WORKSHOP FOR
ZONING COMMISSION OF THE CITY OF DANBURY

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OUTLINE OF DISCUSSION TOPICS*

1. **ZONING COMMISSION POWERS AND DUTIES.**

   1. **Creature of Statute.**
      
      C.G.S. § 8-1 authorizes municipalities to create local zoning commissions.

   2. **Charter**
      
      Danbury has created its Zoning Commission through Charter § 2-2A.h(i) & (2).

   3. **Membership**
      
      9 regular members, 3 alternates.

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*This outline is intended as a quick reference to applicable requirements of the Connecticut General Statutes, the Zoning Regulations of the City of Danbury, governing court decisions. It is not intended as a substitute for direct review of these authorities. The Commission should consult with the office of the Corporation Counsel if it has any questions as to the applicability or scope of the authorities and principles outlined herein to particular applications.*
4. Functions:

a. **Legislative.**
   1. **Regulations** – Adopt and amend the Zoning Regulations. (Regulations §§ 10.A.1.a, 10.I.1)
   2. **Map** – Adopt and amend the Zoning Map. (Regulations §§ 10.a.1.a, 10.I.2)

b. **Administrative.**
   1. **Special Permits** - Hear and decide special permit applications for restaurants, liquor stores, cafes, taverns, grocery stores, package stores, breweries and distilleries (to extent retail sale of alcoholic beverages is involved). (Regulations § 3.F)
   2. **Motor Vehicle Repairers and Dealers** – Determine suitability of location. (Regulations § 10.A.1.a(1); C.G.S. § 14-54)
      - Commission acts as agent for State.
      - Commission determines if use is permitted in the district.
      - Commission should consider suitability of location and whether it will imperil public safety.
II. THE ZONING AND PLANNING PROCESS--AN OVERVIEW OF THE LEGISLATIVE FUNCTION.

A. THE CONSTITUTIONAL ORIGINS OF ZONING.

1. Original Ordinances. Zoning came about in the late 1800's-early 1900's. With the growth in numbers and concentrations of urban population came congestion, traffic, etc. Industrial/commercial uses began to locate in residential neighborhoods and vice versa. Original ordinances were nuisance abatement ordinances. They gradually evolved into plans for the overall development of the municipality in furtherance of the public interest.
2. **Village of Euclid** U.S. Supreme Court, 272 U.S. 365 (1926))--upheld the right of towns and cities to adopt regulations dividing a municipality into several districts and segregating residential, business and industrial uses apart from each other. The ordinance in question changed the plaintiff's land from industrial to residential, thus diminishing its value from its intended industrial use. Plaintiff argued that this was a taking of its property without due process.

The Court held that such regulations do not violate private property owners' due process rights because they are in furtherance of the "police power" -- i.e., the power of local government to protect the public health safety and welfare.
B. LEGISLATIVE ROOTS IN CONNECTICUT.

The Connecticut legislature has set forth the public health, safety and welfare purposes of zoning regulations in C.G.S. § 8-2.

Key language in § 8-2 reminds us of the overriding planning purposes of zoning regulations:

- "Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land."

- "[Z]oning regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."
• “All such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district...”

• “Regulations may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals ... subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values.”

• “Such regulations shall be made in accordance with a comprehensive plan and in adopting such regulations the commission shall consider the plan of conservation and development prepared under section 8-23.”
C.  **CORE ZONING PRINCIPLES.**

1. **Uniformity.**
   The regulations within a district must be uniform for each class and type of use.

2. **No Contract Zoning.**
   Conditions on zone changes generally are not allowed.

3. **Police Power.**
   The power to zone is not unlimited. Regulations must reasonably relate to the police power purposes of § 8-2, and will be declared to be a taking if they are so restrictive that they prevent all reasonable use of property.
4. **Vagueness.**
   A regulation also will be declared unconstitutional if it is too uncertain or vague to provide a sufficient standard for enforcement.

5. **Strict Construction of Zoning Regulations.**
   They limit private property rights; therefore must be narrowly construed in favor of property owner.

6. **“Permissive.”**
   Our regulations are permissive; what is not expressly allowed is **prohibited.**

7. **The Comprehensive Plan.**
   The “comprehensive plan” consists of the zoning regulations and map which divide the municipality into districts. All zoning regulations and boundaries must be consistent with the comprehensive plan. (C.G.S. § 8-2)
D. RELATIONSHIP OF ZONING TO PLANNING--THE "POCD."

- Planning is critical to good zoning.
- Planning Commission must adopt a Plan of Conservation and Development ("POCD") (C.G.S. § 8-23).
- POCD is basically a plan for the overall development of the community.
  - What types of uses go where?
- What is the most desirable density of population in the various districts of the City?
- What areas should be conserved?
- What are the goals for the physical and economic development of the City?
• The POCD is a recommendation, but the Zoning Commission must consider it in adopting or amending regulations and zoning districts. (C.G.S. § 8-2).

