3 Primrose Street
Newtown, CT 06470
www.newtown-ct.gov

# TOWN OF NEWTOWN

Zoning Board of Appeals Public Meeting
Minutes
November 4, 2015 @ 7:30 PM
Meeting Room #3 Municipal Center, 3 Primrose Street, Newtown CT

These Minutes are subject to Approval by the Zoning Board of Appeals

Members Present: Charles E. Annett III (Chair), Ross Carley, Barbara O'Connor, Timothy Cronin and Alan Clavette (7:51)
Alternates Present: Roy Meadows, Jane Sharpe (7:36) and Herb Rosenthal (7:36)
Staff Present: Lynn Kovack (recording clerk) and Jean St. Jean
The meeting was called to order at 7:32PM

The meeting of the Zoning Board of Appeals was called to order by Chairman Annett at 7:30pm.
Mrs. O'Connor called the roll and then read Docket #15-5 and #15-6

Minutes from the August 5, 2015 meeting approved. Mrs. O'Connor made a motion to accept with Mr. Cronin seconded. All approved

The Dockets were switched after Commission agreed as Camp Seawatch was going to be lengthy. All Commissioners agreed to the switch.

Mrs. O'Connor read Docket #15-6 Application of Adrion Balikowski for a variance of Section 7.01.100 of the Zoning Regulations to allow a shed too close to the front and side property lines. The property is located at 147 Lakeview Terrace, in the Town of Sandy Hook in an R-1 Zone.

Mr. Annett asked Mr. Balikowski to state his hardship for the variance of the shed he is requesting. Mr. Balikowski stated that if the shed was placed on the side yard it would take up significant portion of his property. In the rear yard he stated topography and the irregular shape of the property would make it difficult to place it there. Mr. Annett asked if neighbor Mr. Lundbladt was opposed to the placing of the shed and Mr. Balikowski stated no. Mr. Annett then asked for the return receipts from the neighbors within the 500 feet of his property. Mr. Balikowski stated he did not have them and he did not send to all neighbors within the 500 feet required notification. Mr. Annett then suspended the Docket to be moved to the December meeting because the owner needs to send to all neighbors within 500 feet of the property.
Docket was closed at 7:45PM

Mrs. O'Connor read Docket #15-5 Application of Camp Seawatch Kennels, LLC for variances of Section 9.03.210 & 9.03.310 of the Zoning Regulations to permit the continued use of the property as was in existence at the time the Certificate of Zoning Compliance dated March 24, 2014 was issued by the Town. The property Is located at 227 Hattertown Road, in the Town of Newtown in an R-2 Zone.

Applicant Richard D'Aquila spoke first of his hardship for variance. In April of 2012 when he bought the property his intent was to have a family business. He wanted to grow the business with the family. The previous owners left the facility needing lots of renovations to improve comfort and safety for animals. His

plan was to have his children Daniel and Katelyn live on the property and run the facility. He upgraded safety alarms, security and the Fire Marshal safety issues.
Attorney Bruce Jackson of the Jackson Law Firm out of Shelton CT then spoke. He stated that when they received the notice of violation the improved and upgraded the facilities. It was non-conforming use at the time and applied for Certificate of Zoning Compliance. Compliance was issued by Zoning Enforcement Officer Gary Frenette. So now to say they are in violation when it is the same use and just expanded and improved the use. The Zoning officer stated it was fine so they assumed it was in Compliance at the time of purchase. The idea was to clean up and reduce noise for neighbors and trying to be a good corporate facility. Mr. Carley asked if more dogs were housed since the renovations and he stated no. Mr. Jackson stated that there were 31 kennels and that has not changed and that there has always been outside runs off the main house. He stated that the house is a residence and intended to be occupied by Mr. D'Aquila's children. He stated that right now you can't live there as it has been mixed up with dogs. The focus is to clean up and put dogs in proper kennels. Mr. Jackson stated that they want to make the house habitable which need a new roof and wants to create a second floor with apartments for the children to live in and run the business. There are 15 kennels on the ground level now. The will have a total of 31 kennels and all but 6 will have runs.
Mr. Jackson also stated that there are 15 nice kennels in the barn. 14 have runs attached to them and the middle one does not. In the house is another 15 kennels which 9 have runs and 6 do not have run's. The 1st floor of the house is kennels.
Mr. Annett stated that the house is taxed as a residence. Mr. Meadows stated that he went out and saw 24 kennels.
Mr. D'Aquila stated that it is purely boarding dogs and no breeding of dogs. Just bathing dogs and no grooming of dogs. Depending on number of dogs boarding the staff would leave at 8:00pm and be back at 7:00 am. With 20-25 dogs he will have someone there. Average now is 10-12 dogs. Goal is to clear open permits and clean things up. They can have 45-48 dogs during peak periods but average is no more than 10 dogs. He stated that he can use the entire yard for a run if he wanted to.

Mr. Annett stated that in an R-2 Zone you can't have kennels. He asked what the barn would be used for.
Mr. D'Aquila stated that the barn has 14 kennels with runs and 1 without a run. He stated he can't give an exact number as some owners have multiple dogs and want them housed together when boarding. He stated that the 2nd floor was to be used by staff for training dogs. The use is not there now but he has been talking to trainers. He bought the property on the understanding that training had been there and can't make the business work with just boarding dogs. He stated in 1952 it was built as a house but today it is a mixed use. There is a waiting room and office area when entering the house. To the right there is a kitchen and kennels in the back. So it is residential and 2 kennels in the back. The office is used for just checking dogs in and out.
Mr. Annett stated there are at least 7 open permits and asked what he planned to do to close them. Mr. D'Aquila stated that within 8 Months he would try to close out permits after the decision here. He would try to do sooner if possible. He will not add additional lighting to the property as he doesn't think he needs to.

Mr. Annett then asked if anyone was in favor to please come forward. There was nobody at hearing in favor of variance.

Mr. Annett then asked if anyone was opposed to the variance.

Attorney David F. Bennett came forward of behalf of William and Barbara Oravez of 231 Hattertown Road, Newtown, CT. He stated that they are opposed to the variance as it is a residence and that right now the applicants have used as a Business. He stated that and Economic Hardship is not a hardship. He stated that the residential part of it has been removed because the owner's mailing address is Westbrook, CT. It is being used as a kennel which is not permitted. The entire property is being used for non-conforming use. They also have boarding and daycare. Mr. Bennett then explained exhibits A-H that he also presented. Exhibit A clearly states that they have boarding, grooming and training which they stated was only boarding dogs. Exhibit D and E also states Boarding, Day Care, Bathing and Grooming. So they are presenting one thing and stating another. And as he stated in the beginning that Economic Hardship is not a hardship. He stated you can't expand a

non-conforming use property. The fact that they added extended kennels to the barn is clearly an expansion of non-conforming use. The barn when permitted stated that the barn was for storage only

Linda Drap of 87 Castle Meadow Road (house sits on Jetbrook) is also opposed. She wants to know if he can put up a stockade fence because she stated it is loud and realtor said she will have issues if she wants to sell. She is approximately 200 feet from the barn and it is very noisy for her. So if approved she would really like to see a fence. There are approximately 6-7 dogs barking at any given time.

With no other business the meeting was adjourned at 9:19 PM

Respectfully submitted by Lynn Kovack (recording clerk)


CAMP
SEAWATCH
A Vacation Retreat For Dogs
boarding · grooming · training

Exhibit B6

Doc-ID: 002676490002 Type: LAN
BK 1046 PG 643-644

Return to:
Bruce D. Jackson, Esq.
472 Wheelers Farm Road
Milford CT 06461

# STATUTORY FORM WARRANTY DEED

We, Carl A. Ford, Jr. and Gail Ford, acting herein by Andrew Emery Garson, her attorney in fact, of 227 Hattertown Road, Newtown CT 06470, for consideration paid in the amount of Four Hundred and Twenty Five Thousand ($425,000.00) Dollars, grant to Camp Seawatch Kennels, LLC, a Connecticut limited liability company having an address of 227 Hattertown Road, Newtown, CT 06470

*WITH WARRANTY COVENANTS*

All that certain piece or parcel of land with the buildings thereon situated in the Town of Newtown, County of Fairfield and State of Connecticut, described in Schedule A attached hereto and made a part hereof.

SUBJECT TO:
Real Estate Taxes on the Grand List of 2012 & 2013, which taxes the Grantee assume and agree to pay.

$ 1,062.50 Conveyance Tax Received
Debbie Aurelia Halstead
Town Clerk of Newtown

Signed this 27th day of March, 2014.

Witnessed by:

DAVID CRAIG ELLIOTT

Teresa Zajac

Carl A. Ford, Jr.

Gail Ford, by Andrew Emery Garson,
her attorney in fact

STATE OF CONNECTICUT
SS: Fairfield March 27, 2014
COUNTY OF FAIRFIELD

On this the 27th day of March, 2014, before me, the undersigned officer, personally appeared Carl A. Ford, Jr. and Gail Ford, by Andrew Emery Garson, her attorney in fact, the signers and sealers of the foregoing instrument, and who acknowledged the same to be their free act and deed.

In witness whereof I have hereunto set my hand.

Teresa Zajac
Notary Public

TERESA M ZAJAC
NOTARY PUBLIC
CONNECTICUT
MY COMMISSION EXPIRES MAY 31, 2017

STATE OF CONNECTICUT
$3,187.50 Conveyance Tax Received
Debbie Aurelia Halstead
Town Clerk of Newtown

19865.069/599535.2

## SCHEDULE A

### PROPERTY DESCRIPTION

All that certain tract, piece or parcel of land, with the buildings and improvements thereon, situated in Hattertown District, Town of Newtown, County of Fairfield and State of Connecticut, and bounded:

NORTHERLY: by land now or formerly of Gladys Peck Tipton;

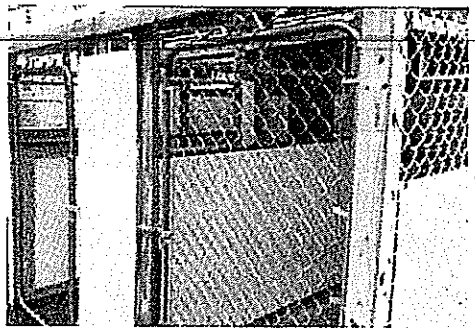
EASTERLY: by land now or formerly of Gladys Peck Tipton;

SOUTHERLY: by land now or formerly of Sarah E. Allen, more recently of Marion S. Silcox;

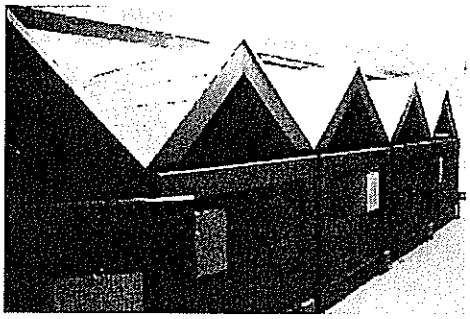
WESTERLY: by Monroe-Hattertown Road.

Said premises are also known as 227 Hattertown Road, Newtown, Connecticut.

Received for Record at Newtown, CT
On 04/01/2014 At 10:00:22 am
Debbie Dunklin Halstead

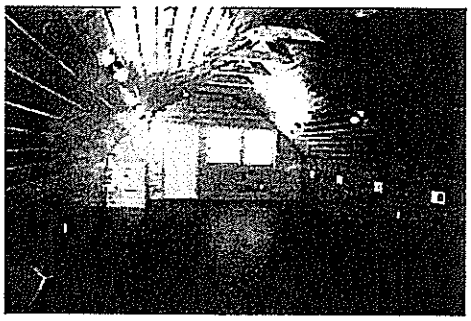


*(http://www.campseawatch-kennels.com/wp-content/uploads/2015/03/facilities21.png)*



*(http://www.campseawatch-kennels.com/wp-content/uploads/2015/03/facilities31.png)*

*The barn also include a new second level training center to support our training programs services.*



*(http://www.campseawatch-kennels.com/wp-content/uploads/2015/03/facilities41.png)*

*All of our exterior yards have been regraded with pea stone, which is especially suited to being safe and comfortable for the paws of our dogs.*

*(http://www.campseawatch-kennels.com/wp-content/uploads/2015/03/facilities51.png)*

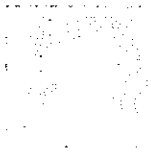
*Our interior upgrades include a new reception area, new furniture for dogs and staff in our social area (the living room) and a new bathing and grooming facility still under construction. Also, all the buildings have been provided with a monitored fire protection system.*

*All of these upgrades are designed to make your pet's experience safer, more comfortable and a greater value.*

*MARCH 28, 2015*



## Written by pdaquila@gmail.com (http://www.campseawatchkennels.com/author/pdaquilagmcom/)



*View all posts by: pdaquila@gmail.com (http://www.campseawatchkennels.com/author/pdaquilagmcom/)*

*Comments are closed.*

*Camp Seawatch Kennels is a boarding kennel for all dogs in all of Fairfield county including but not limited to Newtown, Monroe, Bethel, Danbury, Brookfield, New Milford, Southbury, Oxford, Trumbull, Redding, Easton, Fairfield, Woodbury, Roxbury, and Bridgewater.*

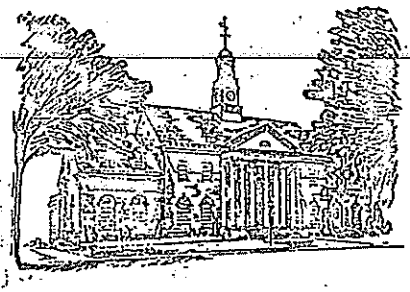


f *(https://www.facebook.com/campseawatchkennels)*

FROM THE INDIANS 1705

TOWNSHIP 1711

TOWN OF NEWTOWN
NEWTOWN, CONN.



