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| APPELLATE COURT DOCKET NO. _____ | : | APPELLATE COURT |
| TRIAL DOCKET NO. LND/HHD-CV-15-6063334-S | : | |
| B. SHAWN MCLOUGHLIN, AND<br>MONO-CRETE STEP CO. OF CT., LLC<br>Plaintiffs | : | SUPERIOR COURT |
| | : | JUDICIAL DISTRICT OF<br>HARTFORD |
| v. | : | |
| | : | AT HARTFORD |
| PLANNING & ZONING COMMISSION OF<br>THE TOWN OF BETHEL, et al.<br>Defendants | : | NOVEMBER 5, 2018 |

**PETITION FOR CERTIFICATION BY APPELLATE COURT**

Pursuant to Practice Book §§ 81-1 et seq., Plaintiffs Shawn B. McLoughlin and Mono-Crete Step Co. of CT., LLC request certification by the Appellate Court from the trial court's October 4, 2018 decision ("Decision"). The Decision dismissed Plaintiffs' administrative appeal from the denial by Defendant Planning & Zoning Commission of the Town of Bethel ("Commission") of Plaintiffs' special permit application to construct a crematory in an industrial zone.

**QUESTIONS PRESENTED FOR REVIEW.**

1. Did the trial court improperly conclude that it was compelled to uphold the denial of the special permit based on this Court's decision in St. Joseph's High School, Inc. v. Planning Comm'n, 176 Conn. App. 570 (2017)?

2. Did the trial court err in concluding that the evidence which this Court has ruled in St. Joseph's may justify denial of a special permit includes general objections about the propriety of locating a crematory in the industrial zone, when the Commission had already rejected such concerns in its legislative decision to allow a crematory use because it is in character with the other uses in the zone?

3. Did the trial court err in ruling that substantial evidence supported the Commission's purported site-specific concerns about the location of the crematory when those concerns were in reality generalized, speculative objections to locating a crematory anywhere in the zone, thus materially distinguishing this case from St. Joseph's?

**BASES FOR CERTIFICATION.**

Certification is necessary to clarify when a reviewing court may find that substantial evidence supports denial of a special permit based on general standards in the zoning regulations, when the commission has already found these general standards to be met in making its legislative determination to allow the use in the zone. Certification is also necessary for this Court to provide guidance to all stakeholders in the special permit process on whether and what to extent generalized, speculative objections to the compatibility of a use constitute substantial evidence in the context of the site-specific inquiry required for consideration of special permits.

**SUMMARY OF THE CASE.**

Plaintiffs appealed the Commission's denial of their special permit application to construct and operate a crematorium at 12 Trowbridge Drive ("Property") in Clarke Business Park ("CBP"), which is in the industrial park (IP) zone. McLoughlin is the owner of the Property and a member of Mono-Crete, which operates a business at the site and is the developer. On July 22, 2014, after a public hearing, the Commission voted four to three to adopt the Plaintiffs' proposed text amendment allowing crematoria by special permit in the IP zone, effective August 15, 2014. The Commission found that the text amendment is "a reasonable request and in character with the uses in the industrial park." (Decision, pp. 1-2)

On February 25, 2015, the Plaintiffs submitted their special permit application. (ROR, Item 18.) A public hearing commenced on April 14, 2015, and was held on various dates until it was closed on July 15, 2015. (Decision, p. 2)

Contemporaneously, codefendant Connecticut Coining, Inc. ("CCI"), which owns abutting industrial property to the north at 10 Trowbridge Drive, submitted applications on February 12, 2015, to repeal the text amendment allowing crematoria use and to place a moratorium on any new applications for crematoria for one year. The Commission opened a public hearing on these applications on April 14, 2015, and closed the public hearing on April 28, 2015. On May 12, 2015, the Commission voted four to three to approve CCI's applications repealing the text amendment and allowing the moratorium. (Decision, p. 2)

On June 23, 2015, the Commission accepted a second application from CCI to repeal the text amendment.[1] After a public hearing on July 28, 2015, the Commission voted four to three to approve CCI's application on September 22, 2015.[2] On that same date, the Commission also voted four to three to deny the special permit application. (Decision, pp. 2-3) The same four members who voted to repeal the text amendment also voted to deny the special permit application.

On October 10, 2015, Plaintiffs commenced this appeal of the Commission's denial of their special permit application. CCI moved to intervene on March 9, 2015, and the court

[1] The defendant filed the second application to correct a procedural defect alleged by Plaintiffs in the present appeal. (ROR, Item 16.)

[2] McLoughlin filed two other separate appeals from the Commission's legislative actions in repealing the text amendment. McLoughlin v. Planning and Zoning Commission of the Town of Bethel, Superior Court, land use litigation docket at Hartford, Docket Nos. LND-CV-15-6063335-S and CV-15-6063336-S. By agreement of the parties (pleading #108.00), the trial court heard the special permit denial appeal first.

granted the motion on September 17, 2018. After a trial on June 26, 2018, the court issued its Decision on October 4, 2018.

As the Commission had been aware since the hearing on the adoption of the text amendment, the crematory will be located in the northwest corner of the Property on a hill above Trowbridge Drive. It will contain two retorts which will be located inside of an unmarked building. The 1,665 square foot building and its two stacks (which will extend approximately three feet from the roof of the building) will be screened from view on all sides. (Plaintiffs' Brief, pp. 2-3) The facility will be over 1,250 feet from the nearest residence, and the few remains transported to it each day will be mostly unmarked vans and SUVs. (Id., pp. 10-11) There was no material difference between the nature and location of the crematory as discussed in the text amendment hearing and as proposed in the special permit application. (Id., pp. 27-28)

The Commission nevertheless denied the special permit on the ground that the application did not comply with general standards contained in the Regulations "concerning the nature of the use, the welfare of the town, and the harmony with other uses and the orderly development of the district."[3] (Decision, p.17) The trial court found that substantial evidence supported this determination, but, as discussed further below, was clearly troubled by the ability of the Commission to first amend the Regulations to allow a crematory as a use compatible in the district, but then deny a special permit for the use because it adversely affects the district. (Id. & n.16)

[3] The Commission also rejected the special permit application because Plaintiffs had not proven that "natural, science, historic and unique feature of the surrounding areas will not be adversely affected by emissions released into the atmosphere from the crematory facility in this location." The trial court found that the evidence in support of this reason for the decision was "not substantial." (Decision, pp. 16-17 & n.15)

## ARGUMENT.

### 1. Certification is necessary to resolve the confusion and uncertainty regarding the scope of a land use agency's discretion in determining special permit applications based on general standards in the regulations.

This case presents the opportunity for this Court to clarify the standards for denial of a special permit on the basis of general considerations set forth in the zoning regulations regarding the public health, safety and welfare. The trial court found Plaintiffs' argument to be "sincere and appropriate: the Commission adopted the Plaintiffs' proposed change to the zoning regulations to allow crematoria and then they applied for a special permit under that regulation prior to its repeal." (Decision, p.17) Yet the Commission denied the special permit based on general standards of incompatibility with the district and/or the public interest--the same general standards that the Commission found were met based on its explicit legislative finding, when it originally allowed the use in the zone, that a crematory was "in character with" the industrial uses in CBP. Despite the perceived unfairness and incongruity of this result, the trial court felt "constrained" to hold that this Court's decision in St. Joseph's compelled affirmance of the denial. Id., p.16 n.17.

