DOCKET NO. CV-15-6052362-S	:	SUPERIOR COURT
78 OLIVE STREET PARTNERS, LLC	:	J.D. OF NEW HAVEN
V	:	AT NEW HAVEN
NEW HAVEN CITY PLAN COMMISSION, SPINNAKER RESIDENTIAL LLC, COMCAST OF CONNECTICUT, LLC	:	MAY 12, 2016

MEMORANDUM OF DECISION

This appeal lies from the New Haven City Plan Commission's approval of a Site Plan Application for the property located at 630 Chapel Street. The property was rezoned from BA (General Business) zoning designation to BD-1 in 2014 by the city Alders. Pursuant to that zone change a site plan application was filed by the defendant Spinnaker.

The plaintiff claims that the Spinnaker site plan does not meet the requirements of the New Haven Zoning Ordinance.

Aggrievement

To take an administrative appeal aggrievement must be established. In other words to have standing to bring an appeal a plaintiff must be aggrieved. Section 8-8(a) states a party who is aggrieved by an agency's decision can bring an appeal; this is called classical aggrievement. Subsection (2) also says an appeal is allowed as to (3) any person owning land which abuts or is within a radius of 100 feet of any portion of the land involved in any decision of "the zoning agency; this is called statutory aggrievement. At trial it was established that the plaintiff owns property at 78 Olive Street which abuts 673 Chapel Street. A deed was introduced to prove

ownership which was entered into evidence without objection. Clearly the decision regarding the Site Plan was involved in the 673 Chapel Street property. Aggrievement was not contested at trial or in the briefs". The court finds that aggrievement has been established. See *Wucik* v. *Planning & Zoning Commission*, 113 Conn. App. 502, 505, 506 (2009).

Standard of Review

This is an appeal from the Commission's approval of a site plan. The standard of review is for the court explained in two sources. In *Konigsberg* v. *Board of Alderman*, 283 Conn. 553, 594 (2007) the court said:

> "Initially, we note that, in rendering decisions on site plan applications, the plan commission acts in an administrative capacity. *Norwich* v. *Norwalk Wilbert Vault Co.*., 208 Conn. 1, 12, 544 A.2d 152 (1988). Moreover, "in reviewing site plans the commission has no independent discretion beyond determining whether the plan complies with the applicable regulations . . . [and] is under a mandate to apply the requirements of the regulations as written." (Internal quotation marks omitted.) Id., 13. This austere standard of review is mandated by our legislature. General Statutes § 8-3(g) provides in relevant part: "The zoning regulations may require that a site plan be filed with the commission or other municipal agency or official to aid in determining the conformity of a proposed building, use or structure with specific provisions of such regulations."

In Volume 9A of the Connecticut Practice Series at § 33:3 at pages 272-273 Fuller says where a Site Plan Application is involved . . . "the basic question is whether the application does or does not conform to the agency's regulations. Accordingly, the agency (here the Commission) has limited discretion when acting in an administrative capacity. However, it does have discretion to resolve debatable questions of fact, and, on appeal, the issue is whether the agency's decision

on factual questions is reasonably supported by the record, in which case the court should not substitute its judgment for that of the Commission.[1]

However, the court can review the reasonableness of the agency's finding[2] and can decide whether the agency reasonably decided that a use met the legal definition of a word in the regulations.[3] Deference to agency action applies only to factual determinations made by it on the merits of the application. Legal questions are for the court to determine, and it is not bound by the opinion of the local agency. Within these basic parameters, the trial court can grant relief on appeal only where the agency has acted illegally or arbitrarily or has abused its discretion".[4]

In conclusion the courts have said "a court cannot take the view in every case that the discretion exercised must not be disturbed, for if it did the right of appeal would be empty", *Suffield Heights Corp.* v. *Town Planning Commission*, 144 Conn. 425, 428 (1957). "On appeal from (the) zoning board's application of (a) regulation to (the) facts of (a) case, (the) trial court must decide whether the board correctly interpreted the regulation and applied it with reasonable discretion . . ." *Wood* v. *Zoning Board of Appeals*, 258 Conn. 691, 698 (2001) . . . "Courts should accord great deference to the construction given (a) statute by the agency, charged with enforcement" . . . *Cunochowski* v. *Hartord Public Schools*, 261 Conn. 287, 296 (2002). The above quoted in *Fedus*

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[1] *Town of Westport* v. *City of Norwalk*, 167 Conn. 151, 161 (1974).

