DOCKET NO. HHD-CV-17-6087235-S

EBC REALTY, LLC	:	SUPERIOR COURT
V.	:	J.D. OF HARTFORD
ZONING COMMISSION OF DANBURY	:	AT HARTFORD

DOCKET NO. HHD-CV-17-6087237-S

EBC REALTY, LLC.	:	
V.	:	
PLANNING COMMISSION OF DANBURY	:	APRIL 11, 2019

MEMORANDUM OF DECISION

This is a consolidated appeal arising from two related but independent actions taken by two separate land use commissions in the City of Danbury, the Zoning Commission ("Zoning") and the Planning Commission ("Planning"). The Zoning action was the adoption of an amendment to the Danbury zoning regulations affecting the CA-80 zoning district. The Planning action was the denial of a special exception application filed by the above-named plaintiff. On the basis of a certified copy of a trustee's deed introduced into evidence at the hearing held on this matter on December 12, 2019, the court finds that the plaintiff ECB Realty, LLC ("ECB") is the owner of real property located in the CA-80 zone. This property was the subject of the special exception application denied by Planning and now being appealed. The plaintiff has thus established the aggrievement required to challenge both the amendment adopted by Zoning and the special permit denial by Planning. See *Lucas v. Zoning Commission,* 130 Conn. App. 587, 589, 23 A.3d 1261, 1264 (2011) and *Winchester Woods Assocs. v. Planning & Zoning Commission,* 219 Conn. 303, 308, 592 A.2d 953, 956 (1991).

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After reviewing the records of both decisions appealed from, reading all of the briefs submitted and listening closely to the oral arguments of the parties, this court finds in favor of both Zoning and Planning in the appeals from their respective decisions.[1]

I.

FACTS AND PROCEDURAL HISTORY

This controversy finds its origins in the decision by ECB to seek a special exception from Planning which would allow it to establish a convenience market at a property it owns located in the CA-80 zone at 110 Mill Plain Road in Danbury. This convenience market would include a drive-through window. (PROR #2A) The drive-through window would account for approximately 60 percent of the traffic entering the store by virtue of customers procuring coffee, donuts, and related products through the window.[2] (PROR # 45A, p.8).

A pre-application meeting on the special exception request was held with Sharon Calitro, the City's Director of Planning. Shortly after that meeting, on March 23, 2017, Calitro herself filed a petition with Zoning seeking an amendment to the zoning regulations for the CA-80 zone "to prohibit uses, except for licensed pharmacies delivering drugs, from being accessed by a drive-in or drive-through facility by which food, beverages and similar products are dispensed to patrons within motor vehicles." (ZROR # 2) It is evident that this petition was precipitated by Calitro's view that ECB's application for a convenience store with a drive-through window was for a use that ought to have fallen within the ambit of the explicit prohibition of fast food

[1] There was a return of record filed in both the Zoning appeal and the Planning appeal. References to items in the Zoning record shall hereinafter be designated "ZROR" and references in the Planning record shall be designated "PROR".

[2] At the public hearing held on the Planning Application on June 17, 2017, counsel for the applicant stated that "It will be a convenience store like every other convenience store that will sell coffee and donuts like every other convenience store and the brand will probably be Dunkin Donuts." (PROR #45A, p.30) Mindful of this probability and for ease of description, this decision will in this decision refer to the drive-through as a Dunkin Donuts.

restaurants in the CA-80 zone which was contained in the existing zoning regulations. (ZROR#2, #4)

Before that proposed amendment was considered by Zoning, ECB filed its special exception application with Planning on April 5, 2017. (PROR#2) The operative zoning regulations at the time the application was filed permitted both convenience market uses and generic drive-through uses as special exception uses in the CA-80 zone.[3] A special exception was also required for this application because it would be a "high traffic generator" as defined in § 3.E.2 of the zoning regulations.

Consistent with the requirements of General Statutes § 8-3a (b), Zoning referred the changes proposed in Calitro's above-referenced petition to Planning. On April 5, 2017, Planning voted four to one to approve those changes as being consistent with Danbury's plan of conservation and development. (ZROR #6) Following a public hearing held on April 25, 2017, Zoning voted to approve the proposed amendment with eight members voting yes and one abstaining. Calitro professional advice to Zoning in connection with its deliberations regarding the proposed amendment.[4]

Following public hearings held on June 21, July 19 and August 2, 2017 and after considerable deliberation, Planning denied ECB's special exception application on October 4,

[3] § 2.B of the Danbury zoning regulations defines a convenience market as: "A retail store with a floor area of 3,000 square feet or less that primarily sells prepackaged food items, tobacco, periodicals and household goods, but excluding the sale of motor vehicle gasoline and automotive servicing or repair unless otherwise allowed as a use in the zoning district." That same definitional section of the zoning regulations defines a fast food restaurant as "[a]n establishment whose principal business is the sale of food and beverages in a ready-to-consume state for consumption (1) within the restaurant building, (2) within a motor vehicle parked on the premises, or (3) off the premises as carry out orders, and whose principal method of operation includes the following characteristics food and/or beverages are usually served in disposable or edible containers; it is self-service, with customers expected to clean up after themselves; and, menus are posted."