The trial court aptly stated its concerns as follows:

> This appeal underscores the inevitable tension between a commission's legislative determination leading to the presumptive compatibility of the use; see TLC Development, Inc. v. Planning & Zoning Commission, 215 Conn. 527, 532-33, 577 A.2d 288 (1990); and a subsequent administrative determination denying a special permit based upon the use adversely effecting the district. See St. Joseph's High School, Inc. v. Planning & Zoning Commission, supra, 176 Conn. App. 570. The analysis is complicated in the current case by the stigma of the proposed use because it is a crematorium. See General Statutes §§ 8-2n and 19a-320.
>
> [St. Joseph's and the cases cited therein] have "the effect of increasing agency discretion over special permits, increasing potential abuses of that discretion, and allowing discrimination between similar applications which meet existing regulations. The courts should be particularly reluctant to uphold denial of special permits based

> on reasons supported only by general regulations since the special permit process is itself an end run around the uniformity concept. Without a strict construction, the agency can in effect arbitrarily deny any application based on broad statements and claims that it is contrary to the public interest or detrimental to the area. Arbitrary action is easily disguised under such superficial terms." 9A R. Fuller, [Connecticut Land Use Law & Practice] § 33:4, pp. 282-83. Thus, the uncertainty, confusion, frustration and perceived unfairness of the special permit process continues for all stakeholders. Perhaps a better standard could be devised.

(Decision, p.7 n.16 (emphasis added))

Certification of this appeal will afford this Court the opportunity to devise that better standard, and to provide appellate guidance to property owners, commissions and trial courts.

**2. The trial court departed from appellate precedent in relying on speculative, non-site specific concerns as satisfying the substantial evidence test.**

The trial court failed to follow controlling appellate precedent in ruling that speculative fears and threats based on the adverse effects of a crematory on development of the district and on property values constituted substantial evidence supporting the Commission's denial of the special permit. Plaintiffs claim that the Commission gave no more than lip service to the principle set forth in Parillo Food Group, Inc. v. Board of Zoning Appeals, 169 Conn. App. 598, 604-05 (2016), and St. Joseph's that, in evaluating a special permit, a commission is required to determine whether the use at the specific location proposed will detrimentally affect neighboring properties and the development of the district. To be sure, in St. Joseph's this Court re-affirmed the principle that a zoning commission "may deny a special permit application on the basis of general standards set forth in the zoning regulations, even when all technical requirements of the regulations are met." 176 Conn. App. at 594. In this case, however, the Commission used the general standards criteria as an excuse for re-litigating its legislative decision allowing the crematory use in the IP zone as compatible with the other

industrial uses in the district. The Commission's efforts to frame its resolution of denial as a site-specific rejection of the suitability of the crematory on the Property were unsupported by substantial evidence, and were driven by speculative fears and threats. St. Joseph's is thus distinguishable, and the trial court erred in relying on it. Comments of opponents based on speculation "do not rise to the level of substantial evidence." Bethlehem Christian Fellowship v. Planning & Zoning Comm'n, 73 Conn. App. 442, 463-65 (2002), abrogated on other grounds, Cambodian Buddhist Society of Conn. v. Planning & Zoning Comm'n, 285 Conn. 381,433 (2008).

The trial court held that "[e]vidence that stakeholders in the industrial park will not expand or invest or will leave the park or the town due to the stigma of the proposed use" supported the denial. (Decision, p.15) The evidence cited by the trial court, however, was no more than unsubstantiated conjecture and fear voiced by the Town's Economic Development Commission ("EDC") and a handful of nearby business owners who threatened to leave CBP or stop expanding their businesses if a crematory were permitted anywhere in CBP. These objections were speculative and based on a perceived stigma associated with crematories. The Supreme Court has held such "vague and undefined aesthetic" objections to be an improper basis for rejection of a special permit. See DeMaria v. Planning Comm'n, 159 Conn. 534, 541 (1970). These business owners' fervent opposition to a crematory in the CBP, regardless of location, was rejected by the Commission in adopting the text amendment. Those same global objections had no proper place in the special permit application process. (Plaintiffs' Br., pp. 22-23)

Similarly, the objections by the EDC were no more than a rehash of its original generalized opposition to the text amendment based on the incompatibility of any crematory

in CBP--i.e., the potential reduced value of adjacent Town property, potential deleterious impact on plans to expand CBP at the end of Trowbridge Drive, and potential competitive disadvantages in attracting businesses to the industrial park. There was no evidence other than conjecture to support even this general position, and no explanation by the Commission of why it rejected the EDC's concerns when it adopted the text amendment but credited the same concerns in denying the special permit application. (Plaintiffs' Br., pp. 20-24)

Moreover, in the context of the site-specific scrutiny required for special permit applications, the Commission provided no linkage between the proposed location of a crematory on this particular property in CBP and the claimed potential adverse impact on the EDC's plans to expand CBP at the end of Trowbridge Drive. The Property is some 1,200 feet away from the end of Trowbridge Drive, which is home to several other businesses. The proposed facility will be in a small, unmarked, and screened building on a hill above Trowbridge Drive. Thus the record reveals that this prong of the Decision, and the testimony on which it was based, amounted to no more than an improper generalized objection to locating a crematory anywhere in CBP.[4]

The trial court also found that the Commission properly relied on the "topography of the lot and the distance requirement of General Statutes § 8-2n,"[5] and that substantial

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[4] Additional evidence submitted by opponents makes clear that the Commission was under intense pressure to reject the special permit application based on its fear of what would be, as one opponent put it, a "stampede" of businesses leaving town if any crematory were built in CBP. (Plaintiffs' Br., p.24) It is clear from its resolution of denial that the Commission majority impermissibly turned the decision into a plebescite based on threats of business owners and the asserted "will" of the community. (Id.) See Global Cos., LLC v. Clinton Planning & Zoning Comm'n, 2015 Conn. Super. LEXIS 3151, *3-4 n.3 (copy attached).

[5] C.G.S. § 8-2n provides in pertinent part: "The zoning regulations adopted under section 8-2 or any special act shall not authorize the location of a crematory within five hundred feet of any residential structure or land zoned for residential purposes not owned by the owner of the crematory.... " In the present case, the "land zoned for residential purposes" is the Town

evidence supported the Commission's finding that the "location of the building, the location, height and depth of retaining walls, change in grade, and planned activities" would hinder development and use of adjacent land and buildings (specifically a fitness center and restaurant located elsewhere in CBP) and impair their value. (Decision, p.15)

Put aside that the building's proposed location and grade complied with the Regulations and that the proposal was essentially the same as that before the Commission when it adopted the text amendment--a glaring example of the uncertainty and confusion caused by the current state of special permit jurisprudence. (See page 4 above.) The fact is that no substantial evidence supports the Commission's findings.

First, there was no evidence that the proposed location of the crematory on the Property--as opposed to a crematory present anywhere in the CBP--would adversely affect the business of a fitness center and a restaurant in the park. In addition to the facts showing the unobtrusive size and location of the building (see page 2 above), there was no testimony that the building would be visible from the cited businesses. Second, the only evidence in support of the finding of reduced property values was speculative. To begin with, that finding is inconsistent with the Commission's determination, in adopting the text amendment, that the crematory use anywhere in the IP Zone was compatible with the other uses in this industrial district. There was no evidence as to why the crematory proposed for the Property would have a greater or lesser impact on nearby property values than one at any other location in the industrial park.