• Uses allowed in a zoning district must be compatible with stated purposes of the district (as found in the Zoning Regulations and the POCD).

• If not, the district becomes a mish-mash of incompatible uses, destroying the integrity of the zone, reducing property values, destroying property owners' reasonable expectations, etc. -- i.e., bad zoning undermines the POCD and its health, safety and welfare goals.

• Both the Zoning Commission and Planning Commission need to consider the POCD and make express findings on it when they are considering changes in regulations or zone boundaries. In other words, Is the proposed change consistent with the POCD? (C.G.S. § 8-3(b)); see also Regulations § 10.1.3 (considerations).
E. **ZONING IS NOT NUISANCE ABATEMENT.**

Nuisance – a use of property which is offensive and unreasonable.

Zoning is not nuisance abatement. It must be based on an overall plan that is in the best interests of the entire community.

-- The Supreme Court in Euclid said:

"The exclusion of places of business from residential districts is not a declaration that such places are nuisances ... but it is a part of the general plan by which the city’s territory is allotted to different uses, in order to prevent, or at least to reduce, the congestion, disorder, and dangers which often inhere in unregulated municipal development." 272 U.S. at 392-93.

Just because a proposed use is not a nuisance does not mean that it is appropriate for a particular zone. (For example, a small office building may not be a nuisance to a surrounding residential neighborhood but it may be inconsistent with the City’s plan.)
F. HIGHEST AND BEST USE DOES NOT CONTROL ZONING DECISIONS.

The highest and best use of a particular piece of property is not a controlling purpose of zoning, nor is the maximum possible enrichment of any particular landowner. Fuller, Land Use Law & Practice § 34.10 (2007). The purpose of zoning is to control the use of land to promote the public interest.
G. SPOT ZONING.

Spot zoning generally may be described as singling out “for special treatment a lot or a small area of land in a way that does not further the comprehensive plan.” Fuller, § 4.8.

To survive a spot zoning challenge, the change of zone must be in accord with the comprehensive plan and reasonably relate to the police power purposes set forth in C.G.S. § 8-2.

Spot zoning is inconsistent with the planning goal of an overall development plan in furtherance of the public interest.

- Fact - intensive!
H. CONSIDERATIONS IN AMENDING THE REGULATIONS OR ZONING MAP.

- Amendments to the regulations to allow a use in a specific zone are effective not only as to the applicant’s contemplated use of its property, but to all properties located in the zone.

- In exercising its legislative judgment the Commission can and should consider the amendment’s effect on all properties in the City located in the applicable zoning district. See Protect Hamden/North Haven from Excessive Traffic and Pollution, Inc. v. Planning & Zoning Comm’n, 220 Conn. 527, 547-48 (1991).

- A conceptual site plan submitted by the applicant with its zone change application does not limit the use of the property if the change is granted. Id. The Commission must consider the maximum development potential of the site if change is granted.

- Vote requirements (C.G.S. § 8-3(b))
  - Majority vote of entire Commission required (five votes).
  - Two-thirds vote of entire Commission required if protest filed at or before hearing by owners of twenty percent of lots included in the change or of lots within 500 feet of the subject property (six votes).
  - See pages 24-25 for Planning Commission referral requirements.
III. THE ADMINISTRATIVE PROCESS – MAKING THE DECISION.

A. SITE PLANS (Role of Planning & Zoning Dept.) – authorized by § 8-3.

- What is a site plan? A plan showing a proposed use on a specific site, showing all information required by the regulations for such use.

- It is required for all permitted and special exception and special permit uses (except 1-3 family dwellings). (Zoning Regulations § 10.D) It must meet requirements of the Regulations. (§ 10.D.3)

- A site plan can be approved, modified (to comply with the Regulations) or denied. A site plan can be modified or denied only if it fails to comply with requirements already set forth in the zoning or inland wetlands regulations. (C.G.S. § 8-3 (g))

- The decision must be based on specific criteria already set forth in the Regulations.
• If particular use is permitted as of right in the zone, a conclusive presumption arises that such a use in general will not adversely affect off-site traffic. Friedman v. Planning & Zoning Comm’n, 222 Conn. 262 (1992).

• Section 10.D.11a(i) of the Zoning Regulations allows inquiry into whether ingress or egress to the site will adversely impact the normal flow of traffic or normal safe conditions of the roadways.” This language does not mean that a site plan can be denied because of existing off-site traffic volumes and patterns. See Fuller, Land Use Law & Practice § 49.14 (1998 Supp.).
B. SPECIAL PERMITS/SPECIAL EXCEPTIONS.

- interchangeable terms in zoning law.

1. In Danbury the Zoning Commission issues Special Permits.

2. In Danbury the Planning Commission issues Special Exceptions.

3. What is a Special Permit /Special Exception use compared to a use permitted as of right?
• A use permitted as of right is one for which the Commission (through the Regulations) has already made the determination that a particular use is appropriate in a particular area.

