DOCKET NO. CV-15-6052363-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 673 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.

673 Site Plan and
Requirement and Standards of Zoning Ordinance

(a)

In the appeal the plaintiff makes four arguments (1) the decision of the Commission approving the site plan is contrary to the evidence and does not find a basis in fact or law (2) the decision of the Commission is the produce of a bias and predetermination (3) A finding of zoning consistency relies, in part, on the rezoning of the subject property in August 2014, through which and only through which the intended use of the subject property is legitimate and which decision is under appeal (4) the site plan does not comply with Section 60 of the New Haven Zoning Ordinance and represents an illegal waiver by the Commission of mandatory requirements, an act beyond its jurisdiction.

The plaintiff's briefs do not explicitly make a bias and predetermination claim. The plaintiff's arguments state that the record evidence reveals that the site plan does not comply with the requirements of the New Haven Zoning Ordinance and thus was not eligible for approval. But a predetermination claim questions the fairness of the process by which a zoning authority makes a decision not the particular decision made. A Commission can be entirely wrong in approving a site plan, mistaken on the law and in deciding a site plan complies with city zoning ordinances. But that, standing alone, cannot mean the decision was predetermined. If that were the law a

predetermination case can be made in every one of these cases where a strong argument is made that a Commission was "just plain wrong".

Argument 3 is not before the court since it has upheld the rezoning.

The only argument before the court is that the Commission in approving the site plan failed to find as it should have that the site plan did not comply with Section 60 of the New Haven Zoning Ordinance and thus represented an "illegal waiver by the Commission of mandatory requirements, an act beyond its jurisdiction ("appeal, paragraph") . Thus, per argument (1), the decision was contrary to the law and is not founded on the facts or the law.

It should be noted that enmeshed in this position is another argument. Rather than a strict predetermination argument the plaintiff makes a procedural argument that the Commission was not the decisionmaker regarding the applicability of Section 60(e)(7) of the Ordinances and its concern for stormwater management. It merely accepted Commission Report 1498-03 and its approval of that aspect of the application. Thus as regards the Commission approval on November 19, 2014 . . . "the Transcript reveals an unacceptably limited presentation where the very elements of the Commission's mandatory findings had been decided elsewhere (see 1498-03) than before the Commission and the Commission was insulated from the very information upon which it is required to decide."

Leaving aside the procedural objections for now the court will now attempt to address the plaintiff's arguments by examining the record.

The plaintiff's argument on appeal is that the site plan application does not meet the requirements of the New Haven Zoning Ordinance which is an applicable zoning regulation of the

city. Specifically the plaintiff claims the site plan does not meet the requirements of Section 60e(7) of the Zoning Ordinance which states "(7) On-site infiltration and on-site storage of stormwater shall be employed to the maximum extent feasible". The plaintiff points out that the Engineering Report presented by Spinnaker explicitly excluded using an infiltration method to accomplish the purposes of Section 60(e).

The court will first set forth Section 60(e) in its entirety:

"§ 60(e) states

(e) In order to approve any application for which a stormwater management plan is required, the commission shall find the stormwater management plan consistent with the following criteria:

(1) Direct channeling of untreated surface water runoff into adjacent ground and surface waters shall be prohibited.

(2) No net increase in the peak rate or total volume of stormwater runoff from the site, to the maximum extent possible, shall result from the proposed activity.

(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 feasible.

(4) Pollutants shall be controlled at their source to the maximum extent feasible in order to contain and minimize contamination.

(5) Stormwater management systems shall be designed and maintained to manage site runoff in order to reduce surface and groundwater pollution, prevent flooding, and control peak discharges and provide pollution treatment.

(6) Stormwater management systems shall be designed to collect, retain, and treat the first inch of rain on-site, so as to trap floating material, oil, and litter.

(7) On-site infiltration and on-site storage of stormwater shall be employed to the maximum extent feasible.

(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.

(9) Stormwater treatment systems shall be employed where necessary to ensure that the average annual loadings of total suspended solids (TSS) following the completion of the proposed activity at the site are no greater than such loadings prior to the proposed activity. Alternatively, stormwater treatment systems shall remove 80 percent TSS from the site on an average annual basis.

(10) Use of available BMPs to minimize or mitigate the volume, rate, and impact of stormwater to ground or surface waters."

