by Union Fair" (subject property). The exact number of vehicles from a new residential and retail project that would not take to the roads via automobiles cannot be predicted using so-called T.O.D. considerations, but this is a far cry from saying that the concept should not be applied at all or a responsible traffic engineer should not try to estimate traffic in light of these considerations. The city plan authorities who reviewed the traffic study and issued its report in February 2015 did so after the BD-1 map change for 87 Union Street and must be

presumed to have been aware of the detailed studies on the T.O.D. concept contained in the record associated with the BD-1 approval which would have predated their review of the Langan report for the Site Plan application.

The City Plan Commission approval of the Site Plan Application also had available to it evidence in the BD-1 Map Amendment record that not only were transit availability and locations to access that availability were within walking distance of the subject property but the subject property was within walking distance of the downtown area, Yale University, and Yale facilities which would attract people into renting units who wanted to be close to school or work sites. Common sense apart from voluminous traffic studies would seem to suggest all of this must lead to reduced vehicle use at morning and afternoon peak traffic periods. Nothing has been presented to the court to suggest that T.O.D. considerations and resulting prediction as to traffic such as made here were not standard and accepted methodology for the type of report prepared by Langan.

Beyond these considerations, (1) given the location where vehicles exit and enter this property on Union Street, the presence of a signalized intersection at Chapel Street and Union Street, Chapel Street and Olive Street and Chapel Street and State Street (2) given the alternate routes that these drivers and 78 Olive Street tenants can avail themselves of, if traffic is heavy on Olive Street or even Chapel Street (three exits on Court Street and signalized exit on Chapel Street, it is difficult to perceive how the traffic situation would be aggravated or increased congestion would occur if the project at 87 Union Street were operational even if a 20% T.O.D. credit were given and/or there were to be increased traffic on Olive Street as a result of this Union Street project. The defendant presented no traffic study concluding that elimination of the T.O.D. credit

would result in unacceptable traffic conditions; the court cannot speculate as to that and the defendant has the burden of proof on the issue. The base line for the foregoing is, for the court, the sentence at page 3 of ROR11, the New Haven City Plan Commission Site Plan Review which states "A traffic study conducted by Langan found no significant changes in the level of service (LOS) for four signalized and three unsignalized intersections in the vicinity of the project".

Let us consider the second prong of the classical aggrievement test and move beyond de minimus consideration just discussed - if there were increased traffic delays brought about by this project how are the tenants of 78 Olive Street especially affected as apart from the general public. Olive Street runs from State Street to Water Street, other vehicles must access Olive Street from properties that border Olive Street all along its length. People, not residing at 78 Olive Street, use Olive and Chapel Streets heavily especially at peak travel hours and come from locations to the west, east, and south of this limited area between Water Street and Court Street and Union Street and the immediate Wooster Square area. With their four exits on Chapel and Court Street 78 Olive Street residents are arguably better off than others who are constrained to use Olive Street no matter how heavy traffic conditions are.

But apart from the validity of a classical aggrievement position regarding the burdens the Union Street project will place on 78 Olive Street tenants which the court finds has not been established, that does not end the discussion. The plaintiff has a right to have its property supervised and managed by personnel retained for that purpose and a classical aggrievement claim can be made as regards the traffic difficulties encountered by those personnel in accessing and exiting the 78 Olive Street site.

Jeanne Mauri was called to testify. She is a property manager for PMC Property Group; one of the properties she manages is 78 Olive Street, others are located at 900 Chapel Street, 254 College Street, 38 Crown Street and 214 State Street. As of the date of trial on November 2, 2015 Ms. Mauri had been associated with PMC Property Group for five and a half years. She identified the various driveways leading to 78 Olive Street. One is located on Chapel Street, there are three on Court Street, and three on Olive Street. The Chapel Street driveway is opposite Union Street and there is a traffic light at that entrance. One of the driveways on Court Street faces a "little side street", Artisan Street, that proceeds to Grand Avenue.

Ms. Mauri visits the Chapel Street property daily.

If she walks up Chapel Street she uses the Chapel Street entrance, there is an entrance "on the backside of 78 Olive Street and that is how she enters the buildings." If she drives she comes up Court Street or Chapel and when she does the latter she cuts through the parking lot to Court Street, makes a right on Olive Street and pulls into the driveway on Olive Street which is labeled PMC and is next to the United Illuminating Company. She parks there. It would appear that one cannot enter these Olive Street driveways from the parking lot - if she could why would she proceed to Olive Street? That being the case the tenants cannot use these driveways to directly access Olive Street.

