DOCKET NO. KNL-CV18-6036463-S	SUPERIOR COURT
SAVIN GASOLINE PROPERTIES, LLC	J.D. OF NEW LONDON
v.	AT NEW LONDON
COMMISSION ON THE CITY PLAN OF THE CITY OF NORWICH, ET AL	NOVEMBER 26, 2019

MEMORANDUM OF DECISION

This action is an appeal by the plaintiff, Savin Gasoline Properties, LLC, of a decision of the defendant, Commission on the City Plan of the City of Norwich (Commission), acting as the administrative zoning authority within the city of Norwich, in granting three (3) approvals to the defendants, Cumberland Farms, Inc. (Cumberland Farms), Agranovitch Real Estate Holding Company, LLC (Agranovitch), Franklin Development Funds II, LLC, and UpCountry II, LLC.[1]

The application submitted to the defendant, Commission, requested (i) a certificate of location approval for a motor vehicle fueling facility pursuant to the provisions of General Statutes § 14-231 and Chapter 6, § 6.3 of the Norwich Zoning Regulations,[2] (ii) a special permit for the siting of a motor vehicle fueling facility, and (iii) a site plan approval with

[1] The plaintiff withdrew the claim as to the nonappearing defendant, UpCountry LLC, on January 15, 2019 (# 123.00).

[2] The return of record (ROR) does not contain the current text of Chapter 6, § 6.3 of the Norwich Zoning Regulations. See ROR 57. Chapter 6, § 6.3 of the Norwich Zoning Regulations was amended by the City Council of the City of Norwich, on September 18, 2017. The amendment was the subject of a separate appeal, *Savin Gasoline Properties, LLC* v. *City Council*, Superior Court, judicial district of New London, Docket No. CV-17-6031567-S (July 1, 2019, *Cosgrove, J.T.R.*) which concluded that the amendment was appropriate.

respect to the redevelopment of properties located at the southeasterly intersection of West Main Street and New London Turnpike in Norwich for a gasoline/convenience store facility. In this appeal, the plaintiff raises issues concerning the subject matter jurisdiction of the Commission to entertain the defendants' permit applications, namely with concern to the notice of the hearing, the fundamental fairness of the manner in which the applications were administered before the Commission regarding the plaintiff's opportunity as a nonparty to present evidence to the Commission, and the failure of the applications to comply with the permitting criteria contained in the Norwich Zoning Regulations for the permits and approvals requested.

The plaintiff is the owner of property located at 489 New London Turnpike in Norwich. The plaintiff's real property is situated at the northwesterly intersection of Salem Turnpike and New London Turnpike in Norwich and is improved with a gasoline/convenience store facility and a self-service car wash facility. The plaintiff's property is located diagonally across the West Main Street-New London Turnpike intersection from the properties which are the subject of this appeal. The Commission has the authority vested with the power to review and approve site development plans and has the authority to approve and issue certificates for approval of gasoline filling stations under General Statutes § 14-321.

On April 24, 2018, Cumberland filed an application for a special permit and § 14-321 location approval for the sale of gasoline for the parcels located at the southeastern intersection of West Main Street and New London Turnpike in Norwich, known as 680-682

and 684 West Main Street and 506 New London Turnpike in Norwich (Site). More particularly, the defendant Cumberland Farms was seeking the siting of a motor vehicle fueling facility along with a proposed convenience store. The application further indicates that two other parcels at West Main Street known as Assessor's Map 116, Block 1, Lots 35A and 35B (Lot 1) were relevant because the parcels would share access with the proposed convenience store and fueling operation pursuant to various reciprocal easements. These two additional parcels involve the remaining defendants: Franklin Development Funds II, LLC and Agranovitch, which are owners of real property similarly located at or near the southerly intersection of West Main Street and New London Turnpike abutting the Cumberland Farm property. Agranovitch submitted a site development plan for the development of a new package store. The site development plans for the convenience store and fueling operation submitted by Cumberland Farms and the site development plan for the development of a new package store, while separate, operate in concert due to the reciprocal easements for access or egress and shared parking. The real properties at issue are all located in a general commercial zoning district.

