DOCKET NO. CV-14-6050230-S	:	SUPERIOR COURT
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78 OLIVE STREET PARTNERS, LLC	:	J.D. OF NEW HAVEN
	:	
V	:	AT NEW HAVEN
	:	
CITY OF NEW HAVEN BOARD OF ALDERS, CITY PLAN COMMISSION OF NEW HAVEN, MAYOR TONI HARP, SPINNAKER RESIDENTIAL, LLC, COMCAST OF CONNECTICUT, INC.	:	MAY 12, 2016

MEMORANDUM OF DECISION

This case involves an appeal from decisions of the New Haven Board of Alers and the New Haven City Plan Commission. By a petition dated March 28, 2014 Spinnaker Residential, LLC filed a petition with the Board requesting that the Board amend the New Haven Zoning Ordinance Map to rezone properties at 630 and 673 Chapel Street from a Business Zone (BA) Zoning District to a Business Zone BD-1 Zoning District (which will be referred to on the Map Amendment).

At the same time Spinnaker filed a petition with the Board that sought to amend the New Haven Zoning Ordinance. As noted in the plaintiff's complaint (par. 7) the amendment were as follows: "(i) Section 1, in order to delete the definition of "Height" and replace it with definitions of "Height" and "Height, Average"; (ii) Section 43(b)(1) by adding the following to the table: "**where a lot in a BD-1 District abuts an RS-1, RS-2, RM-1 or RM-2 Residence District, the maximum permitted FAR is 3.0 (floor area ratio)"; (iii) Section 43(c) by adding the following as a subsection (6): "Where a lot in a BD-1 District abuts property in an RS-1, RS-2, RM-1 or RM-2 Residence District, a maximum building or structure height of 70 feet is permitted"; and (iv)

Section 45(a)(1)a.1. to provide that the parking requirement for a dwelling unit in the BD-1 District shall be the same as for a dwelling in the RH-2 District (i.e. 0.75 space per dwelling unit) (collectively, the Text Amendments).

1.

The court will briefly refer to the factual background of the case which it will expand upon when it addresses the merits of the case. Spinnaker entered into a contract to purchase land at 630 Chapel Street which is on the south side of that street as it borders the intersection of Chapel and Olive Streets. It also contracted to purchase 673 Chapel Street which is directly across from 630 Chapel Street and used as a parking lot by Comcast, Inc. which presently owns both parcels. The parcels together comprise 2.27 acres. The plaintiff 78 Olive Street owns property which abuts 673 Chapel Street and is within one hundred feet of 630 Chapel Street.

As noted Spinnaker filed the previously mentioned petitions to change the Chapel Street addressed from Business District BA to Business District BD-1. To quote from the defendant Spinnaker's brief: "Spinnaker sought the zone change to allow it to redevelop the site into a mixed - use development 'comprised of multifamily residential apartments with neighborhood retail and community amenity space on the ground floor'" (ROR3A). The site is within approximately 300 feet of the State Street Train Station and one half mile of the Union Street Station. ROR56. It is also on a bus line that operates on Chapel Street. ROR18. To the west of the site is the Downtown area of the city which is a block away over the train tracks and State Street which intersects Chapel Street. To the east of subject properties across Olive Street is the Wooster Square residential neighborhood.

As noted the site lies at the intersection of Chapel and Olive Streets. At the southeast corner of that intersection St. Paul and Saint James Church is located. Directly across the street on the northeast corner is a mixed use building with retail medical on the first floor and four stories of residential use above that. The Strouse Adler building to the immediate north of 673 Chapel Street at 78 Olive Street is a converted historic large factory building 4 ½ to 5 stories high which contains rental units: South of the intersection between Wooster Street and Water Street and on the east side of Olive Street is a six story public housing building. Directly to the south of 630 Chapel Street is property known as 87 Union Street, described as underutilized property and at another point as a parking lot with vacant buildings. Immediately to the west of 630 Chapel Street and abutting it is a Firestone Car service building.

2.

Aggrievement

As noted, the appeal in this mater is taken from (1) the granting of a map amendment to 630 and 673 Chapel Street changing the parcels' designation from BA to BD-1 - both business districts and (2) in a text amendment changing provisions in BD-1 ordinances regarding maximum height, parking requirements and, the F.A.R. (floor area ratio). Lengthy briefs and oral argument was had on the merits of these actions but before the court can have authority to address the merits, 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 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.

There is no dispute that the 78 Olive Street property abuts 630 Chapel Street and is within 100 feet of 673 Chapel Street. At trial of this matter the ownership of the 78 Olive Street address was established. And it was also true that the claim for aggrievement was based on statutory aggrievement and not on the basis of classical aggrievement.

Given the location of the 78 Olive Street property vis-a-vis the Chapel Street properties statutory aggrievement has been established regarding the map amendment which changed the zone classification of the subject properties to BD-1.

A more complicated question is presented as to the text amendments to BD-1 districts, referred to above, which would apply to all such districts throughout the City of New Haven. Referring to the language of § 8-8(a)(1) can it be said that the contiguous Chapel Street parties were "land involved in the decision" which is challenged here - changing the zoning ordinances as they apply to the entire city and BD-1 districts so as to provide a maximum height of 70 feet of buildings in such districts, a reduced F.A.R. of 3.0, and parking requirements based on the location of BD-1 districts as they abut specified non BD-1 districts?

Based on a simply linguistic analysis of the definition of statutory aggrievement in Section 8-8a(1) it is difficult to see how the subject properties as the "land involved in the decision" to grant BD-1 status could be said to be "land involved in the decision" to grant the text amendments

previously referred to - they certainly accompanied the map amendment but that action did not dictate or require that the text amendments would apply to BD-1 districts throughout the city. To look at it from another perspective, if the court were to decide (and it proceeds in these cases on a step by step basis) that the BD-1 classification for the subject properties by way of a map amendment was not justified by the Comprehensive Plan and was simply unacceptable spot zoning would not the text amendments to BD-1 zones still stand for general application throughout the city? In other words the juxtaposition of the subject properties to the Wooster Square Neighborhood and the particular problems for the latter which might have been presented by the map amendment may cause The Alders and the City Plan Commission to adopt these text amendments since they decided they were good policy for the city in general as regards BD-1 zones, but that cannot be morphed into a conclusion that the text amendment change for all BD-1 districts was dictated by the map amendment or a necessary consequence thereof.

The plaintiff argues that the text amendments only apply to BD-1 zones bordering certain residential districts which would be the case here since the subject properties border the Wooster Square Neighborhood. The argument proceeds to the effect that the plaintiff's property is in a BA zone, it is an historic structure "but not located in a residential zone which orientation has garnered height controls in the amended text", (April 27, 2015 Reply Brief). Perhaps the court is missing something but is the plaintiff arguing it is statutorily aggrieved because the text amendment in the abstract does not allow the text amendment to apply to its BA property and that because the defendant suggested the text amendment the decision thereon sprang from land involved on the decision? This position, at least to the court, is not viable; its acceptance would give an unusual

and perhaps illogical interpretation to the concept of "aggrievement" which must be proven for classical aggrievement and is assumed for statutory aggrievement. In this particular case the text amendments would apply to the subject property if BD-1 status is granted; they border a residential zone - Wooster Square. The plaintiff's well crafted briefs, as they apply to the merits of the zone change, make no argument that the text amendments somehow prejudice 78 Olive Street in terms of aesthetics, land value, traffic etc. or that even if those considerations are irrelevant in a map amendment case, the text amendments somehow contradict the comprehensive plan, result in or encourage spot zoning or the creation of floating zones. In fact no argument is offered as to why the text amendments as such and considered themselves should not have been enacted.

Both sides argue concerning the relevance of the recent case of *Greenwood Manor, LLC v. Planning and Zoning Commission*, 150 Conn. App. 489 (2014). In the court's opinion the case is not strictly on point factually. In that case a zoning commission, sua sponte, acted to amend its zoning regulations and zoning districts. The plaintiff property owner claimed statutory aggrievement arguing "that although the commission ultimately took no action with respect to its property, the property nevertheless was 'land involved' in its decision, as the commission specifically considered a zone change thereto", id. page 502. The court said at page 507 . . . "we conclude that the adoption of the plaintiff's interpretation would yield bizarre and unworkable results. When a zoning commission anywhere in Connecticut acts sua sponte in its legislative capacity to amend select portions of its zoning map, it necessarily has made a preliminary determination to take no action with respect to excluded properties throughout the municipality. As a result, all such property owners whose property was not reclassified would be statutorily

aggrieved". As the court noted in referring to *Caltabiano* v. *Planning & Zoning Commission*, 211 Conn. 662, 668-669 (1989) giving a statutory right to appeal to "abutters and those owning property within 100 feet of the land involved (in a decision) would not unduly enlarge the class of those entitled to appeal such a decision." This basic observation of *Greenwood* is relevant to the statutory standing issue in this case and whether the decision here was sua sponte or in response to what the defendant submitted regarding the text amendment change does not detract from the importance of the just quoted excerpt from *Greenwood*. The plaintiff's position would result in permitting statutory standing to be found for every property owner in a BA district; they could claim aggrievement as a result of the text amendments granted here even though the amendments would have no impact or relevance to their property or any rights they might have given the fact they are in a BA zone.

An argument could be made, although it was not so made, that but for the text amendments the map amendment decision would not have been approved but the point is that the amendments actually passed applied to BD-1 districts in general and in any event the text amendments which were passed and are applicable to this and all other BD-1 zoned properties may have a bearing on the propriety of the map amendment and its compliance with the comprehensive plan given those amendments. In effect the plaintiff's argument against the text amendment is that it did not go far enough in limiting height of residency in BD-1 districts but it did not directly affect the plaintiff's property in a way that was different from other BA property owners throughout the city, see *Harris* v. *Zoning Commission*, 259 Conn. 402, 413-414 (2001), *Lewis* v. *Planning & Zoning Commission*, 62 Conn. App. 284, 295-296 (2001). If the court is in error it is harmless in the sense that any

relevant argument concerning the amendments can be raised in discussing the propriety of the map amendment for the subject properties from a BA to a BD-1 classification.

