



MEMORANDUM

TO: VIRGIL DE LA CRUZ AND CHARLES PIA, JR.
CO-CHAIRS
LAND USE-URBAN REDEVELOPMENT COMMITTEE
BOARD OF REPRESENTATIVES
C/O VALERIE T. ROSENSON

FROM: WILLIAM J. HENNESSEY

DATE: JULY 31, 2018

RE: AGENDA ITEM LU30.015 (AUGUST 1, 2018)
SPECIAL EXCEPTION / SITE PLAN AND
RESPONSE TO ARGUMENTS FROM MEETING AND PUBLIC HEARINGS
(JULY 18 AND 19, 2018)

During the course of the meetings and public hearings held on July 18 and 19, 2018, counsel for the petitioners and/or opponents (collectively “Opponents”) to the text change amendment offered a number of misleading and/or false statements of law with respect to the special exception standards and procedures as well as the level of deference that trial courts provide to zoning boards and zoning commissions on appeal from the grant or denial of special exception applications.¹ Throughout the text change amendment process, there have also been some incorrect comparisons made between special exceptions and site plans. Although some of these misleading and/or false statements were previously addressed in a Memorandum dated July 18, 2018, a number of members of the Land Use-Urban Redevelopment Committee of the Board of Representatives have asked for a legal analysis pertaining to special exceptions and site plans. Please allow this Memorandum to serve as the legal analysis of the successful applicant for the text change amendment as well as supplemental response to the Opponents misstatements.

¹Notably, counsel for the Opponents have repeatedly reiterated the false proposition that upon acceptance of the amendment, “Elvis will have left the building,” and “the cat’s out of the bag,” because the “special exception protection is no protection at all,” for which “you cannot require off-site improvements,” and “this thing will get built,” effectively ignoring the strength and effectiveness of special exception standards and procedures. In addition, counsel for the Opponents have also repeatedly reiterated the false proposition that “it is not the case that denials of special exception and imposition of conditions on special exceptions are upheld by the courts routinely,” effectively ignoring the well-established deference provided by courts to local zoning boards and zoning commissions in considering special exception applications.

GENERAL OVERVIEW: SPECIAL EXCEPTION / SITE PLAN

Overall, a special exception and a site plan are fundamentally different. Although there are some similarities, considerably more discretion is provided to a zoning board or zoning commission on consideration of a special exception over a site plan.² In addition, with respect to a special exception, as opposed to a site plan, an applicant must comply with an extensive and demanding multi-board review process.

[Connecticut] General Statutes § 8-2 provides in relevant part that local zoning regulations may provide that certain . . . uses of land are permitted only after obtaining a special permit or special exception . . . subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. . . . Section 8-2 authorizes local zoning authorities to impose certain standards and conditions on the use of property when the public interest so requires.”

(Internal quotation marks omitted.) *Kobyluck v. Planning and Zoning Commission*, 84 Conn. App. 160, 170, cert. denied, 271 Conn. 923 (2004).³ A site plan approval, on the other hand, is for a “fully permitted” use the designation of which “establishes a conclusive presumption that such use does not adversely affect the district and precludes further inquiry into its effect on traffic, municipal services, property values, or the general harmony of the district.” (Internal quotation marks omitted.) *TLC Development, Inc. v. Planning and Zoning Commission*, 215 Conn. 527, 532–33 (1990).⁴

In this respect, there is a large variation in the level of discretion provided to a zoning board or zoning commission in consideration of a special exception versus a site plan.

In particular, in consideration of a special exception, a zoning board or zoning commission has a liberal discretion including the discretion to determine whether a proposal

²In general, approval or denial of a special exception, as opposed to a site plan, may be based upon both general and specific grounds found in the regulations. Along the same lines, approval of a special exception, as opposed to a site plan, can attach both on and off-site conditions to an approval.

