DOCKET # CV-19-6082122 S	: SUPERIOR COURT
WILLIAM MILLER, ET. AL.	: J. D. OF FAIRFIELD
V.	: AT BRIDGEPORT
PLANNING & ZONING COMMISSION, CITY OF BRIDGEPORT, ET. AL.	: AUGUST 19, 2019

MEMORANDUM OF DECISION

The Defendant, Brennan Builders, LLC, is the owner of 11-27 Bywater Lane, Bridgeport. The property, which consists of two (2) building lots, is situated entirely within a Residence B (R-B) Zone, and totals 14,741 square feet (ROR 1), or Approximately 0.388 acres.

One of the lots contains a single family residence, while the other is unimproved. Single family dwellings and two (2) family structures are both permitted uses in the R-B Zone.

11-27 Bywater Lane is located within a peninsula, adjacent to Long Island Sound. The only avenue of ingress and egress to the area is Brewster Street, which abuts 11-27 Bywater Lane to the south. Bywater Lane intersects with Brewster Street in a "T" shaped intersection. Bywater Lane is a narrow street, which dead ends at a marina and boat yard.

The westerly side of Bywater Lane contains several single family homes, between the marina and Brewster Street. On the easterly side of Bywater Lane, at its intersection with Brewster Street, is a single family home, across Bywater Lane from the property owned by

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Brennan Builders, LLC. The Bywater Condominiums are adjacent to that residence, on the easterly side of Bywater Lane.

Brewster Street runs adjacent to Ellsworth Park, as it enters the peninsula. It runs in a generally southeasterly direction, passing 11-27 Bywater Lane on the left, and the Fayerweather Towers, a five (5) story condominium complex on the right. The rear of the condominium development fronts on Long Island Sound.

After passing the intersection with Bywater Lane, Brewster Street veers to the southeast. It dead ends at the Fayerweather Yacht Club, and a single family residence.

The side of Brewster Street that abuts the Sound, in addition to the Fayerweather Yacht Club and the Fayerweather Condominiums, also is home to a Veteran's social club, known as Port Five. The social club and the yacht club each have several hundred members.

On November 2, 2018, Brennan Builders, LLC filed an application (ROR 1) with the Defendant, Bridgeport Planning and Zoning Commission. The application sought to change the existing R-B zoning classification of both lots, to a Residence C (R-C) Zone.

The applicant represented that it proposed to build a seven (7) unit residential development on the site, should the change in zoning classification be granted (ROR 1).

Although Brennan Builders, LLC owns, and is in control of 11-27 Bywater Lane, the application also cited "blighted properties" in Bridgeport in support of its change of zone application (ROR 1).

In an application dated November 7, 2018 (ROR 5), Brennan Builders also applied for site plan review pursuant to Connecticut's Coastal Area Management (CAM) Act, Sections 22a-90 through 22a-112 of the General Statutes. The application also referenced a seven (7) dwelling unit proposal (ROR 5, p. 3) following demolition of the existing building.

A notice of the November 26, 2018 public hearing was published in the Connecticut post, on November 15, 2018 and November 22, 2018 (ROR 9). The notices referenced both the proposed change in zoning classification, from " a 1 or 2 family residential zone (R-B) to a multi-family residential zone (R-C), " and a coastal site plan review "to permit the construction of a 7 unit apartment building in the proposed R-C zone and coastal area." (ROR 9; ROR 10: Supplemental ROR, 6-26-19).

Neither the application, or the notice of public hearing indicated that, assuming a change in zoning classification, a variance voted by a super-majority of the Bridgeport Zoning Board of Appeals would be required, in order to build a seven (7) unit apartment building. During the November 26, 2018 public hearing, counsel for the applicant acknowledged the need for a variance, and pivoted to a five (5) unit town house type proposal, which could be erected without a variance, assuming the property was zoned R-C (ROR 20, p. 3-4; p. 7).

Counsel told the Planning and Zoning Commission that he faced a quandary. He wondered "whether we should go to the ZBA first, or go to Planning and Zoning first for a zone change."

The attorney evidently believed that the Bridgeport Zoning Board of Appeals would entertain a variance application, declare the existence of a legally cognizable hardship, and

approve the requested variance, subject to a later change in zoning classification voted by the Planning and Zoning Commission, and the merger of the two building lots into a single parcel. The variance would presumably have been requested, based upon the application of zoning regulations to 11-27 Bywater Lane, which would only apply to the property if and when a change of zone was voted by the Planning and Zoning Commission.

Rather than pursuing that dubious path, Brennan Builders, LLC explained that its "vision" for the property involved five (5) units, because more than five (5) units would require a variance (ROR 20, p. 7). Counsel also explained, "hypothetically," a site plan of the allowed number of units which would be located on the site (ROR 20, p. 5).

In preemptively discussing the issue of "spot zoning," the applicant's attorney asserted: "We're not spot zoning because basically it (11-27 Bywater Lane) is surrounded by Residence C, with Bywater across the street, Fayerweather towers, and the park behind us." (ROR 20, p, 8-9).

This claim is inaccurate, as an examination of the zoning classifications of property abutting 11-27 Bywater Lane reveals.

The record, and the Zoning map, unambiguously show that the properties "surrounding" 11-27 Bywater lane are either zoned Residence (R-A), or Residence (R-B). Although the Bywater Condominium complex, located on the easterly side of Bywater Lane, is zoned R-C, that property does not directly abut 11-27 Bywater Lane.

The property to the north of 11-27 Bywater Lane is zoned R-B, as is the property across the street at the corner of Bywater lane and Brewster Street. Ellsworth Park, a public park, carries an R-A classification.

The Fayerweather Towers Condominium, a five story multi-unit structure, is clearly consistent with the multi-family dwelling use which is permitted in an R-C Zone, subject to the special permit requirement. However, it carries an R-B zoning classification, and only single family dwellings and two family dwellings are permitted in the R-B zone as a matter of right.

The record does not reveal whether the five story edifice represents a pre-existing nonconforming use of 155 Brewster Street, or whether it was constructed following receipt of a variance from the Bridgeport Zoning Board of Appeals. Its R-B zoning status was not changed by the Planning and Zoning Commission, during the last city wide rezoning process.