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owned Sympaug Road which is in a residential zone (R-80) and to the southeast of the Property. (Decision, p.7 n.9)

The Supreme Court has held that denial of a special permit because the special permit use per se devalues properties in the zone "is contrary to the zoning regulations themselves," and defies common sense. See Bethlehem, 73 Conn. App. at 463-65; Loring v. Planning & Zoning Comm'n, 287 Conn. 746, 770-71. And a commission's reliance on speculative fears of reduced values voiced by a handful of nearby property owners is not substantial evidence to reject a special permit on this ground. See Bethlehem, 73 Conn. App. at 463-65, 472; compare St. Joseph's, 176 Conn. App. at 611-15 (residential neighbors' concerns about reduced property values if night-time football games were permitted on adjacent school athletic field were based on their "firsthand experience" with noise, parking problems, loitering, and police activities in neighborhood during prior athletic events).

The only site-specific testimony on property values was a report by a local realtor who used as comparables five operating crematories located in industrial parks in Connecticut (one in Oxford, some 20 miles away); the report found that the proposed crematory would not affect property values in or surrounding CBP. (Plaintiffs' Br., pp. 28-29) There was no contrary expert testimony. Settled appellate law prevented the Commission from disregarding that evidence, especially given its legislative determination that the crematory is in character with the other uses in the zone. See Bethlehem, 73 Conn. App. at 469-72.[6]

[6] The trial court held that it was proper for the Commission to give more weight to a report, submitted by an opposing neighbor, which studied the "hedonic" effects of a malfunctioning crematory located in Rawlins, Wyoming. According to the neighbor, who had no credentials in valuing real estate, this report showed that all crematories "behave badly" and reduce property values wherever they are. (Plaintiffs' Br., pp. 15-16, 29 n.18) The Commission's reliance on this generalized claim of the deleterious effects of all crematories is another example of its relitigation of the merits of the text amendment using the mechanism of the special permit process. See Municipal Funding, LLC, v. Zoning Board of Appeals, 270 Conn. 447, 456-57 (2004) (history of facility in other town is irrelevant).

PLAINTIFFS,
B. SHAWN MCLOUGHLIN AND
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## CERTIFICATION OF SERVICE

This is to certify:

1. That a copy of the foregoing pleading was served in accordance with the provisions of Practice Book Section 62-7 in that it has been sent via electronic mail, to all counsel of record to wit:

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2. That a copy was sent via electronic mail to:

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3. That the pleading has been redacted and does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law;

4. That the pleading complies with all applicable rules of appellate procedure.

Daniel E. Casagrande
Commissioner of the Superior Court

# *Global Cos., LLC v. Clinton Planning & Zoning Comm'n*

Superior Court of Connecticut, Judicial District of Hartford, Land Use Litigation Docket at Hartford

November 27, 2015, Decided; November 27, 2015, Filed

LNDCV146054440S

**Reporter**
2015 Conn. Super. LEXIS 3151 *

Global Companies, LLC v. Clinton Planning & Zoning Commission et al.



## Core Terms

traffic, regulations, zoning, zoning commission, commission's, propane, trucks, site, reasons, Drive, special permit, public hearing, conditions, internal quotation marks, special exception, zoning regulation, intersection, requirements, allegations, applicant's, neighborhood, hazardous, street, travel, tank, storage facility, property value, public health, encroach, provides

**Judges:** [*1] Marshall K. Berger, J.

**Opinion by:** Marshall K. Berger

## Opinion

*MEMORANDUM OF DECISION*

I

The plaintiff, Global Companies LLC (Global),[1] appeals from an August 11, 2014 decision of the defendant, the Clinton planning and zoning commission (commission), denying its application for a special exception to construct a propane storage facility at 140 Knollwood Drive in Clinton. Stanley Black & Decker, Inc. (Stanley)[2] owns the 37.33-acre property which is located in the I-1 zone. (Return of Record [ROR], Item I.B.1.) Under §§10.50 and 10.51 of the zoning regulations of the town of Clinton (regulations), a propane storage facility is allowed by special exception. (ROR, Item XII.B, pp. 10127-30.)

The property is bounded by a rail line, industrial and residentially zoned property, a salt marsh, and the Hammonasset River. (Exhibit 1.) Distances from property lines to storage tanks would range from 200 to 750 feet. (ROR, Item II.J, p. 1.) According to Global's proposal, twelve 45,000-gallon storage tanks holding a total of 540,000 gallons of liquified propane will be constructed. (ROR, Item I.B.4; Item IV.A, p. 4.) During the heating season, it is expected that twenty tractor

[1] According to testimony at the public hearing, Global is a Fortune 150 company and one of the largest owners and operators of gas stations in the northeast, with twenty terminals including one in Bridgeport and one in Wethersfield. (Return of Record [ROR], Item VIII.A, p. 10.) Global owns propane facilities in Albany, New York, and in Westborough, Massachusetts. (ROR, Item VIII.A, p. 10.) Propane is used by 12 million households and 1.4 million commercial establishments. (ROR, Item VIII.A, p. 11.)

[2] According to Global, Stanley operated its Bostitch [*2] division on the property and is responsible for the current remediation as a result of past industrial practices. (ROR, Item I.B.7.) As part of its remediation plan, Stanley proposes to put environmental land use restrictions on thirty of the thirty-seven acres. (ROR, Item VIII.A, pp. 18-19.)

trailer trucks will enter and leave the facility each weekday from 7:00 a.m. to 8:00 p.m. and travel through the residential neighborhood to the Hammonasset connector and Route 1 to Interstate 95. (ROR, Item VI.F, p. 15, Item VIII.A, p. 5.) An existing rail spur will be extended to accommodate sixteen cars which could each contain 30,000 gallons of propane; cars would arrive eight at a time. (ROR, Item IV.A, p. 4.) Global **[*3]** intends on utilizing six of the thirty-seven acres for the facility. (ROR, Item I.B.2; Item VIII.A, p. 5.) The commission received a written petition with 260 signatures and an online petition of 203 signatures and then another 328 signatures all opposed to the application.[3] (ROR, Item II.II; Item II.FFF.)

A group of residents known as the Hammonasset Environmental Trust (Trust) with Victor Caprio of 14 Taylor Ridge in Clinton sought to intervene in the proceeding by filing a petition pursuant to *General Statutes §22a-19* on June 2, 2014. (ROR, Item IX.C.) The commission held a public hearing on June 2, 2014, which was continued to July 7, 2014, and concluded on August 4, 2014. (ROR, Item III.E; Item III.G; Item III.I; Items VIII.A-VIII.C.) On August 11, 2014, during its regular meeting, the commission voted to deny Global's special permit. **[*5]** (ROR, Item IV.A; Item VIII.D.) Notice of the decision was published in the *Harbor News* on August 21, 2014. (ROR, Item IV.B.)

Global commenced this appeal on August 28, 2014. Global alleges that its application met all requirements in the commission's regulations, but the commission required improvements that were preempted by federal law, bowed to pressure from local residents, prejudged the application, and failed to provide Global with a fair administrative process. The return of record was filed on February 18, 2015. Global filed its brief on March 31, 2015, and the commission, the Trust, and Caprio filed their briefs on May 12, 2015. The court heard the appeal on August 4, 2015. Supplemental briefs regarding aggrievement were filed by the Trust and Caprio on August 5, 2015, by Global on August 7, 2015, and by the commission on August 10, 2015.

II

Global has alleged and proven, through an affidavit and exhibits submitted without objection, that Stanley or its predecessors has been the owner of 140 Knollwood Drive and that Global was the contract purchaser for that land from the time of the application through the time of the appeal before this court. "It is well established that a **[*6]** party may be aggrieved for purposes of appeal by virtue of its status as a property owner." *Handsome, Inc. v. Planning & Zoning Commission, 317 Conn. 515, 527, 119 A.3d 541 (2015)*. Therefore, this court found that Global is aggrieved on August 4, 2015.

