DOCKET NO.: FST-CV-16-6028970-S	:	SUPERIOR COURT
NORWALK PUBLIC LIBRARY FOUNDATION, INC.	:	J.D. OF STAMFORD/NORWALK
Plaintiff	:	
v.	:	AT STAMFORD
ZONING COMMISSION OF THE CITY OF NORWALK AND 587 CT AVE, LLC	:	
Defendants.	:	FEBRUARY 22, 2017

DEFENDANT 587 CT AVE, LLC'S TRIAL BRIEF

The Defendant, 587 CT Ave, LLC ("Defendant") submits this trial brief in opposition to the brief filed by the Plaintiff, Norwalk Public Library Foundation, Inc. ("Plaintiff"), dated January 23, 2017.

As a threshold matter, Plaintiff fails to establish statutory or classical aggrievement. Plaintiff is not the City of Norwalk Public Library ("NPL"). Plaintiff is not an abutting property owner. Plaintiff commenced this appeal because the Norwalk Public Library, a municipal agency, cannot sue another municipal agency, the City of Norwalk Zoning Commission ("Commission"). Plaintiff is a distinct legal entity from the NPL and has no possessory use interest in the municipal property owned by the City of Norwalk upon which the Library sits that abuts the Defendant's property. Therefore, the Court need not consider any of Plaintiff's substantive arguments because Plaintiff does not have standing to bring this appeal.

Moreover, even if the Court should reach them, Plaintiff's substantive arguments lack merit. The Defendant's applications for the development of its property submitted to the Commission comply with all of the City of Norwalk Building Zone Regulations ("Zoning Regulations"), were reviewed and signed off on by all necessary municipal departments, and

were approved as a matter of right by the Commission pursuant to the standards of review set forth in the Zoning Regulations. Accordingly, Plaintiff's appeal should be denied and the Commission's approval of the applications affirmed.

RECORD HISTORY

On November 12, 2015, Defendant applied for Coastal Area Management ("CAM") Review, [Application #24-15CAM] (RoR Ex. 1) and Site Plan Review, [Application #9-15SPR] (RoR Ex. 2), (collectively the "Application") in connection with a proposal to build a five story, 69 unit multi-family residential structure atop existing on-grade parking[1] in the western section of its property located at 11 Belden Avenue in Norwalk, Connecticut. (RoR Exs. 1; 2). 11 Belden Avenue (the "Subject Property") is a 1.2+/- acre roughly "L-shaped" property fronting on Belden Avenue to the east and abutting Mott Avenue to the south. (RoR Exs. 1; 48). The Subject Property is currently improved with an existing 9,900 square foot office building constructed around 1978. (RoR Ex. 1). People's Bank occupies the first floor of the existing building. (RoR Ex. 1). No changes were proposed to the existing building. (RoR Ex. 2). The Subject Property abuts the land owned by the City of Norwalk to the east and south. The property upon which is located the NPL, abuts the Subject Property to the east. (RoR Ex. 1).

The Application was preliminarily reviewed by the Plan Review Committee of the Commission at its December 3, 2015 meeting. (RoR Exs. 9; 10; 42). A public hearing on the Application was conducted on January 20, 2016, at which hearing the Plaintiff was given an opportunity to be heard and in fact various individuals submitted letters and/or spoke on behalf of Plaintiff. (RoR Exs. 20; 21; 24; 43). The Commission closed the hearing on January 20, 2016 and referred the Application back to the Plan Review Committee for discussion. (RoR Exs. 43;

[1] Plaintiff incorrectly asserts that the Application proposes "*enclosed* parking on the first floor." *See* Pl.'s Brief at p. 2. The Application proposes to build a structure atop existing open on-grade parking. (RoR Exs.1; 2; 48 at p. A-200 through A-202).

7; 44; 45.) The Application was considered by the Plan Review Committee at its meetings on February 11, 2016 (RoR Exs.7; 44), March 10, 2016 (RoR Exs.6; 45) and was placed on the Commission meeting agenda for consideration at its March 16, 2016 meeting (RoR Exs.5; 46). Action on the Application required four concurrent votes to approve or deny the Application. (RoR Exs.4; 47). The motion to approve the Application received two votes in favor and two votes against and, therefore, it did not constitute an action. (RoR Exs.4; 47). Plaintiff incorrectly suggests that this was a denial, since a denial would also have required 4 concurrent votes in opposition to the motion. Instead, as the record reflects, the Commission's vote did not constitute an action and as reflected in the record, "[t]he item did not carry." (RoR Exs.5; 47); (RoR Ex.4) ("Mr. Blank explained that the application had to have 4 concurring votes. Since the vote was 2-2, it had not constituted an action, therefore, it had to be acted upon again."). On March 18, 2016, Defendant consented to a 35-day extension of time through April 20, 2016 for the Commission to act on the Application. (RoR Ex.13). The Application was placed on the agenda for the April 20, 2016 meeting of the Commission and was approved by a vote of 5 in favor and 1 opposed. (RoR Exs.4; 47). Notice of the decision of the Commission was published in the Norwalk Hour on April 28, 2016. (RoR Ex.12). Remarkably, Plaintiff suggests that the notice of decision was only "allegedly" published in the Norwalk Hour, despite having attached the April 28, 2016 Norwalk Hour publication as Exhibit A to its Complaint. *See* Complaint dated May 11, 2016 (Entry # 100.31).

