DOCKET NUMBER: FST-CV-16-6028970-S

NORWALK PUBLIC LIBRARY FOUNDATION, INC. Plaintiff	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF
	:	STAMFORD/NORWALK
v.	:	
	:	AT STAMFORD
ZONING COMMISSION OF THE CITY OF NORWALK and 587 CT AVE, LLC Defendants	:	JANUARY 23, 2017

PLAINTIFF'S BRIEF

FACTS

On or about November 12, 2015, applications for Coastal Area Management ("CAM") Review [Application #24-15CAM], see Return of Record-1[1], and Site Plan Review [Application #9-15SPR], see RoR-2, (collectively the "Application") were filed with the Norwalk Department of Planning & Zoning and the Defendant Zoning Commission of the City of Norwalk ("Defendant Commission") apparently on behalf of the Defendant 587 CT Ave, LLC (the "Defendant Applicant"), by Carmody Torrance Sandak & Hennessey LLP purportedly acting on behalf of the said applicant.[2] The Applications proposed the construction of a project consisting of a six (6) story structure containing a five (5) story multifamily residential structure (floors 2-6)

[1] The Return of Record is hereafter referred to as "RoR".
[2] Carmody Torrance Sandak & Hennessey LLP claims to represent the Defendant Applicant.

containing 69 units of residential housing (33 one-bedroom apartments and 36 studio apartments), a recreation area, fitness area, roof-top planted garden, and one story of enclosed parking on the first floor. Compare RoR-1 with Ror-48 (C-1) on a 1.2 acre parcel of land located at 11 Belden Avenue in the Central Business Design district, Subarea B, in the City of Norwalk, which roughly 'L-shaped' parcel of land fronts on both Belden Avenue and Mott Street (the "Subject Property"). The Subject Property was already improved with a 9,900 square foot office building containing a bank on the first floor and offices on the second floor, and surface parking some of which is shared with an adjacent property owner. *Id.*

By the Defendant Applicant's calculation, the existing uses and the new proposed use required the following parking to meet the requirements of the Norwalk Zoning Regulations:

		EXISTING	PROPOSED
EXISTING BUILDING			
	1ST Floor Bank (Office)	4,822 SF @ 1/334 (i.e., 15 spaces)	15 spaces
	1ST Floor Office	4,000 SF @ 1/334 (i.e., 12 spaces)	12 spaces
	2ND Floor Office	3,953 SF @ 1/334 (i.e., 12 spaces)	12 spaces
	TOTAL (OFFICE)		39 spaces
PROPOSED RESIDENTIAL BUILDING			
	69 UNITS	69 units @ 1.3/unit	90 spaces
SUBTOTAL			129 spaces
MIXED USE PARKING OVERLAP CRITERIA REDUCTION			-39 spaces
NET SPACES REQUIRED			90 spaces
TOTAL SPACES ON-SITE			51 spaces
TOTAL SPACES OFF-SITE			39 spaces

See Ror-48 (C-1). So, unable to provide the required 90 parking spaces on site, the Defendant Applicant proposed to provide 39 of the spaces across Mott Street at two parcels at 3 and 5 Mott Street respectively. See Ror-48 (C-1). 3 Mott Street is unimproved except with a parking lot, and 5 Mott Street contains an office condominium and parking spaces. *Id.* Collectively 3 and 5 Mott Street are referred to as the "Mott Street Lots". The parking on the Mott Street Lots will be shared between the Subject Property and the uses at the Mott Street Lots.

The Subject Property abuts the property on which a branch of the Norwalk Public Library is situated at 1 Belden Avenue at the corner of Belden Avenue and Mott Street. 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 for ongoing operations including but not limited to the solicitation, receipt and administration of gifts, funds and other properties which funds are devoted to such literary, educational, and public library purposes for the benefit of the Norwalk Public Library System as the Plaintiff's Board shall decided to pursue from time to time and which also include the creation and promotion of programs and activities for the Library and its patrons nearly all of which involve library visits by members of the public both adults and children whom all either arrive at the library

buildings on foot or by vehicle. Plaintiff provides programming that is essential to the survival of libraries in the digital age, Plaintiff is the primary programming sponsor within a library system which receives more than a half-million visitors every year of which some 80% use the main library at 1 Belden Avenue, the library property abuts the Subject Property, the library is an historic building and the first of eighteen Carnegie Libraries in the State of Connecticut the library has limited parking on its site and there is very limited on-street parking near the library on which the Plaintiff is dependent for its programs for the public.