PLANNING & ZONING COMMISSION

August 4, 1978

TO WHOM IT MAY CONCERN:

This letter may be considered a Certificate of Zoning Compliance for the property now owned by Frank & Frances Homer and identified in the Assessor's records as Map 33, Block 6, Lot 11, Hattertown Rd., Newtown, Connecticut.

This property is located in a R-2 Zone and therefore, the use of this property as a Kennel, which is presently a prohibited use in such a zone, is considered a non-conforming use as defined in Section 8.05A of the Newtown Zoning Regulations (copies enclosed) describing "Non-Conforming Buildings and Uses".

Under Section 8.05E (copies enclosed) of the Regulations the use of this property may not "be expanded or intensified above the level at which such activity existed on the date on which it became non-conforming by virtue of the Regulations." In addition "No building in which a non-conforming use is conducted may be enlarged either in area or in cubic content, nor shall any portion of a building which is used for a non-conforming use. Such a building may be otherwise altered, improved or rebuild".

Very truly yours,

David W. Clark

David W. Clark
Zoning Enforcement Officer

DWC/sk
Enc.

Exhibit D

# COME CELEBRATE OUR GRAND RE-OPENING!

## CAMP SEAWATCH *KENNELS* Under New Management

*Boarding • Day Care • Bathing & Grooming for Dogs and Cats*

**Continuing the tradition of a "home like" atmosphere with personalized attention. Our new managers, Katie & Amanda, look forward to welcoming you and your pet and showing you the many upgrades to our facilities.**

Katie D'Aquila

**Introductory Day Care Special**

***Only*** **$20.00 / Day**

**or**

**Our Work Week Special**

**Mon – Fri**

***Only*** **$75.00 / Week**

Amanda Lucas

**227 Hattertown Road, Newtown • 203-426-6535**

**www.campseawatchkennels.com**

**Office Hours: Mon-Fri 8:00 am – 12:00 pm & 3:00 – 6:00 pm or by appointment**
**Saturdays & Sundays 8:00 am – 6:00 pm or by appointment**

Exhibit E


Let us be your pet's family while you're away!
CAMP SEAWATCH IS A SMALLER FACILITY WHICH ALLOWS OUR STAFF TO GIVE YOUR PETS PERSONALIZED ATTENTION.
BOARDING FOR DOGS & CATS | DOGGIE DAYCARE
BATHING, BLOW-OUTS & NAIL TRIMS
GROUP PLAY & ONE-ON-ONE PLAY
CAMP SEAWATCH KENNELS
227 HATTERTOWN ROAD
NEWTOWN | 203.426.6535
Mon-Fri 8am-12pm & 3pm-6pm
Sat & Sun 8am-6pm
CampSeawatchKennels.com
/CampSeawatchKennels
FREE bath with minimum 1 day of daycare
CAMP SEAWATCH KENNELS Newtown | 203.426.6535
With this coupon. Not valid with other offers. Expires 11-27-15.
FREE overnight stay
buy 3 nights, get 4th night free
CAMP SEAWATCH KENNELS Newtown | 203.426.6535
With this coupon. Not valid with other offers. Expires 11-27-15.
FREE daycare
buy 3 days, get 4th day free
CAMP SEAWATCH KENNELS Newtown | 203.426.6535
With this coupon. Not valid with other offers. Expires 11-27-15.
$5 OFF any purchase
of $20 or more
CAMP SEAWATCH KENNELS Newtown | 203.426.6535
With this coupon. Not valid with other offers. Expires 11-27-15.

Exhibit F



2008 WL 590491

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Fairfield.

ANIMAL ADOPTION NEWORK, INC. et al.

v.

ZONING BOARD OF APPEALS, Town of Monroe et al.

No. CV054009151. | Feb. 11, 2008.

**Attorneys and Law Firms**

Pattis Norman A. Law Offices LLC, Bethany, for Animal Adoption Nework, Inc. et al.

Frederick Martin, Monroe, for Zoning Board of Appeals, Town of Monroe et al.

**Opinion**

OWENS, J.T.R.

*1 The plaintiff, Animal Adoption Network, Inc., commenced this action on June 2, 2005, when service of process was made on the defendant, the Monroe Zoning Board of Appeals. The plaintiff holds a commercial kennel license from the State Department of Agriculture and since 1999 has operated its animal adoption activity on the subject property. (Return of record [ROR], 7, page [p.] 12.) In June of 2000 the Monroe planning and zoning commission issued a "position statement" which reached the conclusion that the use of the premises was then consistent with the nature, purpose and character of the prior non-conforming use and was not an illegal expansion of that business. (ROR 7, p. 32.) After more complaints by the neighbors, the planning and zoning commission conducted a site visit on April 14, 2004. (ROR 7, p. 4.) At their subsequent meeting on May 13, 2004, the planning and zoning commission adopted several findings. (ROR 7, p. 5.) The planning and zoning commission concluded that (1) the structures and animal runs as they presently existed were non-conforming and they were not permitted to be expanded, extended or modified; (2) the maximum number of dogs which may be kept or cared for was twenty-nine (29); (3) no expansion of activity, either physically or by level of intensity, shall be permitted; (4) no commercial vehicles of any type shall be parked or stored; and (5) any trailers stored on the premises should not be used or occupied by an animal. (ROR 7, p. 5.) On December 3, 2004, the Monroe police department executed a search and seizure warrant for the property. (ROR 8, Exhibit [Exh.] 11.) As a result of this search, the police found eighty-seven (87) dogs and thirty-two (32) cats on the premises as well as 2 unregistered vehicles including an animal transport vehicle. (ROR 8, Exh. 11.) As a result of these events, the Monroe Zoning Enforcement Officer issued a cease and desist order. (ROR 7, p. 6.) The cease and desist order found the following violations: (1) the plaintiff was using the greenhouse as a place to house dogs; (2) the police report stated that eighty-seven (87) dogs were found on the premises; (3) there continued to be open houses even though the plaintiff was told not to have them; (4) there was a tow truck being stored on the property and; (5) the police report stated that there was six dogs within a trailer. (ROR 8, Exh. 12.) The plaintiff appealed the order and on May 18, 2005, the Monroe Zoning Board of Appeals upheld the decision. (ROR 13.) The plaintiff then filed this appeal with the Superior Court.

"The Superior Court's scope of review is limited to determining only whether the board's actions were unreasonable, arbitrary or illegal." *R & R Pool & Patio, Inc. v. Zoning Board of Appeals,* 257 Conn. 456, 470, 778 A.2d 61 (2001). "It is well settled that a court, in reviewing the actions of an administrative agency, is not permitted to substitute its judgment for that of the agency or to make factual determinations on its own." (Internal quotation marks omitted.) *Connecticut Resources Recovery Auth. v. Planning & Zoning Commission,* 225 Conn. 731, 744, 626 A.2d 705 (1993). "In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule according to which, conclusions reached by [a zoning board] must

be upheld by the trial court if they are reasonably supported by the record. 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." (Internal quotation marks omitted.) *Municipal Funding, LLC v. Zoning Board of Appeals,* 270 Conn. 447, 453, 853 A.2d 511 (2004).

*2 The plaintiff argues that the defendant arbitrarily established a limit on the amount of dogs that the plaintiff could keep on the property, which was contrary to the zoning regulations and the General Statutes. The plaintiff further argues that there was not substantial evidence on the record to support the defendant's decision. Finally, at oral argument, the plaintiff argued that there was no basis for the search warrant which lead to the police discovering the conditions on the property which lead to the cease and desist order.

The defendant argues that there was substantial evidence on the record to support the board's decision. The defendant further argues that the board of appeals used the correct legal standard and properly applied it to the evidence on the record.

"[A] mere increase in the amount of business done pursuant to a **nonconforming** use is not an illegal **expansion** of the original use ... There must be a change in the character of the existing use in order to bring it within the prohibition of the zoning ordinance ... In deciding whether the current activity is within the scope of a **nonconforming** use consideration should be given to three factors: (1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in the effect upon the neighborhood resulting from differences in the activities conducted on the property." (Citations omitted; internal quotation marks omitted.) *Zachs v. Zoning Board of Appeals,* 218 Conn. 324, 331-32, 589 A.2d 351 (1991).

The zoning board of appeals came to the conclusion that the record supported the fact that the nature, character and use of the property had changed and that the record indicated that the change has brought about a substantial effect upon the neighborhood. (ROR 13.) The court finds that there was substantial evidence on the record to reach these conclusions and, therefore, will not disturb the board's decision.

Prior to the plaintiff purchasing the property, the record indicates that the property was used as a **kennel** for dogs whose owners were on vacation. (ROR 7, p. 45.) The prior owner housed an average of fifteen dogs there during popular vacation times, such as the summer months and holidays. (ROR 7, p. 45.) The prior owner also bred poodles and a neighbor testified that there was about 10-15 poodles on the property at a given time. (ROR 7, p. 47.) The current use of the property is entirely different than the prior use. Firstly, the dogs that were on the premises when the prior owners occupied it all had owners. The dogs currently on the property have no owners as they are waiting to be placed with families who wish to adopt them. (ROR 7, p. 11-12.) Also, the prior owners used the property to breed a small number of poodles. (ROR 7, p. 47.) The animals currently on the property are not in any way used for breeding purposes. Based on these factors the board came to the conclusion that the "record evidence and testimony supports the fact that the nature, character, and use of the non-forming **kennel** has changed." (ROR 13.)

*3 Furthermore, the board came to the conclusion that these changes brought about a substantial effect on the neighborhood. (ROR 13.) This conclusion is also supported by substantial evidence in the record. One neighbor testified that she had moved to the neighborhood five years ago and knew about the presence of the kennel. (ROR 7, p. 48.) The neighbor further testified that when she first moved in she had no problems with the kennel's presence, however, each year thereafter she testified that the kennel has grown and the noise has grown to the point where she can no longer use her backyard. (ROR 7, p. 48.) Several other neighbors testified about the increased noise level and smell emanating from the **kennel**. (ROR 7.) The court finds that this testimony provides sufficient evidence for the board to conclude that the changes in the **kennel** brought about a substantial effect on the neighborhood. Since the current use reflects a change in the nature and purpose from the original use and that change has had a substantial effect of the neighborhood, the zoning board of appeals affirmation of the cease and desist order was valid and proper.

For the foregoing reasons, the appeal of the plaintiff is denied and the decision of the board is sustained.

**All Citations**

Not Reported in A.2d, 2008 WL 590491, 45 Conn. L. Rptr. 24

End of Document

Exhibit G



2014 WL 6996359
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

Ronald S. McKOSKY et al.

v.

PLANNING AND ZONING COMMISSION OF the TOWN OF NORTH BRANFORD et al.

No. NNHCV136039112S. | Oct. 31, 2014.

**Attorneys and Law Firms**

Berdon Young & Margolis PC, New Haven, for Ronald S. McKosky et al.

Gesmonde Pietrosimone & Sgrignaril, Hamden, for Planning and Zoning Commission of the Town of North Branford et al.

**Opinion**

ECKER, J.

*1 This is an administrative appeal from the approval by the North Branford Planning and Zoning Commission ("Commission") of a site plan submitted by Kenneth Ochenkowski, one of three owners of approximately 9.2 acres of property located at 88 Parsonage Hill Road, North Branford, Connecticut ("Premises"). The site plan application sought approval of a "staging and storage area and structure" to be used for an "existing trucking and hauling business" located on the Premises. The zoning permit application accompanying the site plan application described the proposed structure as a "new" "accessory building" with an area of approximately 4700 square feet. [1]

All parties agree that the Premises is located in an area that, since 1962, has been designated as a "Residence R–40 District" in the Zoning Regulations of the Town of North Branford ("Regulations"), and further agree that the Regulations allow only residential uses of property within the R–40 zone. Kenneth Ochenkowski's position from the outset of these proceedings has been that his site plan and zoning permit applications should be granted because the storage structure for the trucking and hauling business is permitted as a legal pre-existing **nonconforming** use. The Commission ultimately agreed with him, and voted on May 16, 2013 to approve the site plan application. [2]

This appeal was timely filed on June 3, 2013. The plaintiffs, Ronald and Tatyana McKosky, own property directly across from the Premises on Parsonage Hill Road. The defendants are the Commission and Kenneth Ochenkowski, Jean Szwabowski and Joseph J. Ochenkowski, Jr., who are co-owners of the Premises ("the Ochenkowski Defendants"). [3] The Return of Record was filed and the pleadings were closed in due course. All parties submitted written briefs.

