DOCKET NO. LLI-CV-15-6013033-S	:	SUPERIOR COURT
LIME ROCK PARK, LLC	:	JUDICIAL DISTRICT OF LITCHFIELD
v.	:	
PLANNING & ZONING COMMISSION OF THE TOWN OF SALISBURY	:	FEBRUARY 9, 2016

REPLY OF LIME ROCK CITIZENS COUNCIL TO PLAINTIFF'S OBJECTION TO MOTION TO INTERVENE AS PARTY DEFENDANT

Lime Rock Citizens Council, LLC ("LRCC") files this Reply to the February 2, 2016 Objection of plaintiff Lime Rock Park, LLC (the "Racetrack") to LRCC's Motion to Intervene dated January 19, 2016.

In its Motion and supporting Memorandum of Law, LRCC briefed why it meets the standards for associational standing. The Racetrack has not challenged LRCC's associational standing, and it also concedes that LRCC's Motion is timely. Therefore, this Reply focuses solely on three issues raised by the Racetrack: (1) whether LRCC and its members have substantial and differentiated interests at stake in this appeal; (2) whether the defendant Planning and Zoning Commission ("PZC") can represent LRCC's interests; and (3) whether LRCC's intervention should be denied on the ground that it might delay or obstruct a settlement.

I. FACTS ON WHICH LRCC'S INTERVENTION IS BASED DEMONSTRATE THE NECESSITY OF ITS INTERVENTION.

"For purposes of judging the satisfaction of the conditions for intervention, we look to the pleadings . . . and . . . we accept the allegations in those pleadings as true." *Kerrigan v. Commissioner of Public Health,* 279 Conn. 447, 457 (2006).

Several facts contained in the Racetrack's appeal and LRCC's intervention petition merit highlighting as they are responsive to the Objection:[1]

[1] As *Kerrigan* holds, intervention can be decided based on accepting the proposed intervenor's petition allegations as true. However, it should also be noted that LRCC filed with

- LRCC's institutional members include Racetrack abutters Trinity Episcopal Church and the Lime Rock Cemetery Improvement Association;

- The Church and the Cemetery Association are *parties* to the various injunction actions, *Adams v. Vaill* and the three "ZBA cases," now pending before this Court (of which the Court may take judicial notice), and some of LRCC's individual members are successors to the individual property owner parties in those cases;

- In the *Adams v. Vaill* and the ZBA cases, the Racetrack has moved to modify the terms of the injunctions and stipulated judgments;

- When it adopted the amended Zoning Regulation at issue in this appeal in November 2015, the PZC expressly adopted as regulations the terms of the injunctions entered in those cases, and thus LRCC's institutional and individual members not only have a direct and substantial interest in the precise wording of the amended regulations as adopted, but also an interest different from the PZC, *which is not a party to those actions*, in the relationship of the amended regulations to the injunction terms, including any proposed modification of those terms; and

- While the PZC is interested in the amended regulations as a regulatory tool, the LRCC and its members are primarily interested in the on-the-ground *impacts* of the Racetrack's compliance with the amended regulations, with noise – which the Racetrack claims (Objections at 4 n.2) is beyond the PZC's authority – being a prime example, and thus LRCC has a substantial, important, and different interest should any settlement discussions arise.

II. LRCC SATISFIES REQUIREMENTS FOR INTERVENTION AS-OF-RIGHT.

Connecticut law requires courts to permit the addition of a party when a nonparty seeking to intervene "has an interest or title which the judgment will affect." General Statutes § 52-107; Practice Book § 9-18. Although a decision on a motion to intervene rests within the sound

_____ (continued)
the PZC during the public hearing an extensive package dated October 19, 2015, excerpt attached as Exhibit A, describing LRCC's institutional and individual membership and their direct interest in the impacts that result from the operation of the Racetrack, and commenting on the text of the proposed (and then adopted) zoning regulation amendments. In addition, if needed to testify, LRCC will have representatives of its institutional members present in court on February 23, 2016.

discretion of the trial court, "[i]t must be kept in mind, however, that the rules of intervention should be liberally construed, in order to avoid a multiplicity of suits and settle all related controversies in one action." *Schaghticoke Tribal Nation v. Harrison*, 264 Conn. 829, 838-39 (2003).

The LRCC has several substantial and direct interests in this appeal. The land use issues in this case are the *impacts* of the Racetrack on abutting and neighboring properties, principally noise and traffic, and days of operation. The Church and Cemetery Association are abutters and would be statutorily aggrieved if appellants from a PZC decision. Noise impacts alone would entitle numerous individual property owners in the vicinity of the Racetrack to be classically aggrieved and entitled to appeal. Moreover, as shown by Exhibit A and the Racetrack's appeal itself, the final zoning regulations as adopted by the PZC were shaped in part by testimony and evidence from LRCC presented at the public hearing session on October 19, 2015. LRCC thus has a different interest in these provisions as compared to the PZC, and seeks to defend that interest. In other words, the LRCC is, in effect, a necessary and indispensable party to this appeal, the type of central participant held necessary in *see*, *Fong v. Planning and Zoning Board*, 212 Conn. 628, 632-34 (1989).

In addition, a central issue in this appeal (Appeal ¶ 28) is the legality of the PZC's adoption as regulations of the terms of the injunctions in *Adams v. Vaill* and the ZBA cases. Indeed, the central theme of LRCC's October 19, 2015 presentation to the PZC was that regulation of the Racetrack does not belong in this Court through private injunction cases, but with the PZC through zoning regulations. LRCC thus has a direct and substantial interest in the PZC's adoption of the private injunction terms as regulations, and brings to this appeal the different perspective and situation of having members who are parties to those private injunction cases.

The Racetrack is trying to divide and conquer. It would like to use the outcome of this appeal to collaterally attack the existing judgments in the 1959 injunction and 1977-78 ZBA actions, and to do so without LRCC's involvement. This would be improper and inequitable in

any event, but this tactic is particularly outrageous in light of the fact that the Racetrack has also objected to LRCC's motions to intervene in the motions filed by the Racetrack, relating to the 1959 injunction action and 1977-78 ZBA actions, to modify the injunctions. In fact, objections filed by the Racetrack in those cases argue that LRCC should not be granted associational standing and that LRCC's individual members should be required to file individual nuisance actions. What Lime Rock Park *wants* is "a multiplicity of suits" and a piecemeal resolution of controversies – with LRCC and its members excluded from involvement as much as possible – thus thwarting one of the primary purposes of intervention, which is to avoid a multiplicity of suits and to settle all related controversies in one action.

LRCC, through its abutter / institutional members, individual property owner members who live in the vicinity of the Racetrack and are directly at risk from its noise and traffic impacts, and the roles of these parties in the pending injunction modification actions and in shaping the text of the specific amendments at issue in this appeal, meet the requirements for intervention as-of-right.

As to the adequacy of the PZC representing LRCC, "The burden for establishing inadequate representation of similar interests is minimal." *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 60 Conn. App. 134, 149-150 (2000). "The particular circumstances of each case will dictate whether the [movant] has an interest different from that of an existing party, and doubts should be resolved in favor of intervention." *Id.* For example, inadequate representation was demonstrated where a party could have argued the intervenor's position, but the intervenor was "in a better position to defend its own procedures." *See Milford v. Local 1566*, 200 Conn. 91, 95 (1986). Likewise, representation was deemed inadequate where the applicants' direct and limited interest was quite distinguishable from broad, general concerns of the plaintiffs. *See, State Board of Education v. Waterbury*, 21 Conn. App. 67, 74 (1990). The facts outlined above, most notably the fact that the amended zoning regulations adopt the terms from the private injunction cases to which LRCC members are parties and the PZC is not, demonstrate that LRCC has distinguishable interests that it should be allowed to represent.

III. LRCC'S ALLEGATIONS SATISFY REQUIREMENTS FOR PERMISSIVE INTERVENTION.

With respect to delay and obstruction of settlement, LRCC has done nothing to delay the progress of this appeal. No record has been filed and no negotiations have begun, let alone advanced to a point where LRCC is interfering with a settlement that the PZC and Lime Rock Park have spent time and effort to reach.

While quoting *Fuller*, § 27.21, the Racetrack neglects to mention that, immediately after the quoted statement about the potential for "sabotage" of a settlement, Fuller identifies intervention as "especially a problem when the attempted intervention is not made when the appeal is taken but later when the agency and the property owner of applicant have reached a settlement." Fuller then goes on to illustrate this point by citing cases where intervention was denied "when it was not filed until the plaintiff and the commission had entered into a stipulation to settle the appeal" and where a motion to intervene was "filed three days before the hearing on the settlement." Neither Judge Fuller nor the Racetrack has cited any decision where a timely motion to intervene was denied on the grounds that it might potentially interfere with a future settlement. Our research found no case in which the Litchfield Superior Court denied a motion to intervene filed early in the proceedings in a zoning appeal. In addition to the *Wykeham Rise* appeal included with LRCC's Memorandum, s*ee Crisman v. Zoning Board of Appeals,* 137 Conn. App. 61, 62 (2012); *Kraiza v. Planning and Zoning Commission*, 121 Conn. App. 478, 480 n.1 (2010); *Irwin v. Planning and Zoning Commission*, 244 Conn. 619, 621 n.2 (1998); *Optiwind v. Planning and Zoning Commission*, 2010 WL 4070580 *2 (Roche, J.) (Sept. 15, 2010), attached hereto as Exhibit B.

To the best of our knowledge, this Court has routinely granted motions to intervene (most frequently by abutting property owners) in zoning appeals so long as those motions were filed early in the proceedings. There is no legal, and certainly no factual, reason to reach a different

result in this appeal. Otherwise, the facts delineated above, especially the private injunction term / zoning regulation dichotomy, show that LRCC needs to be a party to any settlement discussion or resolution.

IV. CONCLUSION.

For the reasons discussed above and in its January 19, 2015 Motion and supporting Memorandum of Law, this Court should grant LRCC's timely Motion to Intervene and should overrule Lime Rock Park's Objection to LRCC's Motion.

PROPOSED INTERVENOR,
LIME ROCK CITIZENS COUNCIL, LLC

Timothy S. Hollister
Beth Bryan Critton
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103
Telephone: 860-251-5000
Facsimile: 860-251-5318
thollister@goodwin.com
bcritton@goodwin.com
Juris No. 057385
Its Attorneys

CERTIFICATION

I hereby certify that a copy of the foregoing Reply to Objection to Motion to Intervene as Party Defendant was electronically delivered, this 9th day of February, 2016, to all counsel of record and that written consent for electronic delivery has been received from counsel.