The question becomes is the plaintiff's interpretation of Section 60(e)(7) correct in arguing that because there was a failure to comply with its mandate the site plan application should not have been approved? This requires interpretation of the language of Section 60(e) and reference to the rules of interpretation that should be applied to zoning regulations and ordinances. By its actions the Commission here, in effect, concluded that the site plan application was in compliance with the requirements for an acceptable site plan. The thirty requirements are set forth in Section 64(f)(5), stormwater management is referenced in 64(f)(5). The only requirement claimed not to have been met is compliance with subsection cc: "Stormwater Management Plans as required by Section 60."

In *Pellicone* v. *Planning and Zoning Commission*, 64 Conn. App. 320 (2001) the court said that "although the position of the Commission is entitled to some deference, the interpretation of provisions in the regulations is a question of law for the courts", id. page 335, also see *Coppola* v. *Zoning Board of Appeals*, 23 Conn. App. 636, 640 (1990). It is for the court then to determine if an interpretation given to a zoning regulation by a local zoning agent or by a litigant challenging

its necessary interpretation in an action appealed from is reasonable. What are the criteria for interpretation?

In interpreting a statute or a zoning regulation, the intention of the zoning authority must be ascertained and as the court in *Hutchinson* v. *Board of Zoning Appeals*, 140 Conn. 381, 385 (1953), said: "In ascertaining that intention, we must consider the ordinance in the light of its language and, among other things, of the purpose it was designed to serve." Commenting on *Hutchinson* the court in *P&Z Commission* v. *Syvanon Foundation*, 153 Conn. 305, 310 (1966), said: "If the word to be interpreted is found in a legislative prescription, the overall purpose of the legislation is of particular relevance in arriving at the appropriate meaning," also see *Essex Leasing, Inc.* v. *Zoning Board of Appeals*, 206 Conn. 595, 601 (1988).

The *Hutchinson* case discusses when a court must examine the intention and purposes of a zoning authority to try to ascertain the meaning of a zoning regulation. If the language of a zoning regulation is "artlessly drafted" - i.e. it's meaning is unclear-that is the point when:

> "It becomes necessary, then, to determine the intention of the council in enacting this subsection since, as with statutes, the primary rule for interpreting and construing enactments is that the expressed intention of the legislative body is to be ascertained and given effect. See *Grace Hospital Society* v. *New Haven*, 119 Conn. 146, 154, 174 A. 411. In ascertaining that intention, we must consider the ordinance in the light of its language and, among other things, of the purpose it was designed to serve. *Glanz* v. *Board of Zoning Appeals*, 123 Conn. 311, 315, 195 A. 186. Every ordinance must receive a reasonable construction. *Whitlock* v. *West*, 26 Conn. 406, 414. It is to be construed as a whole and in such a manner as to reconcile all of its provisions so far as possible. *State ex rel. Chatlos* v. *Rowland*, 131 Conn. 261, 265, 38 A.2d 785." 140 Conn. at pp. 384, 385, also see *Schwartz* v. *Planning & Zoning Commission*, 208 Conn. 146, 153 (1988); *Melody* v. *Zoning Board of Appeals*, 158 Conn. 516, 521 (1969); *Essex Leasing* v. *Zoning Board of Appeals*, 206 Conn. 595, 601 (1988); *Fuller, Vol. 9A Connecticut Practice Series* § 34:6.

Interpretation of Section 60(e)(7) must be placed in the context of the New Haven Zoning Ordinance and specifically in the context of subsection (e) of Section 60. Section 60 of the New Haven Zoning Ordinances states as follows:

> "Purpose and authority. Increased development without proper consideration of stormwater impacts can be a significant source of pollution to Long Island Sound, its tributaries, and other waters of the state. The state's water resources are valuable natural, economic, recreational, cultural, and aesthetic resources. The protection and preservation of these waters is in the public interest and is essential to the health, welfare, and safety of the citizens of the City of New Haven. It is, therefore, the purpose of this ordinance to protect and preserve the waters within New Haven from nonpoint sources of pollution through the proper management of stormwater flows and minimization of inputs of suspended solid, pathogens, toxic contaminants, nitrogen, and floatable debris to these flows."

The court has quoted subsection (e) of Section 60 in full. It is necessary to now focus on the subjection in more detail. Section 60(e) states in its introduction: "In order to approve any application for which a stormwater management plan is required (see Section 64 as to Site Plan Applications), the Commission shall find the stormwater management plan consistent with the following criteria" - it then lists ten criteria of which subsection 7 is just one. The subsections relevant to this case are the following since they list the objectives sought to be achieved by stormwater management:

(4) Pollutants shall be controlled at their source to the maximum extent feasible in order to contain and minimize contamination.