Aggrievement

The first issue presented on the appeal is the issue of aggrievement of the plaintiff. "[B]ecause aggrievement is a jurisdictional question, and therefore, the key to access to judicial review, the standard for aggrievement is rather strict." (Internal quotation marks omitted.) *Concerned Citizens for the Preservation of Watertown, Inc.* v. *Planning & Zoning Commission,*

118 Conn. App. 337, 341, 984 A.2d 72 (2009), cert. denied, 294 Conn. 934, 987 A.2d 1028 (2010). The plaintiff must both allege aggrievement in the writ of appeal and prove aggrievement at the time of trial. See *Fox* v. *Zoning Board of Appeals*, 84 Conn. App. 628, 635, 854 A.2d 806 (2004). The determination of aggrievement is a question of fact and the plaintiff has the burden of proving facts sufficient to constitute aggrievement. See *Bethlehem Christian Fellowship, Inc.* v. *Planning and Zoning Commission*, 58 Conn. App. 441, 444, 755 A.2d 249 (2000). In the present case, the plaintiff claims it is both statutorily and classically aggrieved by the decision of the Commission.

"Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *Stauton* v. *Planning and Zoning Commission*, 271 Conn. 152, 157-58, 856 A.2d 400 (2004). In the present case, the plaintiff claims statutory aggrievement pursuant to General Statutes § 8-8 (a) (1), which provides that an "'aggrieved' person includes any person owning land in this state that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board."

A classically aggrieved person entitled to prosecute an appeal must satisfy a two part aggrievement test. "First, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second,

the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision." *Walls* v. *Planning and Zoning Commission*, 176 Conn. 475, 477-478, 408 A.2d 252 (1979). "Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." *Hayes Family Ltd. Partnership* v. *Planning and Zoning Commission*, 98 Conn. App. 213, 219-20, 907 A.2d 1235 (2006), cert. denied, 281 Conn. 903, 916 A.2d 44 (2007). Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest. See *New England Cable Television Assn., Inc.* v. *Dept. of Public Utility Control*, 247 Conn. 95, 103, 717 A.2d 1276 (1998).

In the present case, the plaintiff does not claim that it abuts the subject property. The plaintiff does claim that it is within a radius of 100 feet of any portion of the land involved in the decision of the Commission. The plaintiff offered the testimony of John McNeil, the director of facilities and construction. McNeil testified that he is familiar with the real properties. The plaintiff offered the warranty deed demonstrating that Savin Gasoline owns the property located at 489 New London Turnpike in Norwich. See Ex. 1. The plaintiff offered a title survey showing the subject property owned by the defendant Cumberland Farms as described in the preceding paragraphs. See Ex. 2. Finally, the plaintiff offered the assessor's map, which depicts the respective properties of the plaintiff and the defendant Cumberland Farms. See Ex. 3. It was the opinion of McNeil that the subject properties are within the mandated distance of one hundred (100) feet. The court finds the testimony of McNeil credible

and supported by the evidence presented. The court finds that the plaintiff has alleged and proven statutory aggrievement with sufficient evidence.

The plaintiff claims additionally that the introduction of a second gasoline station and convenience store at the subject intersection will vastly increase traffic, compromise safety and impede access to the plaintiff's property. "Allegations and proof of mere generalizations and fears are not enough to establish aggrievement." (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 785, 160 A.3d 333 (2017). This claim was similarly raised in *Savin Gasoline Properties, LLC* v. *City Council*, supra, Superior Court, Docket No. CV-17-6031567-S. "Because the plaintiffs have failed to show more than speculative concerns regarding the potential impacts of the amendment on their property interests, which may arise from future zoning application approvals and not as a direct result of the decision that is the subject of this appeal, they have not met their evidentiary burden of showing that they are classically aggrieved." See *Savin Gasoline Properties, LLC* v. *City Council*, supra, Superior Court, Docket No. CV-17-6031567-S. While a change in the landscape of commercial enterprises in an area has the potential to impact the area, the plaintiff did not sustain its burden that a specific personal and legal interest has been specially and injuriously affected by the decision. See *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, 266 Conn. 531, 833 A.2d 883 (2003). The plaintiff's generalized concerns about traffic do not warrant a finding of classical aggrievement.

Standard of Review

The plaintiff claims the Commission, based on the record, acted illegally, arbitrarily, or in abuse of its discretion. "Generally, it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. The . . . trial court had to decide whether the board correctly interpreted the section [of the regulations] and applied it with reasonable discretion to the facts. . . . In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal." (Internal quotation marks omitted.) *Meriden* v. *Planning and Zoning Commission*, 146 Conn. App. 240, 246, 77 A.3d 859 (2013).

