ORIGINAL MEMORANDUM OF DECISION

DOCKET NO: CV-15-6013033-S	:	SUPERIOR COURT
LIME ROCK PARK, LLC	:	J.D. OF LITCHFIELD
VS.	:	AT TORRINGTON
PLANNING AND ZONING COMMISSION	:	
OF THE TOWN OF SALISBURY	:	JANUARY 31, 2018

MEMORANDUM OF DECISION

AMENDED MEMORANDUM OF DECISION

DOCKET NO: CV-15-6013033-S	:	SUPERIOR COURT
LIME ROCK PARK, LLC	:	J.D. OF LITCHFIELD
VS.	:	AT TORRINGTON
PLANNING AND ZONING COMMISSION	:	
OF THE TOWN OF SALISBURY	:	July 17, 2018

AMENDED MEMORANDUM OF DECISION

(AMENDMENT TO MEMORANDUM OF DECISION DATED JANUARY 31, 2018. THIS AMENDED MEMORANDUM OF DECISION ADDRESSES ISSUES RAISED IN MOTIONS TO RECONSIDER THE JANUARY 31, 2018 MEMORANDUM OF DECISION. THIS AMENDED MEMORANDUM OF DECISION SUPERSEDES THE ORIGINAL MEMORANDUM OF DECISION)

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I

INTRODUCTION

On December 18, 2015, Lime Rock Park, LLC (Park) filed this action to appeal the November 16, 2015 decision of the defendant, Planning and Zoning Commission of the Town of Salisbury (Comm'n), to amend certain of its zoning regulations. The zoning regulations amended in 2015 pertain to the operation of an automobile race track at a site owned by the Park (Site). On May 16, 2016, the court, *Moore, J.*, granted the motion of the Lime Rock Citizens Council, LLC (Council) to intervene. The court conducted a hearing on May 10, 2017, with an additional argument taking place on August 30, 2017. At that August argument, the parties agreed to allow the court to file its decision in this matter on or before October 16, 2017. On September 11, 2017, two parties submitted supplemental briefing based on issues that arose during the August argument. Thereafter, on September 25, 2017, the court indicated, by way of order, that additional argument was necessary and, on September 26, 2017, ordered the parties to supplement the record. The parties filed the requested supplementation on October 6, 2017, and the additional hearing was held on October 10, 2017. During that hearing, the court allowed

both parties to further supplement the record by admitting documents into evidence, including a more complete version of the Comm'n's 1959 zoning regulations. On January 31, 2018, the court issued its memorandum of decision (#165), denying the appeal in part and sustaining it in part. Judgment entered on January 31, 2018.

On February 20, 2018, the Comm'n (#167), the Council (#169) and the Park (#170) each filed motions to reargue and/or reconsider the decision, along with supporting memoranda of law. On February 27, 2018, the court ordered reargument on the issues raised in each of these three motions (#171). Thereafter, the parties filed a panoply of related objections and memoranda, including the following: the Park's objection to the Comm'n's motion to reargue (#172); the Park's objection to the Council's motion to reargue (#173); the Comm'n's memorandum in opposition to the Park's motion to reargue (#174); the Council's objection to the Park's motion to reargue and joinder to #174 (#175); the Park's reply memorandum to the Comm'n's objection to the Park's motion to reargue (#178) and the Comm'n's reply to the Park's objection to the Comm'n's motion to reargue (#179). The Comm'n also filed a motion for permission to supplement the administrative record (#180), with exhibits set forth in #177. On March 19, 2018, the court heard argument on all of the motions to reargue and responses thereto, as well as on the Comm'n's motion to supplement the record. The court denied the Comm'n's motion to supplement the record on the record on March 19, 2018, and, on March 20, 2018, entered a further order (#180.10), providing additional reasons for this denial.

On April 10, 2018, and April 24, 2018, the court sought additional information from the Comm'n as to when a critical amendment to the zoning regulations occurred (##181 and 183). The Comm'n provided compliance to the court's requests on April 18, 2018 and May 3, 2018, respectively.

The January 31, 2018 judgment is hereby opened and this amended memorandum of decision supersedes the January 31, 2018 memorandum of decision. This amended memorandum of decision reflects the court's response to the issues raised in the motions to reargue. Where the court believed it helpful, it discussed the arguments raised in the motions to reargue in this amended memorandum of decision. For the reasons set forth below, the court sustains the appeal in part and denies it in part.

II

REGULATORY HISTORY

Because regulation of the Site has arisen, as the Comm'n's chair stated, "as an accident of history or evolution," this court finds it both useful and necessary to review the regulatory history related to use of the Site as a motor vehicle race track. The court gleaned the following history from the administrative record and through judicial notice of pleadings in the following related cases: (1) *Adams* v. *Vaill*, Superior Court, judicial district of Litchfield, Docket No. CV-58-0015459-S, and the related appellate decision at 158 Conn. 478, 262 A.2d 169 (1969), including the appellate court file;[1] (2) *Lime Rock Foundation, Inc.* v. *Zoning Board of Appeals*, Superior Court, judicial district of Litchfield, Docket No. CV-77-0016404-S; (3) *Lime Rock Protection Committee* v. *Lime Rock Foundation, Inc.*, Superior Court, judicial district of Litchfield, Docket No. CV-77-0016416-S; and (4) *Lime Rock Protection Committee* v. *Lime Rock Foundation, Inc.*, Superior Court, judicial district of Litchfield, Docket No. CV-78-0016920-S.

Before reviewing the regulatory history of the Site, however, it is vitally important to understand that, for six decades, regulation of the Site has been, at times, reactive in nature,

[1] Volume A-496, Connecticut Supreme Court Records and Briefs, Part 1, A-F, October Term, 1969, 1-62.

rather than planned or thoughtful. Additionally, regulation of the Site has been too often imprecise, and not careful. Regulation of the Site has taken three avenues: (1) a permanent injunction arising out of a nuisance lawsuit brought by neighbors of the Site against the owner, including modifications thereof; (2) a stipulated judgment, arising, in large part, from preexisting, nonconforming uses at the Site, which resolved three appeals of decisions made by the Salisbury Zoning Board of Appeals; and (3) the enactment and amendment of zoning regulations. At times, there has been inconsistency between these three avenues of regulation. Indeed, the mere existence of these three avenues of regulation has sown confusion regarding which authority regulated racing at the Site. The zoning amendments at issue comprise, to some degree, a consolidation of these three paths, and constitute an attempt by the Comm'n to organize the regulation of the Site into a more coherent and accessible fashion. The Comm'n intended to codify what it perceived to be the existing zoning "status quo" by placing into its regulations what it deemed to be the reasonable expectations of its constituents regarding the use of the Site as a race track.

A

Background Facts

Motor vehicle racing and other related activities, including camping, automobile shows, and demonstrations of driving speed and skill have been conducted at the Site since 1957. In 1957, racing and related activities occurred seven days a week. At the inception of such activities, the Town of Salisbury had no zoning regulations.[2] The operation of the race track, therefore, prior to the enactment of zoning regulations, was a preexisting, nonconforming use.

[2] Although the Town of Salisbury created a zoning commission in 1955, it did not adopt zoning regulations until June 8, 1959.

B

Adams v. Vaill: The Injunction Action

In 1958, in response to the presence of the race track, and related undesired activities, a group of local citizens and institutions brought a private nuisance action, *Adams* v. *Vaill*, supra, Superior Court, Docket No. CV-58-0015459-S. The defendants were B. Franklin Vaill, the owner of the Site, and The Lime Rock Corporation (LRC), the lessee of the Site and operator of the race track. The action was brought by twenty-five individuals, mostly residents and property owners in the village of Lime Rock, and two institutions, the Trinity Episcopal Church of Lime Rock (Church)[3] and the Lime Rock Cemetery Improvement Association (Cemetery). The plaintiffs claimed that the use of the race track constituted a nuisance, and they sought to abate this nuisance by means of permanent injunctive relief. Given that the injunction is the original source of regulation at the Site, it is necessary to undertake a careful review of the allegations in *Adams*.

The *Adams* plaintiffs alleged the following facts. For more than twenty-five years prior to 1957, the village of Lime Rock was a "quiet, peaceful and secluded residential area" of Salisbury with little commercial activity. Starting in early 1957, LRC used the Site as a sports car race track, hosting races and exhibitions almost every weekend when weather and driving conditions permitted. Even when no formal events took place, drivers used the track to test their cars and practice racing. This activity began as early as 9:00 a.m. and went as late as 11:00 p.m., and sometimes lasted for up to ten consecutive hours. "[C]onsiderable noise," arising from the racing activity, included the roar of car engines when accelerating at high and low speeds, generally "without mufflers or other devices to silence" the engine exhaust; the revving of

[3] The Church was not an original plaintiff, but was added shortly after the complaint was served.

"unmuffled engines of cars at a stand still;" the "loud screeching of tires and squealing of brakes;" the "noisy changing of gears;" and announcements emanating from loudspeakers and amplifiers. The noise could travel as far as two and one-half to three miles. While attending events at the track, racing fans drove their own cars recklessly and without consideration of the rights of others, "often with loud noises occasioned by operation with cut-outs or without mufflers." The attendees also sped and raced on public roads, and engaged in horn honking and other boisterous conduct. The racing fans created such heavy traffic that the plaintiffs were denied normal access to and from their homes. The fans violated the plaintiffs' property rights by trespassing on their land, turning vehicles on their lawns, throwing beer cans and other litter on private property, and "using [one plaintiff's] property to relieve calls of nature." This behavior continued despite complaints to the police. Noise associated with the racing activity prevented the plaintiffs from occupying their homes with comfort and, in some instances, forced some plaintiffs to either close all of their windows and "retire to the basement" or to leave their homes. The noise was "annoying, irritating and disturbing, both physically and emotionally," and caused some of the plaintiffs to be "seriously nervous and upset." The noise menaced the health of the plaintiffs, lowered property values, prevented homes from selling and being leased, and caused the Cemetery to padlock its grounds on race days.

The Church alleged that the arrival of racing fans "before, during and immediately after the hours of worship," and the attendant "noise, racket and behavior . . . [would] intrude upon, disturb and interfere with the conduct of worship of said Church, deter some of its communicants from attending church services," and "hamper [churchgoers'] access to and egress from" the Church, thereby "endanger[ing] their safety." The Church further alleged that it could no longer

schedule religious rites on race days, and that the rectory's inhabitants could not peacefully enjoy their home.

The foregoing allegations demonstrate that noise was the plaintiffs' primary, although not exclusive, grievance. On May 12, 1959, after a hearing, the court, *Shea, J.*, entered judgment in favor of the plaintiffs by granting a permanent injunction. The court issued a memorandum of decision, setting forth its findings and holding that noise generated by the track's operation constituted a nuisance.[4] In reaching this decision, the court held that "[s]ound may be a nuisance, even in the prosecution of a business lawful per se" and that to "constitute a nuisance the use must be such as to produce a tangible and appreciable injury to neighboring property or such as to render its enjoyment especially uncomfortable or inconvenient." Memorandum of Decision May 12, 1959. The court further held that "when [noises] reach the point where they become annoying, irritating and disturbing to the comfort and rest of the nearby residents of ordinary sensibilities to the extent outlined above, [noises] ought to be so classified [as a nuisance]." Id. In finding that noise from the Site constituted a nuisance, the court further held that the "operation of the race track on Sundays proves to be especially annoying and irritating to the plaintiffs. They are justified in making complaint about the disturbing annoyance and discomfort which is caused by the operation of the race track in any form on Sundays. This activity should be prohibited."

The court found that track noise that constituted a nuisance included "the noise and roar of car engines caused by the operation of the vehicles upon the track," as well as "the squealing

[4] The court rejected the plaintiffs' claims of motor vehicle violations and heavy traffic, finding that many witnesses commended the State Police for their work in defusing these issues. The court held that, "[a]t the present time there is little or no complaint about the traffic problem or the manner in which it is handled."

of brakes, screeching of tires, and other noises emanating from the operation of the cars upon the track" and noise coming from the track's loudspeaker.

Notably, the court underscored the additional volume of noise that arose when car engines were not mufflered, finding that during "weekdays the engines of the cars which are operated upon the track are usually mufflered, but this is not uniformly true and the noise, of course, is much greater when the engines are not mufflered." The court also found that during "racing events or speed tests, and particularly on weekends, the events are often held with unmufflered engines. These events cover an extended period of time. On certain occasions they are carried on continuously for a period of hours. The noise and sounds, particularly when the vehicles are unmufflered, reach such intensity that they can sometimes be heard for some distance beyond the village depending upon the wind and atmospheric conditions."

After considering the legal standards relative to the creation of a nuisance, the court, once again, emphasized the impact of unmufflered racing on its decision: "In applying these principles of law to the case before us, it becomes evident at once that a single or isolated use of the race track does not constitute a nuisance in and of itself. The noise becomes irritating, annoying, and disturbing to the comfort of the community when the race track is used by unmufflered engines for an extended number of hours. In fact, there is little or no complaint to be made against the operations upon the track when it is used by vehicles which are mufflered." As mentioned above, after finding that the "residents of Lime Rock often invite visitors and friends to spend the weekend there and to enjoy the peaceful surroundings of the beautiful countryside," and that the "operation of the race track on Sundays proves to be especially annoying and irritating to the plaintiffs," the court prohibited Sunday racing. The court then found that "the noise does not have the same effect on other days, and the track could be operated on every other day of the

week provided, however, that the events with unmufflered engines should be limited in number and space of time."[5]

As a result of these findings, the court entered a permanent injunction in favor of the *Adams* plaintiffs. This permanent injunction prohibited "[a]ll activity upon the track . . . on Sundays;" limited mufflered racing to weekdays between 9:00 a.m. and 10:00 p.m., except for six days per year when racing could continue beyond 10:00 p.m.; and permitted unmufflered racing between specified hours only on Tuesdays and ten Saturdays each year (as well as the ten Fridays that preceded those ten Saturdays for the purpose of preparing for the Saturday races), and the following holidays between the hours of 9:00 a.m. and 6:00 p.m.: Memorial Day, the Fourth of July and Labor Day. The injunction also referred the parties to General Statutes § 14-80 (c) for the definition of what constituted "permissible mufflers." Judge Shea's decision also imposed a penalty on each of the defendants of $10,000 for violating any provision of the permanent injunction.

C

Original Salisbury Zoning Regulations

Shortly after the *Adams* decision, on June 8, 1959, the Comm'n adopted zoning regulations and a zoning map. The zoning regulations placed the Site in the Rural Enterprise (RE) District, and, significantly, allowed race tracks as a permitted, as of right use within the RE District. Salisbury Zoning Regs., § 8.1.17. The Site was the only race track operating in the RE District. The regulations allowed a "track for racing motor vehicles, excluding motorcycles, to which admission may be charged, and for automotive education and research in safety and for

[5] Notably, the court did not find that unmufflered racing created additional traffic, or enhanced air or light pollution because it was more popular than mufflered racing. This lack of findings is relevant to one argument of the Comm'n, which will be addressed infra.

performance testing of a scientific nature." Id. These regulations also permitted such accessory uses as "grandstands, judges' stands, automobile repair pits, rest rooms, lunch counters or stands . . . use of the premises for automobile shows and exhibitions, for the sale of motor vehicles, automotive parts and accessories and fuels, for manufacturing and automotive repair incident to the other activities herein permitted, [and] may also include the production of television, motion picture or radio programs and the use of necessary lighting and sound equipment therefor." Id., § 8.1.17.7.

Additionally, the regulations allowed racing "during such hours as are permitted by statute." Id. At that time, the controlling statute provided, in relevant part, that any "race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition . . . may be conducted at any reasonable hour on any week day or after the hour of two o'clock in the afternoon of any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances." General Statutes § 898c, as amended by Public Acts 1939, No. 23, § 2.[6]

No provision of any then-existing Town ordinances prohibited or limited racing after two o'clock on Sunday afternoon. As a result, the original zoning regulations were at odds with Judge Shea's injunction. While the May 12, 1959 injunction prohibited Sunday racing, the June 8, 1959 zoning regulations allowed Sunday racing after two o'clock p.m.

D

Modification of the *Adams* Injunction

Even though the *Adams* injunction was permanent, it has been, nonetheless, modified several times. The first modification occurred by way of a March 2, 1966 stipulation, entered

[6] This statute also required that the Commissioner of State Police issue a permit prior to such a race taking place. Id., §§ 1-2.

into by the original plaintiffs and defendants, further limiting the use of the Site for racing and related activity. Specifically, the stipulation provided that the prohibition on Sunday racing applied to both "mufflered" and "unmufflered racing cars;" extended the Sunday prohibition to the "paddock areas;" added a definition of "racing car;" and further limited the Friday unmufflered race preparation by specifying that "no qualifying heats or races shall be permitted on such Fridays." Other limitations, not part of the original permanent injunction, were incorporated via this stipulation, including a prohibition on revving or testing of any racing car engines on Saturdays and permitted holidays before 9:00 a.m. and after 6:00 p.m., except for the transportation of the vehicles to and from the paddock areas or on their trailers. Such transportation could not take place before 7:30 a.m. or after 7:30 p.m. The stipulation also banned the use of loudspeakers at the track before 8:00 a.m. and after 7:00 p.m.

The second modification resulted from litigation activity, as opposed to a stipulation. Upon discovering that the state legislature had, in 1967, amended General Statutes § 14-80 (c) by expanding the mufflering requirement to the operation of motor vehicles in all places and not only when "operated upon a street or highway," see *Adams* v. *Vaill*, supra, 158 Conn. 481, some, but not all, of the original *Adams* plaintiffs [7] filed, on July 29, 1968, a motion to modify the 1966 stipulation to which they had entered with the Park's predecessor. These *Adams* plaintiffs argued that, based on the statutory amendment, the court must modify the 1966 stipulation to prohibit, at all times, the racing of unmufflered vehicles at the Park. Id., 482. The court, *Wall, J.*, agreed. The court issued an order on August 26, 1968, modifying the injunction by "prohibit[ing] the operation and use of unmufflered motor vehicles on the Lime Rock race track." *Adams* v. *Vaill*,

[7] The *Adams* plaintiffs who moved to modify the injunction were thirteen in number: Ann Adams, Herbert Oscar Bergdahl, Grace Bergdahl, Herbert O. Bergdahl, Jr., Helen Heffner, Elizabeth Hetherington, Agatha Mallach, Ralph McLellan, Florence McLellan, Annie M. Olsen, Jack Olsen, Lillian H. Roberts and Moritz Wallach.

Superior Court, judicial district of Litchfield, Docket No. CV-58-0015459-S (August 26, 1968, *Wall, J.*). The court's ruling further ordered the defendants to "cease and desist immediately from sponsoring the racing of said unmufflered vehicles." Id. This 1967 order was upheld on appeal in 1969 by our Supreme Court. *Adams* v. *Vaill*, supra, 158 Conn. 478. In reaching its decision, the Supreme Court held that, "courts have inherent power to change or modify their own injunctions where circumstances or pertinent law have so changed as to make it equitable to do so." Id., 483. Specifically, the Supreme Court found that the legislature's amendment prohibiting the operation of unmufflered vehicles anywhere constituted such a change in "pertinent law." The Supreme Court held that, "where the court's decree expressly authorized unmufflered automobile racing and, by subsequent action of the General Assembly, the operation of an unmufflered motor vehicle anywhere in the state became illegal, it cannot be held that the court committed error in modifying the injunction so that it did not purport to authorize an activity which the statutes prohibited." Id., 484. The Supreme Court reached this conclusion even though it knew, when it issued its decision, that the statutory amendment on which it relied had been undone. Id., 482-84, 484 n.1.[8] Beginning on August 26, 1968, therefore, unmufflered racing was prohibited at the Park.