ARGUMENT

I. PLAINTIFF IS NOT AGGRIEVED

Plaintiff fails to establish statutory or classical aggrievement. Plaintiff is not the NPL. Plaintiff is not an abutting property owner. Plaintiff commenced this appeal because the NPL, a

municipal agency, cannot sue another municipal agency, the Commission. Plaintiff is a distinct legal entity from the NPL and has no possessory use interest in the municipal property owned by the City of Norwalk upon which the Library sits that abuts the Defendant's property.[2]

"Review of an action of a planning and zoning agency exists only under statutory authority." (Internal quotation marks omitted.) *Walls v. Planning and Zoning Commission*, 176 Conn. 475, 477 (1979). "A statutory right to appeal may be taken advantage of only by strict compliance with the statutory provisions by which it is created." (Internal quotation marks omitted.) *Bridgeport Bowl-O-Rama, Inc. v. Zoning Board of Appeals*, 195 Conn. 276, 283 (1985). A zoning appeal is brought pursuant to General Statutes § 8-8. General Statutes § 8-8 (b) provides in relevant part: "[A]ny person aggrieved by any decision of a board . . . may take an appeal to the superior court for the judicial district in which the municipality is located . . . ." The Plaintiff bears the burden of establishing aggrievement under § 8-8. *Hall v. Planning Commission*, 181 Conn. 442, 444 (1980).

"[P]leading and proof of aggrievement are prerequisites to the trial court's jurisdiction over the subject matter of a plaintiff's appeal." *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184, 192 (1996). Subject matter jurisdiction is the power of the court "to hear and determine cases of the general class to which the proceedings belong." *Figueroa v. C&S Ball Bearings*, 237 Conn. 1, 4 (1996). An issue of subject matter jurisdiction can be raised at any time and cannot be waived. *Gagnon v. Planning Commission*, 222 Conn. 294, 297 (1992); Practice Book § 10-33. Once the issue of subject matter jurisdiction is raised, the court must resolve the issue before proceeding with the case. *Figueroa*, 237 Conn. at 4.

[2] The abutting property upon which the NPL sits is owned by the City. (RoR Exs. 1; 2; 48 at Property Survey Sheet).

There are two distinct categories of aggrievement – statutory aggrievement and classical aggrievement. *See Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 486 (2003). Plaintiff fails to establish either statutory aggrievement or classical aggrievement.

A. Plaintiff is not statutorily aggrieved

"Statutory aggrievement exists by legislative fiat, *not by judicial analysis of the particular facts of the case*. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 485–87 (2003) (citations omitted; internal quotation marks omitted). General Statutes § 8-8 provides in pertinent part that an "'Aggrieved person' means a person aggrieved by a decision of a board . . . . In the case of a decision by a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, *'aggrieved person' includes 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*." (Emphasis added). Plaintiff is not an abutting landowner. Plaintiff is not a landowner at all. Therefore, Plaintiff is not statutorily aggrieved and Plaintiff asserts no argument that it is statutorily aggrieved.

B. Plaintiff is not classically aggrieved

Classical aggrievement requires a two-part showing. "First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share.... Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest." *Fort Trumbull Conservancy, LLC v. City of New London*, 265 Conn. 423, 430-431 (2003).

"If the injuries claimed by the plaintiff are *remote, indirect or derivative* with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. When, for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." *Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission of the Town of Newtown*, 285 Conn. 381, 395 (2008) (internal quotations and alterations omitted).

Plaintiff's alleged harm (risk of parking difficulty for the NPL) is, in reality, derivative of alleged harm which, if suffered at all, would be harm to the NPL – not Plaintiff.[3] Plaintiff is not the NPL. Plaintiff is a distinct legal entity, with no interest – possessory or otherwise – in the City of Norwalk property upon which the NPL is located that abuts the Subject Property. Plaintiff is a charitable foundation that administers an endowment to provide materials and services to the NPL.[4] *See* Plaintiff's Trial Brief dated January 23, 2017 ("Pl.'s Brief") at 3, 13. This distinction is particularly important in the context of aggrievement because it demonstrates Plaintiff's lack of standing. Even if library parking difficulties exist, this harm is *remote, indirect or derivative* vis-à-vis the Plaintiff as opposed to the NPL, and the Plaintiff is not the proper

[3] The approval of the application can be claimed to be detrimental to the NPL parking situation when in fact it will provide the NPL with the use of five additional spaces. Moreover, even if parking difficulties exist, it does not suffice as a harm to the NPL or Plaintiff since the Zoning Regulations exempt NPL from being required to provide off-street parking where located within six hundred feet of a municipal parking lot. *See* (RoR Ex. 48 NZR § 118-1220 (N) ("No off-street parking shall be required for a municipal library, where the subject property is located within six hundred (600') of a municipal parking lot").