The applicant proposed to permit the library to make use of five (5) parking spaces on its property from 10:00 AM through 3:00 PM Monday through Friday. See RoR 48 (C-1), however, as the Subject Property has insufficient parking and is dependent on leased off-site parking which the record reflects is of limited duration ("5:30 PM to 8:30 AM on Mondays-Friday and weekends") and the residents of the proposed 69-unit residential development will have to park somewhere when its leased parking is unavailable and there is more than a reasonable likelihood they will use the parking spaces on the library property, the library's reserved spaces on the Subject Property, and adjacent on-street parking spaces rendering Plaintiff's programming use untenable, and the foreseeable traffic conditions and vehicle movements created by insufficient parking, traffic crossing between the Subject Property and the off-site parking spaces across Mott Avenue, only a few feet from the only parking lot available

to Plaintiff's patrons on its site creates unsafe conditions for pedestrian patrons and employees and vehicles negotiating Mott Avenue and entering and exiting Plaintiff's parking lot and off-site parking.

The Application was set down for a public hearing on January 20, 2016 at which time the public hearing was opened and closed that same evening. The Application was discussed by the Plan Review Committee of the Defendant Commission at its meetings on February 11, 2016, See RoR-7, and March 10, 2016, see RoR-6, and was placed on the agenda of the meeting of the Defendant Commission for consideration at its meeting on March 16, 2016. At the meeting on March 16, 2016, at which a quorum was present, a resolution to approve the Applications was moved by Commissioner Emily Wilson, seconded by Commissioner Adam Blank, and failed by a vote of 2 in favor (Commissioners Wilson and Blank), 2 opposed (Commissioners Doug Stern and Jill Jacobson) and 1 abstention (Commissioner Michael Witherspoon) effectively denying the Applications. See RoR-5. The record does not reflect publication of notice of this decision.

Subsequently, on March 18, 2016, the Defendant Applicant through its attorneys, granted a 35-day extension of time for the Defendant Commission to act to April 20, 2016. The Applications were placed on the agenda for the meeting of the Defendant Commission on April 20, 2016 at which time Commissioner Blank explained that the Applications failed to pass at the March meeting because they lacked 4 concurring

votes and hence there was no action. See RoR-4. Commissioner Linda Kruk then moved to approve the Applications again, which motion was seconded by Commissioner Nate Sumpter, and on this second bite at the proverbial apple, approved by a vote of 5 in favor (Commissioners Blank, Wilson, Rod Johnson, Kruk and Sumpter) 1 opposed (Commissioner Stern) and 1 abstention (Commissioner Witherspoon). Notice of the decision of the Defendant commission was allegedly published in the Norwalk *Hour* on April 28, 2016. See RoR-12 (what appears to be not a copy of the published notice, but an order for notice to be published on that date). By Citation dated May 11, 2016, Docket Entry Item ("Doc.") 100.30, the complaint, dated May 11, 2016, Doc. 100.31, in this action with a return date of July 5, 2016, was served upon the Defendant Commission and the Defendant Applicant on May 12, 2016 which process together with the Marshal's return of service, Doc. 100.32, were filed in this court on June 22, 2016.

LAW

I. Plaintiff is aggrieved by the decision of the Defendant Commission approving the Defendant Applicant's application for site plan approval.

"[P]leading and proof of aggrievement are prerequisites to the trial court's jurisdiction over the subject matter of a plaintiff's appeal." (Internal quotation marks omitted.) *Moutinho v. Planning & Zoning Com'n* , 278 Conn. 660, 664-665, 899 A.2d

26, 30, 2006 Conn. LEXIS 211, 7-9 (Conn. 2006)[Head Note ("HN") 2] citing and quoting from *Stauton* v. *Planning & Zoning Commission*, 271 Conn. 152, 157, 856 A.2d 400 (2004). "[I]n order to have standing to bring an administrative appeal, a person must be aggrieved." *Moutinho*, supra 278 Conn. at 664-665 [HN 2] (Internal quotation marks omitted) citing and quoting from *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, 266 Conn. 531, 538, 833 A.2d 883 (2003). See also *Beacon Square Ltd. P'ship v. Inland Wetlands & Watercourses Agency*, Superior Court, J.D. of Waterbury, April 12, 2007, CV-06-4011011-S, 2007 Conn. Super. LEXIS 985, at 3 [HN 1] citing and quoting from *Smith v. Snyder*, 267 Conn. 456, 460 ["Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved…"]

"Standing . . . is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *Id.* [HN 3]

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the decision, as opposed

to a general interest that all members of the community share. . . . Second, the party must also show that the agency's decision has specially and injuriously affected that specific personal or legal interest. . . . Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest. . . *Id.* [HN 4] "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." (Internal quotation marks omitted.) *Moutinho,* supra 278 Conn. at 665 [HN 5] citing and quoting from *Lewis* v. *Planning & Zoning Commission*, 275 Conn. 383, 391, 880 A.2d 865 (2005).

"Aggrievement presents a question of fact for the trial court" and "the scope of review of a trial court's factual decision on appeal is limited to a determination of whether it is clearly erroneous in view of the evidence and pleadings. . . . Conclusions are not erroneous unless they violate law, logic or reason or are inconsistent with the subordinate facts. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Id.* at 665-666 [HN 6] citing and quoting *LePage Homes, Inc.* v. *Planning & Zoning Commission*, 74 Conn. App. 340, 344-45, 812 A.2d 156 (2002).