[4] Due to concerns that the original zoning amendment process may have had some technical deficiencies, it was refiled, and again approved after the information presented in the original public hearing was incorporated by reference into the record of the public hearing on the resubmitted application. That final decision was made on July 26, 2017 and is the decision now on appeal. The record of the initial zoning amendment proceeding can be found in the case of *ECB Realty, LLC v. Zoning Commission*, Docket #HHD-CV-17-6087238-S.

2017. In the consolidated appeals now before the court, ECB challenges the decisions of both Zoning in amending its regulations and Planning in denying its special exception application.

II.

DISCUSSION

A.

THE ZONING DECISION

The appellant argues that there are four reasons why Zoning's amendment to its regulations must be struck down as being unlawful. First, ECB maintains that the change in question is invalid because it was "retaliatory" and the outgrowth of "improper motives." Next, the appellant argues that the amendment must be overturned because Zoning exceeded its lawful authority in seeking to regulate the method of sales. The appellant also argues that the amendment violated the uniformity requirement found in General Statutes § 8-2 and was therefore discriminatory. The appellant's final argument is that the amendment should be overturned because there was not substantial evidence that the prohibited drive-through would cause an unacceptable increase in traffic on Mill Plain Road.

All of these challenges must be considered against the backdrop of the broad discretion that is afforded to zoning commissions when they choose to amend zoning regulations. "[W]hen acting in its legislative capacity to enact or amend its regulations, a local zoning authority must . . . be free to modify its regulations whenever time, experience, and responsible planning for contemporary or future conditions reasonably indicate the need for a change. . . . The discretion of a legislative body, because of its constituted role as a formulator of public policy, is much broader than that of an administrative board, which serves a quasi-judicial function. . . . A less strict rule would require the court to exercise a legislative judgment. . . . This broad legislative

discretion applicable to the approval of a zone change. . . . will not be disturbed on appeal unless the zoning authority has acted illegally or arbitrarily and has thus abused the discretion vested in it." (Citations omitted; internal quotation marks omitted.) *Homart Development Co.* v. *Planning and Zoning Commission*, 26 Conn. App. 212, 216-17, 600 A.2d 13 (1991).

In this case, it is self-evident that the drive-through component of the convenience store proposed by the applicant shared many distinguishing features also found in fast food restaurants. Notably, and important from a zoning perspective, the commission could have found that a convenience store that might include a Dunkin Donuts drive-through could generate traffic volumes comparable to those generated by patrons of fast food restaurants who use their drive-through features to conveniently procure prepared food and beverages. Had Zoning adopted the amendment now under review at Calitro's urging before the subject special exception application was brought to Calitro's attention, it is difficult to posit how such a change could have been determined to be outside of Zoning's legislative prerogative. What the court must now decide is whether the action of Zoning in amending the regulations only after learning of the appellant's proposal, and while that proposal was pending before Planning, operates to render the amendment unlawful.

It is true that "[t]he bright line rule is that decisions of zoning authorities should be overturned if they have not been reached fairly and with proper motives." (Internal quotation marks omitted.) *Barry* v. *Historic District Commission*, 108 Conn. App. 682, 707, 950 A.2d 1, cert denied, 289 Conn. 943, 959 A.2d 1008 (2008). It is also, however, the case that in situations "where municipal authorities act in accordance with formal requirements, courts will interfere only where fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law, enter into or characterize the action taken. . . . Mere

differences in opinion among municipal officers or members of the municipal electorate are never a sufficient ground for judicial interference. . . . any broader rule would potentially involve the courts in the review and revision of many, if not all, major controversial decisions of the legislative or executive authorities of a municipality." (Internal quotation marks omitted.) *Candlewood Hills Tax District* v. *Medina,* 143 Conn. App. 230, 238, 74 A.3d 421, cert. denied, 310 Conn. 929, 78 A.3d 856 (2013).

In this case, it is evident that Calitro believed that the subject application was in contravention of what the zoning regulations intended to accomplish with respect to the regulation of development in the CA-80 district. Her professional opinion guided her in petitioning for an amendment to the zoning regulations in order to forestall what she believed might be future efforts to circumvent the express prohibition against fast food restaurants in the CA-80 zone. The record is devoid of any evidence that Calitro had any personal or financial interest in the proposed change or that she harbored any animus towards the applicant who submitted the proposal. The fact that Zoning approved the zone change at her behest does not operate to invalidate the legitimacy of its own ultimate legislative determination. A "zoning commission is empowered to amend the zoning regulations on its own motion, although the prescribed procedure for a referral to the city plan commission and public hearings must be followed. When the zoning commission acts to propose an amendment formulated by the commission, all of its members could be said to be similarly biased as sponsors of the proposal and, therefore, disqualified from voting on it. Such an inconceivable consequence compels the conclusion that sponsorship of a legislative proposal is not the kind of personal interest the statute was intended to preclude." *Ghent v. Zoning Commission,* 220 Conn. 584, 595, 600 A.2d

1010, 1016 (1991). This reasoning applies with similar force to petitions filed by municipal planning professionals such as Calitro who are employed by land use commissions.