[4] The distinction between Plaintiff and the NPL is critical. Plaintiff brings this appeal in lieu of the NPL because NPL, a municipal library, like the defendant zoning commission, is a municipal agency without statutory authority to sue or be sued independent of the municipality. *See e.g., Luysterborghs v. Pension & Ret. Bd. of City of Milford*, 50 Conn. Supp. 351, 355 (Super. Ct. 2007) ("certain municipal departments are not legal entities separate from their municipalities, and, therefore, they may not be a party in a lawsuit . . . . unless departments within a municipal government constitute distinct bodies politic under state law, the proper defendant is the municipality itself . . . ." (internal quotations and citations omitted).

party to commence this appeal. Plaintiff avoids this critical distinction in its brief and repeatedly refers to itself and the NPL interchangeably where convenient. For example, Plaintiff refers to patrons of the NPL as "Plaintiff's patrons", NPL's parking lot as "Plaintiff's parking lot" as though Plaintiff is the NPL. *See e.g.*, Pl.'s Brief at pp. 5, 15, 16. Plaintiff is not the NPL. Plaintiff owns no land, has no parking lots and has no patrons. Plaintiff is a charitable foundation.

As a foundation, Plaintiff must satisfy an additional test to show classical aggrievement. To evaluate the standing of an association or entity, such as Plaintiff, Connecticut has adopted the federal test for representational standing articulated in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977). *See, Fort Trumbull Conservancy, LLC v. City of New London*, 265 Conn. 423, 434-435 (2003). "Under that test, [a]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (Internal quotation marks omitted.) *Connecticut Associated Builders & Contractors v. Hartford,* 251 Conn. 169, 185 (1999). Therefore, Plaintiff must meet the two-part test for classical aggrievement in the context of the additional three-part test for representational standing. *See e.g., Fort Trumbull Conservancy, LLC*, 265 Conn. at 428, 434-435 (plaintiff limited liability corporation was required to meet associational standing in addition to classical aggrievement). Plaintiff fails to establish representational standing as a threshold matter but, in any event, also fails to establish classical aggrievement in its own right under the conventional two-part test.

1. **Plaintiff fails to establish representational standing**

Plaintiff does not assert any allegations concerning its *members* or allege that any of its *members* have standing to bring this appeal in their own right. Therefore, Plaintiff cannot meet the first prong of the representational standing test. The plaintiff in *Fort Trumbull Conservancy, LLC v. City of New London*, 265 Conn. 423, 428 (2003) was a limited liability corporation formed to preserve, conserve, maintain and protect the continuity, historic importance, environment and legal status of the Fort Trumbull area. The defendant moved to dismiss the complaint for lack of standing. *Id.* at 425. The plaintiff claimed standing to maintain the action arguing that its members, who resided in the area affected by the development plan, were "imminently threatened" by the implementation of that allegedly unconstitutional and otherwise unlawful plan. *Id.* at 434. The Court concluded that this allegation was insufficient to demonstrate classical aggrievement because the plaintiff's complaint contained no allegation of any *specific and direct injury* that the plaintiff's members suffered or were likely to suffer as a result of the alleged constitutional infirmities and violations. *Id.* at 435. In other words, the plaintiff failed to demonstrate how its members had been "specially and injuriously affected" by the defendants' conduct and therefore lacked standing. *Id.*; *see also, Meriden Concerned Citizens, LLC v. City of Meriden*, CV030284428, 2003 WL 22708667 (Conn. Super. Ct. Nov. 3, 2003) (holding plaintiff failed to satisfy the first prong of the *Hunt* test because it failed to demonstrate that any of its individual members would have standing). Plaintiff here lacks standing to bring this appeal for the same reasons. Plaintiff fails to assert any allegations concerning any individual members and fails to establish or even allege that any of its individual members have been "specially and injuriously affected" by the Application's approval. Therefore, Plaintiff lacks representational standing to bring this action.