³“The basic rationale for the special [exception] . . . is that while certain land uses may be generally compatible with the uses permitted as of right in a particular zoning district, their nature is such that their precise location and mode of operation must be individually regulated because of the particular topography, traffic problems, neighboring uses, etc., of the site” *Smith Bros. Woodland Management, LLC v. Planning and Zoning Commission*, 88 Conn. App. 79, 83 (2005).

⁴It has been recognized, however, that it is permissible to conduct “an examination into the special traffic consequences of a given site plan when the applicable zoning regulations permit it.” *Friedman v. Planning and Zoning Commission*, 222 Conn. 262, 266 (1992). Our Supreme Court has clarified that these traffic considerations are limited to specific issues such as placement of entrances and exits and internal traffic circulation, and *not* off-site traffic congestion or traffic volume. See *Pansy Road, LLC v. Town Plan and Zoning Commission*, 283 Conn 369, 379–80 (2007).

meets the standards established in the regulations. *Oakbridge/Rogers Ave. Realty, LLC v. Planning and Zoning Board*, 78 Conn. App. 242, 247 (2003). Thus:

[G]eneral considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special [exception]. . . . Connecticut courts have *never* held that a zoning commission lacks the ability to exercise discretion to determine whether the general standards in the regulations have been met in the special [exception] process.

(Citation omitted; emphasis in original; internal quotation marks omitted.) *Irwin v. Planning and Zoning Commission*, 244 Conn. 619, 627 (1998). “The exercise of that discretion is inherently fact-specific, requiring an examination of the particular circumstances of the precise site for which the special [exception] is sought and the characteristics of the specific neighborhood in which the proposed [use] would [be made].” (Internal quotation marks omitted.) *St. Joseph’s High School, Inc. v. Planning and Zoning Commission*, 176 Conn App. 570, 600 (2017).

To the contrary:

A site plan is a plan filed with a zoning commission or other municipal agency or official to determine the conformity of a proposed building, use or structure with *specific* provisions of the zoning regulations. It is a physical plan showing the layout and design of a proposed use, including structures, parking areas and open space and their relation to adjacent uses and roads, and containing the information required by the zoning regulations for that use.

(Emphasis added; internal quotation marks omitted.) *Fedus v. Zoning & Planning Commission*, 112 Conn. App. 844, 847, *cert. denied*, 292 Conn. 904 (2009); *see also* Connecticut General Statutes § 8-3 (g). “A zoning commission’s authority in ruling on a site plan is limited. . . . The agency has no independent discretion beyond determining whether the plan complies with the site plan regulations and applicable zoning regulations incorporated by reference.” *Id.* at 848. In doing so, unlike a special exception, general considerations may only be used “in conjunction with and not as an alternative to the standards contained in the applicable zoning regulations.” *Kosinski v. Lawlor*, 177 Conn. 420, 423 (1979); *see also Nassau Wood Industries v. Planning and Zoning Commission*, 1994 WL 324389 (1994).

Additionally, a zoning board or zoning commission can prescribe conditions to approval of a special exception application for both on and off-site improvements. *See Viacom Broadcasting, Inc.*, 10 Conn. App. 190, 194–95, *cert. denied*, 203 Conn. 808 (1987), *citing Lurie v. Planning & Zoning Commission*, 160 Conn. 295 (1971). The same is not true for a site plan application in which case a zoning board or zoning commission “may only attach a condition to an approval where . . . the language of a given zoning regulation . . . limit[s] the scope of the use” (Internal quotation marks omitted.) *Kenyon Oil Co. v. Planning and Zoning Commission*, 1996 WL 694633, at *3 (1996); *see also Pansy Road, LLC v. Town Plan and Zoning Commission*, 283 Conn 369, 379–80 (2007) (off-site traffic congestion may not even be considered let alone made a condition for off-site improvements in a site plan application).