The legislative discretion which is given to zoning commissions to amend their regulations "is wide and liberal, and must not be disturbed by the courts unless the party aggrieved by that decision establishes that the commission acted arbitrarily or illegally." (Internal quotation marks omitted.) *Protect Hamden/N. Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 543, 600 A.2d 757 (1991). ECB has not met this burden in connection with its first claim that the decision being challenged was "retaliatory" or the product of "improper motives."

ECB next argues, without citing to any apposite case law, that in amending it regulations to prohibit drive-throughs (except for pharmacies), Zoning was improperly exceeding its statutory authority by regulating the "method of sales."[5] In support of this argument, ECB suggests that while §8-2 permits a zoning commission to regulate "the location and use of building, structures and land for trade," that language does not permit it to regulate the delivery of products sold by a retail establishment by way of a drive-through window. This argument is unpersuasive particularly in light of our Supreme Court's holding in *Spero* v. *Zoning Board of Appeals*, 217 Conn. 435, 437, 586 A.2d 590 (1991).

In *Spero*, our Appellate Court upheld a decision by the Guilford zoning board of appeals disallowing an "ordering station" that a McDonald's restaurant sought to establish. "The

[5] At oral argument, the plaintiff urged the court to apply the reasoning found *in Capalbo v. Planning & Zoning Board of Appeals*, 208 Conn. 480, 484, 547 A.2d 528, 530 (1988) to strike down the zoning amendment now being challenged. *Capalbo* found that § 8-2 did not delegate to the town of Greenwich the power to regulate the number of colors contained in an outdoor advertising sign. In that *Capalbo* was not addressing the proposed use of any building, structures or land, the court finds it's holding to be inapplicable to the present case.

proposed ordering station consisted of an outside menu board and intercom system that would enable the plaintiff's patrons to drive up and place take-out orders while remaining in their vehicles. The patrons would then park their vehicles and retrieve the food and beverages ordered by entering and exiting the building through a take-out door that the plaintiff proposed to add to his existing facility." (Internal quotation marks omitted.) Id. Similarly, in this case, the prohibition against a drive-through is directed at a use of properties in the CA-80 zone and is thus a permissible subject of municipal zoning regulation.

The penultimate claim made by ECB is that the amendment in question must be struck down as being violative of the directive found in § 8-2 that zoning regulations "be uniform for each class or kind of buildings, structures or use of land throughout the district." This argument hinges on the claim that by only prohibiting drive-throughs that offer food and beverages, and by not also disallowing drive-through banks, dry cleaners, or pharmacies, this amendment unlawfully discriminated against drive-through restaurant uses. Existing case law makes clear that Zoning was entitled to view other drive-through services offered by banks, dry cleaners, and pharmacies as being different in kind and in degree from drive-throughs serving food and beverages. "In view of the factors involved in the promulgation of these amendments to the zoning regulations, we cannot say that the commission was unjustified in placing shopping centers in a class separate and distinct from other groupings of retail or individual stores. . . . The differentiation did not constitute invidious discrimination. . . . It is not necessary to establish scientific or marked differences in things or persons or their relations in order to sustain the validity of a regulation under the requirements of the equal protection clause. . . .The classification made by statute between a chain store and other types of stores, for example, has been held by the United States Supreme Court not to be arbitrary or unreasonable in opposition

to the due process and equal protection clauses of the fourteenth amendment." (Citations omitted.) *Dupont* v. *Planning & Zoning Commission,* 156 Conn. 213, 221–22, 240 A.2d 899 (1968). In this case, there was ample basis for Zoning to conclude that it was appropriate to forbid the provision of food and beverage through drive-through windows but to continue to allow, by special permit, drive-through services in other contexts.

Lastly, the plaintiff argues that the amendment in question must be struck down because there was not substantial evidence that the amendment adopted would serve in preventing an unacceptable level of traffic on Mill Plain Road. In support of this contention, the plaintiff argues that because the amendment did not operate to prohibit other permitted uses that might generate as much or more traffic as a drive-through offering food and beverages, it must be invalidated. More specifically, the plaintiff suggests that the amendment is flawed because its traffic expert presented evidence that the convenience store with a drive-through window, as proposed by ECB, would not negatively impact traffic in the area.

Importantly, the amendment in question was not intended to, nor could it lawfully operate to, compel denial of ECB's pending application, which was filed before the amendment was adopted. Rather, the amendment was approved in Zoning's stated belief that the prevention of future drive-throughs in the CA-80 zone would protect the public health, safety, and welfare by prohibiting a use that "had the potential to contribute to increased traffic along the CA-80 corridor." (ZROR #6 and 9) The fact that Zoning did not amend its regulations to prohibit all other uses that might also have the potential to increase traffic in this zone does not render unlawful the step that it did take to address this particular potential traffic concern. "[W]e are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did . . . . that a legislature need not strike at all evils at the same

time . . . . and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . . Legislatures may implement their program step by step . . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." (Internal quotation marks omitted.) *Jolly, Inc.* v. *Zoning Board of Appeals,* 237 Conn. 184, 203, 676 A.2d 831 (1996).