Moreover, "[w]hen the local authority grants a certificate of approval, they are acting as an agent for the state under [General Statutes § 14-321]." *Drake Petroleum Co., Inc.* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-06-4012428 (February 16, 2007, *Pinkus, J.*). Thus, in reviewing the Commission's approval of Cumberland's application for § 14-321 location approval, the court must decide based on a review of the record whether the Commission abused the discretion afforded to it by the applicable statutes. See *Atlantic Refining Co.* v. *Zoning Board of Appeals*, 150 Conn. 558, 562, 192 A.2d 40 (1963). Like the Commission's approval of a special permit application, the Commission is afforded liberal discretion in ruling upon a § 14-321

application, and the court may not substitute its discretion for the Commission's. Id.

"In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule. . . . If [the reviewing] court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." *Putnam Park Apartments, Inc.* v. *Planning and Zoning Commission*, 193 Conn. App. 42, 53-54, __ A.3d __ (2019).

"The evidence supporting the decision of a zoning board must be substantial. . . . This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . The substantial evidence rule is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. It is broad enough and capable of sufficient flexibility in its application to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication. On the other hand, it is review of such breadth as is entirely

consistent with effective administration. . . . The corollary to this rule is that absent substantial evidence in the record, a court may not affirm the decision of the board." *Martland* v. *Zoning Commission*, 114 Conn. App. 655, 663, 971 A.2d 53 (2009).

Finally, "[o]ur case law clearly requires the trial court, in appeals from planning and zoning authorities, to search the record to determine the basis for decisions made by those authorities. In *Parks* v. *Planning & Zoning Commission*, 178 Conn. 657, 661–62, 425 A.2d 100 (1979), [our Supreme Court] said that [t]he [planning and zoning] commission's failure to state on the record the reasons for its actions . . . renders appellate review more cumbersome, in that the trial court must search the entire record to find a basis for the commission's decision. . . . [Our Supreme Court] further stated that [i]f any reason culled from the record demonstrates a real or reasonable relationship to the general welfare of the community, the decision of the commission must be upheld. . . . [Our Supreme Court has] enunciated this duty of a trial court with respect to appeals from zoning boards in a long line of cases." (Citations omitted; internal quotation marks omitted.) *Graff* v. *Zoning Board of Appeals*, 277 Conn. 645, 670, 894 A.2d 285 (2006). Hence, the court reviews the record in light of the issues raised by the plaintiff to determine whether the Commission's decision to approve the applications was reasonably supported by the record, not to substitute its judgment for that of the Commission.

Discussion

A. Consent of Upcountry II, LLC

The plaintiff claims that the Commission did not have jurisdiction to consider the applications of the defendant Cumberland Farms due to a lack of consent by all of the site property owners as required by Chapter 7, § 7.11 of the Norwich Zoning Regulations. Chapter 7, § 7.11 of the Norwich Zoning Regulations provides in pertinent part: "Applications shall be signed by the applicant and, if applicable, the owner of the property affected or the authorized agent or representative of the owner." The plaintiff claims that the authorization executed, in part, by UpCountry, LLC did not constitute a valid authorization and therefore the Cumberland Farm application was not in compliance with the zoning regulations.

More specifically, the plaintiff contests that "[t]he authorization identifies the limited liability company owner [UpCountry, LLC] as being an entity with a mailing address of P.O. Box 70, Pine Meadow, Connecticut 06061. Based upon the business entity records maintained by the Secretary of the State of Connecticut, UpCountry, LLC, a Connecticut limited liability company, maintains a place of business at *352 Main Street, in the Town of New Hartford, Connecticut,* and has a mailing address of P.O. Box 70, Pine Meadow, Connecticut. The statutory form Warranty Deed evidencing ownership of the real property . . . as a Hawaii limited liability company registered as a foreign company transacting business in the State of Connecticut under the name UpCountry II, LLC. The property owner maintains an address of *315 Canal Street, Newport Beach, California.*" (Citations omitted; emphasis added.) Pl.'s Br., p. 17-18. In sum, there are two distinct

entities with similar names, but only one owns property subject to the application.