Standard of Review

As Fuller notes in Vol. 9A of Connecticut Practice, Land Use Law & Practice, § 33.2: "A zoning commission when amending zoning regulations or passing a zone change, acts in a legislative capacity, which gives it very broad discretion, and the superior court on appeal should not substitute its judgment for that of the commission unless the appellants prove that the commission's actions was clearly arbitrary or illegal", *Protect Hamden/North Haven from Excessive Traffic and Pollution, Inc.*, 220 Conn. 527, 542 (1991), *Burnham* v. *Planning and Zoning Commission*, 189 Conn. 261, 265 (1983), *Konigsberg* v. *Board of Aldermen*, 283 Conn. 553, 581-583 (2007).

The plaintiff does not dispute that the New Haven Board of Alders and the City Plan Commission in adopting text amendments[1] to the city zoning ordinances and an amendment to the New Haven Zoning Map purported to act in a legislative capacity. On page 11 of its February 19, 2015 brief wherein the Standard of Review is discussed the plaintiff states that: "The standard of review courts use in challenges to legislative decisions of local zoning authorities is well settled but does not eliminate the need for the court to review the record critically as each case turns on its own facts". The plaintiff then proceeds to discuss the standard of review for legislative decisions. Later in the brief, however, the plaintiff cites an Oregon case, *Fasano* v. *Board of*

[1] Assuming the plaintiff has standing to pursue an objection to the text amendment which oddly enough might be it did not go far enough.

County Commissioners, 507 P.3d 23 (Or, 1973) holding that judicial rather than legislative review is warranted when the zoning authority implements site specific zoning as opposed to general rezoning.

The court first will discuss the standard for review when the zoning authority acts in a legislative capacity and then it will try to discuss the *Fasano* case and its applicability to the review of the zoning authorities' actions in this case.

The case of *Protect Hamden/North Haven* (supra) lays out in detail the standard for review for a trial court when the zoning authority acts in a legislative capacity citing numerous prior cases, 220 Conn. at pp. 542-544:

> "We have often articulated the proper, limited scope of judicial review of a decision of a local zoning commission when it acts in a legislative capacity by amending zoning regulations. "[T]he commission, acting in a legislative capacity, [has] broad authority to adopt the amendments." . . . . In such circumstances, it is not the function of the court to retry the case. Conclusions reached by the commission must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the agency. The question is not whether the trial court would have reached the same conclusion but whether the record before the agency supports the decision reached. . . . . Acting in such legislative capacity, the local board is free to amend its regulations whenever time, experience, and responsible planning for contemporary or future conditions reasonably indicate the need for a change . . . The discretion of a legislative body, because of its constituted role as formulator of public policy, is much broader than that of an administrative board, which serves a quasi-judicial function . . . . This legislative discretion is wide and liberal, and must not be disturbed by the courts unless the party aggrieved by that decision establishes that the commission acted arbitrarily or illegally. . . . Zoning must be sufficiently flexible to meet the demands of increased population and evolutionary changes in such fields as architecture, transportation, and redevelopment . . . The responsibility for meeting these demands rests, under our law, with the reasoned discretion of each municipality acting through its duly authorized zoning commission. Courts will not interfere with these local legislative decisions unless the action taken is clearly contrary to law or in

> abuse of discretion . . . Within these broad parameters, [t]he test of the action of the commission is twofold: (1) The zone change must be in accord with a comprehensive plan, General Statutes § 8-2, and (2) it must be reasonably related to the normal police power purposes enumerated in § 8-2 . . ."

As previously mentioned the plaintiff does not argue that the legislative capacity standard would in general apply when a zoning authority takes actions as it did here in approving the petition for a map amendment and grants a text amendment to the zoning ordinances. But the plaintiff cites the *Fasano* case for the proposition that a distinction must be made between general rezoning and site specific zoning. In the latter situation the *Fasano* court set forth a test to determine whether legislative review or administrative / quasi-judicial review should apply. The plaintiff quoted the test . . ." This test involves a determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interests, or situations or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former, there is legislative action, if the latter determination is satisfied, the action is judicial. 507 P.2d at page 27. The plaintiff goes on to argue that if the *Fasano* test were to be applied here "it is patently clear that the Commission's and Board's actions in this case are not purely 'legislative' under *Fasano* to the extent they are not applicable to an open class of individuals but apply to very 'specific individuals, interests, and situations' to achieve their very personal goals, in this case for two pieces of land on Chapel Street surrounded by zoning districts other than the one to which the subject properties are sought to be changed."

What might be called the *Fasano* test is applied in some states, see *Rathkopf: The Law of Zoning and Planning*, Ziegler, Vol. 3, § 62:4 and § 62:50 although it is apparently a minority

position, see *Todd Mart, Inc.* v. *Town Board of Webster*, 370 NYS.2d 683, 689 (1975). The court is not aware of any Connecticut cases adopting the view of the Oregon Court regarding a map amendment such as occurred here; the text amendment for all BD-1 zones city wide would not even seem to even meet the *Fasano* test. Fuller in Volume 9A of his *Land Use Law & Practice* at §§ 33:1 and 33:2 makes no mention of the *Fasano* test and blanketly asserts that for the type of zoning actions taken in a case such as this the legislative standard of review applies. If the *Fasano* standard is to be adopted it cannot be done by a trial court but must be addressed by the appellate courts or the legislature.

Furthermore, by inference it can be argued that a review of our case law specifically suggests *Fasano* is not our law even where a claim is made the result of the zoning authority's action engenders a claim of spot zoning or where a claim is made the comprehensive plan is being ignored for the benefit of one or a few applicants.

Thus in *Konigsberg* v. *Board of Alderman*, 283 Conn. 553 (2007) the court upheld the amending of the zoning map and ordinance to facilitate the construction of a school. The court rejected a contention that what occurred here was spot zoning saying it was not "an attempt to wrench a single small lot from its environment and give it a new rating that disturbs the tenor of the neighborhood . . . it is merely an extension of a zone already established" which is proper as long as "it is in accord with the comprehensive plan and the general welfare", id. p. 592. The point is that to determine these issues in the context of a map amendment it used the legislative capacity standard, also see *Campion* v. *Board of Alderman*, 278 Conn. 500 (2006). In *Campion* neighborhoods contested the approval of a planned development district by the New Haven Board

of Alderman. The court applied the legislative capacity standard saying it would not interfere with "local legislative decisions" unless the action taken is clearly contrary to law or an abuse of discretion". Spot zoning was not involved because of the unlimited discretion Section 65 of the city zoning ordinances gives the Board as to the formation of planned development districts. The Board is still subject to review on a case by case basis as to whether the comprehensive plan is complied with and the action is related to normal police powers, id. pp. 530-531. There is no suggestions that even if a colorable claim of spot zoning is made that a la *Fasano* a judicial standard of review applicable to administrative decisions of the zoning authority should apply.

The court will try to discuss the merits of the appeal. First the plaintiff argues that: "The decisions of the City Plan Commission and the New Haven Board of Alders (were) arbitrary and not in accordance with New Haven's Comprehensive Plan". A subheading in this first section of the plaintiff's initial brief is a claim that "This is illegal spot zoning".

Secondly the plaintiff argues that: "The regulatory path led inexorably toward approval; the proceedings lacked fundamental fairness".

The court will first address the zone change map amendment.

(1)

Under our case law the zone change in this case should be upheld on appeal if the following test is satisfied "(1) The zone change must be in accord with the comprehensive plan, General Statutes 8-2 and (2) it must be reasonably related to the normal police power purposes enumerated in § 8-2", *Protect Hamden/North Haven From Excessive Traffic and Pollution, Inc. v. Planning and Zoning Commission*, 220 Conn. 527, 544, 545 (1991). As said in *First Hartford Realty Corp.*

v. *Planning and Zoning Commission*, 165 Conn. 533, 541 (1973): "The requirement of a comprehensive plan is generally satisfied when the zoning authority acts with the intention of promoting the best interests of the entire community", quoted in *Konigsberg* v. *Board of Alderman of City of New Haven*, 283 Conn. at 585.

What is the comprehensive plan? In the *First Hartford Realty Corp.* case, supra, the court said: "A comprehensive plan has been defined as a general plan to control and direct the use and development of property within a municipality or a large part thereof, dividing it into districts according to the present and potential use of the properties", id. at page 541. In *Burnham* v. *Planning and Zoning Commission*, 189 Conn. 261, 267 (1983) the court said that the comprehensive plan "consists of the zoning regulations themselves and the zoning map which has been established pursuant to those regulations".

An interesting complication is presented in this case, at least for the court. In *Protect Hamden/North Haven* the court said that, as the trial court concluded, the amendments (to zoning regulations) conformed to the town's comprehensive plan referred to in § 8-2 (of the General Statutes)". The court also said that "In the absence of a formally adopted comprehensive plan, a town's comprehensive plan is to be found in the scheme of the zoning regulations themselves", 220 Conn. at p. 551.

Subsection (a) of § 8-2 (CGSA) states as to zoning regulations municipalities are authorized to enact: "Such regulations shall be made in accordance with a comprehensive plan and in adopting such regulations the commission shall consider the plan of conservation and development prepared under section 8-23." Section 8-23 does not use the word "comprehensive" as a preface to its

discussion of plans of development. *Konigsberg* at 283 Conn. page 585 quoted the language of *Protect Hamden/North Haven* just referred to and said its task was as follows: "In order to determine therefore whether the board of aldermen's approval of the zoning amendments was in accordance with the comprehensive plan and in the best interests of the community, we look to the general scheme outlined in the city's zoning ordinance - the *City* in *Konigsberg* being New Haven. The court deduces from all this that there are two separate concepts - a formally adopted comprehensive plan as per Section 8-2 of the general statutes and a "plan of conservation and development" per § 8-23 of the general statutes.

