DOCKET # CV-19-6082679 S | SUPERIOR COURT
OLD MINE ASSOCIATES, LLC | J.D. OF FAIRFIELD
V. | AT BRIDGEPORT
PLANNING & ZONING COMMISSION, TOWN
OF TRUMBULL, ET. AL. | APRIL 29, 2020

DOCKET # CV-19-6082682 S | SUPERIOR COURT
OLD MINE ASSOCIATES, LLC | J.D. OF FAIRFIELD
V. | AT BRIDGEPORT
PLANNING & ZONING COMMISSION, TOWN
OF TRUMBULL, ET. AL. | APRIL 29, 2020

DOCKET # CV-19-6083239 S | SUPERIOR COURT
JOHN D. CALLAHAN, ET. AL | J.D. OF FAIRFIELD
V. | AT BRIDGEPORT
PLANNING & ZONING COMMISSION, TOWN
OF TRUMBULL, ET. AL. | APRIL 29, 2020

MEMORANDUM OF DECISION

FACTS

48 Monroe Turnpike is a 17.6 acre parcel situated on the easterly side of Route 111, north of Old Mine Road, in the Town of Trumbull. The property contains a 253,000 square foot office building, with underground parking, and a free standing 145,000 square foot parking garage (ROR 45a, p. 3-4).

The office building, which was completed in 1988, consists of four (4) stories. The two (2) upper stories consist of office space, while the lower levels were utilized for parking. Surface parking exists on the site. The free standing garage, which was constructed in the 1990s, provides additional parking, on three (3) levels.

The property served as the regional headquarters for United Healthcare until 2015. In that year, United Healthcare, which was formerly known as Oxford Health Plans, vacated the complex. The company maintained that the facility, which it had used for over twenty (20) years, was obsolete, and could not be adapted to accommodate the company's needs (ROR 1). The property remains vacant.

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The current owner, 48 Monroe Turnpike, LLC, purchased the property in August of 2018. At the time title was transferred, most of the parcel was zoned Business Commercial (B-C). A small section adjacent to the Pequonnock River and Old Mine Road carried a Residence A (R-A) designation.

48 Monroe Turnpike, LLC is owned by Silver Heights Development, which maintains offices in Westport, Norwalk and Southbury. The company develops senior housing, including age restricted independent living units, memory care facilities, and assisted living (ROR 1; ROR 45a, p. 8).

On October 17, 2018, 48 Monroe Turnpike, LLC filed an application with the Trumbull Planning and Zoning Commission, seeking to change the Business Commercial (B-C) and Residence A (R-A) designation of the 17.6 acres, to an Industrial (I-L) Zone.

A second application requested specific amendments to provisions of the Trumbull Zoning Regulations.

An Amendment was proposed regarding Section 4.1.5 of the Regulations applicable to an Industrial (I-L) Zone. The proposal concerned the measurement standard to be used in measuring the height of a building, and building setbacks (ROR 1).

Amendments were also proposed concerning two (2) overlay zones contained in the Zoning Regulations – the Multi-Family Overlay (MFO) Zone, and the Assisted Living Facility (ALF) Zone (ROR 1). Both of the overlay zones may be applied, under the Regulations, to an Industrial (I-L) Zone. They may not be located by the Planning and Zoning Commission in a Business Commercial (B-C) Zone, or a Residence A (R-A) Zone.

The proposed Amendments increased the town-wide cap on the number of units allowed in MFO Zones, and also dealt with building coverage, and requirements applicable to age restricted units in an MFO Overlay Zone. Suggested Amendments applicable to parking, height measurements, and the independent living units in an ALF Zone, were also submitted by the owner.

48 Monroe Turnpike, LLC, acknowledged that it intended to convert its property from office use, to an assisted living facility and an active adult community, using both of the existing structures. In order to accomplish this objective, it envisioned a two (2) step procedure (ROR 45a, p. 3-7).

First, the Planning and Zoning Commission was asked to approve, simultaneously, the change of zone application, and the changes to the existing Regulations. Assuming favorable action by the Commission, a second set of applications will be submitted. The contemplated follow-up applications, would establish the MFO and ALF Overlay Zones on the property. A special permit application would also be required, in order to establish the age restricted residential use of 48 Monroe Turnpike (ROR 45a, p. 13-14).

The change of zone and change in Regulations applications were the subject of three (3) evenings of public hearings before the Commission. The proposals provoked both passionate support, and vehement opposition (ROR 45a; ROR 45b; ROR 45c).

During the initial public hearing, held on November 14, 2018, Mark DePecol, a principal in both 48 Monroe Turnpike, LLC and its parent company, Silver Heights Development, explained the age restricted residential development envisioned at 48 Monroe Turnpike. The entire evening was devoted

to explaining the need for the change in zoning classification, as a prerequisite for residential overlay zones being situated on the property.

It was claimed that tax revenues would increase as a consequence of the development, without any excessive increase in town services, and that retail, restaurant and other services would benefit (ROR 45a, p. 9-10). Letters of support were received from the Trumbull Chamber of Commerce, owners of commercial property in the immediate vicinity, and Michele Jakab, Trumbull's Director of Human Services (ROR 14). All of the correspondence mentioned the use of 48 Monroe Turnpike for residential purposes.

On November 28, 2018, the hearing resumed.

Attorney Joel Green, representing Old Mine Associates, LLC, maintained that the use of 48 Monroe Turnpike for residential purposes was not compatible with the Home Depot operated by his client on the adjacent property (ROR 45b, p. 9-10). Attorney Green raised the possibility that a nuisance would be created, if age restricted residential units and assisted living units were in close proximity to an active retail and commercial establishment such as Home Depot.

John Guszkowski, a municipal planner associated with CME Associates, explained that a residential development was incompatible with a retail commercial operation, conducted on abutting property. He also questioned the elimination of available commercial real estate, in favor of multi-unit housing, as a planning objective (ROR 45b, p. 29-32).

Counsel for Old Mine Associates, LLC, read into the record a "protest petition," signed by property owners within five hundred (500) feet of 48 Monroe Turnpike (ROR 45b, p. 44). The acceptance, and subsequent verification of the protest petition, pursuant to Section 8-3(b)[1] of the General Statutes, mandated that four (4) affirmative votes would be required, should the Planning and Zoning Commission decide to change the zoning classification of 48 Monroe Turnpike.

The public hearing was continued until December 19, 2018, after the applicant consented to the continuance (ROR 45b, p. 58). Because additional testimony was anticipated from both proponents and opponents of the applications, the Commission determined to continue the hearing.

The December 19 session began with a review of the applications by the attorney for 48 Monroe Turnpike, LLC. Included in the review was the anticipated approval of the ALF and MFO overlay zones, should the change to the Industrial (I-L) Zone be approved. This was followed by a response to the presentation made by CME Associates on November 28 (ROR 45b, p. 34-47).

