

NO. CV14 604 60 11 S : SUPERIOR COURT
ST. JOSEPH'S HIGH SCHOOL, ET AL : JUDICIAL DISTRICT OF
VS : FAIRFIELD AT BRIDGEPORT
TRUMBULL PLANNING & ZONING :
COMMISSION : OCTOBER 28, 2015

OFFICE OF THE CLERK
SUPERIOR COURT
2015 OCT 28 PM 3:27

MEMORANDUM OF DECISION

FACTS:

The Bridgeport Roman Catholic Diocesan Corporation, is the record owner of property known as 2320 Huntington Turnpike, in the Town of Trumbull. The parcel has been the site of St. Joseph's High School, a private secondary school operated by the Plaintiff, St. Joseph's High School, Inc., since the early 1960s.

2320 Huntington Turnpike consists of approximately forty (40) acres, and is located in a AA Residential Zone. Approximately twenty-seven (27) acres are used as a secondary school, athletic fields, parking and related school activities.

In August of 2014, the Plaintiff, St. Joseph's High School, Inc., submitted an application for a special permit (ROR 1) to the Trumbull Planning and Zoning Commission. The application sought a special permit, "to permit the installation of four (4) 70 ft. light poles to illuminate the athletic field at St. Joseph's High School."

*waived to
all parties
record + ROR
on 10/28/15*



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The request was submitted, pursuant to a regulation adopted by the Planning and Zoning Commission in August of 2014. The regulation's effective date was September 10, 2014, one week prior to the public hearing on the requested special permit. The public hearing was noticed (ROR 3) for September 17, 2014.

The applicable regulation, Article II, Sec. 1.2.4.4 of the Trumbull Zoning Regulations, reads, in relevant part:

“... Permanent and temporary light poles for lighted athletic fields on non-profit secondary school property shall be permitted for school related purposes only, provided:

- a) the poles, lights and structures supporting such poles do not exceed a combined height of eighty (80) feet.
- b) No light structure shall be within two hundred (200) feet of an abutting residential property.
- c) Applicant shall submit a photometric plan at the time of application.
- d) Lights must be shut off no later than 11: p.m. and applicant shall install an automated control system to ensure compliance.
- e) All requirements of Article XV Special Permit/Special Exception shall be satisfied.

Counsel for the applicant explained the lighting proposal, and reviewed with the Commission the requirements of the regulation, at the outset of the hearing. In addition to

complying with all of the regulations, the attorney stated that the applicant would agree to several conditions of approval, which he suggested (ROR 31, TR 9-7-14, p. 8-9).

The proposal received vocal support from school officials, and supporters of the St. Joseph's athletic program. Opposition was voiced by neighbors and abutting property owners. The opponents focused upon noise which would be generated by night football games, and the impact of the lights and music on the quiet enjoyment of their property.

It was also claimed that parking and public safety issues were intensified by the advent of night football, even if the same number of games were played. Security and safety issues, not present during afternoon football games, would be aggravated, they claimed, by the parking of vehicles on side streets at night.

Following the close of the public hearing (ROR 31, TR 9-17-14, p. 47), the Commission deliberated, concerning the special permit application.

A review of both the transcript of the public hearing (ROR 31), and the minutes of the Planning and Zoning Commission's deliberations (ROR 4) which followed the public participation portion of the meeting, reveals that a motion was made to approve the special permit application, subject to specific conditions (ROR 4, p. 5; ROR 31, TR, 9-17-14, p. 48).

Once the motion was made by Commissioner Garrity, and seconded by Commissioner Silber, discussion ensued. Ten (10) conditions were moved as part of the approval motion:

1. Only activities related to Saint Joseph's High School to take place on lighted field.
2. Athletic field shall not be rented by outside or third party vendors.
3. Automatic shut-off of field lights to be as follows: 10:00 p.m. on week nights, 8:00 p.m. on Saturdays, 9 p.m. for practice sessions and no lighted fields on Sunday.
4. Field lights shall be permitted from March 15th thru June 15th and August 15th thru December 15th.
5. The lights shall be powered 100% for games at an average of 60 candle lights at the field and an average of 50% for practice sessions.
6. Only four light poles are permitted and subject poles are to be located only on the field.
7. Light shields are to be installed.
8. A maximum of three nighttime games per week shall be permitted.
9. No music to be permitted at night games.
10. With the exception of varsity football and lacrosse, public address booth shall not be utilized during nighttime games.