• In contrast, in reviewing a special permit application the commission must determine, inter alia, whether it would be compatible with the zoning district and the existing structures permitted in that zone as of right.
• Basic principle – special permit/special exception uses may be generally compatible with permitted uses in a district, but because of their nature, their location and operation must be scrutinized because of topography, traffic problems, neighboring uses, etc. Barberino Realty v. Planning & Zoning Comm’n, 222 Conn. 607, 620 (1991).
C. THE 10.C.4 STANDARDS TO GRANT A SPECIAL PERMIT OR SPECIAL EXCEPTION.

The Commission must follow the standards set forth in the Zoning Regulations. The standards for approval are in § 10.C.4 of the Zoning Regulations. The Commission must find that the proposed use:

(1) will not emit noise, smoke, glare, odor, or vibration or other conditions which will create a nuisance having a detrimental effect on adjacent properties;

(2) is designed in a manner which is compatible with the character of the neighborhood;

(3) will not create conditions adversely affecting traffic safety or which will cause undue traffic congestion; and

(4) will not create conditions harmful to the natural environment or which will jeopardize public health and safety.
D. ADDITIONAL STANDARDS FOR SPECIAL PERMITS INVOLVING ALCOHOL SALES.

1. For Cafes, Taverns, Restaurants, Breweries, Distilleries, Grocery Stores, Package Stores (Regulations, § 3.F.2.b. through d.), Commission must find that:

(1) the proximity of such premises or buildings will not have a detrimental effect upon any adjacent school, church or other place of worship; and

(2) the location of such premises or buildings will not have a detrimental effect upon the immediate area with due consideration given to:

(a) the compatibility and impact of the use on the surrounding area, including adjacent residential neighborhoods, and

(b) the impact of the use upon traffic congestion and safety.

- If the proposed alcohol sales will cause or worsen traffic congestion (not merely an increase in traffic in general) or create a traffic hazard (safety), the Commission may deny a special permit in a proper case. Necessary traffic and highway improvements adjacent to the property may be a basis for a condition.

2. Planning & Zoning Department must approve (or waive) site plan before special permit application may be filed. Id., § 10.C.4.b.(3).
IV. OVERLAPPING JURISDICTION OF LAND USE AGENCIES; NOTICE AND REFERRAL REQUIREMENTS.

A. ADOPTION OF ZONING REGULATIONS AND BOUNDARIES.

1. Proposal must be referred to Planning Commission at least 35 days before start of hearing. (C.G.S § 8-3a)

   a. Planning Commission must issue report on consistency of proposed regulation/boundary change with plan of conservation and development and any other factors Planning Commission deems relevant.

   b. Report must be submitted prior to or at the Zoning Commission public hearing.

   c. Report must be read aloud at the Zoning Commission public hearing.
d. If no report, Planning Commission approval is implied.

e. If Planning Commission issues negative recommendation, amendment or boundary change may be adopted only upon vote of two-thirds of entire Zoning Commission (six votes).

NOTE – IF COMMISSION FAILS TO OBTAIN AND READ PLANNING COMMISSION’S REPORT INTO HEARING RECORD, COURT WILL OVERTURN THE ADOPTION OF THE PROPOSAL.

B. NOTICES AND REFERRALS TO OTHER AGENCIES.

1. Notice to Adjoining Municipality.

   Zoning Commission, Planning Commission, Zoning Board of Appeals and Wetlands Agency must notify clerk of any adjoining municipality of pendency of any application, petition, request or plan concerning any project on any site if any portion of the property affected by a decision is within 500 feet of the boundary of the adjacent municipality or if traffic, sewer or water, drainage or runoff will have impacts on the adjoining municipality, under specified circumstances. (C.G.S. § 8-7d(f))
   
   • Appears not to apply to zone changes.

2. Notice to Regional Planning Agency.

   Required for changes in zoning regulations or boundaries affecting use of a zone within 500 feet of boundary of another municipality within a regional planning agency area. Notice must be not later than thirty (30) days before hearing. (C.G.S. § 8-3b)
3. Notice by Applicant to Water Companies.

Required for any application to Zoning Commission, Planning Commission, or Zoning Board of Appeals concerning any project on any site within the watershed of a "water company," provided the water company has filed a map showing boundaries of the watershed on the land records and with the zoning commission, planning and zoning commission or zoning board of appeals. (C.G.S. § 8-3; § 22a-42f)

4. Wetlands.

- If any application for a boundary change involves a site on which there are wetlands or watercourses, the Commission should review whether any § 8-2 factors are implicated.

- If application for special permit/special exception involves a regulated wetlands activity, applicant must submit wetlands application to EIC no later than the day the special permit/special exception application is filed. (C.G.S. § 8-3c).

- Commission must wait for EIC decision, must give "due consideration" to EIC decision. (Id.)
V. PROTECTING THE DECISION: PROBLEM ISSUES.

A. PARTICIPATION IN THE HEARING PROCESS.

Allow public to inspect all documents and plans submitted.