The applicant's attorney submitted a petition (ROR 16, Ex 5) addressed to both the Planning and Zoning Commission and the Zoning Board of Appeals, as part of his presentation. The petition called for a seven (7) unit building on the property, based upon both a change in zoning to R-C, and a variance (ROR 20, p. 11).

The applicant's attorney was permitted to complete his presentation, without interruption or admonition from the Commission's presiding officer.

Nor did the Commission chair interrupt a "land use attorney" who was the only speaker who addressed the Planning and Zoning Commission in support of the application.

The attorney claimed that the project described by the applicant was "very appropriate for the site, and for the zone change." (ROR 20, p. 14)

Only when multiple opponents of the proposal addressed the Commission, did the chair seek to limit and constrain the scope of the testimony.

Speakers were interrupted by the chair with such comments as "we are not commenting on the units sir" (ROR 20, p. 17), and "we're not here to discuss how many units ma'am" (ROR 20, p. 27). This, despite extensive testimony and exhibits concerning the number of units presented by Attorney Raymond Rizzio in support of the application of his client, Brennan Builders, LLC.

After three (3) speakers addressed the Commission, Chairman Riley exclaimed "... please, let's not be redundant and let's not waste everyone's time with pontificating." (ROR 20, p. 24). The safety of pedestrians and Little League players being dropped off by parents for games in Ellsworth Park was raised. Use of the narrow streets for the movement of boat trailers was also raised as a public safety issue in the area. The chair retorted: "Ma'am, what does that have to do with the zone change?" (ROR 20, p. 28)

The applicant, Brennan Builders, LLC, presented no expert testimony from real estate appraisers, or traffic specialists.

Gail Robinson, a realtor who specializes in the Black Rock section of Bridgeport, testified in opposition to the change of zone proposed by Brennan Builders, LLC. She opined that property values in the area would not be positively impacted by a change of zone from R-

B to R-C. She also correctly indicated that once the zoning classification is changed, there is no guarantee concerning the use to which the site, 11-27 Bywater Lane, will be committed.

Opposition speakers pointed out that under the existing zoning regulations, two (2) buildings of two (2) families each could be constructed on the property, for a maximum of four (4) dwelling units. This is one less unit than can be obtained, in an apartment building located in an R-C zone (ROR 20, p. 32; p. 35).

In rebuttal. Attorney Rizzio was permitted to address issues of parking on the site if it was developed into dwelling units. (Supplemental ROR, p. 40). He concluded by stating that the R-C zone is "... consistent with uses around it..." (Supplemental ROR, p. 42).

The public hearing, and the Commission's decision session which followed, made scant mention of the uses which could be permitted in an R-C zone, subject to the issuance of a special permit, consistent with Table 1 of the Bridgeport Zoning Regulations. These include: 1) rooming or boarding houses, 2) entertainment, recreation trade, 3) restaurants, 4) entertainment, live, and 5) mixed uses in adaptive reuse. None of these uses are permitted in an R-B zone.

The Planning and Zoning Commission discussed the change of zone application during its executive session (Supplemental ROR, p. 43-49), and voted, 6-3, to approve Brennan Builders, LLC's application.

Although individual Commissioners stated reasons for the approval, no collective reasons of the Commission were included in the motion to approve (Supplemental ROR, p. 42-43).

Notice of the decision was published in the December 2, 2018 edition of the Connecticut Post (ROR 17).

This timely appeal by the Plaintiffs, William Miller, Debra Miller and Gary DeBrizzi followed.

AGGRIEVEMENT

The Plaintiffs, William Miller and Debra Miller, are the record owners of 45 Bywater Lane, Bridgeport. They acquired a one-third interest in the property in 2003, which interest is recorded at Volume 5191, page 343-344 (Ex. 2) of the land records of the City of Bridgeport.

Additional percentages of ownership concerning 45 Bywater Lane were deeded to the Millers in 2013 (Ex. 3; Ex. 4), and 2014 (Ex. 5),

William and Debra Miller have been the owners of the property, which abuts 11-27 Bywater Lane to the north, throughout the time this appeal has been pending.

The Plaintiff Gary DeBrizzi acquired ownership of Unit 4-B of the Fayerweather Towers Condominium (Ex. 1) via a warranty deed dated March 14, 2007 (Ex. 1). The Fayerweather Towers Condominiums are located at 155 Brewster Street, across Brewster Street from 11-27 Bywater Lane. As a unit owner, the Plaintiff owns an interest in the common elements of the condominium.[1]

Pleading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an appeal. Stauton v. Planning & Zoning Commission, 271 Conn. 153,

[1] Section 47-74(b) (1), C.G.S.

157 (2004); Jolly, Inc. v. Zoning Board of Appeals, 237 Conn. 184, 192 (1996). The question of aggrievement is one of fact, to be determined by the trial court. Primerica v. Planning & Zoning Commission, 211 Conn. 85, 93 (1989). The burden of proving aggrievement rests with the party claiming to be aggrieved. London v. Zoning Commission, 149 Conn. 282, 284 (1962). One claiming aggrievement must sustain his interest in the property throughout the course of an appeal. Craig v. Maher, 174 Conn. 8, 9 (1977).

Aggrievement falls into two (2) basic categories – statutory aggrievement, and classical aggrievement.

Statutory aggrievement exists by virtue of legislative fiat, and is a legislative recognition of a right to institute an appeal, without regard to an analysis of the facts of a particular case. Moutinho v. Planning & Zoning Commission, 278 Conn. 660, 665 (2006); Weill v. Lieberman, 195 Conn. 123, 124-25 (1984). One claiming statutory aggrievement must show that a particular statute grants to a party the right to pursue an appeal, without the necessity of demonstrating actual injury based upon the particular facts at hand. Pond View, LLC v. Planning & Zoning Commission, 288 Conn. 143, 156 (2005); Fort Trumbull Conservancy v. Alves, 262 Conn. 480, 485-87 (2003).

