

SPECIAL PERMIT AND SITE PLAN REVIEW

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I. INTRODUCTION

A. Traditional “Euclidean” zoning - arranging areas into districts and permitting certain uses in districts as designated on a zoning map.

1. Residential, industrial, commercial zones.
2. Uniform regulations within each district.

B. Alternative zoning schemes - allows certain compatible uses subject to agency review.

1. Special permits or special exceptions - agency approves a particular use for a particular piece of land.
2. Site plan review - agency reviews compliance with zoning regulations of “as of right” uses.

II. AGENCY ACTION

A. Special Permits (or Special Exceptions)

1. “Special permits” and “special exceptions” are synonymous terms and are used interchangeably. Mobil Oil Corp. v. Zoning Commission, 30 Conn. App. 816, 819 (1993); See also MacKenzie v. Planning & Zoning Commission, 146 Conn. App. 406, 409-10, n. 2 (2013); A.P. & W. Holding Corp. v. Planning and Zoning Board of Milford, 167 Conn. 182,

185 (1974); and Summ v. Zoning Commission of Ridgefield, 150 Conn. 79, 87 (1962).

- i. Also referred to as special uses or special cases.
 - ii. Common special permit uses - churches, schools, hospitals in residential districts.
 - iii. Review definitions in regulations.
2. Special permit process permits a generally compatible use in a zoning district but because of the nature of the proposed use, special attention must be given to its location and method of operation in order to keep such special uses compatible with uses as of right in that district. See Mobil Oil Corp. v. Zoning Commission, supra, 30 Conn. App. 819; and Barberino Realty & Development Corp. v. Planning and Zoning Commission, 222 Conn. 607, 614 (1992).
3. In other words, special permits allow a use of property in a manner expressly permitted under the zoning regulations, but the proposed use must comply with the zoning regulations and conditions may be imposed if necessary to protect the public health, safety, convenience and property values. Mobil Oil Corp. v. Zoning Commission, supra, 30 Conn. App. 819. (Emphasis added.) See also A. Aiudi & Sons, LLC v. Planning & Zoning Commission, 267 Conn. 192, 203 (2004).
- i. Proposed use cannot be required to comply with standards not authorized by the regulations. See DeMaria v. Enfield Planning and Zoning Commission, 159 Conn. 534 (1970); WATR, Inc. v. Zoning Board of Appeals of Town of Bethany, 158 Conn. 196 (1969).

- ii. Conditions, however, can be imposed for the public interest when an application is approved. See Summ v. Zoning Commission of Ridgefield, supra, 150 Conn. 91.
- iii. An excellent example is Kilburn v. Plan & Zoning Commission of The Town of West Hartford, 113 Conn. App. 621 (2009). Faith Kilburn owns a residence in a residential neighborhood in West Hartford and in 2004 owned and kept 22 dogs on the premises. That year she sought a special permit to have a kennel at her house and to keep the 22 dogs. West Hartford granted her 2004 application but said she could only keep two dogs and had two years to remove the other 20. Instead of complying, she sought to have the condition altered in 2006 so as to keep the 22 dogs. West Hartford denied the second special permit application and she appealed. The Appellate Court concluded that she could not enjoy the benefit of the two-year grace period and then attack the condition “while making no attempt to actually comply with the condition of the permit. The plaintiff’s untimely collateral attack on the conditions of the 2004 permit is not allowable.” Id. at 635.

When West Hartford’s Plan & Zoning Commission found that there was substantial evidence in 2004 not to permit 22 dogs to remain its reasons were premised on existing regulation for kennels that allow 2 or more dogs but to take into account surrounding circumstances. Because this application was for a kennel in a single-family residential zone, the Commission had particularly difficult issues to weigh. The Appellate Court noted the proper standard. “When a special permit is issued, the affected property may be allowed an exception to the underlying zoning regulations, but it continues to be governed in the same manner as provided in the overall comprehensive plan...” Id. at 628.

- 4. A special permit or special exception does not require any showing of hardship because it allows uses that are expressly permitted under conditions pursuant to regulations. See Grasso v. Zoning Board of Appeals of the Groton Long Point Association, Inc., 69 Conn. App. 230, 242 (2002).