[2] *Daughters of St. Paul, Inc.* v. *Zoning Board of Appeals*, 17 Conn. App. 53, 68 (1988).

[3] *Jeffery* v. *Planning & Zoning Board of Appeals*, 155 Conn. 451, 454 (1967).

[4] *Raysbestos - Manhattan, Inc.* v. *Planning & Zoning Commission*, 186 Conn. 466, 470 (1982).

v. *Zoning & Planning Commission*, 112 Conn. App. 844, 849 (2009). *Fedus* itself involved an appeal from the Commission's granting approval to a site plan application.

Failure To Comply with Zoning Ordinance

The plaintiff raises three instances where it claims the site plan application does not comply with certain subsections of Section 60e) of the New Haven Zoning Ordinances. Section 8-3g of the General Statutes says that "A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning or inlands wetlands regulations . . ." The corollary of this is that a site plan application can only be approved if it does comply with zoning regulations. As said by *Fuller* in Volume 9A of the Connecticut Practice Series: "The question for the agency and the Superior Court on appeal is whether or not hte application submitted conformed to the agency's regulations" citing *McGamm* v. *Town Plan and Zone Commission*, 161 Conn. 65, 77 (1971); *Kosinski* v. *Lawlor*, 177 Conn. 420, 427 (1979); *Marimah, Inc.* v. *Town of Greenwich*, 176 Conn. 116, 118 (1978); *Barberino Realty & Development Corporation* v. *Planning & Zoning Commission*, 272 Conn. 607, 614 (1992). As said in *Allied Plywood, Inc.* v. *Planning & Zoning Commission*, 2 Conn. App. 506, 512 (1984): "In ruling upon a site plan application, the planning commission acts in its ministerial capacity, rather than in its quasi-judicial or legislative capacity. It is given no independent discretion beyond determining whether the plan complies with the applicable regulations . . . The board is under a mandate to apply the requirements of the regulations as written." The court will now try to address the plaintiff's argument as to non-compliance with Section 60(e)(7), 60(e)(3), and 60(e)(8) of the City Zoning Ordinance.

(a)

Compliance or Non Compliance with Section 60(e)(7)

The plaintiff's claim of non-compliance with this subsection as to 630 Chapel Street raises the same non-compliance argument as was raised as to the 673 Chapel Street property where a residential unit is planned which is across Chapel Street and to the north of this site. The court would refer to that discussion.

The argument made here is that "the ordinance calls for infiltration and the rejection of it appears to have been an election and a concession without the Commission's involvement".

As discussed in 15-6052363 the ordinance reads "(7) On-site infiltration and on-site storage of stormwater shall be employed to the maximum extent feasible." It does not read as the plaintiff suggests (7) On-site infiltration and on-site storage of stormwater shall be employed".

The applicant submitted a lengthy and detailed engineering report by Malone and MacBroom (ROR4) which address the maximum extent feasible question. It states:

> "V. WATER QUALITY MANAGEMENT
>
> Water quality measures or Best Management Practices (BMPs) have been incorporated into the design to maintain water quality in order to provide protection for the areas downgradient of the proposed development. Prior to discharging off site, the stormwater will pass through several stormwater quality measures. The drainage system will include catch basins with 2-foot sumps that trap coarse sediments and a hydrodynamic separator that will trap additional sediment and other pollutants.
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> The hydrodynamic separator is the CDS unit by Contech and will be sized using the "first inch of rainfall" water quality flow rate as stated in the *2004 Connecticut Stormwater Quality Manual*. Per the manufacturer's requirements, at least 80% removal of total suspended solids can be expected. The design of a proprietary hydrodynamic separation water quality treatment device was selected in favor of

infiltration practices for this development, primarily for two reasons: the site is entirely urban fill, which is traditionally unacceptable for infiltration practices and the proximity of the new building and the surrounding existing buildings. Accordingly, the volume of the first inch of runoff will not be recharged to groundwater."