Against the backdrop of the analysis set forth above, the court does not find that ECB has met its burden of adducing evidence that would obligate the court to strike down the amendment being challenged. "[T]he justification for zoning in any municipality is that it serves to promote the public health, safety, welfare and prosperity of the community. . . . In considering whether [a] regulation works to achieve a proper legislative object of zoning, we must examine it to see if it operates in a manner reasonably related to such a legitimate purpose of zoning. Every intendment is to be made in favor of the validity of [an] ordinance and it is the duty of the court to sustain the ordinance unless its invalidity is established beyond a reasonable doubt." (Citations omitted; internal quotation marks omitted.) *Harris* v. *Zoning Commission,* 259 Conn. 402, 425, 788 A.2d 1239 (2002).

B.

THE PLANNING DECISION

The gravamen of the appellant's first claim in the Planning appeal is that it was unlawful for Calitro or members of her staff to have provided guidance to Planning with regard to the appellant's special exception application after Calitro had proposed an amendment to the zoning regulations that would in the future prohibit the special exception uses at issue in ECB's application. The record suggests that ECB's proposal was viewed by Calitro as being

inconsistent with the spirit of what the zoning regulations were intended to accomplish. (ZROR#2, #4) There is however, no evidence to suggest that Calitro had any personal or pecuniary interest in the actions of either Zoning or Planning in connection with the issues raised in this appeal. The appellant urges this court to adopt the view that if a land use application brings to light what a municipal land use employee believes to be an oversight in the existing regulations, members of the land use staff should be prohibited by law from simultaneously spearheading efforts to correct the perceived defect and advising land use commissions in connection with their decision on the application that revealed the perceived defect. Insofar as that claim is directed at Calitro's conduct in connection with professional advice offered to Planning, it should be noted that Jennifer Emminger, Associate Planner, took on this responsibility and that Calitro herself did not participate in advising Planning on this application. (PROR #15)

A.

Disqualifying Personal Interests

ECB's appeal of Planning's decision rests on several grounds. First, ECB challenges the propriety of ECB's application being considered after Planning, acting pursuant to its obligation found in General Statutes § 8-3a (b),voted four to one to find that the zoning amendment discussed above in this decision was consistent with Danbury's plan of conservation and development. This vote was taken on April 5, 2017, the same day that ECB submitted its application for a special permit to Planning. (PROR#2) ECB argues that this § 8-3a(b) approval coupled with Planning receiving advice on this application from a representative of the municipal planning office that had proposed the challenged zoning amendment, rendered Planning's denial of the special exception the product of unlawful predetermination and/or bias.

ECB's position is that the interplay between Calitro's zoning amendment application, ECB's special permit application, and the role played by staff of the planning department in advising both Zoning and Planning in connection with both applications made it impossible for its application to be fairly considered by Planning.

In response, Planning points to the truism that it was bound by General Statutes § 8-2h(a) to consider the special permit application under the zoning regulations as they existed at the time the application was filed. Further evidence of Planning's understanding of this requirement is found in the extensive record which was created in connection with this application, the multiple public hearings held and the lengthy and detailed analysis of the proposal by several municipal departments.

EBC suggests that the Appellate Court's holding in *Barry* v. *Historic District Commission*, supra, 108 Conn. App. 705, dictates that Planning's denial in the present case must be reversed. In *Barry*, a commission member recused himself from participating in the consideration of an application because he was going to testify as an expert in opposition to that application. His expert testimony was in contravention of competing testimony provided by an expert retained by the applicant. See id., 704. After the commission denied the application and adopted the position espoused by its recused member, the Appellate Court struck down the denial as being fundamentally unfair and held that: "Judicial review of administrative process is designed to assure that administrative agencies act on evidence which is probative and reliable and act in a manner consistent with the requirements of fundamental fairness. . . . Further, we have repeatedly emphasized that [n]eutrality and impartiality of members are essential to the fair and proper operation of . . . . [Zoning] authorities. . . . In reviewing the challenged conduct of

public officials, fairness and impartiality are fundamental." (Citations omitted; internal quotation marks omitted.) Id., 705.

The Appellate court went further in articulating the nature of disqualifying personal interests. "Public policy requires that a member of a public board or commission refrain from placing himself or herself in a position in which personal interest may conflict with public duty. . . . A personal interest has been defined as an interest in either the subject matter or a relationship with the parties before the zoning authority impairing the impartiality expected to characterize each member of the zoning authority. A personal interest can take the form of favoritism toward one party or hostility toward the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness which a zoning official in our state is required to possess." (Citations omitted; internal quotation marks omitted.) Id., 706.

