

FBT CV 07 4019417 S

: SUPERIOR COURT

WALGREEN EASTERN CO., INC.

: FAIRFIELD JD

: AT BRIDGEPORT

VS.

ZONING BOARD OF APPEALS
OF THE TOWN OF FAIRFIELD, et al

FBT CV 07 4021646 S

WALGREEN EASTERN CO., INC.

VS.

TOWN PLAN AND ZONING COMMISSION
OF THE TOWN OF FAIRFIELD, et al

: MAY 22, 2009

OFFICE OF THE CLERK
SUPERIOR COURT
2009 MAY 22 P 2:44
JUDICIAL DISTRICT OF
FAIRFIELD AT BRIDGEPORT
STATE OF CONNECTICUT

MEMORANDUM OF DECISION

The plaintiff in both of these administrative appeals, Walgreen Eastern Co., Inc., is the lessee of premises located at 1280 Stratfield Road, at the corner of Stratfield Road and Fairfield Woods Road, in Fairfield (the "Site"). The Site, which is located partially in the Neighborhood Designed Business District and partially in Residence District A, is improved with a building and was formerly used as a supermarket by Grand Central Markets. The plaintiff proposes to use the Site for a "Walgreen" drug store which it claims is a permitted use in the Neighborhood Designed Business District. The plaintiff's proposal does not involve any additions or exterior alterations to the building on the Site.

The appeal from the Zoning Board of Appeals ("ZBA") arose when the plaintiff purported to appeal from a decision of Fairfield zoning officials ruling that the plaintiff needed to apply to the Fairfield Town Plan and Zoning Commission ("TPZC") for a

Certificate of Zoning Compliance with respect to its proposed use of the Site. That appeal was filed pursuant to General Statutes § 8-6 (a) (1) which empowers zoning boards of appeal to “[h]ear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of . . . any . . . regulation adopted under the provisions of this chapter. . . .”

Following an unsuccessful appeal to the ZBA, the plaintiff filed an appeal to the Superior Court pursuant to General Statutes § 8-8. Thereafter, the plaintiff filed an application for a Certificate of Zoning Compliance with the TPZC. Following denial of that application, the plaintiff appealed to the Superior Court pursuant to General Statutes § 8-8. On February 18, 2008 the court, *Gilardi, J.*, granted a motion to make Jeffrey Rowe, Barbara Rowe (the “Rowes”) and The Stratfield Village Association (the “Association”) parties defendant in the appeal from the ZBA. On February 21, 2008, the court, *Frankel, J.*, granted a motion to add the Rowes and the Association parties defendant in the appeal from the TPZC. The two appeals were consolidated pursuant to the order of the court, *Radcliffe, J.*, on June 10, 2008.

The plaintiff’s appeal from the ZBA asserts that, under the Fairfield Zoning Regulations, it was not required to obtain a Certificate of Zoning Compliance from the TPZC. The plaintiff contends that, under Section 2.21 of the regulations, the Zoning Enforcement Officer should have issued the Certificate of Zoning compliance. If the plaintiff is correct and the ZEO is required to issue a Certificate of Zoning compliance, it would be entitled to implement its plans for the Site without further approvals and the appeal from the decision of the TPZC would be moot. If the plaintiff does not prevail on its appeal from the ZBA, the court will be required to consider the merits of the plaintiff’s appeal from the denial of its application for Certificate of Zoning Compliance by the TPZC.

AGGRIEVEMENT

On January 21 and 26, 2009, the court heard argument regarding the defendant's motion to dismiss the appeal from the ZBA on the ground that the plaintiff was not aggrieved by the ZBA's decision. On this issue of aggrievement, the plaintiff presented a "Ground Lease Agreement," dated July 26, 2006, between Samuel Lotstein Realty Company, LLC, as lessor, and plaintiff, as lessee. (Ex. 1.) That lease states that the demised premises are "1280 Stratfield Road, Fairfield, Connecticut, and more particularly described in Exhibit 'A'." Exhibit "A" to the lease is a legal description of the demised premises which states that they are shown and designated as "Lots Nos. 2, 18 and 19" on a certain recorded map. The description of the boundaries of the premises states, inter alia, that they are bounded on the west "by Stratfield Road, 50 feet more or less."

The plaintiff also introduced in evidence a certified copy of a 1990 deed conveying certain premises to Samuel Lotstein Realty Company, a partnership. (Ex. 2) The premises described in the deed are the same as those described in the lease. The plaintiff also introduced a certified copy of a certificate of change of name stating that "Samuel Lotstein Realty Company," had changed its name to "Samuel Lotstein Realty Company, LLC" (hereinafter referred to as "Lotstein") in 1996. (Ex. 3)

In their post hearing brief, dated February 13, 2009, the Rowses and the Association claimed that the plaintiff failed to demonstrate aggrievement because of the premises described in Exhibits 1 and 2 do not include the property on which the plaintiff plans to operate its Walgreen's store. Those defendants claim that the property description in the lease and the deed match that of the parking lot adjacent to the property on which the building formerly occupied by Grand Central Market is located. The defendants point out that the site plan included in the record of the appeal from the ZBA as item # 27 supports their claim that the plaintiff failed to establish aggrievement.