As to the Trust and Caprio, Global attempted to revisit the September 30, 2014 ruling by the court, Domnarski, J., granting the motion to intervene at the August 4, 2015 hearing before this court. First, Global argues that the commission never formally acted upon the petition during the administrative process. While the parties agree that the record

[3] In addition to the petitions and letters (ROR, Item II.M; Item II.N; Item II.V; Item II.CC; Item II.KK; Item II.AAA; Item II.BBB; Item II.CCC; Item II.HHH; Item II.III); approximately 791 individuals signed petitions against the proposal. As noted in the commission's brief, sixty-nine residents, including the first selectman of Madison, objected to the proposal at the public hearing. (ROR, Item VIII.A, pp. 28-29; Item VIII.B.) Moreover, eight business owners submitted petitions in opposition. (ROR, Item II.GGG.) Finally a number of real estate analyses were submitted discussing the negative impact on home values. (ROR, Item II.S; Item II.T; Item II.U; Item II.X; Item II.TT; Item II.EEE.) Nevertheless, the property is currently zoned for a propane facility. It is projected that it will bring in approximately $70,000 more in taxes than the existing use. (ROR, Item VIII, p. 7.) As this **[*4]** court stated in ***TCR New Canaan v. Planning & Zoning Commission, Superior Court, judicial district of Hartford, Docket No. CV-384353, 1992 Conn. Super. LEXIS 683 (March 5, 1992)***, "'Zoning is not to be based upon a plebiscite of the neighbors. Their wishes are to be considered but the final ruling is to be governed by the basic consideration of the benefit or harm involved to the community at large.' *Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213, 219 (1966)*." Another court put it this way: "In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community." *Udell v. Haas, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968)*.

does not reflect a formal action on the petition, Global's counsel at the August 4, 2015 hearing agreed that at least one of the commission's reasons for denial is the functional equivalent of such formal action. Additionally, Global alleges in paragraph twelve of the complaint that "[t]he Motion to Intervene appears to have been granted by the [commission]." Thus, the court rejects Global's first argument.

Second, notwithstanding the court's finding that the intervention petition satisfied the requirements of §22a-19, Global argues that the intervenors failed to comply with General Statutes §22a-19(a)(2) as amended by No. 13-186 of the 2013 Public Acts. Section 22a-19(a)(2) provides: "The verified pleading shall contain specific factual [*7] allegations setting forth the nature of the alleged unreasonable pollution, impairment or destruction of the public trust in air, water or other natural resources of the state and should be sufficient to allow the reviewing authority to determine from the verified pleading whether the intervention implicates an issue within the reviewing authority's jurisdiction. For purposes of this section, 'reviewing authority' means the board, commission or other decision-making authority in any administrative, licensing or other proceeding or the court in any judicial review." The September 30, 2014 ruling is the law of the case and this court will not revisit that decision. See Total Recycling Services of Connecticut, Inc. v. Connecticut Oil Recycling Services, LLC, 308 Conn. 312, 322, 63 A.3d 896 (2013) ("The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored . . . [When] a matter has previously been ruled [on] interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, [*8] in the absence of some new or overriding circumstance" [internal quotation marks omitted]).

Third, in Sard Custom Homes, LLC v. West Hartford Planning & Zoning Commission, Superior Court, land use litigation docket at Hartford, Docket No. LND CV-14-6048983-S (July 31, 2014, Berger, J.) [58 Conn. L. Rptr. 697, 2014 Conn. Super. LEXIS 1874], this court stated, "The amendment to §22a-19 first requires the petition to 'contain specific allegations setting forth the *nature* of the alleged unreasonable pollution.' . . . By the unambiguous statutory language; see General Statutes §1-2z ('[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes . . .'); the legislature required allegations of the nature of the impact—not allegations of the 'actual adverse impact.' . . .

"The amendment also requires the proposed intervenor to provide sufficient information to allow the reviewing authority to determine whether the issue is within its jurisdiction . . . [T]he amendment codifies our Supreme Court's ruling in Nizzardo v. State Traffic Commission, 259 Conn. 131, 788 A.2d 1158 (2002). In *Nizzardo*, the court held: 'Our construction of the pleading requirement of §22a-19 is reasonable and consistent with our conclusion that intervention under that statute must implicate an environmental issue within the agency's [*9] jurisdiction. By requiring that intervention petitions under §22a-19 allege facts setting forth the environmental claim that the intervenor intends to raise, we ensure that the agency will have the ability to determine upon a review of the petition whether the agency properly has jurisdiction over that environmental issue.'" (Citation omitted; emphasis in original.) In the present case, it seems evident the commission had sufficient information to make its determination.

Finally, while this court recognizes the requirement for such information where a proposed intervenor did not participate in the administrative process; see Red Hill Coalition, Inc. v. Conservation Commission, 212 Conn. 710, 715-17, 563 A.2d 1339 (1989); it is duplicative where the intervenor participated in a full hearing during the

administrative process and where the administrative agency ruled on the specific allegations. In *Branhaven Plaza, LLC v. Inland Wetlands Commission, 251 Conn. 269, 276 n.9, 740 A.2d 847 (1999)*, the court noted that "[b]ecause the plaintiffs filed a notice of intervention at the commission hearings in accordance with *§22a-19(a)*, they had standing to appeal the environmental issues associated with that commission's decision." The Trust and Caprio meet that test and this court need not, for a third time, review their *§22a-19* intervention allegations.

III

"*General Statutes §8-2(a)* provides in relevant part that local zoning regulations **[*10]** 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 . . . The terms special permit and special exception are interchangeable . . . A special permit allows a property owner to use his property in a manner expressly permitted by the local zoning regulations . . . The proposed use, however, must satisfy standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience and property values . . . When ruling upon an application for a special permit, a planning and zoning board acts in an administrative capacity . . . [Its] function . . . [is] 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 . . . We have observed that the nature of special [permits] is such that their precise location and mode of operation must be regulated because **[*11]** of the topography, traffic problems, neighboring uses, etc., of the site . . . Review of a special permit application is inherently fact-specific, requiring an examination of the particular circumstances of the precise site for which the special permit is sought and the characteristics of the specific neighborhood in which the proposed facility would be built . . .

"Our Supreme Court has concluded that general considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit. Also, [it has] stated that before the zoning commission can determine whether the specially permitted use is compatible with the uses permitted as of right in the particular zoning district, it is required to judge whether any concerns . . . would adversely impact the surrounding neighborhood . . . Generally, it is the function of a zoning board or 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 ha[s] to decide whether the board correctly **[*12]** 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 board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal . . .

"In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule . . . 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 **[*13]** evidence that supports any one of

the reasons given . . .