John L. Cordani, Jr., Esq.
Richard L. Street, Esq.
Carmody Torrance Sandak & Hennessey LLP
195 Church Street
P.O. Box 1950
New Haven, CT 06509
jlcordani@carmodylaw.com
rstreet@carmodylaw.com

James K. Robertson, Jr., Esq.
Maureen Danehy Cox, Esq.
Carmody Torrance Sandak & Hennessey LLP
50 Leavenworth Street
Waterbury, CT 06721
jrobertson@carmodylaw.com
mcox@carmodylaw.com

Charles R. Andres, Esq.
LeClair Ryan
545 Long Wharf Drive, 9th floor
New Haven, CT 06511
charles.andres@leclairryan.com

Beth Bryan Critton
Commissioner of the Superior Court

EXHIBIT A

PRESENTATION OF THE LIME ROCK CITIZENS COUNCIL, LLC

to the

SALISBURY PLANNING AND ZONING COMMISSION

regarding

PROPOSED AMENDMENTS TO THE SALISBURY ZONING REGULATIONS SECTIONS 205.2, 205.3, 221.1, AND DEFINITIONS

October 19, 2015

Timothy S. Hollister
thollister@goodwin.com
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919
PHONE: (860) 251-5000

Martin J. Connor, AICP
mjconnor@hotmail.com
20 Dresden Court West
Goshen, CT 06756
PHONE: (860) 485-3262

PRESENTATION OUTLINE

Lime Rock Citizens Council, LLC

Salisbury Planning and Zoning Commission
October 19, 2015

I. INTRODUCTION

A. Attorney Tim Hollister; Martin Connor, AICP; Sarah Wolf, Salisbury resident

B. As a team, we represent Lime Rock Citizens Council (LRCC), whose membership includes Trinity Episcopal Church, Lime Rock Cemetery Association (both of which abut Lime Rock Park), Music Mountain, and more than 300 individuals

C. Aerial photo of track showing location of Church, Cemetery, and Music Mountain submitted as an exhibit

D. In this presentation, LRCC will focus only on the proposed regulation

II. SUMMARY OF LRCC'S POSITIONS REGARDING PZC'S PROPOSED ZONING REGULATION AMENDMENTS

A. Support proposed incorporation of terms of Litchfield Superior Court injunction into Zoning Regulations, as a way to make the rules governing Lime Rock Park public information, and more importantly, to replace the current private party injunctions and stipulations with enforceable municipal regulation

B. In Section VI of this outline, strongly suggest improvements to several sections of proposed text of amendments

C. In general, LRCC does not oppose continued operation of Lime Rock Park in compliance with existing restrictions, but opposes Lime Rock Park's attempt to expand its operations by asking a Superior Court judge to modify the existing private lawsuit injunction, thereby bypassing the PZC and the Town. The proposed zoning regulation amendments are not only a fair and equitable but also necessary legal means for the Town to oversee and regulate a major land use within its borders.

D. As we will explain later (and in response to Attorney Andres' inquiry), the PZC unquestionably has the authority, through the special permit process, to control when and how auto racing occurs, including hours of operation

III. THE CURRENT ANOMALOUS LEGAL SITUATION

A. Lime Rock Park is controlled today by the terms of an injunction resulting from a 1959 lawsuit between the track owner and private citizens, and subsequent modifications of that injunction, because of two circumstances:

1. The track began operating before Salisbury adopted zoning in 1959; and

2. To date, the Town of Salisbury has allowed Lime Rock Park to keep operating without a zoning special permit or site plan approval because the Park has been generally (though not always) complying with the injunction

B. However, Lime Rock Park now wants to substantially modify the injunction – thus putting front and center the issue of the Town, through its PZC, stepping up to its obligation to supervise a major land use activity

C. Very important, widely misunderstood: Lime Rock Park *is currently a non-conforming use*, governed by Section 500 of Salisbury Zoning Regulations:

1. Non-conforming status acknowledged by Attorney Robertson (PZC September 8, 2015, p. 78)

2. **Stated by Superior Court in several stipulations and judgments**

3. **Park is non-conforming because even though a "Track for Racing Motor Vehicles" is a use listed in Section 221.1 of the Zoning Regulations, *Lime Rock Park has never applied for or received a special permit or site plan approval for track / racing operations; it has chosen to continue operating under the terms of Superior Court injunction and stipulations***

D. **"Grandfathering" based on auto racing in 1959 use is irrelevant to today's situation and the PZC's proposed amendment. Lime Rock Park has a right to continue the basic use – auto racing – that existed in 1959 when Salisbury adopted zoning, but its *present* scope of operations, and its desire to expand operations, are not grandfathered or vested rights.**

Notably, any claim that Lime Rock Park has long since abandoned (by operating for decades without Sunday racing) any claim it may have had to Sunday racing as a grandfathered, pre-1959 right.

E. **In general, a non-conforming use is one that *violates* existing regulations (which violation can be the use itself, or failure to have obtained zoning approval); is intended to cease operation at the end of its useful / economic life; and therefore may be maintained and repaired, *but may not be expanded or modified***

F. **Section 503 governs – and generally prohibits – enlargement / expansion of a non-conforming use. Section 500.2 of Salisbury's Regulations states: "[It] is the intent of these Regulations to reduce or eliminate non-conforming situations as quickly as possible."**

G. **In addition, in the court cases in which injunctions and stipulations have been entered containing restrictions on Lime Rock Park's operations, *the Park has been adjudicated to be a noise nuisance*, see *Adams v. Vaill*, 158 Conn. 478 (1969) – that is why the Park has been restricted by an injunction in the first place**

H. In summary, at this time, as a matter of land use law, Lime Rock Park's operation:

1. Is a non-conforming use that violates Salisbury's Zoning Regulations

2. Is a noise nuisance

3. Is controlled only by the terms of an injunction and stipulations entered by the Litchfield Superior Court in a lawsuit involving private parties, not the Town or the PZC

4. As a result, *the burden of monitoring, enforcing, and reacting to proposed modifications to the injunctions and stipulations, and expansions or modifications of operations, is placed on the private parties to the 1959, 1966, 1979, and 1988 court orders – many of whom have passed away, moved, or (if an organization) gone out of existence*

J. CONCLUSION: THE OPERATION OF LIME ROCK PARK, AS A MATTER OF CONNECTICUT LAND USE LAW, MUNICIPAL RESPONSIBILITY, AND FAIRNESS TO IMPACTED PROPERTY OWNERS IN THE VICINITY OF THE TRACK, NEEDS TO BE BROUGHT UNDER THE CONTROL OF THE TOWN THROUGH ITS ZONING REGULATIONS

IV. LIME ROCK PARK'S DISINGENUOUS LITCHFIELD SUPERIOR COURT MOTIONS (see September 8, 2015 hearing Exhs. 17, 18; Tab 5 of this package) [relevant to regulation amendment because it underscores need for regulation]

A. Lime Rock Park's proposed, substantial expansion of its operations is summarized at Tab 4 of this package; major proposals include 20 new Sunday events, overnight camping, longer race weekends, and extended hours for currently allowed events

B. None of this expansion is grandfathered; none is allowed by the current or proposed Zoning Regulations or injunction / stipulations

C. **The expansion is far more than "one Sunday per year." This claim makes the assumption that "mufflered" racing does not cause noise and traffic impacts.**

D. **Lime Rock's Motions are a procedural end-run on impacted property owners, the PZC, and the Town: September 4, 2015 Motions to Modify *proposed to give notice only to those private parties to the 1959-1988 injunctions who are still living or organizations still in existence, not the Town, not PZC, and not the 160+ residential property owners who live within 1.5 miles of the perimeter of the track* (see Tab 3 of this package)**

E. **Affirming that the Park operates without Town / PZC oversight, the Park is asking *a Superior Court Judge* to allow expanded operations**

F. **In addition, Lime Rock Park is asserting that the injunctions should be modified *based on two grounds only (neither of which is documented in the court filings)*:**

   1. ***changes in the auto racing industry since 1988; and***

   2. ***Lime Rock's undocumented claim that the track is not financially viable without the expanded operations it seeks***

G. **Under Connecticut law, the PZC is supposed to determine allowable land uses, after which our courts may review the legality of that decision. But Lime Rock is seeking Court approval of expanded operations *without having PZC address*:**

   1. **Noise impacts of expansion**

   2. **Traffic impacts of expansion**

   3. **Property value impacts of expansion**

   4. **Environmental / water and air quality impacts of expansion, or**

   5. **Enforcement of expansion**

V. LRCC SUPPORTS THE PZC'S PROPOSED REGULATION AMENDMENT, WITH STRONGLY SUGGESTED MODIFICATIONS

A. **Most important, the Zoning Regulations, in Section 221.1, in addition to the Table of Uses, should state that a track for racing motor vehicles is a SPECIAL PERMIT USE in the RE Zone, which will require the track, to become a conforming use, to apply for and obtain a special permit under the procedures and standards stated in the Connecticut General Statutes and Sections 802 to 804 of the Zoning Regulations**

B. **A special permit is the singularly appropriate procedure for regulating an operation like Lime Rock Park:**

1. **Special permit use is one that the Commission deems acceptable in a particular zone, but has potential impacts that need to be controlled through the imposition of approved conditions**

2. **Requiring Lime Rock Park to obtain a special permit use will bring its current operation and any proposed expansion or change *under time-tested legal procedures*:**

    a. **Notice to potentially impacted parties;**

    b. **Public disclosure requirements;**

    c. **Public hearing procedural requirements and protections;**

    d. **PZC consideration, possibly with expert testimony, of impacts such as noise, traffic, property values, environmental considerations, the Plan of Conservation and Development, and enforcement;**

    e. **Written standards, set forth in Zoning Regulations Sections 802-804;**

    f. **A written PZC decision; and**

    g. **Appeal rights to Court**

C. **Need for special permit regulation articulated by Chair Klemens on July 16, 2015**

VI. SUGGESTED IMPROVEMENTS TO PZC'S PENDING REGULATION AMENDMENT

(Note: Consideration of amendments to a legislative proposal at this stage of the proceedings does not require new notices on a new hearing)

(ADDITIONS IN CAPS, [deletions in brackets])

1. **<u>In Section 221.1, clarify that the track is a special permit use</u>:**

   "A track for racing MOTOR VEHICLES [caps in existing PZC proposal], excluding motorcycles, as well as for automotive education and research in safety and for performance testing of a scientific nature, private auto and motorcycle club events, AND car shows, [and certain other events identified in section 221.2 are permitted] SUBJECT TO ISSUANCE OF A SPECIAL PERMIT IN COMPLIANCE WITH THE PROCEDURES AND STANDARDS STATED IN THESE REGULATIONS, and ALSO subject to the following . . . [remainder of Section 221.1 as proposed by PZC]

2. **<u>Delete Footnotes 1 and 2</u> in proposed Section 221.1, as they imply that the injunction terms are a constraint on the PZC's regulatory authority, which is legally incorrect.**

3. **<u>Clarify that allowable accessory uses as those that are subsidiary or incidental to the principal use, a "track for racing motor vehicles</u>." Section 221.2 as drafted could be read to state that accessory uses are "permitted" uses, allowed as-of-right, stand-alone uses, whether part of the track's operations or not. Clarify this section to say:**

   [Permitted] Uses incidental to and accessory to the operation of the track for racing motor vehicles SHALL BE IDENTIFIED ON A SITE PLAN SUBMITTED WITH A SPECIAL PERMIT APPLICATION. SUCH USES include: retail stores, professional or business offices, fire or emergency services, ATMs, restaurants,

and food stands. Incidental accessory uses may also include the use of the premises for automobile shows, sale of motor vehicles during racing events, sale of automotive parts and accessories; car washes; auto service and repairs; filling stations; commercial parking; laundry; equipment storage; racing schools and clubs; indoor theaters; and other similar activities that are accessory to the operation of a recreational race track herein permitted. Other accessory uses [may] include the production, showing, or performance of television, motion picture or radio programs with their related lighting and sound equipment.

4. **<u>Clarify enforcement</u>. Lime Rock Park premises are regularly "leased" to private clubs, making enforcement problematic. The following new section should be added:**

221.5. IF THE HOLDER OF A SPECIAL PERMIT FOR A TRACK FOR MOTOR VEHICLE RACING LEASES ALL OR PART OF ITS PROPERTY TO A PRIVATE ORGANIZATION, IT SHALL REQUIRE THE LESSEE TO COMPLY WITH ALL PROVISIONS OT THESE REGULATIONS, THE SPECIAL PERMIT, AND ITS CONDITIONS.