Finally, with respect to special exceptions, a public hearing is required by statute. *See* Connecticut General Statutes § 8-3c. Otherwise, “[l]ocal zoning regulations determine if a public hearing is required for review of a particular application.” *October Twenty-Four, Inc. v. Planning and Zoning Commission*, 35 Conn. App. 599, 602 (1994). Section C6-40-14 of the Stamford Charter requires site plans for designed districts to include at least one public hearing, while Section 19-3.3 (a) of the Stamford Zoning Regulations requires a public hearing for all special exceptions. In addition Section 19-3.3 (c)–(d) of the Stamford Zoning Regulations requires referral of special exceptions to other agencies, including but not limited to the Planning Board, for review and report, and prescribe a super-majority vote of the Zoning Board (4/5 votes) if the Planning Board recommends denial of a special exception. The same is not true of a site plan application.

Furthermore, despite these differences between a special exception and site plan application, it bears noting that under the Stamford Zoning Regulations, any applicant has to comply with both sets of requirements. “All applications for special exception shall include as a minimum site plans prepared to the standards and specifications of section 19,2.3,b. of these Regulations. The form of application, number of copies of plans to be submitted, and the filing fee shall be established by the reviewing board.” Section 19-3.3 (b) of the Stamford Zoning Regulations. Thus, any applicant will also have to comply with Sections 7.2 and 19-2.3 (b) of the Stamford Zoning Regulations.

RESPONSE TO OPPONENTS

Even after submission of the July 18 Memorandum, counsel for the Opponents continued to rely on *Beckish v. Planning and Zoning Commission*, 162 Conn. 11 (1971) for the proposition that conditions to a special exception cannot be based on general provisions of the zoning regulations, while adding to the previous citation to *Mead v. Planning Commission*, 1999 WL 1212244 (1999). Counsel cited *Sowin Associates v. Planning and Zoning Commission*, 23 Conn. App. 370, cert. denied, 216 Conn. 832 (1990), for the proposition that off-site improvements cannot be made a condition to a special exception. As mentioned previously, *Beckish* does not stand for this proposition, while *Sowin* is completely inapposite as it dealt with a subdivision application.

Our Supreme Court has stated that “[a] special permit, as requested by the plaintiffs, permits an applicant to put his property to a use which is expressly permitted under the regulations so that the condition under which a special exception is allowed must be found in the regulations” *Beckish, supra*, 162 Conn. at 15. The specific details in *Beckish*, however, concerned a special permit seeking the expansion of a legally existing non-conforming retail establishment within the existing floor area of an existing main building. The planning and zoning commission in that case granted the special permit but attached eighteen (18) separate conditions including requiring the applicant to remove two pre-existing legally non-conforming outdoor signs. Our Supreme Court then specifically stated:

There is nothing in the zoning regulations, however, which gives the defendant commission any authority to require the discontinuance of a preexisting use of undisputed legality, *as distinguished from a proposed use*, so as to impose such a requirement in the nature of a condition before

it will agree to grant the expansion of a nonconforming use of the remainder of the floor area in the building.

(Emphasis added.) *Id.* This is critical language. The issue in *Beckish* was that the condition had fundamentally no relationship to the proposed use under the special permit. Our Supreme Court then summarized:

The commission could not lawfully require the removal of the signs as a condition to the granting of the special permit in the present case. The plaintiffs' application was requested for the purpose of expanding their nonconforming use to include the unoccupied floor area in the building. ***The signs did not bear any relation to the plaintiffs' application for the proposed use of the building.*** The existence of the signs was brought into the public hearing on the application tangentially, no clear evidence was adduced and the discussion was not within the purpose of the meeting.

(Emphasis added.) *Id.* at 17.