"This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred . . . [I]t 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 . . . The substantial evidence rule is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. It is broad enough and capable of sufficient flexibility in its application to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication. On the other hand, it is review of such breadth as is entirely consistent with effective administration." (Citations omitted; internal quotation marks omitted.) *Meriden v. Planning & Zoning Commission, 146 Conn.App. 240, 244-47, 77 A.3d 859 (2013).*

"The zoning commission has no discretion to deny the special exception if the regulations and statutes are satisfied . . . The burden of proof to demonstrate that the board acted **[*14]** improperly is upon the plaintiffs . . . Furthermore, in reviewing the conclusions of a zoning authority, [c]ourts must be scrupulous not to hamper the legitimate activities of civic administrative boards by indulging in a microscopic search for technical infirmities in their actions." (Citations omitted; internal quotation marks omitted.) *Raczkowski v. Zoning Commission, 53 Conn.App. 636, 640, 733 A.2d 862,* cert. denied, *250 Conn. 921, 738 A.2d 658 (1999).*

IV

The commission denied the application, in relevant part, for the following reasons:

"Based on the testimony and photographs presented, the application is not exempt from the requirements of the Coastal Management regulations because the proposed activity can be visible from the water. No Coastal Area Management Permit has been sought.[4]

"While the evidence indicates that the proposal meets all requirements of the 1995 National Fire Protection Association (NFPA) 58: Liquefied Petroleum Gas Code, which is presently in effect in Connecticut as well as meeting the updated code, there remain unaddressed issues regarding public safety. Neither the Commission's own expert nor the expert retained by the applicant were able to satisfactorily explain what **[*15]** force it would take to rupture a tank or multiple tanks. Neither the Commission's own expert nor the expert retained by the applicant were able to explain what would occur, from a safety/hazard standpoint, if a tank *did* rupture. The Commission's expert's statement that he was willing to sleep under a tank does not adequately apprise the Commission of the degree or what level of risk may be involved and he was unable to describe with any precision the forces needed to puncture a tank despite repeated requests. Further, on a direct question from the Commission, the Applicant's safety expert conceded that an armor-piercing bullet would create a hole in the tank and said he was not sure if this would cause an explosion. The Commission finds that this is a very clear safety risk for which there is no effective remedy.

"The Intervenors have indicated that a 'BLEVE'[5] would cause high intensity heat to radiate out in an area at least one-half mile in radius. This evidence is supportive of their claims that the tidal marshes would be damaged by the presence or in the event of a BLEVE of the proposed facility. The Commission finds that the allegations of unreasonable pollution are supported by **[*16]** the weight of the evidence. The Commission further finds that the applicant has failed to offer any

[4] The application indicates that the property is in a coastal area management zone. (ROR, Item I.B.1.)

[5] "BLEVE is an acronym which stands for boiling liquid, expanding vapor explosion." *Walker v. Blitz USA, Inc., 663 F.Sup.2d 1344, 1357 n.9 (N.D.Ga. 2009).*

reasonable modifications which would make it less likely to have the effect of unreasonably polluting, impairing or destroying the public trust in the air, water and other natural resources of the state.

"Pursuant to Section 1.4 of the Regulations, the Commission finds that the approval of this application would not promote the health, safety and general welfare of the community, nor would it conserve the value of property or encourage the most appropriate use of land throughout the town. The application as presented would not secure safety from fire. It would not provide for public health, comfort or general welfare in living and working conditions. Based on the evidence submitted from other business owners in town as well as the Economic Development Commission, this Commission finds that approval of this application would not promote the economic and operational viability of the businesses in town, nor would it maintain the community character.

"Pursuant to Section 9.2.1, the location, type, character and size of the use of any [*17] building or other structure in connection therewith is not in harmony with nor conforms to the appropriate and orderly development and use of adjacent property. There are residential uses sufficiently close to the site that the peace of mind and quality of life of the occupants would be negatively affected by this proposal. The personal statement of their claims that the property values, together with the submissions by various real estate agents regarding property values were not specifically contradicted by the applicant. The information provided by the applicant's representative regarding the Albany facility was not comparable to the neighborhood around the proposed facility in Clinton. The Assistant General Counsel for Global Partners, LLC made two unsubstantiated statements regarding where successful developments had been done near propane storage facilities. There was no supporting evidence. The applicant's representative stated that it would be too difficult to isolate factors which impact property values and that is insufficient to maintain the argument that the property values would not be affected.

"Pursuant to Section 9.2.2 and Section 10.52.2(b), the Commission has continuing concerns that, in the event [*18] of a major fire, substantial evacuations would be needed and public safety would be endangered for a potentially extended period. Additionally, given the testimony that propane trucks leaving this site would need to turn into oncoming traffic on Route 1, the Commission does not accept that all actions needed to protect public safety have been undertaken. The lack of secondary ingress and egress as well as the lack of ability to view the facility from off-site makes the site inaccessible in the event of damage to the only entrance to the property, causing hazardous conditions for emergency personnel.

"Pursuant to Section 9.2.3, the Commission finds that the intersection of Knollwood and Route 1 does not adequately provide space for fuel trucks to turn into and out of the side street. Testimony was given by the applicant's own traffic expert that even at present trucks frequently turn into the Ocean State Job Lot parking lot to be able to turn around and cross directly on to Knollwood Drive. The July 28, 2014 traffic report prepared by James Buberis, P.E. states specifically, 'We find that it would be highly undesirable to have large tanker trailers . . . to do so where their turning path would encroach [*19] on traffic traveling in the opposite direction into Knollwood Drive or eastbound on the Boston Post Road.' The applicant has failed to address these concerns. There was uncontroverted testimony that Knollwood Drive narrows during the wintertime, the period of greatest use by the fuel trucks, making traffic conditions more hazardous. The Commission heard that there *may* be a solution involving acquiring property from the Estate of Steven Hutt, but the Commission is unwilling to permit an operation of this sort based on the unknown possibility of a future agreement to arrange better access for trucks at this crucial intersection, for which it has no evidence to conclude that this is likely to occur.

"Pursuant to Section 9.2.4, the lot on which the use is proposed to be established does not contain sufficient area or adequate dimensions to permit construction and use of the buildings and structures in such a manner that will not be detrimental to the neighborhood or adjacent property. In the event of an explosion, the buffering provided has not been demonstrated to be wide enough to provide a margin of safety to local residents.

"Pursuant to Section 9.2.5, the proposal contains landscaping which would not adequately [*20] screen the neighborhood in the event of an accident.

"Pursuant to Section 9.2.6, the plan as submitted is not consistent with the Town's Plan of Conservation and Development in that it does not preserve the character of Clinton as a small New England coastal town by protecting and enhancing the aesthetic and historic qualities of the town.

"Pursuant to Section 9.2.7, the plan as submitted does not envision any street improvements which might be required to allow Knollwood Road to be used safely after the installation of a use of this type.

"Pursuant to Section 9.2.8, the applicant has failed to provide evidence of the architecture of the proposed structures at the facility, leaving the Commission unable to determine its consistency with the neighborhood . . .

"The Commission cannot conclude that the requirement of a 14 foot tall opaque fence, as required by the Zoning Regulations, is preempted by State or Federal regulation. At best, the Applicant has offered evidence that this sort of fence would not be preferable, or might be less safe, but there has been no offer of specific conflict with existing State or Federal regulation, and thus no preemption is found to exist. The Chairman of the Commission asked counsel for Applicant [*21] directly for a direct prohibition and preemption and counsel conceded that she could not provide such a citation. As a result, the Commission, being unable to waive the requirements of its Regulations, cannot grant a permit for a chain-linked fence of any height. The Applicant would need to obtain a variance of this requirement or seek [to] amend the Regulations to remove this requirement." (Emphasis in original.) (ROR, Item IV.A, pp. 4-7.)