Following the rebuttal, a presentation in opposition to the change in zoning classification and the Amendments to the Zoning Regulations was received on behalf of residents of the Woodland Hills Condominium Association, a residential development located across Route 111 from the entrance to 48 Monroe Turnpike. It was claimed that a comprehensive review of the use of 48 Monroe Turnpike was

[1] Section 8-3(b), C.G.S. – "... If a protest against a proposed (boundary) change is filed on or before a hearing with the zoning commission, signed by the owners of twenty percent or more of the area of the lots included in such proposed change or of the lots within five hundred feet in all directions of the property included in the proposed change, such change shall not be adopted except by a vote of two-thirds of the members of the commission."

suggested in Trumbull's most recent Plan of Conservation and Development (POCD), or Master Plan. (ROR 45c, p. 58-67).No such review had been conducted.

Testimony was received from two police officers, and the interim chief of the Trumbull Emergency Medical Service (EMS) (ROR 45c, p. 80-102). Despite objections from the applicant's attorney, in conjunction with the Trumbull Town Attorney, information was presented regarding the challenges faced by emergency responders, when answering calls for assistance.

Public comment was received and encouraged from those who favored the proposal, and those who were in opposition. Among those urging approval was the executive director of the Trumbull Chamber of Commerce.

The public hearing was closed, after an opportunity for additional comments by counsel for the applicant, and counsel for Old Mine Associates, LLC.

On January 2, 2019, the Planning and Zoning Commission discussed both the proposed Amendments to the Regulations, and the change of zone application (ROR 45d).

An additional issue arose after the close of the public hearing, and was addressed before the Commission took up discussion of the applications.

Commission chair Fred Garrity informed those in attendance, in public session, that he had been the subject of an email communication sent to First Selectman Vicki Tesoro on December 28, 2018. The email, without mentioning Garrity by name, claimed that a member of the Commission was subject to a conflict of interest, based upon a business transaction with a company which employed Thomas Tesoro, the first selectman's husband.

Upon receipt of the email, Garrity obtained a legal opinion from a private attorney. He read a portion of the opinion during the January 2, 2019 discussion.

The attorney, in an exhaustive opinion, found that Garrity had no conflict of interest, either consistent with any provision of the General Statutes, or the Trumbull Code of Ethics.

The commission then proceeded to discuss the merits of the proposed Amendments submitted by 48 Monroe Turnpike, LLC. After two changes were voted (ROR 40, p. 4-5; ROR 45d, p. 29-36), the Amendments were approved by a vote of four (4) to one (1).

A vote concerning the change of zoning classification request was also approved with four (4) votes in favor (Garrity, D'Aquila, Helfrich, Chory), and one (1) opposed (LaConte).The super majority standard of Section 8-3(b) was satisfied.

Although individual commissioners expressed personal reasons for voting in favor of the Amendments and the change of zone, (ROR 45d, p. 7-17) no collective reasons were stated in the motions, or in the minutes to the meeting (ROR 40).

Notice of the approvals was published (ROR 43) within the time required by law, and these three (3) appeals followed.

Old Mine Associates, LLC brought two (2) appeals. One challenged the Commission's decision to approve changes to the Trumbull Zoning Regulations, while a second challenged the change in zoning classification from Business Commercial (B-C) and Residence A (R-A), to Industrial (I-L).

Three residents of the Woodland Hills Condominium Association, John D. Callahan, Jr., Jennine M. Gleason and Sara A. Mayer, instituted a single appeal, challenging both approvals by the Planning and Zoning Commission.

All three (3) appeals involve the same property, 48 Monroe Turnpike, Trumbull, the same applications by 48 Monroe Turnpike, LLC, and the same return of record. Therefore, they were consolidated for trial.

AGGRIEVEMENT

Old Mine Associates, LLC is the owner of property on Monroe Turnpike (Ex. 6; Ex. 7), which abuts the property which is the subject of the applications. It has owned the property throughout the time these appeals have been pending.

Old Mine Associates, LLC operates a Home Depot on its property.

Salvatore DiNardo, a principal in Old Mine Associates, LLC, testified at trial. He claimed to be aggrieved by the siting of an age restricted residential development at 48 Monroe Turnpike, in that it would impact the Home Depot operation.

The Plaintiffs John D. Callahan, Jr. (Ex. 1), Jennine M. Gleason (Ex. 2) and Sara A. Mayer (Ex. 3) are the owners of units within the Woodland Hills Condominium complex, situated across Route 111 from the entrance to 48 Monroe Turnpike.

John D. Callahan, Jr. testified at trial that he is the owner of 605 Woodland Hills Drive, and has owned the unit at all times during the pendency of this appeal. He owns the property consistent with the Woodland Hills Condominium Declaration (Ex. 4) and the terms of Connecticut's Common Interest Ownership Act (COIA).

Both of the Defendants in these appeals, 48 Monroe Turnpike, LLC and the Trumbull Planning and Zoning Commission, challenge the standing of all Plaintiffs to contest the amendments to the Trumbull Zoning Regulations approved on January 2, 2019.They maintain that any challenge to the regulations is premature, and must await the filing of a special permit application, and a request to apply the MFO and ALF Zones to the 48 Monroe Turnpike property.

The Defendants claim that the overlay zones should be treated in the same manner as floating zones and planned development districts, for purposes of standing.

Although floating zones and overlay zones are similar, significant differences distinguish the two (2) land use devises.

A floating zone differs from a district established in traditional Euclidian Zoning, because it is not tied to any physical boundaries. Pleasant Valley Neighborhood Assn. v. Planning & Zoning Commission, 15 Conn. App. 110, 114 (1988). Instead, it conceptually "floats" over the municipality, until an applicant demonstrates that the conditions pertaining to the establishment of the zone can be met, the zone

change has been approved, and the zone floats down upon the designated area, thus creating physical boundaries. Nick v. Planning & Zoning Commission, 6 Conn. App. 110, 113 (1986).

The Connecticut Supreme Court has determined that the mere approval of regulations establishing a floating zone, does not affect any particular parcel of land, and, therefore, there can be no aggrievement, statutory or classical, until the zone is mapped to a particular property, and the change of zone is voted by the zoning commission. Schwartz v. Town Plan & Zoning Commission, 168 Conn. 20, 23 (1965); Sheridan v. Planning Board, 159 Conn. 1, 17 (1969).

An overlay zone differs from a floating zone, in that it does not change the overall zoning in the area by altering the underlying zone. If the Trumbull Planning and Zoning Commission approves the Assisted Living Facility (ALF) Zone and the Multi-Family Overlay (MFO) Zone for 48 Monroe Turnpike, in conjunction with a special permit application, the underlying Industrial (I-L) Zone is not eliminated. The underlying zone remains, subject to the overlay zones.

Trumbull's Regulation allows for the siting of the overlay zones only on property zoned for Industrial (I-L) use. Therefore, unlike a floating zone, it is dependent upon the existing zoning classification, and cannot be situated anywhere within the Town of Trumbull.

Because the overlay zones are dependent upon the classification of the underlying zone, and the rezoning of 48 Monroe Turnpike to Industrial (I-L) is a prerequisite to the approval of an overlay zone, the Plaintiffs have standing to challenge both the change of zoning classification and the change in the Zoning Regulations as part of this appeal, assuming that they are able to establish either statutory or classical aggrievement.