In a letter to the court, dated February 17, 2009, plaintiff's counsel offered to address the "new issues involving aggrievement based on the contents of the Lease submitted to the Court during the evidentiary hearing." In late March 2009, the court advised plaintiff's counsel of its acceptance of this offer. Thereafter, on April 8, 2009, the plaintiff filed a Motion to Reopen Evidentiary Hearing on the Issue of Aggrievement. In that motion the plaintiff requested the opportunity to present additional evidence to meet the objections raised in the defendants' memorandum of law of February 13, 2009. The court heard that motion on April 21, 2009.

The plaintiff's counsel informed the court that Exhibit A to the lease between Lotstein and the plaintiff (Ex. 1) did not correctly describe the premises as intended by the parties to that lease, due to a "scrivener's error." Plaintiff's counsel also pointed out that many provisions of the lease referred to a building situated on the leased premises, when, in fact, the premises described in Exhibit A to the lease included only the parking lot. Plaintiff's counsel suggested that the court could find, from the evidence already produced and the record, that the parties to the lease intended to include the building formerly used as Grand Central Market in the premises leased to the plaintiff. The court rejected the plaintiff's suggestion, pointing out that the evidence before the court did not yet establish that Lotstein owned any interest in the building or the land on which it was situated.

After hearing the defendant's objections to the plaintiff's motion to reopen, the court, recognizing Connecticut's long standing public policy favoring the resolution of land use appeals on the merits, allowed the plaintiff to present additional evidence of aggrievement. *R. C. Equity v. Zoning Commission of Bourough of Newtown*, 285 Conn. 240 (2008). The plaintiff introduced deeds (Ex. 4 and 5) showing that Lotstein had title to the building in question and the lot on which it was situated. Lotstein's attorney, Marshall Goldberg, testified that it was the intention of Lotstein to lease both the parking lot and the building lot to the plaintiff. He further testified that when it was brought to his attention that the legal description in the lease was in error, Lotstein and the plaintiff

signed an amendment to the lease that included a legal description of both lots in Exhibit A. (Ex: 6). Goldberg testified that the plaintiff was not required to pay any consideration for the amendment to the lease.

Richard Steiner, a member of the plaintiff's in-house legal staff testified that he had negotiated the lease with the understanding that the property to be leased included both the parking lot and the lot on which the building was located. He confirmed Goldberg's testimony as to the execution of an amendment to the lease.

The court finds that the evidence demonstrates that the plaintiff was the lessee of the entire property (both parking lot and building lot) at the time of the applications to the defendant ZBA and the defendant TPZC and that the plaintiff remained the lessee thereafter. As the lessee of the property which is the subject of its applications, the plaintiff has standing to bring these appeals. *Mountinho v. Planning and Zoning Commission*, 278 Conn. 660, 667-68 (2006); *Primerica v. Planning & Zoning Commission*, 211 Conn. 85 (1989).

MOTION TO DISMISS APPEAL FROM ZONING BOARD OF APPEALS

In their amended motion to dismiss, the Rowes and the Association argue that Peter Marsala, Fairfield's Zoning Enforcement Officer, did not, in fact, make any decision which could be appealed to the ZBA pursuant to General Statutes § 8-6 (a) (1) That statute provides: "The zoning board of appeals shall have the following powers and duties: (1) To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter. . ."

Section 2.31 of the Fairfield Zoning Regulations provides that "The Zoning Enforcement Officer shall (a) be appointed by the Commission, (b) work under the

supervision of the Planning and Zoning Director, and (c) have the responsibility and authority to enforce the Zoning Regulations. No application for a Certificate of Zoning Compliance, Order to Comply or other zoning enforcement document shall be issued unless signed by the Zoning Enforcement Officer.” The record establishes that at all relevant times Peter Marsala was Fairfield’s Zoning Enforcement Officer.

The Rowses and the Association submit that if Marsala made no decision, the ZBA lacked subject matter jurisdiction to hear the plaintiff’s appeal and that, consequently, the court lacks subject matter jurisdiction over the plaintiff’s appeal to the Superior Court. In the alternative, the Rowses and the Association assert that if the court finds that the ZEO made a decision, the plaintiff’s appeal to the ZBA was untimely. They argue that, in either event, the court lacks subject matter jurisdiction which requires the court to dismiss the ZBA appeal. The court heard evidence in support of the motion to dismiss.