In zoning appeals,

> [t]his court has not set forth a precise standard that defines the required interest a nonowner must possess in order to become an aggrieved party . . . Rather, we have held that the extent to which a party with an interest in the property other than that of an owner is aggrieved depends upon the circumstances of each case, because the concept of standing is a practical and functional one designed to ensure that only those parties with a substantial and legitimate interest can appeal an order.

Moutinho v. Planning & Zoning Common, supra 278 Conn. at 666 quoting from *Primerica* v. *Planning & Zoning Commission*, 211 Conn. 85, 93, 558 A.2d 646 (1989). Manuel Moutinho had applied to the Bridgeport Planning & Zoning Commission for a special permit and site plan and coastal site plan review in order to construct and operate a batch asphalt plant. *Moutinho v. Planning & Zoning Com'n*, supra 278 Conn. at 662, on property owned by a trust for the four Julian brothers, but during the pendency of the appeal, the property was conveyed by the trustees to a general partnership, J.R.R.C Associates, whose partners were three of the four Julian brothers. *Id.* at 662-663. Although listed in the application as the lessee of the property, at oral argument, the Court found Moutinho did not in fact have a lease, but rather "***an oral agreement*** with the owner of the property to enter into a long-term lease agreement if the applications were approved." *Id.* at 664 [emphasis provided]. The trial court, however, concluded that Moutinho was not aggrieved by the denial of the applications because his oral agreement with J.R.R.C. did not comply with the statute of frauds and, therefore, was unenforceable. *Id.* Moutinho had claimed that as

he was either a lessee or a licensee with respect to the property, he was classically aggrieved, and on appeal, the Supreme Court agreed.[3] *Id.*

The Supreme Court, having not previously addressed the question as to whether a party who has an oral agreement to lease, i.e., to have a possessory interest in, property after the fulfillment of a contingency may be aggrieved by a land use decision affecting the property, *Id.* at 668, looked to the decision of the Connecticut Appellate Court in *DiBonaventura* v. *Zoning Board of Appeals,* 24 Conn. App. 369, 370-71, 588 A.2d 244, cert. denied, 219 Conn. 903, 593 A.2d 129 (1991) which had addressed this issue. In *DiBonaventura*, one of the plaintiffs applied for zoning approval of a used car dealership on property owned by his parents. Although the parents were not listed as applicants, they signed the son's zoning application to indicate their consent to his use of the property. *Id.* At the public hearing, the father and son both testified that they intended to continue the long-standing prior use of the property as a used car dealership, with the father supplying the land and the son managing the business. *DiBonaventura* v. *Zoning Board of Appeals,* supra 24 Conn. App at 371-72. The board denied the son's application, and the father and son

[3] Note that the *Moutinho* court also thoroughly rejected the applicability of the statute of frauds concluding that "the statute of frauds does not apply in this case. The statute of frauds governs disputes that arise between the parties to a contract; see General Statutes § 52-550; 6 and the present case does not involve a contract dispute between Moutinho and J.R.R.C." *Moutinho v. Planning & Zoning Com'n*, supra 278 Conn. at 670.

appealed to the Superior Court. *Id.*, 372. The trial court concluded that neither the father nor the son was aggrieved and, specifically, that the son was not aggrieved because he did not have a legally enforceable interest in the property. *Id.*, 373. The father and son appealed, and the Appellate Court reversed the judgment of the trial court, holding, inter alia, that the informal agreement between the parents and their son had created a sufficient interest in the property to establish the son's aggrievement. *Id.*, 376-77.

Acknowledging that *DiBonaventura* presented the Court in *Moutinho* with a factually different situation as *Moutinho* did not involve an agreement among family members, nevertheless, the Supreme Court found *DiBonaventura* to be instructive "inasmuch as it 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 v. Planning & Zoning Com'n*, supra 278 Conn. at 668-669[emphasis provided].

Our Supreme Court in *Moutinho* also cited as instructive, the decision of the Supreme Judicial Court of Massachusetts in the matter of *Marinelli* v. *Board of Appeal*, 275 Mass. 169, 175 N.E. 479 (1931), in which a fuel company applied for a permit to construct certain structures on land owned by a railroad corporation.

> The ***parties orally had agreed*** that the fuel company would relocate to the subject property, ***which it would either buy or lease*** from the railroad. After the building commissioner denied the permit, both parties petitioned the board of appeal, which granted a variance allowing the proposed construction. Opponents of the project appealed from the board's decision, claiming, inter alia, that the fuel company did not have sufficient interest in the matter to appear before the board. The court concluded: "Even ***though the agreement*** between the railroad corporation and the fuel company ***was oral and hence not enforceable at law, there is no reason why their purpose to execute an obligation of honor and fair dealing should not be respected***. . . . The fuel company, having no title to the land, nevertheless had such interest therein in view of the attitude of the railroad corporation as entitled it . . . to consideration by the respondent board." Id., 172-73. The court further concluded that, ***although the oral agreement was not enforceable between the parties, it established a sufficient link between the fuel company and the property to confer subject matter jurisdiction for purposes of the zoning appeal.***

Moutinho v. Planning & Zoning Com'n , supra 278 Conn. at 669 citing and quoting from *Marinelli* v. *Board of Appeal*, supra 275 Mass. 169 [internal citations omitted; emphasis provided].