The first question is ownership of the affected property. The warranty deed demonstrates that the property is owned by Franklin Development Funds II, LLC and "Upcountry, LLC d/b/a (in Connecticut) Upcountry II, LLC, a Hawaii limited liability company with an address of 315 Canal Street, Newport Beach, CA . . . ." See ROR 27, p. 76. Simply stated, Upcountry, LLC is the owner, while Upcountry II, LLC is the name under which Upcountry, LLC transacts business within Connecticut. As such there is no obfuscation about the owner of the property, which is Upcountry, LLC d/b/a Upcountry II, LLC. "[T]he designation [d/b/a] . . . is *merely* descriptive of the person or corporation who does business under some other name. . . . [T]he significance [of the term doing business as] is, thus, much like that given to other phrases in common use in the law for slightly different purposes, alias . . . a/k/a or also known as . . . ." (Citations omitted; emphasis in original, internal quotation marks omitted.) *Coldwell Banker Manning Realty, Inc.* v. *Computer Sciences Corp.*, Superior Court, judicial district of Hartford, Docket No. CV-03-0825180-S (November 12, 2010, *Sheldon, J.*), aff'd, 136 Conn. App. 695, 47 A.3d 465 (2012). The use of a "d/b/a" provides more rather than less information.

The second question is who signed the authorization for the property owned by Franklin Development Funds II, LLC and "Upcountry, LLC d/b/a (in Connecticut) Upcountry II, LLC, a Hawaii limited liability company with an address of 315 Canal Street, Newport Beach, CA . . . ." The letter was executed by Steven Cohen, a duly authorized member of both Franklin and Upcountry, LLC, the record owners of 684 West Main Street

and 506 New London Turnpike. See ROR 4.[3] Thus, the "the owner of the property affected or the authorized agent or representative of the owner," was a signatory to the Cumberland Farms application.

Third, the plaintiff's reliance on *D.S. Associates* v. *Planning & Zoning* Commission, 27 Conn. App. 508, 607 A.2d 455 (1992) is misplaced. That case is distinguishable because in that matter, the appellant, D.S. Associates, was the named applicant for subdivision approval, but D.S. Associates had transferred the title to the property to another entity, Twin Pines. The actual owner of the property, for which subdivision approval was requested, was not identified in the records. This is hardly the situation before the Commission in this case. The Commission had the authorized consent of the affected real property owners. The Commission, therefore, had jurisdiction to hear the application and to administer approvals.

B. Notice of the Public Hearing

The plaintiff claims the Commission lacked jurisdiction to consider Cumberland Farms' application because the May 15, 2018 hearing notice was either defective or misleading.

General Statutes § 8-3c (b) provides that a hearing on an application for special permit shall be held in accordance with the provisions of General Statutes § 8-7d, which requires notice to be published at certain intervals in a newspaper having general

[3] The Cumberland Farms application included letters from the owners of the Site and Lot 1 authorizing Cumberland to file its application with the Commission. See ROR 3, 4. The first letter was executed by Paul M. Agranovitch, a duly authorized member of Agranovitch, the owner of the parcel located at 680-682 West Main Street and Lot 1. At the relevant time, Franklin was under a contract to purchase the affected Agranovitch real property.

circulation in the municipality. See General Statutes § 8-3c (b); see also General Statutes § 8-7d. The purpose of notice is "fairly and sufficiently to apprise those who may be affected by the proposed action of the nature and character of the proposed action so as to enable them to prepare intelligently for the hearing." *Planning & Zoning Commission* v. *Gaal*, 9 Conn. App. 538, 541, 520 A.2d 246, cert. denied, 203 Conn. 803, 522 A.2d 294 (1987); see also *Cocivi* v. *Planning & Zoning Commission*, 20 Conn. App. 705, 707, 570 A.2d 226, cert. denied, 214 Conn. 808, 573 A.2d 319 (1990).

Notice of the public hearing on the special permit application was published in The Bulletin, a newspaper having a substantial circulation in Norwich on May 4, 2018, and May 11, 2018. See ROR 36. The public hearing notice provides in relevant part: "SP #18-04: Southeast Intersection of New London Turnpike and West Main Street (Application includes properties previously known as 684 West Main Street, 680-682 West Main Street, 506 New London Tpke. and Assessor's Map 116, Block 1, Lots 35A and 35B) . . . . Application of Cumberland Farms, LLC. Properties of: Franklin Development Funds II LLC & UpCountry LLC & Agranovitch Real Estate Holding Company, LLC (Paul M. & Linda R. Agranovitch). Assessor's Map 116, Block 1, Lots 35, 36, 37, 35A & 35B." See ROR 36.