Given the foregoing the question becomes can ROR34 which is entitled "Comprehensive Plan of Development" be considered the formally adopted Comprehensive Plan of New Haven. The distinction has some bearing on the issues before the court because in *Dutko v. Planning and Zoning Board*, 110 Conn. App. 228 (2008) the court said: "The plan of conservation and development or master plan prepared by the planning commission under Section 8-23 is not the same thing as the comprehensive plan, which is a zoning concept", page 242 (emphasis by court).

ROR 34 in its first sentence says "The Comprehensive Plan of Development is the guiding land use policy of the City of New Haven." It then says: "The plan is prepared and approved as New Haven's Comprehensive Plan, in accordance with CGS, Section 295-302, An Act Creating a City Plan Commission in the City of New Haven." Only then does it say: "In addition, the plan is prepared in a manner consistent with Connecticut General Statutes (CGS) Section 8-23" - why does not the foregoing refer to a "zoning concept"? In fact in Section 41 of the New Haven Zoning Ordinances which is entitled "Description and purpose of business and industrial districts" it states:

"The regulations here adopted are hereby found and declared to be appropriate to New Haven and in accordance with a comprehensive plan designed for the continued vitality and development of the city" which can only refer to ROR34.

Despite these observations Fuller's comments, as always should be taken into account. In Volume 9 of the Connecticut Practice Series at § 4:3 Requirement of Conformity to a Comprehensive Plan Fuller observes that the conformity requirement serves as an effective break upon spot zoning and "unlike the plan of development which is always subject to quick changes, the scheme of development in the community as shown by existing uses together with the zoning regulations and map provides stability and consistency of treatment of land in the municipality and is more likely to reflect community interests". Query whether this observation should apply in the urban context where there is often a need to respond to development issues and in light of the just quoted language of the city's plan of development which to the court is somewhat confusing on the issue. Also the language of *Clark* v. *Town Council*, 145 Conn. 476, 486 (1958) must be examined where, quoting from an earlier case, the court said: "A comprehensive plan has been defined as general plan to control and direct the use and development of property in a municipality or a large part thereof by dividing it into districts according to the present and potential uses of the properties" (emphasis by this court).

Should the evaluation process as to a zone change petition post regulation adoption or formulation somehow not consider the plan of development - that would not appear an acceptable way of proceeding and is not what the city envisaged and seems to contradict the quoted language from § 8-2. In the first sentence of the Plan it states: "The Comprehensive Plan of Development

is the guiding land use policy of the City of New Haven". It should also be noted that these petitions were filed in 2014. The Comprehensive Plan of Development was created in 2003 and came with a proposed land use map.

Also reference to the plan of development does not preclude taking into account spot zoning concerns which at another point Fuller describes as an obsolete concept in any event.

In any event whether a comprehensive plan is formally adopted or not as said in *First Hartford Realty* and *Konigsberg* the requirements of such a plan is generally satisfied when the zoning authority acts so as to promote the best interests of the entire community. In this regard and referring to the earlier discussion of the standard of review section as Fuller notes in Volume 9A, *Land Use Law and Practice* when a municipal entity or agency passes a zone change it "acts in a legislative capacity, which gives it very broad discretion, and the superior court on appeal should not substitute its judgment for that of the (agency) unless the appellants prove that the (agency's action was clearly arbitrary or illegal". § 33:2 at page 265. Also see *Konigsberg* v. *Board of Alderman*, 283 Conn. 553, 582 (2007). *Konigsberg* cited *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 266 (1983) as providing the reason for this rule "the courts allow zoning authorities this discretion in determining the public need and the means of meeting it, because the local authority lives close to the circumstances and conditions (that) create the problem and shape the solution".

(a)

The question presented is whether the zone change here was arbitrary and in violation of the Comprehensive Plan in terms of zoning regulations, and the zoning map and the Plan of

Development resulting in spot zoning which will be specifically discussed later in this opinion. Violation of the Comprehensive Plan - it is important to put this claim in the context, of the zoning districts involved and the location of zoning districts on the city's zoning map. The district where the subject properties are located is currently zoned as a BA district. The map amendment approved by the Board of Alders changed the zoning district for these two properties to a BD-1 district. The court will first set out the definitions of these two districts as they appear in Section 41 of the New Haven Zoning Regulations.

> "*Business A Districts - General Business.* These districts serve several functions. They provide central concentrations of convenience goods and services for one or more neighborhoods, supplemented by more scattered stores for such goods and services within the neighborhoods provided for under a special provision of the regulations for residence districts. They provide comparison shopper's goods, specialty goods, amusements and numerous services for less than a citywide market. And they also provide locations for small businessmen with a city-wide market who cannot operate in the downtown area. The predominant purpose of all these functions is retail trade.
>
> *Business D-1 Districts - Central Business/Residential.* These districts include appropriate downtown areas which have concentrations of historic structures suitable for both residential and commercial use. This district concentrates residential uses at high density mixed with activities that have both a city-wide and district-wide function: small stores offering comparison shopper's goods, specialty stores, business services, offices and entertainment uses. The use of land is intensive, but respects the historic character of existing historic structures. It is the purpose of these regulations to encourage preservation of existing historic structures, conversion of existing structures to residential use, high intensity of use, and to exclude activities that have a negative effect upon the proper functioning of National Register Historic District or of the larger downtown."

The court will first set the subject properties in their geographic setting then it will address the differences between BA and BD-1 districts as set forth in Section 41 of the zoning regulations.

To the east of the subject properties lies the Historic Wooster Square District in a residential RM2 zone. To the north there is, across Chapel Street, a BA zone with a large parking lot area and the plaintiff's property at 78 Olive Street which is a former factory building. It is four or five stories high, of brick construction and is rented out by means of 150 rental units. To the west of this property are located State Street which is bordered immediately to the east by railroad tracks and a small railroad station. To the west of the subject property located on the south side of Chapel Street is a Firestone auto building. This building is a non-descript two story brick building owned by Comcast which is in large member abandoned. To the west of the subject properties and across the railroad tracks and State Street is a fairly large BD-1 district which at its northeast corner abuts the New Haven Green. To the immediate south of the subject properties is a large lot and warehouse building known as 87 Union Street.

Given the fact that a comprehensive plan, by definition divides a municipal land into districts according to present and potential use of the properties so divided, the court will first discuss in more detail the distinction between BA and BD-1 districts and what they respectively permit and do not permit. It should first be preliminarily noted that both districts are business districts albeit in this case abutting the historic Wooster Square location. But returning to definitions let us compare each district.

At the end of the description of BA districts in Section 41 of the New Haven Zoning Regulations after various functions allowed in such districts are referred to it says: "The predominant purpose of these functions is retail trade." The BD-1 Districts are described as "Central Business/Residential". The just quoted Section 41 description of the zone states "This

district concentrates residential uses at high density mixed with activities that have both a city wide and district wide function . . ." Then explicitly referring to the aim and purpose of the zoning regulations as regards BD-1 districts in general it says: "It is the purpose of these regulations to encourage preservation of existing historic structures, conversion of existing structures to residential use, high intensity of use, and to exclude activities that have a negative effect upon the proper functioning of National Register Historic Districts or of the larger downtown."

Other aspects of BA and BD-1 districts in comparison to each other must also be pointed out. There are a variety of commercial uses permitted in a BA district which are not permitted in a BD-1 district. They are for example: rooming and boarding houses, poultry markets, pawn shops, gun and weapon repair shops, drive in theaters, fairs and carnivals, miniature golf courses, car washes, vehicular sales, signs and billboards, commercial kennels.

Thus even if the analysis is confined to the definitions of BA and BD-1 districts in Section 41 of the zoning regulations, given the proximity of Wooster Square and the historic district, the uses permitted in these districts and the aims sought to be achieved by them it cannot be said that the zoning amendment to a BD-1 district was an arbitrary action not related to the purposes set forth in district dividing purposes of the comprehensive plan.

Concomitant with the map amendment a petition was filed and approved to limit building height to 70 feet and F.A.R. where a zone such as the one here borders a residential zone like Wooster Square, cf *Konigsberg* v. *Board of Alderman* at 283 Connecticut at page 589 where in conjunction with rezoning amendments building restrictions were added and "addressed to the specific concern of minimizing the impact of any new construction and preserving the tenor of the

neighborhood". The argument against the text amendment here seems to be "it doesn't go far enough". But the 78 Olive Street building, a fairly massive structure, to the immediate north of the subject properties and directly facing Wooster Square is 4 to 5 stories high and the building on the northeast corner of Chapel and Olive is 5 stories high - it was said in this case 70 feet would mean only a 6 story high building. Besides what is located on the subject properties now - a parking lot, a mostly abandoned building, another open lot to the south of 630 Chapel Street graced by a warehouse building - a more "massive" barrier between Wooster Square and downtown it could be argued than the 70 foot buildings contemplated for these sites. And as noted a BA zone has no current height restriction comparable to the 70 foot limit in the BD-1 district. In several of the foregoing respects the BD-1 zone change here is much more respectful of the historic district to which it is attached than the BA zone - in the zoning regulations themselves the BA zone only talks of retail trade opportunities while the BD-1 New Haven Zoning regulations repeatedly refer to the object of making such districts compatible with historic districts and structures.

Also insofar as the zoning map is to be considered when deciding whether a zone change is in accord with the comprehensive plan examination of the city's land use map indicates a large BD-1 zone exists to the west of the subject properties across the Shoreline East railroad tracks and State Street and stretching all the way to the New Haven Green in the downtown area. But the zone map indicates its eastern boundary extends across the train tracks and State Street to Union Street even touching a small portion of the subject property. Certainly no development could be contemplated in the middle of State Street or on top of the railroad tracks. It does indicate the possibility and perhaps desirability of a transition zone between Wooster Square and downtown.