VII. RESPONSES TO ATTORNEY ROBERTSON'S SEPTEMBER 8, 2015 REMARKS

A. **The Commission clearly has the authority to adopt regulations controlling a major land use within the Town**

B. **The proposed regulation is not "micro-management" of an individual business, but public enforcement / responsibility in place of a private injunction**

C. **Special permit conditions commonly regulate hours and other operational details of businesses and commercial enterprises**

D. **The incorporation of the injunction terms into the regulations proposes *no substantive change to the restrictions that Lime Rock Park purportedly complies with today***

E. **The proposed regulation amendment is not a noise (decibel level) ordinance but a permissible regulation of a land use that emits noise. (In addition, when a town has not adopted a noise ordinance *per se*, state statutes, §§ 22a-67 *et seq.*, govern noise emissions; Torrington Area Health District's regulation also governs.)**

F. **The proposed regulation amendment does not "codify an obsolete injunction," but the currently-applicable restrictions**

G. **The existing restrictions are reasonable: Lime Rock Park has been operating under them for years!**

VIII. RESPONSES TO ATTORNEY ROBERTSON'S OCTOBER 13, 2015 LETTER AND ATTORNEY ANDRES OCTOBER 15, 2015 E-MAIL INQUIRY

A. **Neither General Statutes § 14-164a(a) nor any other statute preempts local regulations of racing or hours. In fact, § 14-164a(a) expressly allows racing to occur during "reasonable hours" on weekdays and Sundays after 12 noon, but "no such race . . . shall take place contrary to the provisions of *any* city, borough, or town ordinances." This section is plainly not the legislature prohibiting municipal control. Other provisions of state law reinforce that towns are allowed to decide whether racing is allowed at all, and if so, when and where, such as the noise statutes, see, e.g., State Regulations § 22a-69.1.8 (auto racing noise criteria applicable IF the Town otherwise allows the activity).**

[Note: § 14-164a(a) says nothing about Saturday]

B. **As noted earlier, the hours proposed in the PZC's regulations are by definition reasonable because they are the existing hours stated in the Superior Court orders, and the hours that Lime Rock Park has accepted for decades**

C. In response to Attorney Andres:

1. **The current § 221.1 does not violate § 14-164a, because § 14-164a does not prohibit municipal regulations of auto racing hours; it allows racing during specified hours, subject to municipal limitations on racing itself**

2. **The terms of the existing Superior Court orders are independent of and unaffected by Salisbury's Zoning Regulations. (Attorney Andres so stated at a PZC meeting on April 19, 2011.) The Superior Court cannot amend Salisbury's Zoning Regulations, except on a direct appeal from adoption or amendment of regulations.**

3. **The current Zoning Regulation, § 221.1, incorporates the terms of the Court injunction, but at this time, Lime Rock Park is not operating under the provisions of the Salisbury Zoning Regulations; it operates under the terms of the Court injunction. This is the anomalous situation that the PZC needs to rectify.**

DOCKET NO. LLI-CV-58-0015459-S	:	SUPERIOR COURT
ANN ADAMS, ET AL.	:	JUDICIAL DISTRICT OF LITCHFIELD
v.	:	
B. FRANKLIN VAILL, ET AL.	:	OCTOBER 6, 2015

MOTION TO INTERVENE OF THE LIME ROCK CITIZENS COUNCIL, LLC

Pursuant to Connecticut General Statutes ("General Statutes") §§ 52-102, 52-107 and 52-108 and Connecticut Practice Book §§ 9-18 and 9-19, Lime Rock Citizens Council, LLC ("Council") hereby moves to intervene as a party plaintiff in this action and, in particular, in proceedings in which Lime Rock Park, LLC is seeking to modify a long-standing injunction proscribing the activities permitted at Lime Rock Park racetrack ("racetrack"), establishing days and hours of operation, and setting fines for violations of the injunction.

The Council is a Connecticut limited liability company, comprised of residents and neighbors of the Lime Rock area of Salisbury and organized for "the purpose of promoting and protecting the interests of those adversely affected by the activities of Lime Rock Park, a motorsport road racing venue located in Lime Rock." See Exhibit A, attached. The Council was formed in August 2015 to ensure that interests, including those previously represented by the Lime Rock Protection Association, Inc., are properly and vigorously protected.

The Council was notified of the pending Motion to Modify Injunction and Judgment ("Motion to Modify") by an Order of Notice signed by the Court on September 4, 2015. The Order of Notice prepared by Lime Rock Park, LLC specifically directed that notice of hearing on the Motion to Modify be served on Peter Wolf, the Council's agent for service. Pleadings

filed by Lime Rock Park, LLC included the Council's letter of August 25, 2015 (Exhibit A to this Motion), which advised this Court, Lime Rock Park and the Chair of the Town of Salisbury Planning and Zoning Commission of the Council's interests in this matter.

I. FACTUAL BACKGROUND.

Issues relating to the racetrack have been the subject of litigation as long ago as 1958 when owners of properties near the racetrack and others affected by racetrack operations filed an injunction action, alleging irreparable harm and nuisance based on racetrack operations. According to a 1969 Supreme Court decision that reviewed previous court proceedings, the trial court found in 1959 that "unrestricted racing events on defendant's track constituted a nuisance and caused irreparable injury to the plaintiffs." *Adams v. Vaill*, 158 Conn. 478, 480, 485 (1969).

"In March, 1966, pursuant to a stipulation of the parties, the court amended the decree to decree to define more precisely what sports car racing activities were proscribed and what were permitted." Id., p. 481.

In 1968, the original plaintiffs moved to modify the 1966 injunction. The sole basis of the motion was to the passage of a 1967 Public Act relating to unmufflered motor vehicles. The trial court modified the injunction and the Supreme Court upheld the modification. Id.

In 1988, Lime Rock Protection Committee, Inc. and Lime Rock Associates, Inc. came before the court and entered into a Stipulation, signed by the presidents of the Lime Rock Protection Committee, Inc. and Lime Rock Associates, Inc., modifying the injunctive order with respect to the activities permitted and the days and hours of operation.

Lime Rock Park, LLC, the current movant, was not a party to the original or subsequent proceedings and, on knowledge and belief, has filed no motion to intervene or otherwise become a party to the action. Counsel representing Lime Rock Park, LLC has filed an Appearance on behalf of "The Lime Rock Corporation," which was a defendant in the original nuisance action filed by a group of neighbors in 1958, and is, according to records of the Office of the Secretary of State, now dissolved.

In its Motion, Lime Rock Park, LLC seeks to modify the injunction originally entered, after a full trial before the Superior Court, on May 12, 1959 and modified several times over the years, most recently in 1988. The specific modifications requested would significantly extend the duration (both in terms of days and hours of operation) and change the types of activities at the racetrack, to the detriment of the interests of the Lime Rock Citizens Council, LLC with reference to noise and air pollution, property values, traffic congestion, the use and enjoyment of their properties, and the character of the community.

II. LEGAL ANALYSIS.

General Statutes § 52-102 provides, in pertinent part, that, "[u]pon motion by any party or nonparty to a civil action, . . . the nonparty so moving . . . (2) shall be made a party by the court if that person is necessary for a complete determination or settlement of any question involved therein." General Statutes § 52-107 provides: "The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an

interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party." See also Practice Book § 9-18. General Statutes § 52-108 and Practice Book § 9-19 provide for the addition of parties "at any stage of the action, as the court deems the interests of justice require."

In considering motions to intervene or to add parties, Connecticut courts have recognized a distinction between "necessary" and "indispensable" parties. In *1525 Highland Associates, LLC v. Fohl*, 62 Conn. App. 612, cert. denied, 256 Conn. 919 (2001), our Appellate Court said it this way:

> Parties are considered indispensable when they not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such condition that its final [disposition] may be... inconsistent with equity and good conscience ... Indispensable parties must be joined because due process principles make it essential that [such parties] be given notice and an opportunity to protect [their] interests by making [them] a party to the [action] ... Necessary parties, in contrast, are those [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it .... (Internal quotation marks omitted.)
> *Id.*, at 618.

In moving to intervene as of right, the intervenor must satisfy four requirements. *See, e.g., Kerrigan v. Commissioner of Public Health,* 279 Conn. 447, 456–57 (2006). The motion to intervene must be timely, the moving party must have a direct and substantial interest in the subject matter of the litigation, the moving party's interest must be impaired by disposition of the litigation without that party's involvement and the moving party's interest must not be represented adequately by any other party to the litigation. Id.

"For purposes of judging the satisfaction of [the] conditions [for intervention] we look to the pleadings, that is, to the motion ... to intervene and to the proposed complaint or defense in intervention, and ... we accept the allegations in those pleadings as true. The question on a petition to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not to be determined. The defense or claim is assumed to be true on [a] motion to intervene, at least in the absence of sham, frivolity, and other similar objections. Thus, neither testimony nor other evidence is required to justify intervention, and [a prospective] intervenor must allege sufficient facts, through the submitted motion and pleadings, if any, in order to make a showing of his or her right to intervene. The inquiry is whether the claims contained in the motion, if true, establish that the [prospective] intervenor has a direct and immediate interest that will be affected by the judgment." (Citation omitted; internal quotation marks omitted.) Id., p. 457.

Lime Rock Citizens Council, LLC meets the four conditions for intervention as of right. Its Motion to Intervene is timely. Both in this Motion and in its letter of August 25, 2015, which Lime Rock Park, LLC itself provided to the Court, the Council has claimed an interest in the modification of an injunction that its members and other neighbors have relied upon for years. This interest will be impaired if the Council is not permitted to intervene and present legal analysis and evidence to the Court regarding the harm and inequity that neighbors will face if the Council is not permitted to protect its interests. Because many of the plaintiffs in the original 1958 nuisance action are deceased or not longer reside in Lime Rock, and because the Lime Rock Protection Committee no longer exists, there is no original party who can adequately represent the Council's interests.

For all these reasons, the Motion to Intervene of the Lime Rock Citizens Council, LLC should be granted. Lime Rock Citizens Council, LLC is a person necessary for the complete determination or settlement of the issues, warranting intervention pursuant to General Statutes § 52-102, and represents persons whose interests will be affected by any judgment, warranting intervention as of right under General Statutes § 52-107 and Practice Book § 9-18. The interests of justice will be served by the addition of the Council, supporting intervention pursuant to General Statutes § 52-108 and Practice Book § 9-19. Finally, there is no prejudice to any party to this action by permitting the Council to intervene as a party plaintiff.

III. CONCLUSION AND RELIEF REQUESTED.

Lime Rock Citizens Council, LLC is both a necessary and indispensable party to this injunction action and attempted Motion to Modify Injunction and Judgment and should be permitted to intervene pursuant to General Statutes §§ 52-102, 52-107 and 52-108 and Practice Book §§ 9-18 and 9-19. Therefore, Lime Rock Citizens Council, LLC respectfully moves this Court to grant its Motion to Intervene and order that it be added as a party plaintiff in this action.