A second amendment was carried, concerning lighting, followed by a motion designed to limit the number of varsity football games which could be played at night. This was also approved (ROR 4, p. 5).

The additional conditions were (ROR 4, p. 5):

1. Lighting for practice sessions to be shut off at 8 p.m.
2. Field lights shall not be permitted on weekends.
3. Boys nighttime varsity football games limited to four (4) games per season.

Before the final vote on the motion as amended, the Town Attorney referenced S. 4.14(1) of Article XV or the Trumbull Zoning Regulations. He asked, before any vote on the motion to approve was taken, that a finding be made. The requested finding stated that approval of the special permit application would not be detrimental to the character of the residential district (ROR 3, TR 9-17-14, p. 72).

Commissioner Garrity moved that the finding be approved, and his motion received a second. The finding declared that approval of the special permit with conditions "is not hazardous or inconvenient to, or detrimental to, the characteristics of the neighborhood."

The finding was approved by a vote of three (3) in favor (Garrity, Silber, Chory), and two (2) (Deecken, Preusch) opposed. (ROR 4, p. 6)

When the vote on the main motion as amended was called, the motion failed on a tie vote, and the special permit application was not approved. Voting in favor of the motion as amended

were Commissioners Garrity and Silber, while Commissioners Chory and Preusch voted in opposition. Commissioner Deecken abstained.

Notice of the Commission's decision was published (ROR 5), and this timely appeal was commenced by St. Joseph's High School, Inc., and the Bridgeport Roman Catholic Diocesan Corporation.

The Defendants Jeffrey W. Strouse, Barbara H. Strouse, Mukesh H. Shah, Vibhavary M. Shah, Jai R. Singh, Sonali Singh, Dennis J. McEniry and Joanne McEniry were granted Intervener status, in order to support the decision of the Commission.

AGGRIEVEMENT

The Plaintiff, Bridgeport Roman Catholic Diocesan Corporation, is the owner of the tract of land known as 2320 Huntington Turnpike, Trumbull. The Plaintiff, St. Joseph's High School, Inc., operates a secondary school under the auspices of the Diocese of Bridgeport, at the location.

The Intervening Defendants, Jeffrey W. Strouse, Barbara M. Strouse, Jai R. Singh, Sonali Singh, Dennis J. McEniry and Joanne McEniry, are the owners of property which abuts a portion of the property owned by the Bridgeport Roman Catholic Diocesan Corporation.

Jerry W. Strouse and Barbara M. Strouse are the owners of 80 Ironwood Road, having purchased the property in 2010 (Ex. A), while Jai R. Singh and Sonali Singh own 86 Ironwood Road (Ex. B). They have owned the property since 2000.

Dennis J. McEniry and Joanne McEniry own 11 Applegate Lane, which they purchased in 2004 (Ex. C).

Each of these Intervening Defendants have owned the property in question throughout the time this appeal has been pending.

Because no evidence was received on the issue of aggrievement concerning the Intervening Defendants Mukesh H. Shah and Vibhavary M. Shah, no finding on the issue of aggrievement is possible as to those Interveners.

Pleading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an appeal. Stauton v. Planning & Zoning Commission, 271 Conn. 152, 157 (2004); Bakelaar v. West Haven, 193 Conn. 59, 64 (1984). The burden of proving aggrievement is on the party claiming to be aggrieved. London v. Zoning Commission, 149 Conn. 282, 284 (1962). Because aggrievement is a question of fact, to be determined by the trial court; Hughes v. Town Planning & Zoning Commission, 156 Conn. 505, 508 (1968); the court must be satisfied that

the party claiming to be aggrieved has alleged facts which, as a matter of law, if proven, would constitute aggrievement, and that the party has proven the truth of those factual allegations. Beckish v. Managort, 175 Conn. 415, 419 (1978); Nader v. Altermatt, 166 Conn. 43, 54-55 (1974).