2. **Plaintiff fails to establish classical aggrievement under the conventional two part test**

Even if Plaintiff met the standing test for an association – which it has not – Plaintiff fails to satisfy the two prong test for classical aggrievement. Plaintiff cannot articulate what specific, personal and legal interest in the controversy it has as opposed to the general interest of all members of the community, or how that specific, personal and legal interest has been injuriously affected.

i. Plaintiff has no specific, personal and legal interest

With respect to the first prong, Plaintiff claims that it has a specific personal and legal interest in the NPL property because "the impact of this development on parking, perhaps the chief challenge for the Plaintiff to overcome in performing its function, together with the fact that the Application sets aside five spaces for use by the Library, constitutes a specific, personal and legal interest in the subject matter of the decision." Pl.'s Brief at p. 16. Plaintiff fails to establish how this is a specific, personal and legal interest at stake that is different from the interests shared by all members of the community. Available parking for library patrons is a matter of concern shared by all members of the community – not a specific personal ***and legal interest*** unique to Plaintiff. *See Fort Trumbull Conservancy, LLC*, 265 Conn. at 430-431. The fact that Plaintiff is a charitable benefactor of the library and financially contributes to its programs does not transform a general concern into a specific, personal and legal interest. Simply put, Plaintiff does not have a legal interest in the NPL's parking. Plaintiff has a general interest as do all members of the community.

ii. The Application has not specially and injuriously affected Plaintiff

Second, Plaintiff claims that the approval of the Application has specially and injuriously affected its specific personal and legal interest in the controversy insofar as there is an alleged "*possibility* of an adverse effect" because residents of the proposed building "will take spaces not included within the Application" thereby "rendering Plaintiff's programming use untenable." Pl.'s Brief at p. 17. Thus, Plaintiff argues, as a benefactor of the NPL, "it is reasonably foreseeable *and possible* that Plaintiff will suffer a significant negative impact as a result of the approval of the Application". Plaintiff's Brief at p. 16. This assertion strains credulity and Plaintiff does not specify what negative impact it will suffer. Nor does Plaintiff articulate *how* its purported specific personal interest will be specially and injuriously affected or claim any specific injury *to itself* beyond a general speculative notion that the Library will attract fewer patrons if the Application is approved. This purported injury is far too attenuated to confer standing on Plaintiff. Even assuming for purposes of argument that fewer patrons would use the NPL if the Application is approved – which Defendant denies – Plaintiff will not suffer *any* injury. For example, Plaintiff does not claim that its administration of its endowment will be impacted whatsoever. "The Plaintiff is a non-stock corporation which was organized for the purpose of establishing and administering an endowment to provide materials and program services to the Norwalk Public Library System that go beyond what is available through public funding . . . ." Pl.'s Brief at p. 3. Moreover, as part of the approved site plan, the NPL will actually gain use of five (5) additional parking spaces which are not presently available to the patrons of the NPL. (RoR Ex. 43 at pp. 12-13, 18, 73; RoR Ex. 42 at p. 4).

Plaintiff relies upon *Moutinho v. Planning & Zoning Comm'n of City of Bridgeport*, 278 Conn. 660 (2006), and cases cited therein, to argue that its general indirect interest and vague

alleged injury are sufficient to establish classical aggrievement. However, *Moutinho* and the cases cited therein are distinguishable because they all involve some agreement ***to use*** the underlying property; in this instance, Plaintiff does not have an agreement to use the NPL property or the Subject Property. (RoR Ex. 43 at p. 19) ("[D]oes the library have any rights or lease or any agreement that allows them to park on this site currently? No."). Plaintiff has no legal interest in the Subject Property or the NPL property. Plaintiff merely contributes funding for services to the Norwalk library system including its library branches that are not in proximity to the Subject Property.

In *Moutinho*, our Supreme Court held that the non-owner applicant was classically aggrieved because he had an oral agreement that the parties intended to abide by for a long-term lease of the underlying property *contingent on approval of the application*. *Moutinho*, 278 Conn. at 669-670. Thus, the non-owner applicant was held to be either a lessee or licensee with a substantial and legitimate interest. *Id.* Significantly, Moutinho was the applicant and had a possessory interest in the property by virtue of the agreement, far more significant than the Plaintiff's alleged interest here. Plaintiff is not the applicant and has no possessory interest or other nexus to the property apart from administering an endowment to benefit the real property user, the NPL.

In *Moutinho* the Court also analyzed *DiBonaventura v. Zoning Board of Appeals*, 24 Conn. App. 369, 588 A.2d 244, *cert. denied*, 219 Conn. 903, 593 A.2d 129 (1991). In *DiBonaventura*, a father and son appealed the denial of a zoning approval for a used car dealership. The father owned the land and he and his son had an informal agreement that the son would manage the car dealership located on the property. *DiBonaventura*, 24 Conn. App. at 370-71. The Appellate Court held that although the son did not have a legally enforceable

interest in the property he was classically aggrieved because the family agreement to use the property created a sufficient interest in the property. *Id.* at 376-77. Again, as in *Moutinho,* the son in *DiBonaventura* was the applicant and had a possessory interest in the use of the underlying property by virtue of the agreement, far more significant than the Plaintiff's purported interest here. Plaintiff has no possessory interest in the NPL property.