[8] Footnote one stated that "[w]e do not overlook the fact that the General Assembly, in its 1969 session, further amended subsection (c) of General Statutes § 14-80 to provide an exception to this prohibition by adding the clause 'when such motor vehicle is operated in a race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition in accordance with the provisions of subsection (a) of Section 29-143.' Public Acts 1969, No. 17." Although such a further amendment might have rendered the 1969 Supreme Court decision moot, the Supreme Court found that the amendment did not do so. The Supreme Court cryptically noted that "[t]his subsequent amendment, however, does not render the present appeal moot since it appears that there is litigation pending, the outcome of which is dependent, at least in part, upon the legality of the existing injunction as modified." The Supreme Court did not identify such "pending litigation" and neither the existing *Adams* trial court file nor the Supreme Court Records and Briefs contain any motions or pleadings that would inform this court as to the nature of this "pending litigation."

In 1988, in part to end this prohibition, two new parties, namely a substituted plaintiff, the Lime Rock Protection Committee, Inc.[9] and the then-owner of the Park, Lime Rock Associates, Inc. entered into a stipulation. The preamble of this stipulation expressly stated that the parties wanted to make two changes to the 1968 judgment and injunctive order, namely (1) to eliminate motorcycle racing, and (2) to modify the prohibition on unmufflered racing in light of the legislature's 1969 amendment. In 1969, as mentioned above, the state legislature allowed the unmufflered operation of motor vehicles used in public racing. This stipulation accomplished those two goals, prohibiting motorcycle racing and reinstituting unmufflered racing with the same restrictions that existed in the 1966 stipulation. On March 21, 1988, the court, *Dranginis, J.*, approved the motion to amend the judgment in accordance with the stipulation. The 1988 stipulation did not include the $10,000 penalty for violations of the amended injunction.

E

Appeals of Salisbury ZBA Decisions

Beginning in 1977, a series of appeals were taken from decisions of the Salisbury Zoning Board of Appeals' (ZBA) determination of what constituted "permitted activities" at the Site. The first such action, brought by the then-owner of the Site, the Lime Rock Foundation, Inc.

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[9] The parties did not identify any of the incorporators, officers, directors, constituent members or shareholders of the Lime Rock Protection Committee, Inc. at the time of this stipulation or, for that matter, at any time. The court takes judicial notice of the facts that (1) the two cases brought by the Lime Rock Protection Committee, Inc. discussed below in section E, allege that the Committee is a non-stock corporation organized for the purpose of "minimizing noise and other forms of annoyance which result from the operation of a race track," and that the "officers, board of directors and members of the Committee are residents and taxpayers of" Salisbury, (2) the Secretary of State's CONCORD system reflects that one Joan C. Bergdahl was the agent for service of process of this corporation and (3) the court's files in the cases that led to the ZBA Judgment reveal that Joan C. Bergdahl was president of this corporation in the late 1970's and that Jack Olsen, Herbert O. Bergdahl, Jr. and Albert Tilt, Jr. were members of the Committee at that time. The review of these court files further evidences that Joan C. Bergdahl's property abutted the Site, as did Jack Olsen's. The 1988 stipulation also evidences that Joan C. Bergdahl executed it on behalf of the Lime Rock Protection Committee, Inc.

(Foundation), appealed an August 5, 1977 decision of the ZBA upholding the Comm'n's limitation on the number of campers at the Site to 1,000 at any given time. *Lime Rock Foundation, Inc.* v. *Zoning Board of Appeals*, Superior Court, judicial district of Litchfield, Docket No. CV-77-0016404-S. After the appeal was filed, the ZBA agreed to raise the limit to 1,500 campers at a time. Id. The Foundation claimed that the 1,500 person limitation was illegal, arbitrary, and constituted an abuse of discretion because the track was a "valid nonconforming use which cannot be limited in this manner." Id.

Almost immediately after the Foundation filed its appeal, the Lime Rock Protection Committee (Committee) and three individual abutting neighbors of the track, Herbert O. Bergdahl, Joan C. Bergdahl and Jack Olson, sued the Foundation and the ZBA, also alleging that the ZBA's decision to raise the number of campers to 1,500 was illegal, arbitrary, and not supported by record evidence. *Lime Rock Protection Committee* v. *Lime Rock Foundation, Inc.*, Superior Court, judicial district of Litchfield, Docket No. CV-77-0016416-S. In this appeal, the plaintiffs alleged that the Comm'n, in an August 5, 1977 decision, issued a ruling that camping at the track was "a permitted use of said property" subject to the following limitations: (1) camping was confined to the infield; (2) camping could not include spectators; and (3) camping could not exceed more than 1,000 campers at a time. The plaintiffs further alleged that, after the Foundation appealed the August 5, 1977 decision, the ZBA modified said decision by (1) dispensing with the requirement that camping be confined to the infield; (2) allowing campers to include spectators; and (3) increasing the allowed number of campers at any one time to 1,500. The plaintiffs alleged that the ZBA acted illegally because (1) camping is not a permitted use in the RE Zone, where the Site is located, and the zoning regulations do not otherwise permit such a use, and (2) the type of camping that existed prior to the 1959 zoning regulations was

substantially different in nature, type and degree from that permitted by the ZBA, in that pre-zoning camping (a) did not include spectators; (b) was limited to the infield; (c) was limited to far less than 1,500 campers; (d) took place over shorter time periods; and (e) was far less objectionable in nature. The plaintiffs further claimed that the ZBA's action was illegal because it permitted a use not in harmony with the "general purpose of the Zoning Regulations of the Town of Salisbury and is contrary to public policy," and did not attempt to conserve the public health, safety, convenience, welfare and/or property value of the plaintiffs and of other Town residents. Finally, the plaintiffs alleged that the ZBA's action was undertaken pursuant to defective notice.

In the third action, filed in 1978, the Committee and the same three individuals,[10] all abutting landowners, brought another action against the Foundation and the ZBA. *Lime Rock Protection Committee, Inc.* v. *The Lime Rock Foundation, Inc.*, Superior Court, judicial district of Litchfield, Docket No. CV-78-0016920-S. In the third action, the plaintiffs asserted that, at their request, the Comm'n had issued, on May 20, 1975, an order enforcing a zoning regulation that required a buffer strip between the race track and its neighbors, but that the Foundation did not comply with this order and that the Comm'n never enforced the order. The plaintiffs took an appeal seeking enforcement of the order, which was denied by the ZBA. The plaintiffs alleged that the actions of the ZBA were illegal because (1) it failed to require the Comm'n to enforce the buffer strip regulation; (2) its action was not supported by record evidence; (3) it permitted a use not in harmony with the general purpose of the zoning regulations and violative of public policy; (4) it failed to consider public health, safety, convenience, welfare and/or property values of the plaintiffs and other Salisbury residents; and (5) it provided defective notice.

[10] The original plaintiffs were Lime Rock Protection Committee, Inc., Joan C. Bergdahl and Jack Olson. It appears that Herbert O. Bergdahl was added at a later date as a plaintiff.

All three appeals were resolved by one stipulation for judgment dated May 31, 1979, with judgment entered in each file on September 19, 1979 (ZBA Judgment). The stipulation did not mention any provision of the zoning regulations, but simply recited that the track's owner was permitted to use the Site for camping for an unlimited number of spectators and participants at any events held there, subject to the following restrictions: (1) camping was limited to the infield; (2) no non-official motor vehicles were allowed to be parked in the outfield, except between 6:00 a.m. and 10:00 p.m.; (3) the track entrance running past the Reed Williams property was closed between 11:00 p.m. and 6:00 a.m. to all camping traffic; and (4) the 1978 case (Docket No. CV-78-0016920-S) was dismissed with prejudice.

The judgment in each of the two 1977 cases (Docket Nos. CV-77-0016404-S, CV-77-0016416-S), although identical in all significant respects, also augmented the stipulation by construing "the nonconforming use" of the Site to permit camping by an unlimited number of spectators and participants as an accessory use to permissible car racing events subject to certain restrictions, including: (1) camping and camping vehicles were confined to the infield of the race track; (2) no motor vehicles were to be parked in the race track outfield between 10:00 p.m. and 6:00 a.m., except for those on official track business, which had to be parked in the parking lot area adjacent to the track office; and (3) the back road and the race track entrance, which abutted the Reed Williams property were to be closed, between 11:00 p.m. and 6:00 a.m., to all traffic except for emergency and service vehicles.

F

Zoning Regulation Amendments

From June 8, 1959, though the 1967 version of the zoning regulations, racing at the Site was a permitted use but, in 1975, over the objection of the Park's predecessor, the Comm'n

voted to change the use of the Site from a permitted use to one allowed pursuant to a special permit. There is no evidence, however, that since this change, the Park or any of its predecessors have ever sought a special permit for its main uses, i.e., racing and exhibitions. Conversely, there is also no evidence that the Comm'n ever sought to require, in any formal way, that the Park or its predecessors apply for a special permit to operate.

The May 12, 1967 version of the zoning regulations still stated, as did the 1959 version thereof, that "[n]o races shall be conducted on any such track except during such hours as are permitted by Statute." At some time after March 11, 1974, and before February 23, 1981, however, the relevant zoning regulations were amended in a very critical way.[11] Significantly, at this time, Regulation 415.1, the provision regulating racing times, pivoted from the relevant state statute to the permanent injunction.

This amendment to the regulations is the critical amendment previously referred to in Section I of this memorandum of decision. While it would be extremely helpful for the court to understand the circumstances under which this regulation was amended, including whether this amendment was enacted properly, the Comm'n cannot locate this documentation.[12] The Comm'n

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[11] The court arrived at this range of dates by considering the following facts. The March 11, 1974 revision of the zoning regulations still provided that racing times were governed by the state statute. The typed copy of the 1974 regulations includes handwritten notations that the regulations were further amended on August 27, 1976, June 22, 1979, February 21, 1980 and February 23, 1981. A handwritten cross-out of section 415.1 provides that no "races shall be conducted on any such track except during such hours as are permitted by court order dated 5.12.59." The court infers that the handwritten cross-out was contemporaneous with one of the revisions noted in handwriting on the typed, March 11, 1974 version of the regulations, but the actual date of the revision was not noted.

[12] The amendment under our law is entitled to a presumption that it was enacted lawfully. See *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 542, 600 A.2d 757 (1991) (presumption that a zoning commission is acting within the statutory authority granted to it by § 8-2); see also *Bauer* v. *Waste*

was able to provide the court with only a reference in the Comm'n's minutes to this amendment. See #161, attachment H, p. 146. In what the court construes to be the minutes of the Comm'n for the February 10, 1975 meeting, after a "Regular Meeting" that convened at 8:00 p.m., the members "[a]djourned to Mr. Athoe's Office" at "9:07 p.m." Since this portion of the meeting is distinguished from the "Regular Meeting," the court finds that this was an executive session of the Comm'n. During this executive session, a nine-page letter from a group called the Lime Rock Protection Association was presented and discussed by "J. Brock." The minutes indicate that the "court injunction of 1959 is more restrictive than the zoning regulations. The court injunction pertained only to racing. . . ." The minutes proceed to state that "Wilson made point that P. & Z. cannot stop racing at the track but by Regulation 415.1 can enforce injunction imposed racing times."

The amendment that ensued effected a radical change in the zoning regulations. Whereas the previous version of the regulations allowed racing during the hours permitted by statute, this amendment stated that "[n]o races shall be conducted on any such track except during such hours as are permitted by Court Order dated 5/12/59." This amendment did not specify what these hours were, but simply referred the reader to the 1959 order. Thus, it would be necessary to locate the 1959 order to discover the permitted hours of racing. Additionally, this amendment did not acknowledge that the 1959 order had been amended by stipulation in 1966 and by means of a motion to modify in 1968.

The last version of the zoning regulations prior to the amendments at issue, the May 26, 2013 regulations, specified that "[n]o races shall be conducted on any such track except during such hours as are permitted by Court Order dated 5/12/59 and subsequent Court Orders on file in

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Management, 234 Conn. 221, 258, 662 A.2d 1179 (1995) (zoning regulats are entitled to a presumption of validity).

the Planning and Zoning Office, or the Town Clerk's Office." The 2013 regulations did not clearly set forth what these "permitted" hours were, and further did not include a specific reference to days of operation. Moreover, the 2013 regulations did not incorporate, by reference, the ZBA Judgment and did not contain any provisions as to camping, parking, or traffic on access ways to the track. Consequently, to determine the permitted hours of racing under the 2013 version of the zoning regulations required one to refer to the most recent version of the injunction.

The 2015 amendments were proposed by the Comm'n on or before July 20, 2015, and adopted on November 16, 2015. Portions of Sections 221.1 and 221.3 of these amendments[13] are the subject of the present appeal. The sections at issue will be set forth in more detail infra in this amended memorandum of decision.

G

Special Issues Arising from the Table of Uses

The zoning regulations have, since at least 1967, contained a separate Table of Uses setting forth which uses are permitted as of right and which only by special permit in the various zoning districts. A review of pre-1975 regulations reveals that, when the Comm'n began to employ a

[13] Several of the 2015 amendments are not at issue in the present appeal, including clarifying and expanding a list of various uses that are incidental and accessory to a race track use; modifying the Table of Uses to specify that a race track is a use allowed by special permit in the RE District; adding a definition of "motor vehicle" that is derived from state statute; and providing that certain temporary uses associated with racing, even though not incidental or accessory thereto, may be allowed by special permit. Moreover, initially, the 2015 amendments also added Section 221.6, a severability clause, providing that, if one portion of the regulations were found by a court to be invalid, all of the other provisions would be invalid as well. Section 221.6 also contained what the Park termed an "in terrorem" clause. This clause provided that, if the Park were to successfully challenge one or more provisions in the amended regulations, then a track for racing motor vehicles shall be found not to be permitted in the RE zoning district. The Park challenged this section on appeal, and the Comm'n, in a public hearing on March 30, 2016, repealed Section 221.6. Therefore, Section 221.6 is no longer before the court on this appeal.

Table of Uses, the race track was listed as permitted as of right. After the 1975 zoning amendment making the race track a specially permitted use, the Tables of Uses listed the race track a specially permitted use. However, the 2004 Table of Uses neglected to list a track for racing motor vehicles as either a permitted use or a use requiring a special permit in any zoning district. The 2008 Table of Uses corrected this oversight by listing a track for motor vehicle racing as a use allowed by special permit in the RE district. The 2013 regulations, once again, however, omitted to list a track for motor vehicle racing as a permitted or specially permitted use in any zoning district.

Because the zoning regulations state that any uses of land that are not allowed as permitted uses or by special permit or otherwise allowed are prohibited, Zoning Regulations Section 102.a, the failure to list the motor vehicle racing track as a permitted or specially permitted use, even though inadvertent, meant, strictly speaking, that the use was prohibited. See, e.g., *Gada* v. *Zoning Board of Appeals*, 151 Conn. 46, 48, 193 A.2d 502 (1963). Counsel for the Comm'n made this point during the deliberative session on the 2015 amendments, but later that evening pointed out that the failure to include the track on the table of uses was a mistake that would be rectified under the amendments. As mentioned in footnote 13 of this memorandum of decision, the 2015 amendments fix this problem by listing a motor vehicle racing track as a use by special permit in the table of uses for the RE district.

H

Summary of Confusing, Imprecise and Inconsistent Regulation of the Park

A great amount of confusion has been engendered by the manner in which the Park's use of the Site has been regulated over time. To illustrate this point, the court will examine three

major regulatory issues: (1) the categorization of use of the Site for motor vehicle racing; (2) Sunday racing and (3) the treatment of the ZBA Judgment.

(1)

Categorization of the Use at the Site

When the track began operations, there were no zoning regulations in Salisbury. Initially, therefore, there were no restrictions as to this use. Because the track existed prior to the enactment of zoning regulations, it was a pre-existing, nonconforming use. The use prior to the existence of Town zoning regulations included Sunday racing. When the zoning regulations were first adopted, in June, 1959, motor vehicle racing at the Site was listed as a permitted use. It remained one until 1975. As previously mentioned, in 1975, the Comm'n changed the designation of motor vehicle racing at the Site to one of use by special permit. However, neither the Park nor any of its predecessors have ever applied for a special permit. The Comm'n has never formally required the Park to apply for a special permit. No special permit has, therefore, ever been granted. To exacerbate this problem, in 2004, for four years, and in 2013, for two years, the Comm'n forgot to list motor vehicle racing as a specially permitted use in the RE zoning district on the applicable section of the Table of Uses. Even though the Comm'n now acknowledges that the omission was done in error, strictly speaking, the failure to list meant that the use of the Site for motor vehicle racing was prohibited between 2004 and 2008, and between 2013 and the enactment of the 2015 regulations, which, once again, placed the Park in the Table of Uses as a specially permitted use..

During the deliberative session considering the 2015 amendments at issue, the Comm'n's chairman made several comments that underscore the historically jumbled nature of the

regulation of the Park's racing activities.[14] During that session, the chairman first stated that "de facto [the Park] has right now a special permit, though it doesn't apply for one, it's operating as a permitted special permit without the permit." The chairman further stated that "so here we have a permitted use, they have not come in for a special permit. We've accepted that through practice." The chairman finally stated that "[i]n a way, those standards in that injunction in a sense de facto form the basis of the permitted use that doesn't have the special permit right now . . . that's basically what it is." Most significantly, the chairman summarized the Comm'n's goals as "defining for the first time that it's this permitted use subject to a special permit that does not have a special permit from an accident of history or evolution; but these are the parameters."[15]

(2)

Regulation of Sunday Racing

The history of Sunday racing is also fraught with inconsistencies. Prior to the May 12, 1959 injunction in *Adams*, the Park's predecessors conducted Sunday racing. Although the May 12, 1959 injunction prohibited Sunday racing and exposed the Park's predecessor to a $10,000 fine for, inter alia, violating that portion of the injunction, less than one month later, on June 8, 1959, acting as if it were unaware of the less than one month-old injunction, the Comm'n enacted, as discussed above, zoning regulations which allowed Sunday racing after two o'clock in the afternoon pursuant to the relevant state statute. The patent inconsistency of the injunctive

[14] The court understands that these comments are not part of the formal statement of reasons for the amendments, but cites to these comments merely to explain the confused status of the regulation of the Site at the time of the amendments.

[15] Moreover, as discussed infra, there is case law holding that, at least to some degree, a pre-existing, nonconforming use runs with the land, notwithstanding any change to the characterization of the use as otherwise permitted or specially permitted. This concept was evidenced in the ZBA Judgment. Although issued four years after the Comm'n changed the categorization of the Site use from permitted to specially permitted, the ZBA Judgment termed the use of the Site, as least as far as camping and parking were concerned, as "nonconforming."

prohibition of Sunday racing existing side by side with the zoning regulations permitting Sunday racing after two o'clock p.m. persisted, as discussed previously in footnote 11 of this memorandum of decision, for a significant amount of time, at least from 1959 through 1974, and possibly until 1981. At that time, the regulations were amended to refer to the hours of operation permitted in the 1959 injunction, as opposed to those hours permitted under the statute. There is no evidence before the court that, during the extended period of time of this discrepancy between what the *Adams* injunction prohibited, e.g., Sunday racing, and what the zoning regulations allowed, e.g., Sunday racing after two o'clock p.m., the Park's predecessor(s) ever sought to race on Sundays.[16] In other words, despite the permission granted by the regulations over at least fifteen, and possibly as many as twenty-two years, the Park's predecessors abided by the injunction's prohibition on Sunday racing.

From the time of the zoning regulation amendment referring parties to the 1959 order for guidance on Sunday racing, on forward, through and including the 2013 version, the zoning regulations never specified what the permitted hours of racing were, but merely referred the reader to the 1959 injunction, or to revisions thereof. The zoning regulations during this time never even told the reader where to find the 1959 injunction, or any modifications thereof, until 2013, when the regulation directed anyone interested to the 1959 order or "subsequent Court Orders on file in the Planning and Zoning Office, or the Town Clerk's Office." As the Comm'n pointed out in argument, had the *Adams* injunction been modified at any time when the regulations incorporated it by reference to set forth hours of racing, the regulations would, ipso facto, have been amended without the benefit of the required administrative process.

[16] In fact, the Comm'n's counsel volunteered during the deliberative session, that, "I'm not aware there's been violations [by the Park of any restrictions imposed by the injunction or its modifications]."