Classical aggrievement, on the other hand, requires a party to satisfy a well-established two-fold test: 1) the party claiming aggrievement must demonstrate a personal and legal interest in the decision appealed from, as distinct from a general interest, such as concern of all members of the community as a whole, and 2) the party must prove that the specific personal and legal interest has been specifically and injuriously affected by the

decision which generated the appeal. Cannavo Enterprises v. Burns, 194 Conn. 43, 47 (1984); Hall v. Planning Commission, 181 Conn. 442, 444 (1980).

Section 8-8 (1) of the General Statutes, defines "Aggrieved person" to include:

> "... any person owning land that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board..."

The Plaintiffs William and Debra Miller own 45 Bywater Lane. That property directly abuts 11-27 Bywater Lane, the property which is the subject of the change of zone application.

It is therefore found that both William and Debra Miller have satisfied the test for statutory aggrievement, and have standing to maintain this appeal.

The Plaintiff Gary DeBrizzi owns a condominium unit, along with an interest in the common elements of the Fayerweather Condominium complex. The condominiums are located at 155 Brewster Street, which is across the street from 11-27 Bywater Lane.

The Defendant, Brennan Builders, LLC, and the Fayerweather Towers Condominiums, each own to the center of Brewster Street. Antenucci v. Hartford Roman Catholic Diocesan Corp., 142 Conn. 349, 355-56 (1955). Therefore, as an abutting land owner, Gary DeBrizzi is statutorily aggrieved, and has standing to prosecute this appeal. Furthermore, the five story condominium structure is within one hundred (100) feet of 11-27 Bywater Lane.

STANDARD OF REVIEW – CHANGE OF ZONING CLASSIFICATION

When passing upon an application for the rezoning of property, a planning and zoning commission sits in a legislative capacity, rather than in an administrative or quasi-judicial capacity. D & J Quarry Products, Inc. v. Planning & Zoning Commission, 217 Conn. 447, 450 (1991); Dutko v. Planning & Zoning Board, 110 Conn. App. 228, 230 (2008).

When acting as a legislative body, the commission is the formulator of public policy, and its discretion is much broader than an administrative board, or one exercising a quasi-judicial function. Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc. v. Planning & Zoning Commission, 220 Conn. 527, 543 (1991); Parks v. Planning & Zoning Commission, 178 Conn. 657, 660 (1979); Malafronte v. Planning & Zoning Board, 155 Conn. 205, 209 (1967). In the exercise of its discretion, a commission is free to amend its zoning regulations and/or its zoning map, whenever time, experience, and reasonable planning for contemporary or future conditions reasonably indicate the need for a change. Campion v. Board of Aldermen, 278 Conn. 500, 526-27 (2006); Kaufman v. Zoning Commission, 222 Conn. 112, 150 (1995). Such discretion is vested in a municipal zoning authority, because it is closer to the circumstances and conditions which create the problem, and shape the solution. Raybestos-Manhattan, Inc. v. Planning & Zoning Commission, 186 Conn. 466, 470 (2006); Stiles v. Town Council, 159 Conn. 212, 219 (1970).

Courts will not interfere with legislative discretion, unless the action taken is contrary to law, arbitrary, illegal, or an abuse of discretion. Burnham v. Planning & Zoning Commission, 189 Conn. 261, 265 (1983). Questions concerning the credibility of witnesses

and the determination of issues of fact, are matters within the province of the agency. Property Group, Inc. v. Planning & Zoning Commission, 226 Conn. 684, 697 (1993). The question is not whether another decision maker, such as the trial court, would have reached a different conclusion, but whether the record before the agency supports the decision reached. Calandro v. Zoning Commission, 176 Conn. 439, 440 (1976).

Conclusions reached by the commission must be upheld, if they are supported by substantial evidence in the record. Substantial evidence is enough evidence to justify, if the trial were to a jury, the refusal to direct a verdict where the conclusion sought to be drawn is one of fact. Huck v. Inland Wetlands Agency, 203 Conn. 525, 541 (1987).

The possibility of drawing two inconsistent conclusions does not prevent a decision from being supported by substantial evidence. Sampieri v. Inland Wetlands Agency, 226 Conn. 579, 588 (1993).

When acting upon a request for a change in zoning classification, the test to be applied is whether substantial evidence supports a finding that: 1) the action is in accordance with the municipal comprehensive plan, and 2) whether it is related to the normal police powers enumerated in S. 8-2 of the General Statutes. First Hartford Realty Corp. v. Planning & Zoning Commission, 165 Conn. 533, 541 (1973). The comprehensive plan consists of the zoning regulations, and the zoning map. Konigsberg v. Planning & Zoning Commission, 283 Conn. 553, 584-85 (2007); Pike v. Zoning Board of Appeals, 31 Conn. App. 270, 277 (1993).

When a municipal land use agency has stated collective reasons for its decision, a court should not go beyond the collective reasons, but should only determine whether any

reason given is supported by substantial evidence in the record. Gibbons v. Historic District Commission, 285 Conn. 755, 770-71 (2008). However where, as here, the agency has failed to state collective reasons in support of its decision, that fact is not fatal. In that event, a reviewing court is obligated to search the record, to determine whether substantial evidence supports the action taken. Grillo v. Zoning Board of Appeals, 206 Conn. 362, 369 (1985).

NOTICE NOT PROVIDED IN COMPLIANCE WITH BRIDGEPORT ZONING REGULATIONS

The Plaintiffs claim that proper notice of the November 26, 2018 public hearing was not provided, pursuant to the provisions of S. 8-7 of the General Statutes, and the applicable Zoning Regulations of the City of Bridgeport.

They claim, as abutting property owners and as persons owning land within one hundred (100) feet of 11-27 Bywater Lane, that they were entitled to receive personal notice of the public hearing.

Section 8-7 of the General Statutes reads, in part:

> "... Notice of the hearing shall be published in a newspaper having a general circulation in such municipality where the land that is the subject of the hearing is located at least twice, at intervals of not less than two days, the first notice not more than fifteen days or less than ten days and the last not less than two days before the date set for the hearing..."

Notice in advance of the November 26, 2018 public hearing was published in the Connecticut Post on November 15, 2018 and November 22, 2018 (see corrected record dated June 26, 2019).