Pleading and proof of aggrievement are prerequisite to a trial court's jurisdiction over the subject matter of an appeal. Stauton v. Planning & Zoning Commission, 271 Conn. 153, 157 (2004); Jolly, Inc. v. Zoning Board of Appeals, 237 Conn. 184, 192 (1996). The question of aggrievement is one of fact, to be determined by the trial court. Primerica v. Planning & Zoning Commission, 211 Conn. 85, 93 (1989). The burden of proving aggrievement rests with the party claiming to be aggrieved. Harris v. Zoning Commission, 259 Conn. 402, 410 (2002); London v. Zoning Commission, 149 Conn. 282, 284 (1962). One claiming aggrievement must sustain his interest in the property throughout the course of an appeal. Craig v. Maher, 174 Conn. 8. 9 (1977); Goldfield v. Planning & Zoning Commission, 3 Conn. App. 172, 177 (1985).

Aggrievement falls into two (2) basic categories – statutory aggrievement, and classical agrievement.

Statutory aggrievement exists by virtue of legislative fiat, and is a legislative recognition of a right to appeal, without regard to the facts of a particular case. Moutinho v. Planning & Zoning Commission, 278 Conn. 660, 665 (2006); Weill v. Lieberman, 195 Conn. 123, 124-25 (1985). One claiming statutory aggrievement must show that a particular statute grants to a party the right to pursue an appeal, without the necessity of demonstrating actual injury based upon the particular facts at hand. Pond View, LLC v. Planning & Zoning Commission, 288 Conn. 143, 156 (2005); Fort Trumbull Conservancy v. Alves, 262 Conn. 480, 485-87 (2003).

Classical aggrievement, on the other hand, requires a party to satisfy a well-established two-fold test: 1) the party claiming aggrievement must demonstrate a personal and legal interest in the decision

appealed from, as distinct from a general interest such as concern of all members of the community as a whole, and 2) the party must prove that the specific personal and legal interest has been specifically and injuriously affected by the decision which generated the appeal. Cannavo Enterprises v. Burns, 194 Conn. 43, 47 (1984); Hall v. Planning Commission, 181 Conn. 442, 444 (1980).

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

> "... 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..."

Old Mine Associates, LLC owns property which abuts 48 Monroe Turnpike. Therefore, it is found that Old mine Associates, LLC has satisfied the test for statutory aggrievement, and is aggrieved by the decisions which generated these appeals.

Although it is not necessary for Old Mine Associates, LLC to prove classical aggrievement, in light of the court's finding of statutory aggrievement, Old Mine Associates claims to be classically aggrieved, in that the establishment of an age restricted residence complex adjacent to its property may or will transform the Home Depot operation into a private nuisance. A use may be lawful, but may still constitute a nuisance, if it affects the rights of neighboring property owners. Maykut v. Plasko, 170 Conn. 310, 317-18 (1976).

Maykut v. Plasko, supra, known as Trumbull's "corn cannon" case, held that use of a cannon designed to frighten birds threatening a cornfield on a twenty-eight (28) acre farm at five (5) minute intervals, might be appropriate in a rural farming community, but might be inappropriate in a developing suburban area. The cannon was declared a nuisance.

However, classical aggrievement has not been demonstrated here, notwithstanding Old Mine Associates' fear that its commercial operation might be found to interfere with the use and enjoyment of 48 Monroe Turnpike. Pesty v. Cushman, 259 Conn. 345, 352 (2002); 4 Restatement (Second) Torts, S. 821 D (1979).

John Callahan testified at trial, that the entrance to the Woodland Hills Condominiums is across Route 111 from the entrance to 48 Monroe Turnpike.

The Defendants first claim, that Callahan's unit is not within one hundred feet of any portion of 48 Monroe Turnpike. Therefore, they claim, he is not statutorily aggrieved by the decisions of the Trumbull Planning and Zoning Commission.

This claim is not well taken.

As a unit owner in the Woodland Hills Condominium, John Callahan enjoys certain rights, consistent with Chapter 825 of the General Statutes, known as the Common Interest Ownership Act (CIOA), and the Condominium Declaration (Ex. 4).

As the owner of 605 Woodland Hills Drive, he holds an undivided interest in the common elements[2] of the complex, as specified by the Condominium Declaration. Section 47-68a of the General Statutes defines "common elements" to mean "all portions of the condominium other than the units."

General Statutes Section 8-8 (1) deals with persons "owning land" within one hundred feet of the land involved in the decision of the land use agency. John Callahan's ownership interest in 605 Woodland Hills Drive includes the common elements of the condominium complex. The entrance to the dwellings is part of the common elements.

Therefore, if the entrance to the Woodland Hill Condominium Association is within one hundred feet of any portion of 48 Monroe Turnpike, the Plaintiff John Callahan is an aggrieved party.

Callahan's testimony concerning the distance between 48 Monroe Turnpike and the Woodland Hills Condominiums was ambiguous. He first determined that the distance was one hundred twenty eight (128) feet, but then revised his testimony to indicate that the distance was one hundred (100) feet or less.

However, the exact distance between the entrances is not dispositive, in that the entrances to the properties are separated only by the width on Route 111.

As early as 1814, the Connecticut Supreme Court of Errors, determined that where land is bounded by a highway, the boundary is the middle of the highway, subject to a right of passage in members of the public. The holder of the easement has no interest in the soil. Peck v. Smith, 1 Conn. 103, 132-33 (1814).

Connecticut courts have consistently held that as to land within the limits of a highway, an abutting owner enjoys all of the rights which are not incompatible with the public easement. Allen v. Mussen, 129 Conn. 151, 155 (1942); Knothe v. Zimmer 96 Conn. 709, 714 (1921). An abutting owner is presumed, no evidence having been offered to the contrary, to own the fee to the land to the center of the highway. Antenucci v. Hartford Roman Catholic Diocesan Corp., 142 Conn. 349, 355-56 (1955); Parsons v. Wethersfield, 135 Conn. 24, 28 (1948); State v. Murlo, 119 Conn. 323, 326 (1935).

It is found, that the common area of the Woodland Hills Condominiums abuts Route 111, as does the entrance to 48 Monroe Turnpike.

It is therefore found that John D. Callahan, Jr. is statutorily aggrieved, and has standing to pursue his appeal.

Since no testimony was received at trial from Jennine M. Gleason or Sara A. Mayer, the court is unable to make a finding concerning their ownership of units during the course of these appeals, notwithstanding the full exhibits (Ex. 2; Ex. 3).Therefore no finding of aggrievement can be made regarding these Plaintiffs.

However, because one of the Plaintiffs is aggrieved, the court has jurisdiction to hear the appeal brought on behalf of the three (3) Woodland Hills Condominium residents.

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[2] Section 47-74 (b) (1), C.G.S. – "Each unit owner shall own an undivided interest in the common elements in the percentage expressed in the declaration..."