Even counsel for the Comm'n found the 2013 regulations to be ambiguous in regard to Sunday racing. During the deliberative session on the amended regulations, when discussing the incorporation by reference of the injunction's prohibition on Sunday racing, the Comm'n's counsel commented that "someone coming in for the first time wouldn't know what that lawsuit [the *Adams* suit] is." Shortly after that comment, the Comm'n's counsel stated, when discussing versions of the court order on file with the Town, "[s]o what if there's five court orders in the office, and there are. There's '59, '66, there was '88. So what is it? I mean just from a point of view what does it mean and what are you referring to? Yeah, I think it's a good idea to not have ambiguity but to say what it is." In referring to times of operation, counsel for the Comm'n concluded by saying that "I think it's important to remove the ambiguity of what it is."

(3)

Ambiguity about the ZBA Judgment

The zoning regulations, prior to the 2015 amendments, never addressed the issues decided in the ZBA Judgment pertaining to camping and parking. However, the Comm'n, in the formal statement of reasons it adopted in support of the 2015 amendments, nonetheless, termed the ZBA Judgment part of the Town's zoning "present status quo." During the deliberative session in which the Comm'n approved the 2015 amendments, counsel for the Comm'n first stated that the actions giving rise to the ZBA Judgment "involved . . . an interpretation of the regulations," and then described the ZBA Judgment as being "part of the zoning status." Counsel for the Comm'n later described the ZBA Judgment as "part of our zoning scheme." The formal statement of reasons adopted by the Comm'n further refers to the ZBA Judgment as "restrictions that are already part of the Town's zoning scheme," and states that positing "the standards in the regulations themselves allows the affected property owners to know what the zoning restrictions

are without having to review outside documents." Even though the provisions of the ZBA were never, prior to the 2015 amendments, part of the Town's zoning regulations, the Comm'n viewed the incorporation of the provisions of the ZBA Judgment into the 2015 regulations as simply a codification of language already governing the use of the Site with regard to camping, parking and the other issues addressed in the ZBA Judgment.

III

STANDARD OF REVIEW[17]

As a threshold matter, aggrievement is a prerequisite to maintaining a zoning appeal, and the Park bears the burden of proof that it is aggrieved by the Comm'n's decision to amend its regulations. Unless an appellant pleads and proves aggrievement, the case must be stricken for lack of subject matter jurisdiction. In the present case, the parties have stipulated to facts which allow this court to make a finding that the Park is aggrieved. See *Hughes* v. *Town Planning & Zoning Commission*, 156 Conn. 505, 509, 242 A.2d 705 (1968); *Hendel's Investors Company* v. *Zoning Board of Appeals*, 62 Conn. App. 263, 270-71, 771 A.2d 182 (2001); R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 32:3.

A local zoning commission, acting in a legislative capacity, has broad authority to enact or amend zoning regulations. *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 542, 600 A.2d 757 (1991); *Arnold Bernhard & Co.* v. *Planning & Zoning Commission*, 194 Conn. 152, 164, 479 A.2d 801 (1984). "Acting in such legislative capacity, the local board is free to amend its regulations whenever time, experience, and responsible planning for contemporary or future conditions reasonably indicate the need for a change." (Internal quotation marks omitted.) *Protect Hamden/North*

[17] This section has been redrafted based on the arguments made in the various motions to reconsider.

Haven from Excessive Traffic & Pollution, Inc. v. *Planning & Zoning Commission*, supra, 543. The broad discretion of local zoning authorities acting in their legislative capacity is not, however, unlimited. *Damick* v. *Planning & Zoning Commission*, 158 Conn. 78, 83, 256 A.2d 428 (1969). "Zoning is an exercise of the police power. . . . As a creature of the state, the . . . [Town . . . whether acting itself or through its planning commission,] can exercise only such powers as are expressly granted to it, or such powers as are necessary to enable it to discharge the duties and carry into effect the objects and purposes of its creation. . . . In other words, in order to determine whether the regulation in question was within the authority of the commission to enact, we do not search for a statutory prohibition against such an enactment; rather, we must search for statutory authority for the enactment. . . . If the legislation is [a zoning] ordinance, it must comply with, and serve the purpose of the statute under which the sanction is claimed for it. . . . A local zoning commission is subject to the limitations prescribed by law [and] [t]he power to zone [is] not absolute but [is] conditioned upon an adherence to the statutory purposes to be served." (Citations omitted; internal quotation marks omitted.) *Builders Service Corp.* v. *Planning & Zoning Commission*, 208 Conn. 267, 274-75, 545 A.2d 530 (1988).

General Statutes § 8-2 is the statutory source of authority for the 2015 amendments. "The test of the action of the commission is twofold: (1) The zone change must be in accord with a comprehensive plan, General Statutes § 8-2 . . . and (2) it must be reasonably related to the normal police power purposes enumerated in § 8-2 . . . ." (Citations omitted; internal quotation marks omitted.) *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 543-44; see also *Arnold Bernhard & Co.* v. *Planning & Zoning Commission*, supra, 194 Conn. 159 ("General Statutes § 8-2 delegates broad authority to municipalities to enact local zoning regulations").

In order to describe "normal" police powers delegated to local zoning commissions under § 8-2, our Supreme Court, has referred, in one case, to the following language in § 8-2: "[Z]oning regulations shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements." (Internal quotation marks omitted.) *First Hartford Realty Corp.* v. *Plan & Zoning Commission*, 165 Conn. 533, 541 n.1, 338 A.2d 490 (1973). Elsewhere, our Supreme Court has further described the zoning police powers as those that, inter alia, advance the "prosperity of the community . . . ." (Internal quotation marks omitted.) *Corthouts* v. *Newington*, 140 Conn. 284, 288, 99 A.2d 112 (1953); see *Builders Service Corp.* v. *Planning & Zoning Commission*, supra, 208 Conn. 283; *State* v. *Hillman*, 110 Conn. 92, 100, 147 A. 294 (1929).

Noted commentator Professor Terry Tondro places a finer point on the zoning police power under § 8-2, positing that "Section 8-2 . . . is the basic statement of the purposes for which the zoning powers may be exercised." T. Tondro, Connecticut Land Use Regulation (Cum. Supp. 2000), p. 53. Tondro notes that the language employed in § 8-2 includes "very general" language, particularly in the older portion of the statute, as well as more specific language from the new portion of the statute. Id. He further posits that the "present language permits zoning powers to be used" in the following relevant ways: "[T]o regulate the location and use of structures [and land] for trade [and] industry," and "to conserve the value of buildings; [and to] encourage the most appropriate use of land throughout the municipality." Id., pp. 53- 54.

After reviewing numerous cases interpreting the zoning powers delegated to a local commission, Tondro makes the following salient observations. First, "the zoning purposes recited in C.G.S. § 8-2 are simply statements about the subjects the zoning commission may consider, rather than policy objectives municipalities are directed to achieve. They indicate neither the relative strength of competing considerations, nor how to evaluate any one of them. As such, they do little to constrain the discretion of zoning commissions when deciding the objective they will pursue with the power delegated to them." Id., p. 57. Second, a tension exists between a proposition consistently articulated in a long line of unchallenged Supreme Court precedent and the manner in which this proposition has been applied in practice. The proposition is that "the zoning powers" are to be construed "in a limited way because they are in derogation of the common law." Id., p. 44. In fact, a 1988 Supreme Court decision, *Builders Service Corp.* v. *Planning & Zoning Commission*, supra, 208 Conn. 274-75, holds that "specific authority to enact a regulation . . . must be provided for in the language of the statute [§ 8-2]," T. Tondro, supra,[18] and that "the . . . [town . . . whether acting itself or through its planning commission,] can exercise only such powers as are expressly granted to it [by § 8-2], or such powers as are necessary to enable it to discharge the duties and carry into effect the objects and purposes of its creation." (Internal quotation marks omitted.) *Builders Service Corp.* v. *Planning & Zoning Commission*, supra, 274. More specifically, "in order to determine whether the regulation in question was within the authority of the commission to enact, we do not search for a statutory prohibition against such an enactment; rather we must search for statutory authority for the enactment." (Internal quotation marks omitted.) Id., 275. Tondro notes, however, that, notwithstanding this very clear Supreme Court guidance, "a long line of zoning techniques and

[18] Accord *Capalbo* v. *Planning & Zoning Board of Appeals*, 208 Conn. 480, 490, 547 A.2d 528 (1988).

objectives have been approved by Connecticut courts even though no specific statutory language authorizes them." T. Tondro, supra, p. 44; see id., p. 44 nn. 36-53 (citing decisions granting a zoning body authority to regulate absent specific authorization in § 8-2). From this tension, Tondro concludes that "[i]f there is a pattern, it appears to be one of judicial deference to any local initiative unless it threatens other important constitutional interests as well as threatening private property rights." Id., pp. 47-48.

Assuming that a zoning commission is acting within the statutory authority granted to it by § 8-2, judicial review of a decision to amend zoning regulations is limited. *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 220 Conn. 542. It is a "rare case in which the legislative judgment of what is beneficial to the community can be superceded by that of the judiciary." (Internal quotation marks omitted.) *Timber Trails Associates*, v. *Planning & Zoning Commission*, 99 Conn. App. 768, 787, 916 A.2d 99 (2007). "[I]t is not the function of the court to retry the case. Conclusions 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 agency. The question is not whether the trial court would have reached the same conclusion but whether the record before the agency supports the decision reached." (Internal quotation marks omitted.) *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.*, supra, 542-43. A local zoning board's "legislative discretion is 'wide and liberal,' and must not be disturbed by the courts unless the party aggrieved by that decision establishes that the commission acted arbitrarily or illegally." (Internal quotation marks omitted.) Id., 543; see *Stiles* v. *Town Council*, 159 Conn. 212, 218-19, 268 A.2d 395 (1970) ("[c]ourts cannot substitute their judgment for the wide and liberal discretion vested in the local zoning

authority when it is acting within its prescribed legislative powers"). "Courts will not interfere with . . . local legislative decisions unless the action taken is clearly contrary to law or in abuse of discretion. . . ." *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 543-44; see *Arnold Bernhard & Co.* v. *Planning & Zoning Commission*, supra, 194 Conn. 159 ("General Statutes § 8-2 delegates broad authority to municipalities to enact local zoning regulations"). Our Supreme Court has, however, found zoning amendments to be invalid because they were "not rationally related to any legitimate purpose of zoning as set out in § 8-2," *Builders Service Corp.* v. *Planning & Zoning Commission*, supra, 208 Conn. 306, and because they were deemed to be arbitrary, unreasonable, and confiscatory, *Corthouts* v. *Newington*, 140 Conn. 284, supra, 288-90.

Applying these principles to the present case, this court must decide if the 2015 amendments at issue are (1) proper exercises of the statutory authority granted to the Comm'n under the police powers set forth in § 8-2, (2) rationally related to the exercise of those powers, and, if so, (3) neither arbitrary, unreasonable, illegal or confiscatory. In making these determinations, the court should consider the Comm'n's statement of reasons. "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 authority was required to apply under the zoning regulations. . . . The zone change must be sustained if even one of the stated reasons is sufficient to support it. . . . The principle that a court should confine its review to the reasons given by a zoning agency does not apply to any utterances, however incomplete, by the members of the agency subsequent to their vote. It applies where the agency has rendered a formal, official, collective statement of reasons for its action. . . . [H]owever . . . the failure of the zoning agency to give such reasons requires

the court to search the entire record to find a basis for the commission's decision." (Citations omitted; internal quotation marks omitted.) *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 220 Conn. 544. Accordingly, to determine whether the 2015 amendments are within the Comm'n's authority, the court first will refer to the Comm'n's formal statement of reasons, and then decide if even one of the officially proffered reasons is reasonably supported by the record. While this formulation sounds simple, its application in the present case is complex, especially with regard to the Park's arguments concerning the restriction on days and hours of racing and the regulation of noise.

IV

PARTIES' ARGUMENTS

The Park's complaint averred that its action is an appeal from "amendments to the Salisbury Zoning Regulations . . . adopted by the Commission on November 16, 2015." Compl. ¶ 2 (#100.30). At the present time, the Park asserts that the Comm'n acted illegally, arbitrarily, capriciously and in abuse of its discretion in several ways.[19]

The Park raised three interrelated threshold arguments that arise from § 8-2, which authorizes the Comm'n to adopt zoning regulations. The first of these arguments is that the amendments contravene the requirement of § 8-2 that zoning regulations be in conformity with the comprehensive plan. Second, it is argued that § 8-2 does not authorize the Comm'n to engraft restrictions from both the *Adams* injunction concerning days and hours of racing operation and also from the ZBA Judgment pertaining to camping, parking and use of access

[19] Although the Park originally mounted attacks on the amendments other than those to be listed, infra, it failed to brief some of these arguments, including an improper notice argument and an argument that the new regulations required the Park to seek a special permit for activities it undertook prior to these amendments. The court will not consider the Park's abandoned arguments.

roads onto the Town's zoning regulations. Specifically, the Park claimed that § 8-2 "does not . . . allow a Commission to simply defer to what private individuals have settled upon in private lawsuits without any consideration whatsoever of whether such settlement terms further statutorily sanctioned purposes." Pl. Br. p. 17 (#127). In further support of this argument, the Park posited that the Comm'n disallowed testimony in regard to limitations it already considered to be part of the "zoning scheme," namely the injunctive restrictions from *Adams* and the camping and parking limitations from the ZBA Judgment. The third argument is that there is no legitimate land use basis under this statute, as well as no record evidence thereof, to support the amendments. In support of this argument, the Park argued that "[c]reating consistency with a court order or stipulation is not among the listed permissible reasons for land use regulation." P. Br., p. 21. As a result, the third argument also takes up the issue of the insertion of the *Adams* injunctive restrictions and the ZBA Judgment into the zoning regulations.

The Park also made arguments about specific provisions of the amendments. Among these are the following: (1) The limitations on days and hours of racing and race car activities violate and are preempted by General Statutes § 14-164a; (2) the amendments attempt to regulate noise in an improper fashion; and (3) the Comm'n exceeded its statutory authority under § 8-3 (c) by requiring the Park to file an application for a special permit, as well as a site plan, as a prerequisite to moving to amend the regulations. This third argument is an appeal of virtually identical provisions in Sections 221.1 and 221.3. As previously mentioned, Section 221.1 largely deals with days and hours of racing, and also deals with restrictions on mufflered and unmufflered racing. Subsection (8) of Section 221.1 a. provides that "[t]he parameters set forth in this subsection may be amended by the Commission upon filing and approval of (1) a special permit application in compliance with all requirements of these regulations, including a site plan

identifying the location of all uses, accessory uses, buildings, structures, pavement, and all other improvements on the relevant property, and amendments to any of the parameters set forth above; and (2) a petition to amend the zoning regulations setting forth alternative parameters for this subsection." Almost identical is subsection (d) of 221.3, which pertains to camping by spectators and participants: "The standards set forth in this subsection may be amended by the Commission upon filing and approval of (1) a special permit application in compliance with all requirements of these regulations, including a site plan identifying the location of all uses, accessory uses, buildings, structures, pavement, and all other improvements on the relevant property, and amendments to any of the restrictions set forth above; and (2) a petition to amend the zoning regulations setting forth alternative standards for this subsection."

The Park also made several general arguments that applied to sections of the amendments other than the ones reviewed above. The Park argued that the amendments constitute illegal spot zoning, target a single property owner and regulate a user rather than a use. The Park further contended that the amendments do not conform to the Town's Plan of Conservation and Development.

In response, the Comm'n argued that: (1) there is a legitimate land use basis for the amendments; (2) it acted within its authority in addressing how certain standards in the regulations may be amended; (3) there is evidentiary support for the amendments in the administrative record; (4) the Park has not sustained its burden to prove that the amendments do not conform to the Town's comprehensive plan or its plan of conservation and development; (5) the amendments do not constitute spot zoning, target a single property owner, or seek to regulate a user rather than a use; (6) the amendments concerning the track's hours of operation are not preempted by or irreconcilably in conflict with General Statutes § 14-164a; (7) the amendments

concerning mufflered versus unmufflered racing do not constitute illegal noise regulations, and, in fact, the limitations on unmufflered racing are not even attempts to regulate noise; and (8) the Comm'n is acting within its statutory authority by requiring the Park to file an application for a special permit, as well as a site plan, as a prerequisite to moving to amend the regulations.

In support of the Comm'n's position, the Council contended that several of the Park's claims have been abandoned for failure to brief; the Park's prior stipulations to limits on Sunday racing and hours of operation in the injunction action act as a waiver to any current challenge to the amended regulations; the Comm'n's actions in limiting Sunday racing are not preempted by General Statutes § 14-164a; the amendments do not impermissibly regulate noise; and state law allows the Comm'n to require the Park to file for a special permit with a site plan in order to seek to amend the zoning regulations.

V

DISCUSSION

A

Language of the Amendments at Issue

As set forth above, the Park has briefed or argued appeals of portions of Sections 221.1 and 221.3 of the 2015 amendments. Therefore, it is important to review the language of these two sections of the amendments. Section 221.1 provides, in relevant part, as follows:

> A track for racing motor vehicles, 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, car shows, and certain other events identified in section 221.2 are permitted subject to the issuance of a special permit in compliance with the procedures and standards of these regulations and also subject to the following:
>
> a. No motor vehicle races shall be conducted on any such track except in accordance with the following parameters [footnote 1 is then inserted which reads as follows: FN 1. The parameters set forth herein are identical to those set forth in

the Amended stipulation of Judgment entered by the Court, Dranginis, J., on March 21, 1988 in the civil action, Ann Adams, et al. v. B. Franklin Vaill, et al., CV No. 15,459 (Judicial District of Litchfield at Litchfield), which parameters were previously incorporated by reference in the zoning regulations]:

(1) All activity of mufflered or unmufflered racing cars upon the asphalt track or in the paddock areas shall be prohibited on Sundays.

(2) Activity with mufflered racing car engines shall be permitted as follows: (A) On any weekday between 9:00 a.m. and 10:00 p.m. provided, however, that such activity may continue beyond the hour of 10:00 p.m. without limitation on not more than six (6) occasions during any one calendar year. (B) Permissible mufflers are those which meet the standards set forth in Section 14-80(c) of the General Statutes of Connecticut, Revision of 1959, or as the same may be amended from time to time.

(3) Activity with unmufflered racing car engines shall be permitted as follows: (A) On Tuesday afternoon of each week between 12:00 noon and 6:00 p.m. (B) On Saturdays, not more than ten (10) in number each calendar year, between the hours of 9:00 a.m. and 6:00 p.m. (C) On the ten (10) Fridays which precede the said ten (10) Saturdays between the hours of 10:00 a.m. and 6:00 p.m. for the purpose of testing, qualifying or performing such other activities as may be necessary or incidental to the direct preparation for races on the Saturdays specified, provided that no qualifying heats or races shall be permitted on such Fridays. (D) In such event the scheduled activity for any of the said ten (10) Saturdays must be rescheduled for a "rain date", then said "rain date and the Friday preceding it shall not be considered as one of the ten (10) days referred to in Paragraphs b) and c) above. (E) On Memorial Day, Fourth of July and Labor Day between the hours of 9:00 a.m. and 6:00 p.m. (i) In the event any of the holidays falls on a Tuesday, Thursday or a Friday, there may be unmufflered activity on the day preceding the holiday between the hours of 12:00 noon and 6:00 p.m., but in the event the permissible unmufflered activity of the Tuesday next preceding the holiday shall be forfeited. (ii) In the event any of said holidays falls on a Sunday, the next day (Monday) will be considered the holiday for these purposes. (iii) In no event shall any such holidays increase the number of Saturdays of permissible unmufflered activity beyond ten (10) as provided in Paragraph b) above.

(4) Prohibited activity upon the track shall include the revving and testing of mufflered or unmufflered car engines on Saturdays and permitted holidays prior to 9:00 a.m. and after 6:00 p.m., excepting the transportation of said vehicles to and from the paddock areas on or off their respective trailers, which transporting, unloading or loading shall not commence before 7:30 a.m. or extend beyond 7:30 p.m.