The appeal was heard by this Court on June 2, 2014. The hearing consisted entirely of legal argument, with two minor exceptions. Ronald McKosky testified and submitted documentary evidence establishing that the McKoskys own real property within 100 feet of the Premises, and therefore are "aggrieved persons" under General Statutes 8–8(a)(1) for purposes of this appeal. In addition, the plaintiffs submitted a color copy of an aerial photograph of the Premises (Pl.Ex.3). The photograph is not new evidence because a copy of the same photograph had been an exhibit before the Commission, see Comm'n Ex. 11. A black-and-white photocopy of that exhibit was included in the Return of Record see ROR No.5, but the color copy (Pl.Ex.3) was useful to the Court due to the poor quality of the black-and-white photocopy. Both plaintiffs' counsel and the Ochenkowskis' counsel

presented argument about the contents of Pl.Ex. 3, but no new evidence was taken.[4] Supplemental briefs were submitted by the parties on July 2, 2014.

There are three fundamental issues raised by this appeal, the last of which was never addressed by the Commission. The first issue is whether there was substantial evidence before the Commission to support its determination that a trucking and hauling business existed on the Premises prior to the adoption of zoning in North Branford in 1962. Kenneth Ochenkowski's site plan application seeks Commission approval based upon a claim of pre-existing legal **nonconforming** use, and the Commission, after considering the issue over the course of three meetings, found that the allegation had been proved. The second question is whether the Commission erroneously concluded that the proposed use of the storage structure is permissible under Section 5 of the Regulations, which, among other things, prohibits the enlargement or **expansion** of any building devoted to a **nonconforming** use. The Commission made no explicit findings regarding compliance with Section 5, but the site plan application could not have approved in the absence of such a finding. The third issue, which appears to have received no attention before the Commission but has been briefed and argued extensively by the parties on appeal, is whether the proposed structure qualifies under the Regulations as a permissible "accessory" building, which defendants say alone would justify its approval. Each of these three issues is addressed below.

*2 For the reasons that follow, the appeal is sustained and the matter is remanded to the Commission with direction to deny the site plan application.

## SUMMARY OF ADMINISTRATIVE PROCEEDINGS AND RELEVANT FACTS

As noted, the Commission is responsible for site plan approval in North Branford. The application and approval process is governed by Sections 41 and 62 of the Regulations. Section 41 contains "Site Development Plan Standards," and includes numerous categories of general and specific standards. Section 41.1 establishes at the outset that the site plan must comply with *all* Regulations, not simply the standards contained in Section 41: "The standards in this Section are *in addition to* other provisions of these Regulations applicable in the district [i.e., zone] in which the use is to be located [emphasis added] ..." Section 62.6.3 makes the same point: "The SITE DEVELOPMENT PLAN shall be approved by the Commission when the Commission determines that the PLAN conforms to *all of the requirements of these Regulations and* to the standards for SITE DEVELOPMENT PLANS specified in Section 41 [emphasis added]." The term "these Regulations" refers to *all* of the Regulations, and necessarily includes, among others, regulations relating to **Nonconformity** (Section 5), Permitted Uses (Section 23), and Additional Standards (Section 44).[5]

To carry out its obligations, the Commission met on three separate occasions (April 4, April 18, and May 16, 2013) to review the Ochenkowski site plan application (hereinafter, "Application"). At the first meeting, Attorney David Gibson, the Ochenkowskis' lawyer, briefly described the storage structure, its proposed use in connection with the trucking and hauling business, and the zoning issues he considered relevant. Consistent with the written "Statement of Use" submitted with the Application, Attorney Gibson explained that the Premises, though zoned R–40 since North Branford adopted zoning in 1962, and serving as the Ochenkowski family's homestead since the late 1940s, also had been used for the family's "trucking and delivery business" and the "manufacture and sale of building construction materials" prior to 1962, and continuously since that time. TR 4/4/13, at 1–2. Based on that history, Attorney Gibson explained that the trucking and hauling operation (now known as Ochenkowski Services, LLC) was a "legal, pre-existing **nonconforming** use." *Id.* at 2. "The reason we're before you this evening," he said, "is because Ochenkowski Services, several years ago, wanted to consolidate some of its vehicles, trucks and equipment and basically protect it from the elements ..." *Id.* Attorney Gibson noted that the storage structure was constructed in 1998 without any site plan or other zoning approval. *Id.* The Ochenkowskis later were instructed by town zoning officials that zoning approval was necessary, and Kenneth Ochenkowski filed the relevant site plan and permit applications in February 2013.

*3 Robert Criscuolo, the applicant's engineer, made a short presentation to the Commission at the April 4th meeting. Criscuolo recited the dimensions of the storage structure see n. 1 above, and described the materials used in its construction. TR 4/4/13,

at 3. He submitted photographs of the 4700 square foot structure and the Ochenkowski's 2000 square foot home, also located on the Premises. Comm'n Exs. 4A–4C. Criscuolo opined that the building complies with the Regulations.[6] TR 4/4/13, at 4. He did not mention the **nonconformity** regulations specifically.

The applicant, Kenneth Ochenkowski spoke briefly. He explained that the structure is constructed using lightweight metal siding, and the top is covered using tarps secured with wooden firring strips. *Id.* at 5. The Commission also permitted plaintiff Ronald McKosky to speak at the April 4th meeting. McKosky, a long-time neighbor who lives directly across Parsonage Hill Road, stated that the trucking business was not in existence prior to the adoption of zoning regulations in North Branford.[7] *Id.* at 7. McKosky complained that he had been attempting to get the town's Zoning Enforcement Officer to take remedial action for years, to no avail. Attorney Gibson and Joseph Ochenkowski, Jr. (the applicant's brother and the eldest son of Joseph Ochenkowski, Sr.) responded to McKosky's comments. Joseph did not provide any direct information about his father's commercial trucking or hauling business, but said that his father was "a very enterprising man" who owned an old Model A pick-up truck which was used by his father to haul dirt to the Premises. *Id.* at 7–8. He also submitted two undated photographs depicting two different trucks, which he said had been owned, at different times "way back" by his father. Comm'n Ex. 10.[8] The April 4th hearing on the Application ended with members of the Commission requesting that the Ochenkowskis provide documentary evidence ("any kind of billing ... any kind of paperwork") that the trucking business existed prior to 1962. TR 4/4/13, at 12. One of the Ochenkowski brothers assured the Commission that "[w]e would be able to find that ..."

The historical inquiry continued at the Commission meeting convened on April 18, 2013. Attorney Gibson reported that his clients had been unable to locate any records demonstrating when the trucking and hauling business was started, or that it existed prior to the adoption of zoning regulations in North Branford. TR 4/18/13, at 2–3. He explained that "there was a fire some time ago when most of the records were destroyed ..." *Id.* at 3. A later comment by Joseph Ochenkowski, Jr., however, indicated that the "fire" referenced by Attorney Gibson was set by Joseph's father, who burned "a lot of stuff" after it sustained water damage due to storage in a leaky trailer. *Id.* at 17.

The closest that the Ochenkowskis came to documentary evidence of a pre–1962 trucking and hauling business was their submission of a written, notarized statement dated April 12, 2013, signed by John S. Ochenkowski, the brother of Joseph Ochenkowski, Sr. See Comm'n Ex. 16. The written statement confirms that Joseph Ochenkowski, Sr., was a hard worker with an entrepreneurial spirit. It contains no explicit assertion about a trucking and hauling business. The statement says that in 1947, John Ochenkowski helped his brother Joseph make the foundation blocks used to build the house located on the Premises, and requests were made thereafter by unidentified persons who apparently admired the foundation blocks and wanted some for themselves: "We made the blocks in [Joseph Ochenkowski, Sr.'s] back yard, and delivered them with his flatbed truck." *Id.* John Ochenkowski's statement also says that he and his brother worked for Wallingford Steel starting in the late 1940s, and "Joe soon began making deliveries of steel to their [i.e., Wallingford Steel's] customers with the same truck." *Id.* According to his brother, "Joe would do and move anything for anyone." *Id.* Whether Joseph Ochenkowski, Sr., charged for his services, or used the Premises to operate anything that could be characterized as a hauling business, is left to implication.

*4 Ronald McKosky spoke again at the April 18th meeting. TR 4/18/13, at 15. He stated that he had known Joseph Ochenkowski, Sr., since 1950, and asserted that Ochenkowski was never in the trucking business. According to McKosky, Ochenkowski had owned a single Model A Ford pick-up truck, which McKosky said was not capable of hauling steel commercially. McKosky said that Ochenkowski fabricated his own concrete blocks for personal use, not for sale. "The only preexisting business in 1962 was an insurance business that branched out onto real estate only." *Id.* McKosky complained that Kenneth Ochenkowski now runs a "truck terminal" on the Premises by operating very large long, low-bed, rigging type tractors and trailers on the road. Very noisy ... coming in every day, seven days a week." *Id.* at 18.

The Commission once again requested Kenneth Ochenkowski to provide additional evidence of the pre-existing use of the Premises as a trucking and hauling business. As the April 18th meeting came to a close, Commissioner Gunn asked the applicant to "[a]ddress what has been done since the last meeting in an effort to satisfy your concerns and our concerns, too." *Id.* at 18. Kenneth Ochenkowski replied: "We looked and the only thing we could do was to go to my uncle [John Ochenkowski] who was

here. He did work with my father." *Id.* Commissioner Gunn observed that the Commission was "still left with the problem of when did the trucking business start." *Id.* at 19. He suggested that if the Applicant could, "you know, come up with something about the trucking business was actually there earlier [sic] ... early on, I think we can settle it and have some concrete facts to go by." *Id.* Gunn suggested that the applicant "go back and try to get some informa[tion] ... some data ..." *Id.* at 20 (ellipses in original). Commissioner Leskovich reiterated the request: "There must be taxes. There must be motor vehicle registrations. There's gotta be something." *Id.* She suggested that the Ochenkowskis consult with their accountant: "[Y]ou've surely been to an accountant over the years," and urged the applicant to provide documentary evidence. *Id.* at 19–20 ("Something that establishes this trucking [business] ... I think that's what you have to establish."); *id.,* at 20 ("Show us something, something").[9] Once again, Kenneth Ochenkowski said he would do so: "Okay, okay. Thank you." *Id.*

The Commission took up the Application for the final time on May 16, 2013. At the outset, Commissioner Gunn commented: "I think the one thing ... they were going to look for evidence that the trucking business was there, you know, prior to the zoning in '62 ... and I think, at least in my case, that was the big question. If we got some indication that this business had gone on there, uh, maybe it's ... will help us get out of the woods on this damn thing." TR 5/16/13, at 1. The Ochenkowskis responded by offering various documents—none of which demonstrated or even suggested that a trucking and hauling business existed prior to the 1970s. For example, Joseph Ochenkowski, Jr., submitted a bill of sale for "one of my first trucks," *id.,* a 1959 Mack tractor. See Commission Ex. 23A. The bill of sale, however, is dated October 20, 1976, and has no probative value regarding the state of affairs in 1962 or before. The same is true of a document reflecting Joseph Ochenkowski, Jr.'s purchase of a bulldozer in 1975. *See* Comm'n Ex. 23B.

*5 A significant amount of time at the May 16th meeting was spent discussing the legal issue of "intensification" versus "**expansion**" of a **nonconforming** use.[10] The North Branford Town Planner, Carol Zebb, who also serves as the clerk for the Commission, stated that Town Attorney John Gesmonde had provided her with a number of legal opinions, drafted by Attorney Gesmonde in connection with previous zoning matters, regarding the intensification/**expansion** distinction. *See* TR 5/16/13, at 6. The opinion letters were made Comm'n Ex. 22. Attorney Gibson, on behalf of the Ochenkowskis, addressed the intensification/**expansion** issue at length. *See* TR 5/16/13, at 6–9. He argued that the examples of intensification contained in the Town Attorney's legal memoranda supported the Ochenkowskis' position and helped demonstrate "exactly what we're talking about here." *Id.* at 6. Attorney Gibson argued that the pending application involved a permissible intensification, not an impermissible **expansion**, and submitted a short legal memorandum on the issue. *See* Comm'n Ex. 25.