1. Include all written reports and comments in hearing record (log in exhibits; read aloud regional planning agency and Planning Commission reports on zone changes).

2. Identify speakers.

3. Provide interested persons fair opportunity to comment, introduce exhibits; parties must be allowed to examine and cross examine witnesses (through the Chair).

4. Adopt and adhere to a basic protocol for conducting the hearing (Robert’s Rules, e.g.) – direct all questions to Chair, speak clearly and not until recognized by Chair. Bottom line: create a clean, organized record for appeal.

B. “EX PARTE” COMMUNICATIONS – COMMUNICATIONS OUTSIDE THE HEARING ROOM.

1. Avoid them. They create a presumption of prejudice; switches burden in any court appeal to the Commission to show that communication did not affect decision.

2. If you are contacted, decline to discuss the matter, put the contact on the record.

3. Even communications among Commission members should be avoided (no e-mails, texts, etc.) If you have a question on any application, contact the staff.
C. RECEIPT OF POST-HEARING EVIDENCE.

1. The Commission may not consider evidence (including public comment) after close of hearing; receipt and consideration of such information can invalidate decision. Basis for this rule is that consideration of any post-hearing evidence denies due process.

   • If you get anything from applicant or the public after close of hearing, give it to staff and note on the record that you have not considered it.

2. There is an exception for receipt of staff reports or guidance based on information already in the record.
D. ROLE OF STAFF.

1. Department's role is to act as your advisor and consultant; it provides guidance on technical issues, City policies, precedents, and procedures; historical information on the regulations and on particular sites.

2. Important to understand the differing roles of staff (guidance) v. petitioner representatives (advocacy).


   • Excellent case study on powers of our commissions.
   • Summarizes role of Planning Director and staff in providing professional guidance to commissions.
E. TESTIMONY BY EXPERTS.

1. Commission need not believe any witness, even an expert. But as to technical matters, Commission cannot ignore the only expert evidence on a technical issue without putting on the record the basis for its disagreement with the expert and allowing the applicant and public opportunity to address concerns. *Milardo*, 27 Conn. App. 214, 222.

2. If Commission intends to use its own expertise or knowledge of a site, it must disclose that expertise or knowledge during the hearing, as well as material facts on which it is relying, and give the applicant a chance to respond or rebut. (See 40 Conn. App. 501, 509)

3. But the Commission may rely on its own knowledge and experience and observations of a site, including matters involving traffic congestion and traffic safety.
F. SITE VISITS.

1. Site visits are authorized and appropriate.

2. A site visit is not part of the public hearing, and thus compliance with the formal notice requirements for public hearings is not required, and agency members may vote on an application even though they have not attended this site inspection. Grimes v. Conservation Comm'n, 49 Conn. App. 95 (1998). Agency members, however, must disclose at the next hearing session after the site visit any information they obtained during the site inspection.

3. The Commission members should not ask questions about the substance of the application. You are not there to listen to questions or comments from the applicant or the public. Those are best addressed at the public hearing.
4. If a quorum of members plans to attend the site inspections, it should be noticed as a special meeting, open to the public. If landowner refuses to allow public to attend the site inspection, this may be deemed an FOI violation (as an illegal closed meeting).
G. RIGHT OF MEMBERS ABSENT FROM HEARING TO PARTICIPATE IN DECISION.

1. In order to participate and vote on petition, a member (or an alternate duly seated) should review entire record (including documents and hearing tapes) and state that on the record. If not, the member can be disqualified by court. This jeopardizes the decision.

--Alternates--Alternates can participate in public hearing, but if not seated for the decision, may not participate in decision process (no comments or questions).
H. CONFLICTS OF INTEREST, DISQUALIFICATION.

1. Prejudgment – Do not take a public position on an application before application has been heard or considered. This does not mean that a member cannot hold opinions or express preliminary concerns. Avoid statements before or during hearing suggesting you’ve made up your mind.

2. No member of a planning commission, zoning commission or zoning board of appeals may appear for or represent any person in any matter pending before any of those three agencies. Members of any other land use commission (including wetlands agencies) cannot appear for or represent others before their own commissions. (C.G.S. §§ 8-11, 8-21, 7-148f, 22a-42(c))

3. No member of any land use commission may participate in hearing or decision on any matter in which member is directly or indirectly interested in a personal or financial sense. (ld.)

When in doubt, get out.
I. THE DECISION.

1. Land use commissions need to adhere to standards and criteria set forth in their respective regulations.

2. The Commission should adopt a collective statement of reasons.
   a. General rule -- court will not go behind reasons stated by the Commission. (But recent court decisions have moved away from this rule.)

3. Statement of an individual member’s reasons is not the collective reasoning of the Commission.

4. Better practice – state reasons; it focuses the Commission on the evidence and on its standards as set out in the Regulations.
J. CONCLUSION.

- Questions.