Aggrievement falls into two basic categories -- statutory aggrievement, and classical aggrievement.

Statutory aggrievement exists by virtue of legislative fiat, rather than through an analysis of the facts of a particular case. Weill v. Lieberman, 195 Conn. 123, 124-25 (1986). One claiming statutory aggrievement must show that a particular statute grants standing to pursue an appeal, without the necessity of demonstrating actual injury based on the particular facts at hand. Pond View, LLC v. Planning & Zoning Commission, 288 Conn. 143, 156 (2008); Fort Trumbull Conservancy v. Alves, 262 Conn. 480, 485-87 (2003).

Section 8-8 (1) of the General Statutes, defines "aggrieved person" to include:

“... any person owning land in this state that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board...”

Classical aggrievement, on the other hand, requires a party claiming to be aggrieved to satisfy a well established two-fold test: 1) that party must show a specific personal and legal interest in the subject matter of the decision, as distinct from a general interest, such as concern of all members of the community as a whole, and 2) the party claiming to be aggrieved must show that

the personal and legal interest has been specifically and injuriously affected by the decision which generated

the appeal. Cannavo v. Burns, 194 Conn. 43, 47 (1984); Hall v. Planning Commission, 181 Conn. 442, 444 (1980).

The Plaintiff, the Bridgeport Roman Catholic Diocesan Corporation, owns 2320 Huntington Turnpike (Ex. 1; Ex. 2), while St. Joseph's High School, Inc. operates a private secondary school, complete with athletic facilities, at the complex.

The denial of the special permit application by the Trumbull Planning and Zoning Commission has specifically and injuriously affected the interests of both Plaintiffs to this action. The owner of property, which forms the subject matter of an action before a land use agency, is aggrieved by an adverse decision of that agency. Huck v. Inland Wetlands & Watercourses Agency, 203 Conn. 525, 530 (1987); Bossert v. Norwalk, 157 Conn. 279, 285 (1968).

It is found, that the Plaintiffs, the Bridgeport Roman Catholic Diocesan Corporation and St. Joseph's High School, Inc., are aggrieved by the decision which generated this appeal.

The Intervening Defendants, Jeffrey W. Strouse, Barbara M. Strouse, Jai R. Singh, Sonali Singh, Dennis J. McEniry and Joanne McEniry all own property which abuts a portion of the property which is the subject of this appeal. Although their property is not within one hundred feet of the precise activity which was the subject of the special permit application, the statute, S. 8-8

(1) of the General Statutes, merely requires ownership of land which abuts "any portion" of the land involved in the decision of the agency. The Connecticut Supreme Court has approved a "bright line" approach to the issue of statutory aggrievement. Caltabiano v. Planning & Zoning Commission, 211 Conn. 622, 669-70 (1989).

It is found that the Intervening Defendants owning property which abuts 2320 Huntington Turnpike, are aggrieved by the decision of the Trumbull Planning and Zoning Commission.

SPECIAL PERMIT – STANDARD OF REVIEW

A special permit permits a property owner to use its property in a manner which is expressly permitted by the zoning regulations. A.P. & W Holding Corporation v. Planning & Zoning Commission, 167 Conn. 82, 85 (1984); Kobyluck v. Planning & Zoning Commission, 84 Conn. App. 160, 169-70 (2004). The terms "special permit" and "special exception" have the same meaning, and are often used interchangeably. Summ v. Zoning Commission, 150 Conn. 79, 87 (1962).

A planning and zoning commission's authority to issue a special permit, is derived from S. 8-2¹ of the General Statutes. The authorizing statute, does not permit a commission, in the exercise

¹ Section 8-2, C.G.S. – "... the regulations...may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and zoning commission or

of its discretion, to vary the application of its regulations on a case by case basis. MacKenzie v. Planning & Zoning Commission, 146 Conn. App. 406, 428-29 (2013). While S. 8-2 permits the imposition of conditions upon approval of a special permit application, those conditions must be authorized by the zoning regulations themselves, and must be necessary to protect the public health, safety, convenience and property values. Housatonic Terminal Corporation v. Planning & Zoning Board, 168 Conn. 304, 307 (1975).