STANDARD OF REVIEW – LEGISLATIVE ACTION

When it acts upon an application for the rezoning of property, or an amendment to existing zoning regulations, a municipal planning and zoning commission sits in a legislative capacity, rather than in an administrative or quasi-judicial capacity. Harris v. Zoning Commission, supra, 416; D & J Quarry Products, Inc. v. Zoning Commission, 217 Conn. 447, 450 (1991); Dutko v. Planning & Zoning Board, 110 Conn. App. 228, 230 (2008).

When exercising a legislative function, a planning and zoning commission has wide and liberal discretion, and is free to amend its zoning regulations and/or its zoning map, whenever time, experience and reasonable planning for contemporary or future conditions reasonably indicate the need for a change. Campion v. Board of Aldermen, 278 Conn. 500, 526-27 (2006); Kaufman v. Zoning Commission, 232 Conn. 122, 150 (1995); West Hartford Interfaith Coalition, Inc. v. Town Council, 228 Conn. 498, 505 n. 10 (1994). Such discretion is vested in a municipal zoning authority, because it is closer to the circumstances and conditions which create the problem, and shape the solution. Raybestos-Manhattan, Inc. v. Planning & Zoning Commission, 186 Conn. 466, 470 (1982); Stiles v. Town Council, 159 Conn. 212, 219 (1970).

Courts will not interfere with legislative discretion, unless the action taken is contrary to law, arbitrary, illegal, or an abuse of discretion. Burnham v. Planning & Zoning Commission, 189 Conn. 261, 265 (1983). Zoning must be sufficiently flexible to meet the demands of increased population, and evolutionary changes in such fields as architecture, transportation, and redevelopment. Under our law, the responsibility for meeting those demands rests with the municipal zoning authority. Roncari Industries, Inc. v. Planning & Zoning Commission, 281 Conn. 66, 81 (2007). Questions concerning the credibility of witnesses and the determination of issues of fact, are matters within the province of the zoning agency. Property Group, Inc. v. Planning & Zoning Commission, 226 Conn. 684, 697 (1993). The question is not whether another decision maker, such as the trial court, would have reached a different decision, but whether the record before the agency supports the decision reached. Calandro v. Zoning Commission, 176 Conn. 439, 440 (1976).

Conclusions reached by the commission must be upheld, if they are 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, where the conclusion sought to be drawn is one of fact. Huck v. Inland Wetlands Agency, 203 Conn. 525, 541 (1987). The substantial evidence standard is highly deferential, and permits less judicial scrutiny than a "clearly erroneous" or "weight of the evidence" standard. Sams v. Department of Environmental Protection, 308 Conn. 359, 374 (2013). 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).

When acting upon a request for a change in zoning classification, the test to be applied is whether substantial evidence supports a finding that: 1) the action is in accordance with the municipal comprehensive plan, and 2) whether it is related to the normal police powers enumerated in Section 8-2 of the General Statutes. First Hartford Realty Corp. v. Planning & Zoning Commission, 165 Conn. 533, 541 (1973). The comprehensive plan consists of the zoning regulations, and the zoning map. Konigsberg v. Board of Aldermen, 283 Conn. 553, 584-85 (2007); Pike v. Zoning Board of Appeals, 31 Conn. App. 270, 277 (1993).

When a municipal land use agency has stated collective reasons for its decision, a reviewing court should not go beyond the collective reasons of the agency, but should determine whether any reason given is supported by substantial evidence in the record. Gibbons v. Historic District Commission, 285 Conn. 755, 770-71 (2008). However, the failure to state collective reasons is not fatal. In that event, a reviewing court is obligated to search the record, to determine whether substantial evidence supports the decision reached. Grillo v. Zoning Board of Appeals, 206 Conn. 362, 369 (1985).

CHANGE IN ZONING CLASSIFICATION AND ZONING REGULATIONS SUPPORTED BY THE RECORD

The Plaintiffs claim that the decision of the Trumbull Planning and Zoning Commission to change the zoning classification of 48 Monroe Turnpike to Industrial (I-L), and to amend existing Regulations, was arbitrary, and constituted an abuse of discretion. They list several reasons in support of this claim.

The Plaintiffs first claim, that 48 Monroe Turnpike, LLC has submitted a "hypothetical" use of 48 Monroe Turnpike, in that no age restricted residential development can be established on the property, until the overlay zones, accompanied by a special permit, are approved. They argue that the applicant should have submitted the special permit application and overlay zones, at the same time the change of zoning classification to Industrial (I-L) and the change in the Trumbull Regulations were proposed.

48 Monroe Turnpike, LLC insists a two- step procedure is required, pursuant to Section 8-3 (d) of the General Statutes, and that all of the approvals cannot be heard simultaneously.

The court agrees with the Defendant.

Section 8-3 (d) reads:

> "(d) Zoning regulations or boundaries or changes therein shall become effective at such time as is fixed by the zoning commission... and notice of the decision of the commission shall have been published in a newspaper having a substantial circulation in the municipality, before such effective date..."

Unlike a floating zone, or a planned development district (PDD), both of which can be situated at any location within a municipality without regard to the existing zoning classification, the MFO and ALF Overlay Zones can only be established within an Industrial (I-L) Zone, consistent with the Trumbull Zoning Regulations. Therefore, as applied to 48 Monroe Turnpike, a change in the underlying zoning classification is a necessary prerequisite to establishing the overlay zones.

Section 8-3 (d) requires a zoning commission to establish a date on which the new classification will take effect, and to publish notice in a newspaper having a substantial circulation in the community. Therefore, a two-step process is mandated, as a matter of law.

The Plaintiffs next claim that the Commission's actions were arbitrary, in that the record reveals no discussion concerning uses allowed in an Industrial (I-L) Zone, which are not permitted in a Business Commercial (B-C) Zone. The only discussion, they argue, concerned an age restricted residential development, which is not allowed, absent approval of overlay zones, and a special permit.

This claim is not well taken.

48 Monroe Turnpike contains a vacant office building and a free standing parking garage. It adjoins a B-C Zone, in which a Home Depot is operated. The majority of the uses of land permitted in a B-C Zone, consistent with the Trumbull Regulations, are also permitted in an I-L Zone.

Only three uses, 1) manufacturing, fabricating, processing and packaging operations, 2) research laboratories, and 3) warehousing, are permitted in an Industrial (I-L) Zone, but are not allowed in a Business Commercial (B-C) Zone. (See Article II, Section 4.1.4, Trumbull Zoning Regulations).In each instance, it is mandated that an applicant obtain a special permit, in order to insure a site-specific analysis by the Commission.

The fact that multiple uses of land are permitted uses in both an I-L Zone and a B-C Zone, indicates that the change of zone is consistent with the comprehensive plan; the zoning regulations, and the zoning map. Konigsberg v. Board of Aldermen, supra, 584-85.

The record also reveals that any age restricted residential development will be separated from a residential condominium development, by Route 111. This provides addition support for the claim that the change of zone is consistent with the comprehensive plan.