(5) The use of the track loudspeakers before 8:00 a.m. and after 7:00 p.m. is prohibited.

...

(8) The parameters set forth in this subsection may be amended by the Commission upon filing and approval of (1) a special permit application in compliance with all requirements of these regulations, including a site plan identifying the location of all uses, accessory uses, buildings, structures, pavement, and all other improvements on the relevant property, and amendments to any of the parameters set forth above; and (2) a petition to amend the zoning regulations setting forth alternative parameters for this subsection.

Section 221.3 provides, in pertinent part, as follows:

Camping by spectators and participants is allowed as an accessory use to permissible automobile events subject to the following restrictions:

a. All camping and camping vehicles shall be locations within the infield of any asphalt race track existing as of the effective date of this regulation.
b. No motor vehicles shall be parked in any Race Track outfield during the hours of 10:00 p.m. to 6:00 a.m. except those which are (1) on official track business; and (2) parked in the parking lot existing as of the effective date of this regulation.
c. No traffic other than emergency or service vehicles shall be allowed between the hours of 11:00 pm [sic] and 6:00 am [sic] on any accessway into any race track that abuts property located at 52 White Hollow Road.
d. The standards set forth in this subsection may be amended by the Commission upon filing and approval of (1) a special permit application in compliance with all requirements of these regulations, including a site plan identifying the location of all uses, accessory uses, buildings, structures, pavement, and all other improvements on the relevant property, and amendments to any of the restrictions set forth above; and (2) a petition to amend the zoning regulations setting forth alternative standards for this subsection.

Return of Record, Ex. 20.

B

Park's Arguments Under § 8-2

As mentioned above, the Park makes three interrelated arguments under § 8-2. The court will address one argument separately, and, then, the other two together.

(1)

Conformity to the Comprehensive Plan

The Park argued that the amendments do not comply with the mandate that the zoning regulations conform to the Town's comprehensive plan. The court disagrees.

Section 8-2 states that municipal zoning regulations "shall be made in accordance with a comprehensive plan. . . ." "A comprehensive plan has been defined as a general plan to control and direct the use and development of property in a municipality or a large part thereof by dividing it into districts according to the present and potential use of the properties." (Internal quotation marks omitted.) *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 220 Conn. 551. "In the absence of a formally adopted comprehensive plan, a Town's comprehensive plan is to be found in the scheme of the zoning regulations themselves." (Internal quotation marks omitted.) Id.

In its brief, the Park contended that "[a]lthough the scheme of zoning allows race tracks as a permitted use, the Amendments seek to limit the operation of a race track to such an extent that the use will be severely hampered." Pl. Br., p. 22 (#127). In support of this proposition, the Park argued that the prohibition on Sunday racing, regulation of days and hours of racing and limits on unmufflered racing would put the Track at a severe competitive disadvantage with other national race tracks, and, thus, the Amendments are not in conformity with the comprehensive plan.

There are two fatal flaws with this position. First, this position proceeds on an incorrect premise concerning the zoning status of the Park prior to the regulations at issue. As previously discussed, the use of the Site for car racing has not been a permitted use under the zoning regulations for over forty years. Although the use of the Site for car racing by the Park's predecessors was a permitted use from 1959 until 1975, the Comm'n voted in 1975 to amend the

regulations to categorize this use as one requiring a special permit. After that time, the use of the Site for car racing was a specially permitted use, not a permitted use, as the Park suggests.

Second, the argument marshalled in search of this position evinces a misunderstanding of bedrock zoning principles. Preventing the Park from being placed at an economic disadvantage with its national competitors is not a goal of the Town's comprehensive plan, as reflected in its zoning regulations. A comprehensive zoning plan is a "general plan to control and direct the use and development of property in a municipality or a large part thereof by dividing it into districts according to the present and potential use of the properties." *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 220 Conn. 551; see also *Lewis* v. *Zoning Board of Appeals*, Superior Court, judicial district of Middlesex, Docket No. CV-96-080068-S (May 2, 1997, *Arena, J.*) (protection from competition not an interest protected by zoning laws). Therefore, based upon the arguments it made, the Park did not sustain its burden to convince the court that the amendments were generally discriminatory or out of harmony with the comprehensive plan of zoning adopted to serve the needs of the Town.

(2)

Authority under § 8-2 to Engraft Provisions from the *Adams* Injunction and from the ZBA Judgment into the Zoning Regulations; Legitimate Land Use Basis Under § 8-2 to Support the Engrafted Amendments

Both of these arguments pertain to the insertion of provisions from the *Adams* injunction and the ZBA Judgment into the zoning amendments. The Park contended that § 8-2 did not authorize the Comm'n to graft restrictions from the *Adams* injunction concerning days and hours of racing operation and from the ZBA Judgment pertaining to camping, parking and use of access roads onto the Town's zoning regulations. Specifically, the Park claimed that § 8-2 "does not . . . allow a Commission to simply defer to what private individuals have settled upon in

private lawsuits without any consideration whatsoever of whether such settlement terms further statutorily sanctioned purposes." Pl. Brief, p. 17 (#127). Similarly, the Park argued that amending zoning regulations to make them consistent with a previous court order or stipulation is not a permissible reason for land use regulation under § 8-2, and that no record evidence supports the amendments. The Park's two main arguments are two sides of the same coin, namely that the Comm'n acted in an ultra vires manner and without a legitimate reason when it inserted provisions from the most recent version of the *Adams* injunction and from the ZBA Judgment into the zoning regulations. The court will first review the language that was incorporated into the zoning regulations from the private actions which gave rise to the current *Adams* injunction and the ZBA Judgment.

(a)

Language Incorporated from Previous Court Orders into the Amendments

Subsection a. of Section 221.1 clearly acknowledges that its intent is to cut and paste what it calls the "parameters" of the 1988 *Adams* Stipulation into the zoning regulations. Section 221.1 states that "[n]o motor vehicle races shall be conducted on any such track except in accordance with the following parameters [footnote 1 is then inserted which reads as follows: FN 1. The parameters set forth herein are identical to those set forth in the Amended stipulation of Judgment entered by the Court, Dranginis, J., on March 21, 1988 in the civil action, Ann Adams, et al. v. B. Franklin Vaill. . . ." The "parameters" adopted by the 2015 amendments address the days and hours of the week in which motor vehicle racing may take place in the following fashion. The 2015 amendments expressly prohibit all "activity of mufflered or unmufflered racing cars" on the track or in the paddock area on all Sundays. In addition to the Sunday prohibition, the 2015 amendments only permit "activity with mufflered racing car engines" on

weekdays, which are defined as Mondays through Fridays, from 9:00 a.m. to 10:00 p.m., but provide an exception for six days a year on which "such activity may continue beyond...10:00 p.m. without limitation." Therefore, the regulations do not allow mufflered racing on Saturdays. The 2015 amendments also place extensively detailed limitations on the days of the week on which "activity with unmufflered racing car engines" may take place. Specifically, such activity may take place on Tuesdays between 12:00 noon and 6:00 p.m., on ten Saturdays per year between 9:00 a.m. and 6:00 p.m., on the ten Fridays that precede the ten Saturdays between 10:00 a.m. and 6:00 p.m. for the purpose of testing, qualifying or performing other activities related to direct preparation for the Saturday racing. The regulations also include provisions for what happens in the event of a rain out. Unmufflered racing may also take place on Memorial Day, the Fourth of July and on Labor Day between 9:00 a.m. and 6:00 p.m. The regulations prohibit revving and testing of any car engines, mufflered or unmufflered, on Saturdays and the permitted holidays before 9:00 a.m. and after 6:00 p.m., except for the transportation of such vehicles off their trailers or back and forth from the paddock area. Such transporting must occur between 7:30 a.m. and 7:30 p.m. The regulations also prohibit loudspeaker activity before 8:00 a.m. and after 7:00 p.m. The aforementioned restrictions on racing and racing-related activity found in Section 221.1 have been engrafted from the 1988 Stipulation to the *Adams* injunction.

Section 221.3 incorporates provisions from the ZBA Judgment that (1) limit camping and camping vehicles to the Track's infield, (2) prohibit parking in the track outfield, except for cars on official business and those parked on the current parking lot, between 10:00 p.m. and 6:00 a.m., and (3) disallow traffic, except for emergency or service vehicles, between 11:00 p.m. and 6:00 a.m. on any roadway leading to the track that abuts 52 While Hollow Road.

The court shall next review the status of the regulations just prior to the adoption of the 2015 amendments to understand more clearly the changes effected by the 2015 amendments.

(b)

Changes Effected by the 2015 Amendments

As mentioned above, (1) the provisions from the ZBA Judgment were never part of the zoning amendments prior to the 2015 amendments, and (2) the only reference in the version of the zoning regulations preceding the amendments, the 2013 version, to the *Adams* stipulation posited that "[n]o races shall be conducted on any such track except during such hours as are permitted by Court Order dated 5/12/59 and subsequent Court Orders on file in the Planning and Zoning Office, or the Town Clerk's Office." The court, in accordance with the opinion of the Comm'n's counsel, has found, as set forth above, this language to be ambiguous. The court has further found that the language from the 2013 amendments operated solely to regulate hours, as opposed to days of racing per the 1988 *Adams* Stipulation.

Therefore, the court finds that the 2015 amendments effect the following changes. Unlike their predecessors, the 2015 amendments expressly prohibit Sunday racing, disallow mufflered racing on Saturdays, and limit unmufflered racing to 10 Saturdays a year and to the three warm weather holidays, Memorial Day, the Fourth of July and Labor Day. Moreover, the 2015 amendments not only restrict "races . . . on . . . [the] track," as did the 2013 regulations, but also "activity of" race cars on Sunday both in the paddock or on the track, as well as "activity with mufflered racing car engines" on the days specified above during the week. Additionally, whereas the 2013 regulations were silent as to camping and parking, the new amendments limit camping to the track infield, disallow public parking outside of the existing parking lot in the

track outfield between 10:00 p.m. and 6:00 a.m., and prohibit non-emergency traffic on any roadway leading to the Park that abuts 52 While Hollow Road.

The court will next review the formal statement of reasons provided by the Comm'n.

(c)

Formal Statement of Reasons Pertaining to the Incorporation of Provisions from *Adams* Injunction and from ZBA Judgment

Near the end of the Comm'n's deliberative session on the amended regulations, its counsel presented to the Comm'n a formal statement of reasons he had drafted before the meeting. The formal set of reasons relevant to the issues before the court may be summarized, in pertinent part, as follows:

- Reason 1 posited that placing the portions of Sections 221.1 and 221.3 engrafted from the operative *Adams* injunction and from the ZBA Judgment "into the regulations themselves allows the affected property owners to know what the zoning restrictions are without having to review outside documents [the *Adams* judgment and modifications thereof, as well as the ZBA Judgment]."
- Reason 2 acknowledges that *Adams* is based on private nuisance law and that the authority of the Comm'n derives from § 8-2, but states because "zoning attempts to be consistent with affected property owners' reasonable expectations concerning land use, it is reasonable to incorporate these restrictions on land use within the zoning regulations themselves." Reason 2 further posits that, by incorporating the relevant provisions of the *Adams* injunction and the ZBA Judgment into the zoning regulations, the Comm'n clarified "the exact standards that are the present 'status quo' and that have shaped the conduct and reasonable expectations of affected property owners for decades." By doing so, the Comm'n also eliminated the possibility of an unintended amendment of the

zoning regulations, which previously had referred to the hours of racing operation in the *Adams* injunction, were the *Adams* injunction to be modified. Reason 2 also states that "articulating the current restrictions within the regulations themselves" provides a benefit by setting forth a clear mechanism, namely, the permitting and amendment process for zoning changes, so that any interested party may, if it chooses to do so, seek to amend such restriction without the necessity of attempting to modify the injunction.

- Reason 4 declares (1) that the amendments support "public health & safety and preserve property values," (2) that Section 221.1 a and the other zoning provisions regulate a use, namely a car race track, that "may have substantial impacts on surrounding properties," including "noise . . . traffic (including volume, the size of vehicles travelling on narrow streets, and congestion), nighttime illumination, air quality, and changes to property values."

(d)

Analysis of Amendments under § 8-2

As discussed above Section III of this memorandum of decision, the court must take a multi-step approach to discerning whether the Comm'n's incorporation of provisions from the *Adams* injunction and from the ZBA Judgment into its zoning regulations is an authorized and reasonable exercise of the Comm'n's police power under § 8-2, and an exercise supported by a legitimate land use basis. In regard to both sets of incorporated provisions, the court must decide whether the incorporation of these provisions was authorized under § 8-2, whether these amendments at issue constitute a proper exercise of the Comm'n's zoning police powers under § 8-2, whether these amendments are rationally related to the exercise of those police powers, and whether these amendments are arbitrary, unreasonable or illegal. Because the Park's initial

argument is that the Comm'n improperly grafted the judgment from a private nuisance case into the zoning regulations, the court will examine, first, the incorporation of the provisions from the *Adams* injunction and from the ZBA Judgment. The Park argued consistently that such "cutting and pasting" was, per se, an activity beyond the Comm'n's § 8-2 authority.

At first blush, these arguments seem to have some merit. Comments of individual Comm'n members, made prior to the formal vote in favor of the amendments, reveal that some members felt that their charge was not substantive, but, rather, that it involved nothing more than cutting and pasting. Based on the belief of some Comm'n members that they were simply codifying the existing zoning "scheme," one Comm'n member issued stern warnings at the beginning of the public hearings that the Comm'n would not hear any testimony regarding the impact of the Park on townsfolk. As mentioned above, the Comm'n's counsel evinced a belief that all provisions of the amendments before them were already incorporated by reference into the existing zoning regulations or were, at least, part of some generalized zoning "scheme" or "status quo." As a result, the Comm'n may have seen the job at hand as being merely the administrative task of spelling out each such provision in the regulations to obviate the need for an interested person to obtain a copy of the most recent injunction from the Superior Court or the Town Clerk's office to find out what was incorporated by reference into the regulations. This belief, however, was mistaken. While the 2013 regulations did incorporate the injunction's restrictions on hours of racing, those regulations did not clearly incorporate the injunction's restrictions on days of racing, or the 1979 ZBA Judgment's restrictions on camping and traffic.

Nonetheless, the partially erroneous beliefs of individual members of the Comm'n are not a sufficient basis upon which this court could sustain the Park's appeal. First, despite the Comm'n's expressed intent to limit the testimony, it, in fact, took voluminous evidence and

public commentary related to the essential issues at dispute in the present appeal, including, but not limited to, noise, traffic, and days of racing. Second, as set forth above, in a situation such as this, where the Comm'n has provided a formal statement of reasons, this court must disregard comments by Comm'n members during the public hearing, prior to the formal vote to amend, and consider only the formal statement of reasons. See *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 220 Conn. 544.

The court finds that the incorporation of provisions from previous causes of action into zoning regulations does not, per se, constitute a violation of the authority of a zoning commission and is not otherwise, in and of itself, an arbitrary or illegal action. Rather, the court must review the provisions that were incorporated, in light of the formal statement of reasons provided by the Comm'n, in order to decide whether the actual provisions themselves sprang from the Comm'n's authority and were otherwise reasonable and legal.

In doing so, the court is aware that the private judgments from which the incorporated provisions were lifted serve a different purpose than do zoning regulations. The common thread among all of the descriptions of the zoning police power cited above is that it is intended to benefit the general welfare, the public and the community. As one commentator stated, "zoning...proceeds on the basis of benefitting the entire community. . . ." *Zoning & the Law of Nuisance*, 29 Fordham L. Rev. 749, 750 (1961). Zoning is "primarily intended to protect the public at large and not the interests of individuals." 83 Am. Jur. 2d, Zoning and Planning § 2 (2017). At least one Connecticut case has adopted this line of thinking in the context of individual developers. "Our case law indicates that the primary purpose of zoning is to protect the *public* interest . . . . [Z]oning is meant to protect the public at large and not the interests of

individual developers." (Citations omitted; emphasis in original.) *Lewis* v. *Swan*, 49 Conn. App. 669, 677-78, 716 A.2d 127 (1998).

Private nuisance cases, like *Adams,* however, proceed on an entirely different footing. "Private nuisance law . . . is concerned with conduct that interferes with an individual's private right to the use and enjoyment of his or her land. Showing the existence of a condition detrimental to the public safety . . . is often irrelevant to a private nuisance claim." *Pestey* v. *Cushman*, 259 Conn. 345, 357, 788 A.2d 496 (2002). "[I]n order to recover damages [or to be awarded injunctive relief] in a common-law private nuisance cause of action, a plaintiff must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property." Id., 361.

In sum, therefore, the analysis that a court must undertake in a private nuisance case is whether the allegedly offensive use of its real property by one landowner unreasonably interferes with the use and enjoyment of another landowner's real property. These private and personal interests stand in contrast to the public, community interests furthered by zoning regulation. Although the court is aware of these differences, the court's task at hand is to decide if § 8-2 authorizes the incorporation of the specific language from *Adams* and the ZBA Judgment into the regulations. In other words, notwithstanding the differences between the authority for private nuisance relief and that for zoning regulations, the court's job is still the same. The court must determine whether the amendments are within the police power of the Comm'n, are otherwise not arbitrary, unreasonable or capricious and are supported by any formal reasons and record evidence.

The court has set forth above a general statement of the normal police powers delegated, under § 8-2, to a local zoning commission in adopting zoning regulations. Generally, a local

zoning commission may pass regulations "to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements." (Internal quotation marks omitted.) *First Hartford Realty Corp.* v. *Plan & Zoning Commission*, supra, 165 Conn. 541 n.1, 338 A.2d 490 (1973). Elsewhere, our Supreme Court has described the zoning police power as making decisions that further the "prosperity of the community." (Internal quotation marks omitted.) *Corthouts* v. *Newington*, supra, 140 Conn. 288. Citing Connecticut case law, Professor Tondro adds that the "present language [of § 8-2] permits zoning powers to be used" in the following relevant ways: "to regulate the location and use of structures [and land] for trade [and] industry," "to conserve the value of buildings; [and to] encourage the most appropriate use of land throughout the municipality." T. Tondro, supra, p. 53. By its very language, § 8-2 provides that a zoning body may provide regulations "to protect the public health, safety, convenience and property values." § 8-2.

For several reasons, the court concludes that the actions of the Comm'n fall within the police power articulated in § 8-2, are otherwise not arbitrary, unreasonable or capricious, and are supported by formal reasons and record evidence.

As set forth above, the Comm'n's formal statement of reasons contains clearly legitimate general land use bases for the amendments under § 8-2, to wit, that the proposed amendments support public health and safety, and preserve property values. Formal statement of reason number four states that the "proposed amendments also support public health & safety and preserve property values." Reason four also states that a car race track is the kind of use that

"may have substantial impacts on surrounding properties" including not only noise, but also traffic volume, traffic congestion, and large vehicles travelling on roads, as well as nighttime illumination, air quality and property values. Persuasive evidence was taken during the public hearing to support these reasons and to underscore the impact that the Site has on the value of surrounding properties. "If any one [reason] supports the action of the commission, the plaintiff must fail in his appeal." *Zygmont* v. *Planning & Zoning Commission*, 152 Conn. 550, 553, 210 A.2d 172 (1965). As mentioned above, § 8-2 expressly recognizes that the promotion of health and safety and the preservation of property values are two purposes of zoning regulations.[20] "Zoning legislation has been upheld with substantial uniformity as a legitimate subject for the exercise of the police power when it has a rational relation to the public health, safety, welfare and prosperity of the community and is not in plain violation of constitutional provision, or is not such an unreasonable exercise of this power as to become arbitrary, destructive or confiscatory." (Internal quotation marks omitted.) *Builders Service Corp. Inc.* v. *Planning & Zoning Commission*, supra, 208 Conn. 283.

Moreover, other aspects of the formal statement of reasons supply additional legitimate land use bases for adopting the amendments. These bases include making the regulation of racing at the Site consistent, accessible and clear.