Also insofar as the zoning map is to be considered when deciding whether a zone change is in accord with the comprehensive plan examination of the city's zone map as the case law indicates.

Furthermore the 2003 Proposed Land Use Map suggests a zone stretching from Water Street to beyond Court Street to a property abutting 78 Olive Street is designated as Commercial/Mixed Use. In the plan of development such a use is described as follows: "Commercial mixed use areas are general business zones found generally along major arterials. The Commission further encourages mixed-use environments (both commercial/residential and retail/office) where appropriate. This definition meets the BD-1 zone description much more effectively than a BA classification and in any event can be said to permit the BD-1 change here as complying with the comprehensive plan.

However, rather than confining the discussion to repeating zone definitions let us take a broader view of the comprehensive plan. The Comprehensive Plan of Development, or as described more fully in the first paragraph of the plan as New Haven's Comprehensive Plan is even more supportive of the just stated conclusion and the concomitant position that in approving the BD-1 map amendment, the zoning authorities acted with the intention of and accomplished the intention of promoting the best interests of the community. This is true even if the plan of development is merely viewed as a guide to interpreting the comprehensive plan and not the comprehensive plan under current case law.

The first page of the plan states the "plan's primary focus is physical development" and "because development in New Haven often involves previously developed sites (consider here

Olive Street from the present parking lot north of Chapel as Olive Street runs south on the west side to Water Street) special attention is given to fitting new development into its urban context in a way that emphasizes the city's natural strength" - this perfectly describes the need to establish a so-called transition between the downtown area and historic Wooster Square area. What do we have there now - a largely abandoned nondescript brick Comcast building, to the immediate south what one opponent kindly described as an underutilized lot (i.e. 87 Union Street).

On page II of the plan it states the City Plan "Commission's directive is to elevate the quality of development in New Haven . . ." - an objective that seems more consonant with a BD-1 designation as discussed previously. Just "tweaking" the BA district description which is suggested as a preferable alternative to the BD-1 designation would subvert the "predominant purpose" of such districts as retail trade which standing alone does not appear to meet the requirements of a transitional introduction to Wooster Square. - What is being suggested - change BA requirements to better fit the role of transition to the historic district - perhaps it would be more like a BD-1 district? Is it suggested all BA districts be so modified or just the area of the subject property - query would this be spot zoning?

To return to the plan of development it says at page II 4: "In keeping with long standing policy and development patterns, the plan emphasizes New Haven's position (as) the economic, cultural and physical center of south central Connecticut. The last sentence of this "Regional Standing" section states: "Transit orientated development strategies are proposed, thereby building a larger walk-to-work population and residential options near commuter rail and bus lines". That plan of development exactly fits the Chapel Street properties - Union Station, the central station

for railroad trains going east toward New London and west toward Stamford, and the State Street station with connections to suburban and residential areas to the east of New Haven are all within walking distance of the subject properties. A walk to work population from the subject properties accesses Yale, and Yale New Haven Hospital properties and well as downtown businesses.

The latter portion of the plan places emphasis on transportation orientated development. The Transportation Section on page II 16 beings in the second paragraph: "Today's transportation policy overwhelmingly favors vehicular transportation. This approach has failed to broaden public support and public use of alternative means of transportation as the services are not optional and/or are cost prohibitive. At page II 17 the plain again references a solution to this problem. Under the heading "Encouraging Transit Orientated Development" it says: "The plan recommends a better alignment of economic development and city planning policies reflecting a broader context for transportation resources. Foremost among the opportunities for transit development are . . . the east side of State Street". The subject properties are extremely close to the east side of State Street practically bordering it. At page II 18 it says there must be a shift from single occupant vehicles and there are opportunities to do this by enhancing Shoreline East operations and the enhancement of commuter rail through a new service to Hartford.

The "Proposed Land Use Section" ties the city's aim of development, transit orientated development and higher density residential development together. Two of the proposed land uses are "High Density Residential" where it says "In certain areas, generally located near transit or Downtown, the Commission recommends higher density residential developments". Another proposed land use is "Commercial Mixed Use" with the following description: "Commercial mixed

use areas are general business zones found generally along major arterials. The Commission further encourages mixed use environments (both commercial residential and retail; office) where appropriate." One cannot deny that Chapel Street is a major arterial.

The BA designation does not conform to any of the foregoing purposes. Its primary purpose is to foster "retail trade" not mixed use such as residential. Such districts must comply with RM-2 residential requirements which dictate single family, two family and multi-family dwellings; there is a permitted density of 22 dwelling units per acre. And where are these residential areas to be located given the geographical setting of the BA district that once ran from Water Street to 78 Olive Street? Are one and two family houses to be crammed against Chapel Street with a view on the west side of railroad tracks and State Street? To ask the question provides the answer - high density residential complexes such as the one proposed for the subject properties fit into the BD-1 description which encourages "high intensity" use and has the added attraction of being close to transit options.

In any event if one confines one's examination of the issue before the court to the zoning regulations or the zoning regulations in conjunction with the Comprehensive Plan of Development it seems clear that the zone change here was in accord with the comprehensive plan of development. The second part of the test requires that the zone change "must be reasonably related to the normal police power purposes enumerated in § 8-2", *Protect Hamden/North Haven*, 220 Conn. 544, 545.

Section 8-2 states zoning regulations including zone changes "shall be designed to lessen congestion in the streets, to secure safety from fire, panic, flood and other dangers, to promote

health and general welfare, to provide adequate light and air; to prevent the overcrowding of land, to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewage, schools, parks and other public requirements".

Quoting Fuller *Dutko* v. *Planning and Zoning Board*, 110 Conn. App. 228, 241 (2008) states that zone change is "more likely to be upheld if it is based upon the material considerations for a zone change, namely conformity with the comprehensive plan and a use which meets one of the police power purposes in § 8-2 of the General Statutes, 9 R Fuller supra § 21:10, af page 623" (emphasis by this court).

In this case there was evidence that high density residential projects could have the effect of reducing traffic congestion if they are located near public transit facilities such as railroad stations at Union Station and the Shoreline East Station on State Street. In other words people who are residents could easily walk to Union Station and the State Street Station without having to drive their vehicles from the western portion of the city and to parking facilities at Union Station. More to the point, residents could walk to jobs or school at Yale, or to retail jobs and employment at Yale-New Haven Hospital, or other job sites in the downtown area. No traffic studies were introduced by the defendant but common sense observations seem admissible. In any event the record indicates that general welfare and safety will be improved which for the court is the one most convincing criteria for the application of the § 8-2 police power test. The court will discuss this more fully in the section of the decision on whether the zoning action promotes the best interests of the community. Suffice it to say here that in the record there was testimony that Wooster Square residents had safety concerns about walking to downtown in the area of Chapel

Street located between the two subject properties because of its present condition of being adjacent to a building that is largely not in use with large parking lot across Chapel Street. In *Protect Hamden/North Haven*, supra, the court observed allowing the amendments to the zoning plan would promote health and general welfare "by improving an unsightly area and by bringing long term benefits to it, 220 Conn. at page 550. An apt description of the preamendment condition of this property. It is interesting to note if full development under a BA zone had occurred or could be expected to occur what would the traffic conditions be - so is the solution for a city seeking development to let an "underutilized" area lie fallow on the hope with fingers crossed that somehow, someday development would occur?[2]

(b)

The court will now try to discuss that separate test which states that the requirement of a comprehensive plan is generally satisfied when the zoning authority acts with the intention of promoting the best interests of the entire community, see *Konigsberg* v. *Board of Alderman*, 283 Conn. at page 585.

First let it be said that the just discussed Plan of Development and the court's conclusions expressed in reviewing it can also be used to establish that the approval of these petitions, the map amendment and text amendment, was done with the intent with promoting the best interests of the entire community. The court will first discuss the contents of the record exclusive of the

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[1] Also see the record for the testimony of Mr. Brown, a traffic engineer and the court's comments on the following section on the traffic congestion issue.

regulations and plan of development the previous discussion of which the court, however, also relies upon.

The court will now examine the record in more detail to determine whether the zoning authorities in this case reached their decision and did not arbitrarily or illegally. Was their decision supported by the full record and not an abuse of discretion and does it indicate the petitions were granted with the intention of promoting the best interests of the community?

There is a prescribed procedure for review of the type of petitions filed in this case. The petition to amend the Zoning Ordinance Map and the petition to amend F.A.R. and height requirements in BD-1 zones were submitted to the Board of Alders which in turn referred them to the City Plan Commission. The commission, after considering the zoning ordinances and City Charter issued Advisory Reports on each petition, 1493-01 and 1493-02. The Commission considered the Milone & Mac Brown report prepared for the defendant and held a public hearing in which representatives of Spinnaker and Milone R. Mac Brown spoke. Five others spoke or submitted letters including plaintiff's counsel. After the public hearing the Commission voted to approve the petitioners and adopt the advisory reports.

After these procedures the petitions went before the Legislation Committee of the Board of Alders which held a meeting in where twelve people spoke in favor of the petitions. Five people, including plaintiff's counsel voiced their opposition. The Legislation Committee approved the Petitions. Two members of the City Plan Staff also spoke. The Legislation Committee approved the petitions unanimously.

So-called First and Second Readings regarding the favorable decision on the petitions were conducted. The Board approved the petitions which became effective on August 31, 2014.

On June 4, 2014 the Legislative Service Staff issued a favorable report on both petitions after reviewing Advisory Reports 1493-01 and 1493-02 by the City Plan Commission. Advisory Report 1493-02 addressed the so-called text amendments and in its section on "Planning Considerations" echoed the Plan of Development and gave some background to recent development in the city which underline the fact that the granting of these petitions would not be some aberrant gesture to reward a particular developer. It states: "As the City has come to recognize the importance of high density mixed use with a strong residential component in areas adjacent to both its traditional center and in areas with accessibility to public transit, so too has the development community become aware of the opportunities afforded by this view. This has led to a movement to expand the boundaries of districts that allow for this type of development. In the City of New Haven it is the Central Business/Residential (BD-1) District that most specifically allows for such development. As the boundaries of the district have expanded (or are proposed to be expanded) they are occasionally located in adjacency to residence districts of lesser density and of lesser physical scale."