Nor are the Plaintiffs assisted, by their claim that the change in zoning classification and amendments to the Regulations are inconsistent with Trumbull's Plan of Conservation and Development (POCD) or Master Plan, adopted pursuant to Section 8-23[3] of the General Statutes.

Although Section 8-3 (a) of the General Statutes requires a zoning commission to state "... its findings on consistency of a proposed zoning regulation, boundaries or changes thereof with the plan of conservation and development "... the POCD or Master Plan is purely advisory, and does not control the commission in its enactment of amendments to regulations, or changes in zone boundaries. Lathrop v. Planning & Zoning Commission, 164 Conn. 215, 223 (1973).

A review of the record reveals that the Commission considered the Plan of Conservation and Development (POCD) in its deliberations. Any alleged failure to adhere strictly to the POCD, however, is not fatal to the change in zoning classification or the amendments to the Regulations, both of which are legislative actions.

The Plaintiffs also maintain that the actions of the Commission are not supported by substantial evidence, and are arbitrary, in that the use of abutting property by Old Mine Associates, LLC as a Home Depot, is incompatible with the use of 48 Monroe Turnpike for residential purposes.

This claim fails to resonate, and is more appropriately addressed to the Commission if and when it considers the adoption of the MFO and ALS Overlay Zones, along with the approval of the mandated special permit. A planning and zoning commission may deny a special permit application, on the basis of general considerations involving public health, safety and welfare, even though the process is administrative in nature. Whisper Wind Development Corp. v. Planning & Zoning Commission, 229 Conn. 176, 177 (1994); St. Joseph's High School, Inc. v. Planning & Zoning Commission, 176 Conn. App. 570, 594 (2017). When deciding upon a special permit application, a commission may properly consider the

[3] Section 8-23 (a), C.G.S. – "The commission shall prepare, adopt and amend a plan of conservation and development for the municipality. Such plan shall show the commission's recommendation for the most desirable use of land... "

mode of operation, as it relates to topography, traffic problems, and the use of neighboring property. Barbarino Realty & Development Corp. v. Planning & Zoning Commission, 222 Conn. 607, 612-13 (1992).

Nor are the Plaintiffs assisted in their implicit claim that the rezoning of 48 Monroe Turnpike constitutes spot zoning.

Spot zoning occurs when 1) the change in zoning classification affects only a small area, and 2) the change is out of harmony with the municipal comprehensive plan. Morningside Associates v. Planning & Zoning Board, 162 Conn. 154, 161 (1972); Eden v. Town Plan & Zoning Commission, 139 Conn. 59, 63 (1952).

Here, neither prong of the spot zoning test is satisfied. The change does not involve a small area of land, and the changes are consistent with the municipal comprehensive plan. Some commentators have suggested that when a change of zone is consistent with the comprehensive plan, and is related to the police powers contained in Section 8-2 of the General Statutes, the size of the parcel will not support a claim of spot zoning. Fuller, Robert A., "Land Use Law and Practice" (4th Ed. 2015), S. 4.8, p. 20.

Both of the Commission's actions which are the subject of these appeals are supported by substantial evidence in the record.

CHANGE OF ZONE, CHANGE IN REGULATIONS DO NOT VIOLATE UNIFORMITY PROVISION IN SECTION 8-2 OF THE GENERAL STATUTES

The Plaintiffs claim that the Amendments to the Zoning Regulations adopted by the Planning and Zoning Commission on January 2, 2019, violate the "uniformity provision" contained in Section 8-2 of the General Statutes. They claim that the capping of the number of multi-family units permitted in the Town of Trumbull does not accord all of the owners of property located in an I-L Zone the same opportunity to develop their property.

They further allege, that if 48 Monroe Turnpike is developed as planned, the cap will be consumed.

The plaintiffs cannot prevail on this claim.

Section 8-2(a) provides in relevant part:

> "All such regulations shall be uniform as for each class or kind of buildings, structures or uses of land throughout the district, but the regulations in one district may differ from those in another district."

The Defendants argue that an overlay zone, like a floating zone, is not governed by the uniformity provision found in Section 8-2. They insist that concerns regarding uniformity only apply within zones, rather than between zones. Each overlay zone, they contend, must be viewed independent of the underlying zone.

The Plaintiffs claim that overlay zones are subject to the uniformity provision of Section 8-2, and that the underlying Industrial (I-L) Zone must be included in any analysis. They further claim that Section 7.6.4 of the Trumbull Zoning Regulations violates the uniformity requirement.

The Plaintiffs cannot prevail on this claim, even assuming, arguendo, that the uniformity provision found in Section 8-2 applies to overlay zones.

Any cap mandated by the Regulations applies to all MFO Zones in conjunction with the special permit process.

Courts have found a violation of uniformity requirements, in cases where a regulation applies only to certain properties within a particular zone.

In Veseskis v. Zoning Commission, 165 Conn. 358 (1975), the Supreme Court determined that a zoning regulation was in violation of the uniformity provision, where a buffer zone was mandated between one zone of a particular classification and another zone, only on the easterly side of the district. In other areas where the two zones abutted, the buffer requirement did not apply. Veseskis v. Zoning Commission, supra, 360.

A zoning authority will also run afoul of the uniformity provision, when it seeks to vary its regulations on a case by case basis. No provision of the General Statutes permits a zoning commission to vary the terms of a regulation on a case by case basis. MacKenzie v.Planning & Zoning Commission, 146 Conn. App. 406, 431 (2013). Nor can a planning and zoning commission, acting administratively, impose as a condition of approval, use of an office facility exclusively as a medical office building, where the condition did not apply to other properties in the same zone. Bartsch v. Planning & Zoning Commission, 6 Conn. App. 686, 689 (1986).

Here, the applicable regulation contains a cap on the number of units which can be built throughout the community. The Regulation is applicable to all properties contained within an MFO Overlay Zone. Furthermore, the challenged Amendment did not establish the cap. It merely increased the number of units which may be constructed. It cannot be said, based upon a review of the record, that the increase in the cap is unrelated to issues of health, safety and welfare.

In the adoption of zoning regulations, a commission's authority is wide and liberal. Given the ability of a commission to allow for certain uses of land only after a special permit has been approved, complete uniformity is not mandated. Roncari Industries, Inc. v. Planning & Zoning Commission, supra, 81.

In Roncari, a regulation allowing valet parking in certain business zones, and only along a certain highway, by special permit, did not violate principles of uniformity. Roncari Industries, Inc. v. Planning and Zoning Commission, supra, 81.

The Amendment Adopted by the Trumbull Planning and Zoning Commission does not violate the uniformity provision contained in General Statutes Section 8-2.

TOWN ATTORNEY INVOLVEMENT IN DECEMBER 19, 2018 PUBLIC HEARING, DID NOT RENDER PUBLIC HEARING PROCESS FUNDAMENTALLY UNFAIR

During the November 14, 2018 public hearing (ROR 45a) and the subsequent November 28 hearing (ROR 45b), the applicant presented its vision for the future use of 48 Monroe Turnpike.