(5) Stormwater management systems shall be designed and maintained in order to reduce surface and groundwater pollution, prevent flooding and control peak discharged and provide pollution treatment.

(6) Stormwater management systems shall be designed to collect, retain, and treat the first inch of rain on-site, so as to trap floating material, oil and litter.

(7) On-site infiltration and on-site storage of stormwater shall be employed to the maximum extent feasible.

The point of all this is that reading Section 60 and Section 60(e) together there is a mandate to control pollutants, minimize contamination, and minimize and trap floating material which may be pathogens.

In other words "on-site infiltration" referred to in subparagraph 7 is not a desired end in itself but is set forth as a means to accomplish the goals set forth in subparagraphs (4) through (6) - i.e. pollution control, capture of particles, reduction of contamination. Let us examine the language of subsection (7) from two perspectives. It could have read in a way that would be much more favorable to the plaintiff's position:

(7) On site infiltration and on-site storage of stormwater shall be employed.

Instead it reads with the additional words the court will underline.

"(7) On-site infiltration and on-site storage of stormwater shall be employed to the maximum extent feasible."

What is the meaning of the word "feasible"? The court will quote the applicable dictionary definitions:

Webster's Third International Dictionary, feasible (1) capable of being done, executed or effected; possible of realization (2) capable of being managed, utilized or dealt with successfully (3) reasonably, likely.

Random House Dictionary feasible (1) capable of being done, effected, or accomplished; a feasible plan (2) probably, likely.

These definitions are related to the concept of feasibility. The following definitions are given for "feasibility".

Black's Law Dictionary, feasibility: the possibility that something can be made, done, or achieved or that is reasonable; practicability.

Ballentine's Law Dictionary, feasibility: capable of accomplishment.

And perhaps just as basically to the issue at hand let us examine the dictionary definition of the word "infiltrate".

Random House, infiltrate (1) to filter into or through (2) to cause to pass in by or as by filtering.

Infiltration: the act or process of infiltrating.

Webster's Third International Dictionary, infiltrate (1) to cause something(as a liquid) to enter or penetrate the pores of (2) to pass into or through (a substance) by filtering or permeating.

Infiltration: the act or process of infiltrating.

No where in the ordinances are the words feasible, feasibility, infiltrate or infiltration defined. So in the interpretive task before the court where can the court go to define the meaning of these words which will govern its decision. The court will rely on a principle set forth in the case law on one aspect or tool of statutory interpretation which common sense dictates should apply to the interpretation of zoning ordinances or other regulations. *Connecticut Recovery Authority* v. *Planning & Zoning Commission*, 46 Conn. App. 566, 571 (1997). Can it rely on

dictionary definitions? In *Efstathiadus* v. *Holden*, 317 Conn. 482, 488 (2015) the court said: "In the absence of a definition of terms in the statute itself we may presume . . . that the legislature intended (a word) to have its ordinary meaning in the English language, as gleamed from the context of its use - under such circumstances it is appropriate to look to the common understanding of the term as expressed in a dictionary". This language was quoted with approval in *Struder* v. *Struder*, 320 Conn. 483, 488 (2016).

An engineering report was submitted by the applicant to the Plan Commission. The report was submitted by a firm called Milone & MacBroom which specializes in Engineering, Landscape Architecture and Environment Science. The report submitted is complicated and lengthy. No other expert opinion was offered which challenged the Milone & MacBroom observations and conclusions. The report noted the studies it relied upon. It noted that 673 Chapel Street is a parking lot with an impervious surface. Because of this the report states . . . "the post-development results (per studies made) showed a decrease in the peak flow rates and runoff volumes as some impervious areas will be returned to grassed landscaped areas. All Hydrographics input Computations and model results were included in an appendix to the report.

In the section of the report entitled "Water Quality Management" it states:

> "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.

> The hydrodynamic separator proposed 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 hte first inch of runoff will not be recharged to groundwater."

The report thus states that "the site is entirely urban fill, which is traditionally unacceptable for infiltration practices" (emphasis by court). Subsection (7) of § 60(e) talks to infiltration practices "to the maximum extent feasible" but the expert report says such practices are not feasible in any event. In other words due to urban fill infiltration as defined in the dictionaries referred to cannot operate to accomplish the purposes of subsection (4), (5), and (6) of Section 60e of the Ordinances.

This section of the report concludes: "The proposed development will not have any negative impacts or adversely affect any down gradient areas. Through the use of on-site stormwater management control measures, there will be no incerase in the post-development stormwater runoff peak flow rates, and water quality will be maintained and improved when compared to the predevelopment condition." These expert opinions are backed by studies conducted.