MOVANT,
LIME ROCK CITIZENS COUNCIL, LLC

Timothy S. Hollister
Beth Bryan Critton
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103
Telephone: 860-251-5000
Facsimile: 860-251-5318
bcritton@goodwin.com
Juris No. 057385
Its Attorneys

CERTIFICATION

I hereby certify that a copy of the foregoing was transmitted by e-mail and first-class mail, postage prepaid, on this 6th day of October 2015, to:

Charles E. Roraback, Esq.
Roraback & Roraback
24 Mason Street
P.O. Box 925
Torrington, CT 06790
cer@rorabacklaw.com

John L. Cordani, Jr., Esq.
Richard L. Street, Esq.
Carmody Torrance Sandak & Hennessey LLP
195 Church Street
P.O. Box 1950
New Haven, CT 06509
jcordani@carmodylaw.com
rstreet@carmodylaw.com

James K. Robertson, Jr., Esq.
Carmody Torrance Sandak & Hennessey LLP
50 Leavenworth Street
Waterbury, CT 06721
jrobertson@carmodylaw.com

Martha A. Miller, Esq.
462 Lime Rock Road
Lakeville, CT 06039
Martha@millertaxlaw.com

Beth Bryan Critton
Commissioner of the Court

4315042_1

EXHIBIT A

LIME ROCK CITIZENS COUNCIL (formerly known as the "Lime Rock Protection Association")
c/o Peter S. Wolf
45 White Hollow Rd.
Lakeville, CT 06039

August 26, 2015

By Registered Mail:
Mr. Brandon Pelegano, Chief Clerk of Court
Clerk's Office, Litchfield County Superior Court
15 West Street
Litchfield, CT 06759

With copies to:

By Email:
Ms. Georgia Blades
Lime Rock Park
60 White Hollow Rd.
Lakeville, CT 06039

By Hand Delivery:
Dr. Michael Klemens, Chairman
Salisbury Planning and Zoning Commission
Town Hall
Salisbury, CT 06068

Re: ***Ann Adams, et al., v. B. Franklin Vaill, et al.,* No. 15,459**

Dear Mr. Pelegano,

Please be advised that a group of residents and concerned neighbors of Lime Rock have organized to form the **LIME ROCK CITIZENS COUNCIL**, LLP ("LRCC") with the purpose of promoting and protecting the interests of those adversely affected by the activities of Lime Rock Park, a motorsport road racing venue located in Lime Rock, Connecticut (the "Track"). The LRCC is a limited liability corporation established under the laws of the State of Connecticut (Business ID 1181805).

It recently has come to the attention of the LRCC that the Track intends to seek amendments to an Order and Injunction entered by the Superior Court of Litchfield County in 1959 (amended by stipulation in 1966 and 1988), in *Ann Adams, et al., v. B. Franklin Vaill, et al.,* No. 15,459 (the "Injunction"). This Injunction imposes significant restrictions on the Track's activities, which in

turn protect the rights and interests of those home owners, business owners, residents, and concerned citizens represented by the LRCC. The LRCC understands, on information and belief, that the entity that most recently represented the interests of Lime Rock's residents and neighbors in this court action, the "Lime Rock Protection Association, Inc." is no longer in existence. The LRCC therefore has formed to ensure that those interests are properly represented and vigorously protected.

Accordingly, the LRCC respectfully requests that the Clerk of Court provide notice to the LRCC of any activity on this docket (*Ann Adams, et al., v. B. Franklin Vaill, et al.*, No. 15,459, a copy of which is attached hereto) or any action filed by or on behalf of the Lime Rock Park seeking to amend or challenge the provisions of the Injunction (as amended). Notice may be provided to the LRCC's legal agent, Peter Wolf of 45 White Hollow Road, Lakeville, CT 06039, (860-435-9411), and by email to: limerockcitizenscouncil@gmail.com.

Please also be advised that should the Track decide to take any legal or administrative action to modify the terms of the 1959 Injunction (as amended), the LRCC fully intends to oppose any such action.

Sincerely,

Peter S. Wolf, Managing co-Founder

Douglas R. Howes, Managing co-Founder

On behalf of the **LIME ROCK CITIZENS COUNCIL**

DOCKET NO. LLI-CV-58-0015459-S	:	SUPERIOR COURT
ANN ADAMS, ET AL.	:	JUDICIAL DISTRICT OF LITCHFIELD
v.	:	
B. FRANKLIN VAILL, ET AL.	:	OCTOBER 6, 2015

MOTION OF LIME ROCK CITIZENS COUNCIL, LLC FOR STAY OF PROCEEDINGS

The intervening plaintiff, Lime Rock Citizens Council, LLC, ("Council") respectfully moves this Court to enter a stay of court proceedings initiated by Lime Rock Park, LLC to modify a long-standing injunction and judgment originally entered by this Court in 1959, based on its findings that the activities of Lime Rock Park racetrack ("racetrack") caused irreparable injury to its neighbors and constituted a nuisance. See *Adams v. Vaill*, 158 Conn. 478, 480, 485 (1969), discussing earlier court proceedings relating to the racetrack. In particular, by Order of Notice signed September 4, 2015, this Court has scheduled for hearing on October 26, 2015 to act on Lime Rock Park, LLC's Motion to Modify Injunction and Judgment ("Motion to Modify"). For the reasons discussed below, the Council asks this Court to stay any hearing on the Motion to Modify until such time as the Town of Salisbury Planning and Zoning Commission, *which is currently considering amendments to its zoning regulations directly related to the racetrack's activities and days and hours of operation* (the very same issues that Lime Rock Park, LLC is asking this Court to determine), renders a decision and any court appeal relating to such decision is concluded by a final decision.

As discussed in more detail below, the Council moves to stay of the proceedings based on the doctrine of primary jurisdiction, which provides that where a matter is within the

jurisdiction of, and is being considered by, a municipal administrative agency, a Court should not act until the agency action is complete, as the agency action may supplant or moot any proceedings initiated directly in court.

I. THE DOCTRINE OF PRIMARY JURISDICTION REQUIRES THIS COURT TO STAY THE PROCEEDINGS.

A. The Doctrine of Primary Jurisdiction

Connecticut has an "extensive body of case law - such as the exhaustion and primary jurisdiction doctrines - establishing the general principle that, whenever possible, courts will stay their hand with respect to addressing matters that are within the cognizance of administrative agencies." Citation omitted. *Financial Consulting, LLC v. Commissioner of Insurance*, 315 Conn. 196, 212 (2014). The primary jurisdiction doctrine is "triggered when courts and administrative agencies have concurrent subject matter jurisdiction over a case." Id., p. 222, n. 23.

"The doctrine of primary jurisdiction is a rule of judicial administration created by court decision in order to promote 'proper relationships between the courts and administrative agencies charged with particular regulatory duties.'" Citation omitted. *City of Waterbury v. Town of Washington*, 260 Conn. 506, 574 (2002). "Primary jurisdiction ... applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such case the judicial process is suspended pending referral of such issues to the administrative body for its views." Citation omitted. Id.

"Ordinarily, a court should not act upon subject matter that is peculiarly within the agency's specialized field without giving the agency an opportunity to apply its expertise, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements." Citation omitted. *Sharkey v. City of Stamford*, 196 conn. 253, 256 (1985). "In deciding whether to apply the primary jurisdiction doctrine to a given case, a court must take into account the need for uniform decisions and the specialized knowledge of the agency involved." *City of Waterbury v. Town of Washington*, 260 Conn. at 575.

Connecticut's municipal powers act authorizes municipalities to, *inter alia*, "[p]rohibit, restrain, license and regulate all sports, exhibitions, public amusements and performances and all places where games may be played" and to "[m]ake and enforce ... regulations and protect or promote the peace, safety, ... and welfare of the municipality and its inhabitants." General Statutes §§ 7-148(c)(7)(H)(vii) and (xiii). General Statutes § 8-2, Connecticut's Zoning Enabling Act, authorizes the zoning commission of each municipality to regulate uses of land with regulations "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." In the Town of Salisbury, in which the racetrack is located, zoning authority is vested in its Planning and Zoning Commission.

B. Relevant Factual Background.

On May 12, 1959, when this Court entered its injunction specifying permitted activities and days and hours of operation of the racetrack, the Town of Salisbury had no zoning. Its

first regulations were adopted on June 8, 1959, rendering the racetrack a nonconforming use, subject to both local regulations and judicially created principles regarding nonconforming uses.

Since 1959, the injunction has been modified several times, generally in response to changes in the General Statutes. The most recent iteration of the injunction, entered by Stipulation of the parties in 1988, is incorporated by reference in the Town's current zoning regulations. Were this Court to modify the injunction and 1988 judgment, as Lime Rock Park, LLC requests, it would be, in effect, amending the Salisbury zoning regulations - a responsibility clearly vested solely in the Planning and Zoning Commission by General Statutes § 8-2. And the Court would be amending the regulations without complying with the requirements of the General Statutes and local regulations with respect to notice, application, public hearing, regional referral, consideration of the Town's plan of conservation and development, or any of the other procedural safeguards mandated by the General Statutes and the local regulations.

More important, the Commission is currently in the process of considering amendments to its regulations, which, if adopted, would address the very elements (types of activities, hours and days of operation) that Lime Rock Park, LLC is asking this Court to adjudicate. In other words, Lime Rock is seeking to do and "end run" around the Planning and Zoning Commission. Lime Rock Park, LLC has been participating in the public hearing on the proposed zoning regulation amendments, which hearing opened on September 8, 2015 and is continued until October 19, 2015.

C. The Doctrine Of Primary Jurisdiction Requires This Court To Stay the Proceedings.

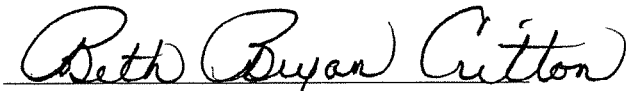
Because the Planning and Zoning Commission is the administrative agency with sole responsibility for the promulgation of land use regulations in Salisbury and because there are both existing and proposed zoning regulations dealing with the activities and operations of the racetrack (the subject of Lime Rock Park, LLC's Motion to Modify), the Commission, not this Court, has primary jurisdiction.

Therefore, this Court should stay any proceedings on the Motion to Modify until the Planning and Zoning Commission has rendered a decision on the proposed zoning regulation amendments relating to the racetrack and, should such decision be appealed, until such appeal is finally determined.

II. CONCLUSION AND RELIEF REQUESTED.

For the reasons discussed above, this Court should enter a stay continuing the hearing presently scheduled for October 26, 2015 until the proceedings of the Town of Salisbury Planning and Zoning Commission on proposed amendments to the zoning regulations relating to the racetrack are concluded and any appeal relating to the Commission's decision is finally determined.

INTERVENING PLAINTIFF,
LIME ROCK CITIZENS COUNCIL, LLC



Timothy S. Hollister
Beth Bryan Critton
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103
Telephone: 860-251-5000
Facsimile: 860-251-5318
bcritton@goodwin.com
Juris No. 057385
Its Attorneys

CERTIFICATION

I hereby certify that a copy of the foregoing was transmitted by e-mail and first-class mail, postage prepaid, on this 6th day of October 2015, to:

Charles E. Roraback, Esq.
Roraback & Roraback
24 Mason Street
P.O. Box 925
Torrington, CT 06790
cer@rorabacklaw.com

John L. Cordani, Jr., Esq.
Richard L. Street, Esq.
Carmody Torrance Sandak & Hennessey LLP
195 Church Street
P.O. Box 1950
New Haven, CT 06509
jcordani@carmodylaw.com
rstreet@carmodylaw.com

James K. Robertson, Jr., Esq.
Carmody Torrance Sandak & Hennessey LLP
50 Leavenworth Street
Waterbury, CT 06721
jrobertson@carmodylaw.com

Martha A. Miller, Esq.
462 Lime Rock Road
Lakeville, CT 06039
Martha@millertaxlaw.com

Beth Bryan Critton
Commissioner of the Court

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DOCKET NO. LLI-CV-58-0015459-S	:	SUPERIOR COURT
ANN ADAMS, ET AL.	:	JUDICIAL DISTRICT OF LITCHFIELD
v.	:	
B. FRANKLIN VAILL, ET AL.	:	OCTOBER 7, 2015

MOTION TO STRIKE OF LIME ROCK CITIZENS COUNCIL, LLC

Pursuant to Connecticut Practice Book § 10-39(a)(3), Lime Rock Citizens Council, LLC, moves to strike in its entirety the Motion to Modify Injunction and Judgment filed by Lime Rock Park, LLC on or about September 4, 2015 because of the failure of Lime Rock Park, LLC to take reasonable steps to identify, notify, and join necessary and indispensable parties to this action.