A

Global takes issue with each of the commission's reasons. This court cannot substitute its judgment for that of the commission if there is substantial evidence in the record to support the commission's findings. *Meriden v. Planning & Zoning Commission, supra, 146 Conn.App. 247.* Moreover, "[t]he agency's decision must be sustained if an examination of the record discloses evidence that supports any *one* of the reasons given." (Emphasis added; internal quotation marks omitted.) *Id.*

This court first examines the commission's reasons concerning traffic safety. Section 9.2.3 of the regulations, in relevant part, requires "[t]hat the streets serving the proposed use are adequate to carry prospective traffic, that provision is made for entering and leaving the property in such a manner that no undue hazard to traffic . . . is created . . ."[6] [*22] (ROR, Item XII.B, p. 901.) The commission gives three related reasons in connection with this section. The first states: "Pursuant to Section 9.2.3, the Commission finds that the intersection of Knollwood and Route 1 does not adequately provide space for fuel trucks to turn into and out of the side street. Testimony was given by the applicant's own traffic expert that even at present trucks frequently turn into the Ocean State Job Lot parking lot to be able to turn around and cross directly on to Knollwood Drive. The July

[6] Section 9.2.3 provides: "The Commission may approve a Special Exception if it determines that the proposed buildings, structures and/or use will conform to the following general conditions, in addition to any special standards hereinafter specified . . . [t]hat the streets serving the proposed use are adequate to carry prospective traffic, that provision is made for entering and leaving the [*23] property in such a manner that no undue hazard to traffic or under traffic congestion is created and that adequate off-street parking and loading facilities are provided." (ROR, Item XII.B, p. 901.)

28, 2014 traffic report prepared by James Buberis, P.E. states specifically, 'We find that it would be highly undesirable to have large tanker trailers . . . to do so where their turning path would encroach on traffic traveling in the opposite direction into Knollwood Drive or eastbound on Boston Post Road.' The applicant has failed to address these concerns. There was uncontroverted testimony that Knollwood Drive narrows during the wintertime, the period of greatest use by the fuel trucks, making traffic conditions more hazardous. The Commission heard that there *may* be a solution involving acquiring property from the Estate of Steven Hutt, but the Commission is unwilling to permit an operation of this sort based on the unknown possibility of a future agreement to arrange better access for trucks at this crucial intersection, for which it has no evidence to conclude that this is likely to occur." (Emphasis in original.) (ROR, Item IV.A, pp. 5-6.) Next, the commission stated, "Pursuant to Section 9.2.7,[7] the plan as submitted does not envision any street improvements which might be required to allow Knollwood Road to be used safely after the installation of a use of this type." (ROR, Item IV.A, p. 6.) Finally, while not directly related to traffic safety, the commission also stated, "Pursuant to Section 9.2.2[8] and Section 10.52.2(b),[9] the Commission has continuing

[7] Section 9.2.7 provides: "The Commission may approve a Special Exception if it determines that the proposed buildings, structures and/or use will conform to the following general conditions, in addition to any special standards hereinafter specified . . . [t]hat the site plan provides for connection, continuation and appropriate improvements of street in accordance with any future transportation, road, and/or circulation plan which is a part of a Plan of Conservation and Development adopted by the Commission where the use is to be located." (ROR, Item XII.B, p. 901.)

[8] Section 9.2.2 provides: "The Commission may approve a Special Exception if it determines that the proposed buildings, structures and/or use will conform to the following general conditions, in addition to any special standards hereinafter specified . . . [t]hat the nature and location of any use and of any building or other structure in connection therewith shall be of such that there will be adequate access to it for emergency vehicles and fire protection purposes." **[*24]** (ROR, Item XII.B, p. 901.)

[9] It is noted that the fire marshal had no comments on the initial application. (ROR, Item I.B.5.) Before this court on August 4, 2015, all parties acknowledged that the reference to §10.52.2(b) is an error and the correct citation is §10.51.2(b). Section 10.51 fully provides:

> 10.51 Commercial Oil, Propane, or Gasoline Storage Tanks
>
> 10.51.1 *Purpose*: The purpose of these Regulations is to permit commercial oil, propane and gasoline storage tanks in a way that ensures that this use is compatible with the surrounding area and protects the public health, safety and welfare of the community.
>
> 10.51.2 *Standards and Requirements*: A Special Exception may be granted provided that the following criteria are met in addition to the standards, criteria and conditions stated in Section 9:
>
> (a) There shall be one hundred foot (100') setback from all residential districts and abutting residential properties and structures.
>
> (1) Said distance shall be measured in a straight line between the residential structure and the structure and/or tank that is being used for the commercial oil, propane or gasoline storage tanks.
>
> (b) There shall be adequate access to all portions of the facility for fire suppression equipment and personnel. **[*25]**
>
> (c) The outside storage of materials and equipment shall conform to the following:
>
> (1) Materials and equipment shall be located within a designated area shown on the site plan.
>
> (2) The outside storage area shall be enclosed by a fourteen foot (14') high fence that is opaque or solid.
>
> (3) The outside storage area shall have a setback of fifty feet (50') from all property lines.
>
> (4) There shall be no storage of any liquids or hazardous materials, except as approved under Section 10.50 of these Regulations.
>
> (5) All fuel storage tanks shall have self-containment capabilities in case of a spill or leak.
>
> (d) All maintenance work on equipment shall be performed within a structure or on an impervious surface that is designed to retain any spillage of fluids and cleaned immediately upon completion of work on that particular piece of equipment.
>
> (e) The transport of material in and out of the site shall be conducted between 7:00 a.m. and 8:00 p.m., Monday through Friday, except in the case of emergency.
>
> (f) The subject site shall be kept in an orderly and safe condition at all times to provide for access of emergency equipment to all areas of the site.
>
> (g) Security lighting shall be in effect upon sunset.

(ROR, Item **[*26]** XII.B, pp. 10129-30.)

concerns that, in the event of a major fire, substantial evacuations would be needed and public safety would be endangered for a potentially extended period. Additionally, given the testimony that propane trucks leaving this site would need to turn into oncoming traffic on Route 1, the Commission does not accept that all actions needed to protect public safety have been undertaken. The lack of secondary ingress and egress as well as the lack of ability to view the facility from off-site makes the site inaccessible in the event of damage to the only entrance to the property, causing hazardous conditions for emergency personnel." (ROR, Item IV.A, p. 5.)

It is evident that the commission found, based upon the peer review of the applicant's traffic study (ROR, Item VI.F) by the town's traffic consultant, James Bubaris, that the intersection at Knollwood Drive and Route 1 was inadequate to accommodate safely a tractor-trailer truck because it would encroach into the other lane of traffic when turning.[10] (ROR, Item VI.I, p. 2.) Bubaris stated: "We find that it would be highly undesirable to have the large tanker trailers, even though not a large number, that will travel out of this site by turning right from Knollwood Drive and heading west on Boston Post Road, to do so where their turning path would encroach on traffic traveling in the opposite direction into Knollwood Drive or eastbound on the Boston Post Road.

"We therefore highly recommend that the northwest corner of the intersection of Knollwood Drive at Boston Post Road be modified so that the turning path of these exiting tanker trailers does not encroach on any other traffic utilizing this intersection given the size of these vehicles and the nature of the loads that these vehicles will be carrying." (ROR, Item VI.I, p. 2.)

This statement is essentially repeated in the commission's stated reasons for denial, and **[*28]** the commission evidently found this review more persuasive than that of Global's traffic engineer. "[A]n administrative agency is not required to believe any witness, even an expert witness." (Internal quotation marks omitted.) *King's Highway Associates v. Planning & Zoning Commission, 114 Conn.App. 509, 523, 969 A.2d 841 (2009)*. Moreover, this report constitutes substantial evidence upon which the commission could base its decision. See *Meriden v. Planning & Zoning Commission, supra, 146 Conn.App. 247*. Traffic safety, and in this case, the concern of the twenty propane gas tractor trailer trucks arriving and leaving every weekday[11] (ROR, Item II.FF, p. 9); turning into the opposite lane on Route 1, without any proposed "changes to signal timing or intersection configuration" (ROR, II.FF, p. 14); is a proper basis for the commission's decision. See *Irwin v. Planning & Zoning Commission, 244 Conn. 619, 627, 711 A.2d 675 (1998)* ("general considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit").