Ms. Mauri testified that when she tries to turn into the first driveway on Olive Street she has to wait to have someone let her into that traffic proceeding south on Olive Street which is the direction she has to travel to be able to turn into the driveway.

When asked why she does not proceed down Chapel Street and turn left on Olive Street and thence into the driveway she testified has to wait multiple times for the Chapel Street - Olive Street light so she can turn left on to Olive Street. When she does that she has to cross over the Olive Street traffic proceeding south - this is difficult because when the light on Chapel Street is red cars back up.

Even crediting Ms. Mauri's testimony classical aggrievement is not established. In the morning peak hours when she cuts through the parking lot from Chapel Street, proceeds to Court and tries to make a right on Olive to enter the driveway on Olive Street, the heavy traffic on Olive Street is travelling south. This heavy traffic is independent of any vehicle contributions from 87 Union Street. The exit for the subject property is on Union Street and project traffic can go south to Water Street, west to the Chapel Street and at that intersection can turn left to go to State Street right to go head straight up Chapel Street to go to Franklin Street or other points east or right on Chapel Street to go to Wooster Street or Water Street. The Langan study determined only a few cars from the Union Street project would turn left at this intersection to go north on Olive Street. But how would any such Olive Street traffic, even barring application of T.O.D. estimates have anything to do with creating heavy traffic going south on Olive Street? cf *Tucker* v. *Zoning Board of Appeals*, supra. There were no observations by the witness as to whether heavy traffic to the south of the Olive-Chapel intersection has anything to do with south moving traffic on Olive Street to the north of that intersection let alone congestion to the east of that intersection affecting whether the Olive Street traffic could turn left and travel east on Chapel Street. No traffic studies were introduced by the plaintiff to dispel the conclusion that this south moving traffic on Olive Street

in large measure turned right at the Olive Street Chapel Street intersection to proceed downtown and to Yale facilities. No witness statements or traffic studies were introduced as to whether traffic moving west on Chapel after the Chapel - Olive intersection was heavy or congested and more to the point whether any congestion was caused by and increased by traffic exiting 87 Union Street, proceeding to the Chapel Street - Union Street intersection and turning left on Chapel Street to go to the downtown area. In any event the court concludes that based on Ms. Mauri's testimony the plaintiff has not carried its burden of proving classic aggrievement as to her ability to perform her job and perform managerial functions in the morning prime peak hours.

But Ms. Mauri went on to testify that the evening peak hours present an even worse problem because the traffic is heavier and more congested. She must not only cross south moving Olive Street traffic and then cross into north moving traffic on Olive Street to be able to go to Grand Avenue so that she can "loop back" to State Street to go to 38 Crown Street or 900 Chapel Street where PMC Property Group has other locations.

But traffic moving north on Olive Street during the evening peak hours cannot be attributed to vehicles attempted to access the 87 Union Street project and it is also difficult to see how vehicles seeking to enter the 87 Union Street by accessing the Union Street Driveway to the building could cause heavier traffic let alone congestion on northbound Olive Street traffic. Traffic moving south on Olive Street during the evening peak hours could include residents trying to get to 87 Union Street but according to figures 5 and 6 of the Langan report very few cars leaving that address would turn left on to Olive Street to go north so how could they contribute to congestion when they come home by the same Olive Street route.

It is also true that Ms. Mauri's observations do not support a classical aggrievement argument based on traffic harm that may result to 78 Olive Street tenants trying to exit or enter the property. They do not do so from Olive Street but have several exits on Court Street which enables them to access Grand Avenue through Artisan Street or go to State Street and take a right to proceed north or a left to access Chapel Street where they can turn east or west on that street in the morning. In the morning, if they wanted to go up Court Street to Olive Street to go right none of the southerly traffic on Olive Street can be said to be reasonably generated by the proposed 87 Union Street project. At night they are not confined to going down Olive Street then turning into Court Street to access the 78 Olive Street parking lot. The tenants can go down State Street and make a left into Court Street to access their parking lot.

In sum whether a classical aggrievement argument is based on harm that will be presented to 78 Olive Street tenants because of traffic congestion or harm Ms. Mauri has to access her job at that site the plaintiff's argument is based on speculation. At least in the court's opinion it does not take into account the basic findings of the Langdon report and perhaps even more to the point, generalized arguments about the increase traffic generation that certainly will be produced by the Union Street project on "adjacent streets" do not take account of (1) the location of the entry and departure driveway (2) access to streets other than Olive Street location that the of that driveway provides. Generalized fears of traffic problems caused by increased traffic on adjacent streets will not do - there must be an analysis of expected traffic flow and direction street locations and traffic control vis a vis the site and its occupant and its users where there is a claim they will be a harm imposed on them. As said in *Town of Wallingford* v. *Zoning Board of Appeals*, 146 Conn., App.