In *Moutinho,* the Court reasons that *DiBonaventura* stands for the proposition that "a landowner and a nonowner ***developer*** need not have a written, legally enforceable agreement when other facts, such as the existence of a credible, oral agreement, establish that the ***developer*** has a specific, personal stake in the property." *Moutinho*, 278 Conn. at 668-69. (Emphasis added). Plaintiff attempts to analogize the facts of this case to that proposition. However, the facts in *Moutinho* and *DiBonaventura* are wholly unlike those in the instant dispute. In *Moutinho* and *DiBonaventura,* the aggrieved party was the applicant and there was an agreement establishing a possessory use interest in the property. The possessory interest in use of the property was the critical factor that provided the basis for the required *personal* stake required for classical aggrievement in both *Moutinho* and *DiBonaventura*. Those facts do not exist here. Plaintiff is not the applicant. There is no agreement providing Plaintiff any interest in the NPL property. Plaintiff has no possessory interest in use of the NPL property. Plaintiff's only nexus to the NPL property is its administration of an endowment to benefit the NPL. This is too indirect, too remote of a connection to suffice for aggrievement under our case law.

II. STANDARD OF REVIEW

Connecticut General Statutes section 8-3 provides, "A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning or inland wetlands regulations." The Norwalk Zoning Regulations pertaining to site plan review similarly

provide, “Applications which comply with these regulations shall be approved or modified and approved by the Commission.” (RoR Ex. 49, NZR §118-1451 (B)(4)). “A site plan may be modified or denied only if it fails to comply with requirements already set forth in these regulations.” (RoR Ex. 49, NZR §118-1451 (B)(6)). The Commission approved the Application as of right, consistent with these principles.

It is axiomatic that the review of site plan applications is an administrative function of a planning and zoning commission. *Norwich v. Norwalk Wilbert Vault Co.,* 208 Conn. 1, 12, 544 A.2d 152 (1988). When a zoning commission is functioning in such an administrative capacity, a reviewing court's standard of review of the commission's action is limited to whether it was illegal, arbitrary or in abuse of discretion. *Clifford v. Planning & Zoning Commission,* 280 Conn. 434, 440, 908 A.2d 1049 (2006); *see also, Loring v. Planning & Zoning Comm'n of Town of N. Haven,* 287 Conn. 746, 756 (2008).

> In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the board] must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [board]. ... The question is not whether the trial court would have reached the same conclusion, but whether the record before the [board] supports the decision reached.... If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board.... If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court ... cannot substitute its judgment as to the weight of the evidence for that of the commission.... The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given.

Loring v. Planning & Zoning Comm'n of Town of N. Haven, 287 Conn. 746, 756–57 (2008) *quoting Vine v. Zoning Board of Appeals,* 281 Conn. 553, 559–60, 916 A.2d 5, on remand, 102 Conn.App. 863, 927 A.2d 958 (2007). (Internal quotation marks omitted.) Applying the foregoing in the instant case establish that the Commission’s approval must be affirmed.

III. APPROVAL OF THE APPLICATION MUST BE AFFIRMED BECAUSE THE RECORD REVEALS THAT THE APPLICATION COMPLIES WITH THE ZONING REGULATIONS AS FOUND BY THE COMMISSION

A. The Application Provides the Required Parking

Plaintiff incorrectly asserts that the Application lacks the legally required parking suggesting that the off premises parking at 3 and 5 Mott Avenue are insufficient in dimensional size and therefore fail to conform to the Zoning Regulations. The record contradicts this assertion. Furthermore, the Court need not consider Plaintiff's argument because Plaintiff failed to raise it before the Commission. (RoR Ex. 43 at p. 8) ("The parking is completely consistent with the regulations and meets the regulations Section 118-1220, particularly Sections G and H, which allow for off-site parking as we've proposed"); (RoR Ex. 43 at p. 20) ("be cognizant that they do meet the parking requirements for the site . . . I don't expect we're going to hear any testimony that they don't meet what's under our regs that is required parking for the site. They are allowed to use the offsite parking, which they are making use of. . . ."). The Zoning Regulations allow for use of offsite parking where the uses are complementary. (*Id.*); (RoR Ex. 49, NZR §118-1220 (G)-(H)). Here, as the record reflects, the proposed use of offsite parking at night and on weekends at 3 and 5 Mott Avenue is permitted because the parking complements the proposed use and does not conflict. (RoR Ex. 43 at p. 4); (RoR Ex. 42 at p. 2-3) ("So we're into that use of that space for use by the residential at night and weekends and office during the day, and out [sic] regulations allow that."). The parking at 3 and 5 Mott Avenue is office use during the day. (RoR Ex. 43 at p. 4). The proposed use by the Defendant is at night and weekends so it is a complementary use of existing parking lots that complies with the requirements of the Zoning Regulations. (RoR Ex. 43 at p. 4); (RoR Ex. 45 at pp. 2, 6); (RoR Ex. 46 at p. 3).