The plaintiff claims three defects in the notice. The plaintiff first claims the reference to "properties previously known as," without reference to the then current address is misleading. Second, the notice references to site addresses and the assessor's map

number/block/lot at the beginning and end are not identical.[4] Third, the plaintiff claims that the use of the name Upcountry, LLC was misleading.[5]

In *R.B. Kent & Son, Inc.* v. *Planning Commission*, 21 Conn. App. 370, 378, 573 A.2d 760 (1990), the notice for a proposed subdivision described the property as "35.42 acres at the southern end of Eagle Ridge Drive and Partridge Hollow Drive," and further provided notice that the application was on file at the planning office in the town hall. The description was challenged as the parcels were known as "Section B-3R" and "Section B-2A." See id., 377-79. The notices were held to be sufficient because they "adequately apprised the public of the location of the property involved in the resubdivision application." See id., 379. The Appellate Court rejected the claim that the omission of the sections was a defect because the notices properly described the general area and approximate size of the proposed resubdivision and noted that the application was on file for public review. See id. As such, the public was fairly apprised of the location and nature of the application. See id.

Similarly, the court finds the notice with regard to public hearing on the applications was more than sufficient. The reference to the phrase "previously known," must be considered in the context of the notice as a whole, which included several forms of identification of the property site affected. First, the notice references that the application concerned property to the "Southeast Intersection of New London Turnpike and West Main

[4] The notice describes the affected properties as "properties previously known as 684 West Main Street, 680 – 682 West Main Street, 506 New London Turnpike and Assessor's Map 118, Block 1, Lots 35A and 35B," and also as property owned by "Franklin Development Funds II, LLC & UpCountry, LLC & Agranovitch Real Estate Holding Company, LLC (Paul M. & Linda E. Agranovitch) Assessor's Map 116, Block 1, Lot 35, 36, 37, 35A & 35B."
[5] See note 4.

Street." Second, the notice listed the known address of each parcel. Finally, the notice referenced the properties as identified on the assessor's map, by block and lot number for each parcel. As in *R.B. Kent & Son, Inc.*, the notice explained that copies of the application -which incorporated property descriptions of the Site and Lot 1 - were available for review and inspection in the Norwich Planning Department, where interested persons could go to gather additional information. In sum, the notice was not misleading given that the notice, taken in its entirety, sufficiently apprised the public of the location of the properties at issue, the nature and character of the proposed action, and the date, time and location of the public hearing.

With regard to the second claim, there is no deficiency in the notice by a failure to repeat the description in precisely the same terms. The failure to have a mirror image of the description at the beginning and end of the notice does not render either description defective. There is a separate and distinct reason to find the notice sufficient. At the time of the Cumberland Farms application, the assessor's office had not assigned an address to the newly-merged Lot 1 parcel. Absent an address, the description of the property by location and assessor's map, block and lot designation provided both a commonly known and specific identification. Indeed, this offered a dual description for the notice. As to the final claim regarding the reference in the notice to "Upcountry, LLC," the court further rejects the claim that notice was improper for the reasons set forth in part A of this opinion. More specifically, the owner, in part, of the affected property was Upcountry, LLC albeit d/b/a

Upcountry II, LLC in Connecticut. The notice must fairly and sufficiently apprise those who may be affected by the proposed action of the nature and character of the proposed action, which it did.

C. The Hearing – Fundamental Fairness.

The plaintiff claims that the Commission failed to provide it ample opportunity to contest the applications, because the Commission did not continue the subsequent hearing held on June 19, 2018 to allow the plaintiff a reasonable opportunity to review and respond to the information provided to the Commission prior to or at that hearing.[6] This requires a further review of the record.

The first hearing was held on May 15, 2018. The applicant Cumberland Farms presented its applications and submitted exhibits. The only member of the public to contest the application was the plaintiff, which was provided an opportunity to present its evidence. The plaintiff does not claim it was deprived of any opportunity to present evidence at this May 15 hearing. Indeed, the record is clear that the plaintiff made a comprehensive presentation, which included comments on safety, traffic and storm water drainage.[7] The Commission continued the public hearing for additional evidence, including an opportunity for Cumberland Farms to comment on the issues presented by the plaintiff. The next public hearing was held on June 19, 2018. The plaintiff's claim of fundamental fairness concerns only the June 19 hearing. Pl.'s Br., p. 24-29.