The facts of the present case differ in several important respects from the facts in *Barry*. First, there is no evidence that any member of Planning had any kind of personal interest in the outcome of ECB's application. It is undeniable that Calitro believed ECB's special permit application brought to light an oversight in Danbury's zoning regulations. It is also undeniable that as soon as she was made aware of that oversight, she sought to remedy it by filing a request with Zoning for an amendment to the regulations which, if adopted, would correct that defect. There is no evidence in the record that Calitro had any personal interest in the amendment or the special exception application beyond what she believed her professional responsibilities to demand. Also absent from the record is any evidence that she harbored personal animus toward the applicant or its members. There is similarly a complete lack of evidence which would suggest that any member of Planning was tainted by any disqualifying personal interest or was otherwise unable to evaluate this application on its merits.

ECB's reliance on *Marmah, Inc.* v. *Greenwich,* 176 Conn. 116, 121, 405 A.2d 63 (1978), involving the illegal denial of a site plan, is also misplaced. This 1978 case was decided before the General Assembly's 1989 passage of § 8-2h (a), and involved a site plan application for an "as of right" post office use that was subsequently prohibited under newly adopted zoning regulations. See id., 122. As such, when that application for the "as of right" use was denied, despite it having been approved by the town's traffic department, architectural review board, and building department, the court concluded that it would be fundamentally unfair to have no remedy for the wrongful site plan denial because the use that was previously allowed under the zoning regulations was no longer permitted. Id., 123. "The [trial] court was clearly correct, in these circumstances, in taking the jurisdictional plea under advisement and in hearing testimony about its merits. It was not automatically bound to apply the zoning regulations as of the time of the appeal. Furthermore, it was entitled, on this essentially equitable inquiry, to hear testimony about the process of amendment and to admit into evidence the transcript of the relevant public hearing." *Marmah, Inc.* v. *Greenwich,* 176 Conn. 116, 121, 405 A.2d 63 (1978).

Were the court to adopt ECB's position that Planning's denial was patently unlawful solely on the basis of the interplay between the planning staff's role in the two applications, such a ruling could have a chilling effect on the legitimate actions that land use professionals might responsibly wish to take in the face of situations that reveal perceived deficiencies in zoning regulations. To conclude that the law prohibits amending zoning regulations to address deficiencies in those regulations which are brought to light when an application seeks to take advantage of those deficiencies until that application is finally adjudicated would tie the hands of land use professionals who believe there is a need to respond rapidly to prevent further exploitation of such deficiencies. Taking such lawful steps to address the deficiencies by way of

an amendment to the zoning regulations, standing alone and without evidence of a personal interest on the part of a commissioner or land use professional, is not a basis to adjudicate that there must necessarily be unlawful predetermination or bias in connection with the consideration of the application which brought the deficiencies to light. Rather, if the commission abides by its obligation found in § 8-2h (a) and reviews the application under the rules that existed when the application was filed and if staff analyses the application in the context of those operative rules, an appeal of the denial of the application in question may only properly be upheld if the commission fails to fairly apply the requisite criteria to the subject application.

B.

Merits of Planning's Denial

Having determined that the plaintiff has not met its burden of proving bias or predetermination such that a reversal of Planning's denial is required by law on these grounds, the court next turns to ECB's claim that it satisfied the criteria for a special permit and that the reasons proffered by Planning for its denial were not supported by substantial evidence.

Planning unanimously adopted a thirteen page resolution of denial in which it set forth four distinct reasons why the appellant's application failed to satisfy the criteria set forth in the zoning regulations for the granting of a special permit. (PROR#42) "Where a zoning authority has stated the reasons for its action, a reviewing court may only determine if the reasons given are supported by the record and are pertinent to the decision. . . . The [zoning board's] action must be sustained if even one of the stated reasons is sufficient to support it." (Citation omitted; internal quotation marks omitted.) *Torsiello* v. *Zoning Board of Appeals*, 3 Conn. App. 47, 50, 484 A.2d 483 (1984). In addition, "where a zoning commission has formally stated the reasons for its decision the court should not go behind that official collective statement of the

commission. It should not attempt to search out and speculate upon other reasons which might have influenced some or all of the members of the commission to reach the commission's final collective decision." *DeMaria* v. *Planning & Zoning Commission*, 159 Conn. 534, 541, 271 A.2d 105 (1970).

Mindful of the above-stated standards, it is appropriate to determine whether there was substantial evidence in the record to support each of Planning's proffered reasons for denying the application.

1.