The Commission entertained a motion to approve the Application toward the end of the meeting. A short discussion ensued. Commissioner Combs stated that he "kinda wanted to go against [the motion]," explaining that the trucking business had grown to the point that "it's like a sink overflowing. You don't want to have too much truck traffic ... [Y]ou run a business out of the house and that's fine but there has to be a point where it becomes too much for the neighborhood." TR 5/16/13, at 10. Commissioner Lescovich disagreed, stating that the "[Ochenkowskis'] father started this business and it has intensified. It's been there for 60 years and certainly I'm not going to deny a family 60 years of improvement on a business that they ... are relying on ..." *Id.* at 11. Commissioner Combs explained that he was concerned because "we don't know ... when it was started [or if] ... it's one or two trucks a week and now it's ... you know, who knows." *Id.* At this point, Kenneth Ochenkowski interjected: "I have one truck. I have no drivers. I am one truck. I have two trucks that are registered as on or off road." *Id.* at 11. The assurance evidently had its intended effect. Without further discussion, the Commission voted 3–0 (with one abstention) to approve the Application.[11]

## STANDARD OF REVIEW

The parties agree that the applicable standard of review is well-settled under established Supreme Court precedent:

> Judicial review of an administrative agency's decision differs depending on whether the court is reviewing a factual or a legal determination. When "the administrative agency has made a factual determination, the scope of review ordinarily is expressed

in such terms as substantial evidence or sufficient evidence." *Quarry Knoll II Corp. v. Planning & Zoning Commission* 256 Conn. 674, 721 (2001), emphasis removed]. Under this standard, the "[c]onclusions reached by [the board] must be upheld by the [reviewing] 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 [reviewing] court would have reached the same conclusion ... but whether the record before the board] supports the decision reached ... If a [reviewing] 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. *Rural Water Co. v. Zoning Board of Appeals,* 287 Conn. 282, 94 (2008).

*6 When the administrative agency has made a legal determination, however, the scope of review is ordinarily plenary. *Quarry Knoll II Corp. v. Planning & Zoning Commission, supra,* 256 Conn. at 721. "Generally, it is the function of a zoning board ... to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. [In turn] [the trial court ha[s] to decide whether the board correctly interpreted the [applicable regulations] and applied [them to the facts with reasonable discretion ... In applying the law to the facts of a particular case, the board is endowed with ... liberal discretion, and its action is subject to review ... only to determine whether it was unreasonable, arbitrary or illegal ... [T]he plaintiffs bear the burden of establishing that the board acted improperly. *Wood v. Zoning Board of Appeals,* 258 Conn. 691, 697–98 (2001).

Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion ...

Finally, zoning regulations are local legislative enactments ... and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes ... Thus, in construing regulations, our function is to determine the expressed legislative intent ... Moreover, regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended ... and the words employed therein are to be given their commonly approved meaning. *Id.,* at 698–99.

*Rapoport v. Zoning Board of Appeals,* 301 Conn. 22, 32–34 (2011); *accord Villages, LLC v. Enfield Planning and Zoning Commission,* 149 Conn.App. 448, 456 (2014).

The underlying proceeding involves a site plan approval. That fact that does not change the standard of review, *see, e.g., Loring v. Planning and Zoning Commission,* 287 Conn. 746, 756 (2008) ("When a 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 [its] discretion ... [A] reviewing court is bound by the substantial evidence rule ..."); but it does define the proper role and responsibilities of the zoning authority acting on the Application. "A zoning commission's authority in ruling on a site plan is limited. [A] site plan is an administrative review procedure that assists in determining compliance of an underlying development proposal with zoning regulations ... A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning ... regulations ... General Statutes § 8–3(g)." *Yagemann v. Planning & Zoning Commission,* 92 Conn.App. 355, 361 (2005) (internal quotation marks omitted); *see Gerlt v. Planning & Zoning Commission,* 290 Conn. 313, 322 (2009) ("It is axiomatic that the review of site plan applications is an administrative function of a planning and zoning commission") (internal quotation marks omitted); *Barbieri v. Planning & Zoning Commission,* 80 Conn.App. 169, 172 (2003). ("In ruling upon a site plan application, the planning commission acts in its ministerial capacity, rather than its quasi-judicial or legislative capacity. It is given no independent discretion beyond determining whether the plan complies with the applicable regulations") (internal quotation marks omitted).

*7 Finally, municipal boards are often composed of laypersons rather than lawyers, and the specific reasons underlying a board's decision are sometimes not stated in formal legal terms, or at all. No express findings were made here. Under these circumstances, governing law requires the trial court to do its best to identify the reasoning underlying the decision at issue. *See*

*Rapoport, supra,* 301 Conn. at 34 ("[W]hen a [board] gives no reason for its decision, the [reviewing] court must search the entire record to find a basis for the [board's] decision ...") (internal quotation marks and citations omitted); *see also Gibbons v. Historic District Commission,* 285 Conn. 755, 769–71 (2008).

## I. NONCONFORMING USE

All parties agree that the threshold question on appeal is whether the Commission properly concluded that the **nonconforming** use of the Premises existed at the time the location was zoned R–40 (residential) in 1962. If the trucking and hauling business did not exist at that time, then the site plan did not conform to the Regulations, and the Application should have been denied. If the business did pre-exist zoning in North Branford, then approval of the site plan was proper unless the proposal violated the Regulations in other ways. [12] The record discloses that the Commission clearly understood that it was required to decide this historical question, and it determined that the Ochenkowskis operated a trucking and hauling business before 1962. See Summary of Proceedings, above.

Whether the trucking and hauling business existed as of 1962 is a question of fact. The issue before the Court is whether the Board's finding in this regard is supported by substantial evidence under the applicable standard of review. The "substantial evidence" standard is highiy deferential, and has been analogized "to the 'sufficiency of evidence' standard applied in judicial review of jury verdicts ... [under which the evidence] must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' " *Lawrence v. Kozlowski,* 171 Conn. 705, 713 (1976), *cert. denied,* 431 U.S. 969 (1977), *quoting National Labor Relations Board v. Columbian Enameling and Stamping Co.,* 306 U.S. 292, 299–300 (1939); *accord Finley v. Inland Wetlands Commission,* 289 Conn. 12, 38 (2008). See also n. 14 below.

Even under this restrictive standard of review, the question is a very close one on this record. The evidence of pre-existing use was extremely weak. Despite numerous requests by the Commission, the Ochenkowskis were unable to produce any of the evidence that reasonably would be expected to exist had there been a trucking and hauling business on the Premises from 1949 (or thereabouts) until 1962. The Ochenkowskis failed to produce a single business record of any kind relating to any such activity prior to the adoption of zoning regulations in 1962. There were no ledgers, invoices, receipts, bills of lading, payroll documentation, tax returns, correspondence, licensing or regulatory documents, or any other formal (or even informal) indicia of commercial activity. Nor were there any newspaper articles, photographs, marketing materials, signs, or similar documentary or tangible items. The Ochenkowskis, in short, were unable to produce a single scrap of contemporaneous evidence to support their claim that a trucking or hauling business existed on the Premises before 1962. [13] The Ochenkowskis also failed to offer any compelling explanation for the absence of that evidence; their only excuse was that their father burned some water-damaged records. They could not explain why they were unable to produce any type of documentation from a local or state governmental agency, the public library or historical society; a former customer, or a family member, that would tend to show—directly or even circumstantially—that Joseph Ochenkowski, Sr ., had operated a trucking and hauling business before 1962.

*8 Despite serious skepticism concerning the evidence, the Court feels compelled to conclude that the record contains "substantial evidence," as that term is defined under Connecticut law, [14] to support the Commission's finding that a trucking and hauling business did exist prior to 1962. Kenneth Ochenkowski and Joseph Ochenkowski, Jr., two sons of Joseph Ochenkowski, Sr., spoke in support of the historical claim of a pre-existing business, and an affidavit to the same effect was received from John Ochenkowski. While these statements are general in nature and lack important detail, the statements nonetheless constitute some evidence that Joseph Ochenkowski, Sr., sometimes used his truck to haul items (blocks and steel, at least) for pay. *See* TR 4/4/13, at 3 (Joseph Ochenkowski, Jr.); *Id.,* at 12–13 (speaker identified only as Mr. Ochenkowski); TR 4/18/13, at 1–2 and Comm'n Ex. 16 (written statement of John Ochenkowski); TR 4/18/13, at 2 (statement of Kenneth Ochenkowski). [15] The "for pay" part is implied, but it is a reasonable inference: the record is clear that Joseph Ochenkowski, Sr., was hard-working and entrepreneurial, and the nature of the work is not of a kind normally done without charge. The lack of detail and specificity also may be attributable to the fact that the Ochenkowskis' statements at the Commission hearings were accompanied

by extensive comments made by their attorney, David Gibson, who stated repeatedly throughout the hearings that the trucking and hauling business was in continuous operation since the 1950s. Attorney Gibson did not purport to base his statements on his own personal knowledge; [16] he was simply stating his clients' position as a matter of fact. However, in light of the informality of the proceedings (the Commission heard from anyone who wished to speak, and statements were not made under oath), the Ochenkowskis may have believed that their fundamental point was too obvious to require verbal elaboration.

To summarize: the record facts, and reasonable inferences drawn from those facts, support—just barely—the finding that Joseph Ochenkowski, Sr., owned a truck, [17] which he kept on the Premises, and he sometimes used his truck to haul materials, for pay, during the 1950s and early 1960s. Sometimes he hauled concrete blocks from the Premises to an off-site customer, and at other times he hauled steel from one off-site location to another off-site location. The evidence produced at the Commission's hearings probably would not have satisfied this Court, but it cannot be said that the Commission's factual finding on this point is without basis in the record.

## II. DID THE SITE PLAN APPLICATION PROPOSE AN ILLEGAL EXPANSION OF THE PRE–EXISTING NONCONFORMITY?

Two issues remain once it has been determined that the trucking and hauling business existed prior to 1962. One is whether the construction of the proposed storage structure expanded the pre-existing **nonconformity** in violation of applicable law. The other is whether the structure qualifies as an "accessory building," which is a zoning concept that defendants say applies on these facts and justifies the Commission's site plan approval. [18] The "accessory building" issue is addressed in Part III below.

### A. Compliance With North Branford's Nonconformity Regulations

*9 A pre-existing **nonconforming** use may not be eliminated by municipal zoning laws, see General Statutes § 8–2, but municipalities are free to enact regulations to prohibit the **expansion** or enlargement of a **nonconforming** use. Such regulations are very common in zoning codes throughout Connecticut and elsewhere. Indeed, the underlying objectives of zoning law would be substantially frustrated if municipalities were unable to prevent the **expansion** of **nonconforming** uses. The Connecticut Supreme Court long ago explained that the "obvious purpose" of zoning regulations prohibiting enlargement of **nonconformities** "is to contain a **nonconforming** use within the limits of the use in existence when the regulations were adopted so that, eventually, the use may be brought into conformity with the regulations for the district in which the premises are located." *Guilford v. Landon,* 146 Conn. 178, 182–83 (1959); see 9B R. Fuller, *Connecticut Practice Series: Land Use Law and Practice* § 52.2, at 204 (3d ed.2007). One of the most basic principles in zoning law supplements this precept by providing that "**nonconforming** uses should be abolished or reduced to conformity as quickly as the fair interest of the parties will permit. In no case should they be allowed to increase." *Salerni v. Scheuy,* 140 Conn. 566, 570 (1954), *quoted in Connecticut Resources Recovery Authority v. Planning & Zoning Commission,* 225 Conn. 731, 740 (1993); *accord Vine v. Zoning Board of Appeals,* 281 Conn. 553, 562 (2007); *State v. Perry,* 149 Conn. 232, 234–35 (1962) (stating that restrictive regulations of this nature are "in accordance with the policy of the law and the spirit of zoning"); *Woodbury Donuts, LLC v. Zoning Board of Appeals,* 139 Conn.App. 748, 760–61 (2012).

The Regulations adopted by North Branford, particularly Section 5, unequivocally reflect a purpose to limit, to the maximum degree possible, any enlargement of a **nonconforming** use or building. "We always must construe a regulation in light of its purpose." *Michos v. Planning and Zoning Commission,* 151 Conn.App. 539, 548 (2014) *quoting Heim v. Zoning Board of Appeals,* 289 Conn. 709, 718 (2008). [19] Section 5 of the Regulations (entitled "**Nonconformity**") first expresses that intention in general terms, and then enumerates more specific prohibitions designed to prevent any increase in the nature or size of pre-existing **nonconformities**. Section 5.1 ("Intent") states:

> It is the intent of these Regulations that **nonconformities** are not to be expanded contrary to the comprehensive plan of zoning, that the **nonconforming** use of land, buildings and other structures should be changed to conformity as quickly as the fair interest of the owners permit and that the existence of any **nonconformity** shall not of itself be considered grounds for the approval of a variance for any other property.

Section 5.6 ("**Nonconformity**—Use") contains five subsections prohibiting various ways of expanding a **nonconforming** use. Section 5 .6.1 states:

> *10 *Enlargement:* No **nonconforming** use of land shall be enlarged, extended or altered, and no building or other structure or part thereof devoted to a **nonconforming** use shall be enlarged, extended, reconstructed or structurally altered, except where the result of such changes is to reduce or eliminate the **nonconformity.** No **nonconforming** use of a building or other structure shall be extended to occupy land outside such building or other structure or space in another building or other structure.