In any event, counsel for the Opponents attempt to use this case for the proposition that absent specific detailed authority in the regulations for attaching conditions, conditions cannot be attached. This proposition has been expressly rejected. A zoning board or zoning commission can grant or deny special exception applications on both narrow and specific grounds found in the regulations. See *Town of Farmington v. Viacom Broadcasting, Inc.*, *supra*, 10 Conn. App. at 194. In *Viacom Broadcasting*, the Court considered whether a zoning commission could condition special exception approval for a new broadcast tower upon removal of the old standby tower. Indeed, the Court in *Viacom Broadcasting* expressly distinguished *Beckish* because “[t]he defendant’s maintenance of the existing standby tower plainly bears a substantial relationship to its request for a new tower. . . . It is therefore within the scope of the zoning regulations for the commission to impose conditions related to aesthetics and property values on the granting of the special exception.” *Id.* at 196. In short, conditions could be based on these general provisions.

In addition, the Court considered general special exception provisions in the Farmington Zoning Regulations and expressly concluded:

The regulations condition the commission’s granting of any special exception upon the requirement that the proposed use not increase fire or traffic hazards, depreciate neighborhood property values, or cause other detriment to the neighborhood or its residents. ***The regulations do not restrict the commission’s power to grant or deny special exceptions to narrow or specific grounds alone. Rather, the regulations give the commission authority to make decisions with broad, general limits related to a proposed structure’s potential impact on the community.***

Id. at 194.

Notably, both the existing Stamford Zoning Regulations and the proposed C-D text change amendment have both general and specific standards and conditions for special exception applications. Standards for a special exception which require that the special exception “shall be granted by the reviewing board only upon a finding that the proposed use or structure or the

proposed extension or alteration of an existing use or structure is in accord with the public convenience and welfare” directs the Zoning Board to numerous considerations. *See* Section 19.3 of the Stamford Zoning Regulations.⁵ Indeed, if these standards are not met, the Zoning Board can simply deny the application. This authority is further bolstered by the proposed C-D text change amendment which requires the Zoning Board to make specific findings related to noise, traffic, light, and site plan design.⁶

⁵The standards require the Zoning Board to take into account:

- (1) The location and nature of the proposed site including its size and configuration, the proposed size, scale and arrangement of structures, drives and parking areas and the proximity of existing dwellings and other structures.
- (2) The nature and intensity of the proposed use in relation to its site and the surrounding area. Operations in connection with special exception uses shall not be injurious to the neighborhood, shall be in harmony with the general purpose and intent of these Regulations, and shall not be more objectionable to nearby properties by reason of noise, fumes, vibration, artificial lighting or other potential disturbances to the health, safety or peaceful enjoyment of property than the public necessity demands.
- (3) The resulting traffic patterns, the adequacy of existing street to accommodate the traffic associated with the proposed use, the adequacy of proposed off-street parking and loading, and the extent to which proposed driveways may cause a safety hazard, or traffic nuisance.
- (4) The nature of the surrounding area and the extent to which the proposed use or feature might impair its present and future development.
- (5) The master plan of the City of Stamford and all statements of the purpose and intent of these regulations.

⁶In particular, the text change amendment requires the following additional findings:

- (1) Lighting – all lighting shall be directed so as to reduce glare and ensure all direct rays fall on the subject property and do not adversely impact an adjacent residential area. Lighting of outdoor facilities shall be limited solely to safety and security lighting. The applicant shall take measures to minimize the adverse effects of indoor lighting on the neighboring residential uses.
- (2) Screening – structures, outdoor uses and parking areas shall be appropriately screened by walls, fences, plantings or other devices to protect the privacy of any adjacent Residential District.
- (3) Noise – During the hours when outdoor uses are permitted, as per Section BBB-5.e., noise levels for outdoor uses shall not exceed 55dBA at any property line, except for Sundays, when noise levels shall not exceed 55dBA between the hours of 10:00am and 5:00pm. During all other times, noise levels shall not exceed 45dBA at any property line. A detailed noise analysis shall be required as part of the Special Exception and Site Plan application and a noise measuring device shall be required for a certain period or permanently after the completion of the project, to be determined by the Zoning Board. No final Certificate of Occupancy