Persuaded by the rationale of the Appellate Court in *DiBonaventura* and the Massachusetts SJC in *Marinelli*, our Supreme Court held that an agreement between a landowner and a non-owner party need not be in writing to establish that party's aggrievement in a zoning appeal. When the evidence establishes the existence of an oral agreement and the intent of the parties to abide by that agreement, 'a substantial and legitimate interest' in the property exists . *Moutinho v. Planning & Zoning Com'n*, supra 278 Conn. at 669-670 [internal citations omitted].

This is not unlike the situation in the case at bar. Here, the Plaintiff Foundation was created to implement library programming. It acts as a tax-exempt charity to raise funds for this purpose and then runs the programs. The parking issues the library has are the Plaintiff's issues as well and as the Library has a right to five (5) parking spaces on the Subject Property by virtue of the Application, those spaces impact the Foundation's execution of its mission in support of the library. After all, the people parking in those spaces will undoubtedly be people attending library programming conducted by Plaintiff including the parents of children, 10,000 in the last year, participating in Foundation children's programming at the Library. See RoR 43, p. 66, line 12 through p. 67, line 10.

Plaintiff is aggrieved by the Defendant Commission's decision in that Plaintiff was created for the very purpose of supporting and enriching the library experience and attracting library patrons as the primary programming sponsor within a library system that receives more than a half-million visitors every year at the main library at 1 Belden Avenue. RoR 24. The library property abuts the Subject Property and is an historic building and the first of eighteen so-called Carnegie Libraries in the State of Connecticut. RoR 43, p. 55, lines 6-16. A substantial number of the patrons visit the library for the Foundation's programming. See e.g., RoR 21, RoR 24, and RoR 43, p. 59, lines 19-24, p. 66, lines 12-20, p. 73, lines 3-6. Library parking is extremely limited, RoR 24, RoR 43, p. 39, lines 11-16, p. 50, lines 8-17, p. 54 line 11 through p. 55, line

4, p. 66, line 30, through p. 66, line 10, p. 67, lines 12-17, and there is very limited on-street parking near the library on which the Plaintiff is dependent for its programs for the public. RoR 43, p. 54 line 5 through p. 55, line 5. The parking for Foundation programming is limited and there are times when it is difficult to find a parking space. RoR 43, p. 50, lines 8-17, p. 59, lines 19-24. As the Application provides 5 spaces for use by the Library during the hours of 10:00 AM to 3:00 PM, and the Plaintiff creates programming which in turn increases the number of patrons, and this in turn creates the demand for parking, those five spaces are spaces that from time to time will no doubt be used by the Plaintiff for parking for programs.

Further, as the Subject Property has insufficient on-site parking and is dependent on leased off-site parking which the record reflects is of limited duration ("5:30 PM to 8:30 AM on Mondays-Friday and weekends"), RoR 16, Article I, Section 1.01, and the residents of the proposed 69-unit residential development will have to park somewhere when its leased parking is unavailable and there is more than a reasonable likelihood they will use the parking spaces on the library property, the library's reserved spaces on the Subject Property, and adjacent on-street parking spaces rendering Plaintiff's programming use untenable. The foreseeable traffic conditions and vehicle movements created by insufficient parking, traffic crossing between the Subject Property and the off-site parking spaces across Mott Avenue, only a few feet from the only parking lot available to Plaintiff's patrons on its site creates unsafe conditions for

pedestrian patrons and employees and vehicles negotiating Mott Avenue and entering and exiting Plaintiff's parking lot and the proposed off-site parking at 3 and 5 Mott Street which were of concern but were never studied. See RoR 42, p. 4, line 13 through p. 7, line 9 [colloquy between Defendant 587 CT AVE, LLC's lawyer Ms. Suchy and Zoning Commissioner Stern about Mr. Stern's concern that the traffic study did not look at pedestrian crossing issues related to the remote parking at 3 and 5 Mott Avenue, and his request that this be studied, and Ms. Suchy's promise to take a look at it, a promise what went unfulfilled as it was never addressed even at the subsequent public hearing. See RoR 43, p. 29, line 17 through p. 30, line 7 (parenthetical material added): MR. SUMPTER (Zoning Commissioner): "but has your traffic study incorporated the potentially 39 carloads of people that will be crossing that street as far as pedestrians(?)" MR. GALANTE (Applicant's Traffic Engineer): "As far as pedestrians, no."]