The failure to provide newspaper notice, in accordance with the statute, represents a subject matter jurisdictional defect. Hartford Electric Light Co. v. Water Resources Commission, 162 Conn. 89, 109 (1971). The record in this instance demonstrates full compliance with the newspaper publication mandates of S. 8-7 of the General Statutes.

However, the finding that newspaper notice was provided in accordance with the statute, does not end the inquiry.

Section 8-7 allows, at the option of the municipality, for additional notice. The statute reads, in relevant part:

> "...In addition to such notice, such commission, board or agency may, by regulation, provide for additional notice. Such regulations shall include provisions that the notice be mailed to persons who own land that is adjacent to the land that is the subject of the hearing, or be provided by posting a sign, on the land that is the subject of the hearing, or both. For purposes of such additional notice, (1) proof of mailing shall be evidenced by a certificate of mailing and (2) the person who owns land shall be the owner indicated on the property tax map on the last-completed grand list as of the date such notice is mailed."

The City of Bridgeport, as part of its Zoning Regulations, has provided for notification in addition to that required by S. 8-7.

A list of property owners within one hundred (100) feet of 11-27 Bywater Lane is included in the Return of Record (ROR 4).

The record also reflects (ROR 18), certified mailings were sent to William and Debra Miller, the owners of 45 Bywater Lane, and to the Park Department of the City of Bridgeport. Notification to the Park Department was provided, because 11-27 Bywater Lane abuts Ellsworth Park.

In a letter (ROR 11), addressed to the attorney for Brennan Builders, LLC, the City stated that the applicant was required to notify "... only the abutting property owners adjacent to the sides and rear of the property, not less than ten (10) days in advance of the scheduled public hearing date..."

During the course of the November 26, 2018 public hearing, a resident of the Fayerweather Towers Condominiums, who serves as secretary to the Association's Board of Directors, informed the Commission that no certified letter was received by the Condominium's Board of Directors, even though the complex is within one hundred (100) feet of 11-27 Bywater Lane (Supplemental ROR, p. 19-20).

The Commission's chair, Melville Riley, informed the Fayerweather Towers resident that "only abutting property owners" were entitled to notice via certified mail, adding "not one hundred (100) feet, abutting."

Riley then informed the citizen that across the street is "not abutting." (Supplemental ROR, p. 20).

The record reveals that the Plaintiff Gary DeBrizzi, a resident and condominium unit owner, did not receive notification of the public hearing by certified mail.

The Bridgeport Zoning Regulations contain several sections, mandating that notice in addition to the newspaper notice required by statute, be provided to residents owning property in the area adjacent to the land affected by an application being presented to the Commission.

Section 14-8-2 c requires that notification of an upcoming public hearing be posted on the property which is the subject of the application. The section reads:

> "Sign Posting: The applicant shall display a Public Information Notice sign on the site giving notice that an application is pending before the Planning and Zoning Commission or Zoning Board of Appeals. The sign shall be in a manner and form as prescribed by the Commission or Board and shall be provided by the Commission or Board to the applicant. It shall be displayed in a highly visible place at each location on the site where the property line abuts a public or private street or at a visible location nearest the site. It shall be the responsibility of the applicant to ensure that the sign remains on display for a period of seven days prior to the public hearing and are removed within seven days following the close of the hearing."

Where a regulation such as Section 14-8-2 c has been adopted, it is considered complementary to, rather than in derogation of, the statutory notice requirement. Compliance

with the regulation, is therefore mandatory. Wright v. Zoning Board of Appeals, 174 Conn. 488, 491 (1978).

Here, it is found that notice was properly posted (ROR 16), in compliance with the Bridgeport Regulation.

The Bridgeport Zoning Regulations also impose additional requirements on an applicant seeking a change in zoning classification. Section 14-9-2b of the Regulations provides

"b. Boundary Change: All applications for a boundary change shall include:

1. A survey showing the parcel of land to be rezoned, and the existing zone(s) of the subject property and all abutting properties.
2. A list of all the names and addresses of all property owners of record within 100 feet of all property lines of the subject property, and proof that all such property owners were properly notified."

The notice (ROR 15) sent to William and Debra Miller by certified mail, reads:

" As an abutting property owner (neighbor) this is to notify you that an application has been submitted to the Planning and Zoning Commission seeking a zone change from a 1 or 2 family residential

zone (R-B) to a multi-family residential zone (R-C) at the property address of 11-27 Bywater (a/k/a By Water) Lane."

The list of property owners (ROR 4) includes Fayerweather Towers at 155 Brewster Street. However, no certified letters were sent (ROR 15) to either the Fayerweather Condominium Association, the Association's Board of Directors, or any individual unit owners.

The notice required by Section 14-2-2b of the Bridgeport Zoning Regulations involves personal notice to certain designated property owners. The Regulation does not contain a requirement of constructive notice, which is provided by publication in a newspaper, or by posting a sign at the property. When proof of additional notice is required, Section 8-7 requires that proof of mailing "shall be evidenced by a certificate of mailing."

The record contains no certificate of mailing for either the Fayerweather Towers condominiums, or any individual unit owner.

Section 14-9-2b-2 does not use the term "abutting property owner," but instead references "owners of record within 100 feet of all property lines."

However, assuming, arguendo, that the City of Bridgeport is correct, and that notification by certified mail is required only to abutting property owners, the City's claim is unavailing.

The City of Bridgeport, and the Chair of the Planning and Zoning Commission, argue that properties do not "abut" if they are separated by a public or private street. This claim ignores centuries of Connecticut case law, and English common law.

In 1814, prior to Connecticut's adoption of The Fundamental Orders, the Supreme Court of Errors, in Peck v. Smith, 1 Conn. 103 (1814), determined that where land is bounded by a highway, the boundary is the middle of the highway, subject to a right of passage in members of the public. Justice Swift set forth a maxim which is as valid in 2019, as it was when he penned the words over two centuries ago. The jurist wrote:

> "... A highway is nothing but an easement, comprehending merely the right of the individuals in the community to pass and repass, with the incidental right of the public to do all things necessary to keep it in repair. The easement does not comprehend any interest in the soil, nor give the public the legal possession of it. Such is the description of a highway by all the common law writers, and this being the nature of it, the consequence clearly follows that the right of freehold is not revoked by establishing a highway, but the freehold continues in the original owner of the land in the same manner it was before the highway was established, subject to the easement... It makes no difference who owned the land when the highways were reserved or granted. Whoever owned the land retained the fee in the place where the highway was reserved, and whenever he sold or granted the adjoining land, the freehold in the soil of the highway passes as an appurtenance to the land subject to the easement." Peck v. Smith, supra, 132-33.