The advisory report adopts the Spinnaker proposal to reduce maximum height to 70 feet and F.A.R. (Floor area ration) noting that BD-1 zone adjacent to residential districts "can only be made appropriate by means of transitional standards" ensuring their properties do not substantially impact residential areas. The advisory report concludes these concerns are met by means of the text amendment.

Advisory Report 1493-01 which concerns the map amendment substituting a BD-1 zone, for the existing BA zone does say "the proposed amendment represents an eastward expansion of (albeit with a tenuous connection to) the existing Ninth Square BD-1 zoning". It is difficult to understand the use of the word "tenuous" - does it mean prior to the BD-1 expansion or even after it. On the following page the confusion, if there be any, is cleared up. It states "the location of the proposed area also has east/west significance. The existing BA zoning has resulted in a variety of uses which appear to have limited connection to either Wooster Square or the Ninth Square. Approval of this proposal may, if properly managed, provide a connective element between the Ninth Square and Wooster Square that could benefit both". The expansion of the BD-1 across the railroad tracks is "in most respects" a positive application of transit orientated development and may be the initial stage in the creation of a high density north/south corridor running along both sides of the tracks from Water Street to Grove Street. The report recommends approval of the map amendment.

Milone and Macbroom, Inc. prepared a thorough analysis of the Spinnaker proposals which point out and explain why BA zoning is "antithetical" to the idea of transit orientated development and the Comprehensive Plan of Development while at the same time agreeing that a height and F.A.R. reduction would be appropriate in light of the adjacency to a residential district. The report makes the affirmative point that "It is the clear intent of the BA district to discourage residential uses that would be incompatible with the primary uses in the zone" - i.e. retail trade. It then list so-called "noxious" uses permitted in a BA but not a BD-1 zone - so much for high density / mixed uses in districts with this geographic location. The report then opines that the proposal is consistent

with the Comprehensive Plan for Development based on the previous discussion. It refers to plan for development to underline the benefits this transit orientated proposal would have and the "walk to work" possibilities previously discussed by the court when it reviewed the plan for development.

Finally the report notes the city has been working with the State Department of Transportation to advance transit orientated development around Union Station to develop mixed-use commercial residential development.

The report ends with the observation that the limit on height in the BD-1 district where it abuts a residential district "will further strengthen the transition between higher and lower density development". It then notes BA districts have no height limitation.

Several letters were written in support of the petitions. One from Mr. Davis on behalf of the Town Green Special Services Districts composing 27 square blocks in the downtown central business district and representing 300 property owners give strong support to the BD-1 amendment stating higher residential density will increase safety on the streets, enhance the tax base and generate increase retail demand. Similar support is expressed in a letter from the president of the Greater New Haven Chamber of Commerce.

Another letter from an alder, Dolores Colon, supports the petition by observing there is a housing shortage in the city while population is growing.

Letters were written in opposition. One from the president of the New Haven Urban Design League. She objects to a zoning procedure that rezones property one lot at a time and notes a BD-1 district would allow a range of uses and proportion of uses incompatible with the historic residential area - no mention of BA uses is made. Other letters express concern about traffic issues

and one, from a resident, expresses fears that "a subsequent developer" could build at twice the scale - these letters are from area residents. The text amendment would prevent this and again there is no mention of the height problem presented in BA districts.

The next item in the record is a report from Milone and MacBroom which makes an added point about the benefits of transit orientated development - it presents an alternative to driving which reduces site generated trips. It notes that Connecticut Department of Transportation current assigns a 20 percent automobile traffic credit for (Transit Orientated Development projects).

The attorney for the plaintiff wrote a letter to the Chairmen and members of the Legislation Committee on June 12, 2014. One of its major points is that what is proposed by way of the map amendment for a BD-1 district is "illegal spot zoning". (The court will discuss that issue separately after this review of the record to determine promotion of best interest of the community.) It mentions that the BD-1 designation will "cause adverse impacts to neighboring properties". The 70' foot height limitation proposed by Spinnaker is a self-serving suggestion that does not go far enough; 45 feet was enacted the Hill to Downtown neighborhood. The nature of this neighborhood for comparative analysis is not provided. Also, the building on the northeast corner of Chapel and Olive has a retail ground floor and four residential floors above it, the plaintiff's 78 Olive Street address has over 150 rentals and is a five story former factory building - query what is the height of these buildings? The point sought to be made is that the proposal is not an appropriate transition from downtown to the Hill Square neighborhood. There was no "meaningful engagement" with people living in the community as there was when the Hill-to-Downtown Community Plan was broached. However, there was community outreach in this case as some of the letters in support

of the Spinnaker proposal indicate. The letter goes on to say: "Why wouldn't an amendment to the text of the existing BA zoning district that identified and provided for mixed use development represent a viable alternative to the drastic outcomes embedded in the pending proposal?" Query would this make such a district more in keeping with a BD-1 mixed use zone? The letter also says the proposal would create traffic congestion and thus violate Section 8-2 of the general statutes.

Finally the letter states transit orientated development is not found or defined in the Zoning Ordinances. TOD "is not achieved through a two parcel map and amendment change just because the State Street Train Station is adjacent". But the Comprehensive Plan of Development is replete with references to the concept of Transit Orientated Development.

A final point is made that BD-1 permits mixed use development but does not require mixed use development and approval of the map amendment and text amendment "does not bind the applicant or its successor in interest, to create a mixed use development on these two parcels".

But the record makes clear that Spinnaker which is the moving force behind the petitions and has spent time, money and effort through the procurement of detailed reports in fact intends to erect high density residential units. Common sense indicates this is the most likely profitable use of land in this immediate area - for example, 78 Olive Street with a 150 plus rental apartment building, one can guess, is motivated by a desire not to have the project come to a fruition being a competitor for rentals.

A hearing before the Board of Alders was held on June 12, 2014. Ms. Gilvarg who is the Executive Director of the City Plan Commission testified in support of the map and text amendments referring to 1493-01 and 1493-02, the Commission's Advisory Reports. An attorney

for the defendant then spoke; he said the proposal was an opportunity for the city, reflected the goals of the Comprehensive Plan and met the legal test for a zone change. Another representative of Spinnaker noted per Section 64D the two subject parcels exceed the acreage required for a zone change. The attorney for the plaintiff then spoke and pointed out the danger of traffic congestion - studies she procured indicate there were 160 traffic incidents at the intersection of Chapel and Olive Streets which the subject property abuts. The attorney made the same points she made in the previously discussed letter to the City Plan Commission. She said that approval of these petitions will send a message: ". . . the message it will send to developers (is) that you are open for business to make piece by piece decisions on zone changes." She also said that: "The whole idea of comprehensive planning and zoning is to create broad swaths of coherent land uses and then if somebody needs a variance, they may need a special permit because we've identified that use needs a little extra overseeing before we permit it". The point is then made that in the Hill-to-Downtown plan heights start at 45 feet and can go up to 75 feet. . . contrary to the present text amendment for BD-1 zones where heights "start" at 70 feet - but the proposed text amendment makes 70 feet a maximum height. The attorney then argues if the petition is allowed 70 feet gets a 5 or 6 story building - a "big wall" not providing a transition from Wooster Street. But it conceded the 78 Olive Street building is 4 ½ stories and the building on the northeast corner of Chapel and Olive is 5 stories. This argument takes no account of what is located now at the subject properties - a large parking lot, a largely unused nondescript brick Comcast building bordered on its south by a large lot with a warehouse and parking lot.

The attorney then argues that transit orientated development implies "high quality thoughtful planning and design of land use" that use transit and walking and cycling. There is nothing in the zoning regulations about such development. But there is mention of it in the Comprehensive Plan of Development where a TOD corridor running along the east side of State Street is referred to and the walk to work advantages of high density residential in this specific area given the Yale connection and retail and business employment opportunities in downtown are apparent. And how can these factors be ignored under a case law rule that says the comprehensive plan is satisfied if the zoning action promoted the community's best interests?

The Chairman then asked a question of the attorney for the plaintiff and said if mixed use is permitted on a BD-1 zone and not in a BA zone why not grant the zone change. The attorney answered the question by interestingly assuming mixed use is desirable for the location but then put forth an idea that the BA zone can be changed to accommodate mixed use but this was not fully developed. As indicated much of the plaintiff's argument is based on a spot zoning complaint where parcel by parcel zone changes are permitted which are not part of a comprehensive plan of development. The court will address this issue separately after the review of the record.

The hearing was then opened to members of the public. The pastor of the Episcopal Church on the southeast corner of Chapel and Olive spoke in favor of the petitions saying residential development at the site would add life to the neighborhood and make one feel safer at night walking to the downtown area. He also noted the City Plan Commission voted unanimously for the petitions and were impressed by the support from many members of the community. Traffic

problems or building size would not warrant turning down the petitions he and his parishoners now feel cut off from downtown and "yearn to be connected to downtown".

A letter from a co-chair of the Historic Wooster Square Association was read into the record supporting the map and text amendments. An Alder living on Olive Street also spoke in favor of the petitions. He said the area craves more density. Long range planning is fine but the Alder felt it is "important to move forward now".