Contrary to the long-standing precedent controlling a court's review of a record appeal such as this, Plaintiff improperly attempts to incorporate evidence outside the record – counsel's own inexact, unverified measurements – to suggest that the offsite parking is nonconforming with the Zoning Regulations and, therefore, the Application should have been denied. Counsel claims that his measurements of the survey map (RoR Ex. 48, C-1.1), indicate that the dimensional size of the parking areas are not big enough. The Court need not consider this argument, but it is meritless in any event.

There is nothing in the record to suggest that the parking lots at 3 and 5 Mott Avenue were nonconforming. All required municipal departments reviewed the project and signed off on it. (RoR Ex. 33); (RoR Ex. 43 at p. 23); (RoR Ex. 42 at p. 4). Plaintiff could have raised this issue before the Commission prior to or at the public hearing but did not as indicated by the lack of citation to the record. Plaintiff belatedly attempts to introduce counsel's measurements, which is evidence outside the record. The Court previously considered this issue and held that allowing this evidence was an impermissible expansion of a zoning record because Plaintiff could have but failed to raise these alleged violations and discrepancies with the Commission prior to or during the public hearing. *See* Order dated January 19, 2017 (Entry # 106.01). Even if this untimely argument were correct – which it is not – the offsite parking at 3 and 5 Mott Avenue were existing uses. Even though there is nothing in the record to suggest that 3 and 5 Mott Avenue were nonconforming uses, even if they were, the parking complements the proposed use and does not conflict. Therefore, it would not be "enlarged, extended or altered." (RoR Ex. 49, NZR §118-800 (C) (1)). Accordingly, the Application provides the required parking.

B. The Application Meets the Required Setbacks

Plaintiff misconstrues Zoning Regulations § 118-504 (C)(1)(a)[2] to suggest that the proposed plan fails to meet the required setbacks because it purportedly "exceeds the 50% threshold of NZR §118-504 (C)(1)(a)[2]." In contrast to Plaintiff's argument, that section does not limit the square feet of all floors above the first floor to 50% of the first floor as Plaintiff suggests. Rather, in Subarea B (the relevant subarea) that section limits the uses set forth in [a] through [d] to 50% or less of the first floor. In other words, the uses set forth in subparagraphs [a] through [d] may make up only half of the first floor. That section does not speak to the square feet requirements of other floors. If Plaintiff's interpretation were correct, it would yield the absurd result that the combined square feet of every floor above the first floor could never exceed 50% of the square feet of the first floor. That is not the intention. Rather, that subsection contemplates that only half the first floor may be used for those enumerated uses. Here, the proposal conforms with this section because the building is being built atop existing on-grade parking and, therefore, "[t]he first floor is parking." ROR 43 at pg. 7. Therefore, no portion of the first floor is being used for multifamily dwellings.

C. No Special Permit was Required for the Parking Located at 3 and 5 Mott Avenue or Below the Proposed Building

Plaintiff makes the novel argument that by using existing parking lots for complementary parking (as expressly permitted under the Zoning Regulations), somehow "changed the character of the use" to an off-street parking facility requiring a special permit because it now supports the parking requirements of another property. As a threshold matter, the Court need not even consider this argument because Plaintiff could have but failed to raise it before the Commission. But even if the Court does consider this argument, it is meritless. The record does not reflect a special permit for any of the parking proposed in the Application because none was required.

The proposed parking sites located at 3 and 5 Mott Avenue did not require a special permit because, as discussed above, such a complementary use is expressly permitted pursuant to the Zoning Regulations as the record reflects. (RoR Ex. 42 at p. 2-3); (RoR Ex. 43 at pp. 4, 8, 20); (RoR Ex. 45 at pp. 2, 6); (RoR Ex. 46 at p. 3); (RoR Ex. 49, NZR §118-1220 (G), (H)). Furthermore, the off-site parking provided and allowed is an accessory use to the primary use – office – that exist at 3 and 5 Mott Avenue. (*Id.).* Moreover, the existing surface level parking above which the proposed building will be built did not require a special permit either and as indicated above, all required municipal departments reviewed the project and signed off on it. (RoR Ex. 43 at p. 23); (RoR Ex. 42 at p. 4). Plaintiff incorrectly asserts that the "NZR requires that all buildings containing a parking facility have a special permit. NZR §118-504.C(1)(b)[1]." Pl.'s Brief at 25. However, careful review of (RoR Ex. 49) NZR §118-504 C(1)(b)[1] contrasted with §118-504 C(1)(a) reveals that that section does not stand for the proposition that *all buildings* containing a parking facility require special permit, but that a proposed principle use of the property as a parking facility would. The parking below the proposed building is not the principle use and §118-504 C(1)(a) controls. If Plaintiff's contention were correct, then all uses would require special permit applications since all require on-site parking, thereby eliminating all uses by site plan review. A special permit is required under the Zoning Regulations for an off-street parking facility only when that use is the primary or principal use. Plaintiff is merely trying to distort the issues to shoehorn in an argument that the parking sites are parking facilities requiring a special permit. This is not the case.