The five parking spaces on the Subject Property that are to be made available for the use of Plaintiff's patrons are likely to be negatively impacted by the foregoing and the nonconformity of the Application with the Norwalk Zoning Regulations at issue in this appeal. Moreover, if the inadequate aisles and parking stall length of the spaces at 3 and 5 Mott Avenue result in parkers unable to properly maneuver and as a result, a single car taking up more than once space, it is reasonably foreseeable and thus possible this will further exacerbate the competition for spaces and thus, negatively

impact the access to the 5 spaces reserved for Library patrons on the Subject Property, and Plaintiff's other parking. In short, it is reasonably foreseeable and possible that Plaintiff will suffer a significant negative impact as a result of the approval of the Application. See *Moutinho v. Planning & Zoning Com'n*, supra 278 Conn. at HN 4.

The Plaintiff has met the test for aggrievement. First, Plaintiff has and will through its testimony at the hearing on this appeal demonstrated that its interest in 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. Its success in fulfilling its mission is directly proportional to the ability of the public to access its programs. This places its interest well beyond the interest of the general public in simply having a place to park.

Second, the Plaintiff has demonstrated that there is the possibility of an adverse effect on a legally protected interest by the approval of the Application that has specially and injuriously affected that specific personal or legal interest. The Application creates a building that has 43% of its parking off site. On days of inclement weather, or just simply because of the well known tendency of the average person to take the parking space closest to their destination, it is reasonably possible that residents of the proposed 5-story residential building in the Application, will take

spaces not included within the Application seeing as how that building straddles a public street (Mott Avenue), and the remainder of the parking lot for 11 Belden Avenue and the neighboring property the owner of which has appealed this same decision which appeal has been consolidated with the instant case. See generally *S&E Properties, LLC v. City of Norwalk Zoning commission, et als.*, FST-CV-16-6028615. That this is foreseeable is evidenced by a considerable amount of testimony in the record of the public hearing as well as the grant to Plaintiff by the Applicant limited use of five parking spaces. See e.g., RoR 20, RoR 43, p. 72, line 22 through p. 73, line 21; see generally the testimony of Attorney Kevin Duffy, RoR 43, p. 43, line 17 through p. 44, line 21.

The testimony at the public hearing of Eli Alsof, a principal of the Plaintiff in the consolidated action S&E Properties, LLC, owner of the property abutting the subject Property to the northwest, see RoR 48, sheet C-1, illustrates another way that the approval of the Application creates the reasonably inferred likelihood of a negative impact on the Plaintiff as a result of the approval of the Application.

> I don't know the numbers like they do. I mean architects and engineers, I don't understand, but I see it every day. I'm there. I'm there when women and children, babies, she come holding child and carrying another one, can I got to the library. I'm like no, sorry, it's 1:00 o'clock and I have – and then she's like please, please. Okay, go.

RoR 43, p. 46, lines 2-9. When the building proposed in the Application is occupied, and its residents, returning for a short time and unwilling to cross the street to 3 and 5

Mott Avenue, park on Belden Avenue, or on the S&E Properties, LLC parcel at 15 Belden Avenue because they are "just running in for a minute" and this puts pressure on the persons needing to park to use 15 Belden Avenue, will Mr. Alsof still be in a position to have the grace to say "Okay, go"? And if he doesn't, will those mothers with children and babies still be able to enjoy the 500 children's programs per year serving 10,000 kids? See generally the testimony of Vicki Otis, planner of the children's programs at the Library at RoR 43, p. 66, line 12 through p. 67 line 10.

II. Standard of Review.

When the zoning commission acts upon a site plan application, it acts in its administrative capacity. Fuller, 9A Land Use Law & Practice, 4th Ed., 33:5, p. 287, citing *City of Norwich v. Norwalk Wilbert Vault Co., Inc.*, 208 Conn. 1, 12, 544 A.2d 152, 157 (1988)[additional citations omitted]. "The question for the agency and the superior court on appeal is whether or not the application submitted conformed to the agency's regulations." *Id.* citing *McCrann v. Town Plan and Zoning Commission of Town of Bloomfield*, 161 Conn. 65, 282 A.2d 900, 906 (1971)[additional citations omitted.] The term "site plan" as used in General Statute 8-3(g)

> is a general term in a functional sense to denote a plan for the proposed use of a particular site, purporting to indicate all the information required by the regulations for that use. As such, it includes the entire package of documents submitted to a zoning 'commission or other municipal agency or official to aid in

determining the conformity of a proposed building, use or structure with specific provisions of such [zoning] regulations.'

SSM Associates Ltd. Partnership v. Plan and Zoning Com'n of Town of Fairfield, 15 Conn. App. 561, 566 (1988) quoting from Conn. Gen. Stat. § 8-3(g).

Upon appeal, the trial court reviews the record before the board to determine whether it has acted fairly … upon valid reasons … and the court must determine the correctness of the conclusions from the record on which they are based. *Id.* [citations omitted]. Parking is a proper consideration and subject to some discretion, provided that a denial of a site plan on the basis of parking has some basis in the record. *Loring v. Planning and Zoning Com'n of Town of North Haven*, 287 Conn. 746, 770, 950 A.2d 494, 509 (2008).