[6] The defendant submitted information on June 18, one day prior to the next scheduled public hearing.

[7] The plaintiff's submissions included the testimony of its traffic consultant, David Spear of DLS Traffic Engineering, LLC, a peer review report, a professional engineering report by Mark E. Reynolds of Reynolds Engineering, LLC, and evidence from a professional engineer Mark Temple of Lenard Engineering, which generally challenged traffic, environmental, safety and compliance issues of the proposed site design.

"Judicial review of administrative process is designed to assure that administrative agencies act on evidence which is probative and reliable and act in a manner consistent with the requirements of fundamental fairness." *Feinson* v. *Conservation Commission*, 180 Conn. 421, 429, 429 A.2d 910 (1980). The principle of fundamental fairness in administrative proceedings was more recently described in *Megin* v. *Zoning Board of Appeals*, 106 Conn. App. 602, 942 A.2d 511, cert. denied, 289 Conn. 901, 957 A.2d 871 (2008). In *Megin*, our Appellate Court stated that "[w]hile proceedings before zoning and planning boards and commissions are informal and are conducted without regard to the strict rules of evidence . . . they cannot be so conducted as to violate the fundamental rules of natural justice. . . . Fundamentals of natural justice require that there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary. . . . Put differently, [d]ue process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act . . . and to offer rebuttal evidence. In short, [t]he conduct of the hearing must be fundamentally fair." (Citations omitted; internal quotation marks omitted.) Id., at 608-09. The burden on showing a lack of fundamental fairness is on the plaintiff. See *Grimes* v. *Conservation Commission*, 243 Conn. 266, 278, 703 A.2d 101 (1997).

The court having reviewed the record does not find that the Commission in closing the hearing on June 19, 2018, deprived the plaintiff of fundamental fairness in the proceedings. Indeed, on the day before the continued hearing, Cumberland Farms submitted to the Commission additional documentation in response to the issues that arose at the May

15 hearing, including a revised traffic report, a revised site development plan, a letter from the applicant's design professional engineer and an updated storm water drainage report. Cumberland Farms, as the party seeking approvals, was provided an opportunity to comment on the issues raised on May 15, which it did.

The plaintiff, however, stands in a different position than the applicant. The plaintiff is a member of the public with no intervenor or formal status with regard to Cumberland Farms' applications. The plaintiff, nonetheless, claims that the fundamental fairness doctrine requires the Commission to provide hearing continuances to allow the public ample opportunity to review and provide written commentary to a responsive submission by the applicant. The plaintiff relies on *Pizzolla* v. *Planning & Zoning Commission*, 167 Conn. 202, 355 A.2d 21 (1974). In *Pizzolla*, the applicant submitted a traffic report after the public hearing was closed, which was used in connection with the commission's decision. See id., 203-04. The court held that the *post-hearing submission* deprived the opposition of the opportunity to rebut the report. See id., 207-08.

In the present case, the plaintiff's request at the hearing for a continuance to allow his consultants time to review the traffic report was denied. The plaintiff does not claim that it was precluded from offering evidence on June 19, only that it was denied a continuance. As noted previously, the Commission exercises discretion over the proceedings before it. It must provide legal notice of the public hearing and provide an opportunity to the public to be heard, but that does not require unfettered opportunities to rebut the evidence presented by the applicant prior to and at the hearing. The doctrine of fundament fairness does not dictate such a result.

The court finds the remainder of the plaintiff's claims regarding the hostility by the Commission and a lack of interest in the evidence it presented to be unsupported on the record and inadequately briefed by the plaintiff.

D. Substantial Evidence to Support an Approval of the Site Plan, Special Permit and General Statutes § 14-321 Application.

The plaintiff has the burden of proof to establish that there is not "substantial evidence" in the record as a whole to support the agency decision. See *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 587, 628 A.2d 1286 (1993). "This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and to provide a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action." Id., 588.