In accordance with Practice Book § 10-39(c), a Memorandum of Law accompanies this Motion.

INTERVENING PLAINTIFF,
LIME ROCK CITIZENS COUNCIL, LLC

Timothy S. Hollister
Beth Bryan Critton
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103
Telephone: 860-251-5000
Facsimile: 860-251-5318
bcritton@goodwin.com
Juris No. 057385
Its Attorneys

CERTIFICATION

I hereby certify that a copy of the foregoing was transmitted by e-mail and first-class mail, postage prepaid, on this 7th day of October 2015, to:

Charles E. Roraback, Esq.
Roraback & Roraback
24 Mason Street
P.O. Box 925
Torrington, CT 06790
cer@rorabacklaw.com

John L. Cordani, Jr., Esq.
Richard L. Street, Esq.
Carmody Torrance Sandak & Hennessey LLP
195 Church Street
P.O. Box 1950
New Haven, CT 06509
jcordani@carmodylaw.com
rstreet@carmodylaw.com

James K. Robertson, Jr., Esq.
Carmody Torrance Sandak & Hennessey LLP
50 Leavenworth Street
Waterbury, CT 06721
jrobertson@carmodylaw.com

Martha A. Miller, Esq.
462 Lime Rock Road
Lakeville, CT 06039
martha@millertaxlaw.com

Beth Bryan Critton
Commissioner of the Court

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2010 WL 4070580
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of Litchfield.

OPTIWIND
v.
PLANNING & ZONING COMMISSION OF GOSHEN.

No. LLICV084007819S.
|
Sept. 15, 2010.

ROCHE, J.

I

STATEMENT OF APPEAL

***1** The plaintiff, Optiwind, appeals from a decision of the defendant, the Planning and Zoning Commission of the town of Goshen ("the commission"), to deny the plaintiff's special permit application.

II

FACTUAL BACKGROUND

On or about July 14, 2008, the plaintiff filed a special permit application with the commission for the purpose of erecting a wind turbine for the farming of wind energy on a 114-acre parcel of land located at 113 Brush Hill Road ("the premises") owned by the Woodridge Lake Sewer District. (Return of Record [ROR], Exhibit [Exh.] I.a.) The plaintiff's application was accepted by the commission at its meeting on July 22, 2008, at which time the commission scheduled a public hearing for September 30, 2008. (ROR, Exh. III.b.) At the meeting held on July 22, 2008, the commission also voted to approve the application of the plaintiff to install two temporary meteorological towers for wind speed measurement on the premises. (ROR, Exh. III.b.) Notice of the public hearing to be held concerning the plaintiff's special permit application appeared in the *Waterbury-Republican* on Tuesday, September 16, 2008, and Tuesday, September 23, 2008. (ROR, Exh. II.a.)

The commission held the public hearing on September 30, 2008. (ROR, Exh. III.d.) At the hearing, David Hurwitt, the vice president of marketing and business development for the plaintiff, spoke on behalf of the plaintiff in asking that the commission approve the application. (ROR, Exh. III.d, p. 2.) Also present and affiliated with the plaintiff were Russ Martin, Ted Chadwick and Bret Slycher. *Id.* Hurwitt testified that the plaintiff believed that the application met or exceeded every requirement for approval of the special permit. (ROR, Exh. III.d, p. 2.) Hurwitt addressed several issues regarding the proposed wind turbine that the plaintiff believed were of concern to members of the public including the visibility of the wind turbine and tower, the noise levels of the turbine once in operation and the negative effect the turbine might have on property values. (ROR, Exh. III.d, pp. 2-5.)

Hurwitt testified that the plaintiff made a "very careful effort to site the turbine in a spot where it is minimally visible to the community."(ROR, Exh. III.d, pp. 2-3.) In accordance with § 289 of the Planning and Zoning Regulations of the town of Goshen ("the regulations"), the plaintiff conducted a "balloon test" from September 13, 2008, through September 15, 2008. (ROR, Exh. III.d, p. 3.) Section 289 of the regulations requires that applicants or facility owners seeking approval of a special permit for a "wind facility" shall conduct certain tests in order to demonstrate a visual representation of the height and visibility of a proposed wind turbine tower. Section 289 provides in relevant part: "The Commission shall select between three and six sight lines, including from the nearest building with a view of the wind facility for pre and postconstruction view representations. Sites for the view representations shall be selected from populated areas or public ways within a 2-mile radius of the wind facility. View representations shall have the following characteristics: a. Within 21 days of filing for a Special Permit, the applicant shall arrange for a balloon test (with a balloon diameter of at least eight feet), or a crane test, at the proposed site to illustrate the height and position of the proposed tower. The date ... time and location of such test shall be advertised in a newspaper of general circulation in the Town at least 15 days, but not more than 21 days, prior to the primary date of the test. The balloon or crane test shall be conducted for at least two days, one of which shall be a Saturday or Sunday. b. The applicant will submit photographs showing the tower

imposed on the photograph with the tower height established in reference to a balloon flown to the proposed tower height at the site."(ROR, Exh. VI.) Hurwitt testified that the images prepared by the plaintiff during its balloon test demonstrate that the site chosen for the turbine would "be the optimal site in terms of minimizing visibility" of the tower. (ROR, Exh. III.d, p. 4.)

*2 In addressing the concerns about the noise produced by the proposed wind turbine, Hurwitt noted that noise levels everywhere in town are regulated by the Torrington Area Health District ("TAHD"). (ROR, Exh. III.d, p. 4.) Hurwitt testified that the plaintiff worked with TAHD in regards to this project and a letter from TAHD, dated September 10, 2008, stated in part that "[g]iven the distances from adjoining property lines, it is unlikely that noise generated by the turbine will exceed the Torrington Area Health District standards."(ROR, Exh. III.d, p. 4.)

Hurwitt then addressed the concern over the wind turbine's impact on property values. Hurwitt identified three reports that the plaintiff also submitted to the commission concerning the effect of wind turbine on property values, each of which found that there was no support for the claim that wind turbines would negatively impact property values. [1] (ROR, Exh. III.d, p. 5.)

Hurwitt concluded his remarks, before fielding questions from the commission, by stating the plaintiff's belief that the proposed wind turbine would have a significant positive environmental impact on Goshen and Connecticut. (ROR, Exh. III.d, p. 6.) Specifically, he noted that the installation of the wind turbine would reduce the need for fossil fuel based electricity at the Woodridge Lake Sewer District facility.

After members of the commission asked a series of questions to the plaintiff's representatives, members of the public were able to participate in the hearing. Three members of the public-Bob Mosca, [2] Eric Warwo and Keith Marcheski-spoke in favor of the application. (ROR, Exh. III.c.) Several members of the public, including Fran Goodhouse, Tom Mudrey, Susan Stansick, Elaine Frost, James Upton, George Schuster, Bill Gregware, Heidi Conig, June Greenwood, Leo Mayo and Brian Rose spoke in opposition to the plaintiff's application. (ROR, Exh. III.c.)

At the close of the public hearing on September 30, 2008, the commission's chairman, Mark Fraher, announced that the decision on the application would be made at the commission's next regular meeting. (ROR, Exh. III.d, p. 58.) On October 28, 2008, at its regularly scheduled meeting, the commission unanimously denied the plaintiff's special permit application to erect the wind turbine. (ROR, Exh. II.b.) The minutes of the meeting state that prior to making its decision to deny the plaintiff's application for special permit, the commission reviewed all the comments, letters and petitions submitted at the public hearing. (ROR, Exhs.III.e.) The commission noted that the majority of concerns expressed by those in opposition to the application concerned the noise and visibility of the turbine and the negative effects on property values and wildlife. (ROR, Exhs. III.e; III.f, p. 7.) In granting a special exception, the commission noted, an applicant must meet the specific requirements of § 280 of the regulations as well as the general requirements of Article V, § 521 of the regulations. (ROR, Exhs. III.e; III.f, p. 4.) The commission unanimously voted to deny the plaintiff's application because it did not meet the requirements of §§ 521.d [3] and 521.e [4] of the regulations. (ROR, Exh. III.f, p. 28.) Notice of the denial of the plaintiff's application appeared in the *Waterbury-Republican* on Friday, October 31, 2008. (ROR, Exh. II.b.) The plaintiffs commenced the present appeal on November 13, 2008. On December 8, 2008, a motion to intervene was filed by several individuals who alleged that they were abutting property owners or owned property within one hundred feet of the premises and the court subsequently granted their motion. [5] The hearing in this matter was held on July 1, 2010.

III

JURISDICTION

*3 "A statutory right to appeal may be taken advantage of only by strict compliance with the statutory provisions by which it is created."(Internal quotation marks omitted.) *Cardoza v. Zoning Commission,* 211 Conn. 78, 82, 557 A.2d 545 (1989).General Statutes § 8-8(b) governs appeals from decisions of planning and zoning commissions to the Superior Court.

A

Aggrievement

"[P]leading and proof of aggrievement are prerequisites to [a] trial court's jurisdiction over the subject matter of a plaintiff's appeal ... [I]n order to have standing to bring an administrative appeal, a person must be aggrieved."(Citation omitted; internal quotation marks omitted.) *Moutinho v. Planning & Zoning Commission,* 278 Conn. 660, 664, 899 A.2d 26 (2006)."Aggrievement presents a question of fact for the trial court and the party alleging aggrievement bears the burden of proving it."*Bongiorno Supermarket, Inc. v. Zoning Board of Appeals,* 266 Conn. 531, 538-39, 833 A.2d 883 (2003).

"Two broad yet distinct categories of aggrievement exist, classical and statutory ... Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the decision, as opposed to a general interest that all members of the community share ... Second, the party must also show that the agency's decision has specially and injuriously affected that specific personal or legal interest ... Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest ... Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation."(Internal quotation marks omitted.) *Moutinho v. Planning & Zoning Commission, supra,* 278 Conn. at 665, 899 A.2d 26. The standard for statutory aggrievement in zoning appeals is set forth in General Statutes § 8-8(a)(1), which provides in relevant part: "[i]n the case of a decision by a ... planning and zoning commission ... 'aggrieved person' includes any person owning land that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board."

The plaintiff argues that it has proven that it was aggrieved by the decision of the commission to deny the special permit application. In its substituted complaint, the plaintiff alleged that at all times relevant to the application for special permit and this appeal it "has been and is a lessee of the premises" on which it applied for the special permit to construct and operate a wind turbine. The substituted complaint further alleges that the plaintiff is "aggrieved by the decision of the Commission ... since it was the applicant for the special permit and site plan approval."

***4** In support of its contention that it has been aggrieved by the commission's denial, the plaintiff submitted a copy of the deed of the premises, which shows that the premises is owned by the Woodridge Lake Sewer District ("WLSD") and a certification by a title searcher that WLSD continues to own the premises. Attached to its brief concerning aggrievement the plaintiff submitted to the court a memorandum from Joseph J. Poniatowski, commissioned by the plaintiff to conduct a title search of the premises, which states that upon examining the land records of Goshen regarding the premises Poniatowski determined that the property was owned by the Woodridge Lake Sewer District. Additionally, the plaintiff submitted to the court a certified copy of the warranty deed for the premises, which also indicates that WLSD is the owner of the premises.