The November 14 session was entirely devoted to an explanation of the rationale for requesting the change of zoning classification, and changes in the Trumbull Zoning Regulations. In the office

building, the applicant sought the change to an Industrial (I-L) Zone, in order to locate two hundred two (202) units of age restricted housing on the property. One hundred forty (140) would be designated independent living, forty six (46) would be assisted living units, and sixteen (16) units would be devoted to memory care. Approximately one hundred fifty (150) independent living units were contemplated for the parking garage in the rear of the site (ROR 45a, p. 45).

Commentary and discussion was entertained, concerning the use of the property for age restricted housing, including whether an age restricted housing development was appropriate, next to a retail commercial operation (ROR 45b, p. 10-30). No attempt was made to restrain, curtail or disallow any public comment or information presented in support of, or in opposition to, the use of 48 Monroe Turnpike for residential purposes.

On the third evening of the public hearing, December 19, 2018, Attorney Timothy Herbst, a former Trumbull first selectman and former chair of the Trumbull Planning and Zoning Commission, addressed the Commission on behalf of several residents of the Woodland Hills Condominium complex. Town Attorney James Cordone, who had assisted the Commission during the first and second nights of the public hearing, asked for a recess. Following the recess, Attorney Cordone explained that he had represented, in his capacity as a private attorney, at least one of Attorney Herbst's clients. While Attorney Carbone opined that he did not feel that a conflict of interest existed, he nevertheless recused himself from further participation in the hearing, and Town Attorney Daniel Schopick replaced him.

Attorney Herbst began his opposition to the applications, by highlighting the role of emergency services in responding to calls from a multi-unit age restricted housing complex. Counsel for 48 Monroe Turnpike, LLC objected (ROR 45c, p. 70-71), claiming that such issues were not germane to the change of zone application, but should properly be addressed during the special permit process, when the overlay zones were presented for approval.

Chairman Fred Garrity refused to preclude the testimony. The chair ruled: "He has the ability to present whatever information he thinks is valid. We're going to sit and listen to it and weigh it and judge it as required." (ROR 45c, p. 71).

The first witness presented by Attorney Herbst was Sergeant Robert Coppola, a veteran Trumbull police officer. Sergeant Coppola, the President of the Trumbull Police Union, explained the interface between the Trumbull Police Department and the Trumbull Emergency Medical Service (EMS), when responding to calls for assistance.

He was asked: "Would you say that currently, without any new assisted living facilities, apartments or new developments, is it fair to say that the Trumbull police officers are stretched to the max as far as first responders?"(ROR 45c, p. 85)

Sergeant Coppola responded "Yes", to which Attorney Schopick interjected " Mr. Herbst, that's not a question for a police officer to answer."

Although the question had been answered on the record, a tag team response involving Attorney Schopick and counsel for 48 Monroe Turnpike, LLC ensued. Each questioned the relevance of the inquiry. (ROR 45c, p. 85-87).

This repartee prompted a response from counsel for Old Mine Associates, LLC. Attorney Joel Green replied to the relevance argument: (ROR 45c, p. 88)

> "... Regulations are adopted by this Commission pursuant to Section 8-2. The Connecticut General Statute says, this commission is aware and I know counsel is aware that among the provisions are 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. Such regulations shall be designed to lessen congestion in the streets, secure safety from fire, panic, flood and other dangers, to promote public health and general welfare.
>
> "Certainly, these are concerns of health and general welfare, concerns of safety, which are concerns that this Commission, pursuant to the Connecticut General Statutes needs to take into account in both adopting and indeed in amending your regulations, which require the same standard."

The Plaintiffs maintain that Attorney Schopick's attempt to limit information considered by the Commission, and his comment on the weight the Commission should accord the testimony of Sergeant Coppola, rendered the public hearing process fundamentally unfair, and prejudiced the Commission's vote on both the change in zoning classification, and the amendments to the Trumbull Zoning Regulations.

Courts have long recognized a common law right to fundamental fairness in administrative proceedings. Grimes v. Conservation Commission, 243 Conn. 266, 273-74 (1997). While hearings before municipal land use bodies are conducted without regard to strict rules of evidence, and are informal, the conduct of a hearing must be fundamentally fair, and cannot violate rules of natural justice. Pizzola v. Planning & Zoning Commission, 187 Conn. 202, 207 (1974); Miklus v. Zoning Board of Appeals, 154 Conn. 399, 406 (1967). During the course of a public hearing, no one may be deprived of the right to present relevant evidence, or to cross examine witnesses produced by an adversary. In order to meet the fundamental fairness standard, all parties must have an opportunity to know the facts on which the commission is forced to act, and to offer rebuttal evidence. R & R Pool & Patio, Inc. v. Zoning Board of Appeals, 257 Conn. 456, 480 (2001); Megin v. Zoning Board of Appeals, 106 Conn. App. 602, 608-09 (2008).

There is a strong presumption of regularity in the proceedings before a municipal land use body. Foran v. Zoning Board of Appeals, 158 Conn. 331, 336 (1969); Scovil v. Planning & Zoning Commission, 155 Conn. 12, 19 (1967). However, even in a situation in which the presumption of regularity is rebutted, not all irregularities require a reviewing court to set aside a decision. Material prejudice to the complaining party must be shown. Murach v. Planning & Zoning Commission, 196 Conn. 162, 205-06 (1985).

At trial, counsel for the Town of Trumbull did not claim that the intervention of Attorney Schopick into the December 19, 2018 public hearing session was appropriate. Instead, trial counsel argued that no prejudice to any party had been demonstrated, and that a single incident which took place on one evening of a three night public hearing, is insufficient to taint the entire process. Furthermore, counsel maintained, nothing said by the Trumbull Town Attorney instructed the commission concerning how to vote on the applications.

The record supports trial counsel's claim that the incident of December 19, 2018 involving Attorney Schopick and Attorney Herbst was isolated, and not representative of the conduct of the entire proceeding. However, it should be noted that the intervention occurred during a presentation orchestrated by a politically active attorney, and one time first selectman, after the Commission's chair had ruled that the information would be heard. At all other times, the record of the hearing reveals, Attorney Schopick and Attorney Cordone assumed the role of passive observer.

A municipal town attorney, as legal advisor to a land use commission, does not function in the role of judge or magistrate. If expert testimony is proffered, he or she is not a gatekeeper, charged with determining which expert testimony will be considered, a role played by a presiding judge in a civil or criminal trial. State v. Porter, 241 Conn. 57, 74-75 (1997).

The weight to be given to the testimony of any witness, expert or lay, is for the land use agency to determine, in all instances. A commission is not required to believe any witness, even an expert. Kaufman v. Zoning Commission, supra, 156-57; Manor Development Corporation v, Conservation Commission, 180 Conn. 692, 697 (1980). The commission chair presides at all meetings, and rules on any points of order, pursuant to Robert's Rules of Order.[4]

Sergeant Coppola and Barbara Crandall, interim chief of Trumbull's Emergency Medical Service (EMS) were not subpoenaed by Attorney Herbst to testify in a civil court of jury trial, or in an administrative proceeding to which the Town of Trumbull is a party. Under those circumstances, it is entirely appropriate for them to consult with, and obtain guidance from, the office of the Trumbull Town Attorney. In those instances, the Town Attorney serves as an advocate, acting on behalf of a party to the proceedings, and the municipal employees would be testifying in their capacity as Trumbull officials or employees.