In support of their motion to dismiss, the Rowses and the Association rely on the following facts. On August 22, 2006, Richard Saxl, the Fairfield Town Attorney, wrote a letter to the First Selectman of Fairfield. (ROR, # 2). That letter first expressed Saxl’s opinion that Walgreen would be required to obtain a modification of a variance granted to a prior tenant, Grand Central Markets, in 1980. That variance contained the condition that the “parking waiver is restricted to use of Grand Central Markets, Inc.”¹ Saxl’s letter then recites the need, under the Fairfield Zoning Regulations, for a Certificate of Zoning Compliance from the TPZC, if modifications of the existing site plan are proposed. Saxl also notes the need for a Certificate of Zoning Compliance from the TPZC if the existing structure on the Site is undergo exterior alterations, additions or reconstruction. Finally, Saxl expresses his opinion that any new user of the

¹ “Saxl’s opinion in this regard appears to be mistaken. General Statutes § 8-6(b) enacted as P.A. 93-385 codified existing case law and expressly provided that: “Any variance granted by a zoning board of appeals shall run with the land and shall not be personal in nature to the person who applied for and received the variance.”

Site seeking a "zoning compliance" should be required to apply to the TPZC for one.

The requirements for Certificates of Zoning Compliance are set forth in Section 2.1 of the Fairfield Zoning Regulations. In relevant part, that section provides:

"No building or other structure, or part thereof, shall be constructed, reconstructed, enlarged, extended, moved or structurally altered until an application for a Certificate of Zoning Compliance has been approved by the Zoning Enforcement Officer or the Town Plan and Zoning Commission, hereinafter called the 'Commission'. No land, building or other structure, or part thereof, shall be used or occupied, or changed in use, until a Certificate of Zoning Compliance therefore has been issued by the Zoning Enforcement Officer certifying conformity with the Zoning Regulations."

Saxl's letter was apparently sent in response to an inquiry from the First Selectman. As of the date of Saxl's letter, no applications had yet been filed by the plaintiff. However, it is clear that by that time the plaintiff's intentions with regard to the property at 1280 Stratfield Road were well known in the community. James Wendt, Fairfield's Assistant Director of Planning and Zoning, testified that he was aware of Saxl's August 22, 2006 letter prior to the end of August of that year. In the body of the letter, Saxl states that a copy of the letter was being sent to the Town Planner. In September 2006, a copy of the Saxl letter was obtained by the plaintiff's attorney, John F. Fallon. Thereafter, attorney Fallon held discussions with officials of the Fairfield Zoning Department, including Peter Marsalla, the Zoning Enforcement Officer and James Wendt, the Assistant Director of Planning and Zoning regarding Walgreen's plans and the contents of Saxl's letter.

On October 24, 2006, attorney Fallon presented the plaintiff's plans to the Zoning Department. On that same date, Wendt advised Fallon that the plaintiff would

be required to apply to the TPZC for a Certificate of Zoning Compliance. Attorney Fallon immediately filed an appeal on behalf of the plaintiff to the ZBA challenging the need for such an application. The appeal was heard by the ZBA on January 4, 2007 and denied the same day. Thereafter, the plaintiff filed an appeal from the decision of the ZBA to this court.

In the hearing on the motion to dismiss, Peter Marsalla, Fairfield's ZEO, testified that no documents dealing with the issue of whether the plaintiff needed a Certificate of Zoning Compliance from the TPZC had ever been submitted to him, personally. He further testified that he had not discussed that issue with either Joseph Devonshuk, Fairfield's Director of Planning and Zoning, or Devonshuk's assistant, James Wendt.

Wendt testified that on October 24, 2006, the plaintiff filed three applications with his office. The first was an application to the Planning and Zoning Commission for a Certificate of Zoning Compliance. The second was an application to the Zoning Board of Appeals to modify a variance granted with respect to the subject property. The modification was simply to clarify that the variance was not personal to Grand Central Markets, a prior occupant of the property.² The third application was an appeal to the Zoning Board of Appeals from the decision requiring that the plaintiff obtain a Certificate of Zoning Compliance.

The claim that a court lacks subject matter jurisdiction to hear a case can be raised at any time and must be answered before the court can proceed to the issues originally raised on appeal. *Lichtman v. Beni*, 280 Conn. 25, 30 (2006); *Fennelly v. Norton*, 103 Conn. App. 125, 134, cert. denied, 284 Conn. 918, 931 (2007). Moreover, General Statutes § 8-8 (j) provides, in relevant part: "Any defendant may, at any time after the return date of the appeal, make a motion to dismiss the appeal. If the basis of

² The ZBA granted the modification to the variance to remove the language limiting it to Grand Central Markets. No appeal was taken from that decision.

the motion is a claim that the appellant lacks standing to appeal, the appellant shall have the burden of proving his standing. . . .”

“A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.” (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134 (2007).

“When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.” (Internal quotation marks omitted.) *Cogswell v. American Transit Ins. Co.*, 282 Conn. 505, 516 (2007). “Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction.” *St. George v. Gordon*, 264 Conn. 538, 545 (2003). Moreover, “[t]he issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss.” *Id.*, 544. As a result, “[t]he proper procedural vehicle for disputing a party’s standing is a motion to dismiss.” (Internal quotation marks omitted.) *D’Eramo v. Smith*, 273 Conn. 610, 615 n.6 (2005). Finally, “[t]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised.” (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n.12 (2003).