The plaintiff additionally provided the court with a copy of the minutes of a WLSD meeting held on June 30, 2008, at which the WLSD approved a motion to enter a preliminary agreement with the plaintiff. As to the issue of aggrievement, Hurwitt testified that the plaintiff entered into a preliminary written agreement with WLSD, dated June 30, 2008, "establishing [the plaintiff's] rights" to the premises. In further support of this position, the plaintiff submitted several documents to demonstrate that an agreement had been entered between the plaintiff and WLSD for construction of the wind turbine on the premises by the plaintiff and that, accordingly, the plaintiff had a specific legal interest in the decision of the commission concerning the special permit application. These documents, which became plaintiff's Exhibit 1, consisted of a "preliminary agreement," dated June 30, 2008, a "clarification of preliminary agreement," dated December 16, 2008, a "preliminary agreement overview," dated February 17, 2009, and a "further clarification of preliminary agreement," also dated February 17, 2009.

The commission and the intervening defendants argue that the plaintiff has failed to submit evidence proving that it has been aggrieved by the commission's decision to deny the special permit application and, therefore, that the plaintiff's appeal should be dismissed. The commission specifically argued that the plaintiff failed to establish that WLSD owned the premises, failed to establish that the plaintiff had a valid agreement with WLSD and failed to submit documents that establish a valid lease for the premises. The commission and intervening defendants contend that the documents submitted by the plaintiff constitute nothing more than an "agreement to agree," and do not demonstrate that the plaintiff had a legal interest in the subject matter of the commission's decision that would rise to the level necessary to show aggrievement. Both the commission and intervening defendants note in their

briefs that the preliminary agreement reached between the plaintiff and WLSD explicitly states only that the plaintiff and WLSD will "agree to work together in good faith during the next ninety (90) days to establish and agree to a formal agreement. The formal agreement is required prior to the installation of the wind turbine."The defendants argue that if WLSD and the plaintiff did not reach a final agreement, then the plaintiff would not have any legally enforceable rights to compel its use of the premises for the wind turbine and therefore would not possess a legal interest necessary to show aggrievement. The commission and intervening defendants argue that since no formal agreement has been entered, the plaintiff cannot meet its burden of demonstrating aggrievement.

***5** The commission and intervening defendants additionally argue that the preliminary agreement expired prior to the making of a formal agreement. The defendants point to the explicit language in the preliminary agreement, which states that the "term of this preliminary agreement, shall begin on June 1, 2008" and that the plaintiff and WLSD "agree to work together in good faith during the next ninety (90) days to establish and agree to a formal agreement."The intervening defendants argue that since the preliminary agreement required a formal agreement to be entered within ninety days after the term of the preliminary agreement commenced and since no such formal agreement was entered by the plaintiff and WLSD, the plaintiff no longer had an interest in the premises sufficient to establish aggrievement after September 30, 2008. Since it is not enough for a party to have an interest in the premises sufficient to establish aggrievement only at the time of the application, but must have a specific legal interest in the subject matter of the appeal throughout the course of the appeal, the intervening defendants argue, the plaintiff in the present case cannot establish aggrievement because the preliminary agreement expired prior to the commencement of a formal agreement term.

First, regarding the issue of ownership of the premises, this court finds that the evidence submitted by the plaintiff-the certified copy of the warranty deed of the premises and Poniatowski's memorandum concerning the title search conducted of the premises-is sufficient to establish that WLSD was the owner of the premises.

Additionally, this court finds that the evidence submitted, including Plaintiff's Exhibit 1, consisting of the preliminary agreement between the plaintiff and WLSD and the three addendums to the preliminary agreement, is sufficient to demonstrate that the plaintiff has a legal interest in the subject matter of the commission's denial of the special permit application. While the defendants are correct that the preliminary agreement states that a "formal agreement is required prior to the installation of the wind turbine," they ignore the fact that the same agreement provides that "WLSD does hereby agree to provide Optiwind the land necessary to erect a wind turbine on the WLSD property."This explicit language, in a contract signed by officers of the plaintiff and WLSD respectively, constitutes a potentially enforceable legal interest for the plaintiff in WLSD's land for the purpose of erecting a wind turbine on the premises. The fact that the preliminary agreement does not grant the plaintiff the right to construct or install the wind turbine on the premises prior to the establishment of a formal agreement, which would invariably not be established until after zoning approvals were granted or any appeals were finalized, does not eliminate the contractual right acquired by the plaintiff, and agreed to by WLSD, the owner of the premises, "to erect a wind turbine on the WLSD property."Since the preliminary agreement extended to the plaintiff the legal interest to build such a wind turbine, and the subject matter of the commission's decision centered on an application for a special permit to construct a wind turbine, the plaintiff can demonstrate a specific, legal interest in the subject matter of the commission's decision, and can show that the commission's decision has specially and injuriously affected that specific personal or legal interest.

***6** In addition to contending that the preliminary agreement did not convey to the plaintiff a legal interest sufficient to establish aggrievement, the defendants argue that the language in the preliminary agreement suggests that the agreement expired ninety days after June 30, 2008, because no formal agreement was entered into by the plaintiff and WLSD. Consequently, the defendants argue, the plaintiff did not possess a legal interest in erecting a wind turbine on the premises at the commencement of this appeal and therefore cannot show aggrievement, which requires that a party be aggrieved throughout the pendency of an appeal. This court disagrees with the defendants' contention. The preliminary agreement does not state that it will expire after ninety days if no formal agreement is established between the plaintiff and WLSD, but only states that "Optiwind and WLSD agree to work together in good faith during the next ninety (90) days to establish and agree to a formal agreement."This contract provision in no way states that the failure of the parties to reach a formal agreement within ninety days after the entering of the preliminary agreement terminates the preliminary

agreement or causes it to expire. The provision only provides that the parties must "work together in good faith" during that ninety-day period. Nothing about this language suggests that the plaintiff's contractual right to erect a wind turbine on the premises ceases to be effective after ninety days should there be no formal agreement between the plaintiff and WLSD. The clarification of the preliminary agreement, dated December 16, 2008, and signed by representatives of the plaintiff and WLSD states clearly that the parties did not intend for the preliminary agreement to expire after ninety days and provides: "Optiwind and WLSD do hereby agree that the current agreement has not expired and the parties continue to work together in a spirit of good faith to establish and sign a final agreement for the siting of an Optiwind wind turbine at the WLSD site ... This preliminary agreement shall remain in effect until the final agreement has been signed."The defendants argue that the preliminary agreement expired prior to this clarification, but the court disagrees and finds that the clarification of the preliminary agreement was unnecessary to show that the preliminary agreement had not expired.

The defendants point to *JZ, Inc., Dunkin Donuts v. Planning & Zoning Commission,* 119 Conn.App. 243, 987 A.2d 1072,cert. denied, 296 Conn. 905, 992 A.2d 329 (2010), and *Goldfeld v. Planning & Zoning Commission,* 3 Conn.App. 172, 486 A.2d 646 (1985), to support their position that the plaintiff cannot show that it has been aggrieved throughout the appeal, however, the facts of the present case are easily distinguished from these Appellate Court cases. In *JZ,* the Appellate Court reversed the trial court's decision to sustain the plaintiff's appeal of the commission's denial of a special use permit, concluding that the plaintiff was not aggrieved. The plaintiff had entered into a contract to purchase certain real property but the zoning approval for a special permit was made a condition of the sale. *JZ, Inc., Dunkin Donuts v. Planning & Zoning Commissio* n, *supra,* at 245.The agreement, entered into on July 25, 2006, specifically provided that the closing of title "shall take place on or before thirty (30) days following satisfaction of all conditions precedent ... but in no event later than one year" from the date the agreement was signed. *Id.* The plaintiff's special permit application was denied on November 21, 2007, more than a year after the agreement was signed and the plaintiff appealed the commission's decision.*Id.* The trial court sustained the plaintiff's appeal, first finding that the plaintiff had been aggrieved. *Id.* The Appellate Court disagreed, concluding that the plaintiff had not been aggrieved because the purchase and sale agreement had expired one year after being signed as the closing of title had not yet occurred, as required under the agreement and, therefore, the plaintiff was not aggrieved at the time it commenced the appeal. *Id.,* at 246, 486 A.2d 646. The preliminary agreement between WLSD and the plaintiff in the present case contained no similar provision that would terminate the agreement. While the preliminary agreement provided that the parties would work in good faith to reach a final agreement during the ninety days after entering the preliminary agreement, no contractual language terminated the plaintiff's rights to build a wind turbine if a final agreement was not reached after the ninety days had passed.

*7 Similarly, in *Goldfeld,* the Appellate Court held that the trial court's finding of aggrievement had been clearly erroneous. *Goldfeld v. Planning & Zoning Commission, supra,* 3 Conn.App. at 176, 486 A.2d 646. In *Goldfeld,* the plaintiff entered into an agreement to purchase an approximately 102-acre parcel of land on December 9, 1975, conditioned on the approval of an application before the commission to rezone the land. *Id.,* at 174, 486 A.2d 646. The plaintiff applied for the zoning change on September 29, 1977, the commission denied the application on December 7, 1977, and the plaintiff appealed. *Id.* A new contract, dated December 1, 1978, which completely superceded the original contract, changed the plaintiff's status from a purchaser to a holder of an option to purchase the land, an option that terminated on November 30, 1980, except that it could be extended by the plaintiff to May 30, 1981, if his appeal had been decided by the trial court and if there was a further appeal pending. *Id.,* at 175, 486 A.2d 646. On October 31, 1981, the option agreement was amended to provide that the option would expire on June 30, 1982. *Id.* The trial court rendered its judgment on August 10, 1982, finding aggrievement and sustaining the plaintiff's appeal.*Id.* The appellate court reversed the decision of the trial court, holding that the plaintiff failed to show aggrievement throughout the appeal. *Id.,* at 178, 486 A.2d 646. The court determined that the plaintiff's option to purchase the property terminated on either November 30, 1980, or, at the latest, May 31, 1981. *Id.,* at 177, 486 A.2d 646. The court further noted that the plaintiff's interest was "revived on October 31, 1981, but that resurrection lasted only until June 30, 1982, some six weeks before the trial court's judgment in this case."*Id.* Accordingly, there was an interruption in the plaintiff's interest in the property and, therefore, the trial court erred in finding that the plaintiff was aggrieved. *Id.* In the present case, unlike *Goldfeld,* there was no contractual language terminating the plaintiff's right, secured in the preliminary agreement, to build a turbine on the premises. The provision requiring the

plaintiff and WLSD to work in good faith over the ninety days following the entering of the preliminary agreement to enter a formal agreement did not contain language that indicated a termination of the preliminary agreement if such formal agreement was not entered. The plaintiff in the present case contracted for the right to use WLSD's land to construct a wind turbine. That legal interest has not terminated since the entering of the preliminary agreement.

For the foregoing reasons, this court disagrees with the commission's assertions and finds that the plaintiff has demonstrated that it was aggrieved by the commission's denial of the special permit application.

B

Timeliness and Service of Process

Pursuant to General Statutes § 8-8(b), an "appeal shall be commenced by service of process in accordance with subsections (f) and (g) of this section within fifteen days from the date that notice of the decision was published as required by the general statutes."General Statutes § 8-8(f) provides in relevant part: "Service of legal process for an appeal under this section shall be directed to a proper officer and shall be made as follows ... (2) For any appeal taken on or after October 1, 2004, process shall be served in accordance with subdivision (5) of subsection (b) of section 52-57 ..."General Statutes § 52-57(b)(5) provides that in an action against a town commission, process must be served "notwithstanding any provision of law, upon the clerk of the town, city or borough, provided two copies of such process shall be served upon the clerk and the clerk shall retain one copy and forward the second copy to the ... commission ..."

***8** The commission published notice of its decision to deny the plaintiff's application for a special permit to erect the wind turbine in the *Waterbury-Republican* on Friday, October 31, 2008. (ROR, Exh. II.b.) The plaintiffs commenced the present appeal on November 13, 2008, by service of two copies of process on the Goshen town clerk, Barbara L. Breor. Accordingly, the court finds that the plaintiff's appeal was timely and that service of process was proper.