Additionally, a zoning board or zoning commission can prescribe conditions to approval of a special exception application for both on and off-site improvements. *See Viacom Broadcasting, Inc., supra*, 10 Conn. App. at 194–95, *citing Lurie, supra*, 160 Conn. 295. In *Lurie*, as summarized in *Viacom Broadcasting*:

[T]he court held that a zoning commission ***had the authority reasonably to condition the grant of a special permit upon certain on and off-site changes and improvements by the applicant and by other town agencies not under the commission’s control.*** In *Lurie*, the applicant sought to construct office buildings for conducting a particular business. The commission laid down in meticulous detail specific conditions to the granting of the requested special exception. . . . Several of the conditions related to on-site matters such as the placement of buildings and parking facilities. Other conditions, however, applied to off-site matters, including road improvements, the provision of traffic guards and the posting of a performance bond. . . .

The *Lurie* plaintiffs argued that the special exception was invalid because the commission lacked power to impose off-site conditions. ***The court held that the commission properly determined exactly what off-site . . . changes were desirable in the interests of public safety and then made their effectuation . . . a condition of the special permit. . . . In so holding, the court noted that General Statutes § 8-2 permitted local zoning authorities to impose certain standards and conditions on the use of property when the public interest required it.***

Id. at 194–95.

Notably, Section 19-3.2 (b) of the Stamford Zoning Regulations prescribe that “[i]n granting a Special Exception the reviewing board may attach reasonable conditions and safeguards as it deems necessary to protect the general health, safety, welfare and property values of the neighborhood. Failure to comply with any such conditions shall constitute a violation of these Regulations.” The Stamford Zoning Regulations then list conditions which may be included.⁷

for the outdoor use shall be granted until the Zoning Board is satisfied with the noise level compliance of said outdoor uses.

- (4) Site Plan Design – buildings, structures, parking areas and driveways shall be located in such a manner as to minimize adverse impacts on any adjacent Residential use. Outdoor activities may be permitted (subject to the requirements of this Section BBB-5) provided that any potentially adverse effects will not be more impactful to adjacent properties than as of right uses.

⁷The “conditions may include ***but are not limited to*** those issues previously listed as well as the following:

- (1) Require shading or artificial light sources so that no direct rays fall on other than the subject property and to reduce glare from such sources.

Counsel for Opponents paradoxically continues to argue that the Zoning Board cannot require off-site improvements. Notably, the cases cited, *Mead, supra*, 1999 WL 1212244, and *Sowin Associates, supra*, 23 Conn. App. 370, determined that you cannot condition approval of a **subdivision** application on off-site improvements. This is based upon Connecticut General Statutes § 8-25, which deals expressly with subdivision applications. The *Mead* Court concluded, “there is nothing in § 8-25 authorizing a planning commission to require a developer to improve an existing public highway, except where subdivision roads intersect with town accepted roads.” There is a long history, however, that unlike subdivision applications, **special exceptions** may be conditioned on off-site improvements. See *Lurie, supra*, 160 Conn. at 302–303 (zoning commission was permitted to condition special permit on off-site traffic improvements). Simply, the Zoning Board would always be able condition approval of a special exception on off-site improvements such as off-site traffic improvements related to the **proposed use** of the property.

In total, the case law and Stamford Zoning Regulations, including the text change, provide numerous general and specific protections in consideration of any subsequent special exception application. Elvis has not left the building and the cat is not out of the bag. These are simply scare tactics. By affirming the Zoning Board’s approval of this text change, this Board of Representatives will not be approving any specific plan or development. Indeed, all this Board of Representatives will be doing is allowing the Zoning Board to consider a “Gymnasium or Physical Culture Establishment” use based on these extensive special exception standards and procedures. Unlike the existing office and day care uses, which are permitted as-of-right, no matter the site specific conditions, a “Gymnasium or Physical Culture Establishment” would only be permitted if the Zoning Board determines these extensive special exception standards and procedures have been met.