Courts have consistently held that, as to land within the limits of a highway, an abutting owner enjoys all of the rights which are not incompatible with the public easement. Allen v. Mussen, 129 Conn. 151, 155 (1942); Knothe v. Zinzer, 96 Conn. 709, 714 (1921). An abutting owner is presumed, under the laws of this state, no evidence having been offered to the contrary, to own the fee to the land to the center of the highway. Antenucci v. Hartford Roman Catholic Diocesan Corporation, supra, 355-56; State v. Murlo, 119 Conn. 323, 326 (1935).

Parsons v. Wethersfield, 135 Conn. 24 (1948), a case cited by the Defendant Brennan Builders, LLC, does not assist the City of Bridgeport. In fact, the case stands for a proposition which bolsters the Plaintiffs' claim.

In Parsons, the issue involved a strip of land used by the New York, New Haven and Hartford Railroad Company. In assessing the significance of the sixty-six (66) foot strip of land, to a claim that the Plaintiffs owned land immediately adjacent to the property which was the subject of a rezoning application, the Supreme Court declared: "If the railroad owned only a right of way, the property owners on either side owned it to its center and the land might be said to be immediately adjacent ... If it owned this 66-foot strip in fee, the land of the Plaintiffs did not adjoin or abut the land in question." Parsons v. Wethersfield, supra, 28.

The City of Bridgeport does not claim that it owns Brewster Street in fee. The only defense proffered at trial was "we've always done it that way," words once described by Admiral Grace Hopper as "the most dangerous phrase in the language."

It is found that 11-27 Bywater Lane abuts 155 Brewster Street, where the five story Fayerweather Towers Condominium is located.

The Plaintiffs, William and Debra Miller, lack standing to challenge the absence of personal notice, since they, as abutting property owners, received notice of the November 26, 2018 public hearing via certified mail, and had actual notice of the hearing.

The Plaintiff Gary DeBrizzi, the owner of Unit 4-B (Ex. 1) of the Fayerweather Towers Condominium, however, also challenges the adequacy of the personal notice, and has standing to do so.

As a unit owner of the Fayerweather Towers Condominiums, DeBrizzi enjoys certain rights consistent with Chapter 825 of the General Statutes, known as the Common Interest Ownership Act (CIOA), and the Condominium Declaration.

Since he is a unit owner, Gary DeBrizzi not only owns Unit 4-B, but holds an undivided interest in the common elements[2] of the complex, as specified and established by the Condominium Declaration. S. 47-68a of the General Statutes defines "common elements" to mean "all portions of the condominium other than the units."

Because the Fayerweather Towers Condominium complex is across Brewster Street from 11-27 Bywater Lane, and the Plaintiff Gary DeBrizzi owns an undivided interest in the common elements of the condominium development, he has an interest in property which abuts the property which is the subject of the change of zone application.

[2] Section 47-74 (b) (1), General Statutes – "Each unit owner shall own an undivided interest in the common elements in the percentage expressed in the declaration..."

A review of the record reveals that Gary DeBrizzi, unlike William and Debra Miller, did not receive notice via certified mail of the November 26, 2018 public hearing.

The notice required to be provided under Bridgeport Regulation Section 14-9-2b, is considered personal notice to the land owner. Lauer v. Canterbury, 60 Conn. App. 504, 509 (2000); Fuller, Robert A.; "Land Use Law and Practice", (4th Ed. 2015), S. 46.1, p. 7. Companion provisions of the Bridgeport Regulations, Section 14-2-4c (site plans), Section 14-3-4c (Coastal Area Management (CAM) site plan), Section 14-4-2c (special permits) and Section 14-7-3b (variances) also require personal notification to abutting property owners.

The failure to give personal notice to a specific individual is not a jurisdictional defect. Schwartz v. Hamden, 168 Conn. 8, 15 (1975). Therefore, the failure to give personal notice may be waived by the party entitled to receive it. Palo v. Rogers, 116 Conn. 601, 605 (1933). Actual notice of a pending matter may act as a waiver, where personal notice is involved. Sachem's Head Assn. v. Lufkin, 168 Conn. 365, 378 (1975).

However, the failure to comply with personal notice requirements in a municipal zoning ordinance, renders a subsequent agency decision voidable at the option of one entitled to receive notice. Lauer v. Zoning Commission, 220 Conn. 455, 465 (1991).

Gary DeBrizzi did not testify during the course of the public hearing (ROR 20), and the record does not indicate that he was present. There is nothing in the record which would support a claim that Gary DeBrizzi waived his right to receive personal notice, or that he had actual knowledge of the hearing on the proposed change of zone.

Waiver is the intentional relinquishment of a known right. Jacobson v. Zoning Board of Appeals, 137 Conn. App. 142, 150 (2012). A waiver occurs only if there is both knowledge of the existence of a right, and an intention to relinquish that right. Heyman Associates No. 1 v. Insurance Co. of Pennsylvania, 231 Conn. 756, 777 (1995).

Waiver cannot be found, where the record makes no mention of the Plaintiff, and no actions or statements are attributed to him.

The Plaintiff, Gary DeBrizzi, may therefore successfully challenge the decision of the Bridgeport Planning and Zoning Commission, based upon the failure of the applicant to satisfy the notice requirements specified in the Bridgeport Zoning Regulations.

ACTION OF THE PLANNING AND ZONING COMMISSION CONSTITUTES SPOT ZONING

The Plaintiffs further challenge the decision to change the zoning classification of the 0.338 acre parcel known as 11-27 Bywater Lane, as an illegal attempt at spot zoning.