- Thank you for your dedication and service to the City!
Sec. 8-2. Regulations. (a) The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes, including water-dependent uses, as defined in section 22a-93, and the height, size, location, brightness and illumination of advertising signs and billboards. Such bulk regulations may allow for cluster development, as defined in section 8-18. Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district, and may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, whichever commission or board the regulations may, notwithstanding any special act to the contrary, designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. Such
regulations shall be made in accordance with a comprehensive plan and in adopting such regulations the commission shall consider the plan of conservation and development prepared under section 8-23. Such regulations shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. Such regulations may, to the extent consistent with soil types, terrain, infrastructure capacity and the plan of conservation and development for the community, provide for cluster development, as defined in section 8-18, in residential zones. Such regulations shall also encourage the development of housing opportunities, including opportunities for multifamily dwellings, consistent with soil types, terrain and infrastructure capacity, for all residents of the municipality and the planning region in which the municipality is located, as designated by the Secretary of the Office of Policy and Management under section 16a-4a. Such regulations shall also promote housing choice and economic diversity in housing, including housing for both low and moderate income households, and shall encourage the development of housing which will meet the housing needs identified in the state's consolidated plan for housing and community development prepared pursuant to section 8-37t and in the housing component and the other components of the state plan of conservation and development prepared pursuant to section 16a-26. Zoning regulations shall be made with reasonable consideration for their impact on agriculture, as defined in subsection (q) of section 1-1. Zoning regulations may be made with reasonable consideration for the protection of historic factors and shall be made with reasonable consideration for the protection of existing and potential public surface and ground drinking water.
supplies. On and after July 1, 1985, the regulations shall provide that proper provision be made for soil erosion and sediment control pursuant to section 22a-329. Such regulations may also encourage energy-efficient patterns of development, the use of solar and other renewable forms of energy, and energy conservation. The regulations may also provide for incentives for developers who use passive solar energy techniques, as defined in subsection (b) of section 8-25, in planning a residential subdivision development. The incentives may include, but not be limited to, cluster development, higher density development and performance standards for roads, sidewalks and underground facilities in the subdivision. Such regulations may provide for a municipal system for the creation of development rights and the permanent transfer of such development rights, which may include a system for the variance of density limits in connection with any such transfer. Such regulations may also provide for notice requirements in addition to those required by this chapter. Such regulations may provide for conditions on operations to collect spring water or well water, as defined in section 21a-150, including the time, place and manner of such operations. No such regulations shall prohibit the operation of any family child care home or group child care home in a residential zone. No such regulations shall prohibit the use of receptacles for the storage of items designated for recycling in accordance with section 22a-241b or require that such receptacles comply with provisions for bulk or lot area, or similar provisions, except provisions for side yards, rear yards and front yards. No such regulations shall unreasonably restrict access to or the size of such receptacles for businesses, given the nature of the business and the volume of items designated for recycling in accordance with section 22a-241b, that such business produces in its normal course of business, provided nothing in this section shall be construed to prohibit such regulations from requiring the screening or buffering of such receptacles for aesthetic reasons. Such regulations shall not impose conditions and requirements on manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards or on lots containing such manufactured homes
which are substantially different from conditions and requirements imposed on single-family dwellings and lots containing single-family dwellings. Such regulations shall not impose conditions and requirements on developments to be occupied by manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards which are substantially different from conditions and requirements imposed on multifamily dwellings, lots containing multifamily dwellings, cluster developments or planned unit developments. Such regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations or require a special permit or special exception for any such continuance. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use. Such regulations shall not terminate or deem abandoned a nonconforming use, building or structure unless the property owner of such use, building or structure voluntarily discontinues such use, building or structure and such discontinuance is accompanied by an intent to not reestablish such use, building or structure. The demolition or deconstruction of a nonconforming use, building or structure shall not by itself be evidence of such property owner's intent to not reestablish such use, building or structure. Unless such town opts out, in accordance with the provisions of subsection (j) of section 8-lbb, such regulations shall not prohibit the installation of temporary health care structures for use by mentally or physically impaired persons in accordance with the provisions of section 8-lbb if such structures comply with the provisions of said section. Any city, town or borough which adopts the provisions of this chapter may, by vote of its legislative body, exempt municipal property from the regulations prescribed by the zoning commission of such city, town or borough; but unless it is so voted municipal property shall be subject to such regulations.
(b) In any municipality that is contiguous to Long Island Sound the regulations adopted under this section shall be made with reasonable consideration for restoration and protection of the ecosystem and habitat of Long Island Sound and shall be designed to reduce hypoxia, pathogens, toxic contaminants and floatable debris in Long Island Sound. Such regulations shall provide that the commission consider the environmental impact on Long Island Sound of any proposal for development.

(c) In any municipality where a traprock ridge, as defined in section 8-1aa, or an amphibolite ridge, as defined in section 8-1aa, is located the regulations may provide for development restrictions in ridgeline setback areas, as defined in said section. The regulations may restrict quarrying and clear cutting, except that the following operations and uses shall be permitted in ridgeline setback areas, as of right: (1) Emergency work necessary to protect life and property; (2) any nonconforming uses that were in existence and that were approved on or before the effective date of regulations adopted under this section; and (3) selective timbering, grazing of domesticated animals and passive recreation.