Global posits that, as the property is in an industrial zone and allows for a propane facility, it is conclusively presumed that it will not affect the traffic. There **[*29]** are "two propositions with respect to the role of traffic considerations in

[10] The applicant's study on page fourteen stated: "A review of truck turning movements at the intersection of Knollwood Drive and Route 1 was conducted in order to identify the path that delivery trucks would travel through entering and exiting Knollwood Drive. A typical tractor with a full-size tanker trailer was used for the simulation. As shown on Figure 6, the truck is able to execute a left-turn into Knollwood **[*27]** Drive without encroachment into other travel lanes or travel onto curbways. When exiting to the west, the right-turning vehicle does encroach into the center of the intersection, but this would occur during a minor street signal phase with minimal effect on the shopping center drive exiting traffic." (ROR, Item VI.F, p. 14.) It is noted that in a May 28, 2014 memorandum, John Guszowski, a consulting planner with CME Associates, Inc., did not find traffic impact to be an issue. (ROR, Item II.H.) At the June 2, 2014 public hearing, commissioner James Staunton requested that a traffic study with a turning analysis be provided (ROR, Item VIII.A, p. 75); and he returned to that discussion on July 7, 2014. (ROR, Item VIII.B, p. 81.)

[11] The court recognizes that Stanley concluded that the proposed operation would produce fewer truck trips per day than that generated by Bostich some five years ago. (ROR, Item II.O.)

weighing site plan applications. First, the language of a given zoning regulation may, by its textual content, limit the scope of the use of traffic considerations. Second, once a zoning authority establishes that a particular use within a zone is permitted, e.g., an office building or a church, a conclusive presumption arises that such a use in general, does not adversely affect the traffic within the zone. Neither of these tenets, however, precludes an examination into the special traffic consequences of a given site plan when the applicable zoning regulations permit it." *Friedman v. Planning & Zoning Commission, 222 Conn. 262, 266, 608 A.2d 1178 (1992)*.

In the present case, the regulations, such as §9.2.3, so provide. Additionally, the commission was concerned about the impact of a narrowed road due to snow in the winter—the facility's busiest time—again without any road improvements. Therefore, the denial based upon traffic safety is supported by substantial evidence in the record.[12] See *Meriden v. Planning & Zoning Commission, 146 Conn.App. at 247*.

B

Global also argues that it was denied due process. First, it maintains that the commission prejudged the application because of the "research" that certain commissioners did both prior to and during the administrative hearing process. It maintains that commissioner Alan Kravitz researched **[*33]** Environmental Protection Agency (EPA) guidelines (ROR, Item VIII.B, pp. 67-69; Item X.II); commissioner Pamela Fritz examined other facilities owned by Global (ROR, Item VIII.B, p. 76); and commissioner Timothy Guerra inspected the site after the close of the public hearing. (ROR, Item VJII.D, p. 15.) Further, Global stresses it was

[12] As previously mentioned, Global takes issue with the remainder of the commission findings, including but not limited to, the determination of whether a coastal area management permit was required; whether general **[*30]** health safety and welfare considerations were improperly utilized as reasons for denial instead of determinations of compliance with specific regulatory standards; whether the site plan included proper buffering, i.e., chain link rather than opaque fence; and finally whether the commission intruded into regulatory areas that are controlled by federal regulations. In light of this court's holding that a denial of the application based upon traffic safety considerations is supported by substantial evidence in the record, the court need not address the remaining reasons. See *Meriden v. Planning & Zoning Commission, 146 Conn.App. at 247* ("[t]he agency's decision must be sustained if an examination of the record discloses evidence that supports any *one* of the reasons given" [emphasis added; internal quotation marks omitted]).

This court notes that the commission gave a number of the reasons utilizing such language as the application "does not preserve the character of Clinton"; "the peace of mind and quality of life of the occupants would be negatively affected by this proposal"; and "the approval of this application would not promote the health, safety and general welfare of the community, nor would it conserve the value of property or encourage the most **[*31]** appropriate use of land throughout the town . . . It would not provide for public health, comfort or general welfare in living and working conditions." (ROR, Item IV.A.) One line of cases indicates that "[a] special permit may be denied only for the failure to meet specific standards in the regulations, and not for vague or general reasons." (Internal quotation marks omitted.) *Martland v. Zoning Commission, 114 Conn.App. 655, 666, 971 A.2d 53 (2009)*; see also T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 179 ("[i]f the standards for issuance of the special permit have met by the application, a permit must be issued"). Similarly, "vague and undefined aesthetic considerations alone are insufficient to support the invocation of the police power, which is the source of all zoning authority." *De Maria v. Planning & Zoning Commission, 159 Conn. 534, 541, 271 A.2d 105 (1970)*. On the other hand, our appellate courts have also stated, "As a matter of law, general considerations enumerated in the zoning regulations are an adequate basis for denying an application for a special permit or exception." *A. Aiudi & Sons, LLC v. Planning & Zoning Commission, 72 Conn.App. 502, 507, 806 A.2d 77 (2002)*, aff'd, *267 Conn. 192, 837 A.2d 748 (2003)*; see also *Irwin v. Planning & Zoning Commission, supra, 244 Conn. 628* ("[The commission] does have discretion to determine *whether* the proposal meets the standards set forth in the regulations. If, during the exercise of its discretion, the zoning commission decides that all of the standards **[*32]** enumerated in the special permit regulations are met, then it can no longer deny the application. The converse is, however, equally true. Thus, the zoning commission can exercise its discretion during the review of the proposed special exception, as it applies the regulations to the specific application before it." [emphasis in original]).

In the present case, the commission was confronted with an application that was objected to by neighboring residents for a variety of reasons. (ROR, Item II.M; Item II.N; Item II.V; Item II.CC; Item II.KK; Item II.AAA; Item II.BBB; Item II.CCC; Item II.HHH; Item II.III.) The commission's stated reasons reflect these concerns. (ROR, Item IV.A.) Nevertheless, while some general reasons were given, this commission, as previously discussed, reviewed the application to determine compliance with the standards set forth in the regulations and found a failure to comply with them.

denied due process because the commissioners did not specifically state their findings on the record and allow for rebuttal. Second, Global argues that the commission's reliance on a July 31, 2014 letter from the town's economic development commission (EDC) was improper because Global never knew of the letter and because it was not marked as an exhibit during the public hearing on August 4, 2014. (ROR, Item II.WW.) Moreover, related to the letter, Global asserts that two members of the commission, Maurice Kirk Carr and Michael Knudsen, were also members of the EDC. Global argues that it was improper for the commission to rely on that EDC letter in making its decision.

"Although proceedings before administrative agencies such as the defendant are informal and are conducted without regard to the strict rules of evidence, the hearing must be conducted so as [*34] not to violate the fundamental rules of natural justice . . . Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross examine witnesses and to offer rebuttal evidence . . . To that end, our law holds that commissions cannot consider additional evidence submitted by a party without granting the opponents and the public the opportunity to examine that evidence and to offer evidence in explanation or rebuttal . . .