Spot zoning has been generally defined as the reclassification of a small area of land in such a manner as to disturb the surrounding neighborhood. Langer v. Planning & Zoning Commission, 163 Conn. 459, 461 (1972); Furtney v. Zoning Commission, 159 Conn. 585, 600 (1970). Spot zoning represents an illegal exercise of power by a zoning authority. In order to establish spot zoning, two (2) separate elements must be established: 1) the change in zoning classification must affect only a small area, and 2) the change must be out of harmony with the comprehensive pan of the municipality. Morningside Associates v. Planning &

Zoning Board, 162 Conn. 154, 161 (1972); Guerriero v. Galasso, 144 Conn. 600, 607 (1957); Eden v. Town Plan & Zoning Commission, 139 Conn. 59, 63 (1952).

Merely because a change of zoning classification involves a small area of land, and the new classification differs from the immediate area, does not mean that a claim of spot zoning will inevitably, or necessarily prevail. Pierrpont v. Zoning Commission, 154 Conn. 463, 468 (1967). Some commentators have opined that the concept of spot zoning is obsolete, in that the size of the parcel will not support a claim of spot zoning, if the zone change is in accordance with the comprehensive plan, and is related to the police powers contained in S. 8-2 of the General Statutes. Fuller, Robert A.' "Land Use Law and Practice", (4th Ed. 2015) S. 4.8, p. 80.

However, regardless of the size of the parcel, a change in zoning classification cannot be upheld, unless the action is in accordance with the comprehensive plan. Campion v. Board of Aldermen, supra, 531; Protect Hamden / North Haven from Excessive Traffic & Pollution, Inc. v. Planning & Zoning Commission, supra, 543.

A comprehensive plan has been described 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 uses of the property. Konigsberg v. Board of Aldermen, supra, 584-85. The requirement of a comprehensive plan is generally satisfied when the zoning authority acts with the intention of promoting the best interest of the community. First Hartford Realty Corp. v. Planning & Zoning Commission, supra, 541. In making a decision regarding a change in zoning classification, a zoning agency must consider

the general public welfare inherent in the comprehensive development plan, rather than the individual benefit to one petitioner. DeMeo v. Zoning Commission, 148 Conn. 68, 73-74 (1961); Levinsky v. Zoning Commission, 144 Conn. 117, 125 (1956); Fenn v. Planning & Zoning Commission, 24 Conn. App. 430, 436 (1991).

The municipal comprehensive plan, is found in the zoning regulations, and the zoning map, which are primarily concerned with the use of property. Burnham v. Planning & Zoning Commission, supra, 267; Damick v. Planning & Zoning Commission, 158 Conn. 78, 81 (1969); Dutko v. Planning & Zoning Board, supra, 242.

The comprehensive plan must be distinguished from a municipal plan of conservation and development, or Master Plan, prepared by the planning and zoning commission pursuant to Section 8-23[3] of the General Statutes. While a plan of conservation and development is controlling as to municipal improvements and the regulation of subdivision of land; Purtill v. Town Plan & Zoning Commission, 146 Conn. 570, 572 (1959); the Master Plan does not control the zoning board in its enactment of zoning regulations or changes in zone boundaries. In these instances, it is purely advisory. Lathrop v. Planning & Zoning Commission, 164 Conn. 215, 223 (1973); Sheridan v. Planning Board, 159 Conn. 1, 9 (1969).

This is not to say that the Master Plan must be ignored when changes are contemplated. Section 8-3(a) requires a planning and zoning commission to "... state on the

[3] Section 8-23, General Statutes – "The commission shall prepare, adopt and amend a plan of conservation and development for the municipality. Such plan shall show the commission's recommendation for the most desirable use of land..."

record its findings on consistency of a proposed zoning regulation or boundaries or changes thereof with the plan of development of the municipality."

11-27 Bywater lane contains 14,714 square feet (ROR 1) or approximately 0.388 acres. Therefore, the size of the parcel affected by the change of zone voted by the Commission easily satisfies the first prong of the spot zoning test.

The change of zone affects only a small area. Contrary to representations made during the public hearing, it is not contiguous with any property which is zoned Residence C (R-C).

However, a change in zoning classification will withstand a spot zoning attack, if the reclassification is consistent with the comprehensive plan.

In auguring for the rezoning of 11-27 Bywater lane, counsel for Brennan Builders, LLC highlighted the five story Fayerweather Towers condominium units at 155 Brewster Street. Based upon the presence of the multi-unit, multi-story condominium development, counsel opined that 11-27 Bywater Lane would "... thrive... in a Residence C area and we think that is the appropriate site for this location." (ROR 20, p. 10).

The Fayerweather Towers are located in an R-B Zone, where only one family and two family dwellings are permitted as of right. The record does not reveal whether the Fayerweather condominiums were erected as the result of a variance granted by the Zoning Board of Appeals, or represent a pre-existing nonconforming use of 155 Brewster Street.

Because Bridgeport's comprehensive plan consists of its zoning regulations and its zoning map, the first question which must be addressed is whether the presence of a

nonconforming use, or a use permitted by variance, may be considered when determining whether changing 11-27 Bywater Lane from an R-B to an R-C Zone, is in accordance with Bridgeport's comprehensive plan.

A nonconforming use is, by definition, inconsistent with the municipal comprehensive plan. Raffaelle v. Planning & Zoning Board, 157 Conn. 454, 462 (1965). The policy regarding nonconforming uses is that they should be abolished, or reduced to conformity as quickly as possible. Hyatt v. Zoning Board of Appeals, 163 Conn. 379, 383 (1972).

Therefore, the presence of a nonconforming use should not be considered, when determining consistency with the comprehensive plan.

In order for the Fayerweather Towers Condominiums to be supported by a variance, the Bridgeport Zoning Board of appeals was required to find: 1) that the granting of the variance would not affect substantially the municipal comprehensive plan, and 2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship, unnecessary to the carrying out of the general purposes of the zoning plan. Francini v. Zoning Board of Appeals, 228 Conn. 785, 790 (1994); Verillo v. Zoning Board of Appeals, 155 Conn. App. 657, 676-77 (2015). A zoning board of appeals does not have the power to grant a variance, if the variance would impair the integrity of the comprehensive plan. Moon v. Zoning Board of Appeals, 291 Conn. 16, 19-20 (2009); Whitaker v. Zoning Board of Appeals, 179 Conn. 650, 656 (1980).