When ruling upon an application for a special permit, a commission sits in an administrative capacity, rather than in a legislative or quasi-judicial capacity. Irwin v. Planning & Zoning Commission, 224 Conn. 619, 627 (1988); Goldberg v. Zoning Commission, 173 Conn. 23, 29 (1977); Farina v. Zoning Board of Appeals, 157 Conn. 420, 422 (1969). The commission has no independent discretion, beyond determining whether an application, as presented, satisfies the standards set forth in the regulations. Quality Sand & Gravel, Inc. v. Planning & Zoning Commission, 55 Conn. App. 533, 537 (1999). The conditions under which a special permit is permitted, must be found in the regulations themselves. Beckish v. Planning & Zoning Commission, 162 Conn. 11, 15 (1971).

zoning board of appeals...subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values..."

When considering a special permit application, a commission is empowered to determine: 1) whether the proposed use of the property is permitted under the zoning regulations, 2) whether the standards contained in the regulations are satisfied, and 3) whether any conditions of approval or modifications are necessary in order to protect public health, safety, convenience and property values. Housatonic Terminal Corporation v. Planning & Zoning Commission, supra, 307. Sitting in an administrative capacity, a commission has a right to determine, within prescribed limits, whether a particular regulation applies, and the manner in which it applies. Irwin v. Planning & Zoning Commission, supra, 627. However, the discretion exercised must be controlled by fixed standards, applying in all cases, in a like manner. Sonn. v. Planning & Zoning Commission, 172 Conn. 156, 163 (1976).

Although a special permit enables a property owner to use his property in a manner which is permitted by the zoning regulations, a permit must be obtained because the nature of the use is such that the exact location and operation must be regulated, due to unique topographical conditions, traffic problems and neighborhood uses. Barbarino Realty & Development Corporation v. Planning & Zoning Commission, 222 Conn. 607, 612 (1992).

In applying the law to the facts of a particular case, the commission is endowed with liberal discretion, and its actions are subject to review by a court only to determine whether the challenged action was unreasonable, arbitrary or illegal. Schwartz v. Planning & Zoning Commission, 208

Conn. 146, 152 (1988). Raczkowski v. Zoning Commission, 53 Conn. App. 636, 639 (1999). On factual issues, a reviewing court cannot substitute its judgement for that of the municipal land use agency. Timber Trails Corp. v. Planning & Zoning Commission, 222 Conn. 380, 401 (1999).

Conclusions reached by the commission must be upheld, if supported by substantial evidence in the record. Substantial evidence is enough evidence to justify, if the trial were to a jury, the refusal to direct a verdict, when the conclusion to be drawn is one of fact. Huck v. Inland Wetlands & Watercourses Agency, 203 Conn. 525, 541 (1987). The possibility of drawing two inconsistent conclusions does not prevent a decision from being supported by substantial evidence. Sampieri v. Inland Wetlands Agency, 226 Conn. 579, 588 (1993).

Since the motion to approve the special permit failed on a tie vote, no collective reasons were given in support of the Commission's action. Therefore, the court must search the record to determine whether it provides a basis for the decision. Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc. v. Planning & Zoning Commission, 220 Conn. 527, 544-45 (1991); Parks v. Planning & Zoning Commission, 178 Conn. 657, 661-62 (1979).

PLAINTIFFS CANNOT PREVAIL ON CLAIM THAT FINDING REGARDING IMPACT ON NEIGHBORHOOD REQUIRES APPROVAL OF SPECIAL PERMIT

The Plaintiffs claim that the Planning and Zoning Commission found, by a vote of three (3) to two (2), that the approval of the requested permit was not hazardous or inconvenient to, or detrimental to the characteristics of the neighborhood.