PLANNING'S FIRST REASON FOR DENIAL

Planning's first reason for denial was that "the proposed use functions as a use not permitted in the CA-80 Zoning District." This conclusion was reached on the grounds that the use for which the special permit was sought did not qualify as "a convenience market" as that term is defined in § 2 of the zoning regulations. A "convenience market" is defined as "a retail store .... that primarily sells prepackaged food items, tobacco, periodicals and household goods." In its decision, Planning relied upon ECB's own expert, who testified that his best estimate was that 60 percent of the vehicles entering the facility would be doing so to access the drive-through window primarily for coffee and donuts. Planning therefor concluded that a special exception should not be granted because the subject facility would not be "primarily selling" those items that would qualify it to be defined as a "convenience market." At oral argument on this appeal, plaintiff's counsel, without pointing to any direct evidence in the record, hypothesized that while the applicant anticipated that fewer than 40 percent of the vehicles entering the subject premises would have passengers that would exit their vehicles and enter the store, the store's sales would nevertheless "primarily" be derived from "prepackaged food items, tobacco, periodicals and

household goods" as required to meet the definition of a "convenience market" set forth in the regulations.

"Recent decisions of [the Connecticut Supreme Court] . . . . have evidenced a trend toward investing zoning commissions with greater discretion in determining whether [a] proposal meets the standards contained in the regulations. The agency [may now] [decide] within prescribed limits whether a particular section of the zoning regulations applies to a given situation and the manner in which it applies." (Internal quotation marks omitted.) *Torrington* v. *Zoning Commission*, 261 Conn. 759, 769–70, 806 A.2d 1020 (2002). In this case, Planning's conclusion that what was proposed did not meet the definition of "convenience market" is supported by substantial evidence in the record, and must therefore be upheld. ECB makes much of what it believes was Planning's erroneous belief that what was proposed was in the nature of a "fast food restaurant." While it is true that the facility proposed did not meet the definition of "fast food restaurant" found in the zoning regulations, it nevertheless did possess several of the requisite features found in such restaurants. For instance, the business would be selling "food and beverages in a ready-to-consume state . . . . served in disposable or edible containers" and have "posted menus." Regardless of the definitional arguments surrounding "fast food restaurants," Planning had a sound basis to determine that the facility proposed was not a "convenience market." This conclusion was not dependent on a finding that what was proposed was instead a "fast food restaurant."

2.

PLANNING'S SECOND REASON FOR DENIAL

Planning's second reason for denial is predicated on what was identified in the City Traffic Engineer's report as "an unconventional layout [that] does not adhere to normal traffic design standards or practice." (PROR #23) This layout results in the crossing of inbound and outbound traffic in the throat of the driveway as vehicles enter and exit the drive-through. Planning found that this phenomenon, "especially during long queues, result[s] in a pattern that restricts and obstructs traffic flows within the site. The resultant obstructions create gridlock within the site and prohibit vehicles from entering or exiting the site driveway, both parking areas, and the loading/refuse area." (PROR#42, p.5)

In light of these commission's findings, drawn from the plans submitted, staff comments and testimony, as well as their own experience with the operation of drive through uses, Planning concluded that § 3.E.8.a of the zoning regulations governing special permits for drive-through uses had not been satisfied. That provision requires that in order to be granted a special permit, a proposed drive-through shall have "traffic lanes providing access to and from drive through windows and order boards shall not obstruct on-site vehicular traffic flow to and from required parking and loading spaces or other driveways providing ingress and egress into and within the site."

The plaintiff argues that because its property fronts on a state road and its proposal was approved by the State Traffic Commission ("STC"), Planning could not lawfully concern itself with any traffic considerations. This argument fails because § 3.E.8.a of the zoning regulations, relied upon by Planning, deals with both the internal traffic flow of the proposed use and the affect that flow might have on driveways providing ingress and egress to the site. It is true that to the extent that the internal design in question might prevent vehicles from entering the site from

the state highway, there would be resultant adverse traffic consequences both on site and on the state highway.

The plaintiff seemingly asserts that the STC approval preempted Planning from giving any consideration to traffic conditions arising from the proposed facility and affecting either the subject site or the state highway. To support this argument, ECB relies on a case in which the STC had approved a site plan proposal that was nonetheless denied by the zoning commission because of concerns that the proposed facility would have on a local road. In reversing the denial, the court held that "[t]hus, the question for this court is whether the defendant's reliance on the potential traffic problems on West Street, a street which is neither part of the parking lot for which site plan approval was sought nor immediately contiguous thereto, is explicitly authorized by the defendant's own regulations. If it is not then under the rule of *TLC Development, Inc. v. Planning and Zoning Commission,* [215 Conn. 527, 577 A.2d 288 (1990)], the defendant Commission acted illegally." *Compounce Associates. Ltd. Partnership* v. *Southington Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-89-043603S (June 28, 1991, *Holzberg, J.*) (4 Conn. L. Rptr. 262, 265).

In this case, §10.C.4 (a) (3) of the zoning regulations expressly conditions special permit approvals upon a finding by Planning that the proposed use "will not create conditions adversely affecting traffic safety or which will cause undue traffic congestion." Therefore, it was within the province of Planning to make determinations regarding both on-site traffic issues and traffic issues on the state highway beyond what had been approved by the STC. "The report of the State Traffic Commission . . . properly dealt with needed modifications and improvements to [the state highway], if the Commission decided to grant the special permit application of the [applicant]. . . . The Supreme Court . . . . has stated that an examination into special traffic consequences of a

given site is permissible when the regulations require it. The zoning regulations in this case specifically require it." (Citations omitted; internal quotation marks omitted) *Weiner* v. *New Milford Zoning Commission,* Superior Court, judicial district of Litchfield, Docket No. CV-95-0068930 (January 31, 1996, *Pickett, J.*).