ROR4 also includes a detailed discussion on CDS-continuous, deflection, separation - which will be resorted to in lieu of infiltration practices. It states the CDS system which will be resorted to instead of infiltration practices "removes sediment, trash, and free oil and grease . . . and

retains 100% of floatables." Performance is said to have been verified by lab and field testing - testing is attached.

A cursory examination of the CDS section indicates installing this system is a large project not lightly engaged in and methods of inspection and cleaning of the system are spelled out in some detail with an attached "inspection and maintenance log" as a model for system operation.

All of this impresses the reader as not a contrivance to avoid infiltration practices but a reasonable conclusion that the CDS system will accomplish all the goals set forth in Section 60e(4), (5), and (6).

In any event Commission Report 1498-3, which approved the application, was signed off on November 19, 2014 by the City Plan Commission contains the following:

> "Stormwater Management Plan:
> Stormwater runoff from the proposed site will be collected and conveyed via a subsurface pipe and catchbasin drainage system routing to the City's drainage system in Chapel Street. Roof leaders from the proposed building will be discharged to the on-site drainage collection system. BMPs have been incorporated into the design via catchbasins and a hydrodynamic particle separator. City Engineer aggress that the first inch of rainfall does not need to be infiltrated due to the high groundwater table in the area. For more information, see the engineering report. Design meets the requirements of Section 60."

If we stop the examination of the record at this point, and leaving aside the procedural objections raised by the plaintiff, it seems evident that the defendant correctly interpreted the ambit of Section 60(e)(7) and decided that infiltration practices were not mandated thereby.

However, the plaintiff relies heavily on the case of *Fedus v. Planning & Zoning Commission*, supra, to argue that the last mentioned conclusion of the court is erroneous. *Fedus* discusses, in relevant part, the question before this court and, in the court's opinion supports the

defendant Commission's position, see 112 Conn. at pp. 854-857. In *Fedus* Section 12.5.4.g of the Colchester zoning regulations explicitly states and requires that "all pipe for storm drains shall be reinforced concrete pipe (RCP) conforming to DOT form 815 or latest edition and shall be approved for use by the Town Engineer. At public hearings on the matter the plaintiffs presented a memorandum from an expert who "pointed out that under the regulations, storm piping was to be made of reinforced concrete and not the corrugated high density polyethylene pipe that was proposed", id. page 855. On appeal the plaintiffs did "not substantially dispute that the drainage pipes (did) not conform to the regulations", id. page 854. The only response by the town to say we have accepted the use of corrugated high density polyethylene pipe for ten years, id. page 855. The appellate court rejected this excuse for not enforcing the regulations as it read. Referring to the mandated use of reinforced concrete piping it said that: "In acting within its legislative capacity, the commission created this regulation and therefore bound itself to comply with until it finds that a change is needed and then decides to amend it," id. p. 857. The court had just noted that "there are no exceptions to the regulation requiring use of pipe made from reinforced concrete thus the decision that the drainage design conformed with this clear regulation was illegal and arbitrary. Id.

This case is not *Fedus*. Section 60(e)(7) does not read, a la the *Fedus* regulation under consideration "(7) on-site infiltration and on-site storage of storm water shall be employed". It reads "(7) on-site infiltration and on-site storage of storm water shall be employed to the maximum extent feasible". The only expert opinion offered in the case was offered by the defendant Spinnaker and that opinion held on-site infiltration was not feasible.

Therefore, if *Fedus* is read closely, in the court's opinion it supports the conclusion previously stated that Plan Commission correctly interpreted the regulation at issue and applied it reasonably within its discretion.

Given the foregoing interpretation of the meaning of Section 60(e)(7) there is nothing in the record by way of expert evidence that rebuts the position that as a result of the only expert testimony presented infiltration is not only not mandated but not advisable given the conditions present at this property.

In addition to the plaintiff's position that subsection (e)(7) somehow mandates infiltration practices, it refers to the contents of the record in one respect to try to refute the Milone and MacBroom conclusion that infiltration practices were not viable. The plaintiff refers in its briefs that in addition to the urban landfill condition, which the plaintiff does not appear to contest, the Milone and MacBroom report itself (ROR4) appears to rely on the scale of the developer's own project contributing to a reduction of area available for infiltration "- that is the building is too large. But with BD-1 classification the building is permissible and the reductio ad absurdum of this argument is that there should be no building at all but the impervious parking lot should be dug up and planted as a garden. It is not appropriate in a site plan application setting to introduce positions which would argue against the BD-1 classification in the first place and defeat the very purpose of allowing a zone change. As it is garden areas will be developed which will permit some infiltration. The building is to be 62 feet high, less than 70 foot maximum in a BD-1 zone pursuant to text amendments approved along with the zone change.