By contrast, in a matter before a land use board of commission, the town attorney does not represent either the applicant, or those opposed to the application. He or she should not advocate for either party.

Furthermore, as Sergeant Coppola and Barbara Crandall both indicated, they were speaking as individuals. Sergeant Coppola explicitly stated that he was not appearing before the Planning and Zoning Commission on behalf of either the Chief of Police, or the Trumbull Police Commission (ROR 45c, p. 89). As private citizens, each has a right to express opinions during the course of a public hearing, without interference or commentary by the town attorney. Both were subject to cross examination on December 19, had counsel for the applicant decided to exercise that prerogative.

Viewed in context, however, the statements of the Town Attorney on December 19, 2018, did not impact the fundamental fairness of the proceedings, and the record substantiates the "no harm no foul" defense provided by trial counsel for the Town of Trumbull.

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[4] It is too often assumed that an attorney possesses expertise concerning Robert's Rules of Order, simply on the basis of his or her status as an attorney at law. The court is not aware of any law school which offers an accredited class in Robert's Rules of Order, nor is the document featured on any bar examination. Furthermore, General Henry Martyn Robert, who published the first edition of Robert's Rules of Order in 1876, was a Brigadier General in the Army Corps of Engineers. He was not a practicing attorney. The court is able to take judicial notice of the plethora of non-lawyers at the federal, state and municipal level, who are recognized and respected for their parliamentary expertise, but lack formal legal training.

Nothing in the record supports an inference that Attorney Schopick attempted to influence any member of the Commission to vote in favor of or against either application. Nor did he provide any information, either on the record or ex-parte, bearing upon the merits of the proposal before the Commission.

His comments dealt only with the weight to be given to Sergeant Coppola's information. There is no evidence suggesting that any Commission member was influenced by the Town Attorney's comments. No evidence was excluded, in that Sergeant Coppola responded to the question which was asked, prior to the interruption by Attorney Schopick.

The record is, therefore, totally lacking in any evidence that any prejudice resulted from the exchange on December 19, 2018.

It should also be noted, that Attorney Schopick did not advise the Commission during the first two nights of the public hearing process. Therefore, he may have been unaware of the extreme latitude given to both opponents and proponents of the use of 48 Monroe Turnpike for age restricted residential purposes.

Before the public hearing was closed, additional testimony was received from many witnesses, including Trumbull First Selectman Vicki Tesoro, concerning the use of 48 Monroe Turnpike for residential use. The first selectman spoke as an advocate for assisted living, and responded to remarks made earlier in the evening concerning the Trumbull EMS. She spoke "... personally in favor of this zone change." (ROR 45c, P. 120-21)

All witnesses testified without interruption or comments from the Commission's legal advisor.

Since the record is devoid of any evidence of prejudice to any party, the Plaintiffs' claim that the public hearing was fundamentally unfair, is unfounded, and not supported by the record.

NO CONFLICT OF INTEREST BY COMMISSION CHAIR DEMONSTRATED

The Plaintiffs next claim that Fred Garrity, the chair of the Trumbull Planning and Zoning Commission, was burdened by a conflict of interest, and should have recused himself prior to the Commission's January 2, 2019 votes concerning the change of zone, and amendments to the Zoning Regulations.

This claim is not meritorious.

No issue concerning any real or potential conflict of interest was raised prior to the close of the public hearing process on December 19, 2018.

On December 28, 2018, nine (9) days after the public hearing was closed, and six (6) days before the Commission was slated to vote on the applications, the chair of the Trumbull Republican Party sent an email to First Selectman Tesoro. The email claimed that an unnamed member of the Planning and Zoning Commission was subject to a conflict of interest, because of work he had performed at the request of a firm which employed the first selectman's husband.

The email was provided to Commissioner Garrity, prior to the January 2, 2019 voting session. Rather than ignore the communication, and wait for an unsuccessful party to raise the issue on appeal,

Garrity announced at the January 2, 2019 meeting that he was the commissioner referred to in the communication (ROR 45d, p. 3-7).

Garrity explained that he is the owner of a company known as FTG Strategic Partners. In the spring of 2018, his company entered into a contract with SPM Corporation, a concern with which Thomas Tesoro, the first selectman's husband, is associated. FTG Strategic Partners performed sexual harassment training for SPM Corporation, which included a video, accompanied by a sixty-five (65) page written presentation.

The final installment on the contract was paid in October of 2018.

The Trumbull Town Carter provides that the Town Attorney is appointed by the first selectman. The appointment involves employment at will, and the attorney can be removed at any time, without cause.

Garrity decided to consult with an outside attorney concerning any alleged conflict of interest, in that the issue involved a member of the first selectman's family. This decision avoided any potential political blowback, should the Town Attorney opine that no conflict of interest was present.

Attorney William Bloss provided a written opinion to Commissioner Garrity, a portion of which was read, on the record, at the January 2, 2019 meeting. The opinion letter, which analyzed both Section 8-11 of the General Statutes along with applicable provisions of the Trumbull Code of Ethics, found that no conflict of interest existed, based upon an analysis of the facts presented. Therefore, Commissioner Garrity could properly case a vote on both the zone change application, and the proposed amendments to the Trumbull Zoning Regulations.

During the course of these appeals, the Plaintiffs requested permission to supplement the administrative record, regarding the claimed conflict of interest involving Commissioner Garrity. It was ordered that a copy of Attorney Bloss' opinion letter consisting of eight (8) pages, be made part of the record (ROR 46).

The Plaintiffs claim that they were denied the right to cross examine Commissioner Garrity concerning the opinion letter (ROR 46) and the specifics of the relationship between FTG Strategic Partners and SPM Corporation. This claim, particularly in light of the fact that the entire opinion letter was made part of the record, is not persuasive.

The record supplies no information which illuminates the conflict of interest issue, and the court is unwilling to speculate concerning any reason, strategic or political, for the failure of the email's author to bring the issue forward prior to the close of the public hearing. However, the court applauds Commissioner Garrity's decision to address the issue in a public forum, rather than allowing it to fester in an atmosphere of gossip and innuendo.

There is a presumption, that members of an administrative agency are not biased. Jutkowitz v. Department of Health Services, 220 Conn. 86, 110 (1991); Rado v. Board of Education, 216 Conn. 541, 556 (1990); Villages, LLC v. Planning & Zoning Commission, 149 Conn. App. 448, 459 (2014). To overcome this presumption, a party must do more than raise an issue of conflict of interest of bias after the administrative record has been closed. Actual bias, not merely potential bias, must be shown. O & G

Industries, Inc. v. Planning & Zoning Commission, 232 Conn. 419, 429 (1998); Clisham v. Board of Police Commissioners, 223 Conn. 354, 362 (1992).