(d) Any advertising sign or billboard that is not equipped with the ability to calibrate brightness or illumination shall be exempt from any municipal ordinance or regulation regulating such brightness or illumination that is adopted by a city, town or borough after the date of installation of such advertising sign or billboard pursuant to subsection (a) of this section.
Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)
47 S.Ct. 114, 54 A.L.R. 1016, 71 L.Ed. 303, 4 Ohio Law Abs. 816

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Sullivan Properties, Inc. v. City of Winter Springs,
M.D.Fla., September 25, 1995

47 S.Ct. 114
Supreme Court of the United States.

VILLAGE OF EUCLID, OHIO, et al.
v.
AMBLER REALTY CO.

No. 31.
Reargued Oct. 12, 1926.
Decided Nov. 22, 1926.

Synopsis
Mr. Justice Van Devanter, Mr. Justice McReynolds, and Mr.
Justice Butler dissenting.

Appeal from the District Court of the United States for the
Northern District of Ohio.

Suit by the Ambler Realty Company against the Village of
Euclid, Ohio, and another. From a decree for plaintiff (297
F. 307), defendants appeal. Reversed.

94 Cases that cite this headnote

  Propriety of classification and uniformity of
  operation in general
Zoning and Planning
  Classification of property; size and
  boundary of zones
Zoning and Planning
  Classification of property
If validity of legislative classification for
zoning purposes be fairly debatable, legislative
judgment must be allowed to control.

232 Cases that cite this headnote

  Matters affecting validity in general
Zoning and Planning
  Standards governing conduct of
  administrative officials
Zoning law, drawn in general terms and
providing reasonable margin to secure effective
enforcement, will not be held invalid because
individual cases may turn out to be innocuous in
themselves.

36 Cases that cite this headnote

  Matters affecting validity in general
That zoning ordinance of village, which is suburb
of city, will divert industrial development of city
from course which it would naturally follow does
not render it invalid.

38 Cases that cite this headnote

[8] Zoning and Planning
  Matters affecting validity in general
Zoning and Planning
  Public health, safety, morals, or general
  welfare
Zoning ordinance must be clearly arbitrary and
unreasonable and without substantial relation to
Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)
47 S.Ct. 114, 54 A.L.R. 1016, 71 L.Ed. 303, 4 Ohio Law Abs. 816

public health, safety, morals, or general welfare before it can be declared unconstitutional.

905 Cases that cite this headnote

[10] Constitutional Law
  ➔ Scope of inquiry in general

Constitutional Law
  ➔ Necessity of Determination

It is the policy of the Supreme Court in considering matters of constitutional law not to formulate rules or decide questions beyond necessities of immediate issue.

18 Cases that cite this headnote

186 Cases that cite this headnote

  ➔ Zoning and Land Use

Zoning and Planning
  ➔ Uses permitted or excluded

Zoning ordinance, excluding apartment houses, business houses, retail stores, and shops from residential district, held not invalid.

202 Cases that cite this headnote

Attorneys and Law Firms

**115  *367 Mr. James Metzenbaum, of Cleveland, Ohio, for appellants.

*371 Messrs. Newton D. Baker and Robert M. Morgan, both of Cleveland, Ohio, for appellee.

Opinion

*379 Mr. Justice SUTHERLAND delivered the opinion of the Court.

The village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the city of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from 12 to 14 square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately 3 1/2 miles each way. East and west it is traversed by three principal highways: Euclid avenue, through the southerly border, St. Clair avenue, through the central portion, and Lake Shore boulevard, through the northerly border, in close proximity to the shore of Lake Erie. The Nickel Plate Railroad lies from 1,500 to 1,800 feet north of Euclid avenue, and the Lake Shore Railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid avenue to the south and the Nickel Plate Railroad to the north. Adjoining this tract, both on the east and on the west, there
have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the village council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, *380 industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries, and truck gardening; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds, and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, **116 studios, telephone exchanges, fire and police stations, restaurants, theaters and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs, and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, electric substations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks), and distributing stations for central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works milk bottling and central distribution stations, laundries, carpet cleaning, dry cleaning, and dyeing establishments, *381 blacksmith, horseshoeing, wagon and motor vehicle repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or motor trucks), and wholesale produce markets and salesroom; U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper, and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble-minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4, or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative—that is to say, uses in class U-2 include those enumerated in the preceding class U-1; class U-3 includes uses enumerated in the preceding classes, U-2, and U-1; and so on. In addition to the enumerated uses, the ordinance provides for accessory uses; that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of 2 1/2 stories, or 55 feet; in class H-2, to 4 stories, or 50 feet; in class H-3, to 30 feet. To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: In A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2,000 square feet for corner lots; in A-3 *382 districts, the limits are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively. The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side, and rear yards, and other matters, including restrictions and regulations as to the use of billboards, signboards, and advertising signs.