The proposed building mass then, is less massive than what is permitted in a BD-1 zone. The purpose of Section 60(e)(7) is not to encourage in the abstract as much as possible infiltration practices. Infiltration practices are only a means of achieving the goals of reducing the possibility of pollution, contamination, and particle transfer from runoffs that will occur - they are not a desired end in and for themselves. The question of feasibility of infiltration practices must be considered in the context of permitted uses in a BD-1 zone. In this regard it seems apparent that the CDS storm management plan is itself not questioned in the record or in argument thereon as not being capable of effectively controlling pollution, contamination and particle runoff and otherwise appropriately providing acceptable drainage from this property. Nothing even has been suggested to counter the Conclusion paragraph on page 6 of the Project Overview Section of the Milone and MacBroom report (ROR4) submitted by the applicant for the Site Plan - there it says: "The proposed development will not have any negative impacts or adversely affect any down gradient areas. Through the use of on-site stormwater management control measures, there will be no increase in the post development stormwater runoff peak flow rates, and water quality will be maintained and improved when compared to the pre-development condition." Also see the extensive discussion of the CDS technology (Continuous Deflection Separation) in the Water Quality Treatment section of the same report.

In any event the court concludes that there is nothing in the record that indicates Section 60(e)(7) was not complied with because of the application's failure to employ infiltration practices. The only expert testimony in the record concludes infiltration practices are not viable.[5]

But the discussion is not over. The plaintiff raises concerns about how this matter was decided.

(b)

The court will now try to address what it has called procedural issues raised by the plaintiff. The argument is best represented by quotations from the plaintiff's brief. It is first said that: "There is no evidence in this record that the Commission had carefully considered the design or efficacy of the proposed stormwater management system upon which its 'decision' is based. And there is no evidence that the Commission itself had any role in determining the viability, the conformity, the need or the desirability of the stormwater techniques used in the Applicant's design and those not used to find regulatory consistency." The argument goes on to say "In this case, the Transcript (of the November 19, 2014 Public Hearing) reveals an unacceptably limited presentation where the very elements of the Commission's mandatory findings had been decided elsewhere than before

[5] In the plaintiff's reply brief there is only one other reference to the substantive issues presented by the record. The brief argues there is no discussion about why the design features of the proposed building preclude implementation of infiltration practices. The point is not elaborated on and it cannot speculate as a self-appointed expert how this observation counters the Milone and MacBroom report's rejection of infiltration practices. In the Project Overview Section of ROR4 on page 1 it is apparent that the engineers making it were aware of the proposed building's size and "footprint" and how parking is to be accommodated as to construction on the site.

the Commission and the Commission was insulted from the very information upon which it is required to decide".

The plaintiff's argument runs into an immediate problem when confronted with the statutory language of Section 8-3(g)(1) which discusses site plan applications. Ensconced within the statutory language are two sentences which, at least in the court's opinion, are of some relevance to the issue now under consideration. The two sentences are "Approval of a site plan shall be presumed unless a decision to deny or modify it is rendered within the period specified in section 8-7d". The second sentence reads "A decision to deny or modify a site plan shall set forth the reasons for such denial or modification". When a site plan is approved the Commission taking that action is not required to give its reasons and presumably the court is left to review the record to determine whether the decision to approve is arbitrary or illegal. If an approval is presumed absent a decision to modify or deny it is rendered within the 8-7d time period this would apparently be the case even where a public hearing is not held and then again a court on appeal must review the record to determine if the decision to approve was arbitrary or illegal.

Perhaps more to the point than a linguistic analysis is the fact that the Commission at the public hearing approving the application has its staff report, 1498-03 for its examination. That report indicates the plans which would include ROR 4, the Milone and MacBroom Engineering Report, was reviewed by the City Plan Review Team, which included representatives from City Plan, City Engineer, Building, Building, Disabilities Service and Transportation, Traffic and Parking "and was found to meet the requirements of the city's ordinances and regulations".