III. The Site Plan Approval should be overturned because the application does not conform to the Norwalk zoning regulations in that (A) it lacks the required parking, (B) the proposed structure fails to meet the required setbacks, (C) the proposed building lacks a required special permit; (D) the proposed parking facilities at 3 and 5 Mott Street lack a required special permit; (E) the limitations on hours constitute a restriction on use in violation of the NZR; and (F) the Subject Property lacks the buffer between its on-site parking facility and Mott Avenue required by the NZR

A. The Application lacks the required parking.

The application itself recites that under the Norwalk Zoning Regulations (the "NZR"), RoR 49, the proposed use requires 90 parking spaces. RoR 48, Proposed Parking Plan Sheet C-1.1 (4th page). As stated above under the Facts, 51 of the parking spaces are provided on the subject Property, but 39 of the parking spaces are to be provided on two lots, 3 Mott Avenue and 5 Mott Avenue, which are situated across and down Mott Street from the Subject Property.

The NZR specifically provides that "[i]t is essential that all structures and land uses provide a sufficient amount of off-street parking and loading spaces to meet the needs of persons making use of them." NZR Article 120 Off Street Parking & Loading Regulations, § 118-1200.[4] Once required and established, "such off-street parking and loading facilities shall not be reduced in quantity, reduced in area of otherwise altered below the requirements set forth herein." NZR § 118-1210 (A). Recognizing that many structures were created prior to the adopting of Article 120 in 1951, the regulations provide a limited safe haven for those structures as follows:

> A building in existence at the time of adoption of this regulation may continue to be used without adequate parking and loading as required by §§ 118-1210 through 118-1260 of these regulations. However, should such building be increased in area or changed in use so as to require additional parking or loading, such additional parking or loading shall be determined by applying the standards set forth in §§ 118-1210 through 118-1260.

[4] The Off Street Parking and Loading Regulations were adopted June 17, 1951 and § 118-1200 was last amended effective April 1, 1975. See RoR 49, § 118-1200.

NZR § 118-1210 (C).

Parking stalls (spaces) for full size vehicles are required to be 18-feet 6-inches in width and nineteen (19) feet in length. NZR § 118-1230 (B)(1). Parking stalls for compact spaces are required to be 7-feet 6-inches in width and 15 feet in length but are only permitted in a parking structure and then only for certain uses. NZR § 118-1230 (B)(3).

The Application provides for 39 parking spaces in the off-site lots at 3 and 5 Mott Avenue. At 3 Mott Avenue, the parking spaces shown are surface parking spaces laid out in two rows separated by an aisle roughly perpendicular to Mott Street. RoR 48, Sheet C-1.1. In order to conform with the requirements of the NZR, the lot would have to be 62 feet wide to contain two 19-foot spaces and a 24-foot aisle. However, as is readily apparent from the survey map showing 3 Mott Street (RoR 48, sheet C-1.1), that parcel is at most 60-feet wide and the area devoted to parking varies from 55 to 56 feet in width, so it cannot contain conforming parking spaces. The scale of the map is 1" = 30', so the width of the lot would have to exceed 2 inches and even using a common ruler it is apparent that 3 Mott Avenue is of insufficient width to contain two legal parking spaces and an aisle. There is a similar problem with the parking spaces at 5 Mott Avenue. Of the 21 Parking spaces at 5 Mott Avenue proposed to be leased for use by the Subject Property, only five of them (the five northerly most spaces nearest the building) are conforming. The remainder are not even legal surface

parking spaces as they are lacking in both depth and aisle width. Lacking the legally required parking, the Application does not conform to the NZR.

B. The 5-story building shown in the Application fails to meet required setbacks.

The Subject Property is located in the Central Business Design District Subarea B ("CBDB"). See RoR 2, ¶ 6, and RoR 48, sheet C-1 (in the zoning grid at the top center). The NZR permits multifamily residences in the CBDB, however, when "any portion of the lot abuts West or Belden Avenues, shall be restricted to fifty percent (50%) or less of the gross square footage of the first floor of any building within three hundred (300) feet of those streets…" NZR § 118-504 (C)(1)(a)[2]. Viewing RoR 48 sheet C-1, it is apparent that the Subject Property abuts Belden Avenue at its eastern-most boundary, and most of the building proposed is within 300 feet of Belden Avenue. Again, as the scale of sheet C-1 of RoR 48 is 1-inch = 20-feet, the court is able to take judicial notice of the fact by simple mathematics that 300-feet would be 15-inches and the use of a simple ruler makes it apparent that most of the building is within 300' of Belden Avenue. Similarly, looking at RoR 48, sheet 1-1, notice that the northerly boundary of the Subject Property is a straight line roughly perpendicular to Belden Avenue with a length of 214.05 feet. Were that line extended to just a little less than 150% of its length and swept south-easterly across the property, it would reveal the same thing.