This is the only expert opinion in the record on the issue of infiltration. The Plan Commission report, 1498-04 was reviewed by staff and several city departments. The report specifically discusses the Storm Water Management Plan and indicates its reliance on the Milone and MacBroom Engineering Report.

"**Stormwater Management Plan:**

Under the proposed development, the three watershed areas of the site are combined into one area containing the entire property. An underground stormwater management system consisting of 36" storm piping routed to an outlet control structure to attenuate the proposed discharge to the predevelopment rates is shown. Roof leaders from the proposed building will discharge to the on-site storm drainage collection system. Peak flow rates from the project site are controlled using and underground detention area. BMPs have been incorporated into the design to maintain water quality. City Engineer aggress that the first inch of rainfall does not need to be infiltrated due to the high groundwater table/urban fill in the area. For more information, see the engineering report. Design meets the requirements of Section 60."

ROR 5 and 7 indicates there were extensive communications between Milone and MacBroom an the City Plan Commission regarding the application, specifically the Commission's Executive Director and the Senior Project manager.

As the court discussed in its decision involving the site plan application for 630 Chapel the point of Section 60(e) is not to encourage infiltration systems as such; the language of subsection (e) 7 obviously is concerned with stormwater management and the control of pollution,

contaminants, and particles which may be affected y runoffs from properties such as 630 and 673 Chapel Street.

Rather than relying on infiltration which the Milone and MacBroom report says is not "feasible" as a means of accomplishing water quality control, the report the staff relied on discusses in detail the continuous deflection separation technology (CDS) the applicant intends to rely upon. The system requires ongoing maintenance and inspection and can hardly be viewed as a cheaper and easier way of water quality management that infiltration.

In its memorandum of decision in CV15-6052363 the court also discussed the plaintiff's suggestion that the fact is that the scale of the proposed building contributes to the reduction of the area available for infiltration - a "self-created, arguably avoidable, situation". ROR4 is referred to and apparently the comment on page 6 which says . . . the infiltration method was not selected because "the site is entirely urban fill, which is traditionally unacceptable for infiltration practices and the proximity of the new building and the surrounding existing buildings. (Emphasis by court). The expert report indicates there are two separate and independent reasons for choosing the CDS system of water quality management. In any event the property is a BD-1 zone and a reductio ad absurdum argument cannot be used to defeat the purposes of the zone change. In any event the court relies on its discussion of this argument in CV 15-6052363.

(b)

Compliance with Section 60(e)(3)

The plaintiff argues the Commission in approving the site plan application did not comply with the Section 60 (e)(3) provision of the city zoning ordinance. That section reads as follows:

> "(3) Design and planning for site development shall provide for minimal disturbance of pre-development natural hydrological conditions, and shall reproduce such conditions after completion of the proposed activity, to the maximum extent feasible."

The plaintiff refers to the City Plan Report (1498-04) which states that "Under the proposed development, the three watershed areas of the site are combined into one area containing the entire property." It is argued that this "is at variance" with Section 60(e)(3). The argument then proceeds to say that as in CV 15-6052363 that the Commission made no decision at all, the November 19, 2014 hearing approving the site plan application for 630 Chapel Street gave only cursory treatment to the application. The court refers to its discussion in CV 15-0652363 but has additional comments. *Yurdin* v. *Town Plan & Zoning Commission*, 145 Conn. 416, 421 (1958) does recognize a zoning commission can turn to technical and professional assistance beyond their expertise but the commission must be the decision maker. A commission "may seek advice and assistance frm a professional staff, it is the agency itself that must find the facts and apply the statutory criteria to those facts", *Laufer* v. *Conservation Commission*, 24 Conn. App. 708, 713 (1991). Let us look at *Laufer* more closely. In *Laufer* the plaintiff wanted to subdivide a lot into two separate parcels to build a second house on one of the parcels. To get access to the second house the plaintiff filed an application seeking the commission's permission to cross a stream and erect colverts to create a driveway to cross the stream. The commission held a public hearing on the plaintiff's application in which it heard evidence from both the proponent and the oppoents of the application. The commission also received a recommendation from the Fairfield inland

wetlands agency at the hearing which recommended the plaintiff's application be conditionally approved. The commission after the public hearing denied the plaintiff's application, id. page 710.