IV

SCOPE OF REVIEW

General Statutes § 8-2(a) provides, in part, that local 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 ... commission ... whichever commission ... the regulations may ... designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values."

"When ruling upon an application for a special [permit], a planning and zoning [commission] acts in an administrative capacity ... Generally, it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. The ... trial court [must] decide whether the board correctly interpreted the section [of the regulations] and applied it with reasonable discretion to the facts ... In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal ... Although a zoning commission or board possesses the discretion to determine whether a proposal meets the standards established in the regulations, it lacks the discretion to deny a special permit if a proposal satisfies the regulations and statutes."(Internal quotation marks omitted.) *Kilburn v. Plan & Zoning Commission,* 113 Conn.App. 621, 626-27, 967 A.2d 131 (2009). When a commission functions in "an administrative capacity, a reviewing court's standard of review of the commission's action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion ... In determining whether a zoning commission's action was illegal, arbitrary or in abuse of its discretion, a reviewing court's principal inquiry is whether the commission's action was in violation of the powers granted to it or the duties imposed upon it."(Citations omitted; internal quotation marks omitted.) *Clifford v. Planning & Zoning Commission,* 280 Conn. 434, 440, 908 A.2d 1049 (2006).

"[A] local board or commission is in the most advantageous position to interpret its own regulations and apply them to the situations before it."(Internal quotation marks omitted.) *Trumbull Falls, LLC v. Planning & Zoning Commission,* 97 Conn.App. 17, 29, 902 A.2d 706,cert. denied, 280 Conn. 923, 908 A.2d 545 (2006)."[D]ecisions of local boards will

not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing."(Internal quotation marks omitted .) *Garlasco v. Zoning Board of Appeals,* 101 Conn.App. 451, 456, 922 A.2d 227,cert. denied, 283 Conn. 908, 927 A.2d 917 (2007)."Where a zoning agency has stated its reasons for its actions, the court should determine only whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the [commission] was required to apply under the zoning regulations."(Internal quotation marks omitted.) *Cumberland Farms, Inc. v. Groton,* 262 Conn. 45, 51 n. 8, 808 A.2d 1107 (2002).

***9** "In reviewing a decision of a zoning board [or commission], a reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the commission] must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission] ... The question is not whether the trial court would have reached the same conclusion, but whether the record before the [commission] supports the decision reached ... If a trial court finds that there is substantial evidence to support a zoning [commission's] findings, it cannot substitute its judgment for that of the [commission] ... The [commission's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given."(Internal quotation marks omitted.) *Loring v. Planning & Zoning Commission,* 287 Conn. 746, 756, 950 A.2d 494 (2008).

V

DISCUSSION

The plaintiff argues that the commission's denial of the plaintiff's special permit application should be overturned because the decision was not supported by substantial evidence, was plagued by procedural irregularities and ignored expert evidence.

A

Whether the Site Plan Application was Automatically Approved

As a threshold matter, the court must determine whether the site plan, which accompanied the plaintiff's special permit application, was automatically approved due to a failure of the commission to act upon the site plan within sixty-five days of its filing. The plaintiff contends that it did not file a single application for a special permit to construct a wind turbine on the premises, but instead filed two applications, one for a special permit and another for site plan approval, submitting both to the commission on July 14, 2008. In its brief, the plaintiff argues that at the direction of staff members of the town of Goshen, the plaintiff checked two boxes on the application zoning application, one marked "Special Permit" and the other marked "Site Plan Approval." (ROR, Exh. I.a.) The plaintiff states that the commission, at its meeting on October 28, 2008, unanimously denied the plaintiff's special permit application, but took no action on the site plan application. The plaintiff further argues that pursuant to General Statutes § 8-7d, which provides in relevant part that "whenever the approval of a site plan is the *only* requirement to be met or remaining to be met under the zoning regulations for any building, use or structure, a decision on an application for approval of such site plan shall be rendered not later than sixty-five days after receipt of such application," the commission's failure to act on the site plan within sixty-five days rendered the site plan application automatically approved. (Emphasis added.)

This court finds that the plaintiff's position is without merit. The plaintiff's application to erect a wind turbine for the farming of wind energy on the premises was filed pursuant to § 282.1 of the regulations, which provides that the "construction of a Wind Facility shall be permitted in RA5 and RR zoning districts *subject to the issuance of a Special Permit.*" (Emphasis added.) (ROR, Exh. VI.) Section 510 of the regulations provides that "applications for Special Permits shall be accompanied by a Site Plan, as prescribed in ARTICLE IV of these Regulations."It is correct that when a commission fails to act within sixty-five days after receiving a site plan application that site plan is automatically approved if that site plan approval is the only requirement to be met under the zoning regulations for the use the applicant seeks. That, however, is not the case in the present case. In the present case, the issuance of a special permit is required for applicants seeking to construct a wind facility, and without the issuance of that special permit, pursuant to § 282.1 of the regulations, the plaintiff cannot erect its wind turbine facility. Here, the site plan approval is a required component of a special permit application pursuant to § 510 of the regulations. Since the special permit was denied by the commission, there was no

automatic approval of the plaintiff's site plan because site plan approval was not the only requirement to be met in the plaintiff's application to erect a wind turbine on the premises.

B

Whether the Denial was Flawed because of the Participation of an Alternate Member

***10** The plaintiff contends that because Fred Zuck, an alternate member of the commission, participated in the commission's deliberations in violation of General Statutes § 8-1b[6] and that his participation had a profound effect on the voting members of the commission, the denial issued by the commission was procedurally flawed. Based on this argument, the plaintiff seeks a remand to the commission. The plaintiff points to a single Superior Court case, *Weiner v. New Milford Zoning Commission,* Superior Court, judicial district of Litchfield, Docket No. CV 94 0066607 (May 23, 1995, Pickett, J.) (14 Conn. L. Rptr. 245), in which the trial court remanded a land use appeal to the zoning commission due to the improper participation in deliberations by an alternate member of the commission. In *Weiner,* which centered on the commission's denial of the plaintiffs' special permit application to operate a flea market, the court noted that the alternate member "participated in the discussion and ... he had a persuasive impact on the voting members."*Id.* While a single Superior Court case is not controlling, the holding in *Weiner* suggests that a remand to the commission would be proper if it is determined that in the present case Zuck participated in the proceedings after the commission began its deliberations and that Zuck's participation had a profound effect on the voting members.

At issue in *Komondy v. ZBA,* Superior Court, judicial district of Middlesex, Docket No. CV 07 4006628 (August 17, 2009, Jones, J.) [48 Conn. L. Rptr. 389], also cited by the plaintiff, was whether a zoning board of appeals acted improperly by allowing an alternate member of the board "to participate in the public hearing and board discussion, in derogation of the statute that regulates when an alternate may participate in decision-making."The court identified the statements made by the alternate member as follows: "She primarily posed questions to the town's attorney and to obtain clarification of the rule of law applicable to the issues, as well as questions to the applicant as to the status of the insurance coverage for the fire, and the use of insurance funds from the fire ... [The alternate] remained silent until she made a comment about the fact that the Board did not know if the [the applicant] had another place to live. Directly thereafter, she made an error in arguing that allowing a variance might open the town up to long term risk. Thereafter, her comments are not as argumentative. She suggested that there is a possibility of construction delays, asserted that one cannot talk oneself into a hardship (which is immediately refuted by another Board member), and asked for clarification about the logistics of the fiscal relationship between the [the applicants] and their insurance company. Her final assertion is that this matter should be decided because the Board chose to hear it in the first place, which does not speak to whether the variance itself should be granted."The court in *Komondy* found that overall the alternate member's comments did "not appear to echo a sentiment that was inconsistent with the sentiments raised by the other members. At the end of the meeting, the seated members of the board articulated their reasoning, none of which seem to be influenced by" the alternate member. Accordingly, the court did not remand the appeal on the ground that the board's procedures were improper because the alternate member "did not materially participate in the deliberation in a way that had a 'profound' effect upon the voting members."

***11** In the present case, as in *Komondy,* the plaintiff has failed to demonstrate that Zuck's comments had a profound effect on the deliberations of the voting members of the commission. Zuck's first comments at the October 28, 2008, commission meeting, during which the commission denied the plaintiff's application, simply stated the number of petitions the commission received in opposition to the application and that the major concern of these petitions was increased noise levels, views of the wind turbine, decreased property values and impact to wildlife. (ROR, Exh. III.f, p. 7.) The plaintiff puts great weight on Zuck's statement that he "personally wouldn't want to build a house next to a structure that was, that windmill, I just think that would have an averse effect on future development."(ROR, Exh. III.f, p. 15.) Zuck does not appear to speak at any other time during the course of the meeting on October 28, 2008. The plaintiff's argument, that Zuck, an alternate member of the commission, made statements that had a profound impact on the deliberations of the other voting members of the commission is thin.

It is highly unlikely that the commission, having sat through a public hearing during which only three residents spoke in favor of the application, one of whom was an officer of WLSD, and during which several members of the public

voiced opposition to the application was influenced by two short statements by Zuck. Public sentiment against the application was strong enough at one point during the hearing that the chairman had to instruct those present to hold their applause. (ROR, Exh. III.d, p. 26.) In order to deny the application for special permit, the commission need only point to a section of its own regulations with which the application was not in compliance. The commission voted unanimously to deny the special permit application on the grounds that it did not comply with § 521.d, which prohibits the issuance of a special permit unless "there will be no adverse effects upon the existing and probable future character of the neighborhood or its property values" and § 521.e., which prohibits the issuance of a special permit unless "the proposed activity will not hinder the orderly and appropriate development of adjacent property."(ROR Exh. III.f, p. 27.) Zuck's statement expressing his view that he "wouldn't want to build a house next to" the proposed windmill was made only after the chairman of the commission raised the issue of the special permit conflicting with § 521.d. (ROR Exh. III.f, p. 15.) This court does not believe that Zuck's single comment, made after the issue of neighborhood character and property values were raised, had a profound impact on the commission's subsequent unanimous vote. As to compliance with § 521.e of the regulations, Zuck makes no statements at all, but the chairman voiced concern that the wind turbine's approval "hinders that development potential" in the area. For the foregoing reasons, this court finds that Zuck's statements did not have a profound effect on the deliberations and that the commission's denial was not flawed by Zuck's limited participation.

C

Whether the Commission's Denial was Supported by Substantial Evidence

***12** The plaintiff argues that the commission's stated reasons for denying the special permit application, namely that the application failed to comply with §§ 521.d and 521.e of the regulations, were not supported by substantial evidence in the record. This court is bound by the substantial evidence rule, according to which conclusions reached by the commission must be upheld by the trial court if they are reasonably supported by the record. This court finds that the record supports the conclusion reached by the commission to deny the plaintiff's special permit application on the grounds that the application did not meet the requirements of §§ 521 .d and 521.e.

Section 521.d of the regulations provides that a special permit cannot be granted unless the commission finds "[t]hat there will be no adverse effects upon the existing and probable future character of the neighborhood or its property values."Section 521.e of the regulations provides that a special permit cannot be granted unless the commission finds "[t]hat the proposed activity will not hinder the orderly and appropriate development of adjacent property."

At the public hearing on September 30, 2008, several members of the public testified in opposition to the plaintiff's application including James Upton, an owner of property near the premises, who testified that the proposed wind turbine would "change the landscape dramatically and ... affect the value of [his] property drastically."(ROR, Exh. III.d, p. 37.) Additionally, Upton contended that the photographs of the balloon test submitted by the plaintiff were deceptive because they were taken at a time of year when the trees are in full bloom and that if the photographs were taken during the winter "we [would have] a better view of how, how unattractive this could be."(ROR, Exh. III.d, p. 37.)