Matthew Nemerson who is the Economic Development Administrator for the city also spoke to the Board of Alders. He spoke strongly in favor of the petitions. He said you don't want to change zoning block by block but opportunity presents itself must be seized as a community competing with other communities. He said we do not have the staff to be thinking about every square inch of town and doing comprehensive zoning all the time. He also said the maximization of taxes must be taken into account. He pointed out a lot of cities of New Haven's size have neighborhoods a few blocks from downtown where people do not want to live: "So great opportunity requires difficult decisions and we think this is a good set of compromises under the circumstances we're delighted to be able to present it to you and we hope you'll approve it." The court will try to deal with the complexities of spot zoning and Euclidian zoning principles separately but the foregoing observations by Mr. Nemerson provided a practical basis for approving the petitions while meeting the requirements of the Comprehensive Plan of Development and the test approved by the courts to determine if a zone change is permissible.

Traffic congestion was raised by defendant's counsel and a resident opposed to the plan as a factor militating against approval of the map amendment and traffic congestion is an important factor to be considered under Section 8-2.

A traffic engineer, Mr. Kwesi Brown was presented at the hearing for the defendant. He said a traffic study was not performed because it is not part of a long term application such as this. He testified the proposed BD-1 zoning change would not generate any more traffic than a BA zone given the latters permitted retail uses. He also made to the Alders what are common sense observations which are accepted in his industry - transit orientated development for any residents of planned projects such as this means people who would have driven through the city to get to Union Station or the State Street Station could walk to them - and they could walk home after they left these transportation options (i.e. not requiring the use of an automobile. The State (as noted before assigns a 20 percent reduction factor to auto traffic when TOD projects are being considered).

Referring to a traffic study introduced into the record by the plaintiff, Mr. Nemerson said that the study of traffic incidents at the intersection of Chapel and Olive Street translates to two accidents a month but this is not atypical of Connecticut cities. Also a direct correlation as to traffic congestion cannot be made.

Let us look at the traffic study of this intersection more closely. The record began January 7, 2011 and ran to May 25, 2014. The court counted the number of incidents in this almost 3 ½ year period as 138. But 22 were listed as Evading of Responsibility indicating a separate accident as such was not involved. One incident is a "Moving Violation", another lists an accident as being

located in a garage, one says "Sick Person", one says "Administrative Assignment" not accident all of which brings the total accidents for this period down to 116 - never proficient in math the court can at least calculate that from the study provided there were less than three accidents a month.

The attorney for the plaintiff said there was no traffic study regarding the intersection's ability to absorb traffic (nor was one presented in opposition to the zone change). General comments on traffic under the circumstances of a zone change approval are not germane or helpful to the issue at hand - we cannot know where even the exit and entry points to the residential project will be located. Will they be on Chapel Street, Olive Street, can there be one at Union Street?

Ms. Gilvarg testified again and said the 2003 Comprehensive Plan gave guidance to the Commission that "this area" could be more intensely developed as a mixed use area and make use of transit connections" - "this area" apparently not being confined to the subject properties, of which more later in the spot zoning discussion.

An Alder, Mr. Marchand, then testified who was one of five members of the City Plan Commission and he said spot zoning was not involved - the subject properties are over the 2 acre requirement in Section 64d of the regulations, the petitions are part of the direction that the city has taken and there has been evidence the community, in which the project will be ensconced, believe it will benefit them. He said "we've been trying to intensify development in many parts of the City and this is one of those places we can do it and we should". The changes would be beneficial to safety and economic vitality so the assertion that these petitions benefit one applicant is untrue.

The Chair ended the meeting by saying he would support the map and text amendments saying "for my two cents I actually am also compelled by the extensive community work and the aldermanic support from people who are within the area". He describes it as a "gesture toward a transition zone "between downtown and Wooster Square. He further said this is a good place to start that transition zone. All voted to approve the petitions.

The last substantive portion of the record is ROR56. This is the May 28, 2014 meeting of the City Plan Commission which approved the map and text amendments. The senior vice president of Milone and MacBroom spoke first. He emphasized the closeness of the properties to Union Station and the State Street Station and the disadvantages for mixed use rental and high density rental in BA districts tied as they are to RM standards. He talked about certain BA uses that would not be appropriate for Olive Street and the concept of transit orientated development.

Ms. Farwell representing the New Haven Urban Design League spoke against the petitions. She said Olive Street is a significant corridor and nothing has been said about "how to shape Olive Street". She heard from the City that the lot just to the south of the subject properties is being looked at by developers. There is a lot of "under-utilized" properties in this area and her concern was "we are not looking at the whole area". Olive Street down to Water Street should be looked at as well as Olive Street up to Grand Avenue. But there are no references to specific unutilized areas; she certainly cannot mean 78 Olive Street. And it is interesting to note that the zone change for the subject properties was approved on August 25, 2014 and the underutilized property, a large lot abutting the subject properties and to their south known as 87 Union Street was approved for a BD-1 zone change, see complaint in CV15-6052216 on November 25, 2014. Ms. Farwell also

objected to the height limitations on BD-1 property - in this case it should perhaps be 45 feet on Olive Street but move on to greater heights on Union Street, 60 feet, and more beyond that.

A woman who lives on Court Street near the project spoke and she also said the present Comcast Building on the south side of Chapel Street does not fit in with the neighborhood and is an ugly building. From there down Olive Street on the west side to Water Street there is another vacant building and series of parking lots and a little restaurant that "hasn't been able to make it". She said also New Haven was built before zoning so it is difficult to create a map that is not "spotty". But she urged the Commission to look at the area in a "bigger swathe", at the end of Olive Street there is a "defunct" gas station.

The attorney for the plaintiff spoke and raised the points noted in other sections of the record.

Alder Marchand then spoke and said in response to the complaints about the need to look at the whole area and not just grant a zone change to the subject properties:

> "And when we talk about taking more time to look at this in a broader context, because we now want to include the entire street, then I say enough. Let's get this part done, and if the neighborhood has to fight every additional developer that comes onto Olive Street, who wants to having this done as precedent, now they want to do something grander or something that is not in keeping with what we, as residents, feels should be done, and I'm not speaking for the community, I'm speaking for myself, but knowing my community, we are prepared to fight for things that we don't feel are right for our community."

An Alder named Abigail Roth then spoke in favor of the approval of the zoning amendment saying she attended several community meetings. The height of the buildings was discussed. She sent a letter to 700 people in her ward and no one objected to the petitions but she lives downtown

and her ward only touches one of the parking lots. She has no car, however, and walks to Wooster Square but does not go at certain hours "because it's deserted there".

A North Haven resident who represents the Episcopal church adjacent to the subject properties said his only concern was with traffic congestion but is in support of the zoning change.

The conclusion of this hearing provides an interesting part of the record which has significance for the main issues in this appeal. To place the remarks made after page 63 of the transcript in context we must examine remarks made at a March 19, 2014 meeting of the City Plan Commission which was also transcribed and appears as part of ROR48.

At the March 14th meeting Chairman Mattison expressed procedural problems with the manner in which the map and text amendments were being considered. At page 63 he said:

> "CHAIRMAN MATTISON: What this project – I've heard the testimony of the neighbors, I am very aware of the area in question and how bleak, is I think the appropriate word, it is and I would hate to have us stand in the way of something that feels, at least to the people that have the most to gain or lose, to be of value. But there is a reason why we don't consider what is planned for a particular area at the time that we are making zoning changes. That it is our responsibility to consider not just whether this would be a good project, but whether it fits the way that the City has decided that it is going to move ahead on changes in zoning. And this feels to me, I have to say, using a sledgehammer on a mosquito. I mean, an enormous change in the way we do zoning in this city, making a change in the map and also in the definition with remarkably little really concern – opportunity for all of the relevant parties to really respond to the zoning issue.
>
> I mean, I am willing to accept the proposition that this – this project would be a good one for the area and virtually anything I would have to say would be an improvement over the present state. But this way of doing it makes me very uncomfortable I have to say. It really feels as though we're making a major change in the way we do business in general to accomplish a change in a particular – on two particular sites.

> I would hope, I mean, I asked the proponents to consider whether there is another way of achieving the opportunity to go forward with this project without doing it this way. It just makes me feel as a veteran of many of the zoning wars in our city very uncomfortable. And that's really all I have to say. I mean, it's remarkable how much of the testimony was not about the zone change, but about the project. Well, that's not the way we're supposed to do it. So that's what makes me uncomfortable."

He also said that: . . . "I just think this is a little rushed and it may be that . . . after due consideration we will decide to go forward with it just as the staff has proposed it . . . if we were just discussing the merits of this particular project nothing we have said would bother me but it's on the context of the zoning change that makes me uncomfortable. It has to be the feel of spot zoning . . . I'm not making a legal argument . . . I'm saying a policy argument . . . this is not the way you do it. At that point the zoning amendment and text amendment were withdrawn. We then come to ROR56 and the next meeting on May 28, 2014 of City Plan Commission and which the court has been discussing. At page 64 of ROR56 Chairman Mattison said he was thinking of the amendments as spot zoning not as a legal matter but as a policy matter - "we don't want to have the bad effects of spot zoning and I want the proponents to kind of satisfy us that we're not going to see that."

A representative of the defendant made several points (1) he referred to the Malone & Macbroom report (2) he noted the mitigation proposals as to height and F.A.R. that would accompany and BD-1 designation (3) he noted spot zoning involves a reclassification of property which is not in harmony with the comprehensive plan (4) it would bring people on the streets and replaces a zone that is "a desolate no-man's land" (5) the community wants the change.

A member of the Commission then said when the area was classified as BA the anticipation was for "heavy retail and automotive use like you see at the Forestone property but I think times have changed and the proposed change is conducive to modern urban planning. Another Commissioner said he supported both amendments because "opportunities may not present themselves at a later date to do what we can do right now that's going to be for the good of those who spend most of their time there" - i.e. residents of the area.

With all of that Chairman Mattison said he too would approve the amendments and put aside the doubts he had previously expressed on March 2014. He would vote yes because the area of the subject properties is a wasteland and had been so for "a very long time". He noted a considerable number of people back the project and he decided "it would be a bad thing if we forced the abandonment of a project that may well do the area some good and may well be a catalyst for development along a very desolate street". He surmised the backers of the project must have made the economic decision that there would be a catalytic effect otherwise no one would want to live in their residential buildings. He reluctantly decided to vote yes "for the City's sake" and to satisfy the "need to do something good in a neighborhood that really needs it".