The City engineer approved the storm water Management plan of the applicant and its conclusion that infiltration practices were not appropriate. ROR exhibits 5 and 7 indicate Plan Commission staff had contact with Milone & MacBroom, Inc., Spinnaker's engineers regarding their report in support of the application and all its many aspects including that of the CDS proposal in lieu of the infiltration method.

In *Laufer* v. *Conservation Commission*, 24 Conn. App. 708 (1991) which involved an appeal from the denial of a permit application, the staff recommended the permit be granted. The plaintiff argued that the Commission in failing to follow its staff's recommendations it failed to apply its own standards. The court rejected this argument stating: "It is quite apparent that the statutory scheme for the resolution of permit applications envisions that the authorized agency shall be the decision maker. While the agency may seek advice and assistance from a professional staff, it is the agency itself that must find the facts and apply the statutory criteria to those facts. . . It is well settled that issues of credibility of witnesses and determinations of issues of fact are matters within the exclusive province of the administrative agency", id. page 713.

Here, however, we are dealing with issues involving expert opinion. The commission had Report 1498-03 before them which as noted recommended adoption of the application which included the Engineering Report of Milone and MacBroom. At the November 19, 2014 public hearing Ms. Gilvarg testified. She is the Executive Director of the Plan Commission staff. She testified as follows:

> "Ms. Gilvarg. I'll just mention that we met (the staff) with transportation, traffic and parking staff, engineering staff, Building Department several times. The Applicatns responded to questions we had. They provided all of the calculations

for those items, such as storm drainage, reflective heat and lighting levels, and those have been reviewed by the appropriate departments."

The case of *Yurdin* v. *Town Plan and Zone Commission*, 145 Conn. 416 (1958) is interesting. In that case the plaintiff appealed the decision by the Commission changing the zone of certain properties. One of the issues the plaintiffs raised in argument on appeal, the court noted, was that "great stress was laid by the plaintiffs on the action of the commission in conferring, in executive session following the public hearing, with two of its employees, the planning director and the planning technician, and in considering reports of studies they had previously made for commission". The court rejected the plaintiffs' argument saying: "The commission did not exceed its authority or violate any rights of the plaintiffs when it had the reports and population maps explained by the trained personnel who prepared them for the commission. It must be born in mind that the commission is composed of laymen. That they are entitled to professional technical assistance in doing the statistical work required to enable them to carry out the responsibilities of there is necessarily implied in the legislation creating the commission and outlining its duties". Id. page 421.

In *Feinson* v. *Conservation Commission*, 180 Conn. 421, 429 (1980) the court said:

> "Judicial review of administrative process is designed to assure that administrative agencies act on evidence which is probative and reliable and act in a manner consistent with the requirements of fundamental fairness. From both perspectives, we are compelled to conclude that a lay commission acts without substantial evidence, and arbitrarily, when it relies on its own knowledge and experience concerning technically complex issues such as pollution control, in disregard of contrary expert testimony, without affording a timely opportunity for rebuttal of its point of view."

In *Loring* v. *Planning & Zoning Commission*, 287 Conn. 746 (2008) there was an appeal from the Commission's denial of a site plan application. Quoting from an earlier case, the court noted: "However, for the agency to disregard evidence from experts there must be some evidence in the record which undermines either the expert's credibility or their final conclusions", id. page 761.

In the last analysis the plaintiff is arguing that the Plan Commission "was not presented with any substantive information upon which to assess the applicant's or staff's assertions regarding the site plan. "To assess" - that is the issue, and there is no indication the Commission included any members with special expertise on this mater as opposed to being lay members trying to perform their jobs. Assessment was done by experts, Milone and MacBroom and it was their assignment to submit a report which they did (ROR4). It was a detailed report and the Commission was aware, of the thorough review of the report by its staff and other city departments including the city engineer.

True, it is clear that a Commission acting on a site plan does not have to follow the advisory recommendations of its own staff, *Laufer* v. *Conservation Commission*, supra. The agency, or here Commission, must be the "decision maker". But here there is no indication that the Commission did anything else than accept the advice of its own staff on a matter involving expert opinion offered by an applicant, the staff investigated the application and sought the opinion of other city agencies in arriving at its recommendation to approve the application. In that sense it was the decision maker having decided to accept the report (1498-03) provided to them. This is not a situation where; as discussed in Fuller, zoning agencies or Commissions delegate the ultimate

decision a zoning issue to the decision of another city or state agency, see *Fuller*, Volume 9, § 22:4, Connecticut Practice Series, pp. 703-704. Citing several cases to this effect .

For all the foregoing reasons the appeal is dismissed.

Corradino, J.
Judge Trial Referee