They therefore argue that the finding is binding upon the Commission, and, once made, demonstrates that substantial evidence does not support the decision to deny the special permit.

This claim is not well taken, and is contrary to basic tenants of Parliamentary procedure.

At trial, the Trumbull Town Attorney acknowledged that the provisions of Robert's Rules of Order (Revised) govern the proceedings of all Trumbull boards and commissions.

Pursuant to Robert's Rules of Order, a main motion is the vehicle through which a substantive question is put before the body. The main motion, in this case the motion to approve the special permit, may be amended. However, no main motion is allowed to be moved or introduced, while another main motion or question is pending. Robert's Rules of Order (10th Edition, 2000), Perseus Publishing, Chapter V, S. 10, p. 98.

The Commission's minutes (ROR 4) reflect that a main motion was introduced, and that the chair entertained several germane amendments. The finding suggested by the Town Attorney was moved and seconded, while the main motion was pending. At no time was the main motion postponed, tabled, or withdrawn, prior to the motion which was made by Commissioner Garrity.

(ROR 4)

The finding, therefore, carried the status of a subsidiary motion, which had the effect of amending the main motion. It was not a separate main motion.

Once the amendment concerning the "finding" suggested by the Town Attorney was approved, the finding became part of the main motion, which had yet to be voted upon.

The minutes reveal (ROR 4), that: Commissioner Chory voted for the finding, but voted against the motion as amended when it was finally put to a vote.

Although this scenario may give rise to the paradox "I voted for it, before I voted against it," pursuant to Robert's Rules of Order, a member's vote on an amendment in no way obligates him to vote for the motion to which the amendment attaches. Robert's Rules of Order Newly Revised, (10th Edition), supra, 125.

Since the main motion failed on a tie vote, the finding failed at the same time, as did the amendments which had been previously approved by the Commission.

Therefore, the court can draw no inference or conclusion from the vote on the finding suggested by the Town Attorney, since it was not adopted as part of the decision of the Commission.

SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DENIAL OF THE SPECIAL PERMIT

APPLICATION

Article II, S. 1.2.4.4 of the Zoning Regulations of the Town of Trumbull was adopted by the Trumbull Planning and Zoning Commission in August of 2014. It took effect on September 10, 2014, one week prior to the public hearing on the special permit application submitted by St. Joseph's High School, Inc. The regulation, by its express terms, applies to "athletic fields on non-profit secondary school property."

Prior to the adoption of the regulation, lights were installed at Trumbull High School's McDougald Field, located on Strobel Road. No regulation existed when those lights were installed.

Both St. Joseph's High School and its cross town rival, Trumbull High School are members of the Fairfield County Interscholastic Athletic Conference (FCIAC). According to counsel for the special permit applicant, St. Joseph's is the only FCIAC school which does not have lights on its home field (ROR 1).

The record compiled at the September 17, 2014 public hearing, unambiguously reveals that the applicant's proposal meets the standards set forth in Article II, S. 1.2.4.4, subparagraphs a through d.

The four (4) poles to be installed are 70 feet tall, ten (10) feet shorter than the eighty (80) foot maximum provided by subparagraph a of the regulations.

Subparagraph b of the regulation requires a buffer of two hundred (200) feet from the property line of an abutting residential parcel. The proposal is three hundred twenty-five (325) feet

from the nearest residential property line. The measurement required by the regulation is from the property line, not from the location of any dwelling on the property. (ROR 31, TR 9-17-14, p. 2)

A photometric plan was submitted with the application, and an automated control system as mandated by subparagraph d, is also included.

The regulation, in subparagraph e, provides that "All requirements of Article XV, Special Permit/Special Exception shall be satisfied."

Article XV, Section 4.14, deals with uses adjacent to or impacting residential areas. Although the section does not contain any specific standards or requirements, it does provide a guidepost for the Commission, as it seeks to evaluate conditions which should be adopted, before a special permit application is approved.

The authority for a municipal planning and zoning commission to issue a special permit, is found in S. 8-2 of the General Statutes, and is circumscribed by that statute.