As set forth in great detail above, a significant amount of chaos has arisen concerning the regulation of the race track at the Site in the past sixty years. This confusion, inconsistency and imprecision has arisen from various sources, including (1) the simultaneous regulation of racing by several sometimes incompatible mechanisms, (2) sloppiness, such as accidentally failing to

[20] Section 8-2 (a) provides, in relevant part, that zoning regulations "shall be designed to . . . promote health and the general welfare" and that "[s]uch regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings . . . ."

include the race track on some versions of the Table of Uses and (3) laxness, such as the Comm'n's failure to require a specially permitted use, the track, to apply for a special permit. The amendments intend to clarify and make more consistent and convenient the regulation of car racing at the Site.

Our Supreme Court has described the exercise of the police power by a zoning body as promoting the "public welfare," *Wade* v. *Town Plan and Zoning Commission*, 145 Conn. 592, 594, 145 A.2d 597 (1958), and has described "convenience" as one aspect of the promotion of the public welfare. *Abel* v. *Planning & Zoning Commission*, 297 Conn. 414, 430, 998 A.2d 1149 (2010). Moreover, at least one trial court decision held that amending zoning regulations for purposes of clarification is a valid exercise of the zoning police power. See *Davko, Inc.* v. *New Milford Zoning Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-00-55157-S (April 24, 1992, *Pickett, J*) (commission did not act illegally, arbitrarily or in abuse of discretion by adopting an amendment to zoning regulations designed to "to clarify the uses permitted"). As mentioned above, § 8-2 explicitly states that convenience is another appropriate exercise of the zoning police power. The following statements drawn from the formal statement of reasons support the conclusion that the amendments will serve the legitimate land use goals of public welfare and convenience:

Formal statement one points out that "[s]etting forth the standards in the regulations themselves allows the affected property owners to know what the restrictions are without having to review outside documents." Formal statement two states that the amendments serve (1) to clarify the exact standards that govern the use of the Park, and (2) to eliminate the unintended consequence that could occur were a modification of the *Adams* injunction to automatically amend the zoning regulations without the requisite administrative processes. Formal statement

two also posits that articulating the existing restrictions into the regulations affords all parties a clearer mechanism by which to seek to amend zoning provisions by means of the Town's permitting and amendment processes. As discussed both in formal statement two and in the record evidence, allowing an interested party to try to effect change by following zoning regulation amendment processes saves such a party the burden and expense of seeking to amend the *Adams* injunction in court. Each of these formal statements of reasons supports a legitimate land use goal, by promoting the public welfare and promoting convenience in ascertaining how the Park is regulated. Moreover, the overwhelming impression that the court garners from the formal statement of reasons is that the adoption of the zoning regulations is an attempt to hit the "reset" button on land use regulation governing the track, an attempt to correct all the past accidents of history that have led to the multiple avenues of regulation listed, supra, and an attempt to place all parties on equal footing and to direct them to seek redress from the Town's zoning bodies pursuant to the clear guidance of their administrative processes. Once again, doing so promotes both the public welfare and convenience in unifying the applicable regulation of the Site.

Accordingly, this court finds that the foregoing articulated reasons for the 2015 amendments are valid, are reasonably supported by the record and are pertinent to the considerations the Comm'n was required to apply under the zoning regulations. See R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 33:2.

Therefore, the Park cannot succeed on its arguments that (1) the "cutting and pasting" of the injunction into the regulations was improper; (2) the Comm'n generally acted outside of its statutory authority; (3) no legitimate land use basis was provided, in general, for the amendments; and (4) no record evidence generally supported the amendments.

C

Days of Racing and Preemption under General Statutes § 14-146a

In its original decision, the court found that the restrictions placed on days of racing and racing activities violate and are preempted by General Statutes § 14-164a (a). Both the Comm'n and the Council moved the court to reconsider this conclusion. The Comm'n and/or the Council, which adopted the Comm'n's supporting brief, raise the following arguments in their motions for reconsideration: (1) The court misapplied the law of waiver to the actions of the Park's predecessors in stipulating to judgments in *Adams*; (2) the court did not adequately consider § 14-164a in light of other statutes, such as § 8-13, which permits the Comm'n to adopt more stringent standards as to days of racing than does § 14-164a; and (3) in light of the broad authority granted to a zoning commission to enact zoning regulation amendments under § 8-2, the legislature did not explicitly state that § 14-164a usurped the right of a zoning commission to adopt limitations on hours or days of operation. Section 14-164a, like the pertinent zoning regulation, is prohibitory, not permissive. The court will consider these arguments made upon reconsideration in seriatim.

(1)

The Park, Through Its Predecessors, Did Not Waive Its Rights to Challenge the Prohibition on Sunday Racing and Hours of Operation

As discussed immediately above, the Council and the Comm'n argued that the Park, through the actions of its predecessors, waived its right to oppose the amendments that prohibit Sunday racing or racing on other days of the week. The court finds no merit in this argument. In support of the waiver argument, the Council and the Comm'n first posited that the 2013 regulations already served to limit days of racing. This argument is rebutted by the plain language of the 2013 regulations that "[n]o races shall be conducted on any such track except

during such hours as are permitted by Court Order 5/12/59 and subsequent Court Orders on file in the Planning and Zoning Office, or the Town Clerk's Office." The 2013 regulations do not, on their face, limit days of racing, but only hours. Further, the 2013 regulations reveal that the Comm'n knew, at that time, how to exercise oversight over days of operation when it chose to do so. In discussing the adaptive re-use of existing buildings near the RE district, the 2013 regulations state, in pertinent part, that "the commission may impose conditions, limiting the number of employees working on the site at one time, and also limited the *days* and hours *of operation* based upon the characteristics of the use, the site, and the surrounding area." (Emphasis added.) Town of Salisbury 2013 Zoning Regulations, § 209.6 j. Finally, as discussed, supra, counsel for the Comm'n opined to the Comm'n, during its deliberative session, that the hours of use provision in the 2013 regulations was ambiguous. The court agrees with counsel's opinion. Thus, the 2013 regulations limited hours, but not days, of racing.

This court finds equally unpersuasive the Council's argument, made both initially and upon reconsideration, that the Park waived its right to contest the Sunday racing zoning amendments because it, or its predecessors, agreed, as part of previous stipulations to the injunction order, to limitations on Sunday racing. In its motion for reconsideration, the Council argued that the court misapprehended the law in several ways. The Council contended that the court failed to recognize that the injunction bound the Park because it was *in rem* and ran with the land. The Council also argued that the stipulated judgments entered into by the Park's predecessors were contracts that, by necessary inference, were immutable. More specifically, the Council argued that the "1966, 1968 and 1988 stipulations in *Adams* v. *Vaill* (Appendix to LRCC's Brief at A29-40) are clearly 'stipulations,' not judgments after trial; they clearly constitute the *acceptance* by Lime Rock's predecessors of the ban on Sunday racing and the

limits on racing hours."[21] (Emphasis in original.) (# 169). In fact, counsel for the Council argued, at reconsideration, that because the Park's predecessors entered into such stipulated judgments, the Park was precluded from seeking a modification of them.[22] For the reasons set forth below, the court disagrees.

The court begins by examining the familiar formulation of waiver law in Connecticut. "[W]aiver is [t]he voluntary relinquishment or abandonment—express or implied—of a legal right . . . ." (Internal quotation marks omitted.) *Delahunty* v. *Targonski*, 158 Conn. App. 741, 748, 121 A.3d 727 (2015). Putting aside, for the moment, the very real issue of whether the Park's predecessors could have voluntarily relinquished or abandoned a legal right of their successors, the Park, the court makes the following findings and conclusions.

First, the court's original memorandum of decision never took the position that the injunction does not bind the Park under the holding of cases like *Commissioner of Environmental Protection* v. *Farricielli*, 307 Conn. 787, 805-15, 59 A.3d 789 (1990). In fact, the final paragraph of the original memorandum of decision contained the following sentence: "The court must remind all of the parties, however, that both the *Adams* injunction and the stipulated ZBA Judgment remain in full force and effect." This amended memorandum of decision ends with a similar admonition.

Second, the court understands and appreciates that a stipulated judgment is both a contract and a judgment under the authority of cases such as *Solomon* v. *Keiser*, 22 Conn. App. 424, 426-27, 577 A.2d 1103 (1990) (a stipulated judgment is defined as a contract of the parties

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[21] One problem with this argument is that the 1968 modification to the *Adams* injunction was, as discussed above, not the result of a stipulation, but of litigation activity by the plaintiffs.

[22] The Council also raised waiver issues concerning the requirement of a special permit to seek the future amendment of zoning regulations. Based upon the court's treatment of this issue upon reconsideration, discussed infra, there is no need for the court to discuss this argument.

acknowledged in court and ordered to be recorded by a court as its judgment). However, the stipulated judgments in *Adams* are contracts only between the parties thereto. In this regard, it is noteworthy that the composition of the parties, both plaintiffs and defendants, in *Adams* has changed over time. An unsuccessful 1965 motion to modify the original injunction was filed solely by The Lime Rock Corporation, not by the defendant Vaill. Along these same lines, only about one-half of the original *Adams* plaintiffs moved to modify the 1966 Stipulation in 1968. While the 1966 stipulation involved the Park's predecessors and the original *Adams* plaintiffs, the parties to the most recent stipulation, the1988 stipulation, included a later predecessor to the Park, named Lime Rock Associates, Inc., and an entity apparently substituted in for the original plaintiffs in *Adams*, the Lime Rock Protection Committee, Inc. As mentioned above, the parties did not provide evidence of the names of the constituents, incorporators, shareholders, officers and/or the directors of the Lime Rock Protection Committee, Inc. at the time of the 1988 Stipulation. In fact, the only officer of the Lime Rock Protection Committee that the court can identify is Joan C. Bergdahl, its president and the person who executed the 1988 Stipulation on behalf of the Lime Rock Protection Committee. Joan C. Bergdahl was not an original *Adams* plaintiff, although the court infers that she was a descendant or successor in title to one of the Bergdahls who were original plaintiffs. In any event, neither stipulation is a contract between the Park's predecessor and all citizens of the Town. More to the point, the Council failed to articulate a persuasive reason why the court should find that a stipulation in a private nuisance lawsuit to modify the relief awarded therein to a limited number of plaintiffs would or should operate to preclude a party from objecting to town-wide zoning amendments proposed by the Comm'n under claim of statutory authority.

Third, and most importantly, our Supreme Court has already ruled that a stipulation in *Adams* may be modified. As noted in footnote 21 of this amended memorandum of decision, and as recognized in a previous brief by the Council, the modification of the injunction in 1968 did not occur by means of a stipulation. As previously discussed in detail, slightly less than one-half of the original *Adams* plaintiffs filed, on July 29, 1968, a motion to modify the 1966 stipulation of the permanent injunction to which they had entered with the Park's predecessor. These *Adams* plaintiffs argued that, based on a statutory amendment, the court must modify the 1966 stipulation to prohibit, at all times, the racing of unmufflered vehicles at the Park. *Adams* v. *Vaill*, supra, 158 Conn., 482. The upshot of this case was that the trial judge, *Wall, J.*, issued an order on August 26, 1968 modifying the injunction by "prohibit[ing] the operation and use of unmufflered motor vehicles on the Lime Rock race track." *Adams* v. *Vaill*, supra, Superior Court, Docket No. CV-58-0015459-S; see *Adams* v. *Vaill*, supra, 482. When the case went up on appeal, our Supreme Court held that, "courts have inherent power to change or modify their own injunctions where circumstances or pertinent law have so changed as to make it equitable to do so." *Adams* v. *Vaill*, supra, 483. Therefore, our Supreme Court has already held that a stipulation modifying the original *Adams* injunction may itself be modified by motion, and has set forth standards under which such a stipulation may be modified, e.g., "where circumstances or pertinent law has so changed to make it equitable to do so." Id. To argue that some of the original *Adams* plaintiffs had the right to modify the injunction, but that the Park does not have the very same right, is misguided, at best.

For all of these reasons, the court does not find that either of the two *Adams* stipulations, including the most recent stipulation entered into in 1988, evidence, in any way, a waiver of the

Park's right to oppose the 2015 zoning amendments pertaining to Sunday racing, noise limitations and hours of operation.

(2)

Section 8-13 Does Not Authorize the Town to Regulate Car Racing More Strictly than §14-164a

As set forth above, the Comm'n and the Council contended that the court did not decide an issue previously raised by them, namely that § 8-13 would allow the Comm'n to regulate car racing more strictly than § 14-164a. Although the court agrees that it did not specifically address this issue, the court disagrees with the argument made by the Comm'n and the Council.

The Comm'n and the Council asserted that the court erred in finding that General Statutes § 14-164a preempts the zoning regulations restriction of times of races because § 8-13 explicitly allows zoning regulations to adopt stricter standards than statutes. Section 8-13 reads, in its entirety, as follows: "If the regulations made under authority of the provisions of this chapter require a greater width or size of yards, courts or other open spaces or a lower height of building or a fewer number of stories or a greater percentage of lot area to be left unoccupied or impose other and higher standards than are required in any other statute, bylaw, ordinance or regulation, the provisions of the regulations made under the provisions of this chapter shall govern. If the provisions of any other statute, bylaw, ordinance or regulation require a greater width or size of yards, courts or other open spaces or a lower height of building or a fewer number of stories or a greater percentage of lot area to be left unoccupied or impose other and higher standards than are required by the regulations made under authority of the provisions of this chapter, the provisions of such statute, bylaw, ordinance or regulation shall govern."

The Comm'n and the Council claimed that the amendments' preclusion of Sunday racing and their limitation of racing on other days constitutes the Comm'n's imposition of "other and

higher standards" than are required under § 14-164a, and that, therefore, § 8-13 allows the zoning amendments to trump the application of § 14-164a. The only case that the Comm'n and the Council brought to the court's attention was *VIP of Berlin, LLC* v. *Berlin*, 50 Conn. Supp. 542, 951 A.2d 714 (2007), aff'd, 287 Conn. 142, 946 A.2d 1246 (2008), wherein the court held, inter alia, that there is not an irreconcilable conflict between § 8-2 (a), authorizing towns to regulate the location and use of buildings, and § 7-148 (c) (7) (A) (ii), authorizing towns to regulate the mode of using any buildings. The gravamen of the declaratory judgment action was to determine whether the town's locational restrictions regarding sexually oriented business were enforceable. It was undisputed that that adult store was within 250 feet of a residential zone, in violation of the town's restrictions. In addressing the interplay between §§ 8-2 (a) and 7-148, the court noted that the overlapping authority was anticipated in § 8-13 ("if the provisions of any other statute, bylaw, ordinance or regulation . . . impose other and higher standards than are required by the regulations made under authority of the provisions of this chapter, the provisions of such statute, ordinance, or regulation shall govern"). Id., 556. The court explained: "Thus, the legislature stated that other laws, including municipal ordinances, may overlap with and provide other and higher standards in an area dealt with by zoning regulation." Id. This court cannot, based on *VIP*, summarily find that any irreconcilability between the zoning regulations at issue in the present case and General Statues § 14-164a is unshackled by operation of § 8-13.

Our Supreme Court has already decided that the predecessor to § 8-13 used the word "standards" to refer to physical standards. In *Mallory* v. *West Hartford*, 138 Conn. 497, 86 A.2d 668 (1952), our Supreme Court addressed whether the town followed the proper procedures for a zone change. The plaintiffs argued that the provisions of General Statutes § 838 controlled over certain special laws because section 838 imposed higher standards. Id., 498-500. The plaintiffs

relied on 1925 special act, 19 Special Laws 393, § 20, which is identical to General Statutes § 8-13. Id. Our Supreme Court rejected the plaintiff's reliance on the 1925 special act, finding that "[t]he requirements of § 838 under discussion are procedural. The higher standards referred to in § 20 are concerned with size of yards, number of stories and the like. Section 838 imposes no higher standards of this type." Id., 500.

Inherent in our Supreme Court's conclusion is its application of the maxims of noscitur a sociis ("it is known from its associates") and ejusdem generis ("of the same kind or class"). "Typically, when a statute sets forth a list or group of related terms, we usually construe them together. . . . This principle – referred to as 'noscitur a sociis' – acknowledges that the meaning of a particular word or phrase in a statute is ascertained by reference to those words or phrases with which it is associated. . . . As a result, broader terms, when used together with more narrow terms, may have a more restricted meaning than if they stand alone." (Citations omitted; internal quotation marks omitted.) *Dattco, Inc.* v. *Commissioner of Transportation*, 324 Conn. 39, 48, 151 A.3d 823 (2016). Likewise, ejusdem generis is "[a] cannon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." Black's Law Dictionary p. 556. "The principle of ejusdem generis applies when (1) the [clause] contains an enumeration by specific words; (2) the members of the enumeration suggest a specific class; (3) the class is not exhausted by the enumeration; (4) a general reference [supplements] the enumeration . . . and (5) there is [no] clearly manifested intent that the general term be given a broader meaning than the doctrine requires." (Internal quotation marks omitted.) *24 Leggett St. Ltd. Partnership* v. *Beacon Industries*, 239 Conn. 284, 297, 685 A.2d 305 (1996). "Thus, the doctrine of ejusdem generis calls for more than . . . an abstract exercise in semantics and formal logic. It rests on particular

insights about everyday language usage. When people list a number of particulars and add a general reference like 'and so forth' they mean to include by use of the general reference not everything else but only others of like kind. The problem is to determine what unmentioned particulars are sufficiently like those mentioned to be made subject to the [clause's] provisions by force of general reference." (Internal quotation marks omitted.) Id.

Under these two doctrines of statutory interpretation, the phrase "other and higher standards" cannot be read in a vacuum; rather, it must be read in context. This phrase is found within the following dependent clause, "If the provisions of any other statute, bylaw, ordinance or regulation require a greater width or size of yards, courts or other open spaces or a lower height of building or a fewer number of stories or a greater percentage of lot area to be left unoccupied or impose other and higher standards . . . ." Each standard employed before "other and higher standards" is a standard of physical measurement. Section 8-13 contemplates overlapping regulation of physically measurable concepts, such as "width or size of yards, courts or other open spaces," "height of building," "number of stories" and "percentage of lot area to be left unoccupied . . . . " The statute does not contemplate overlapping regulation of concepts such as days of operation. Interpreting "standard" broadly to refer to *any* statutorily-authorized regulation would render superfluous the foregoing terms because those items would already be encompassed within the broad meaning of "standard." See, e.g., *Dattco, Inc.* v. *Commissioner of Transportation*, supra, 324 Conn. 49 (rejecting interpretation of "facilities" to broadly refer to anything because it would render superfluous the terms "land," "buildings," and "equipment" in statute).

This conclusion is buttressed by the commonly accepted meaning of the word "standard." General Statutes § 8-13 does not define "standard." Therefore, this court interprets the term

according to its common meaning; General Statutes § 1-1 (a); and looks to the dictionary to glean that meaning. *Dattco, Inc.* v. *Commissioner of Transportation*, supra, 324 Conn. 46. Webster's sets forth several distinct meanings for the word "standards," one of which is relevant to the statute at issue: "[S]omething set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality." It is the position of the Comm'n and the Council that this definition is broad enough to include the amendments' regulation of days and times of racing. Days and times of racing, however, are not standards, in that they are not "something set up and established by authority as a rule for the measure of quantity, weight, extent, value or quality."

Thus, the maxims of noscitur a sociis and ejusdem generis provide assistance in interpreting § 8-13, as they did in interpreting its statutory precursor in *Mallory*. See *Historic District Commission* v. *Hall*, 282 Conn. 672, 684, 923 A.2d 726 (2007) (to ascertain legislative intent, the court cannot limit itself to examining words or sentences in isolation; "the whole statute must be considered"); *State* v. *Roque*, 190 Conn. 143, 152, 460 A.2d 26 (1983) ("[a]ssistance in ascertaining the legislative intent is afforded by resort to the familiar maxim of noscitur a sociis"). This conclusion is buttressed by the common understanding of the word "standards' set forth above. Therefore, § 8-13 has no applicability to the present case, as the zoning regulations at issue impose no higher standards of the type referred to in that statute.