D. The Long-Term Parking Agreements Do Not Constitute Restrictions on Use in Violation of the Zoning Regulations

Plaintiff misconstrues Zoning Regulations § 118-1220 (E) to argue that the long-term parking agreements with respect to the complimentary parking the Application utilizes at 3 and 5

Mott Avenue create an impermissible restriction on use.[5] Again, the Court need not take this issue up because Plaintiff could have but failed to raise this issue before the Commission. Regardless, this argument is meritless. The Application contemplates off-premises complimentary parking located at 3 and 5 Mott Avenue pursuant to Zoning Regulations § 118-1220 (G) and (H). Zoning Regulations § 118-1220 (E) contemplates on-premises parking *facilities*, shared among two or more distinct uses. That portion of Zoning Regulations § 118-1220 (E) recited in Plaintiff's brief prohibits restricting the use of particular parking spaces for a specific office, retail, or residential units in an on-premise parking facility shared among two or more distinct uses. (RoR Ex. 49, NZR §118-1220 (E)). That is not what the Application contemplates. Rather, as reflected by the record, the Application contemplates taking advantage of complimentary parking as is expressly permitted by the Zoning Regulations pursuant to § 118-1220 (G) and (H). (RoR Ex. 42 at p. 2-3); (RoR Ex. 43 at pp. 4, 8, 20); (RoR Ex. 45 at pp. 2, 6); (RoR Ex. 46 at p. 3); (RoR Ex. 49, NZR §118-1220 (G), (H)).

Plaintiff next makes the confounding argument that the record contains no long-term parking agreement for the 21 parking spaces to be provided at 5 Mott Avenue. The long term parking agreement providing for 21 parking spaces at 5 Mott Avenue is exhibit 17 of the return of record. (RoR Ex. 17). The long term lease for 18 parking spaces at 3 Mott Avenue is exhibit 16 of the return of record. (RoR Ex. 16). Moreover, the Application was approved with the condition that the long term parking agreements for 3 and 5 Mott Avenue "be reviewed and approved by Corporation Counsel and placed in the Land Records." (RoR Ex. 11).

[5] Zoning Regulations § 118-1220 (E) sets forth the calculation for the number of parking spaces the proposal requires setting out the mixed use parking overlap criteria. (RoR Ex. 49, NZR § 118-1220 (E)). Specifically, as indicated in the Note following the table "Mixed Use Parking Overlap Criteria" § 118-1220 (E) provides that the Mixed Use Parking Overlap Criteria "[m]ust reduce the larger by the percent listed, but not more than the number provided by the lesser." Thus, the Application requires 90 parking spaces. *Cf.* (RoR Ex. 48 p. C-1) *with* (RoR Ex. 49, NZR § 118-1220 (E)).

E. The Application Conforms to Buffer Requirements of Zoning Regulations § 118-504(F)(1)

Plaintiff misconstrues Zoning Regulations § 118-504(F)(1) and argues that the Application does not conform to the Zoning Regulations. As a threshold matter, as discussed above, the on-grade surface parking that the proposed building will be built above is not a parking facility. (RoR Ex. 9 p. 2); (RoR Ex. 49, NZR § 118-504(F)(5)) ("A minimum ten-foot buffer is required for at-grade parking areas which abut a residence zone. Parking structures shall be subject to Subsection D(2) herein.") Therefore, Zoning Regulations § 118-504(F)(1) does not apply to the Application. However, even if it did, Plaintiff's argument fails because it ignores that for purposes of Zoning Regulations § 118-504(F)(1), the principle structure is the existing bank which is "between the [Belden Avenue] street line and all parking". (RoR Ex. 49, NZR §118-504(F)(1)).