5. An agency acts in an administrative capacity when reviewing special permit applications, and as such, its role is to determine whether the use is expressly permitted under the regulations; whether the proposed use satisfies the relevant standards and regulations; and whether any conditions are necessary to protect the public interest. See Irwin v. Planning & Zoning Commission, 244 Conn. 619, 626-27 (1998).
 - i. Special permits allow an agency to control and mitigate potentially adverse effects of a proposal by adding or modifying a development plan.
6. In a 2004 case, even though application was couched in terms of a site plan, the Court held that the application was in fact a special permit application based upon the posture of the application process. Regardless of the use or lack of use of the term special permit or special exception, the Court would review the application under regulatory provisions governing special permits, including general considerations such as public health, safety, and welfare. See Aiudi and Sons, LLC v. Planning and Zoning Commission of the Town of Plainville, supra, 267 Conn. 205-06.
7. Special permits are authorized under § 8-2 of the General Statutes:

Zoning commissions are authorized to regulate height, bulk, coverage, size, density, use and location. Such regulations shall be uniform, but may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission or zoning board of appeals, whichever commission or board the regulations may, notwithstanding any special act to the contrary, designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values.

In Pond View, LLC v. Planning and Zoning Commission of the Town of Monroe, 288 Conn. 443 (2008), the Connecticut Supreme Court dismissed an action brought by two intervenors challenging a zone change that would allow new special permit regulations to come into effect. Because the two individuals only intervened under 22a-19 to raise environmental issues, the high court dismissed that action for lack of jurisdiction noting their real gripe was concerning the subsequent granting of a special permit. In that unusual case Zimnoch v. Planning & Zoning Commission, 302 Conn. 535 (2011) the Connecticut Supreme Court reversed a trial court's decision that had overturned the granting of a special permit because the judge in that matter had improperly decided that another trial court judge had made an error in approving the predicate zone change.

8. Circumstances under which a special exception is permitted must be contained in the zoning regulations. See, e.g., Powers v. Common Council of City of Danbury, 154 Conn. 156, 161 (1966); and Cameo Park Homes, Inc. v. Planning and Zoning Commission, 150 Conn. 672, 678 (1963).
 - i. The zoning regulations as to special permits must be strictly construed. In Balf Company v. Planning & Zoning Commission, Town of Manchester, 79 Conn. App. 626, cert. denied 266 Conn. 927 (2003), zoning regulations required a special permit for a concrete plant if the area was greater than 4 acres, however because the area was 2 acres the regulations were interpreted as meaning that no special permit was required even though the entire tract contained 55 acres.
 - ii. In Michos v. Planning and Zoning Commission of the Town of Easton, 151 Conn. App. 539 (2014), the Appellate Court found that the Easton PZC had created an unambiguous regulation allowing parking in a front yard. Its meaning of front yard was in front of a structure not a front yard setback. The Commission's action allowing a prayer center was overturned because it did not properly apply its own regulation that limited the amount of parking in the front yard. *Id.* at 549.

9. Special permit standards set forth in the zoning regulations can be general in nature. See Connecticut Health Facilities, Inc. v. Zoning Board of Appeals, 29 Conn. App. 1, 7 (1992); and Whisper Wind Development Corporation v. Planning and Zoning, 229 Conn. 176, 177 (1994).
10. Public hearings are required for all special permit and special exception applications. Public Act 03-177 amended many of the sections discussed below by deleting the notice requirements in each section and substituting reference to General Statutes §8-7d, which now governs notice for all applications where a hearing is required. Section 8-7d is discussed below.

General Statutes § 8-3c(b):

The zoning commission or combined planning and zoning commission of any municipality shall hold a public hearing on an application or request for a special permit or special exception, as provided in § 8-2 and on an application for a special exemption under Section 8-2g. Such hearing shall be held in accordance with the provisions of Section 8-7d. Whenever a commission grants or denies a special permit or special exception, it shall state upon its records the reason for its decision.

General Statutes § 8-26e:

The planning commission of any municipality shall hold a public hearing on an application or request for a special permit or special exception, as provided in § 8-2. Any public hearing shall be held in accordance with the provisions of Section 8-7d. Such commission shall decide upon such application or request within the period of time permitted under Section 8-26d. Whenever a commission grants or denies a special permit or special exception, it shall state upon its records the reason for its decision

General Statutes § 8-6(a)(2):

The zoning board of appeals shall have the following powers and duties: . . . (2) to hear and decide all matters including special exceptions . . . upon which it is required to pass by the specific terms of the zoning bylaw, ordinance, or regulation

General Statutes § 8-7:

Whenever a zoning board of appeals grants or denies any special exception . . . in the zoning regulations applicable to any property or sustains or reverses wholly or partly any order, requirement or decision appealed from it, it shall state upon its records the reason for its decision and the zoning bylaw, ordinance or regulation which is varied in its application

11. When reviewing a special permit application, an agency makes the decision whether a particular use would be compatible with a particular zoning district and such a determination can only be made upon examination of the required site plan. Therefore, the zoning regulations usually require that a special permit application be accompanied by a site plan. Special permit approval is usually dependent on site plan approval so the agency can evaluate a revised site plan in light of special permit regulations. See, e.g., Barberino Realty and Development Corp. v. Planning and Zoning Commission of Town of Farmington, supra, 222 Conn. 614.
12. If special permit application involves a regulated activity within a regulated area, a concurrent application to inland wetlands agency is also required. General Statutes § 8-3c(a). A planning or zoning commission must give due consideration of the final inland wetland agency report before rendering its own decision. However, the planning or zoning commission's decision remains valid even if the underlying decision of the inland wetland agency is overturned on appeal. See e.g. Gevers v. Planning & Zoning Commission, 94 Conn. App. 478, 494 (2006). In

Connecticut Fund for the Environment, Inc. et al. v. Town of Old Saybrook Planning Commission, et al., J.D. of Middlesex at Middletown, (Aurigemma, J.) (June 5, 2008), the trial court held that there is an exception to this rule when a planning commission rather than a zoning commission or combined planning and zoning commission is reviewing a special permit application. See General Statutes § 8-26e that omits all mention of the Inland Wetlands Act.

General Statutes § 8-3c(a).

- i. Zoning commission or combined planning and zoning commission cannot act on special permit application until inland wetland agency makes its decision.
 - ii. In making its decision on the special permit, the zoning commission or combined planning and zoning commission must give due consideration to the inland wetlands agency's report.
13. When an agency grants or denies an application, it must state its reasons for that decision. General Statutes § 8-3c(b), § 8-7, and § 8-26e.
- i. In making a decision, agency board members may use their knowledge from observation of the site or their personal knowledge of the area involved, and this knowledge is part of the record for the decision. See Felsman v. Zoning Commission, 31 Conn. App. 674, 680 (1993).
14. If a special exception satisfies the regulations and statutes, an agency does not have the discretion to deny the application. See, e.g., Daughters of St. Paul Inc. v. Zoning Board of Appeals, 17 Conn. App. 53, 57 (1988); and CRRA v. Planning and Zoning Commission, 46 Conn. App. 566, 570 (1997).

- i. In Jewett City Savings Bank v. Franklin, 280 Conn. 274 (2006) the Supreme Court citing to its decision in Irwin v. Planning and Zoning Commission, 244 Conn. 619 (1998) held that a zoning commission “can exercise its discretion during the review of the proposal special exception, as it applies the regulations to the specific application before it.” (internal citation omitted) Id. at 282. The Jewett City Savings Bank Court then held that special exception applications are enforcement actions and may require an applicant or other aggrieved party to file an appeal of an adverse decision to the municipal zoning board of appeals before appealing to Superior Court. The Court said that the remedy to this is a legislative action similar to that done in passing P.A. 02-74 that allows direct appeals of site plan decisions to superior court. Id. at 284. Public Act 07-60 did just that so that all special permits or special exceptions may be appealed directly to Superior Court. See C.G.S. §8-8(b).
- ii. In Trumbull Falls LLC v. Planning & Zoning Commission, 97 Conn. App. 17 (2006), the Appellate Court decided that a Trumbull zoning regulation that prohibits locating one Planned Residential Development within one mile of another had to use the straight line method to measure the mile. This holding overturned the Planning & Zoning Commission’s own decision to utilize a different method. The Appellate Court noted that in that case the agency was not entitled to special deference.
- iii. In Woodbury Donuts, LLC v. Zoning Board of Appeals, 139 Conn. App. 748 (2012) the Woodbury Zoning Commission approved a 42,000 square foot retail center in Woodbury by special permit but issued a condition that the zoning enforcement officer would determine future compliance and issue zoning permits. A Dunkin Donuts sought a location but the ZEO denied its application. Dunkin Donuts appealed to the ZBA where it upheld the ZEO finding the Dunkin Donuts was an impermissible expansion.
- iv. MacKenzie v. Planning and Zoning Commission, 146 Conn. App. 406 (2013), involves an action that the Monroe Planning and Zoning Commission took in approving a special exception wherein it varied or waived certain setback and landscaped buffer requirements. The Appellate Court held that the Planning & Zoning Commission usurped the authority of the Zoning Board of Appeals and also violated the uniformity requirements of Section 8-2 by applying its Design District regulations on a case by case basis.