A single family dwelling consists of a basement and not less than three rooms and a bathroom. A two-family dwelling consists of a basement and not less than four living rooms and a bathroom for each family, and is further described as a detached dwelling for the occupation of two families, one having its principal living rooms on the first floor and the other on the second floor.

Appellee's tract of land falls under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semipublic buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries.
theaters, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive. 1

*383 Annexed to the ordinance, and made a part of it, is a zone map, showing the location and limits of the various use, height, and area districts, from which it appears that the three classes overlap one another; that is to say, for example, both U-5 and U-6 use districts are in A-4 area district, but the former is in H-2 and the latter in H-3 height districts. The plan is a complicated one, and can be better understood by an inspection of the map, though it does not seem necessary to reproduce it for present purposes.

The lands lying between the two railroads for the entire length of the village area and extending some distance on either side to the north and south, having an average width of about 1,600 feet, are left open, with slight exceptions, for industrial and all other uses. This includes the larger part of appellee's tract. Approximately one-sixth of the area of the entire village is included in U-5 and U-6 use districts. That part of the village lying **117 south of Euclid avenue is principally in U-1 districts. The lands lying north of Euclid avenue and bordering on the long strip just described are included in U-1, U-2, U-3, and U-4 districts, principally in U-2.

The enforcement of the ordinance is intrusted to the inspector of buildings, under rules and regulations of the board of zoning appeals. Meetings of the board are public, and minutes of its proceedings are kept. It is authorized to adopt rules and regulations to carry into effect provisions of the ordinance. Decisions of the inspector of buildings may be appealed to the board by any person claiming to be adversely affected by any such decision. The board is given power in specific cases of practical difficulty or unnecessary hardship to interpret the ordinance in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secure and substantial justice done. Penalties are prescribed for violations, and it is provided that the various *384 provisions are to be regarded as independent and the holding of any provision to be unconstitutional, void or ineffective shall not affect any of the others.

The ordinance is assailed on the grounds that it is in derogation of section 1 of the Fourteenth Amendment to the federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the state of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions. The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement, 297 F. 307.

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path or progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2,500 per acre; that the first 200 feet of the parcel back from Euclid avenue, if unrestricted in respect of use, has a value of $150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land, so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial, and residential uses in the metropolitan district of Cleveland *385 are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial, and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected use and development of that part of appellee's land adjoining Euclid avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal and reasonably to be expected use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses, to which perhaps should be added-if not included in the foregoing-restrictions in respect of apartment houses. Specifically there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries, and other public and semipublic
buildings. It is neither alleged nor proved that there is or may be a demand for any part of appellee's land for any of the last-named uses, and we cannot assume the existence of facts which would justify an injunction upon this record in respect to this class of restrictions. For present purposes the provisions of the ordinance in respect of these uses may therefore be put aside as unnecessary to be considered. It is also unnecessary to consider the effect of the restrictions in respect of U-1 districts, since none of appellee's land falls within that class.

*386 We proceed, then, to a consideration of those provisions of the ordinance to which the case as it is made relates, first disposing of a preliminary matter.

[1] A motion was made in the court below to dismiss the bill on the ground that, because complainant (appellee) had made no effort to obtain a building permit or apply to the zoning board of appeals for relief, as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled, the effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses, and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming **118 the premises, the existence and maintenance of the ordinance in effect constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See Terrace v. Thompson, 263 U. S. 197, 215, 44 S. Ct. 15, 68 L. Ed. 255; Pierce v. Society of Sisters, 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468.

It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions, namely, as stated by appellee: Is the ordinance invalid, in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory"?

[2] [3] [4] Building zone laws are of modern origin. They began in this county about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in *387 urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim 'sic utere tuo ut alienum non laedes,' which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining *388 the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. Sturgis v. Bridgeman, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Radice v. New York, 264 U. S. 292, 294, 44 S. Ct. 325, 68 L. Ed. 690.

5 Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves.

Hebe Co. v. Shaw, 248 U. S. 297, 303, 39 S. Ct. 125, 63 L. Ed. 255; Pierce Oil Corp. v. City of Hope, 248 U. S. 498, 500, 39 S. Ct. 172, 63 L. Ed. 381. The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise *399 valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are *419 not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect ‘passes the bounds of reason and assumes the character of a merely arbitrary fiat.’ Purity Extrait Co. v. Lynch, 226 U. S. 192, 204, 33 S. Ct. 44, 47 (57 L. Ed. 184). Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

[6] It is said that the village of Euclid is a mere suburb of the city of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village, and in the obvious course of things will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities *390 separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

[7] We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all.