Furthermore, it is not the case that Courts will simply reverse a zoning board or zoning commission’s denial of a special exception or application of a condition. In *Viacom Broadcasting*, the court reiterated the longstanding deference provided to local zoning boards and zoning commissions:

Where it appears that a local zoning authority has made an honest judgment [that] has been reasonably and fairly exercised after a full

-
- (2) Require screening of structure and/or parking areas of the premises or from streets by walls, fences, planting or other devices, size, type and location to be specified by the reviewing board.
 - (3) Limit hours of operation.
 - (4) Require rearrangement and re-design of building, structures, parking areas or driveways to minimize any adverse impact on the neighborhood.
 - (5) Require landscaping of such type, number and size necessary for sedimentation and erosion control, screening or enhancement of the property.
 - (6) Provide that no Certificate of Occupancy shall be granted until certification is made to and approved by the reviewing board that the project has been completed and in compliance with all conditions of approval.

hearing, courts should be cautious about disturbing the decision of the local authority. . . . We will not substitute our discretion for the actions of a local zoning agency. As the commission has the statutory authority to grant special exceptions only if certain requirements relating to safety and aesthetics are met, the commission could reasonably have granted a special exception for a new broadcast tower on the condition that the defendant remove the standby tower.

The Opponents have cited one trial court case, *Procurement, LLC v. Zoning Board*, 2014 WL 1013027 (2014), and made reference to one Appellate Court case, *Martland v. Zoning Commission*, 114 Conn. App. 655 (2009), for the proposition that reversals of local zoning authorities are routine. Notably, each of these cases cite longstanding legal authority requiring **deference** to local zoning authorities. *Procurement, LLC, supra*, at *2-*3; *Martland, supra*, 114 Conn. App. at 661-62. Indeed, both these cases reference the oft-discussed “substantial evidence rule.”

In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule, according to which . . . [c]onclusions reached by [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.

Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning and Zoning Commission, 285 Conn. 381, 427 (2008). Indeed, in *Martland*, the Court specifically stated, “Connecticut courts have never held that a zoning commission lacks the ability to exercise discretion to determine whether the general standards in the regulations have been met in the special permit process.” *Martland, supra*, 114 Conn. App. at 662.

In *Procurement*, there was “**no** support in the record” or “**nothing** in the record” to support the denial of a special exception; *Procurement, LLC, supra*, 2014 WL 1013027, at *4 and *6; and in *Martland*, the court recognized that the rationale behind a condition was “**not supported by anything** other than speculation and conjecture”; *Martland, supra*, 114 Conn. App. at 665. These are extreme examples where zoning boards and/or zoning commissions made determinations without **any** evidence to support their decision. The fact that the petitioners and opponents can only cite examples of reversal in cases in which **no** evidence is offered to support a decision, demonstrates the extent of deference that is provided by courts to local zoning authorities.

In effect, by making the use permitted only following special exception approval, and adding to the standards and procedures to be followed in the text change itself, any applicant seeking a special exception under the text change will have to comply with the most extensive standards and procedures in the City of Stamford. Indeed, the text change could have proposed a “Gymnasium and Physical Culture Establishment” as-of-right or by site plan approval alone, but the applicant took it upon itself to meet the rigors of the special exception standards and procedures. These include having the Zoning Board hire *independent consultants* for lighting, screening, noise, and site plan design, *to be paid for by the applicants*. The purpose and intent of requiring these independent consultants is to ensure that none of these issues pertaining to lighting, screening, and noise even arise and also ensure that, should the Zoning Board find the use at the specific location is inappropriate, there will be evidence in the record to support the Zoning Board’s decision. Again, the uses currently permitted as-of-right in the C-D Zone may cause lighting, screening, and noise issues and there would be very little the Zoning Board could do to mitigate these impacts.

In summary, the text change includes significant protections to prevent any adverse impacts on the neighborhood. Any attempt to minimize or ignore the special exception protections or suggest that mitigation measures could not be required by conditions of approval is sheer fabrication.