In its brief filed in opposition to the motion to dismiss, Walgreen argues that it sought a ruling from Fairfield’s Zoning Department as to the need for a Certificate of Zoning Compliance with respect to the plans it submitted on October 24, 2006, and was immediately informed that such a certificate would be required. In its complaint, the plaintiff alleges that its application to the ZBA was “to reverse a decision of the *Zoning Administrator* that an application for a Certificate of Zoning Compliance was required

with respect to the plaintiff's contemplated renovation and use of the Property as set forth hereinafter." (Emphasis supplied.) In the plaintiff's view, it was being unnecessarily required to obtain a Certificate of Zoning Compliance from the TPZC when it believed its proposed use of its property authorized the ZEO to issue such a certificate.

In deciding this motion to dismiss, the court must determine whether a zoning applicant is required to obtain a decision from the individual designated as the Zoning Enforcement Officer before it can seek relief in the form of an appeal to the ZBA under General Statutes § 8-6 (a) (1). There are no decisions of either the Supreme Court or the Appellate Court directly addressing this issue. Under somewhat similar circumstances, a Superior Court found that an appeal could be taken from the de facto denial of an application by a zoning enforcement officer. *Vitale v. Zoning Board of Appeals*, Superior Court, judicial district of New London, Docket No. 566540 (January 15, 2004, *Purtill, J.T.R.*). In that case, the ZEO failed to make a decision on an application for over six months while awaiting an opinion from the town attorney. The town attorney sent a letter to the ZEO recommending that he deny the application; however, the ZEO never issued a formal written or verbal denial of the application. The court overruled a special defense which claimed that the ZBA lacked jurisdiction over the appeal. The court focused on the claim that the appeal to the ZBA was untimely. In its analysis, the court treated the date of the Town Attorney's letter as the operative date of the ZEO's decision to reject the application. Apparently, the court believed that, having waited six months for the Town Attorney's advice, the ZEO was obviously not going to ignore it. Ultimately, the court found that the appeal to the Superior Court had not been timely filed and dismissed the appeal.

In another Superior Court case, *Sarantopoulis v. Riseman*, Superior Court, judicial district of Windham at Putnam, Docket No. CV 02 0069404 (April 28, 2004, *Foley, J.*) (36 Conn. L. Rptr. 902), the plaintiff brought an action directly to the Superior Court against a Zoning Enforcement Officer seeking to force him to take action on

alleged zoning violations taking place on a neighbor's property. The complaint alleged that the ZEO had failed to act despite numerous complaints. The ZEO filed a motion to dismiss the action for lack of subject matter jurisdiction on the ground that the plaintiff had failed to exhaust administrative remedies. The ZEO argued that the plaintiffs should have filed an appeal with the ZBA, and that their failure to do so constituted a failure to exhaust administrative remedies. The court rejected this argument, explaining that "[the ZEO's] argument that the plaintiffs failed to exhaust their administrative remedies fails because he never issued a decision that would be appealable to Brooklyn's zoning board of appeals. [The ZEO's] failure to comply or otherwise respond to the plaintiffs' complaints does not constitute a decision. . . . Without the rendering of a decision, the plaintiffs had no standing to appeal to the zoning board of appeals."

The problems associated with exercising the right to appeal the decisions of zoning enforcement officers have been recognized. "Local administrative officers do not always make decisions with that degree of formality which could be desired. The question, therefore, arises as to what constitutes sufficient action on the part of the administrative official to vest jurisdiction in the board of appeals to review the decision made by him. . . . The finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual concrete injury." Rathkopf's *The Law of Zoning and Planning*, 4th Ed., §37.04 (1995).

In this case, the Fairfield Zoning Department had a copy of the Saxl letter for over a month before the plaintiff filed its application. The mere fact that the decision that an application for a Certification of Zoning Compliance would need to be filed with the TPZC was communicated to the plaintiff's counsel by the Assistant Director of Planning and Zoning rather than by the Zoning Enforcement Officer is not determinative of the plaintiff's right to appeal that decision. However, unlike *Vitale*, supra, there is no evidence here from which the court can infer that any decision was, in fact, made by the ZEO. Faced with the uncontradicted testimony of Marsala that he never made any decision or ruling with respect to the requirement which formed the basis of the

plaintiff's appeal to the ZBA the court cannot find that any actual decision of the ZEO was implicated in the appeal.

This court has already taken note of Connecticut's public policy of deciding, if possible, land use appeals on the merits. However, General Statutes § 8-6 (a) (1) allows appeals only from decisions "made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter." The statute does not contemplate appeals from the decisions of other public officials including town attorneys, town planners, or directors of planning and zoning. The only appeals authorized are those from the decisions of "the official charged with the enforcement of . . . any regulation adopted under the provisions of this chapter." Under the Fairfield Zoning Regulations the individual so designated is the ZEO. The plaintiff has failed to establish, either in the record or by its evidence, that Fairfield's ZEO made any decision which could be appealed to the ZBA. The court finds the motion to dismiss has merit and accordingly, that motion is granted and plaintiff's appeal from the decision of the ZBA is dismissed.