(3)

Section 14-164a (a) Preempts the Regulations' Restriction on Sunday Racing, but not the Restriction on Racing Other Days of the Week

As discussed at great length, the Park's substantive argument, with which the Comm'n and the Council disagree, is that the prohibition on Sunday racing, set forth in section 221.1 of the 2015 amendments is either preempted by, or violates, General Statutes §14-164a. Our

Supreme Court has provided extensive guidance on the law of preemption. "The State may regulate any business or the use of any property in the interest of the public welfare or the public convenience, provided it is done reasonably." (Internal quotation marks omitted.) *Modern Cigarette, Inc.* v. *Orange*, 256 Conn. 105, 118, 774 A.2d 969 (2001). "[I]n determining whether a local ordinance is preempted by a state statute, [the court] must consider whether the legislature has demonstrated an intent to occupy the entire field of regulation on the matter [23] or whether the local ordinance irreconcilably conflicts with the statute." [24]Id., 119. "Whether the legislature has undertaken to occupy exclusively a given field of legislation is to be determined in every case upon an analysis of the statute, and the facts and circumstances upon which it intended to operate." (Internal quotation marks omitted.) *Bencivenga* v. *Milford*, 183 Conn. 168, 176, 438 A.2d 1174 (1981). "Whether an ordinance conflicts with a statute or statutes can only be determined by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives." *Modern Cigarette, Inc.* v. *Orange*, supra. "Therefore, [t]hat a matter is of concurrent state and local concern is no impediment to the exercise of authority by a municipality through the enactment of an ordinance, so long as there is no conflict with the state legislation." Id. "Whether a conflict exists depends on whether the ordinance permits or licenses that which the statute forbids, or prohibits that which the statute authorizes." Id., 120.

To decide whether the amendments are preempted by or violate General Statutes § 14-164a, the court must review the language of each.

Section 221.1 provides, in relevant part, as follows:

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[23] This concept is commonly referred to as "field preemption."
[24] This concept is often called "conflict preemption."

A track for racing motor vehicles, 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, car shows, and certain other events identified in section 221.2 are permitted subject to the issuance of a special permit in compliance with the procedures and standards of these regulations and also subject to the following:

(a) No motor vehicle races shall be conducted on any such track except in accordance with the following parameters [footnote 1 is then inserted which reads as follows: FN 1. The parameters set forth herein are identical to those set forth in the Amended stipulation of Judgment entered by the Court, Dranginis, J., on March 21, 1988 in the civil action, Ann Adams, et al. v. B. Franklin Vaill, et al., CV No. 15,459 (Judicial District of Litchfield at Litchfield), which parameters were previously incorporated by reference in the zoning regulations]:

(1) All activity of mufflered or unmufflered racing cars upon the asphalt track or in the paddock areas shall be prohibited on Sundays.

(2) Activity with mufflered racing car engines shall be permitted as follows: (A) On any weekday between 9:00 a.m. and 10:00 p.m. provided, however, that such activity may continue beyond the hour of 10:00 p.m. without limitation on not more than six (6) occasions during any one calendar year. (B) Permissible mufflers are those which meet the standards set forth in Section 14-80(c) of the General Statutes of Connecticut, Revision of 1959, or as the same may be amended from time to time.

(3) Activity with unmufflered racing car engines shall be permitted as follows: (A) On Tuesday afternoon of each week between 12:00 noon and 6:00 p.m. (B) On Saturdays, not more than ten (10) in number each calendar year, between the hours of 9:00 a.m. and 6:00 p.m. (C) On the ten (10) Fridays which precede the said ten (10) Saturdays between the hours of 10:00 a.m. and 6:00 p.m. for the purpose of testing, qualifying or performing such other activities as may be necessary or incidental to the direct preparation for races on the Saturdays specified, provided that no qualifying heats or races shall be permitted on such Fridays. (D) In such event the scheduled activity for any of the said ten (10) Saturdays must be rescheduled for a "rain date", then said "rain date and the Friday preceding it shall not be considered as one of the ten (10) days referred to in Paragraphs b) and c) above. (E) On Memorial Day, Fourth of July and Labor Day between the hours of 9:00 a.m. and 6:00 p.m. (i) In the event any of the holidays falls on a Tuesday, Thursday or a Friday, there may be unmufflered activity on the day preceding the holiday between the hours of 12:00 noon and 6:00 p.m., but in the event the permissible unmufflered activity of the Tuesday next preceding the holiday shall be forfeited. (ii) In the event any of said holidays falls on a Sunday, the next day (Monday) will be considered the holiday for these purposes. (iii) In no event shall any such holidays increase the number of

Saturdays of permissible unmufflered activity beyond ten (10) as provided in Paragraph b) above.

The foregoing 2015 amendments address the days of the week on which motor vehicle racing may take place as follows. The 2015 amendments clearly prohibit all racing on Sunday. In addition to the Sunday prohibition, the 2015 amendments also prohibit mufflered racing on Saturdays in the following way. The amendments state that "[n]o motor vehicle races shall be conducted on any track except in accordance with the following parameters . . . " and then proceed to state that activity with mufflered car engines shall be permitted "on any weekday." Weekdays include Mondays through Fridays. Therefore, no mufflered race activity may take place on Saturdays. The 2015 amendments also place extensive limitations on the days of the week on which unmufflered racing can take place. Significantly, unmufflered racing may only take place, for example, on ten Saturdays per calendar year. Because mufflered racing is only permitted on weekdays, and not, therefore, on Saturdays and because unmufflered racing may only take place on ten Saturdays in one year, the regulations operate to limit car racing to ten Saturdays per year.

The court now moves to review the language of General Statutes §14-164a. The parties sharply disagree on the meaning of this statute. Accordingly, this court begins its preemption analysis by gleaning the meaning of General Statutes § 14-164a through the familiar process of statutory interpretation.

"The process of statutory interpretation involves a reasoned search for the intention of the legislature . . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of this case." (Internal quotation marks omitted.) *Cox Cable Advisory Council* v. *Dept. of Public Utility Control*, 259 Conn. 56, 63, 788 A.2d 29, cert. denied, 537 U.S. 819, 123 S. Ct. 95, 154 L. Ed. 2d 25 (2002). In seeking to determine that

meaning, General Statutes § 1-2z directs us to first consider the words of the statute. *State* v. *Heredia*, 310 Conn. 742, 756, 81 A.3d 1163 (2013). "We seek the intent of the legislature not in what it meant to say, but in what it did say." (Internal quotation marks omitted.) *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 187, 592 A.2d 912 (1991). "[T]he actual intent, as a state of mind, of the members of a legislative body is immaterial, even if it were ascertainable." (Internal quotation marks omitted.) Id.

"If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *State* v. *Heredia*, supra, 310 Conn. 756. "When a statute is not plain and unambiguous, we also look for interpretative guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) Id.

In accordance with General Statutes § 1-2z, this court begins its analysis with the text of General Statutes § 14-164a (a): "No person shall operate a motor vehicle in any race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition except in accordance with the provisions of this section. Such race or exhibition may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday. The legislative body of the city, borough or Town in which the race or exhibition will be held may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances." Mindful of the axiom that no sentence in a statute can be read in isolation, *Lackman* v. *McAnulty*, 324 Conn.

277, 287, 151 A.3d 1271 (2016), a careful examination of the three individual sentences in the context of the other sentences found in this portion of subsection (a) will help the court unlock the meaning of subsection (a).

The first sentence states that "[n]o person shall operate a motor vehicle in any race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition except in accordance with the provisions of this section."

The second sentence provides that "[s]uch race or exhibition may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday." The statute does not define the word "such," but, in accordance with General Statutes § 1-1 (a), this court looks to "the common understanding expressed in dictionaries in order to afford the term its ordinary meaning." *Lackman* v. *McAnulty*, supra, 324 Conn. 287. "The word 'such' has been construed as an adjective referring back to and identifying something previously spoken of; the word naturally, by grammatical usage, refers to the last antecedent." (Internal quotation marks omitted.) Id. "The accepted dictionary definitions of 'such' include 'having a quality already or just specified,' 'previously characterized or specified,' and 'aforementioned.'" (Internal quotation marks omitted.) Id. Mindful of the dictionary definition, and when read contextually and in accordance with applicable grammatical rules, "such race or exhibition" refers the reader back to the kinds of "race" and "exhibition" described in the preceding sentence. Quite clearly then, "such race or exhibition" in the second sentence refers to "any race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition," as stated in the first sentence. Further, the word "may" has several functions, and in the context of the second sentence, the word "may" denotes a grant of statutory authority. See Black's Law Dictionary (8th Ed. 2004) p. 1000 (defining "may" as "[t]o be permitted to"). Harmonizing the first and second

sentences, it is permissible to conduct a race, or any contest or demonstration of speed or skill with a motor vehicle at any reasonable hour of any week day or after twelve o'clock noon on any Sunday.

The third sentence provides that "[t]he legislative body of the city, borough or Town in which the race or exhibition will be held may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances." The construction of this third sentence requires this court to seek guidance from traditional rules of English grammar. See, e.g., *Indian Spring Land Co.* v. *Inland Wetlands & Watercourses Agency*, 322 Conn. 1, 14-16, 145 A.3d 851 (2016). Sentence three consists of two clauses: an independent clause ("[t]he legislative body of the city, borough or Town in which the race or exhibition will be held may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday") that, were it not for the second clause, could stand alone as a complete thought, and a subordinate, adverb clause ("provided no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances") that is dependent upon the main clause for its meaning and thus cannot stand by itself. See B. Garner, The Red Book: A Manual on Legal Style (2d Ed. 2006) § 10.48, pp. 179-80. The relationship between the two clauses is shown by the subordinating conjunction "provided" and signals that the subordinate, adverb clause places a condition on the operation of the independent clause. See Black's Law Dictionary, supra, p. 1261 (defining "provided" as a conjunction meaning "[o]n the condition or understanding;" or "[e]xcept").

Thus, application of the normal rules of English grammar dictates the following construction: a local legislative body has the authority to issue a permit allowing a race or exhibition to be held prior to 12 p.m. on Sunday, but this authority is limited by the condition

that "such race or exhibition" cannot be held in violation of any local ordinance. Finally, careful interpretation leads this court to conclude that the adjective "such" in the subordinate clause of sentence three refers the reader back to its immediate antecedent, the "race or exhibition" that may be held before noon on Sunday referred to in the independent clause of the third sentence. *Lackman*, supra.

Consequently, by its plain language, General Statutes § 14-164a (a) allows a race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition to be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday. It further allows a local legislative body to issue a permit authorizing a race or exhibition to be held prior to 12 p.m. on Sunday. However, that grant of authority to the local legislative body is limited by the condition that a race or exhibition can only be conducted prior to 12 p.m. on Sunday if it does not violate any local ordinance.

Contrary to the Comm'n's argument, there is no reasonable construction of General Statutes § 14-164a (a) that results in the subordinate, adverb clause in the third sentence ("provided no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances") placing a condition on the operation of the second sentence ("Such race or exhibition may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday"). The plain language of a statute can be revealed by the legislature's choice of sentence structure and use of punctuation. See, e.g., *Indian Spring Land Co.* v. *Inland Wetlands & Watercourses Agency*, supra, 322 Conn. 14-16; see also *Lieb* v. *Dept. of Health Services*, 14 Conn. App. 552, 559, 542 A.2d 741 (1988) ("courts must presume that the legislature incorporated the purpose of the statute in every sentence, clause, phrase and item of punctuation of the statute"). Indeed, the plain meaning of a statute "will typically heed the

commands of its punctuation." (Internal quotation marks omitted.) *Indian Spring Land Co.* v. *Inland Wetlands & Watercourses Agency*, supra, 14.

Here, the drafters clearly created two sentences, separated by a period for punctuation. By use of a period, each sentence contains an independent, complete thought. The grammar, syntax and punctuation of subsection (a) compel the conclusion that the drafters did not intend for sentence three's subordinate clause to be carried past its intended destination, i.e., the independent clause that comes before the subordinate clause in the third sentence, so as to modify or limit anything in the second sentence. By use of the end punctuation, the period, the legislature created a distinction between the statutory authorization to conduct races and exhibitions at reasonable times, and the power of local legislative bodies to regulate Sunday racing prior to noon. If the legislature had intended to vest local legislative bodies with the power to regulate all days and times of racing, it would have drafted the statute differently. See *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 299, 933 A.2d 256 (2007) (legislature knows how to convey its intent expressly); see, e.g., *Indian Spring Land Co.* v. *Inland Wetlands & Watercourses Agency*, supra, 322 Conn. 16 (legislature could have used comma to separate terms if it intended a different result). This court is constrained to read the statute as written, and, as dictated by its punctuation, structure and grammar, General Statutes § 14-164a (a) does not allow a local legislative body to limit the days and times of racing, other than to allow racing before noon on Sunday on the condition that such earlier racing time complies with local ordinances.

This conclusion is buttressed by the evolution of General Statutes § 14-164a over time, and by the legislative history of the language at issue in this case. Originally enacted in 1935 as General Statutes § 898c, the statute did not address days or times of racing but provided only that

"[n]o person shall operate a motor vehicle in any race or speed contest, open to the public and to which an admission fee is charged, unless the commissioner of state police shall have issued a certificate approving such race or contest."

In 1939, the legislature amended the statute to provide, in more specific detail, that any person desiring to manage, operate or conduct a race or exhibition was required to make an application in writing to the commissioner of state police, setting forth in detail, inter alia, the time of the proposed race or exhibition. See Public Acts 1939, No. 23. The 1939 revision also provided the commissioner of state police with the authority to "issue a permit naming a definite date for such race or exhibition, which may be conducted at any reasonable hour on any week day or after the hour of two o'clock in the afternoon of any Sunday, provided no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances." Public Acts 1939, No. 23.

The clause, "which may be conducted at any reasonable hour on any week day or after the hour of two o'clock in the afternoon of any Sunday," is non-restrictive, as evidenced by both the introductory term "which" and its separation from the beginning and end of the sentence by commas.[25] See W. Strunk Jr. & E.B. White, The Elements of Style (3d Ed. 1979), pp. 3-5. As it is non-restrictive, the clause provides a supplemental, non-essential description of the commissioner's authority to issue a permit naming a definite date for a race or exhibition, and could be removed without changing the basic meaning of the subject-predicate combination. See W. Strunk Jr. & E.B. White, supra, pp. 3-5 (non-restrictive clauses do not limit or define, but

[25] Indeed, that the words "and it" can be substituted for "which" confirms that the clause is nonrestrictive – the commissioner of state police . . . may issue a permit naming a definite date for such race or exhibition and it may be conducted at any reasonable hour on any week day or after the hour of two o'clock in the afternoon of any Sunday. See generally *Commonwealth* v. *Kenehan*, 12 Pa. D. & C. 585, 593 (Pa. Ct. Common Pleas 1929) (clause is nonrestrictive if "and it" or "and their" can be substituted for the relative pronoun).

merely expand upon the meaning of the words to which they relate); B. Garner, The Redbook: A Manual on Legal Style, supra, §§ 1.6, 10.20, pp. 6, 156-58; see also *United States* v. *Indoor Cultivation Equipment*, 55 F.3d 1311, 1315 (7th Cir. 1995) ("Congress's use of the pronoun 'which' is significant; it introduces a nonrestrictive clause . . . that does not limit the meaning of the word it modifies").

The next clause – "provided no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances" – functions solely as a dependent, adverb clause modifying the independent clause ("may issue a permit naming a definite date for such race or exhibition"). Specifically, its purpose is to modify the verb "may issue" by limiting the commissioner's authority to issue a permit for a race or exhibition. See B. Garner, The Redbook: A Manual on Legal Style, supra, § 10.39, p. 173-74 (adverbs modify verbs to explain more about the action); see generally *Wellington Underwriting Agencies, Ltd.* v. *Houston Exploration Co.*, 267 S.W.3d 277, 288 (Tex. App. 2008), aff'd, 352 S.W.3d 462 (Tex. 2011) (interpreting dependent, adverb clause).

By this analysis, the 1939 statute vested the commissioner of state police with the authority to issue a permit allowing races or exhibitions at reasonable times and days, but he could not issue a permit allowing a race or exhibition on a day or at a time that was contrary to any local ordinances. In other words, in 1939, the time and date of a race or exhibition could be limited by local ordinances.

Amendments in 1998, however, significantly altered both the substance and meaning of the statute. To demonstrate how the statute was altered, the legislature placed brackets around the omitted content while capitalizing added content:

> The Commissioner of Motor Vehicles . . . may issue a permit naming a definite date for such race or exhibition, which may be conducted at any reasonable hour

> of any week day or after twelve o'clock noon on any Sunday. [, provided] THE COMMISSIONER, WITH THE APPROVAL OF THE LEGISLATIVE BODY OF THE CITY, BOROUGH OR TOWN IN WHICH THE RACE OR EXHIBITION WILL BE HELD, MAY ISSUE A PERMIT ALLOWING A START TIME PRIOR TO TWELVE O'CLOCK NOON[26] ON ANY SUNDAY, PROVIDED no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances.

Public Acts 1998, No. 98-102, p. 787.

This court cannot discount the drafters' placement of a period after "Sunday," thereby liberating the authority of the commissioner to issue a permit allowing races or exhibitions at any reasonable hour of any week day or after twelve o'clock noon on any Sunday, and giving it grammatical independence. Possibly of even more significance was making the phrase, "provided no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances," dependent upon a newly created main clause ("the commissioner, with the approval of the legislative body of the city, borough or Town in which the race or exhibition will be held, may issue a permit allowing a start time prior to twelve o'clock noon on any Sunday") for its meaning. By these modifications, it is impossible for the sentence, "[t]he commissioner of motor vehicles . . . may issue a permit naming a definite date for such race or exhibition, which may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday," to be modified by the clause, "provided no such race or exhibition shall take place contrary to the provisions of any city, borough or Town ordinances."

"When the legislature amends the language of a statute, it is presumed that it intended to change the meaning of the statute and to accomplish some purpose." *State* v. *Johnson*, 227 Conn. 534, 543, 630 A2d 1059 (1993); cf. *Bassett* v. *City Bank & Trust Co.*, 115 Conn. 393, 400-01, 161 A.852 (1932) (legislature may modify phrase of statute to simplify or condense the statutory

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[26] By revisions in 1975, "two o'clock in the afternoon of any Sunday" was changed to "twelve o'clock noon on any Sunday." Public Acts 1975, No. 75-404, pp. 398-99.

language and not effect a substantive change). As it relates to General Statutes § 14-164a (a), to infer that the amendments were not intended to change the meaning of the statute would be to treat the inclusion of the new language as mere surplusage, a construction of the statute that clearly should be avoided, *Segal* v. *Segal*, 264 Conn. 498, 507, 823 A.2d 1208 (2003), and to ignore the change in punctuation. See *People ex rel Krulish* v. *Fornes*, 175 N.Y. 114, 121, 67 N.E. 216 (1903) (*O'Brien, J.*, concurring) ("[p]unctuation is what gives virility, point and meaning to all written composition. . . . A change in punctuation is frequently as material and significant as a change in words" (citation omitted)).

The materiality of the revisions is a significant indication that it was the intent of the legislature to substantively change the meaning of General Statutes § 14-164a (a) from its prior 1939 version. The alterations in phraseology and change in punctuation cannot be attributed to a desire to condense or simplify the law, or to improve the phraseology, nor can the alterations be construed to reflect nothing more than corrections of inaccurate or superfluous punctuation. See *Bassett* v. *City Bank & Trust Co.*, supra, 115 Conn 400-01; 82 C.J.S. § 332 (2009). The foregoing revisions are more than grammatical sleights of hand, but reflect a significant change in the meaning of the provision.

Returning now to the question of preemption, it is apparent that the legislature intended local authorities to have some input regarding, inter alia, reasonable hours of racing on week days and start times for Sunday racing. As such, the legislature has not demonstrated an intent to occupy the entire field of regulation on hours of racing to the exclusion of local regulations. See, e.g., *Parillo Food Group, Inc.* v. *Board of Zoning Appeals*, 169 Conn. App. 598, 151 A.3d 864 (2016) (legislature did not intend to occupy the entire field of regulation under liquor control act, but intended municipalities and local zoning board to have some input regarding the location of

establishments that sell alcohol and conditions relating to the operation of those businesses). The doctrine of "field preemption" does not, therefore, apply to this case.