Similarly, the plaintiff's argument that Judge Berger's well considered decision in *Hendels, Inc.* v. *Zoning Commission,* Superior Court, judicial district of Hartford, Docket No. CV-17-6074096-S (January 31, 2018, *Berger, J.*), obligated Planning to accept the findings of applicant's traffic expert and approve the special permit is unavailing. In *Hendels*, the commission conceded that traffic issues involved in the application were "technically complex issues that require[d] expert testimony." See id. In reviewing the subject site plan, traffic experts for both the commission and the applicant concluded that the proposed driveways "would not cause more congestion or traffic safety issues." Id. In this situation, Judge Berger concluded that the commission's decision conditioning approval on a limitation supported exclusively by anecdotal evidence offered by member of the public could not be upheld. Id.

In the present case, there was substantial evidence provided by the City's expert staff that the internal flow of traffic would be problematic both on and off the site. This evidence was sufficient for this court to uphold the propriety of Planning's second reason of denial.

3.

PLANNING'S THIRD REASON FOR DENIAL

Planning's third reason for denial is that the application did not satisfy three distinct sections of Danbury's zoning regulations. First, § 8.B.1. b. (1) (a) of the zoning regulations requires that "[t]he street providing access to a lot shall be suitably improved to accommodate the amount and types of traffic generated by the proposed use."

In this case, the applicant's traffic expert candidly acknowledged that conventional sources for measuring the traffic volumes likely to be associated with the proposed facility offered imperfect information because of the unusual characteristics of a drive-through convenience store offering coffee and donuts.[6] In addition, the town's traffic engineer, planning staff, and police chief all expressed concerns about potential traffic and safety issues surrounding the proposed facility's location, between two busy signalized intersections located fewer than three-hundred feet apart from one another. (PRPR#23,39,40) This latter condition resulted in the City's traffic engineer requesting shoulder widening "to facilitate safe and efficient eastbound right turns on to the site without causing potential rear end accidents." (PROR#23) The applicant's failure to adopt this request into its plan provided substantial evidence to support Planning's decision to reject the special permit application on the basis that it did not satisfy this section of the regulations. § 8.B.1. b. (1) (a) of the zoning regulations that "[t]he street providing access to a lot shall be suitably improved to accommodate the amount and types of traffic generated by the proposed use."

Next, Planning concluded that the proposed design for the facility violated § 8.C.5 (a) of the zoning regulations which requires that "[e]ach loading space shall be sufficient in size and arrangement to accommodate trucks of the type servicing the establishment." The applicant repeatedly represented that supplies for this facility would be delivered by trucks that are not more than 30 feet in length. (PROR#45B, p.20) The City's traffic engineer opined that even these 30 foot trucks "would be required to make unsafe backing maneuvers out of the one-way

[6] The testimony of the applicant's traffic expert Scott Hesketh was that: "[W]e are proposing a convenience store with a drive-through window. This is not a use that is included in the ITE data base. It is not a use we can readily go out and measure." (PROR#45B, p.6) In fact, because of the acknowledged unavailability of a reliable method to predict the traffic that might be generated by and/or use the facility, Hesketh conducted an actual traffic count at a nearby 7-11 convenience market to help inform Planning's decision making. (PROR#27,#45B,p.6-7) This facility did not, however, have a drive-through window through which coffee and donuts are served.

ingress (sic) driveway." (PROR#23) The resolution of denial articulates at length the congestion and safety issues associated with deliveries to the site occasioned by its physical limitations of the site. (PROR#42, p. 6-8) There is substantial evidence to support the commission's finding that the applicant failed to satisfy this section of the regulations governing loading spaces.

Lastly, Planning concluded that the proposed plan failed to satisfy § 10.D.11. a. (1) of the zoning regulations because it did not contain physical features that would make it impossible for drivers to make dangerous and traffic inhibiting left-hand turns when entering and exiting the facility. This failure was attributable to the need to design the ingress to and egress from the facility in a manner which would both accommodate delivery and refuse vehicles serving the property and serve to inhibit left hand turns into and out of the facility. This necessity required the construction a six foot wide center mountable curb in between twelve foot wide ingress and egress lanes. The applicant agreed to furnish signage in addition to the mountable curb in an attempt to prevent left-hand turns. The applicant was unable to install curbing features that would make the prohibited left hand turns a practical impossibility. The commission thus found on the basis of the plans, staff comments and testimony as well "as its own experience with left turn restrictions on sites of this nature" that the safeguards proposed by the applicant were inadequate to ensure "ingress and egress to the site which does not adversely impact the normal flow of traffic or normal safe conditions of the roadways" as expressly required in § 10.D.11. a (1) of the zoning regulations. Because there was substantial evidence both in the record and on the basis of the commissioners' personal experience with similar situations, this reason of denial must also be upheld.