Upton also indicated that he had located a report that focused on the effect on property values of a wind turbine erected in Lincoln Township, Wisconsin.[7] (ROR, Exh. III.d., p. 38.) The report, Upton continued, shows that land value in the vicinity of the wind turbine decreased after its erection and that "stray voltage ... infected livestock and people's health and the taste of water in the area where these wind towers are out there in Wisconsin ."(ROR, Exh. III.d., p. 38.) Upton submitted an excerpt of this report to the commission, which details how "Town of Lincoln zoning administrator Joe Jerabeck compiled a list of properties that have been sold in the township and their selling prices."(ROR, Exh. IV .o.) The report claims that sales within one mile of the windmills erected in Lincoln prior to the construction of the windmills "were 104 percent of the assessed values, and properties selling in the same area after construction were at 78 percent, a decrease of 26 points ... Sales more than 1 mile away prior to construction were 105 percent of the assessed values, and sales of properties 1 mile or more after the construction of the turbines declined to 87 percent of the assessed value, an 18 percent decline."(ROR, Exh. IV.o.)

***13** It is quite clear that the commission considered Upton's testimony, or at least the report he submitted, during

its deliberations. Commission member Peter Kaufman, in discussing whether the application complied with the provision in § 521.a of the regulations, which prevents the commission from granting a special permit where the proposed use would "create any conditions that could endanger public health, safety and welfare" questioned whether "concerns about stray voltage" were enough to reject the application on the grounds that it was not in compliance with § 521.a. (ROR, Exhs. III.f, p. 12; VI.) Additionally, in discussing whether property values would be negatively affected by the erection of the wind turbine, town planner Martin Connor stated that "you had studies both ways that were presented."(ROR, Exh. III.f, p. 15.)

Many neighboring homeowners expressed opposition to the proposed wind turbine on the grounds that it would decrease their property values. George H. Schuster and Patricia Schuster, of 574 Beach Street, submitted a letter to the commission voicing opposition to the plaintiff's application, stating that the wind turbine will "have an adverse effect on other town residents, neighbors, as well as property values."(ROR, Exh. IV.d.) Jarrod Upton, of 50 Brooks Road, submitted a letter to the commission opposing the wind turbine and stating "I can only assume property values in the immediate vicinity will also suffer."(ROR, Exh. IV.f.) Suzanne Potters, of 411 Beach Street, stated in her letter to the commission that her property "looks out over the site for the proposed [turbine] and we would have a direct and unobstructed view of the tower ... The proposed Wind Tower would be 70 feet wide and 200 feet in height. It would extend above the tree line and would be significantly wider than any tree in the area ... The property values of the surrounding community would be adversely affected."(ROR, Exh. IV.g.) Nate Upton, who lives at 50 Brooks Road, voiced his strong opposition to the proposed wind turbine in his letter to the commission. He stated that the "proposed Wind Turbine is 200 [feet] tall and over 70 [feet] in Diameter. Much, much larger than the current cell tower [also located on the premises]. Not only will this Turbine ruin the landscape and produce noise, but without a doubt will again lower the value of my property."(ROR, Exh. IV.h.) Andrew and Heidi Koenig, of 38 Brush Hill Road, state in their letter to the commission that they felt "after doing some research that the noise that [the turbine] will create will [be a] hindrance [on the] quality of life at our address. This would ruin our vistas of our wonderful town of Goshen ... not to mention that my property values will only go down."(ROR, Exh. IV.q.) Elaine Frost and Thomas Mudry, residents of Beach Street, opposed the wind turbine on the grounds that "[p]roperty values in our neighborhood would be adversely affected."(ROR, Exh. IV.r.)

***14** The plaintiff submitted three reports concerning the impact of wind turbines on property values, *The Effects of Wind Development on Local Property Values,* prepared by Renewable Energy Policy Project in May 2003, *Impacts of Windmill Visibility on Property Values in Madison County, NY,* completed by the Bard Center for Environmental Policy in April 2006, and *Do Wind Facilities Affect Local Property Values?,* completed by the Lawrence Berkley National Lab in June 2007 (ROR, Exh. I.b.) None of these reports involved property in Connecticut, none was prepared by a licensed real estate appraiser and none was prepared by an individual who appeared to testify at the public hearing concerning the plaintiff's applicant.

In his comments concerning the studies regarding property values, Connor stated: "You certainly had testimony from the neighborhood that they felt it was going to be detrimental to the property values. You had also testimony from the applicant that ... he said would indicate otherwise. [The plaintiff] didn't have any professional experts testify before the Commission either way, so the Commission really has to use their own judgment as to, you know, what they feel on that aspect of it ... [Y]ou didn't have an appraiser here to testify one way or the other so really it's left up to the Commission."(ROR, Exh. III.f, pp. 5, 16.)

The commission argues that testimony of local residents is an appropriate basis upon which a commission can evaluate impacts on local property values, and points to *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission,* 285 Conn. 381, 941 A.2d 868 (2008), for support. In *Cambodian,* a religious society appealed to the trial court from the decision of the defendant planning and zoning commission denying the society's application for a special exception to construct a temple for religious worship on its property. *Id.,* at 384, 941 A.2d 868. The commission denied the society's application for special exception on the grounds, *inter alia,*"the increase in traffic congestion, as well as the traditional Buddhist design of the proposed temple, was inconsistent with ... the regulations, which [provide] that '[t]he proposed use shall not substantially impair property values in the neighborhood.' " *Id.,* at 387, 941 A.2d 868. The society argued that there was not substantial evidence that the temple would negatively impact property values and "presented a report by ... a real estate appraisal firm, in which that firm opined that '[the proposed temple]

will have no impact on the "[quiet] enjoyment," utility, or market value of the surrounding properties.' In reaching this conclusion, the firm had used a 'matched pair analysis' under which it compared sales of residential properties in other ... neighborhoods [in the same town] near existing religious facilities to sales of similar properties where there was no religious facility. It also used a 'comparative market analysis' pursuant to which it examined the impact of similarly intense nonresidential uses on residential neighborhoods." *Id.*, at 442, 941 A.2d 868.

***15** The court in *Cambodian* noted that "the commission also heard evidence that a family in the neighborhood of the proposed temple had been forced to move as a result of past activities there. When that residence was sold, realtors had inquired whether it was near the society's property, leading the family to believe that the location had made it more difficult to sell the property. In addition, the commission heard evidence that a potential purchaser had canceled plans to buy a property when he learned that the property was near the proposed temple. The commission concluded that the society's appraisal report was of little value because the comparable sales on which the report relied were in the vicinity of churches that had 'far fewer members than the participants expected at the temple' and lower levels of continuous activity. It further concluded that '[t]he specific examples provided by the neighbors [were] more persuasive.'Accordingly, the commission concluded that the level of activity at the proposed temple would substantially impair neighboring property values."*Id.*, at 442-43, 941 A.2d 868. The Supreme Court further noted that the "credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission] ... Accordingly, the commission was not required to credit the appraisal firm's conclusion that the proposed temple would have no effect on property values. Similarly, the commission was entitled to credit the anecdotal reports that past activities on the society's property had made neighboring properties less desirable ... Moreover, it is reasonable to conclude that the effect of the activities on the sale of neighboring properties would continue if the activities were allowed to continue. [The court concluded] that the commission's determination that the disruptive activities would significantly impair property values was supported by substantial evidence."(Citation omitted; internal quotation marks omitted.) *Id.*, at 443, 941 A.2d 868.

In the present case, the only support the plaintiff has submitted to the commission for its proposition that the proposed wind turbine will have no negative impact on property values in Goshen and in the area immediately surrounding the turbine comes in the form of three studies, none of which were supported by the testimony of those who conducted the studies at the public hearing. In its own brief, the plaintiff notes that there was "some indication that the Commission wanted property value reports more specific to Goshen or to Connecticut. At the time this application was filed, no such reports existed because no wind turbines were operating in Connecticut or in Goshen."In weighing the record to determine whether the application complies with § 521.d, which prohibits the approval of a special permit unless the commission finds that the proposed use will have no adverse effects on property values, the commission essentially had to make a determination based on the testimony of residents in close proximity to the proposed wind turbine, and the excerpt of the report submitted by Upton, or the three out-of-state studies concerning the effects of wind turbines on property values submitted by the plaintiff. As articulated in *Cambodian,* the credibility of the witnesses and the determination of issues of fact are matters solely within the province of the commission and, in the present case, the commission found the testimony of its residents, who almost universally voiced their belief that the wind turbine would negatively impact property values, more credible. In the present case, at its meeting on October 28, 2008, the commission denied the "special permit application to erect a wind turbine to farm wind energy [on the premises] on the basis that Sections 521.d and 521.e were not met."(ROR, Exh. III.f, p. 26.) This court cannot put itself in the position of fact finder and must dismiss any land use appeal if the commission's denial was based on substantial evidence that the proposed use was in violation of the municipal regulations. In the present case, the court finds that the commission's denial of the special permit application was supported by substantial evidence in the record that the proposed use would violate § 521.d of the regulations.

VI

CONCLUSION

***16** For the foregoing reasons, the plaintiff's appeal of the commission's decision is dismissed. The court finds that there is substantial evidence in the record to support the commission's denial of the plaintiff's special permit application.

All Citations

Not Reported in A.2d, 2010 WL 4070580

Footnotes

1 The reports submitted by the plaintiff concerning the impact of wind turbines on property values were: *The Effects of Wind Development on Local Property Values,* prepared by Renewable Energy Policy Project in May 2003 (ROR, Exh. V.a); *Impacts of Windmill Visibility on Property Values in Madison County, NY,* completed by the Bard Center for Environmental Policy in April 2006; and *Do Wind Facilities Affect Local Property Values?,* completed by the Lawrence Berkley National Lab in June 2007. (ROR, Exh. I.b.)

2 Bob Mosca is a resident of Goshen and the President of Woodridge Lake Sewer District. Mosca signed the preliminary agreement, clarification of the preliminary agreement, preliminary agreement overview and further clarification of preliminary agreement between Optiwind and WLSD on behalf of the WLSD.

3 Section 521.d of the Goshen zoning regulations provides that a special permit shall not be granted unless the commission finds "[t]hat there will be no adverse effects upon the existing and future character of the neighborhood or its property values."

4 Section 521.e of the Goshen zoning regulations provides that a special permit shall not be granted unless the commission finds "[t]hat the proposed activity will not hinder the orderly and appropriate development of adjacent property."

5 The intervening defendants are Elaine Frost, Thomas Mudry, James Upton, William Gregware, Carol Gregware, Pamela Miller, Francis Goodhouse and Maureen Goodhouse.

6 General Statutes § 8-1b provides: "Any town, city or borough, in addition to such powers as it has under the provisions of the general statutes or any special act, shall have the power to provide by ordinance for the appointment or election of alternate members to its zoning commission or combined planning and zoning commission. Such alternate members shall, when seated as herein provided, have all the powers and duties set forth in the general statutes or any special act relating to such municipality for such commission and its members. Such alternate members shall be electors and shall not be members of the zoning board of appeals or planning commission. Such ordinance shall provide for the manner of designating alternates to act."

7 The report purports to be "[p]repared by Elise Bittner-Mackin for presentation to the Bureau County, Illinois, Zoning Board of Appeals regarding the 54.5-MW 33-turbine Crescent Ridge wind facility proposed for Indiantown and Milo by Stefan Noe (Illinois Wind Energy)" and the report deals with the alleged problems with wind turbines that went online in Kewaunee County, Wisconsin, in June 1999.