The plaintiff appealed claiming "that because the commission did not adopt the recommendation of the agency's staff (it must be concluded) that the commission failed to apply its own standards and, thus, abused its discretion", id. pp. 710-711.

The court disagreed and said case law could not be found to support the proposition that failure of a defendant commission to adopt the staff's recommendation constitutes a failure to adhere to its own standards, page 711. It was in that context that although an agency may seek advice from a professional staff it is the agency itself that must find the facts and apply statutory criteria because credibility of witnesses and determination of issues of fact are the exclusive province of the agency, id. p. 713.

This is not the *Laufer* case.

Here opponents of the site plan application did not appear at the public hearing to oppose it. No expert reports were submitted contradicting the Milone & MacBroom report submitted by the applicant. There were no credibility issues to be weighed as between competing witnesses or reports. In the court's opinion the credibility of the work of Milone & MacBroom are underlined by two brief examples. In the report submitted in conjunction with the site plan application for 673 Chapel Street it was noted gardens would be put in that could to some extent accommodate infiltration practices. In the court's opinion this factor did not argue for infiltration practice for the entire subject property but it underlines the candor of the preparers of the report. Also as to the

specific issue now being discussed the Milone and Brackman report readily acknowledged the runoff from the property would exceed by de minimus amounts pre-development runoff.

What the Commission had before it at the November 19, 2014 hearing where the application was approved was the Plan Commission report 1498-04 which had been prepared by staff and reviewed by a Site Plan Review Team which contained representatives from five city departments including the City Engineer. The comment made in the Storm Water Management Section underlines the fact that review team had reviewed the Milone and MacBroom report thoroughly. At the November hearing Ms. Gilvarg, the Executive Director of the Commission emphasized these points by stating: "I'll just mention that we met with transportation, traffic and parking staff, engineering staff, Building Department several times. The Applicants responded to questions that we had: They've provided all the calculations for these items, such as storm drainage, reflective heat and lighting levels, and those have been reviewed by the appropriate departments".

To turn to a more substantive discussion of the issue at hand let us return again to the language of Section 60(e)(3) which the plaintiff maintains was not complied with.

> § 60(e)(3) Design and Planning for site development shall provide for minimal disturbance of pre-development natural hydrologic conditions, and shall reproduce such conditions after completion of the proposed activity, to the maximum extent possible.

The plaintiff argues the City Plan Report (1498-04) merely states that "Under the proposed development, the three watershed areas of the site are combined on an area containing the entire property".

The plaintiff's position, in the court's opinion, does not take account of the modifying language in subsection (3) which parallels to the maximum extent feasible language in subsection (7). The court has underlined that language in subsection (3). Also the engineer's report which addresses the watersheds is not focused upon although per the Plan Commission Report (1498-04) it, along with other aspects of the application, was reviewed by the Commission staff and City Engineer.

Hydrology in the first instance is defined in Webster's Third International Dictionary is described as "a science dealing with the properties, distribution and circulation of water". It is "the physical factors studied by hydrologists (as precipitation, stream flow, snow melt, ground water storage, and evaporation"). The Engineer Report of Milone and MacBroom says the following:

> "A hydrologic analysis has been conducted to analyze the predevelopment and postdevelopment peak flow rates from the site. Three analysis points were used for this study: Analysis Point A (AP-A) is an existing catch basin in Olive Street southeast of the project site; Analysis Point B (AP-B) in an exciting catch basin in Union Street to the west; and Analysis Point C (AP-C) is an existing structure in Chapel Street to the north. The three watersheds encompassing the entire project were used to determine the peak flow rates for current site conditions. The existing watersheds were then modified to include the proposed development and analyzed for comparison to the predevelopment analysis. The total watershed area delineated was approximately 1.4 acres under both existing conditions and proposed conditions. A watershed map depicting both conditions is included in the Appendix of this report.
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> Under the postdevelopment conditions, all three watershed areas were combined into one area containing the entire property and will contain an underground stormwater management system consisting of 36-inch storm piping routed to an outlet control structure to attenuate the proposed discharge to the predevelopment flow rates. Roof leaders from the proposed building will be discharged to the on-site storm drainage collection system. To be conservative, runoff from the landscaped courtyard has been considered to be entirely impervious."