The Application calls for a ground floor plan of 1,231 square feet ("SF"), a first-floor plan of 12,941 SF, a second floor plan of 12,941 SF, a third floor plan of 12,941 SF, a fourth-floor plan of 12,941 SF and loft space of 2,527 square feet. RoR 48, sheet A-001. Whether what is denominated as the ground floor is the "first" floor, or the floor denominated as the first floor is the "first" floor, the square footage of everything above the "first" floor well exceeds 300% of the "first" floor and so exceeds the 50% threshold of NZR § 118-504 (C)(1)(a)[2]. Thus, in this respect, the Application does not conform to the NZR.

C. The use of 3 Mott Avenue and 5 Mott Avenue for a portion of the required parking for the Subject Property is not legally permitted because these parcels constitute parking facilities and there is no evidence in the record of the existence of a special permit for these as parking facilities.

The use regulations for the CBDB do not list parking facilities as an as-of right use, rather off-street parking facilities are listed as a special permit use. Compare RoR 49, § 118-504 (C)(1)(a)[1] with RoR 49, § 118-504 (C)(1)(b)[1]. By treating 3 and 5 Mott Avenue as parking for 11 Belden Avenue, the owners of 3 and 5 Mott Avenue, Union Park Professional Condominium Association, has by virtue of its lease of its parking to Defendant 537 CT AVE, LLC, has changed the character of the use of 3 and 5 Mott Avenue from an office condominium and associated parking to a parking facility since

it now supports the parking requirements of another property and its owner 537 CT AVE, LLC.

A local zoning ordinance is a municipal legislative enactment and "the same concepts of construction which are used in interpreting statutes are applicable to ordinances" Fuller 9A Land Use Law & Practice § 34:6, 3d Ed. p. 299 citing *Hall Manor Owner's Ass'n v. City of West Haven*, 212 Conn. 147, 154 (1989)[additional citations omitted] and the same rules of construction as are used in in interpreting statutes are applicable to municipal ordinances. Fuller, § 34:6, 3d Ed. p. 300 citing *Pelliccone v. Planning & Zoning Com'n of the Town of Ridgefield*, 64 Conn. App. 320, 335 (2001).

"If a statute … does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary." *Kendall v. Commissioner of Correction*, 162 Conn. App. 23, 38, 130 A.3d 268 (2015) citing *State v. Love*, 246 Conn. 402, 408, 717A.2d 670 (1998).

The NZR does not define "parking facility". See RoR 49, Article 10 § 118-100. Parking used as a noun means a "space in which to park vehicles". Dictionary.com ("parking").[5] Facility is defined as "something that is built or installed to perform some particular function". Black's Law Dictionary, 5th Ed., p. 531. Thus a parking facility is a structure or installation intended to function as a place to park vehicles, e.g., a parking lot, a parking structure, the ground floor of the proposed building at 11 Belden Avenue

[5] http://www.dictionary.com/browse/parking. See Appendix A attached hereto.

as set forth in the Application, the parking lots at 3 and 5 Mott Avenue as set forth in the Application.

The record does not reflect the existence of a special permit for any of the parking facilities proposed in the Application, and in particular the parking facilities at 3 and 5 Mott Avenue which are proposed to be used as parking facilities for multiple uses and hence the Application does not conform to the NZR.

D. The proposed building contains a parking facility which under the NZR requires a special permit and there is no evidence in the record of the existence of a special permit.

See Section III (B) above for a discussion of what constitutes a parking facility which materials are incorporated herein. The NZR requires that all buildings containing a parking facility have a special permit. NZR § 118-504.C(1)(b)[1]. The record does not reflect the existence of a special permit for any of the parking facilities proposed in the Application, and in particular the parking facilities contained in the proposed building and hence the Application does not conform to the NZR.

E. The limitations on the hours of use of the off-site parking spaces constitute restrictions on use in violation of the NZR.

The right to park at 3 Mott Avenue is by virtue of a lease between the owner of 3 Mott Avenue (Union Park Professional Condominium Association) and the owner of

the Subject Property (587 CT AVE, LLC). Compare RoR 16 and RoR 17. The Lease demises the following rights to the owner of the Subject Property:

> Landlord demises and leases to Tenant, and Tenant takes accepts and rents from Landlord, subject to terms and conditions hereinafter set forth, 18 parking spaces **from 5:30 pm to 8:30 am on Mondays-Friday and weekends** …

RoR 16 Article I, Section 1.01 [emphasis added]. The NZR allows for shared parking between uses with different time demands, however it contains a restriction that

> Parking facilities for mixed use developments **shall not limit the use of or place any restrictions on the shared parking spaces** and **shall not reserve or restrict** the use of any parking spaces for specific office or retail tenants or residential units.