By emphasizing the use to which 155 Brewster Street is being put, rather than its zoning classification, the Defendant, Brennan Builders, LLC, urges the court to consider the

property a de facto R-C Zone, for purposes of evaluating consistency with the comprehensive plan. The court declines this invitation to engage in slippery slope sophistry, in support of a decision to change the zoning classification of 11-27 Bywater Lane.

The Bridgeport Planning and Zoning Commission did not change the classification of 155 Brewster Street from R-B to R-C during the most recent comprehensive rezoning of property in the City of Bridgeport.

Even if the Bridgeport Zoning Board of Appeals decided by a super majority that a five story building should be located in an R-B Zone, and a hardship which is difficult to fathom was found, the Zoning Board of Appeals is not the body charged with determining the zoning classification of property in the City of Bridgeport. To consider 155 Brewster Street as anything other than an R-B Zone, would be to confer upon the Zoning Board of Appeals a power to rezone property, which is does not possess as a matter of law.

The only property in the vicinity which carries an R-C designation is the Bywater Condominiums, located on the easterly side of Bywater lane and across from the Fayerweather Yacht Club. The only other R-C Zone is across Ellsworth Park, at the intersection of Brewster Street and Ellsworth Street.

During the public hearing, it was conceded that the applicant, Brennan Builders, LLC, was able to construct two single family or an equal number of two family homes at 11-27 Bywater Lane, under existing R-B zoning regulations. Without the variance, as contemplated in the CAM application and the petition introduced at the hearing (ROR 16, Ex. 5), five (5) residential units would be allowed if the zone was changed to R-C.

Speakers at the hearing questioned whether public safety would be adequately served by an increase in density. There was extensive testimony concerning the towing of boats to and from the marina, and the use of Ellsworth Park for Little League and other recreational activities.

The only expert testimony concerning real estate values was supplied by an opponent of the change in zoning classification. She opined that property values would not be positively impacted by the change of zone which Brennan Builders, LLC requested.

These traffic and public safety factors are exacerbated, in that Brewster Street provides the only access to the marina, the Fayerweather Yacht Club, the social club, and the existing multi-unit housing developments.

In light of the record compiled on November 26, 2018, it must therefore be determined whether the change of zoning classification voted by the Commission provides a benefit to the community as a whole, or is designed merely to benefit a particular applicant and property owner. Eden v. Town Plan & Zoning Commission, supra, 64. The ultimate test to be applied, is whether, on the facts and circumstances before the zoning authority, the action represents an orderly development of an existing district, which serves a public need in a reasonable way, or whether it is an attempt to accommodate an individual property owner. Wade v. Town Plan & Zoning, 145 Conn. 592, 596 (1958); Gaida v. Planning & Zoning Commission, 108 Conn. App. 19, 33 (2008).

This determination must be made in light of the fact that the Commission provided no collective reasons in support of its decision, or the consistency of its action with the comprehensive plan.

When considering a parcel which satisfies the first prong of the spot zoning test, courts must determine whether a municipal zoning commission has enacted a change of zone boundaries predominately to benefit the community as a whole, rather than a single person. DeMeo v. Zoning Commission, supra, 73-74.

In Bartram v. Zoning Commission, 136 Conn. 89 (1949), a Bridgeport case, the commission rezoned a small parcel with one hundred twenty five (125) feet of frontage on Sylvan Avenue, and a depth of one hundred thirty-three (133) feet. The commission gave several reasons for its decision, including the goal of alleviating congestion in the centralized shopping district, and an attempt to relieve traffic congestion.

The Connecticut Supreme Court rejected the "spot zoning" claim which had prevailed in the trial court. In an opinion authored by Chief Justice Maltbie, the Court's majority upheld the change in zoning classification, notwithstanding the size of the parcel. The Court focused on the Commission's finding that allowing the use of a small area in a manner different from the surrounding area, would serve the best interest of the community as a whole. Bartram v. Zoning Commission, supra, 94.

A similar result was achieved in DeMeo v. Zoning Commission, supra, where the Bridgeport Zoning Commission voted a change of zoning classification of a 4.16 acre tract from Residence A to Garden Apartment. The commission found that the change was

consistent with the comprehensive plan, and that there was a need to site a certain type of housing in the Residence AA and Residence A Zones of the City. DeMeo v. Zoning Commission, supra, 72.

The record compiled on November 26, 2018 (ROR 20) does not support a finding that the Planning and Zoning Commission's action serves the best interest of the community as a whole. Four (4) residential units are permitted on the parcel, consistent with existing zoning regulations applicable to an R-B Zone. The increase in density, applicable to an R-C Zone, would allow five (5) units in a single building, although the applicant floated the "vision" of a seven (7) unit building as part of its presentation.

The record unambiguously demonstrates existing traffic congestion due to a marina, a yacht club, and a social club on the peninsula. Traffic problems are aggravated, by the use of Ellsworth Park for Little League baseball games, and other recreational activities. These recreational activities attract young children to the area, along with the inevitable automobile traffic brought about by parent supervision, spectating and transportation.

Brewster Street provides the only access to the peninsula, and the R-C Zone at 11-27 Bywater Lane will be "surrounded" by Residence B and Residence A Zones. Utilizing the "uses" in the area argument advanced by counsel for Brennan Builders, LLC, can only foreshadow further changes in the Residence B classifications in subsequent applications.

The zoning classification of other properties directly abutting 11-27 Bywater Lane, including the single family homes, and the Fayerweather Towers Condominiums, remain unchanged as a result of the Commission's action. Leaving these properties unchanged further

demonstrates a failure to conform both to the comprehensive plan, and the uniformity requirements of Section 8-2. Gaida v. Planning & Zoning Commission, supra, 34-35.

Nor did the Commission address other uses permitted in an R-C Zone, subject to the special permit process. The record fails to demonstrate any benefit to the community which would result from non-residential uses which may be contemplated, based upon the R-C classification. Those uses, absent a variance, are not permitted in a Residence B Zone.