IV. THE APPLICATION DOES NOT REQUIRE THE OWNER'S SIGNATURE TO CONFORM TO THE ZONING REGULATIONS

The Zoning Regulations only require that the application be signed by the applicant. (RoR Ex. 49 NZR § 118-1451 (B)(1)). The owner's signature is required only where the applicant is not the owner. (RoR Ex. 49 NZR § 118-1451 (B)(1)) ("The Application shall be signed by the applicant and, ***if the applicant is not the owner,*** the owner of the property. If the applicant is unable to obtain the signature of the owner, the applicant ***may*** submit a letter of authorization signed by the property owner."). Here, there was no requirement for the owner to sign the application because the applicant is the owner so the owner's signature is unnecessary. The applicant was Defendant, 587 CT Ave, LLC. (RoR Exs. 1; 2; 3). The owner was 587 CT Ave, LLC. (*Id.*). The Application was signed by the applicant and owner, 587 CT Ave, LLC, by

and through its attorneys or record. (*Id.*). The Connecticut General Statutes do not require that the Application be signed by the owner.

> There is no statutory prohibition against any person or firm filing an application as agent for someone else although the principal should be disclosed in the application. Attorneys often file as authorized agents for their clients, and this has the advantage of having all correspondence of the agency and its staff go directly to the attorney without bothering the property owner or party in interest.

Robert A. Fuller, 9 Conn. Prac., Land Use Law & Prac. § 15:8 (4th ed.). "Without a provision in the zoning regulations requiring the consent of the property owner to file an application for a site plan, the owner's consent is not necessary even though the form used by the commission has a space designated for a signature 'owner authorization.'" *Id.* In this instance, even though the Norwalk CAM application form includes a direction that if signed by an agent, a letter of authorization from the owner must accompany the application, this is not required by statute or the Zoning Regulations. (RoR Ex. 49 NZR § 118-1451 (B)(1)) ("The Application shall be signed by the applicant and, ***if the applicant is not the owner,*** the owner of the property. If the applicant is unable to obtain the signature of the owner, the applicant ***may*** submit a letter of authorization signed by the property owner.").

> While the application form of the Commission requires the applicant to identify the property owner, there is no provision in the Norwalk Zoning Regulations requiring consent of the property owner for a zoning application of any kind, including a special permit. There is also no provision that the record title owner sign the application.

Lea Manor Health Care Center, Inc. v. Health Resources of Norwalk, Inc., No. CV93 304437S, 1993 WL 499037, (Conn. Super. Ct.) (*Fuller, J.*).

Plaintiff relies upon *D.S. Associates v. Planning and Zoning Com'n of Town Prospect*, 27 Conn. App. 508, 607 A.2d 455 (1992), for the proposition that failing to have the Application signed by an owner or have written authorization of the owner is fatal to the Application.

However, *D.S. Associates* does not stand for that proposition and is factually distinguishable from the instant situation. *D.S. Associates* was an appeal brought by the plaintiffs, two legally separate entities, Twin Pines Development Corporation ("Twin Pines") and D.S. Associates. *Id.* at 509. D.S. Associates was a partnership consisting of four partners, who were also the shareholders of Twin Pines. *Id.*at 510. Acting through its authorized agent D.S. Associates filed an application for subdivision of land identifying itself as owner of record. *Id.* However, approximately two months prior to filing the application, D.S. Associates had conveyed title to the property to Twin Pines. *Id.* Twin Pines was never involved in the proceedings before the commission. *Id.* Twin Pines did not sign the application, nor did its agent. *Id.* Twin Pines was never even identified to the commission. *Id.* The court held that D.S. Associates was not aggrieved because it had no interest in the property either at the time of the application or anytime thereafter. *Id.* at 510-11. Although Twin Pines had an interest in the property as record owner, it did not apply for a subdivision of the property nor did it authorize an agent to do so. *Id.* at 511. Twin Pines was at no time either a party to or a participant in the proceedings before the commission. *Id.* at 512. Therefore, the court held that Twin Pines was aggrieved as the actual record property owner but nonetheless lacked standing because it did not participate in the application. *Id. D.S. Associates* is readily distinguishable from this situation in multiple respects. In this instance, the applicant and the owner are the same and the Application was signed by the applicant 587 CT Ave, LLC (Defendant), by and through its attorneys of record. (RoR Exs. 1; 2; 3). Therefore, the owner's signature was not required.[6] As such, the Application conforms to the NZR.

[6] Moreover, the record indicates "Letter of consent by owners of property submitted herewith." (RoR Ex. 2).

CONCLUSION

The Plaintiff fails to establish aggrievement as a threshold matter and there is no merit to Plaintiff's substantive arguments that the approval of the Application does not conform to the Norwalk Zoning Regulations. The Court should deny the Appeal, affirm the approval of the Defendant Norwalk Zoning Commission and enter judgment for Defendant 587 CT Ave, LLC and the Defendant Norwalk Zoning Commission.

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CERTIFICATION

I certify that on February 22, 2017, a copy of the foregoing was sent via e-mail and/or regular mail to counsel of record as follows:

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