In light of the court's finding that the ZEO did not make any decision from which the plaintiff could appeal, the court need not address the claim that the plaintiff's appeal to the ZBA was untimely. As noted previously, the court must now consider the merits of the plaintiff's appeal from the decision of the TPZC. .

APPEAL FROM THE TOWN PLAN ZONING COMMISSION

The plaintiff's appeal from the decision of the TPZC is based on the denial of plaintiff's application for a Certificate of Zoning Compliance. The plaintiff claims the denial was illegal, unlawful, arbitrary, capricious and in abuse of the powers of the TPZC for a number of reasons: a) the plaintiff proposed no modification to the Site or change in use from the existing retail use; b) the use proposed by the plaintiff is explicitly permitted under the regulations; c) the denial was unwarranted under any .

standards set forth in the regulations; d) the TPZC relied on invalid considerations; e) the TPZC ignored its own regulations; f) the TPZC attempted to impose standards in the Neighborhood Designed Business District other than those set forth in the regulations; g) the decision was inconsistent with a prior decision of the TPZC approving a similar use within the Neighborhood Designed Business District; h) the TPZC relied on speculation and illegally inappropriate considerations; i) the TPZC ignored substantial uncontroverted evidence that the proposed use complied with the regulations; and j) the TPZC failed to articulate any legitimate reasons for its decision.

"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] commission must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission] The question is not whether the trial court would have reached the same conclusion, but whether the record before the [commission] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Citation omitted; internal quotation marks omitted.) *Municipal Funding, LLC v. Zoning Board of Appeals*, 270 Conn. 447, 453. (2004).

The plaintiff's application for a Certificate of Zoning Compliance was dated April 13, 2007 and was signed by the plaintiff's counsel. (ROR # 2) In that application the plaintiff applied to change the use of the site from "food market" to "pharmacy." The application noted that the plaintiff proposed no modifications to the site plan and only interior alterations to the building. The TPZC scheduled a public hearing to consider

the plaintiff's application for June 6, 2007. On that date the TPZC heard the plaintiff's application. On July 10, 2007, the TPZC, by a vote of 2 in favor, and 4 against, denied the application. In the minutes of its July 10, 2007 meeting, the TPZC stated the reasons for its denial of the application:

1. The proposed use does not comply with the purpose of the Neighborhood Designed Business District as outlined in Section 12.5 of the Regulations.
2. The proposed use does not comply with Section 12.5.1 in that it is not a permitted retail use.
3. The proposed use does not comply with Section 25.7.7 in that it is not of such a character as to harmonize with the neighborhood and to preserve and protect property values in the neighborhood." (ROR # 11.)

The same reasons were set forth in the Notice of Denial sent to the plaintiff's attorney. (ROR # 13.)

The following sections of the Fairfield Zoning Regulations are referred to in the TPZC's decision:

"12.5

Neighborhood Designed Business District

The purpose of this district is to provide local neighborhoods with needed and desirable convenience goods and services in a manner which will not be detrimental to the surrounding residential areas. The uses permitted in this zone shall be limited to those which primarily serve the local neighborhood and are consistent with the purpose for which this district was designed.

Permitted Uses in the Neighborhood Designed Business District

12.5.1 Retail uses limited to: antiques, art supplies, books, clothing, drugs, dry goods, flowers, furniture, interior decorating, garden and farm supplies, gifts, groceries, fruits, vegetables, meats, sandwiches, hardware, shoe

repair, stationery, periodicals and toilet articles, pets and related supplies.

...

25.7 Requirements for Approval

The Town Plan and Zoning Commission, after public hearing, shall approve an application for a Special Permit for the establishment of a special permit use if it finds that the proposed use and proposed buildings and structures conform to the standards applicable in the district in which the special permit use is to be located, conform to any applicable special standards for special exception uses in Section 27.0 and conform to the following additional requirements;

....

25.7.7 the development shown on the site and Architectural Plans shall be of such a character as to harmonize with the neighborhood, to accomplish a transition in character between areas of unlike character, to protect property values in the neighborhood, to preserve and enhance the appearance and beauty of the community, and to avoid undue traffic congestion." (ROR # 23)

The transcript of the June 6, 2007 hearing was included in the return of record as # 7. At the hearing, the plaintiff's counsel, John Fallon, argued that its proposed use of the Site was no different from that of the prior two tenants, Grand Central Markets and IGA. His position was that the grocery stores operated by those tenants were retail uses and that the proposed Walgreen's store would also be a retail use - a pharmacy - expressly permitted under Section 12.5.1 of the regulations. In his presentation, Fallon asked the TPZC to rule that no application for either a special permit or a certificate of zoning compliance was required under the provisions of Section 12.2 of the regulations³ because his client did not propose to change the use of the property.