Conflict preemption however, does apply in this case insofar as Sunday racing is concerned. "A test frequently used to determine whether a conflict exists is whether the ordinance permits or licenses that which the statute forbids, or prohibits that which the statute authorizes; if so, there is a conflict." *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 235, 662 A.2d 1179 (1995). As General Statutes § 14-164a (a) is now drafted,[27] it clearly and simply permits Sunday racing after noon by stating that a motor vehicle "race or exhibition may be conducted at any reasonable hour of any week day or after twelve o'clock noon on any Sunday." Section 221.1a, however, flatly prohibits Sunday racing. While the legislature's use of the phrase "at any reasonable hour of any week day" indicates a local body may regulate the hours of racing on weekdays, the statutory statement that racing "may be conducted after noon on any Sunday" expressly authorizes and permits car racing after noon on Sundays. Section 221.1a flatly prohibits Sunday racing. Therefore, there is a conflict under the holding of *Bauer*.

In their motions for reconsideration, the Comm'n and the Council attempt to avoid this conclusion by asking the court to hold that both §14-164a (a) and Section 221.1.a (1) are prohibitions. In support of this argument, the Comm'n and the Council draw the court's attention to other portions of § 14-164a which are indeed prohibitions. The first sentence of § 14-164a (a), for example, states that "[n]o person shall operate a motor vehicle in any race, contest or demonstration of speed or skill with a motor vehicle as a public exhibition except in accordance

[27] In 2004, the legislature revised the statute to its current wording, which no longer includes permitting responsibilities for the commissioner of motor vehicles. See Public Acts 2004, No. 04-199, pp. 714-15. However, in all other relevant respects, the revisions of 1998 remained intact.

with the provisions of this section." Other portions of § 14-164a are prohibitions as well. By way of example, the statute disallows motor races on ice, and motor cross racing by minors under the age of thirteen. The court is not persuaded. When it compares the one simple clause in § 14-164a (a) that permits car racing "after twelve o'clock noon on any Sunday" to 221.1a's flat prohibition on Sunday racing of any kind, the court reaches the inescapable conclusion that the regulations forbid what the statute permits, namely racing after noon on Sunday.

The Council raised another interesting argument. During oral argument, the Council's attorney, a very experienced and extremely capable land use lawyer, opined, in so many words, that conflict preemption was essentially dead in cases such as this. *Bauer*, however, is at odds with this characterization. Citing longstanding precedent, *Bauer* states clearly that one frequent test employed in determining whether conflict preemption exists is "whether the ordinance...prohibits that which the statute authorizes..." and concludes that "if so, there is a conflict." *Bauer*, supra, 235. Because the Supreme Court in *Bauer* plainly articulated a "prohibit versus permit" test to determine conflict preemption, the court concludes that the Council's attorney was, perhaps, commentating that our Supreme Court has recently construed regulatory language so as not to find conflict preemption. For example, in *Bauer*, the Supreme Court held that a Department of Environmental Protection permit authorizing a landfill to build a 190 foot high wall was prohibitory, as were the zoning regulations at issue, because the Supreme Court understood "the permit to allow the landfill to go *no higher* than 190 feet...." *Bauer*, supra, 235-36 (emphasis in original). Additionally, in *Modern Cigarette* v. *Town of Orange*, 256 Conn. 105, 774 A.2d 969 (2001), the Supreme Court, after citing the "prohibit versus permit" test, id., 130, held that both a state statute limiting the placement of cigarette vending machines

to areas that only adults could access and a town ordinance banning cigarette vending machines within the town limits entirely were prohibitory in nature. Id., 129-32.

Unlike the Council's attorney, however, the court does not have the luxury to provide sideline analysis on possible Connecticut Supreme Court interpretation trends. Instead, the court must apply the precedents of cases like *Bauer* and *Modern Cigarette* to the language found in the relevant documents before it. In doing so, the court recognizes that the Supreme Court has not jettisoned the "prohibit versus permit" test. To the contrary, both *Bauer* and *Modern Cigarette* reiterate that the court is to find conflict preemption when "the ordinance...prohibits that which the statue authorizes." *Modern Cigarette*, supra, 120. In this case, the zoning regulations clearly prohibit car racing on Sundays and the state statute clearly authorizes car racing "after twelve o'clock noon on any Sunday." §14-164a(a), Gen. Stat.

As a result, and for the reasons articulated above, § 14-164a(a) preempts the Sunday racing prohibition found in Section 221.1a.

Accordingly, the court sustains the Park's appeal as to that portion of section 221.1.a of the amendments to the zoning regulations which provides that "[a]ll activity of mufflered or unmufflered racing cars upon the asphalt track or in the paddock areas shall be prohibited on Sundays" because this portion of the regulations prohibits that which the legislature permits, namely, car racing after noon on Sundays. However, the court denies the Park's appeal as to preemption of other restrictions on days and hours of racing.

E

Regulation of Unmufflered Racing

The 2015 amended regulations place more strict limitations on unmufflered racing, as compared to mufflered racing. Unmufflered racing is permitted only on Tuesdays, and on ten

Saturdays and Fridays a year. In contrast, mufflered racing is allowed on any weekday between 9:00 a.m. and 10:00 p.m.[28] The Park contends that these limitations on unmufflered racing are an illegal and unauthorized attempt to regulate noise because the Comm'n did not comply with the prerequisites set forth in *Berlin Batting Cages* v. *Planning & Zoning Commission*, 76 Conn. App. 199, 821 A.2d 269 (2003) before passing those specific amendments. The Comm'n and the Council disagree, contending that (1) the separate prohibitions and limitations on unmufflered racing are regulations of use and not noise; (2) even assuming that these restrictions are noise regulations, they are authorized; and (3) *Berlin Batting Cages* does not govern the outcome. Accordingly, this court must decide (1) whether the restrictions on unmufflered racing constitute regulation of noise; if so, then (2) whether the Comm'n has the authority to regulate noise; and, if so, then (3) whether the Comm'n was required to comply with *Berlin Batting Cages*.

The court turns first to the language of the regulations. As the regulations do not contain a definition of "muffler," "mufflered racing" or "unmufflered racing," the court refers to dictionary definitions to determine the commonly approved usage of the language in question. See *Schwartz* v. *Planning & Zoning Commission*, 208 Conn. 146, 153, 543 A.2d 1339 (1988) ("words employed in zoning ordinances are to be interpreted in accord with their natural and usual meaning"); 9A R. Fuller, supra, § 34.6 (land use regulations passed by an agency rather than by the legislative body of a municipality are equivalent to an ordinance). A muffler is "a device to deaden noise; *especially*: one forming part of the exhaust system of an automotive vehicle." Merriam-Webster's Collegiate Dictionary (10th Ed. 1997). Accordingly, by definition, mufflers exist to deaden noise. The only rational distinction between mufflered and unmufflered racing is the amount of noise generated. See *Spero* v. *Zoning Board of Appeals*, 217 Conn. 435,

[28] The restrictions on unmufflered racing are found in Section 221.1.a of the amendments.

441, 586 A.2d 590 (1991) ("[c]ommon sense must be used in construing the regulation, and we assume that a rational and reasonable result was intended by the local legislative body").

The position taken by the Comm'n and the Council, that regulation of unmufflered engines is not a regulation of noise, casts a blind eye on the overwhelming amount of record evidence demonstrating that those who supported the 2015 amendments associated unmufflered racing with intolerable noise. The position taken by the Comm'n and the Council also ignores the lengthy history of the regulation of unmufflered racing at the Site. Given this lengthy history, it cannot be argued that the 2015 amendments were written on a blank slate. Rather, for almost sixty years, beginning with the 1959 injunction, unmufflered racing has been associated with the creation of intolerable noise. Indeed, in issuing the 1959 injunction, the court clearly distinguished mufflered from unmufflered racing, and strictly limited the operation of such unmufflered engines at the Site after finding that noise from unmufflered engines especially created a nuisance.

In an attempt to counter the almost tautological quality of these facts and conclusions, the Comm'n advanced what, at first blush, appears to be a logical sounding argument as to why the regulation of unmufflered racing is not the regulation of noise. According to the Comm'n, unmufflered racing is more strictly regulated because it is more popular than mufflered racing, and, therefore, attracts more fans who, in turn, create more traffic and more air and light pollution. Although the court first expressed a belief that there was no such evidence in the administrative record, the Comm'n, upon reargument, pointed to several places in the administrative record that would seem to constitute evidence that unmufflered racing attracts more fans. (#168, pp. 20-21, nn.12 and 13). Assuming, without deciding, that these examples from the administrative record reflect evidence of greater traffic and other impacts arising from

unmufflered racing, the Comm'n's recently confected argument remains unpersuasive for the following reason. As set forth above, when a zoning commission posits a formal statement of reasons, the court must refer solely to that document to ascertain the commission's deliberative process. "The principle that a court should confine its review to the reasons given by a zoning agency . . . applies where the agency has rendered a formal, official, collective statement of reasons for its action." *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 220 Conn. 544.

Paragraph four of the Comm'n's formal statement of reasons, which is the only reason that pertains to noise and other aspects of public health and safety, does not distinguish between mufflered and unmufflered racing. In fact, it states that "a track for racing motor vehicles . . . *by its very nature,* may have substantial impacts on surrounding properties . . . [including] not only noise, but traffic . . . nighttime illumination, air quality, and changes to property values." (Emphasis added.) Having found that an automobile race track has an intrinsically negative impact on traffic, as well as other aspects of public health and safety, the Comm'n cannot, at a later time, persuasively argue that it limited unmufflered racing more than mufflered racing because unmufflered racing has greater negative impacts on public health and safety.

For the foregoing reasons, the court finds that the regulation of unmufflered racing is the regulation of noise. The court also finds that the Comm'n has the general authority to regulate noise. See *Cambodian Buddhist Society* v. *Planning & Zoning Commission*, 285 Conn. 381, 440, 941 A.2d 868 (2008) (zoning commission could reasonably have concluded that 148-car parking lot would be a significant source of noise); *Husti* v. *Zuckerman Property Enterprises, Ltd.*, 199 Conn. 575, 582, 508 A.2d 735, appeal dismissed, 479 U.S. 802, 107 S. Ct. 43, 93 L. Ed. 2d 6 (1986) (citing § 8-2 and noting that noise is one of dangers that zoning is meant to combat);

Hayes Family Limited Partnership v. *Plan & Zoning Commission*, 115 Conn. App. 655, 662, 974 A.2d 61, cert. denied, 293 Conn. 919, 979 A.2d 489 (2009) (noise was a relevant consideration when evaluating special permit application to construct a pharmacy).

The court must now decide whether the Comm'n's general authority to regulate noise is limited by the holding of *Berlin Batting Cages*. In that case, the court held, inter alia, that a zoning regulation purporting to control noise was invalid because it conflicted with state statutes governing noise pollution control. *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, supra, 76 Conn. App. 215-219. General Statutes § 22a-67 et seq. governs noise pollution control, and mandates that any municipal noise pollution control enactment must be approved by the commissioner of environmental protection. The municipal regulation at issue in *Berlin Batting Cages*, § X (D) (3), was located within a chapter of regulations entitled "Environmental and Related Regulations," and provided that "[a]ny noise emitted outside the property from which it originates shall comply" with certain noise pollution control provisions of the State's Department of Environmental Protection. Id., 215. By its terms, that municipal regulation "purported to adopt the noise control regulations promulgated by the commissioner," and, thus, the court held that § X (D) (3) was a noise control ordinance as contemplated by General Statutes § 22a-67 et seq. Id., 217-18. However, Berlin ordinance § X (D) (3) had not been approved by the commissioner. Id., 217.

The Appellate Court rejected the Town's argument that such approval was unnecessary because General Statutes § 8-2 authorized it to regulate noise. Id., 218. The court explained that the authority granted to zoning commissions under § 8-2, to promote health and the general welfare, does not "necessarily confer" the authority to promulgate regulations concerning noise pollution and, even if it did, § 8-2 certainly could not trump the legislature's specific enactment

in § 22a-67 et seq. Id. Indeed, the court noted that § 8-2 does not even "mention noise or noise pollution." Id. The court also rejected the Town's argument that the regulation did not purport to comprehensively regulate noise emissions because its requirements only applied to site plan reviews. Id., 217-18.

At first blush, it may seem difficult to reconcile *Berlin Batting Cages* with the line of cases cited above that stand for the proposition that § 8-2 gives a zoning body the authority to regulate noise. Read broadly and very liberally, *Berlin Batting Cages* might be construed to require a zoning commission to seek the approval of the state environmental commissioner before promulgating any zoning regulation even remotely related to noise. The broad dicta of *Berlin Batting Cages*, namely that § 8-2 does not even mention "noise or noise pollution," id., 218, seems to conflict with prior and subsequent appellate authority, including *Cambodian Buddhist Society* v. *Planning & Zoning Commission*, supra, 285 Conn. 381, *Husti* v. *Zuckerman Property Enterprises, Ltd.*, supra, 199 Conn. 575, and *Hayes Family Limited Partnership* v. *Plan & Zoning Commission*, supra, 115 Conn. App. 655, all of which stand, either expressly or by necessary implication, for the proposition that zoning commissions may regulate noise under the authority of § 8-2. *Husti*, in particular, is at odds with *Berlin Batting Cages*. In *Husti*, supra, 581-82, our Supreme Court rejected state and federal constitutional challenges to zoning regulations that limited outdoor concerts in a residential neighborhood. In so holding, the Supreme Court cited "noise" as falling within the "kinds of dangers that zoning is meant to combat; see General Statutes §8-2 . . . ." Id., 582.

In attempting to reconcile the foregoing appellate authority with the holding of *Berlin Batting Cages*, this court is mindful of the bedrock principle that "[a]s a procedural matter, it is well established that [our Appellate Court], as an intermediate appellate tribunal, is not at liberty

to discard, modify, reconsider, reevaluate or overrule the precedent of our Supreme Court. . . . Furthermore, it is axiomatic that one panel of [the Appellate Court] cannot overrule the precedent established by a previous panel's holding." (Citation omitted; internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 595, 170 A.3d.73 (2017). Any assumption by this court that *Berlin Batting Cages* intended to overrule Supreme Court precedent recognizing that § 8-2 authorizes zoning bodies to generally regulate noise would contravene those fundamental principles of judicial restraint. Similarly, this court will also not assume that the Appellate and Supreme Court cases issued after *Berlin Batting Cages* were meant to overrule it sub silentio. Rather, in light of appellate authority standing for the proposition that § 8-2 authorizes a zoning commission generally to regulate noise, this court concludes that the holding of *Berlin Batting Cages* should be interpreted narrowly and should be limited to its facts. An argument set forth by the Park in its motion for reconsideration actually confirms and provides additional support for this conclusion: That the court, in its initial review of *Berlin Batting Cages*, overlooked important language in § 22a-73 (c).

To understand subsection (c) of this statute, we must first begin by examining other parts of the statute. Section 22a-73 is entitled "Municipal noise regulation programs; ordinances subject to commissioner's approval." Subsection (a) reveals that the subject of this statute is noise pollution. It provides, in pertinent part, that "it is the public policy of the state to encourage municipal participation by means of regulation of activities causing *noise pollution* within the territorial limits of the various municipalities. To that end, any municipality may develop and establish a comprehensive program of noise regulation. Such program may include a study of the noise problems resulting from uses and activities within its jurisdiction and its development and

adoption of a noise control ordinance." (Emphasis added.) The court reads this section as providing that, to regulate activities causing noise pollution, a town may develop a comprehensive program of noise regulation, which may include both a study of various noise problems and the adoption of a "noise control ordinance." Subsection (b) of § 22a-73 further describes, by means of examples, a "noise control ordinance." Such an ordinance may include a limitation of noise levels in specified zones or other areas; designation of a noise control officer or board; implementation procedures for such programs; procedures for insuring compliance with state and federal noise regulations and restrictions on noise levels applicable to construction. According to subsection (c), no such ordinance "shall be effective until such ordinance has been approved by the commissioner [of DEEP]."

Two things become clear upon review of this language. One is that the proposed regulation in *Berlin Batting Cages* was a noise control ordinance governed by the mandatory approval provisions of § 22a-73 (c). The other is that the zoning regulation in the present case, providing for differential treatment of mufflered and unmufflered racing, is clearly not such a noise control ordinance.

There were two overriding factors that resulted in the finding in *Berlin Batting Cages* that § X (D) (3) was a noise pollution control ordinance subject to approval pursuant to General Statutes § 22a-67 et seq. First, § X (D) (3) was located within the regulatory chapter regarding "Environmental and Related Regulations," and second, by its very terms, i.e., that it "purported to adopt the noise control regulations promulgated by the commissioner," it placed itself within the category of a noise control regulation. *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, supra, 76 Conn. App. 215-219. Therefore, § X (D) (3) defined itself as a noise control regulation and, by doing so, placed itself within the requirements of § 22a-73. By placing

its regulations so clearly within the bounds of the comprehensive state statutory scheme regulating noise pollution, the Town of Berlin insured that the noise control regulations it adopted would be ineffective without the prior approval of the commissioner of environmental protection. This is not the case with the Comm'n's distinction between mufflered and unmufflered racing. The zoning amendments that restrict unmufflered racing to certain days and hours do not come close to falling within any of the examples set forth in subsection (b) and do not constitute regulatory attempts to curb noise pollution under subsection (a). Further, these regulations do not comprise "a comprehensive program of noise regulation." See General Statutes § 22a-73 (a).

The Park further argued, however, upon reconsideration, that the court should consider a different portion of § 22a-73 (c), i.e., that "[n]otwithstanding the provisions of this subsection, any municipality may adopt more stringent noise standards than those adopted by the commissioner, provided such standards are approved by the commissioner," because it was considered by the *Berlin Batting Cages* court along with subsections (a), (b) and another portion of subsection (c). *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, supra, 76 Conn. App. 215-217. The court finds that this portion of § 22a-73 (c), as construed by *Berlin Batting Cages*, did not compel the Comm'n to seek the approval of the Commissioner of DEEP before adopting of the regulations governing unmufflered racing. As § 22a-73 does not define "standards," this court interprets the term according to its common meaning; General Statutes § 1-1 (a); and looks to the dictionary to glean that meaning. *Dattco, Inc.* v. *Commissioner of Transportation*, supra, 324 Conn. 46. As previously noted, the relevant Webster dictionary definition for the word "standard" provides that it is "something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality."

Using this definition, a difference in decibel levels, e.g., five decibels versus ten decibels would be a "standard." Distinctions between days and hours on which mufflered and unmufflered racing may take place do not constitute rules for the measure of quantity, weight, extent, value or quality. Both the legislative history of § 22a-67, et seq. and the regulations arising from it support this conclusion. The legislative history of the Noise Control Act reveals that the Act "does not attempt to address itself to motor vehicle noise . . . or noise from certain exempted activities such as . . . state or local licensed sporting activities." P.A. 74-328. There is no dispute that the vehicles raced on the Track meet the definition of "motor vehicle" set forth in General Statutes § 14-1 (54) and that the noise regulated by the zoning amendments arises from "local licensed sporting activities." Therefore, the noise generated by these vehicles would not be subject to regulation under § 22a-67, et seq. Reflective of this legislative intent are the regulations enacted to effectuate and enforce the Noise Control Act. Specifically, the regulations arising from the Noise Control Act exclude "[s]ound created by any mobile source of noise . . . [including] automobiles . . . ." Regs., Conn. State Agencies, § 22a-69-1.7 (i).