Section 5.6.2 ("Change") states that "[n]o **nonconforming** use of land, buildings or structure shall be changed to any use which is substantially different in nature and purpose from the former **nonconforming** use except to such uses that are permitted uses ..." Section 5.6.3 ("Moving") states:

> No **nonconforming** use of land shall be moved to another part of a lot ... and no **nonconforming** use of a building or other structure shall be moved or extended to any part of the building or other structure not manifestly arranged and designed for such use at the time the use became **nonconforming,** and no building or other structure containing a **nonconforming** use shall be moved, unless the result of any such move is to end the **nonconformity.**

These Regulations—especially 5.1, 5.6.1, and 5.6.3—would appear to create insuperable problems in this case for the Ochenkowskis. Their express intention is to encourage the reduction of any **nonconformity,** prohibit its **expansion,** and encourage its elimination over time. Section 5.6.1 states that "no building or structure or part thereof devoted to a **nonconforming** use shall be enlarged, extended, reconstructed or structurally altered, except where the result of such changes is to reduce or eliminate the **nonconformity.**"[20] The second sentence of Section 5.6.1 imposes the additional restriction that "no **nonconforming** use of a building or other structure shall be extended to occupy land outside such building or other structure or space in another building or other structure." Likewise, Section 5.6.3 prohibits moving a **nonconforming** use to another part of the lot.

Under the circumstances of this case, these provisions cannot reasonably be understood to permit the construction of a brand-new 4700 square foot building devoted to a **nonconforming** use. The Ochenkowski Defendants contend that Section 5.6.1 does not apply because the proposed storage structure is *new;* they say that the structure does not literally enlarge, extend, reconstruct, or structurally *alter* a building, and therefore is not prohibited, because no storage structure at all existed before. Defendants also suggest that the proper analysis asks only whether the structure *itself* conforms to the zoning regulations; the *use* of the structure, they contend, is a separate matter entirely. The following paragraph from the Ochenkowski Defendants' brief summarizes their position:

> The obvious intent of Section 5.6.1 of the Regulations is to prevent *pre-existing uses and/or nonconforming buildings or structures* devoted to a **nonconforming** use to be enlarged, extended, reconstructed or altered, and therefore is not relevant to nor should it be applied to a new structure which complies with the existing Zoning Regulations with regard to location, setbacks and bulk standards, and is used for the purpose of covering and protecting trucks and equipment used in the pre-existing trucking and hauling **nonconforming** use ... *The structure itself is not nonconforming, it is a new structure* that is now included within and is consistent with the pre-existing use and does not constitute an **expansion.**

*11 Supplemental Brief of the Ochenkowski Defendants, dated July 2, 2014, at p. 6 (emphasis in original).[21]

The argument is without merit. To begin with, the attempt to sever consideration of a building's **nonconforming** *use* from the **nonconformity** analysis under Section 5.6.1 ("the structure itself is not **nonconforming**") ignores the explicit textual command of Section 5.6.1 prohibiting the **expansion** of any "building or structure or any part thereof *devoted to a nonconforming use* ..." A structure itself can comply with all Regulations governing location, setbacks, bulk standards, etc., and still violate Section 5.6.1—solely as a result of its use—by undergoing physical enlargement. To be sure, there are other provisions in the Regulations, contained in Section 5.7, that govern **nonconforming** improvements, buildings and other structures regardless of use. But Section 5.6 establishes *additional* limitations applicable to buildings and land "devoted" to a **nonconforming** use. Its requirements cannot be sidestepped in this case.

Equally unpersuasive is the Ochenkowskis' argument that Section 5 .6.1 has no relevance here because the proposed storage structure is "new." The argument is not fully elaborated, but the Ochenkowskis appears to claim that Section 5.6.1 only prohibits the **expansion** of *existing* buildings devoted to a **nonconforming** use, while permitting construction of *new* buildings devoted to that use. To articulate the argument goes a long way toward discrediting it. "Common sense must be used in construing [a] regulation, and we assume that a rational and reasonable result was intended by the local legislative body." *Spero v. Zoning Board of Appeals,* 217 Conn. 435, 441 (1991); *accord Doyen v. Zoning Board of Appeals,* 67 Conn.App. 597, 605, *cert. denied,* 260 Conn. 901 (2002). Common sense and logic dictate that the prohibition contained in Section 5.6.1 (barring any extension of a pre-existing building devoted to a **non-conforming** use) also must prohibit, *a fortiori,* the construction of a *new* building for such use. An example will illustrate the point. Imagine that as of 1962, Joseph Ochenkowski, Sr., stored his Model A truck in a small 200 square foot, one-vehicle garage. Fifty years later his descendants wish to shelter two small trucks used in the trucking business. The existing garage is not big enough for two vehicles. Under Defendants' theory, Section 5.6.1 *prohibits* the successors from adding a tiny 180 square foot bay to the existing structure, but *allows* them to construct a new, separate building consisting of a huge 4700 square foot garage for storage of the two vehicles. This interpretation defies common sense, leads to an absurd result, and contravenes the fundamental intention animating Section 5 of the Regulations. *See Tayco Corp. v. Planning and Zoning Commission,* 294 Conn. 673, 686 (2010) (observing that the principles of statutory construction "require us to construe a statute in a manner that will not thwart its intended purpose or lead to absurd results"); *Hibner v. Bruening,* 78 Conn.App. 456, 459 (2003) ("[W]e presume that the legislature intends sensible results for the statutes it enacts").

*12 The broad language of Section 5.6.1 certainly does not compel Defendants' narrow construction. The provision contains **expansive** language reflecting an effort to prohibit any increase in the physical area of any structure devoted to a **nonconforming** use ("no building or ... structure ... devoted to a **nonconforming** use shall be enlarged, extended, reconstructed or structurally altered"). It does not use the verb "construct" or "build," presumably because the point was thought to be obvious or already subsumed within the prohibitory language, but the text nonetheless contains at least three indications that the creation of new structures is included within the scope of the prohibition. First, new construction of a building, of necessity, "enlarge[s]" and "extend[s]" the physical size of that building as each square foot of the new structure comes into existence and occupies an area previously unoccupied by that structure. Second, new construction is the very instantiation of the structural alteration of a building, and in a very real sense it consists, from start to finish, of nothing else but a countless number of such alterations. Third, a new structure, built to be devoted to a **nonconforming** use, will occupy more and more of the land previously "outside" of the new structure at each stage of construction, in violation of the second sentence of Section 5.6.1, which expressly prohibits any extension of any **nonconforming** use of a building to occupy land outside such building. [22]

The proposed structure also would appear to violate Section 5.6.1 (and/or Section 5.6.3, which prohibits moving a **nonconforming** use to another part of a lot) in one additional respect, because construction of a 4700 square foot building almost certainly increases the size of whatever small area was used by Joseph Ochenkowski, Sr., to park the Model A truck prior in 1962. [23] There was no evidence before the Commission that would allow its members to conclude that Joseph Ochenkowski, Sr., used such a large area, or the same lot location, to store his truck in 1962. [24] To the contrary, the evidence strongly indicates that the storage facility was constructed on land that was covered by trees in the 1950s or 1960s. *See* Comm'n Ex. 24A–24C (showing area occupied by the storage structure and same area in 1990, covered by what appears to be forest). Because the photographic evidence is not self-explanatory, and no definitive or even useful information was provided at any point about

what the photographs show with respect to the location of any truck storage area in 1962 and before. The Court concludes that substantial evidence did *not* exist to support a finding by the Commission that the new storage structure occupies an area that had been devoted to the **nonconforming** use prior to 1962.[25]

The foregoing discussion leads to one additional observation regarding the Commission's decision making in this case. The Regulations require the Commission, before approving a site plan, to determine whether the proposed structure complies with the limitations imposed by Section 5, including 5.6.1 and 5.6.3. *See* above at pp. 3–4. The Commission's findings need not be expressly stated as to any particular Regulation, but there must be grounds for a reviewing court to believe that the Commission considered the relevant Regulations. In the present case, a searching review of the record leads to the opposite conclusion. It appears doubtful that the Commission considered any of the specific requirements set forth in Section 5. Despite holding three lengthy meetings to consider the Ochenkowski Application, and notwithstanding the fact that extensive attention was paid to the general issue of **nonconforming** use and the specific topic of enlargement or **expansion** of a **nonconforming** use, nothing in the record even remotely indicates that the Commission ever actually looked at, or was educated or informed about, the particular requirements governing **nonconformities** contained in Section 5 of the Regulations.

*13 This observation is based on a combination of facts. No direct or indirect reference was made to Section 5 by any Commissioner at any time. A reference to the relevant zoning rules, even in passing or in part, would be expected. The relevant regulations are numerous and detailed, hardly the kind of rules that the Commissioners would have committed to memory. The Commission manifestly was on notice that **nonconformity** issues were raised by the Application, because references to the generic concept had been discussed at length at more than one meeting. The Town Planner, Carol Zebb, went so far as to obtain past legal opinions on the subject of intensification vs. enlargement of a **nonconformity**. TR 5/16/13, at 1, 6; Comm'n Ex. 22 (legal memoranda). Unfortunately, none of those documents reference or analyze the particular **nonconformity** Regulations themselves. The Ochenkowskis' attorney, for his part, also addressed the general issue of **nonconforming** use on numerous occasions, once at length. TR 5/16/13, at 6–9; see also TR 4/18/13, at 9. The attorney also submitted a short "Legal Memorandum" arguing that "AN INCREASE OR INTENSIFICATION OF BUSINESS DOES NOT CONSTITUTE AN **EXPANSION** OF A **NONCONFORMING** USE." Comm'n Ex. 25 (emphasis in original). However, none of these oral or written submissions mention or quote the actual text of the relevant Regulations, in whole or in part.[26] No member of the Commission asked a single question at any point indicating sensitivity to, or familiarity with, the limitations contained in Section 5. To the extent that the Commission meetings focused on the issue of **nonconformity**, the inquiry was limited to determining whether the trucking and hauling business existed before 1962, and, to a lesser degree, the extent to which the use had increased (i.e., the number of trucks). No questions were asked, and no information was elicited, about the factors relevant to Section 5 .6.1 or 5.6.3 (e.g., the specific location of the pre–1962 parking area, whether the proposed storage facility was located where the prior business activity had taken place, whether the construction of the building increased the total square footage devoted to the **nonconforming** use, etc.). While the Court would not expect a lay Commission to conduct a lawyer-like analysis of the Regulations, it is troubling that the administrative body charged with ensuring compliance with the Regulations failed to display any familiarity whatsoever with those Regulations at any point in the proceedings. The Commission's two briefs submitted on appeal continue to avoid discussing the actual substance of Section 5.6.1 of the Regulations.[27]

The foregoing discussion leads the Court to these conclusions:

1. The proposed new 4700 square foot structure, devoted to a **nonconforming** use, violates Section 5.6.1 of the Regulations. The Ochenkowski Defendants' alternative construction of the Regulations, if adopted, would thwart the purpose of the Regulations, and would lead to unreasonable and even absurd results. In addition, the building appears to occupy land that was not devoted to the **nonconforming** use prior to 1962, in violation of Section 5.6.3; there is no substantial evidence in the record to support a contrary conclusion.

*14 2. Although it is impossible at this point to know with certainty whether the Commission actually considered the relevant Regulations before approving the Application, the available evidence indicates that it very likely did not do so, but rather approved the Application solely based on its finding that the **nonconforming** use (the trucking and hauling business) existed

prior to 1962, and did not constitute an "**expansion**" of the **nonconforming** use under the case law dealing with the **expansion** vs. intensification issue. The failure to consider and apply the relevant Regulations is error. Had the Commission given the Regulations due consideration, and properly applied the Regulations to the facts, it would have denied the Application.

B. *The Intensification v. Expansion Issue*

As noted, the Commission appears to have bypassed an examination of the relevant **nonconformity** Regulations. Its attention, instead, was focused on determining whether the proposed use of the Premises was a permissible "intensification" of the **nonconforming** use or an impermissible "**expansion**" of the **nonconforming** use. The intensification/**expansion** distinction is used in Connecticut under certain circumstances to determine whether a landowner has acted lawfully by changing the nature or extent of a pre-existing **nonconforming** use. See, e.g., *Zachs v. Zoning Board of Appeals,* 218 Conn. 324, 331–32 (1981) (explaining intensification/**expansion** doctrine under Connecticut law); see generally 9B R. Fuller, *supra,* § 52:3, at 211–23. The issue sometimes is phrased as whether the current activity is "within the scope" of the prior use. *See, e.g., Bauer v. Waste Management of Connecticut, Inc.,* 234 Conn. 221, 236–37 (1995). The issue was briefed and argued before the Commission in the present case, and it has been a central focus of the Ochenkowski Defendants on appeal. Unfortunately, the near-exclusive focus on this issue has resulted in a flawed analysis of the controlling question.