³

In relevant part, that section provides: "In addition to the foregoing pre-existing permitted uses, the use of land, buildings and other structures shall be solely for the purposes set forth in . . . Section 12.5 for Neighborhood Designed Business District. A Special Permit

Attorney Fallon informed the TPZC that 75% of his client's revenues, nationwide, were the result of prescription sales and sales of over-the-counter medications. Attorney Fallon computed that 95% of his client's revenues were produced by retail sales which are expressly permitted under Section 12.5.1 of the regulations. The remaining 5% of revenues were produced by sales of film/photo finishing, reading glasses, jewelry, watches, toys, calculators, clock radios, telephones, batteries, tv/stereo accessories. Based on the floor plan of the proposed Walgreen's store, Attorney Fallon calculated that only 4.9% of the linear shelf space in the store would be used to sell products not listed in Section 12.5.1 of the regulations. Attorney Fallon pointed out to the TPZC that he was offering this information to them in light of the Supreme Court's then recent holding in *Alvord Investments, LLC. v. Zoning Board of Appeals*, 282 Conn. 393 (2007), that customary incidental uses (a bakery, bank branch, pharmacy, and non-food sales) used only 7% of the floor space, would not disqualify a Super Stop and Shop from being considered a "Food Shop - Retail" under the Stamford Zoning Regulations.

In order to determine whether the record supports the decision of the TPZC to reject the plaintiff's application for a Certificate of Zoning Compliance, the court must determine 1) whether the plaintiff's claim that the use of the Site as a Walgreen's store did not represent a change in the use of the property has merit; and 2) if not, whether the plaintiff's proposed use of the Site is permitted under Section 12.5.1 of the regulations.

under Section 25.0 of the Zoning Regulations shall be required for any new construction, re-construction, exterior alterations, or addition for a use permitted in . . . Section 12.5. Change from one permitted use to another permitted use not involving new construction, re-construction, exterior alterations, or additions shall require a Certificate of Zoning Compliance under Section 22.2 of the Zoning Regulations subject to the standards of Section 25.7."

CHANGE IN USE

Section 2.1 of the Fairfield Zoning Regulations requires a Certificate of Zoning Compliance under two circumstances. The first sentence of that section requires such a certificate when any building is to be "constructed, reconstructed, enlarged, extended, moved or structurally altered." The plaintiff's claim that the first sentence is not applicable to its proposed use of the Site is not disputed by the defendants; no exterior or structural alterations are contemplated by the plaintiff's proposal. The second sentence of section 2.1 requires a Certificate of Zoning Compliance to be issued before any land or building is "changed in use."

The plaintiff argues that it does not propose to make any change in use of the Site. The plaintiff first reasons that the former tenants used the Site as a food market, a retail use. The plaintiff's proposed use is as a pharmacy, also a retail use. The plaintiff concludes that it is entitled to use the Site for a Walgreen's store without being required to obtain a Certificate of Zoning Compliance.

Section 12.5.1 of the regulations lists the uses permitted in the Neighborhood Designed Business District. That section does not permit retail uses generally. It allows: "Retail uses limited to: antiques, art supplies, . . ." The plaintiff concedes that not all the retail uses it intends for the Site are expressly enumerated in the list of permitted retail uses in Section 12.5.1, but, nevertheless claims that its proposal does not constitute a change in use.

The question of whether the plaintiff's proposal constitutes a change in use is one which requires interpretation of the Fairfield Zoning Regulations. Those Regulations do not define the phrases "change of use" or "changed in use." The plaintiff challenges the Commission's apparent determination that plaintiff's proposal to use the Site, which was formerly used for the retail sale of groceries and other food

products, for the retail sale of drugs, gift and toilet articles represented a "change in use." This challenge is rooted in the plaintiff's disagreement with the advice that the plaintiff received from the Zoning Department that its proposal represented a change in use requiring an application to the Commission for a certificate of Zoning Compliance. As noted above the plaintiff did not preserve its right to challenge the correctness of this advice by requiring that the matter be referred to and decided by the Zoning Enforcement Officer. Plaintiff's claim that a "change in use" was not contemplated by its proposal represents an attempt by the plaintiff to litigate an issue it failed to preserve at the appropriate agency level.

Moreover, even if the question of whether the plaintiff's plans for the Site represent a change in use had been appropriately preserved and presented to the TPZC, the court would be required to accord great deference to the decision of the TPZC to regard the plaintiff's proposal as a change in use. "Generally, it is the function of a zoning [commission] . . . 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. The trial court [must] decide whether the [commission] correctly interpreted the section [of the regulations] and applied it with reasonable discretion to the facts. . . . In applying the law to the facts of a particular case, the [commission] is endowed with . . . liberal discretion, and its action is subject to review . . . only to determine whether it was unreasonable, arbitrary or illegal. . . ." *Balf Co. v. Planning & Zoning Commission*, 79 Conn. App. 626, 635 (2003). The record would not support the plaintiff's claim that the TPZC abused its discretion in its determination that the plaintiff's proposed use of the Site constituted a change in use.

Having determined that the record supported the TPZC's determination that the plaintiff's proposed use of the site constituted a change in use, the court must now

determine whether the record supports the TPZC's decision that the proposed use is not a permitted one in the Neighborhood Designed Business Zone.