A municipality, as a specially chartered corporation, may only exercise those powers granted to it by the General Assembly. City Council v. Hall, 180 Conn. 243, 248 (1980). Municipalities have no inherent powers. Simons v. Canty, 195 Conn. 524, 529 (1985); Pepin v. Danbury, 171 Conn. 74, 83 (1976). The question is not whether a provision of state law prohibits a particular action, but whether the statute confers authorization for the municipal action. Avonside v. Zoning & Planning Commission, 153 Conn. 232, 236 (1965). An enumeration of powers in a

statute is uniformly held to forbid those things which are not enumerated. State ex rel Barnard v. Ambrogio, 162 Conn. 491 498 (1972).

General Statutes S. 8-2 authorizes the issuance of a special permit "subject to standards set forth in the regulations and conditions necessary to protect the public health, safety, convenience and property values..."

Section 8-2, while authorizing a municipal planning and zoning commission to adopt regulations, provides that "all such regulations shall be uniform for each class of buildings, structures or uses of land throughout the district."

In MacKenzie v. Planning & Zoning Commission, supra, the Appellate Court observed that the power to grant special permits, pursuant to S. 8-2, does not include the ability to vary the terms of its regulations based upon a case by case analysis. Mackenzie v. Planning & Zoning Commission, supra, 431. (See also Vesekis v. Bristol Zoning Commission, 168 Conn. 358, 359-60 (1975)). While a planning and zoning commission may decide, in its discretion, whether general standards in the regulations have been satisfied, and may impose conditions on any special permit approval; Irwin v. Planning & Zoning Commission, supra, 626-27; such flexibility does not carry with it the authority to vary the requirements of the regulations, or to transform an administrative process into one which is legislative or quasi-judicial.

Here, the Commission, prior to the tie vote which doomed the special permit application, debated conditions of approval. Some of the conditions were suggested by the applicant, while others resulted from public input during the public hearing process, or questions by members of the Commission.

A review of S. 4.14 of Article XV, demonstrates that certain "findings" are required of the Commission, when considering a special permit application which impacts a residential area. Because every special permit application is site specific, the nature and character of abutting properties must be considered, when evaluating a specific proposal. Conditions imposed on a special permit may be designed to limit the impact on surrounding properties, and may be designed to preserve the residential character of a community.

However, since Article XV, S. 4.14 contains no definite standards with which a prospective applicant must comply, it cannot serve as the sole basis for denying a special permit application, where all of the known and definite standards in the regulation in question have been satisfied. To permit the denial of an application on the basis such as a finding that it is "detrimental to the character of a residential district," is inconsistent with the administrative nature of the special permit review. When reviewing a special permit, a commission can not act legislatively, or quasi-judicially.

Nor can the commission's ability to impose conditions justify the elasticity concerning buffers and setbacks, as suggested in S. 14.2 of Article XV. MacKenzie v. Planning & Zoning Commission, supra, 431.

Because the application submitted by the Plaintiff satisfies each of the known and definite standards in the regulation, the Plaintiff's appeal must be sustained.

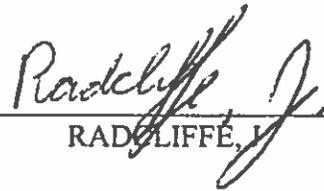
CONCLUSION

The Plaintiff's appeal is SUSTAINED in part, and the matter is remanded to the Defendant, the Trumbull Planning and Zoning Commission. The Commission is ordered to approve the special permit as requested, subject to such conditions as are necessary to protect the public health, safety, convenience and property values.

Conditions imposed may include, but are not limited to, all or some of the conditions listed in the minutes of the September 17, 2014 meeting (ROR 4), along with such other conditions as may be adopted by the Commission.

The court declines to order the Commission to approve the application subject only to the conditions which are contained in the September 17, 2014 minutes. (ROR 4) Conditions which should be imposed are properly left to the judgement of elected commissioners, rather than to a reviewing court.

In determining which conditions should be imposed, the Commission shall utilize the record compiled during the September 17, 2014 public hearing.



RADCLIFFE, J.