To begin with, the Commission's and the Ochenkowskis' fixation on the intensification doctrine, at the expense of a careful analysis of the Regulations themselves, misapprehends the role of the intensification doctrine in determining compliance with the particular municipal regulations governing **nonconformities** in any given case. Different municipalities treat **nonconformities** differently; some are relatively permissive and allow moderate **expansion** of the **nonconforming** use, while others impose strict prohibitions against any increase. *Compare, e.g., Doyen v. Zoning Board of Appeals, supra,* 67 Conn.App. at 607–09 (holding that Essex zoning regulations allow the vertical **expansion** of a structure into airspace over a pre-existing setback **nonconformity**) *with Munroe v. Zoning Board of Appeals, supra,* 75 Conn.App. at 805–11 (holding that Branford zoning regulations, with different language, do not allow vertical **expansion** of **nonconforming** garage); *see generally* 9B R. Fuller, *supra,* § 52:3, at 216 ("The result in each case depends in part upon the terms of the zoning regulations, if any, which deal with this subject"). In the present case, the threshold issue before the Commission was whether the Application complied with the applicable North Branford's *zoning regulations,* including the **nonconformity** regulations. The intensification doctrine is not an alternative to that analysis or a substitute for it, and it was a mistake for the Commission to rely on abstract, generic doctrinal principles in lieu of analyzing the actual Regulations at issue. [28]

*15 The Commission's second, more serious error is its failure to recognize that the Application does not relate solely to the *use* of the Premises. The Ochenkowskis are not seeking approval of a proposal to increase the number of trucks parked on the Premises, nor do they merely want to park a few additional trucks in a pre-existing structure used for that purpose since 1962. In other words, the issue presented to the Commission was not whether the **nonconforming** use itself was being intensified or expanded. Rather, the Ochenkowskis seek approval of an application to build a new 4700 square foot structure, where none previously existed, for use in connection with their trucking and hauling business. In this context, it is not particularly helpful to invoke cases applying the intensification doctrine to determine if a "mere increase in the amount of business" or the use of "more efficient instrumentalities" constitutes an illegal "change in the character" of the **nonconforming** use. See e.g ... *Zachs v. Zoning Board of Appeals, supra,* 218 Conn. at 331 (adding additional antennae to existing radio tower is not **expansion** of **nonconforming** use); [29] *Hall v. Brazzale,* 31 Conn.App. 342, 348–50 (increasing number of stored vehicles from three to eight is not an impermissible **expansion** of **nonconforming** use), *cert. denied,* 227 Conn. 905 (1993). The central issue in this case does not involve a "mere" increase in business volume, or the introduction of modernized equipment, but the landowners' desire to increase business operations by means of a significant *physical* **expansion**, namely the construction of a new 4700 square foot garage devoted to the **nonconforming** use.

The cases dealing with this type of physical **expansion** make it very clear that the intensification doctrine does not permit the construction or **expansion** of physical structures of the type proposed by the Ochenkowski Defendants. Indeed, it is not

a close call. The relevant cases and authorities hold that the *physical* **expansion** of the **nonconforming** use—whether by the erection of a new structure, a structural alteration materially increasing the size of an existing structure, or any similar **expansion** of buildings, structures or other improvements dedicated to the **nonconforming** use—ordinarily constitutes an impermissible **expansion** of the **nonconforming** use. See *Wells v. Zoning Board of Appeals,* 180 Conn. 193, 198–99 (1980) (holding that zoning board exceeded its authority by permitting owner of existing legally **nonconforming** trailer park to expand area and number of trailers); *Jobert v. Morant,* 150 Conn. 584, 587–88 (1963) (holding that impermissible **expansion** would occur in construction of enclosure for patio area used in existing legally **nonconforming** luncheonette business); *State v. Perry, supra,* 149 Conn. at 235 (holding that unlawful **expansion** would occur by adding refrigerated trailer to existing legally **nonconforming** ice cream manufacturing facility);[30] *Guilford v. Landon, supra,* 146 Conn. at 183–84 (holding that unlawful **expansion** would occur by renovating old barn for conversion to sales and office space for existing legally **nonconforming** lumber business); *Munroe v. Zoning Board of Appeals, supra,* 75 Conn.App. at 810–11 (holding unlawful **expansion** would occur by adding second story to existing legally **nonconforming** garage); *Dillon v. Zoning Board of Appeals,* No. CV–00–0177882S, 2002 WL 31254306, at *3–*4 (Super.Ct., Sept. 13, 2002) [33 Conn. L. Rptr. 131] (holding unlawful **expansion** would occur by addition of 3200 square foot storage container to existing legally **nonconforming** gas station); *Shell Oil Co. v. Planning & Zoning Commission,* No. CV–03–27130S, 1997 WL 15428, at *4 (Super.Ct., Jan. 10, 1997) (holding that unlawful **expansion** would occur by adding second gas pump "island" to existing legally **nonconforming** gas station); *Armetta v. Zoning Board of Appeals,* CV–07–4713, 1996 WL 22387, at *3 (Super.Ct., Jan. 2, 1996) (holding unlawful **expansion** would occur by proposed addition of storage enclosure to existing legal **nonconformity**); *Mucci v. Zoning Board of Appeals,* No. CV–95–0050591, 1996 WL 240453, at *5 (Super.Ct., April 19, 1996) [16 Conn. L. Rptr. 503] (holding unlawful **expansion** would occur by proposed construction of enclosure for existing legally **nonconforming** legal dining patio); *cf. Simko v. Zoning Board of Appeals,* CV 126010905S, 2013 WL 4779528, at *2 (Super.Ct., Aug. 15, 2013) [56 Conn. L. Rptr. 664] (holding that municipality's **nonconformity** regulations would be violated if landowner were allowed to reconstruct existing legally **nonconforming** home in a manner that expanded its footprint and size).

*16 These cases expose the deficiencies in the defendants' legal claims by highlighting the fundamental principle that an impermissible **expansion** will occur when a landowner proposes any significant *physical* **expansion** of buildings, structures (or even land) dedicated to the legal **nonconforming** use. The decisions cite numerous well-regarded treatises in support of the proposition. From the *Mucci* case:

> Enlargement of a building or structure which is **nonconforming** or houses a **nonconforming** use, is regarded by most courts as an extension or enlargement of use which is proscribed by regulations against extension of **nonconforming** uses ... The construction or enlargement of a building accessory to a **nonconforming** use is an extension of such use ... Construction of a new building is usually regarded as a prohibited extension or enlargement of a **nonconforming** use.

1 R. Anderson, *American Law of Zoning,* § 6.46, at 585 (3d ed.1992), *quoted in Mucci, supra,* 1996 WL 240453, at *5. Likewise, the *Shell Oil* decision relies on the Anderson treatise (among other authorities) to anchor its holding prohibiting the construction of an additional gasoline-pump island:

> If an increase in the volume of a **nonconforming** use requires structural alterations of a building or additional improvements to the land, provisions of the [local zoning regulations] may ... limit or deny them. That the use is unchanged, although increased, does not found a right in the user to expand his facility.

1 R. Anderson, *American Law of Zoning,* § 6.47, at 598 (3d ed.1992), *quoted in Shell Oil,* at *3.[31]

The foregoing cases also help explain why the holding in *Zachs,* which permits a landowner to increase the **nonconforming** use itself under certain circumstances, does not apply where the landowner seeks to significantly expand the physical area of buildings or structures devoted to that use. *See Shell Oil, supra,* at *4 (distinguishing *Zachs); Mucci, supra,* at *5 (same). Thus, although an intensification of the legally **nonconforming** use within the same physical space previously devoted to that use may

be permissible if the increased use passes muster under the three-factor *Zachs* analysis, *Zachs* does not approve a landowner's **expansion** of the **nonconforming** use to new or existing buildings/structures that previously had not been devoted to that use. The same point applies to the other case principally relied upon by the Ochenkowski Defendants, *Hall v. Brazalle, supra,* 31 Conn.App. at 349 (holding that increasing the amount of equipment and number of vehicles in a storage area was a permissible intensification). See *Shell Oil, supra,* at *4 (distinguishing *Hall,* explaining that the case should not be read to permit physical **expansion** by addition of new structures); see also *Bauer v. Waste Management of Connecticut, Inc., supra,* 234 Conn. at 244 n. 14 (holding that *Hall's* conclusion that " 'more of the same ... cannot be the basis for a finding of an unlawful **expansion** of a prior existing **nonconforming** use' ... can only be read to apply where it is more of the same use not more of the same in the physical sense" (citations omitted; emphasis in *Bauer* )).

*17 Finally, the Ochenkowskis would not prevail even if the resolution of their case permitted a simple application of the intensification doctrine without regard to the substantial *physical* **expansion** represented by their construction of a large new building devoted to that use, and even assuming that the Regulations permitted the construction of a new building devoted to the legal preexisting **nonconforming** use. It is impossible for this Court, on this record, to conclude that the Ochenkowskis' proposed use of the Premises is within the scope of the prior legally conforming use.[32] The Court has reached this conclusion with full awareness of the deferential standard of review applicable to the Commission's implicit finding that the increased use is merely an intensification of the prior **nonconforming** use. That finding, in my view, falls outside the bounds of reasonableness.

The Court's conclusion on this latter point is based largely, though not entirely, on five photographs contained in the record and the explanatory statements made with respect to these photographs. The photographs are Commission Exhibits 4B and 4C (showing the storage building from two different perspectives; also a tractor-trailer and other equipment), Commission Exhibit 10 (trucks used in the 1950s), Commission Exhibit 11 (aerial view of the storage building and current equipment), and Commission Exhibit 24A (aerial views of Premises contrasting its appearance in 1990 vs.2010). Commission Exhibits 4C and 11 show a large number of big, box-trailers surrounding the storage structure. Exhibit 11 in particular tells a story wholly incompatible with a finding of mere intensification of use. The entire back portion of the Premises—acres of land that the aerial photographs depict as having been forested, or at least unoccupied, as recently as 1990—appears to be overrun by semi-trailers. The Ochenkowskis' counsel explained at oral argument that "only" the ten-to-twelve box trailers immediately surrounding the storage building are part of the trucking operation,[33] but this qualification changes nothing. No one could look at the relevant part of Exhibit 11 and reasonably conclude, applying the *Zachs* factors, that the character or nature of the trucking operation is comparable in any meaningful way to the hauling activity carried on by Joseph Ochenkowski, Sr., as of 1962.[34] A single, small pickup-type truck parked near the family home in 1955 or 1960 has become, by 2012, a terminal for a fleet of huge box-trailers designed to be hauled behind "big rig" eighteen-wheeled semi-tractors. The Ochenkowskis have not simply modernized their equipment or adopted more efficient means to continue their father's modest enterprise; they have transformed the enterprise into an unrecognizable version of what existed fifty years ago. Their industry is laudable, but they have chosen to exercise their considerable entrepreneurial abilities in a residential zone.

## III. OTHER ISSUES

### A. Accessory Use

*18 The defendants also seek to justify the construction of the storage structure as a permissible "accessory use." *See, e.g.,* Supplemental Brief of Defendant Commission, at pp. 3 ("Such incidental storage of trucks and related machinery is at most an accessory use to a lawfully permitted pre-existing **non-conforming** use"); Ochenkowski Defendants' Supp. Br., at pp. 5–6. The argument is without merit for two reasons.

First, while presumably the storage of trucks, under certain circumstances, may qualify as an "accessory use" of property used to operate a trucking and hauling business, the word "accessory" must not be ignored in the analysis. An accessory use under

Connecticut law is defined as one that, among other things, is "incidental" and "subordinate" to the main use of the property. *Lawrence v. Board of Zoning Appeals,* 158 Conn. 509, 511–12 (1969); *accord Loring v. Planning and Zoning Commission, supra,* 287 Conn. at 746 (following *Lawrence).* The proposed structure here is not incidental or subordinate either to the residential or the commercial use of the Premises. The structure obviously does not serve the residential use of the property at all. With respect to the trucking and hauling business, Kenneth Ochenkowski told the Commission that the business has no drivers and owns only one truck. TR 5/16/13, at 11. This representation would indicate that the business operates primarily as a truck terminal, which means that the proposed storage building is intended to serve much more than an incidental, subordinate role. To the contrary, it appears that the proposed storage facility is designed to be the primary physical structure used to operate the trucking and hauling business. See Comm'n Ex. 4B, 4C and 11, discussed above at pp. 30–31. By virtue of the structure's large size and important function, it would seem to be intended as the physical centerpiece and operational hub of the business. [35]

Second, the Regulations themselves contain express restrictions on all accessory uses *and* buildings. See Section 44.6 ("Accessory Uses and Buildings"). Section 44.6.1(t) provides:

> In Residence Districts, accessory uses and buildings shall conform to the following additional conditions:
>
> (f) Any accessory building in a residential zone shall be designed to reflect the residential character and appearance of the neighborhood and shall be constructed of materials typically used in residential home construction, unless it is located on a farm. The residential accessory building footprint shall be no more than 50 per cent of the principal residential building footprint on the lot and shall not exceed a maximum building size of 1,000 sq. ft. of floor area on any lot 50,000 sq. ft. or larger, unless it is on a farm.