The foregoing review of the record and the hearings held, letters received, the Plan Commission's advisory opinions support the proposed zone change along with the text amendments establish that these actions were taken with the intent of promoting the best interests of the entire city and in fact would do so. Positive remarks from the Chamber of Commerce, a representative of hundreds of businesspeople in the downtown area, and the City's Economic Development Administrator underline the benefits to be accrued by approval - increase the tax

base, permit safer streets and interaction between Wooster Square and downtown for the benefit of both were pointed out. The change of opinion of Chairman Mattison is particularly interesting in light of the reservations he honestly first expressed. The pastor of the church abutting the subject properties said he and his parishioners "yearned" for a connection with downtown. The comments on feared traffic problems and the court's review of the issue satisfy the police power requirements of Section 8-2 of the general statutes. A major consideration must be the fact that the whole stretch of land from 78 Olive Street to Water Street is underutilized and does nothing to enhance any transition between downtown and Wooster Square, even acting as a barrier thereto. The advantages of traffic orientated development were adequately explained on the basis of observations and arguments none of which were specifically rebutted except by general comments that a closer, more thorough study was needed.

(c)

One of the main argument raised by the plaintiff is that giving BD-1 status to the subject properties constitutes spot zoning. Related to this is a criticism of what is said to be the whole process of parcel by parcel zone changes rather than taking a more comprehensive approach examining whole areas of presumably similarly situated properties to see if a zone change should occur. The arguments are somewhat interrelated since failure to adopt the comprehensive approach, it is said, can and most likely will result in spot zoning.

A case from the State of Washington, quoting from an earlier case, nicely defined the concept of spot zoning:

> "Spot zoning is a zoning for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole . . . the vice of a spot zone is its inevitable effect of granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors or the community without adequate public advantage or justification." *J.T. Chobruck* v. *Snohomish County*, 480 P.2d 489, 497 (1971).

The city regulations permit a zone change if the parcel involved is over 2 acres. Here the subject parcels comprise 2.27 acres. But this does not preclude a claim of spot zoning. As Fuller notes in Volume 9 at Section 4:8 which discusses spot zoning, in determining whether spot zoning has occurred: "While the size of the parcel is a consideration, it is not controlling." He notes *Darnick* v. *Planning & Zoning Commission*, 158 Conn. 78, 85 (1969) where a change from residential to industrial use for an 18 ½ acre parcel was held to be spot zoning. On the other hand a spot zoning analysis was necessary where a 2 ½ parcel was changed to industrial although it was in the middle of a large residential area - Fuller noted the zone change "was upheld where it was shown was in the public interest for development of the community". *Kutcher* v. *Town Planning Commission*, 138 Conn. 705 (1952).

Having reviewed the record the court cannot conclude that this zone change was illegal spot zoning. As Fuller notes in his work on *Land Use Law and Practice* in Volume 9 of the Connecticut Practice Series at § 4:3 "two elements (are) required for a zone change to be illegal as spot zoning (1) a change of zone affecting only a small area of land and (2) a change which is out of harmony with the comprehensive plan for the good of the community as a whole", *Loh* v. *Town Planning and Zoning Commission*, 161 Conn. 32, 38 (1971). Reading the two elements together it seems clear that even though a change of zone may only affect a small area of land it can

still not be regarded as spot zoning if the zone change is found to be in harmony with the comprehensive plan for the good of the community as a whole, cf *Kutcher* v. *Town Planning Commission*, supra.

The Board of Alders specifically found in July 2014 that the zone change was in accord with the Comprehensive Plan and promoted the general welfare of the community when it approved the map and text amendments in this case. In reviewing the record the court has concluded that in reaching its decision the Board did not act illegally or arbitrarily while performing its legislative function.

Using the Fuller test as to the second element which is a requirement for a finding of spot zoning, since the zone change here was in accord with the Comprehensive Plan there can be no finding of spot zoning, *Loh* at page 168. But as said in *Campion* v. *Board of Alderman*, 278 Conn. 503, 531 (2006) which analyzed a spot zoning claim not only could a spot zoning claim not be established because the Board found the zone change was in accord with the Comprehensive Plan but the court went on to say such a claim could not be made because the Board also concluded "that the planned development district would benefit the community as a whole". All of this is consistent with the body of case law, which as the court has earlier noted, holds that the Comprehensive Plan is generally satisfied when the zoning authority acts so as to promote the best interest of the community, see *First Hartford Realty Corporation* v. *Planning & Zoning Commission* at 165 Conn. page 541, *Konigsberg* v. *Board of Aldermen*, 283 Conn. at page 585.

Turning to the specific facts of this case it seems evident that in granting this zone change the Alders were not giving a special benefit to an owner of a single parcel of land and thereby

ignoring whether in so doing their actions created a zone change not in harmony with surrounding properties or plans for development which would benefit the community as a whole. Introduced into evidence was the 2003 Proposed Land Use Map of the City of New Haven. As previously discussed it proposes that a stretch of land running on the west side of Olive Street from just north of Court Street past 78 Olive Street, the Chapel Street, Olive Street intersections, the subject properties, 87 Union Street which fronts Olive Street all the way to Water Street be designated Commercial/Mixed Use. The court has indicated in its opinion such a designation would be more compatible with a BD-1 zoning classification. The plaintiff introduced an enlarged portion of the map showing the area just mentioned, Exhibit 4.

On it two "xs" were placed on the subject properties with the attendant argument that the fact that the zone change here only applied to these two adjacent subject properties underlines the fact that Spinnaker (the subject property developer) was singled out for special treatment. But the court can take judicial notice of the complaint filed by the plaintiff January 15, 2015. Therein it notes BD-1 status was granted to 87 Union Street, abutting the subject properties, on November 25, 2014. This was only three months after BD-1 status was given to the subject property which is the subject of this appeal. At the time briefs were filed in this case not only had BD-1 status been approved for 87 Union Street but suit by the plaintiff in that had been filed. There has been no evidence of a business or financial connection between the developers of these two separate properties and perhaps more to the point the action of the Alders in approving the zone change in this case envisioned an effort to develop a larger area which would benefit the city as a whole but also served as a transition zone between downtown and Wooster Square. The Alders action, in

other words, was not taken to benefit a small parcel of land standing alone but part of a larger development vision which aimed at the development of the Commercial/Mixed Use area on the Proposed Land Use Map but also aimed at extending the downtown BD-1 zone which extended not merely to State Street and the railroad tracks but borders Union Street and a small portion of the subject property. From this it seems evident that the City had an interest in encouraging mixed use retail and high density residential and from the very fact that in 2003 a Proposed Land Use Map was concocted wherein a commercial/mixed use area was envisaged only for 87 Union Street but for 630 and 673 Chapel Street long before Spinnaker purchased the subject properties for development.

Or to put it another way once a city, acting in a legislative capacity, approves a BD-1 designation for several properties such as 87 Union Street, 630 and 673 Chapel Street, as an appropriate extension of a preexisting BD-1 zone and to the north and south of the properties suggests as part of a future plan a commercial/mixed use plan all of which are more compatible with a present BA zone, must it be considered a violation of the zoning laws by sanctioning spot zoning and the sanctity of Euclidean zoning because all the properties under consideration were not given the same zoning designation at the same time and the zoning authorities did not have one or multiple developers for all the property on hand to complete the development forthwith? In an urban setting this would seriously impair the possibility of development given the existence of contiguous small lots that might have varied uses or abandoned uses which might not be compatible with development goals and particularly the ones envisaged in New Haven's Comprehensive Plan of Development.

Besides when we focus on the area in question from State Street to Water Street along Olive Street what benefit would accrue from negating the BD-1 designation for the subject properties and 87 Union Street and proceeding by way of some all inclusive larger Plan for the whole area just mentioned. At this historical point and at the end of the area is a large six story residential building already in place, leaving aside 87 Union Street and the subject properties there is 78 Olive Street which already can be characterized as a high density residential building with over 150 apartments to rent. The only other property mentioned in the record as ripe for development is an abandoned gas station on Olive near State Street but quite a distance from the Wooster Square Historic area.

A response to the foregoing could be, as it was here, framed in terms of arguing that immediate prospects of development should not be taken into account when zone change is being considered.

What if the project does not go through and there is no residential building as proposed how can a zone change be properly considered. There is no guarantee that the development will occur. But even then with the support in the record for the project and the developmental goals that motivate many aspects of the plan of development, there is more likelihood a transitional zone with mix uses will take place for the area in question if BD-1 status is granted in this case then continuing the BA zone in an already underutilized and unattractive stretch of land from 87 Union Street to 78 Olive Street - BA status was certainly no help in the past to achieve development and mere speculation on possibilities will not do. Also what motivates these requests for zone changes even where smaller parcels are involved and a business motive exists - it seems obvious developers like Spinnaker have to be behind the applications. And given the time, money, and effort

Spinnaker has put into this application is it realistic that the project would not be carved out? If the good of the entire city and its welfare are to be taken into account in the circumstances of this case, it is not reasonable for the Board of Alders to ignore or not be expected to consider that a developer is willing and able to bring into effect a project that will help erase a present unattractive barrier between downtown and a historic area that from the record the Board of Alders could clearly and not arbitrarily conclude was in need of a commercial/mixed use BD-1 designation.

The circumstances are such, as Chairman Mattison of the City Plan Commission apparently concluded despite some initial reservations, the development prospect presented which led to this request for a zone change could not be turned down when the proximity of the downtown BD-1 zone and the city's own proposed future land use map suggested such a use would be appropriate for this parcel.

A developer is at hand and there is only the unsubstantiated chimera that some comprehensive plan for the area would be more appropriate.