Any analysis concerning an alleged conflict of interest or personal bias, begins with an examination of Section 8-11 of the General Statutes. It reads, in relevant part:

> "...No member of a zoning commission or board... shall participate in the hearing or decision of the board or commission of which he is a member, upon any matter in which he is directly or indirectly interested in a personal or financial sense... "

Section 8-11 functions as a preventative measure, designed to assure the public that individual property rights will be protected in the zoning process. Thorne v. Zoning Commission, 178 Conn. 198, 203 (1979). Public policy requires that zoning officials decline to participate in situations which might reasonably conflict with private, personal or financial interests. Personal interest may not conflict with public duty, Low v. Madison, 135 Conn. 1, 8 (1948).

Section 8-11 clearly requires a member of a planning and zoning commission to disqualify himself, when a decision of the zoning authority could inure to his pecuniary benefit. Anderson v. Zoning Commission, 157 Conn. 285, 290 (1968); Lake Garda Improvement Assn. v. Town Plan & Zoning Commission, 151 Conn. 476, 480 (1964).

There is no claim that Commissioner Garrity had a financial interest in the applications which were before the Commission. He has no interest in 48 Monroe Turnpike, LLC, or its parent company. Nor does he have any interest in the real estate, 48 Monroe Turnpike, Trumbull.

However, the Plaintiffs posit that FTG Strategic Partners was compensated for a project by a company in which the first selectman's husband is a principal. They insist that this demonstrates a "personal interest" in the two (2) applications before the Commission, and that recusal is required.

This allegation, for reasons set forth in the letter of January 2, 2019 (ROR 46) is utterly untenable, and without foundation.

A personal interest, consistent with Section 8-11, may involve either an interest in the subject matter before the land use body, or a relationship with parties before the zoning authority which impairs the official's impartiality. Anderson v. Zoning Commission, supra, 290; Timber Trails Associates v. Planning & Zoning Commission, 99 Conn. App. 768, 774 (2007).

A search of the record reveals that Commissioner Garrity has no relationship with either the applicant, or any of those opposing the applications, which would impair his impartiality. Nevertheless, the Plaintiffs contend that the relationship between FTG Strategic Partners and SPM Corporation requires recusal, and Commissioner Garrity's vote should be disallowed.

This allegation fails to resonate, based on the facts supplied in the record, as supplemented.

Not every interest, no matter how remote and infinitesimal, may be said to tempt a public official to allow a personal interest to interfere with his or her sworn duty. Gaynor-Stafford Industries, Inc. v. Water Pollution Control Authority, 192 Conn. 638, 649 (1984); Timber Trails Associates v. Planning & Zoning Commission, supra, 775.

Members of the Trumbull Planning and Zoning Commission are elected. They are not subject to appointment by the first selectman, and their terms of office are not coextensive with that of the first selectman.

As is the case with all of Trumbull's boards and commission, the first selectman is an ex-officio member of the Commission, without vote. The Commission's authority is derived from Chapter 124 of the General Statutes, and it is not subject to the dictates of municipal officials. Alternate members of the Commission must be selected consistent with Section 8-1b[5] of the General Statutes.

No provision of the General Statutes, or the Trumbull Code of Ethics prohibits the first selectman from expressing her opinion concerning any issue or application before the Trumbull Planning and Zoning Commission, as was done in this instance. Presumably, members of the Commission, all of whom sought public office, have some familiarity with the person serving as the town's chief executive officer.

The first selectman is required to perform an official role, concerning the Commission's budget. She is charged with recommending the appropriation of monies for clerical staff assigned to the Commission, as well as monies necessary to defray the cost of legal notices required by various provisions of the General Statutes. Any budgetary recommendations of the first selectman are subject to review by the Trumbull Board of Finance, and the Trumbull Town Council.

While it is true that participation by a public official in a matter in which he has a personal interest is sufficient to require disqualification; Low v. Madison, supra, 8; Candlewood Hills Tax District v. Medina, 143 Conn. App. 230, 246 (2013); this recognition must be tempered by the realization that municipal government would be severely handicapped, if any conceivable interest, however remote or speculative, would require the disqualification of a zoning official. To abrogate the action of a land use body, on the basis of remote or nebulous interests, could have the unintended consequence of depriving the municipality of the volunteer services of concerned and public spirited citizens. Anderson v. Zoning Commission, supra, 291.

Hurling political spitballs from the sidelines, must not be confused with the legitimate and indispensable role of an opposition political party to raise questions and expose instances of impropriety, when performing the watchdog function which is expected of the loyal opposition, and is so vital to a healthy representative democracy.

Chairman Garrity's vote concerning the applications submitted by 48 Monroe Turnpike, LLC was proper and appropriate. The records fails to reveal any personal interest or bias which would require recusal.

NO PREJUDGEMENT BY COMMISSION MEMBER

Finally, the Plaintiffs claim that Commissioner Anthony Chory engaged in ex-parte communications concerning the applications, and that he prejudged the merits of the proposals.

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[5] Section 8-1b, C.G.S. – "Any town, city or borough ... shall have the power to provide by ordinance for the appointment or election of alternate members to its ... planning and zoning commission. Such ordinance shall provide for the manner of designating alternate members to act."

This claim is not well taken.

The Plaintiffs have failed to demonstrate any predisposition or bias in the part of Commissioner Chory, despite the court's willingness to supplement the record (ROR 49; ROR 50), so that the Plaintiffs would have an opportunity to develop this claim.

According to Rina Bakalar, Trumbull's Economic and Community Development Director, she met with Commissioner Chory for the purpose of discussing general development issues. The private meeting occurred while the 48 Monroe Turnpike, LLC applications were pending before the Commission, and the public hearing process was ongoing.

According to Ms. Bakalar, (ROR 48; ROR 49), Commissioner Chory offered an unsolicited opinion concerning the issue of noise, relative to the 48 Monroe Turnpike, LLC application. He went on to say that he had no issue with the application, to which Ms. Bakalar replied "I agree."

Commissioner Chory claims to have no recollection of the conversation, but indicated that it was "possible" that the conversation had occurred (ROR 50).

There is no evidence that Bakalar provided any information to Commissioner Chory. Since he does not recall the conversation, no information of an ex-parte nature could have been communicated to other members of the Commission by Commissioner Chory. The two words "I agree," were allegedly uttered by an employee of the Town of Trumbull, not by a representative of the applicant.

The Plaintiffs cannot transform a conversation which Commissioner Chory does not recall, into a finding of predisposition, or bias. In order to show predisposition, a party must demonstrate actual bias, not merely potential bias. O & G Industries, Inc. v. Planning & Zoning Commission, supra, 429. Since the alleged statement was made while the public hearing process was in progress, and not before any evidence was presented, there can be no showing of predisposition of prejudgment. Woodburn v. Conservation Commission, 37 Conn. App. 166, 175-76 (1995).

CONCLUSION

All three (3) appeals filed in this matter, are DISMISSED.

(RADCLIFE, J.)

RADCLIFFE, JTR

RA Hiscock II

CLERK