In sum, the court finds that the 2015 amendments limiting unmufflered racing do not constitute regulation of noise pollution in a manner similar to the regulation of noise pollution found in *Berlin Batting Cages*, and therefore, do not require the preapproval of the Commissioner of DEEP under the Noise Control Act. Rather, the amendments at issue in this case, which restrict noise from car engines arising from entertainment events, i.e., a motor vehicle race, are much more similar to the limitations at issue in *Husti* that restricted noise, under § 8-2, from entertainment events, namely, outdoor concerts in a residential neighborhood. Here, as the Comm'n properly invoked its general authority to regulate noise, conferred by § 8-2, the court concludes that the unmufflered racing regulations are not ineffective for want of the pre-

approval of the commissioner of environmental protection. The Park's appeal as to the regulation of unmufflered racing is denied, and the regulations concerning the same are upheld.

F

Special Permit to Seek Zoning Amendments

The Park argued that the Comm'n exceeded its statutory authority under § 8-3 (c) by requiring that the Park apply for and obtain a special permit as a precondition to attempt to amend sections 221.1 and 221.3 of the new zoning regulations. As previously noted, section 221.1.a regulates racing, including days and hours of racing operation and places restrictions on unmufflered racing. Subsection (8) of 221.1 a. provides that "[t]he parameters set forth in this subsection may be amended by the Commission upon filing and approval of (1) a special permit application in compliance with all requirements of these regulations, including a site plan identifying the location of all uses, accessory uses, buildings, structures, pavement, and all other improvements on the relevant property, and amendments to any of the parameters set forth above; and (2) a petition to amend the zoning regulations setting forth alternative parameters for this subsection." Virtually identical is subsection (d) of 221.3, which pertains to camping by spectators and participants: "The standards set forth in this subsection may be amended by the Commission upon filing and approval of (1) a special permit application in compliance with all requirements of these regulations, including a site plan identifying the location of all uses, accessory uses, buildings, structures, pavement, and all other improvements on the relevant property, and amendments to any of the restrictions set forth above; and (2) a petition to amend the zoning regulations setting forth alternative standards for this subsection."

In contrast to these regulations, General Statutes § 8-3 (c) only requires an applicant requesting a change in zoning regulations to file a written petition requesting such, in a form

prescribed by a zoning commission; it does not authorize a zoning commission to require a petitioner seeking an amendment to apply for and receive a special permit before seeking the change. Counsel for the Comm'n candidly admitted that there is no other provision in the Salisbury zoning regulations requiring a person or entity who seeks a zoning amendment to apply for and receive a special permit. Nevertheless, in an attempt to counter the Park's argument, the Comm'n made several arguments, both originally and upon reconsideration by the court.[29]

The Comm'n's first argument is a claim that §§ 221.1.a (8) and 221.3.d are merely precatory. The portion of these sections that indicate that the Comm'n *may* amend the regulations in question, namely Sections 221.1 and 221.3, is indeed, precatory because they do not compel, coerce or require the Park to seek amendments of 221.1 or 221.3. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 139 Conn. App. 565, 579, 57 A.3d 765 (2012), aff'd, 311 Conn. 259, 86 A.3d 463 (2014) ("the word 'may' denotes permissive behavior"). However, there is nothing "permissive" about what the Park must do to secure an amendment. If it chooses, in the future, to attempt to change either the "parameters" of section 221.1 or the "standards" of section 221.3, the Park must file, and have approved by the Comm'n, (1) a special permit application that is in compliance with all requirements of these regulations (including a site plan identifying the location of all uses, accessory uses, buildings, structures, pavement, and all other improvements on the property); (2) the proposed amendments; and (3) a petition to amend the zoning regulations setting forth alternative parameters or standards. Nothing in the existing language of section 221.1.a (8) or section 221.3.d indicates that these requirements are anything but directory. The requirement to file a

[29] The Citizens Council joined the Comm'n's arguments for reconsidering this portion of the court's original decision.

special permit application with a site plan, as well as proposed amendments and a petition to amend the regulations is, therefore, clearly mandatory.

The Comm'n's argument upon reconsideration is that the court did not address the legal arguments set forth in the supplemental briefing filed by the Comm'n after the August 30, 2017 argument of this appeal. The court granted reconsideration on this issue. After due consideration of the points made in the supplemental briefing, as well as an issue of fact that the court previously overlooked in considering this issue, namely that the Park has never filed for a special permit in the forty-three years in which it was supposed to have done so, the court now denies the Park's appeal of the requirement to file a special permit application, together with a site plan, proposed amendments and a petition to amend the regulations, in order to secure amendment of §§221.1 and 221.3 of the zoning regulations.

The court originally found in favor of the Park on this issue for two reasons. First, as mentioned above, § 8-3 (c) only requires an applicant requesting a change in zoning regulations to file a written petition requesting such, in a form prescribed by a zoning commission. The court originally found that requiring an entity seeking to amend zoning regulations to file, in addition to the prescribed form, a special permit application and a site plan when placing a proposed zoning amendment before the Comm'n, was clearly outside the statutory authority laid out in § 8-3 (c). The court initially found this to be especially true were the Park to seek a minor amendment, such as an amendment allowing activity with mufflered cars on the track until 10:05 p.m. instead of 10:00 p.m. Previously, the court found that the foregoing requirements were clearly outside of the statutory authority and, therefore, the court originally sustained the appeal insofar as it pertained to amendment procedures set forth in sections 221.1.a (8) and 221.3.d. Second, the court also originally found that the proposed amendment process to be unreasonable

given that the Park is a preexisting, nonconforming use. The court earlier found that while there is no doubt that a municipality may regulate a preexisting nonconforming use under its police power, see *Taylor* v. *Zoning Board of Appeals*, 65 Conn. App. 687, 697-98, 783 A.2d 526 (2001) (requiring a landowner to obtain a permit for a quarry was a reasonable regulation of a preexisting nonconforming use under the Town's police powers), a municipality may not do so if the regulation "abrogates such a right [to the preexisting, nonconforming use] in an unreasonable manner, or in a manner not related to the public interest . . . ." (Internal quotation marks omitted.) Id., 698.

The court now finds, however, that, given the peculiar history of regulation of racing at the Site, the requirement that the Park file an application for a special permit with a site Plan when seeking a zoning amendment as to §§ 221.1 and 221.3 should be upheld. To understand this issue, the court will review the legal implications of that aspect of the Park's operations that is preexisting and nonconforming.

(1)

Legal Aspects of Park's Nonconforming Use

As mentioned above, racing at the Site took place before the Town enacted zoning regulations in June, 1959. The manner in which the track operated before this time is, therefore, a preexisting, nonconforming use. Although a nonconforming use may be intensified, it may not be allowed to increase or expand. See *Bauer* v. *Waste Management*, supra, 234 Conn. 243. Although the original zoning regulations listed the operation of the Site as a permitted, as of right use, and the 1975 zoning regulations amended the use to be a specially permitted use, neither

regulation can abnegate the categorization of the use that predated zoning regulations as a nonconforming use.

"Section 8-2 protects the right of a user to continue the same use of the property *as it existed before the date of the adoption of the zoning regulations*. . . ." Id., 240. (Citations omitted; emphasis in original; internal quotation marks omitted.) "Such a use is permitted because its existence *predates* the adoption of the zoning regulations." Id. (Emphasis in original; internal quotation marks omitted.) "Where a nonconformity exists, it is a vested right which adheres to the land itself. And the right is not forfeited by a purchaser who takes with knowledge of the regulations which are inconsistent with the existing use." (Internal quotation marks omitted.) *Taylor* v. *Zoning Board of Appeals*, supra, 65 Conn. App. 694. "The sale of the property will not destroy the right to continue in the nonconforming use." Id., 695. Such "a vested right, unless abandoned, to continue the nonconforming use is in the land . . . . The right to a nonconforming use *is a property right* and . . . any provision of a statute or ordinance which takes away that right in an unreasonable manner or in a manner not grounded on the public welfare is invalid." (Emphasis in original; internal quotation marks omitted.) Id., 694. With such a nonconforming use, the landowner has the right to continue the nonconforming use already established. See id.

This right to continue the original, nonconforming use, however, may be regulated. *Taylor* involved a situation in which the Town of Wallingford enacted zoning regulations making a nonconforming sand and gravel quarry a permitted use in its zoning district subject to a special permit. Id, 689. When the quarry operation failed to apply for the special permit, the Town issued a cease and desist order. Id., 688-89. The Appellate Court held that the municipality had the right to impose the special permit requirement upon the preexisting nonconforming use.

Id., 697-98. "Regulation of a nonconforming use does not, in itself, abrogate the property owner's right to his nonconforming use. . . . A Town is not prevented from regulating the operation of a nonconforming use under its police powers. Uses which have been established as nonconforming uses are not exempt from all regulation merely by virtue of that status." (Internal quotation marks omitted.) Id., 698. Further, the Appellate Court held that "the town has the right to regulate the plaintiffs' nonconforming use under its police powers," although any such regulation "must have a reasonable relation to the public health, safety and welfare and must operate in a manner which is not arbitrary, destructive or confiscatory." (Internal quotation marks omitted.) Id., 697. In deciding whether the regulation is reasonable, the court must decide, "first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." (Internal quotation marks omitted.) Id., 697-98.

Under this line of cases, in regard to so much of the Park's operation that preexisted zoning regulation, therefore, the court must determine (1) whether public interest mandates the requirement that the Park file a special permit with a site plan when seeking a change to §§221.1, regarding racing and 221.3, regarding parking and camping, and (2) that the proposed mechanism is reasonably necessary and not unduly oppressive.[30] In doing so, the court must bear in mind that only the "parameters" of 221.1.a, pertaining to hours, days, and noise quality of racing, and the "standards" of 221.3, concerning parking and camping, would be subject to the foregoing amendment process.

[30] The parties did not focus on the issue of whether the Park's use has legally intensified or illegally expanded since its pre-zoning operation. The court does not feel it necessary to decide this issue, but will instead consider the legal standards that pertain to whatever operation at the track pre-existed the June, 1959 regulations.

The court first finds that the public interest calls for the imposition of the requirement of the special permit with site plan in the event that the Park seeks to amend the regulations as to racing, camping and parking. As set forth in great detail above, the regulation of racing, camping and parking at the track has been ambiguous, jumbled, sloppy and confusing prior to the 2015 zoning amendments. During the deliberation session on the amendments at issue, the Comm'n's chair pointed out that, even though the Park has been a specially permitted use since 1975, the Park has never applied for or received a special permit. Even though it would be legally impossible for the injunction, which resulted from a private nuisance action, to inform, in any manner, the zoning regulations, the Comm'n's chair stated, that under the status quo that constituted what he elsewhere termed a vague "zoning scheme," the injunction's restrictions supplied the special permit's conditions. The injunction does not and cannot legally do so, and it would certainly inure to the public's benefit for the Park, if it desires a change in racing or camping regulations, to file, clearly and publically, an application for a special permit along with the application for the zoning amendments. Moreover, as the Comm'n's counsel pointed out during the argument on the motions for reconsideration, neither the Park nor its predecessor has ever filed a site plan of any kind.[31] It would provide a necessary benefit to the public to have a site plan of the Park on file in the zoning office, detailing important aspects of its operation like sanitation and parking. Moreover, when considering the important issues of the regulation of racing, camping and parking, it would be necessary for any member of the public to be able to understand the proposed amendments in the context of the Park's site plan and its specially permitted use.

[31] Counsel for the Comm'n pointed out in the Comm'n's deliberative session that "It's always good for a commercial operations [sic]... to have an existing site plan, special permit on the books so that everybody knows what is and isn't done." Return of Record, Exhibit 23, 13-14.

The court also finds that requiring the Park to file a special permit application and a site plan in conjunction with a zoning amendment application is reasonably necessary and is not unduly oppressive. As mentioned above, the requirement to file a special permit is long overdue. After forty-three years, it is no longer acceptable to allow the Park to operate as a specially permitted use that has neither applied for nor received a special permit. Requiring the special permit application with a site plan as a precondition for seeking a zoning amendment is reasonably necessary so that the Comm'n may, as stated above, hit the "reset button" on the regulation of the Park, bringing all of the regulation of activity at the Park into one publically accessible home, one with clear administrative due process. To require the Park to do so is not unduly oppressive. After sixty years of operation without ever having filed a site plan and forty-three years of operation without ever having filed for a special permit, it would not be unduly oppressive to require the Park to file for a special permit with a site plan if it were to seek more flexible racing hours or changes to camping or parking.

Therefore, the court finds that the requirement of filing a special permit application with a site plan in order to seek an amendment of § 221.1 or § 221.3 is a reasonable exercise of the Town's police powers over that portion of the Park that is nonconforming.

(2)

Section 8-3 Does Not Preclude the Special Permit/Site Plan Requirement

Similarly, § 8-3 does not preclude the requirement that the Park file an application for a special permit with a site plan before seeking to amend zoning regulations § 221.1 or § 221.3. As mentioned above, § 8-3(c) only requires an applicant requesting a change in zoning regulations to file a written petition requesting such, in a form prescribed by a zoning commission. The Comm'n persuasively argued that the mandated special permit application with a site plan fit

within this authority, as the format in which the zoning commission wished these amendments to be presented. This conclusion is buttressed by a case submitted by the Comm'n after the August 30, 2017 argument, *Zimnoch* v. *Planning & Zoning Commission*, 302 Conn. 535, 29 A.3d 898 (2011). Although the Park argued for a narrower construction, *Zimnoch* clearly stands for the proposition that nothing precludes a Town from combing a zone change application with a special permit application. Id., 552. As a result, there is no bar to the Comm'n imposing a requirement under § 8-3 that an application for a zoning amendment to the critical issues of regulation of racing ,camping and parking be accompanied by a special permit application and a site plan. This is especially given the recitation of the history of regulation at the Site posited above.

For all of the reasons cited in this section, the court denies the Park's appeal of the zoning amendments mandating that any application for a zoning amendment to §§ 221.1 and 221.3 include an application for a special permit and a site plan.

The court will next proceed to consider the Park's contentions that the zoning amendments constituted spot zoning or the regulation of a user, not a use.

G

Spot Zoning and Regulation of User, Not Use

The court finds no merit in the Park's more generalized arguments that the amendments constitute illegal spot zoning or that the Park was singled out for unfair treatment. Spot zoning is "the reclassification of a small area of land in such a manner as to disturb the tenor of the surrounding neighborhood. . . . Two elements must be satisfied before spot zoning can be said to exist. First, the zone change must concern a small area of land. Second, the change must be out of harmony with the comprehensive plan for zoning adopted to serve the needs of the community

as a whole. . . . The vice of spot zoning lies in the fact that it singles out for special treatment a lot or a small area in a way that does not further such a [comprehensive] plan." (Internal quotation marks omitted.) *Gaida* v. *Planning & Zoning Commission*, 108 Conn. App. 19, 32, 947 A.2d 361, cert. denied, 289 Conn. 922, 958 A.2d 150 (defendant's petition for cert.), 289 Conn. 923, 958 A.2d 151 (plaintiffs' cross-petition for cert.) (2008); see *Delaney* v. *Zoning Board of Appeals*, 134 Conn. 240, 245, 56 A.2d 647 (1947) ("'spot zoning,' . . . if permitted, must often involve unfair and unreasonable discrimination and necessarily defeat, in large measure, the beneficial results of zoning regulation"). "Spot zoning is impermissible in this state." (Internal quotation marks omitted.) *Gaida* v. *Planning & Zoning Commission*, supra. "The obvious purpose of the requirement of uniformity in the regulations is to assure property owners that there shall be no improper discrimination, all owners of the same class and in the same district being treated alike." (Internal quotation marks omitted.) Id., 33.

The Park argued that these amendments constitute spot zoning because the RE District is too small to contain more than one track and that, as a result, the amendments affect only the Park's property. However, although the amendments do impact only one property, the court finds that the amendments do consider the use of the Site as a race track within the context of the Comm'n's "general plan for the community as a whole." Maltbie, "The Legal Background of Zoning," 22 Conn. B.J. 2, 5 (1948). One example of this is that, as early as August 3, 1958, the Salisbury Town development plan (the 1958 Plan) considered the proper use of the Site within the context of the Town as a whole. The1958 Plan first recognized that the area around the Site was "not likely to be developed solely or wholly for residence, because of its value for business and industry as a large flat area on gravelly soil." Salisbury's zoning regulations that were developed after that time have always regulated the Rural Enterprise District with this insight in

mind; the newest amendments are both consistent with this insight and also with previous zoning regulations.

Therefore, the Park did not sustain its burden to convince the court that the amendments constituted the reclassification of a small area of land so as to disturb the tenor of the surrounding neighborhood. See *Gaida* v. *Planning & Zoning Commission*, supra, 108 Conn. App. 32. The Park similarly did not sustain its burden to prove that the Park had been singled out for unfair treatment. The amendments do not regulate a user; they regulate the use of the Site as a motor vehicle race track. The amendments generally consider the impact of the Site within the context of zoning of the community as a whole. For these reasons, the court finds that the Park did not sustain its burden to prove that the regulations as a whole constituted spot zoning or were, in any general way, discriminatory.

H

Conformity with the Town's Plan of Conservation and Development

The Park argued that the amendments were not in conformance with the Town's Plan of Conservation and Development. However, the Comm'n heard record evidence adduced from Martin J. Connor, AICP, to the contrary. The Comm'n found this evidence to be credible and persuasive and the court cannot substitute its judgment for that of the Comm'n in regard to this issue. See *Stiles* v. *Town Council*, supra, 159 Conn. 218-19. Therefore, the amendments are in conformity with the Town's Plan of Conservation and Development.

I

Severability

The Council asked the court, during its motion for reconsideration, to address the issue of severability, since the court sustained the Park's appeal in part and denied it in part. Although the Council did not raise this issue at any time prior to the court's initial memorandum of decision, it would be plain error for the court to avoid this analysis. In *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 181 Conn. 607, 609, 436 A.2d 1259 (1980), the Supreme Court held that was plain error for a court to overlook a clearly applicable statute. In this case, General Statutes § 1-3, applies to the zoning regulations at issue in the present case. See *Duplin* v. *Shiels, Inc.*, 165 Conn. 396, 398-99, 334 A.2d 896 (1973) ("[a] local ordinance is a municipal legislative enactment and for purposes of appeal is to be treated as though it were a statute. . . . The same canons of construction are applicable whether an ordinance or an act of the General Assembly is involved" (citation omitted)); see, e.g., *Ghent* v. *Planning Commission*, Superior Court, judicial district of Waterbury, Docket No. CV-92-0106968 (November 12, 1992, *Parker, J.*). Therefore, the court will engage in a severability analysis.

As discussed in footnote 13 of this memorandum of decision, the amendments originally included section 221.6, a clause that provided that, if one portion of the regulations were found by a court to be invalid, all of the other provisions would be invalid as well. The Comm'n repealed this provision at a meeting on March 30, 2016. An examination of the transcript of that hearing (Exhibit 34 of the Return of Record) reveals that the Comm'n clearly desired that, even if an appeal were sustained as to some of the amendments, the Comm'n wanted the other amendments to remain in full force and effect. One member, in fact commented that the Comm'n did not want "to lose all the other things we did and achieved for the use in the RE zone based on the all or nothing." For this reason, the court finds that the amendments are severable and that those for which this appeal was denied will remain in full force and effect.

V

CONCLUSION

The court sustains the Park's appeal as to (1) the provisions of the amendments prohibiting Sunday racing after noon in contravention of the permission granted in General Statutes § 14-164a (a). The court denies all other aspects of the Park's appeal. Therefore, the court finds in favor of the Comm'n in regard to all other aspects of the zoning amendments.

The court must remind all of the parties, however, that both the *Adams* injunction and the stipulated ZBA Judgment remain in full force and effect. This decision has no impact on the pending motion to motion to modify the *Adams* injunction, which awaits a hearing date and a decision. The legal standards for modifying an existing injunction in a private nuisance action are different from those used when a court reviews zoning amendments. Compare *Adams* v. *Vaill*, supra, 158 Conn. 485 ("courts have inherent power to change or modify their own injunctions where circumstances or pertinent law have so changed as to make it equitable to so do") with *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, supra, 220 Conn. 543-44 ("[c]ourts will not interfere with . . . local legislative decisions unless the action is clearly contrary to law or in abuse of discretion").

SO ORDERED.

The Hon. John D. Moore