PERMITTED USES IN THE NEIGHBORHOOD DESIGNED BUSINESS ZONE

In its October 23, 2008 brief, plaintiff argues that each of its proposed uses which are not expressly permitted under Section 12.5.1 of the regulations can be construed as falling into a permitted category of permitted retail sales. For example, plaintiff claims that sales of electronic equipment such as DVD players, television sets and home appliances are, in fact, permitted uses because the regulations expressly permit the sale of gifts. Since practically any property can be given as a gift, the plaintiff concludes that such sales, rather than being prohibited are, instead, expressly permitted. The court does not find this reasoning persuasive.

Section 2.4 of the Fairfield Zoning Regulations defines "Prohibited Uses" as "Uses which are not specifically permitted under the Zoning Regulations are hereby declared to be prohibited uses." The TPZC was entitled to interpret its own regulations and determine whether any of the uses proposed by the plaintiff were not permitted uses under Section 12.5.1. "A local board or commission is in the most advantageous position to interpret its own regulations and apply them to the situations before it. . . ." (Internal quotation marks omitted.) *Farrior v. Zoning Board of Appeals*, 70 Conn. App. 86, 89 (2002). "Common sense must be used in construing the regulation, and we assume that a rational and reasonable result was intended by the local legislative body." (Internal quotation marks omitted.) *Vivian v. Zoning Board of Appeals*, 77 Conn. App. 340, 345 (2003).

"Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . [A]n agency's factual and discretionary determinations are to be accorded considerable

weight. . . A court that is faced with two equally plausible interpretations of regulatory language properly may give deference to the construction of that language adopted by the agency charged with enforcement of the regulation." (Citations omitted; Internal quotation marks omitted.) *Wood v. Zoning Board of Appeals*, 258 Conn. 691, 698-99 (2001). "In applying the law to the facts of a particular case, [a zoning] board is endowed with a *liberal discretion*, and its decision will not be disturbed unless it is found to be unreasonable, arbitrary or illegal." (Internal quotation marks omitted; emphasis added.) *Spero v. Zoning Board of Appeals*, 217 Conn. 435, 440, (1991). In this case the court finds that the record supports the TPZC's rejection of the tortured reading of Section 12.5.1 urged by the plaintiff. The plaintiff has failed to establish that the decision of the TPZC in this regard was unreasonable, arbitrary or illegal.

The plaintiff claims that even if its proposed use of the Site includes sales or services not expressly enumerated in Section 12.5.1, the TPZC nevertheless abused its discretion in refusing to approve plaintiff's application for a Certificate of Zoning Compliance. The plaintiff's position is that the record demonstrates that the overwhelming majority of the retail sales which would be generated at the proposed Walgreen's store would be from retail uses expressly permitted under Section 12.5.1 of the regulations. Any other sales or services made at the Site would be incidental or accessory to the primary use and would be permitted under the authority of *Alvord Investments*, *supra*.

The issue before the court *Alvord* was whether the plaintiff applicant was entitled to use the subject property for a Super Stop & Shop, a use involving the sale of many products other than groceries. In that case, the plaintiff's property was located in a light industrial zone or M-L Zone in which many uses, including "Food Shops, Retail" were permitted as a matter of right. After a two year review and favorable action from each city department having an interest in the project, Stamford's Zoning Enforcement Officer issued the plaintiff a zoning permit finding that subdivision approval was not

required and that the proposed use was permitted in the zone. That decision was appealed by residents owning adjacent properties to the Zoning Board of Appeals which voted to reverse the decision of the ZEO. After the plaintiff appealed to the Superior Court, the trial court found that subdivision was not required as a matter of law and that the evidence in the record demonstrated that the proposed use was permitted in the zone.

The residents appealed the decision of the trial court to the Supreme Court. After determining that the plaintiff was aggrieved by the decision of the ZBA, and that the trial court was correct in determining that subdivision approval was not required, the Supreme Court considered the issue of whether the plaintiff's proposed use was permitted in the zone.

The Supreme Court first noted that the record was not clear that the ZBA had, in fact, decided that the ZEO was correct in his determination that the plaintiff's proposed use was permitted in the zone. The Supreme Court also noted that the trial court simply stated "[t]he record clearly shows that the subject [Super] Stop & Shop meets the classification of 'Food Shops, Retail' as set forth in the zoning regulations. . . Any determination by the [board] to the contrary is not supported by the record. . ." 282 Conn. at 415 Notwithstanding its usual rule of not addressing issues which were not the subject of an administrative decision, the Supreme Court assumed that the ZBA had determined the proposed use to be not a permitted one and considered the issue. The Supreme Court's deviation from its customary practice was taken in order to avoid a subsequent appeal raising the issue of permitted use.

The Supreme Court noted that the Stamford Zoning Regulations did not define "Food Shops, Retail." The court found that this absence of a definition prevented the court from resolving the issue simply by analyzing the language of the regulations.