565, 576: "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", also see *Walls, et al* v. *Planning & Zoning Commission*, supra.

Finally the court should note that insofar as one considers the classical aggrievement issue from the perspective of the interest the plaintiff has in ensuring its property manager has access to its property and the ability to exit it without causing undue delay which prevent her from servicing other of its properties, the court has a difficulty. She says in the morning she goes into the Chapel Street driveway crosses the parking lot and then goes up to Court to access a driveway which gives access to Olive Street. Interestingly she also testified that when she has to merely pick something up or drop something off at 78 Olive Street she just parks in the parking lot in back of the building and does what she has to and after ten minutes leaves (Transcript pp. 30-31) without going on Olive Street. Why cannot she park her car in this same lot, owned by her employer, on all occasions that she is at this property? She can then leave by exiting the Court Street driveways, access Grand Avenue by going up Artisan Street or down to State Street and taking a right. If she wants to access the Crown Street or Chapel Street properties she can take a left on State Street and then proceed to take a right on Chapel Street.

But the plaintiff does not confine its classic aggrievement argument to traffic problems that may be caused by allowing the 87 Union Street project to go forward. The plaintiff makes two other arguments.

The plaintiff says it is specially and injuriously aggrieved because "the applicant failed to meet its burden . . . to establish the effect of its proposed development on property value . . ." But it is the plaintiff's burden to prove classical aggrievement. There has been no appraisal evidence introduced as to a decline in value of 78 Olive Street if this project were allowed to go forward. Beyond that it certainly cannot be argued that the decline in value will occur because 78 Olive Street will lose tenants to the new property - this is merely a roundabout way of advancing a claim of a competitor which cannot be a basis for classical aggrievement.

A decline in value argument to support a classical aggrievement position cannot be made on behalf of other property owners in the Wooster Square area. In any event no expert testimony was presented at trial establishing property values of 78 Olive Street or any other property would decline. The decline in property value is based on speculation, cf, *Goldfisher* v. *Connecticut Sitting Council, et al*, supra. And if speculation were to be permissibly indulged in the 87 Union Street plan would replace a present lot with a warehouse building with a residential unit limited to seventy feet in height. As noted in ROR25, City Plan Commission report on special permit application the current 87 Union Street site "is occupied by a warehouse building and a paved lot", also see ROR10, Commission agenda for site plan reviews, which contains a project summary, and describes existing conditions on the site saying: "The site is currently owned by the Hill-Commerce Realty Company. The existing building is used by Torco Company as a plumbing supply warehouse".

The plaintiff also argues it is classically aggrieved because "the Applicant failed to meet its burden" of establishing eligibility for a Special Permit which must include "the evaluation of

the monolithic development on National Register Properties like Plaintiff's". Again it is not the defendant's burden to negate classical aggrievement, it is the plaintiff's burden to establish it. The plaintiff must show that the "monolithic development" will present the possibility of some harm to the plaintiff - if this is not possible given the facts of a particular case how can there be aggrievement. If this were not the case every argument on the merits as to why a special permit should not have been granted would turn into proof positive of aggrievement - however this must be proved ab initio.

Besides the aerial photographs that are part of this record indicate on the lot area 78 Olive Street occupies there is the large 78 Olive Street former factory building plus a UI building and parking areas fairly full of cars. The buildings border directly on Olive Street and the lot itself faces the main Wooster Square historic. The Union Street property planned residential building would not be much larger than those just discussed even if it were to fill the whole site.

Also it is further down Olive Street and directly faces Wooster Street, Exhibit A of the defendant's site plan application characterizes the nature of Wooster Street when it states on page 2: "The development will be 'built to the street' in keeping with surrounding development, but will also create a plaza along Olive Street at the intersection of Wooster Street, thus extending the Wooster Street restaurant district toward downtown". (Emphasis by Court).

Given the foregoing it cannot be said that the Union Street project will aesthetically overwhelm the Wooster Square area any more than 78 Olive Street. That property has admittedly historic significance but it was after all a large multistory factory building now occupied by over one hundred and fifty tenants with a large parking lot to accommodate its tenants. Furthermore,

as noted, the Union Street project will be replacing a warehouse placed on a lot accommodating parking - what aesthetic or historic significance does that have for the immediate neighborhood or 78 Olive Street?

The appeal is dismissed.

Corradino, J.
Judge Trial Referee