Given the circumstances the court cannot say based on this record spot zoning has been established or perhaps to put it another way the Alders in approving this zone change did not act with the intention of benefitting the community as a whole.

Fundamental Fairness

The plaintiff entitles the final section of its first brief: "The regulatory path led inexorably toward approval; the proceedings lacked fundamental fairness".

As counsel argues our court has recognized a right to fundamental fairness in administrative hearings. *Grimes* v. *Conservation Commission,* 243 Conn. 266, 273 (1991) points out that there

must be due notice of the hearing and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses . . . "Two other cases are also cited by the plaintiff whose relevant language the court will now quote. In *Cioffoletti v. Planning and Zoning Commission*, 209 Conn. 544, 553 - 554 (1989) the court said: "Neutrality and impartiality of members are essential to the fair and proper operation of a planning and zoning commission . . . the evil to be avoided is the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured always exist in the exercise of zoning power". *Huck v. Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 536 (1987) is then cited wherein the plaintiff's focus shifts to a claim of bias which can be considered a subcategory of predetermination. The *Huck* court said: "A charge of bias must be supported by some evidence proving probability of bias before an official can be faulted. Because public officers, acting in their official capacities, are presumed, until the contrary appears, to have acts legally and properly . . . the burden on such a claim rests upon the person asserting it."

The plaintiff argues that "confidence in the proceedings leading up to the adoption of these zoning amendments was eroded through several factors including the participation of members of the Board of Alders, New Haven's Zoning Commission, during the course of the Public Hearings." The word "including" is used but the only factors mentioned as raising concern was the "participation" of three Alders during the course of the public hearings. The court will quote from the plaintiff's brief to set forth the basis of the allegation being made:

> "Alder Dolores Colon of Ward 6 where "the project being proposed here tonight" is located, delivered her letter to the Legislation Committee for its Public Hearing (RE 11). She writes, "I am satisfied that the community's concerns about

the project have been taken into account and that this project will create a residential bridge to the downtown area. . . . I stand alongside my fellow alders in supporting this project." (RE 11).

Alder Aaron Greenberg of Ward 8 delivered a letter to the Legislation Committee "in support of the application before you tonight". (RE 6) In it, he describes himself as "someone who has been intimately involved in the process leading to this evening's hearing. . . ." He wrote: "Some may say that we need to think and plan more holistically about this part of the neighborhood. I agree. I disagree, however, such planning must happen before approving this zone change." (RE 6). The Minutes of the Legislation Committee indicate that he also testified at its hearing and read into the Record letters of support from Alder Roth of the 7th Ward and from Alder Colon in whose ward the Comcast building is located. (RE 16, RE 25).

Abigail Roth, Alder for the 7th Ward which covers the parking lot piece of the Subject Property, testified in favor of the Petitions before City Plan. She sent a newsletter to her ward expressing her support. (RE 56, p. 53)."

Commenting on the foregoing the plaintiff argues in her brief that: "The participation of the Alders as advocates for the applicant in the process for Amendments on which they will vote as the Zoning Commission is unseemly at least."

Despite reference to a few cases setting forth general principles, the plaintiff cites no cases addressing the specific bias argument now raised.

Suffice it to say that in reviewing the petitions for map amendment and text amendment the Alders were acting in a legislative capacity. Alders Colon and Greenberg both wrote letters to the Legislation Committee and Greenberg testified at the June 10, 2014 meeting in support of the petitions. But apparently they were not actually members of the Committee, see first paragraph of ROR 25 and list of Committee members on pages 4-5 of the June 14, 2014 public hearing of the Legislation Committee. Alder Roth sent a letter to the City Plan Commission. Only Alder Greenberg spoke at the public hearing.

The Alders have an obligation to represent and advance position which they conclude will be in the best interests of their constituents and the fact that they are on a city entity that ultimately approves zone changes cannot absolve them of meeting the responsibilities of their representative role. Are they to do or say nothing regarding a decision regarding a zone change or a text amendment affecting a zone existing in various parts of the city directly affecting their constituents? Are they not to advocate a position before a plan commission or at a hearing designed to determine if a zone change or text amendment of this nature should be recommended to the entire Board of Alders even if they have determined such actions would be beneficial to their wards and there is support for them among their constituents? We are not dealing with a Commission chosen by elected officials to determine the desirability of a zone change.

In *Couch* v. *Zoning Commission*, 141 Conn. 349 (1954) the zone change eventually passed by the commission was its own "brain child" which the Commission had been working on for almost two years. The court said "If, under these circumstances it were prohibited from reaching any opinion until after a hearing was held, progress in zonal development in the town might be seriously hamstrung", id. page 357. The court said "weaknesses might be exposed at the hearing and if this occurred the commission should be guided accordingly. In the case at bar, the hearing was not only held but a vote by the commission was subsequently taken as the statute required." Id.

Also of interest, although not directly on point, are the cases of *Schwartz* v. *Hamden*, 168 Conn. 8 (1975) and *Ghent* v. *Zoning Commission*, 220 Conn. 584 (1991). In *Schwartz* the zoning commission approved and adopted street lines for a new highway system referred to as the east-

west connector. A claim of predetermination by certain members of the commission was made by the plaintiffs. The court noted that: "They argue that the mayor of Hamden, pursuant to the town charter, appointed the members of the commission; that the mayor was an outspoken advocate of the proposed east-west corridor; and that he appeared before the commission in favor of that proposal". The Supreme Court agreed with the trial court "that it was a proper function of the mayor to take a position on the issues". It agreed with and quoted an earlier case which had said: "In this day of keen competition to attract industry and business to a state or to a particular locality, public officials are expected to cooperate in helping an industry locate in their community". The court went on to say that: "The mayor as the chief executive officer of the town was in duty bound to express to the public and to local administrative boards what he believed to be in the best interests of the community", id. pp. 15-16. Query would not alders have the same responsibility?

In *Ghent* v. *Zoning Commission*, supra, the plaintiffs appealed the zoning commission's granting amendments to the zoning ordinance of Waterbury which had the effect of prohibiting multiple family dwellings in certain commercial areas. The mayor was involved in the process, an attorney appeared on behalf of the mayor and spoke in favor of the amendments. The mayor was an ex-officio member of the commission and could vote in case of a tie.

The plaintiffs' argued that the presence of the mayor as the presiding officer of the commission at the public hearing on his zoning amendment violated Section 8-21 of the statutes. The court noted the statute provided "no member of any planning commission . . . shall appear or represent any person, firm or corporation or other entity in any matter pending before the planning or zoning commission . . . whether or not he is a member of the commission hearing the matter".

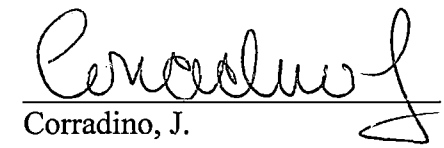
The court noted there was no claim the mayor's conduct at the meeting was anything other than impartial or that he had a financial interest in the proposal, or that he represented anyone except the city. He did not vote on his own proposals since he could only vote in case of a tie and the commission adopted the amendment's unanimously. The court cited an earlier case in holding the statute was not violated in a case such as the one before it where the chief executive, appearing as the municipality's representative, attends a public hearing before a commission of which he is an ex-officio member when the commission is exercising a legislative function.

The record in this case is voluminous. Numerous letters were submitted and reports - some of them opposed the petition, others supported it. Articulate letters were submitted throughout the process. At a March 19, 2014 meeting of the City Plan Commission Chairman Mattison expressed serious reservations about the process being engaged in to approve the map and text amendments. The petitions were then withdrawn by Spinnaker representatives without prejudice. That hearing consumed 27 pages of transcript. The May 28, 2014 hearing at which the Plan Commission approved the petitions had 94 pages at which vigorous debate was held. The Legislation Committee of the Alders then held a hearing on June 12, 2014 which consumed 108 pages. Again advocates for positions pro and con were expressed including an interesting exchange between Chairman Holmes and the plaintiff's attorney regarding the transition question between downtown and Wooster Square. This was discussed with plaintiff's counsel expressing her views in direct response to the Chairman's concerns. Alder Greenberg is the only Alder who spoke at pages 60 through 67; he also read a letter from another Alder. After he spoke there were forty one more pages of transcript which could have offered reasons for the Alders to reject the petitions if they

were so convinced. Ms. Farwell, the president of the New Haven Urban Design League spoke in opposition to approval followed by Mr. Nemerson who is the City's Economic Development Minister who articulated his reasons why the petitions should be approved because of their economic and tax benefits to the city. A representative of Spinnaker then commented on traffic issues and the attorney for the plaintiff offered rebuttal on the traffic testimony but did not explicitly comment on the Nemerson testimony. Ms. Gilvarg and a Mr. Harris who addressed some traffic and transportation questions. The Chairman gave a presentation about why he supported the petitions noting a transition zone was very important and that issue was distinct from the transit orientated concept - that had to be explored more fully but he said he supported the petitions.

The process of approval here was not a rubber stamp operation. What the court found interesting on this point is that two reports were submitted to the City Plan Commission which approved the map amendment to BD-1 and the text amendment they were numbered 1493-01 and 1493-02. In 1493-01 it states regarding the transition zone issue - there is a "tenuous" connection between the downtown BD-1 zone and the subject properties but the eastward expansion of the BD-1 zone from the Ninth Square (downtown) will "in most respects" be a positive application of transit orientated development. But the advisory report, in the last analysis approved the map amendment to BD-1 for the subject properties. These reports were then reviewed by the Legislative Service Staff of the Alders. This language, referred to in fact by the plaintiff in support of its opposition to the BD-1 designation, though not convincing to the court hardly has the ring of a let's join the bandwagon process from beginning to end dictating the defendant would prevail.

In any event for all the foregoing reasons the court concludes the appeal should be dismissed.



Corradino, J.
Judge Trial Referee