As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way. For example, compare State ex rel. v. Houghton, supra, sustaining the power, with State ex rel. Lachman v. Houghton, 134 Minn. 226, 158 N. W. 1917, L. R. A. 1917F, 1050, State ex rel. Roerig v. City of Minneapolis, 136 Minn. 479, 162 N. W. 477, and Vorlander v. Hokenson, 145 Minn. 484, 175 N. W. 995, denying it, all of which are disapproved in the Houghton Case (page 151 (204 N. W. 569)) last decided.

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and **120 safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and ‘factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on.

*392 The Supreme Court of Illinois, in City of Aurora v. Burns, supra, pages 93-95 (149 N. E. 788), in sustaining a comprehensive building zone ordinance dividing the city into eight districts, including exclusive residential districts for one and two family dwellings, churches, educational institutions, and schools, said:

"The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions. *

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* * * The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits, and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety, and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and the of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. *

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* * * The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses, in order to prevent, or at least to reduce, the congestion, disorder, and dangers *393 which often inhere in unregulated municipal development."

The Supreme Court of Louisiana, in State v. City of New Orleans, supra, pages 282, 283 (97 So. 444), said:

"In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place,
the zoning of a city into residence districts and commercial districts is a matter of economy is street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. ***

Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. ***

If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.'

*394 The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from **121 their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances. *395 apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

[8] If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Cusack Co. v. City of Chicago, supra, pages 530-531 (37 S. Ct. 190);


[9] It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not *396 made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. Turpin v. Lemon, 187 U. S.
Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)
47 S.Ct. 114, 54 A.L.R. 1016, 71 L.Ed. 303, 4 Ohio Law Abs. 816

51, 60, 23 S. Ct. 20, 47 L. Ed. 70. In Railroad Commission Cases, 116 U.S. 307, 335-337, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636, this court dealt with an analogous situation. There an act of the Mississippi Legislature, regulating freight and passenger rates on intrastate railroads and creating a supervisory commission, was attacked as unconstitutional. The suit was brought to enjoin the commission from enforcing against the plaintiff railroad company any of its provisions. In an opinion delivered by Chief Justice Waite, this court held that the chief purpose of the statute was to fix a maximum of charges and to regulate in some matters of a police nature the use of railroads in the state. After sustaining the constitutionality of the statute 'in its general scope' this court said:

'Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it any effect whatever as against this company.'

Quoting with approval from the opinion of the Supreme Court of Mississippi, it was further said:

'Many questions may arise under it not necessary to be disposed of now, and we leave them for consideration when presented.'

And finally:

'When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid.'

The relief sought here is of the same character, namely, an injunction against the enforcement of any of the restrictions, limitations, or conditions of the ordinance. And the gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumerated uses because of the general and broad restraints of the ordinance. What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands, is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

[10] And this is in accordance with the traditional policy of this court. In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must **122 be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Decree reversed.

Mr. Justice VAN DEVANTER, Mr. Justice McreYNOLDS, and Mr. Justice BUTLER dissent.

All Citations

272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016, 4 Ohio Law Abs. 816
Footnotes

1 The court below seemed to think that the frontage of this property on Euclid avenue to a depth of 150 feet came under U-1 district and was available only for single family dwellings. An examination of the ordinance and subsequent amendments, and a comparison of their terms with the maps, shows very clearly, however, that this view was incorrect. Appellee's brief correctly interpreted the ordinance: "The northerly 500 feet thereof immediately adjacent to the right of way of the New York, Chicago & St. Louis Railroad Company under the original ordinance was classed as U-6 territory and the rest thereof as U-2 territory. By amendments to the ordinance a strip 630(620) feet wide north of Euclid avenue is classed as U-2 territory, a strip 130 feet wide next north as U-3 territory and the rest of the parcel to the Nickel Plate right of way as U-6 territory."
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 window² (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 restaurants in the CA-80 zone which was contained in the existing zoning regulations (ZROR #2, #4).

² 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 § 3.13.2 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, 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.

*3 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

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 Handen/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.”

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 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.

"5 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 intention 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 resealed 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

*6 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 protractive 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.

*7 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 \cite{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. \cite{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.” \cite{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. 475, 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.” \cite{DeMaria v. Planning & Zoning Commission, 159 Conn. 534, 541, 271 A.2d 105 (1970)}.

*8 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 ground 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 restaurant,” 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.”

PLANNING’S SECOND REASON FOR DENIAL

*9 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 § 3.1.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 § 3.1.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 “[i]t thus, 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 *1 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-950068930 (January 31, 1996, Pickett, J).

*10 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 “[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. 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 (PROR #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 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.

11 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-874331492-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.

*12 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

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.

All Citations

Not Reported in Atl. Rptr., 2019 WL 2137321

Footnotes

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.

3. § 2.8 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: Blain 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 re-filed, 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.
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 found it's holding to be inapplicable to the present case.

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, 445B, p. 6-7). This facility did not, however, have a drive-through window through which coffee and donuts are served.

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.

Planning also determined in the fourth reason of denial that it could not make the finding required by § 10.4. 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.