The municipal agency is charged with the obligation of evaluating the evidence, determining the credibility of witnesses who appear before it and rendering a decision that complies with the requirements of both the state statutes and the municipal regulations which it has promulgated. See *Feinson* v. *Conservation Commission*, supra, 180 Conn. 421. "The substantial evidence rule is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. It is broad enough and capable of sufficient flexibility in its application to enable the reviewing court to correct whatever

ascertainable abuses may arise in administrative adjudication. On the other hand, it is review of such breadth as is entirely consistent with effective administration. . . . The corollary to this rule is that absent substantial evidence in the record, a court may not affirm the decision of the board." (Internal quotation marks omitted.) *Meriden* v. *Planning and Zoning Commission*, supra, 146 Conn. App. 247. Finally, the Commission has broad discretion to determine whether the regulations have been satisfied and an appellant's arguments to the contrary do not dilute the Commission's authority to do so. See *A. Aiudi & Sons, LLC* v. *Planning and Zoning Commission*, 72 Conn. App. 502, 506, 806 A.2d 77 (2002), aff'd, 267 Conn. 192, 837 A.2d 748 (2004).

The court finds ample support for the approvals, but will address the specific issues raised by the plaintiff seriatim. The Commission, although noting an interest in the position of the Connecticut Department of Transportation (DOT), the Office of State Archaeology (State Archaeologist), and the Connecticut Department of Energy and Environmental Protection (DEEP), did not receive said input. However, it is clear that had the Commission deemed these relevant to their deliberations, it was well within their authority to request the information. Furthermore, the plaintiff does not claim that the information was required for approval or required under any regulation. As noted by Cumberland Farms in its brief, each of these matters was considered by the Commission and approval from the DOT was made a condition of approval, the City Planner asked that Cumberland Farms report anything uncovered during construction to the city for possible investigation by the State Archaeologist, and Cumberland Farms promised the Commission that its environmental professional would immediately report any contamination discovered to DEEP.

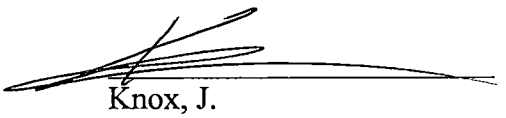
The most significant issue raised by the plaintiff is with regard to the traffic plan. The court concludes that the Commission did not abuse its discretion in finding the traffic impact evidence of Cumberland Farms more credible. The plaintiff claims that the traffic consultant for Cumberland Farms employed Land Use Code 960 rather than 853. The two are distinguishable in terms of gross floor area of the convenience market and number of vehicle filling stations. The traffic consultant of Cumberland Farms provided an explanation as to her selection of the appropriate Land Use Code as it pertained to the applications of Cumberland Farms. Finally, the plaintiff claims Cumberland Farms did not submit trip generation for similar facilities, but does not demonstrate that this was required or how this claim shows a lack of substantial evidence to support the Commission's decision. The Commission also heard testimony and evidence from the traffic consultants of both Cumberland Farms and the plaintiff with regard to the traffic impact. The court, however, does not retry the case or determine the credibility of the witnesses.

The plaintiff next claims "the [d]efendants indicated that a lot line adjustment, as a condition precedent to the filing of their various applications, was approved immediately prior to the submission of the applications by the Zoning Enforcement Officer of the City of Norwich." Pl.'s Br., p. 36. The record does not support the claim that the Commission's approval of the lot line is a mandatory condition precedent. Cumberland Farms further claims that there is no requirement in the regulations, in this record, or legal authority that a lot line revision be approved prior to the filing of the special permit and location approval application.

The court finds no merit with regard to the remaining claims that concern the abutting residentially improved neighborhood. The record does not show any comments by the neighbors about a future proposed decorative fence, lighting, signs, and parking. First, the plaintiff has failed to cite to any regulation that required fencing for approval. Second, the lighting was made a condition of the approval. See ROR 54. Third, the zoning enforcement officer confirmed that the proposed signs complied with the regulations. See ROR 50. The Commission rejected the plaintiff's claim that the parking was insufficient, which was based on its calculation of usage, which the Commission had discretion to do. The Commission has broad discretion to determine whether the regulations regarding these matters have been proven, which it did. The court cannot conclude on this record that Commission abused its discretion or acted arbitrarily with regard to its determination about these matters.

Conclusion

For the reasons stated herein and in light of the thorough consideration and evaluation of the applications by the Commission resulting in approvals of a certificate of location pursuant to the provisions of General Statutes § 14-231 and Chapter 6, § 6.3 of the Norwich Zoning Regulations, a special permit, and a site plan approval, the court finds the record of the Commission proceedings support its authority to act and contain substantial evidence to support its actions in this matter. Therefore, the plaintiff's appeal is dismissed.



Knox, J.