The proposed storage structure violates this provision in virtually every respect: it does not reflect the residential character of the neighborhood, is not constructed of materials typically used in residential home constructions, its 4700 square foot area far exceeds the 1000 square foot maximum, and its footprint far exceeds 50 percent of the footprint occupied by the main residence. The violation appears to be unmistakable and indisputable, yet neither the Ochenkowskis nor the Commission ever addressed this issue. [36]

*19 There is no way to know whether or not the Commission itself ever considered or analyzed the "accessory use/building" claim that has been raised on appeal. It does not appear that the claim was raised during the administrative proceedings, [37] and there are no express findings by the Committee regarding the issue. In any event, for the reasons stated above, it would have been error to approve construction of the proposed storage structure as an accessory use or accessory building on this record.

### B. Procedural Claims Regarding Scope of Administrative Proceedings

Although the defendants have briefed the substantive issues regarding **nonconforming** use and accessory use, they have also argued at times that the issues relating to the use of the Premises should be deferred until after the application for a zoning permit has been processed by the relevant zoning authorities in North Branford. The argument seems to be that the only issue properly before the Commission in connection with an application for site plan approval (the subject of the present appeal) is whether the proposed site plan complies with the technical standards contained in Section 41 of the Regulations regarding such matters as setback, bulk, location, access, drainage, landscaping and other technical requirements relating to the physical characteristics of the proposed building. As the Court understands defendants' argument in this respect, they contend that issues relating to the **nonconforming** *use* of the building should not be part of the site plan inquiry, and thus should not be part of this appeal. [38]

No extended discussion of this point is required. The argument is undermined by virtually every aspect of the underlying proceedings, and by the express language of the Regulations themselves. The site plan application form requires the applicant to provide a statement of *use.* Kenneth Ochenkowski did so, and the Ochenkowskis' presentation regarding the site plan focused extensively on the history and nature of the **nonconforming** use—the very subject that defendants now say is irrelevant.

Likewise, the Commission's conduct throughout the underlying proceedings demonstrates that it considered the issue of "use" central to its task, and understood its mandate to include application of the law governing **nonconforming** use. The Commission presumably focused on this issue because it had some understanding, however vague, that the Regulations themselves make the *use* of the proposed structure a significant consideration in connection with the approval of a site plan application. This point is discussed above at pp. 18–19 of this decision, and will not be repeated here.

## IV. RELIEF

The Court's role in zoning matters is limited, and a remand for further administrative proceedings would be appropriate if any useful purpose would be served by that action See e.g., *Munroe v. Zoning Board of Appeals, supra,* 75 Conn.App. at 811–12 (Bishop, J., dissenting in part). However, this is a case in which only one outcome is possible, because the site plan application must be denied for the reason that the proposed storage structure simply cannot be built in compliance with existing law.

*20 Accordingly, the appeal is sustained and the case is remanded with direction to deny the site plan application.

Ecker, J.

### All Citations

Not Reported in A.3d, 2014 WL 6996359

Footnotes

1 The proposed storage structure is approximately 55 feet wide by 81 feet long by 25 feet high, with a small 210 square foot extension on the rear. The site plan application estimates the structure's total size to be 4610 square feet; the applicant's engineer told the Commission that the total was closer to 4700 square feet. TR 4/4/13, at 2. The difference is immaterial for present purposes. The structure was described at the Commission hearing as "like a bubble building," with a fabric or tarp top and no foundation. *Id.* The frame is constructed of a lightweight metal material. *Id.* at 5. See also Comm'n Exs. 4B and 4C (photographs).

2 The proposed storage structure requires both site plan approval and a zoning permit to comply with the Regulations. Section 62 of the Regulations provides that the site plan and zoning permit applications be submitted together when, as here, both are required. Sections 62.5 and 62.6, which prescribe the procedure governing the site plan approval process, provide that the Commission must review and act upon the site plan application. The Zoning Enforcement Officer is responsible for reviewing and taking action on the zoning permit application after the site plan is approved. See Sections 62.2, 62.3, and 62.7. Kenneth Ochenkowski submitted an application for a zoning permit with his site plan application, but the permit application has not yet been acted upon. The present appeal relates solely to the Commission's site plan approval.

3 The Ochenkowski Defendants are the children of the original owner, Joseph Ochenkowski, Sr., now deceased. They are represented by the same attorney and have acted jointly to date in connection with all filings and submissions in this appeal.

4 Pl.Ex. 3 is mentioned here because the scene it depicted troubles the Court in certain respects. See below at pp. 29–31. It should be noted that the outcome of the appeal would have been the same with or without the Court's consideration of that exhibit.

5 No party seems to dispute this point, although at times the Ochenkowski Defendants have emphasized that site plan review (in contrast to zoning enforcement and the permitting process) involves limited and focused considerations, and should be confined to a narrow set of issues. The defendants have never claimed that a proposed structure that violates the Regulations may nonetheless receive site plan approval. See below at pp. 33–34.

6 Evidently the storage structure's original location infringed "slightly" on one of the zoning setback requirements, but before the Application was submitted the structure was moved to bring it into compliance with those requirements. *Id.* at 2 (Attorney Gibson).

7 McKosky stated at a later Commission meeting that he had lived on Parsonage Hill Road since the 1950s, personally knew Joseph Ochenkowski, Sr. (the patriarch of the Ochenkowski family), and was fully aware of Ochenkowski's commercial activities at the time. TR 4/18/13 at 15–16; see also *id.* at 10.

8 The trucks in the photographs do not appear to display any signs or markings indicating commercial use.

9 An unidentified male, presumably Commissioner Combs or Commissioner Dulak, joined in the chorus of requests for evidence that a trucking business operated on the Premises prior to 1962. *Id.* at 19 ("Tax records, something ... Even if you don't, I'm sure the state has those"); *id.* (suggesting that aerial photographs dating back to 1935 are available on the internet"); *id.* ("We're talking about prior to 1962"); *id.* at 21 ("Just come up with something on that trucking business").

10 This legal issue is discussed at greater length below at 24–31.

11 The Application was approved on the condition that the applicant adhere to the requirements set forth in the review of the Building Officer dated March 12, 2013. Those requirements are not relevant here.

12 The "other ways" are addressed in Parts II and III of this decision.

13 Comm'n Ex. 10, the two photographs each depicting a truck, demonstrates that Joseph Ochenkowski, Sr., owned a small truck at various times. Nothing about the appearance of those trucks as depicted in Ex. 10 indicates that either of them was used for a commercial trucking or hauling business.

14 The word "substantial" has very different meanings. "Substantial" can mean "more than minimal," "important" or "considerable" (as in, "he devoted substantial effort to the project"), a definition that would not describe the evidence here. But "substantial" can also mean "not illusory," or "real" (as in, "they reached substantial agreement"), which is the definition that Connecticut law intends by the phrase "substantial evidence," see Standard of Review, above. Viewing the Ochenkowski Defendants' evidence of a pre-existing trucking and hauling business in a light most favorable to sustaining the Commission's finding, that evidence was "substantial" under the applicable standard. *See generally* M. Malaguti, *Substantial Confusion: The Use and Misuse of the Word "Substantial" in the Legal Profession,* New Hampshire B.J., Autumn 2011, at 6 (reviewing the word's different meanings, the historical sources of those differences, and resulting law-related problems).

15 Kenneth Ochenkowski's statements are not particularly helpful to establish the existence of a business before 1962, because his chronological references were ambiguous at best. For example, he told the Commission that "everything my father did with his trucks *was carried out in the 70s* when my brother [Joseph Jr.] took over. Joe had his own trucks. He had his own equipment. He ... uh, he actually plowed for the town [during] the blizzard of #78." TR 4/18/13, at 2 (emphasis added). Perhaps Kenneth meant that "everything my father did with his trucks was *continued* (or carried *on* ) by Joseph Ochenkowski, Jr., in the 70's." A similar ambiguity and lack of precision is seen in the following colloquy: Question [Commissioner Gunn]: "The business has been run by either your father, yourself or your brother?" Answer [Kenneth Ochenkowski]: "Correct." *Id.*

16 Unsworn statements of counsel can be accepted as competent evidence when offered in evidence to a zoning body. *See Loring v. Planning and Zoning Commission, supra,* 287 Conn. at 758. However, Attorney Gibson was engaging in advocacy, not purporting to give evidence, when he made his repeated assertions regarding the pre–1962 use of the Premises.

17 He owned at least two trucks, but only one at any given time.

18 Another issue, not raised by the parties, involves compliance with a provision in the Regulations requiring that, to qualify for exemption, the **nonconforming** use must have been in existence "on a continuous basis" on the date the Regulations became effective. See Regulations § 5.2 (defining **nonconformity** as "one which existed lawfully ... on the date of these Regulations ... and which fails to conform to one or more of the provisions of these Regulations ... *No nonconforming use, building or other structure, or lot shall be deemed to have existed on the effective date of these Regulations unless 1) it was actually in being on a continuous basis on such date* ... " (emphasis added)). The Court has reviewed the record for any evidence that the Ochenkowski's trucking and hauling business was actually in existence "on a continuous basis" in 1962. The sparse evidence supporting the claim of pre-existing use indicates that any commercial trucking and hauling activity undertaken by Joseph Ochenkowski, Sr., was sporadic and informal in nature-if somebody needed something hauled, Ochenkowski had a Model A truck and was ready and willing to earn extra money by using his truck for the task. (This extreme informality would help explain why the Ochenkowskis were unable to produce any documentary evidence that the business actually existed.) There is nothing in the record indicating that the Commission considered, or even was aware of, the requirement that the business was "in being on a continuous basis" as of 1962. It also is unclear whether this particular requirement of the Regulations is lawful under General Statutes § 8–2 ("[Municipal zoning] regulations shall not provide for the termination of any **nonconforming** use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use"). These issues are not before the Court at this time.

19 Municipal ordinances, including zoning regulations, are construed in accordance with the same principles that govern statutory interpretation. *See. e.g., Heim v. Zoning Board of Appeals,* 289 Conn. at 715; *Michos v. Planning and Zoning Commission,* 151 Conn.App. at 545; *Munroe v. Zoning Board of Appeals,* 75 Conn.App. 796, 804 (2003).

20 The Application uses the words "structure" and "building" to describe the proposed storage facility. Whatever it is called, the storage structure, designed for use in connection with the trucking and hauling business, plainly is subject to the limitations imposed by Section 5.6 (and 5.7) of the Regulations.

21 The Commission's briefs do not discuss the language of Section 5.6.1.

22 The rules of construction are notoriously malleable, see K. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,* 3 Vand. L.Rev. 395, 401 (1950) ( [T]here are two opposing canons on almost every point"), and at least a part of Section 5.6.1 arguably could be read to *exclude* new construction from its ambit, on the theory that the inclusion of certain terms implies the exclusion of all others. See, e.g., *Blumenthal v. Barnes,* 261 Conn. 434, 463 (2002) (invoking maxim, "inclusio unius est exclusio alterius"). Such a construction, however, would directly undermine the fundamental purpose of Section 5 of the Regulations, and lead to the absurd results discussed above. For this reason, applying the "inclusio unius" maxim here would violate yet another rule of construction: "When more than one construction is possible, we adopt the one that renders the enactment effective and workable and reject any that might lead to unreasonable or bizarre results." *Michos v. Planning and Zoning Commission, supra,* 151 Conn.App. at 546. See also *Cahill v. Board of Education,* 187 Conn. 94, 107 (1982) (Shea, J., concurring) ("the maxim inclusio unius, exclusio alterius is merely an aid to construction and not a rule of law having universal application").

23 In oral argument to the Court, the Ochenkowskis' attorney agreed that "maybe there is more [physical area] involved [in the new storage facility] in terms of area, the size," TR 6/2/14 at 52; *see also id.* at 53 ("I don't know how much space was used prior to 1962, but, certainly, my assumption is ... not the same amount of space that is ... used now"). He argued that the physical **expansion** nevertheless was an "intensification" rather than an "**expansion**" under Connecticut case law. See below at pp. 24–31.

24 There also was no evidence before the Commission about either the existence or location of any "staging area" prior to 1962, nor was there any evidence regarding any equipment (other than the one truck) used for trucking or hauling prior to 1962.

25 The Commission made no express finding on this issue; it appears doubtful that the Commission even was aware of the requirements imposed by Sections 5.6.1 or 5.6.3.

26 The second page of the "Statement of Use" attached to the Application mentions Section 5, and even refers to sections 5.6.1–5.6.5, but does so in the context of discussing a February 1978 Certificate of Zoning Compliance that has nothing to do with either the storage structure or the trucking and hauling business at issue in the present case. *See also* TR 4/18/13, at 9 (same). Deliberately or not, the Ochenkowskis' legal presentation throughout the administrative process avoided any direct engagement with the actual requirements of Section 5 of the Regulations. The Commission never asked the Ochenkowskis to address the issue, and itself demonstrated no awareness of the specific limitations contained in Section 5.

27 This point is not intended as a criticism. The Commission's counsel did a very fine job, in both oral and written briefing, seeking to persuade the Court as a legal matter that Section 5 was not relevant to the site plan approval process. That argument ultimately did not prevail, see below at pp. 33–34, but it was not an unwise strategy to pursue under the circumstances.