NZR § 118-1220(E)[emphasis added]. That a restriction on the hours a resident may use an office space is a restriction on use is axiomatic. Further, by restricting the hours of use, this restriction operates as a reservation of parking spaces for the existing office users in violation of the second clause of NZR § 118-1220(E).

The record contains no comparable long-term agreement or parking lease in the record for 5 Mott Avenue for the 21 spaces the Application suggests might be used on that parcel as required by NZR § 118-1220(H). See RoR 48, sheet C-1.1.

Accordingly, in these further respects, the Application does not conform to the NZR.

F. The Subject Property lacks the buffer between its on-site parking facility and Mott Avenue required by the NZR.

The off-street parking and loading requirements for the CBDB provide *inter alia* that

> [f]or **all properties with street frontage on** West Avenue, **Belden Avenue**, Wall Street and Main Street, the principal use and structure shall be located between the street line of the aforementioned streets and **all** parking facilities. Underground parking facilities, the roofs of which are less than three (3) feet above the center-line elevation of the street, shall be exempt from this requirement.

RoR 49, Article 50 § 118-504(F)(1)[emphasis added]. The Subject Property indisputably has street frontage on Belden Avenue. RoR 48, sheet 1-1. However, the Application shows a parking facility directly under, and as part of the ground floor of, the principal structure and surface parking between Belden Avenue and the principal structure, hence the principal structure is not located between the street line of Belden Avenue and ***all parking***. See RoR 48, sheet C-1.

Accordingly, in this further respect, the Application does not conform to the NZR.

IV. The Site Plan Approval should be overturned because the Application is void and does not conform to the NZR because it was not signed by the owner of the Subject Property, nor is there any written designation of authority to the person singing the Application.

> Applications for site plan review shall be in a form and contain such information and supporting documents as the Commission map prescribe from time to time.

> ***<u>The application shall be signed by the applicant</u>*** 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.

RoR 49, Article 140: Administration and Enforcement, § 118-1451 (B)(1). The applicant for the permits in the case at bar, is 587 CT AVE, LLC. The Application is signed by said entity acting by Carmody Torrance Sendak & Hennessy LLC. but it does not identify said firm as a member or manager of the applicant limited liability company which can act by members or managers. See RoR 1. Right below the signature are the words printed on the form:

> **If agent signs, a letter of authorization**
> **from the owner(s) <u>must</u>**
> **accompany this application.**

RoR 1 [emphasis – bold typeface and underscoring of the word "must" – in original]. The record reveals no such authorization. Counsel for the Defendant may argue whether it acted with implied authority, however, failure to comply with the stated requirement of owner signature or written authorization in the NZR is fatal to this application. See *D.S. Associates v. Planning and Zoning Com'n of Town of Prospect*, 27 Conn. App. 508, 512, 607 A.2d 405 (1992); *Cf Automated Container Recovery, Inc. v. Berlin Planning Commission*, 13 Conn. L. Rptr. 214, 1994 WL 715832 at p. 5 (Conn. Super. Ct. 1994)[the court reversed a denial of an application by a lessee that was not

the owner in that "in the absence of an owner consent requirement, a lessee with a significant interest in the subject property may apply for a site plan modification…"].

THEREFORE, Plaintiff respectfully requests that the Court sustain its appeal and reverse the decision of the Defendant Zoning Commission approving the Application.

DATED at Roxbury, Connecticut, this 23rd day of January, 2017.

THE PLAINTIFF

By _____ **JURIS 305270**

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APPENDIX A

(see next page)

parking

[**par**-king]

Spell Syllables

Examples Word Origin

See more synonyms on Thesaurus.com (http://www.thesaurus.com/browse/parking)

noun

1. the act of a person or thing that parks, especially a vehicle.
2. space in which to park vehicles, as at a place of business or a public event:
   There's plenty of free parking at the stadium.
3. permission to park vehicles:
   Is there parking on this side of the street?
4. the activity or occupation of a person who operates or works in a parking lot (http://www.dictionary.com/browse/parking-lot), garage, or the like.
5. parking strip (http://www.dictionary.com/browse/parking-strip).
6. *Informal.* the act of kissing and caressing in a parked car:
   Some of the couples went parking on their way home from the dance.

adjective

7. of, pertaining to, used for, or engaged in parking, especially of vehicles:
   parking regulations; a parking ticket; a parking space; a parking attendant.

Origin of parking

1520-1530

1520-30; park (http://www.dictionary.com/browse/park) + -ing (http://www.dictionary.com/browse/-ing)[1], -ing (http://www.dictionary.com/browse/-ing)[2]

Related forms

unparking, adjective

Word of the Day

asseverate (http://www.dictionary.com/wordoftheday/)

Difficulty index for parking

Most English speakers likely know this word

Word Value for parking

14	17
Scrabble	Words With Friends

CERTIFICATION

This is to certify that a copy of the foregoing brief and appendix of cases has been sent this date by First Class US Mail postage prepaid, or with consent by electronic mail, to all counsel and pro se parties of record to wit:

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