This case is similar to Roundtree v. Planning & Zoning Commission, 2007 Conn. Super. LEXIS 2258 (J.D. of Fairfield, August, 2007). In Roundtree, the property owner argued for a change from Residence A to Office/Retail Regional (OR-R) Zone, based upon the claim that the new zone would be "consistent with uses established in the area."

The change was found to constitute "spot zoning" because the use of neighboring properties consistent with variances, did not alter the comprehensive plan.

Shortly after Bartram was decided, the Connecticut Supreme Court, in Kuehne v. Town Council, 136 Conn. 452 (1950), determined that a change of zone from residential to business constituted "spot zoning." The opinion, authored by Chief Justice Maltbie, determined that the zoning authority had failed to consider the effect the change of zone would have upon the general plan of zoning, and was therefore illegal. Kuehne v. Town Council, supra, 461.

Given the broad discretion vested in a municipal planning and zoning commission when it acts legislatively, judicial determinations that spot zoning has occurred are infrequent. Eden v. Town Plan & Zoning Commission, supra, 63.

However, applications which treat a small parcel in a manner different than surrounding properties, should be regarded with suspicion by a commission. An application should be denied, unless the requested change conforms to the comprehensive plan, and serves one or more of the purposes enumerated in Section 8-2 of the General Statutes. Eden v. Town Plan & Zoning Commission, supra, 64; Bartram v. Zoning Commission, supra, 93.

In this case, a search of the record reveals that the change in zoning classification voted by the Bridgeport Planning and Zoning Commission does not conform to the comprehensive plan, and serves the interest of a single property owner, rather than the interests of the community as a whole.

The Commission's action, therefore, constitutes illegal spot zoning.

CONDUCT OF PUBLIC HEARING REVEALED BIAS, ABSENCE OF FAIRNESS

The appeal of the Plaintiffs must be sustained, in that: 1) the Defendant, Brennan Builders, LLC, failed to comply with additional notice requirements contained in the Bridgeport Zoning Regulations, and 2) the action taken by the Bridgeport Planning and Zoning Commission constitutes spot zoning.

However, while not impacting the outcome of this appeal, the open hostility, animosity and disrespect demonstrated by the Chair of the Commission toward those who spoke in opposition to the change in zoning classification, cannot be ignored.

The presiding officer, Melville Riley, as unambiguously evidenced by the transcript of the November 26, 2018 hearing, made no attempt to camouflage his disdain for those citizens

and taxpayers speaking against the application. This is in direct contrast to the free reign given to Attorney Raymond Rizzio, who appeared as an advocate for Brennan Builders, LLC.

Attorney Rizzio, who regularly appears before land use agencies in the City of Bridgeport, was permitted to explain his client's "vision" for the property, and its potential use as the site of an apartment building with five (5) or seven (7) units. Exhibits were introduced in support of the change of zoning classification from R-B to R-C. Those Exhibits (ROR 5; ROR 6; ROR 7; ROR 16, Ec. 2, 3, 4 & 5), and the application itself (ROR 1), all argued for an apartment building use of 11-27 Bywater Lane, despite the fact that no site plan was before the Commission, and the Coastal Area Management (CAM) application was not being pursued.

In a marked departure from the respectful, even deferential treatment accorded Attorney Rizzio, the Chair harassed, belittled and demeaned those who had come to oppose the change of zone application (ROR 20, p. 16-36).Rather than simply listening respectfully to points of view which might not have reflected his own, the Chair was openly antagonistic, and condescending to those interested citizens who spoke during the public hearing.

Proceedings before municipal land use boards and commissions are informal, and are conducted without regard to strict adherence to the rules of evidence. Barry v. Historic District Commission, 108 Conn. App. 682, 705 (2008). However, hearings may not be conducted in a manner that violates concepts of natural justice. During the course of a public hearing, no one may be deprived of the right to produce relevant evidence, or to cross examine witnesses produced by his adversary. In order for a hearing to be fundamentally fair,

the parties must have an opportunity to know the facts on which the commission is asked to act, and to offer rebuttal evidence. Megin v. Zoning Board of Appeals, 106 Conn. App. 602, 608-09 (2008).

In assessing the conduct of public officials, fairness and impartiality are fundamental, in the conduct of a public hearing. Fletcher v. Planning & Zoning Commission, 158 Conn. 497, 507 (1969). Courts have long recognized a common law right to fundamental fairness, in administrative hearings. Grimes v. Conservation Commission, 243 Conn. 266, 273-74 (1997). The conduct of a hearing must be fundamentally fair, and cannot violate fundamental rules of natural justice. Pizzola v. Planning & Zoning Commission, 187 Conn. 202, 207 (1974).

While the conduct of the November 26, 2018 public hearing failed the test of fundamental fairness, the court is unable to find that the belligerence displayed toward opponents of the application affected the result. A 6-3 majority of the Commission favored the application, and the disqualification of a single member would not have affected the outcome.

The law does not require land use officials to be without opinions, or well-developed philosophies. This is particularly true, when a commission acts legislatively, and is the formulator of public policy.

It would be both unrealistic and undesirable for land use commissioners to be empty vessels, without views and opinions concerning land use issues confronting the community they have taken an oath to serve.

What is required, however, is fairness, and a public toleration of viewpoints and perspectives which may differ from those held by the chair or individual members of the land use agency.

Neutrality and fairness are not synonyms.

A presiding officer is required to be scrupulously fair in the conduct of a public hearing. He or she is not required to be neutral on issues of public policy, or land use philosophy.

In addition to tainting the record of a public hearing, the absence of fairness in the form of hostility and hectoring from the chair, may have the unintended consequence of deterring interested citizens and taxpayers from speaking at a hearing, for fear of incurring the wrath of the presiding officer.

Any such byproduct is unacceptable, and disserves both the community, and the land use agency.

CONCLUSION

The appeal of the Plaintiffs. William Miller, Debra Miller and Gary DeBrizzi, is SUSTAINED.

Radcliffe, J.

RADCLIFFE, J.