28 The Commission's error is perhaps understandable. Some decisional law in this area launches into a discussion of the intensification doctrine without first providing a legal analysis of the applicable **nonconformity** regulations. See, e.g., *Woodbury Donuts, LLC v. Zoning Board of Appeals, supra,* 139 Conn.App. at 757–64. This approach may be used by an appellate tribunal taking up a narrow issue on appeal, but it is not the proper procedure for a local zoning board to follow in a matter involving **nonconformity** regulations. The intensification doctrine in Connecticut can best be understood as serving two related functions. First, the doctrine represents a judicial gloss on the words "extension" or "**expansion**" as used in local zoning regulations governing **nonconforming** uses; if the regulations do not define those terms, the courts will construe them to prohibit something more than a "mere" intensification of the use. See, e.g., *Zachs v. Zoning Board of Appeals, supra,* 218 Conn. at 333. Second, the intensification doctrine enforces a limitation on the extent to which such local regulation can go before impermissibly encroaching on a property owner's statutory and constitutional rights. *See, e.g., Woodbury Donuts, LLC v. Zoning Board of Appeals, supra,* 139 Conn.App. at 760–64. The statutory limitation exists because General Statutes § 8–2, which itself is designed to safeguard constitutional limitations, provides that zoning ordinances "shall not prohibit the *continuance* of any **nonconforming** use, building or structure, existing at the time of the adoption of such regulations." The constitutional limitations are based on the takings clause and the due process clause, which prohibit the government from depriving a landowner of protected property interests. See, *Helbig v. Zoning Commission,* 185 Conn. 294, 306 (1981) ("[T]he rule concerning the continuance of a **nonconforming** use protects the 'right' of a user to continue the same use of the property as it existed before the date of adoption of the zoning regulations"). In this respect, the intensification doctrine helps local zoning boards, as well as courts, distinguish between a protected continuation and an impermissible **expansion** of a **nonconforming** use.

29 The Supreme Court in *Zachs* emphasized the trivial nature of any *physical* **expansion** of the **nonconforming** use. *Id.* at 330, 332.

30 *Perry* should not get lost in the string cite, because it provides a particularly clear basis for reversal of the Commission's decision here. See also *Dillon v. Zoning Board of Appeals, supra,* 2002 WL 31254306, at *3–*4 (discussing and following *Perry* in analogous circumstances).

31 The Fuller and Tondro treatises are also cited and quoted in these cases in support of the same basic point. *See, e.g., Mucci, supra,* at *5, *citing* T. Tondro, *Connecticut Land Use Regulation,* at 157 (2d Ed.1992) and 9 R. Fuller, *Connecticut Practice Series: Land Use Law and Practice* § 52.3, at 846–47 (1993)); *Shell Oil, supra* at *3, *citing* Tondro, *supra,* at 158; *see also North Haven Auto Sales,* No. CV–12–6029512S, 2014 WL 2854034, at *8 (Super.Ct., May 19, 2014), *quoting* 9B R. Fuller, *supra,* § 52.3, at 214 ("Where a **nonconforming** use of property exists, it must be contained within the limits of the use in existence when the regulations

were adopted, so that it is illegal to alter a building containing the **nonconforming** use where the structural changes amount to an enlargement of the area used for that purpose"). *North Haven Auto Sales* also cites to 4 Rathkopf, *Law of Zoning and Planning* 73:18 (2005) for the proposition (in Judge Corradino's words) that a municipality's "prohibition [of an **expansion** of a **nonconforming** use to a new area] is strictly applied even as to an **expansion** on a parcel which contained a **nonconforming** use confined to a particular portion of the parcel."

32 This conclusion is included here as an alternative holding, and is not necessary to the disposition of the case.

33 The numerical estimate is the Court's own. The Ochenkowskis' counsel stated that the many other trailers depicted in Exhibit 11 belong to a separate construction business operated on the Premises by other members of the Ochenkowski family. Whether that construction business was a legal pre-existing **nonconforming** use is not before the Court. The existence of these other trailers does nothing to reassure the Court that the applicable zoning laws are being respected by the landowners or enforced by the town. However, to be clear, the Court makes no findings whatsoever regarding either a construction business or these other box trailers depicted in Exhibit 11, and the presence of that business and its trailers has no impact on the holding here.

34 The *Zachs* factors are contained in a three-part analysis that examines "(1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property." 218 Conn. at 332.

35 This characterization would explain why the trailers and other equipment used in the business are parked all around the structure. See above at pp. 30–31 & n. 33.

36 The Court has considered the possibility that Section 44.6 was not addressed by the Commission because its terms were deemed inapplicable to an accessory building devoted to a **nonconforming** use. That possibility seems exceedingly unlikely as a factual matter, because there is no evidence indicating that the Commission gave careful consideration to the Regulations at all, in any respect. See above at pp. 21–23. As a legal matter, there is no reason to conclude that Section 44.6.1 is inapplicable. Section 44.6 contains no exception for **nonconforming** uses or buildings devoted to **nonconforming** uses. To the contrary, Section 44.6.1(t) on its face applies to "*[a]ny* accessory building in a residential zone ..." The Court has considered inviting additional briefing limited to this narrow issue, but has decided against prolonging the proceedings for that purpose, primarily because the outcome of the case would be the same regardless of the applicability of Section 44 .6.

37 Kenneth Ochenkowski's zoning permit application described the proposed storage structure as an "accessory building," but provided no textual explanation or elaboration.

38 See Commission's Supp. Br. at pp. 5–6; Ochenkowskis' Supp. Br. at pp. 7–8.

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Exhibit H



1996 WL 614824
Only the Westlaw citation is currently available.



Superior Court of Connecticut.

Robert H. HALL et al.

v.

NEWTOWN ZONING BOARD OF APPEALS et al.

No. 322423. | Oct. 17, 1996.

## MEMORANDUM OF DECISION

STODOLINK.

*1 On October 13, 1995, the decision of the defendant, the Zoning Board of Appeals of the Town of **Newtown** (ZBA), approving the application of Thomas Swan for a **variance** from the zoning regulations was published in *The Newtown Bee.* Pursuant to General Statutes § 8-8(b), the plaintiffs timely exercised their appeal rights by instituting this administrative appeal on October 28, 1995, by causing a summons and citation to be served on the ZBA.

On August 31, 1995, Thomas Swan applied to the ZBA for a **variance** from the zoning regulations to permit him to enclose an outdoor staircase on a store he owns with his wife located at 182 South Main Street in **Newtown**, Connecticut. The two-story building on the premises was used for business purposes prior to enactment of the zoning laws, and the area is currently zoned Residential R-1. The building was then and is now considered a nonconforming permitted use. Swan uses the premises to operate a retail store.

Swan's proposal was to simply enclose an outdoor staircase located at the back of the building so that customers would not have to go outside in order to reach the second floor of the shop. The modification would have the effect of changing the building to a single-use premises. The staircase is covered by a roof overhang of approximately nine feet, and the total square footage that the building would be increased by after the enclosure is approximately 400 feet.

The ZBA held a public hearing on Swan's **variance** application on September 6, 1995, which hearing was adequately noticed in *The Newtown Bee* on August 25, 1995, and September 1, 1995. At the hearing, Swan described the changes he wished to make to the building and stated that his reason for wanting to enclose the staircase was to make the building a single-use building. After Swan's presentation, plaintiff Robert Hall spoke out against the proposed **variance**.

Hall had two main objections to the **variance**; first, he felt that existing zoning violations should be remedied before Swan's **variance** application was granted. Second, Hall stated that Swan had not shown that his application was necessitated by a specific **hardship**, and as such, it was legally improper for the ZBA to grant a **variance** that would expand a nonconforming use.

In a letter to the ZBA dated October 4, 1995, William E. Nicholson, Zoning Enforcement Officer, stated that Swan had corrected any zoning violations that were previously on the premises. On October 4, 1995, the ZBA voted unanimously to approve Swan's application for a **variance**. Notice of the decision was published in *The Newtown Bee* on October 13, 1995. Hall timely commenced this appeal.

In his complaint, Hall alleges that the ZBA, in granting Swan's application for a **variance**, acted illegally, arbitrarily, and in an abuse of its discretion in the following six ways: (1) the ZBA did not specify in its decision "any exceptional difficulty or unusual **hardship** on which [its] decision [was] based as required by the provisions of Section 8-7 of the Connecticut General Statutes"; (2) Swan did not prove any exceptional difficulty or unusual **hardship** in support of his application; (3) no exceptional difficulty or unusual **hardship** exists; (4) any **hardship** would have been self-created by Swan by virtue of his purchase of property which had a nonconforming use; (5) the **variance** was granted despite the fact that there were zoning violations on the property; and (6) the ZBA "received information from third parties subsequent to the close of the public hearing on which it based its decision, at least in part."

*2 At the outset, it should be noted that the plaintiffs are statutorily aggrieved since they own property within 100 feet of the subject premises. General Statutes § 8-8(a)(1). Additionally, as noted above, this appeal was timely commenced since the plaintiffs filed this appeal within fifteen days of the notice of decision of the ZBA's approval of the **variance**. General Statutes § 8-8(b).

The standard of review of a decision of an administrative body is well settled. "In reviewing an appeal from an administrative agency, the trial court must determine whether the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citations omitted; internal quotation marks omitted.) *Smith v. Zoning Board of Appeals,* 227 Conn. 71, 80, 629 A.2d 1089 (1993), cert. denied, 114 S.Ct. 1190, 127 L.Ed.2d 540 (1994). "Conclusions reached by the commission must be upheld by the trial court if they are reasonably supported by the record ... The question is not whether the trial court would have reached the same conclusion, but whether the record before the agency supports the decision reached." (Citations omitted; internal quotation marks omitted.) *DeBeradinis v. Zoning Commission* 228 Conn. 187, 198, 635 A.2d 1220 (1994).

"The trial court may not substitute its judgment for the wide and liberal discretion vested in the local authority when acting within its prescribed legislative powers." *Frito-Lay, Inc. v. Planning and Zoning Commission.* 206 Conn. 554, 572-73, 538 A.2d 1039 (1988), quoting *Farrington v. Zoning Board of Appeals,* 177 Conn. 186, 190, 413 A.2d 817 (1979). Further, "[t]he burden of proof is on the plaintiff to demonstrate that the [commission] acted improperly." *Spero v. Zoning Board of Appeals,* 217 Conn. 435, 440, 586 A.2d 590 (1991).

The plaintiffs presented four arguments in their brief. Their first argument was that the ZBA erred when it allowed the **variance** because it permitted an expansion of a nonconforming use. Their second argument is that the ZBA erroneously granted the **variance** in the absence of any showing of "unusual **hardship**" or "exceptional circumstances" by Swan as required by General Statutes § 8-6. Their third argument is that the lack of "unusual circumstances" or "exceptional difficulty" violates Section 11.05 of the **Newtown** Zoning Regulations. Finally, their fourth argument is that the ZBA improperly granted the **variance** because it received information after the public hearing "without giving the plaintiffs the opportunity for cross-examination."

The plaintiffs' first argument concerns the fact that Swan did not present any proof that his need for the **variance** was based on "unusual **hardship**" or "exceptional difficulty." General Statutes § 8-6(a) provides, in relevant part: "The zoning board of appeals shall have the [power] ... (3) to determine and vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual **hardship** so that substantial justice will be done and the public safety and welfare secured ..."

*3 "A **variance** is an authorization obtained from the zoning board of appeals to use property in a manner otherwise forbidden by the zoning regulations." *Kelly v. Zoning Board of Appeals,* 21 Conn.App. 594, 597, 575 A.2d 249 (1990). "An applicant for a **variance** must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation produces an unusual **hardship**, as opposed to the general impact which the regulation has on other properties in the zone." *Bloom v. Zoning Board of Appeals,* 233 Conn. 198, 207, 658 A.2d 559 (1995), quoting *Dolan v. Zoning Board of Appeals,* 156

Conn. 426, 430, 242 A.2d 713 (1968). "Proof of **hardship** is a condition precedent to granting a **variance**." *Kelly v. Zoning Board of Appeals,* 21 Conn.App. 594, 575 A.2d 249 (1990), citing *Point O' Woods Assn, Inc. v. Zoning Board of Appeals,* 178 Conn. 364, 368, 423 A.2d 90 (1979).

The record does not reflect any demonstration by Swan that his proposed **variance** from **Newtown's** zoning regulations was necessitated by any "unusual **hardship**" or "extreme difficulty" within the meaning of General Statutes § 8-6. His statements in the record suggest that his desire to obtain the **variance** to enclose the outdoor staircase was twofold: to prevent customers from having to go outside to enter the second floor of his store, and to convert the building to a single-use premises.

Since Swan did not claim any "unusual **hardship**" or "extreme difficulty," the ZBA could not have considered any. This is not in conformity with § 8-6 of the General Statutes. Accordingly, the appeal is sustained since the ZBA failed to comply with the requirements of General Statutes § 8-6. As such, the court need not address the plaintiffs' remaining contentions.

**All Citations**

Not Reported in A.2d, 1996 WL 614824

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