The watershed area under both pre-existing conditions and postdevelopment conditions is 1.4 acres under both conditions. The watershed was not reduced, as the report says "under the postdevelopment conditions, all three watershed areas were combined into one area containing the entire property. How is this a "disturbance" of predevelopment natural hydrologic conditions let alone a minimal disturbance?

The three watershed areas were examined to show peak flow rates and these were compared to the expected runoff from the proposed development which would assume the combination of the three watershed areas accompanied by an underground management system. The result of the studies which are set forth in the reports is said to reveal the following:

> "The summary of results above shows that no increases in peak rates of runoff are anticipated from the discharge of the underground stormwater detention area. Rather, a decrease in the peak rate of runoff can be anticipated for all of the storm events modeled due to the attenuation provided within the detention area. Therefore, the proposed stormwater management system as designed will prevent increases in existing peak runoff rates from the site. A minor increase in runoff volume from the site is expected."

Given the unrefuted conclusions reached in the record by means of the Milone and MacBroom report it cannot be said that the proposed development will cause more than a minimal disturbance of predevelopment hydrological conditions; in some respect the conditions will be feasible improved. The maximum extent feasible criterion is given the right to development afforded by BD-1 zone reclassification and the only de minimus increase in runoff.

Compliance with Section 60(e)(8)

Section 60(e)(8) reads as follows: "(8) Post-development runoff rates and volumes shall not exceed pre-development rates and volumes for various storm events. Stormwater runoff rates and

volumes shall be controlled by infiltration and on-site detention systems designed by a professional engineer licensed in the State of Connecticut except where detaining such flow will affect upstream flow rates under various storm conditions."

Subsection (8) is difficult to fit in with other subsections of Section 60(e). Subsections (3) and (7) as just discussed, since it uses mandatory language rather than that of flexible wording such as "to the maximum extent feasible", "to the maximum extent possible (see subsection 2), and "minimal disturbance as used in subsection (3)". Reading the Milone and MacBroom report it should be noted "water quality issues" are a different concept from "stormwater management" and "hydrologic analysis". The unanswerable conclusion one can glean from the report is that infiltration is not feasible when water quality is at issue. Stormwater management a different issue and stormwater plans may, as the report candidly admits create an increase in runoff even if it is de minimis. A compatibility analysis trying to read all the subsection (e) mandates together to solve the present issue is not useful.

As said in 73 Am.Jur.2d "Statutes § 104 pp. 342-343: "As a rule where the language of a statute is clear and unambiguous, its clear meaning may not be eucided by an administrative body or a court order under the guise of construction. In such circumstances, there is no room for judicial interpretation, and the language should generally be given effect without resort to extrinsic guides to construction", also see 172, page 287 and Schwartz v. *Planning & Zoning Commission*, 208 Conn. 146, 153 (1988). Also Section 69 of Am.Jur.2d "Statutes at pages 304-305 cites Crooks v. *Harrelson*, 282 U.S. 55 (1930) is cited for the following: "However, an application of the principle that the literal meaning of a statute is to be rejected in favor of a construction in harmony

with its supposed spirit so nearly approaches the boundary between the exercise of judicial power and that of legislative power as to call for great caution an circumspection to avoid what would appear to be judicial legislation.

The court will not reverse the decision of the Commission in its entirety especially in light of the de minimus nature of the increase in runoff volume. However, pursuant to Section 8-8(e) of the general statutes will modify the decision of the Commission for the purpose of requiring compliance with "no net increase" language in Section 60(e)(8) of the New Haven Zoning Ordinance. This is the only respect in which the Commission's decision is revised, in all other respects it is upheld.

Corradino, J.
Judge Trial Referee