"Commissions are entitled to receive technical and professional assistance in matters that are beyond their expertise, and this assistance may be rendered in executive session . . . Such assistance cannot be extended, however, to the receipt of ex parte evidence submitted by a party to the controversy without the opposition's knowledge and opportunity for explanation or rebuttal." (Citations omitted; internal quotation marks omitted.) *Palmisano v. Conservation Commission, 27 Conn.App. 543, 546-47, 608 A.2d 100 (1992).*

"A commission may rely on its personal knowledge . . . It may also visit sites . . . It may rely on material nonrecord facts that are within its special [*35] knowledge and experience or that it has learned through investigation, but in doing so it must allow an adversely affected party an opportunity to rebut at an appropriate stage in the proceedings." (Citations omitted.) *Id., 548.* "Once it has been demonstrated that an improper receipt of ex parte evidence has occurred, a rebuttable presumption of prejudice arises with the burden to show no prejudice on those seeking to uphold the validity of the commission's decision." *Id., 547.*

First, as to the claim that Kravitz improperly read an EPA guideline concerning propane standards, the commission noted that, at the July 7, 2014 hearing, the chairperson requested Kravitz submit the document into the record and he complied. (ROR, Item VIII.B, p. 67; Item XII.) Kravitz also inquired about different versions of the NFPA standards that were in the record and which he explained. (ROR, Item VIII.C, p. 9.) A commission member's examination of pertinent law, revealed on the record, that led to questions at a public hearing is not a denial of due process. See *Palmisano v. Conservation Commission, supra, 27 Conn.App. 548.*

Global also asserts that Fritz improperly and independently researched other Global facilities because of her comments at the public hearing. (ROR, Item VIII.B, [*36] p. 76.) In response to a letter from Global's attorney dated August 4, 2014 (ROR, Item II.DDD); Fritz denied having done so on the record at the next public hearing and noted that her questions were all derived from materials in the record. (ROR, Item VIII.C, p. 10.) While the Albany site is mentioned in the commission's motion to deny, the commission stated that "[t]he information provided by the applicant's representative regarding the Albany facility was not comparable to the neighborhood around the proposed facility in Clinton." (ROR, Item IV.A, p. 5.) Without more, this court does not find a due process violation.

Global also challenges Guerra's solo site visit after the close of the public hearing. "Although administrative adjudicative proceedings and judicial proceedings offer some of the same procedural protections, they differ markedly in their treatment of the fact finder's reliance on nonrecord evidence. An administrative agency can be the investigator and adjudicator of the same matter without violating due process . . . Unlike judicial proceedings, an administrative board may act upon facts which are known to it even though they are not produced at the hearing." (Citation omitted; [*37] internal quotation marks omitted.) *Grimes v. Conservation Commission, 243 Conn. 266, 276, 703 A.2d 101 (1997)*.

In the present case, Guerra attempted to explain his site visit to the commission, but was rebuffed by the other members, and, thus, did not provide them with any information from the visit. (ROR, Item VIII.D, p. 15.) There is no indication of what he saw on the site. Indeed, he made no other comment the whole evening and, of course, the commission voted to deny the application by a seven to one vote. (ROR, Item VIII.D, pp. 15-31.) Without more, this incident is insufficient to prove a violation of due process.

Finally, Global maintains that the commission improperly relied on the EDC letter which was not marked as an exhibit for the hearing. The commission responds that the EDC letter simply asks a number of questions—questions which were all asked by others during the administrative process. For instance, it asks questions such as: "We are deeply concerned that building and maintaining a large propane storage facility and usage of the rail spur as requested by Global Partners, LLC could seriously hurt Clinton's economy, both short and longer-term. While there have been representations made there would be no economic harm, many have been anecdotal [*38] or, in our opinion, too facilely determined or inadequately supported by current, Clinton-specific data.

"Given the potential for serious economic consequences, we strongly recommend, prior to any P&Z approval, a rigorous, quantitative and professionally-managed Economic Impact Study based on actual, current data for Clinton be conducted by an objective third-party which is vetted and approved by the Town and EDC.

"The Economic Impact Study must address and adequately allay the EDC's concerns including, but not limited to . . .

"Near-term, how much revenue will the facility contribute and how [much] will it actually cost the Town to maintain? . . .

"Would the prospect of having such a propane storage facility as a neighbor seriously decrease the attractiveness of any lease/sale, especially given the current industrial/commercial vacancy rate in our region?

* * *

"Longer-term, will the building of a large Propane Storage Facility make any future economic development of investment in Clinton even harder to achieve? . . .

"Will allowing Global to build a 500,000 gallon propane storage facility with up to 16 railroad tank cars, each weighing 130 tons, unloading each night, just a half-mile away, [*39] send the wrong signal to the type of potential partners and developers we desire?

* * *

"Approval of Global's request without applying all proper due diligence available could negate much of the work already completed. Without an Economic Impact Study, approval could lead to a step backward and a step mistaken." (ROR, Item II.WW.)

As noted by the commission, the letter contains another version of the same questions asked by the commissioners and the town residents in the public

hearing and as reflected in the record by the petitions. (ROR, Items VIII.B-VIII.C; Item II.FFF.) These were essentially the same or similar questions to those which were addressed by Global in its presentation. (ROR, Item II.ZZ; Item IX.Z; Item X.AA; Item XI.KK.) "[N]ot all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown." (Internal quotation marks omitted.) *Goldstar Medical Services, Inc. v. Dept. of Social Services, 288 Conn. 790, 828, 955 A.2d 15 (2008).* The EDC letter is such a procedural irregularity which has not resulted in any prejudice even if it was not properly marked for the last public hearing.

As to Global's argument that Carr and Knudsen had, as members of the EDC, prejudged the application, "[t]he law **[*40]** does not require that members of zoning commissions . . . have no opinion concerning the proper development of their communities." *Furtney v. Zoning Commission, 159 Conn. 585, 594, 271 A.2d 319 (1970).* There is no evidence here that Carr and Knudsen had prejudged the application. See *Daviau v. Planning Commission, 174 Conn. 354, 358, 387 A.2d 562 (1978)* ("More importantly, there was no finding that the commissioners had made up their minds that they were going to disapprove the plaintiffs' plan regardless of any evidence or argument presented at the public hearing. Only such a finding could support the conclusion that the commissioners had crossed the line between permissible formulation of a tentative opinion and illegal prejudgment of the issue"). Indeed, Carr was not even present at the August 11, 2014 meeting (ROR, Item III.J); and, while Knudsen participated, he never mentioned the issues or questions raised in the EDC letter. (ROR, Item VIII.D.) Thus, the court concludes that the EDC letter did not cause Global to be denied due process.

In conclusion, the extensive record in this matter indicates that some mistakes were indeed made. Yet, "[w]e do not live in an ideal world, nor one where attorneys, architects and engineers alone populate local land use agencies. Rather, they are comprised of citizens from all walks of **[*41]** life, serving their communities on a voluntary basis. As our Supreme Court observed more than one half century ago, [i]t must be borne in mind . . . that we are dealing with a group of laymen who may not always express themselves with the nicety of a Philadelphia lawyer. Courts must be scrupulous not to hamper the legitimate activities of civic administrative boards." (Internal quotation marks omitted.) *Anatra v. Zoning Board of Appeals, 127 Conn.App. 125, 145, 14 A.3d 386 (2011),* rev'd on other grounds, *307 Conn. 728, 59 A.3d 772 (2013).*

Accordingly, the appeal is dismissed.

Berger, J.

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## APPENDIX TO PETITION FOR CERTIFICATION

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