PLANNING'S FOURTH REASON FOR DENIAL

Planning's final reason for denial centers on its conclusion that the proposed use did not satisfy the conditions contained in § 10.C.4 of the zoning regulations. This provision sets forth the specific requirements which must be satisfied in order for a special exception use to be approved by zoning.

Among other criteria, this regulation prescribes that a proposed use must "not create conditions adversely affecting traffic safety or which will cause undue traffic congestion;" (§ 10.C.4. a. (3)) and that the use "will not create conditions . . . . which will jeopardize public health and safety." (§ 10.C.4. a. (4)).

In the fourth reason of denial, Planning pointed to several considerations discussed in its second and third reasons for denial as also being the basis for its inability to find that the proposal would not "create conditions adversely affecting traffic safety." Specific traffic issues relied on in this section of the resolution of denial were the failure of the proposal (1) to include the shoulder widening recommended by the city traffic engineer, (2) to include physical barriers which would operate to prevent left-hand turns both into and out of the proposed facility and (3) the deficiencies in the internal traffic flow of the facility as articulated in the second reason of denial.

The commission also addressed the issue of "undue traffic congestion" in this fourth reason of denial. In so doing, it observed that "the Applicant's testimony and the information presented in the traffic study result in a confusing and at times inapplicable analysis of the traffic volumes generated by the proposed convenience store and drive-through use." As such, the commission found this information "unhelpful to the traffic analysis."

As noted above, during the public hearing on the application, the applicant's traffic expert candidly acknowledged that the Institute of Transportation Engineers ("ITE") Trip

Generation report table did not provide clear guidance for the proposed use because that use was not in ITE's data base.

In addition, while the City's traffic engineer indicated that "the current general Levels of Service at the signalized intersections of Old Ridgebury Road and Prindle Lane are generally satisfactory," he also noted that the queues for both eastbound and westbound traffic in front of the proposed facility normally stretch to a length that they would block ingress to and egress from the facility making left-hand turns "very challenging" and "potentially very unsafe." (PROR#23) Hesketh, the plaintiff's traffic expert, concurred that at peak hours, the queues on Mill Plain Road would extend past the proposed driveway to the facility. (PROR#17)

"[A]n administrative agency is not required to believe any witness, even an expert . . . . See also *Rinaldi* v. *Zoning & Planning Commission,* Superior Court, judicial district of Hartford, Docket No. CV–87–0331492–S (July 6, 1990, *Corradino*, J.) (2 Conn. L. Rptr. 844, 849) (providing if the question is, given evidence in the record raising this issue and adequate notice, can the commission, relying on its personal knowledge, reject the conclusion of the plaintiff's expert regarding traffic safety, the answer is an obvious yes). Nevertheless, the Supreme Court has also held that [a]lthough the commission would have been entitled to deny an application because it did not believe the expert testimony, however, the commission had the burden of showing evidence in the record to *support* its decision not to believe the experts—i.e., evidence which undermined either the experts' credibility or their ultimate conclusions. " (Citations omitted; internal quotation marks omitted) *Hendels, Inc.* v. *Zoning Commission*, supra, Superior Court, Docket No. CV-17-6074096S.

Here, there was substantial evidence in the record from the city's traffic engineer, police chief and planning staff which, taken together with the commissioners' own personal

familiarity with the site and the surrounding traffic, supports Planning's fourth reason of denial.[7] This reason of denial must, therefore, also be upheld.[8]

III.

CONCLUSION

For all of the reasons stated above, the plaintiff's appeals from the decisions of both Zoning, in approving the zone change (Docket # HHD-CV-17-6087235-S), and Planning in denying the special exception (Docket # HHD-CV-17-6087237-S), are dismissed.

Roraback, J.

RORABACK, J.

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[7] The court notes that as a general proposition "if a special permitted use would have a *significantly* greater impact on traffic congestion in the area than a use permitted as of right, the additional congestion may provide a basis for denying the permit .... Moreover, the significance of the impact should not be measured merely by the number of additional vehicles but by the effect that the increase in vehicles will have on the existing use of the roads. ... In making this determination, the commission may rely on statements of neighborhood residents about the nature of the existing roads in the area and the existing volume of traffic, and its own knowledge of these conditions." (citations and internal quotation marks omitted) *Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning & Zoning Commission,* 285 Conn. 381, 434, 941 A.2d 868, 901 (2008) Given the unique and unusual nature of this application, Planning had a sufficient basis to deny the application on these grounds.

[8] Planning also determined in the fourth reason of denial that it could not make the finding required by § 10.C.4. a. (4) that the proposal "would not create conditions which will jeopardize public health and safety." This conclusion was rooted in the other determinations articulated in the third and fourth reasons of denial and is therefore also upheld as being supported by substantial evidence on the record.