Under such circumstances the court found it appropriate to consider "extratextual sources that provide guidance as to the regulations' scope because [the] regulation is not plain and unambiguous." (Internal quotation marks omitted) 282 Conn. at 417. This "extratextual" analysis led the court to conclude that under the Stamford regulations, the non-food sales generated by the plaintiff's proposed use of the subject property would be accessory uses which are customarily incidental to the main use. The record before the court included the testimony of the ZEO before the ZBA which confirmed that the plaintiff's proposed use would be consistent with other supermarkets which had been classified as "Food Shops, Retail."

Contrary to the plaintiff's apparent claim, *Alvord*, does not stand for the proposition that if 90% or 95% of the uses proposed by a zoning applicant are expressly permitted in a zone, the remaining use must be allowed as incidental or accessory to the permitted use. In *Alvord*, the court examined the record regarding the applicant's proposed use. That portion of the record was largely devoted to the statements of the Stamford Zoning Enforcement Officer regarding prior interpretations of the undefined phrase "Food Shops, Retail." Based on the record, the Supreme Court found that any decision finding that the applicant's proposed use was not permitted in the zone would not have been supported by the record before the board.

The plaintiff claims that, as in *Alvord*, the Fairfield Zoning Regulations do not expressly define all of the uses permitted in the subject zone. The plaintiff urges that this creates an ambiguity which requires the TPZC to interpret the regulations to permit the plaintiff's proposed use of the Site. In *Alvord*, both the ZBA and the court had the benefit of a record containing the findings of the Stamford Zoning Enforcement Officer based on his year long review of the issues presented by the Super Stop & Shop operation, including several prior interpretations of the phrase "Food Shops-Retail." In this case the record does not provide any such evidence. The provisions of Section 12.0 of the Fairfield Zoning Regulations set forth the regulations for all Designed

Business Districts (including the Neighborhood Designed Business Zone). Those regulations do not provide for any accessory or incidental uses in any Designed Business Districts Zone.

In his statements at the public hearing before the TPZC, plaintiff's counsel acknowledged that approximately 5% of its projected sales would be from goods and/or services not expressly listed in Section 12.5.1 of the Fairfield Zoning Regulations. (ROR # 7 p. 10) The Chairman of the TPZC questioned plaintiff's counsel regarding the plaintiff's decision to include these questionable sales in its proposal.

"Chairman: If 5% of the items are specifically not included on the list of permitted items, why didn't you eliminate them?"

Mr. Fallon: The answer is I don't know if that would make anybody happy.

Chairman: No, its not going to make anybody happy but I'm wondering why you didn't do that.

Mr. Fallon: Well the answer is we looked at it in the context of the overall volume of shelf space. And we looked at it in the context of Alvord and the context of what's accessory use -- (inaudible)." (ROR # 7, p. 41.)

Even if the relevant regulations were to be found ambiguous as in *Alvord*, the plaintiff could not prevail in its appeal. The record in this case is nearly devoid of any evidence of prior interpretations of Section 12.5.1 of the Fairfield regulations which cover retail uses permitted in the Neighborhood Designed Business District. Such prior interpretations formed a substantial basis for the Supreme Court's holding in *Alvord*. The only reference to prior interpretations of the Fairfield Zoning Regulations are in transcript of the public hearing held on June 6, 2007. That transcript shows that in the course of his presentation to the TPZC, plaintiff's counsel referred to an "approval of a

CVS at the corner of that street in the Neighborhood Design District not two years ago. I would ask for purpose of this record that the CVS approval and its documentation which is a public record in the Town Hall and in the Town Zoning office by reference be made a part of the record." (ROR # 7, p. 38) The transcript of the hearing of the does not indicate that the TPZC took any action on this request.

The record returned to court by the TPZC does not contain any materials relating to the CVS approval. On December 12, 2007, the plaintiff filed a motion, pursuant to General Statutes § 8-8(k), to allow evidence at trial in its appeal from the ZBA. That motion sought to introduce evidence of the granting of a Special Permit allowing the construction and operation of a CVS Pharmacy at the corner of 390 Jennings Road and 961 Black Rock Turnpike in Fairfield. That motion was denied by the court, *Radcliffe, J.*, on January 11, 2008, "w/o prejudice to the right to review if consolidated with P&Z appeal." No parallel motion was filed in the plaintiff's appeal from the decision of the TPZC. Apparently the plaintiff did not pursue its motion to introduce evidence regarding the CVS approval after the two appeals were consolidated on June 10, 2008.

In section 3 of its trial brief dated October 23, 2008, the plaintiff argues that the denial of its application is inconsistent with the action of the TPZC in approving a similar application filed by CVS. Because of the failure of the plaintiff to include information concerning the CVS application in the record or to pursue its motion to offer evidence outside the record to the court, the court is not in a position to weigh the merits of the plaintiff's claim. Based on the evidence in the record, the court cannot find that the TPZC has previously interpreted the zoning regulations to permit otherwise unauthorized retail uses in the Neighborhood Design Business District as incident or accessory to permitted retail uses.

The conclusion reached by the TPZC that the use proposed by the plaintiff for the Site is not permitted in the Neighborhood Designed Business Zone is amply supported by the Regulations and by the record. Accordingly, the plaintiff's appeal from the decision of the TPZC is dismissed.



David R. Tobin, J.