15. The reviewing agency may deny a special permit upon the applicant's failure to satisfy specific standards of the existing regulations but cannot deny the use for vague, general reasons not found in the regulations. See, e.g., DeMaria v. Enfield Planning and Zoning Commission, 159 Conn. 534, 541 (1970).

In an extraordinary case concerning how Connecticut construes the affect of 42 U.S.C. § 2000cc and C.G.S. § 52-571b to special exception applications for religious use, the Supreme Court in Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission, 285 Conn. 381 (2008) held that the Newtown Planning & Zoning Commission properly denied a special exception application for a Buddhist temple finding that the zoning regulations were neutral and generally applicable to all property owners and did not allow for individualized assessments. It also found that the Commission properly determined that the level of activity would substantially impair property values and that proposed septic and water supply systems would create health risks.

Where extraordinarily difficult sites are subject to applications for special permits the site's topography, traffic uses and neighboring uses can come into play. In Hayes Family Limited Partnership v. Town Plan and Zoning Commission of the Town of Glastonbury, 115 Conn. App. 655, cert. denied, 293 Conn. 919 (2009) the applicant sought to build a 13,013 square foot CVS with a drive-through on a small hill in Glastonbury. To

do so would have required removal of 80,000 cubic yards of material and to build a steep sloped 225 feet long, 14 foot high retaining wall, surrounded on 3 sides by six foot sidewalks, two dumpsters, loading docks and seventy parking spaces near residential properties. The Commission denied the application and both the trial court and Appellate Court upheld the denial noting that Glastonbury's zoning regulations allowed it to consider size and topography of the property, existing and proposed contours, compatibility with the neighborhood and other factors. Citing with approval to Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission, supra, 285 Conn. 427, the Appellate Court affirmed the trial court's judgment dismissing the appeal finding that the proposed development "would directly impact neighboring residential properties not only by way of increased noise and traffic, but also in that it would adversely affect their property values." Id. at 661-662. In a separate action Hayes et al. also sought compensation for inverse condemnation under the Connecticut Constitution, article first, § 11 and the fourteenth amendment of the U.S. Constitution. See Hayes Family Partnership v. Glastonbury, 132 Conn. App. 218 (2011).

16. Conditions: Even if a special permit application satisfies the standards set forth in the regulations, the proposed use is still subject to agency imposed conditions that are necessary to protect the public health, safety, convenience and property values. Summ v. Zoning Commission of

Ridgefield, supra, 150 Conn. 91; See La Rocca et. al. v. Planning and Zoning Commission of the Town of Greenwich, 2004 WL 1926042

(Conn. Super.). General Statutes § 8-2.

- i. Any conditions imposed by a commission cannot be contrary to the requirements set forth in the regulations. See Farina v. Zoning Board of Appeals, 157 Conn. 420 (1969).
- ii. Some courts have said that any imposed conditions must be authorized by the zoning regulations themselves. See Shulman v. Zoning Board of Appeals, 154 Conn. 426 (1967).
- iii. Special permits may be granted on the condition that the application receives favorable action by another agency. See Lurie v. Planning and Zoning Commission, 160 Conn. 295 (1971).
- iv. An agency may impose conditions regardless of whether the agency or the applicant has the ability to satisfy such conditions. Id.

17. More recently, the Appellate Court held that general health, safety and welfare requirements in the regulations may serve for denial of a special permit even though all technical requirements in the regulations are met. See, e.g., Whisper Wind Development Corporation v. Planning and Zoning Commission of Town of Middlefield, supra, 229 Conn. 176.

18. Unsubstantiated statements regarding threats to public safety, however, were held not to be valid basis for denial of a special permit. Relying on the substantial evidence rule, the Appellate Court held that the zoning board of appeals improperly denied an application where there was no evidence that the particular project (a long term drug treatment center), posed a threat to public safety. See Municipal Funding, LLC v. Zoning

Board of Appeals of City of Waterbury, 74 Conn. App. 155, 163-65 (2002). Although the general proposition still stands, the Supreme Court recently overruled the Appellate Court and found that there was substantial evidence in the record that the proposed facility posed a threat to public safety. See Municipal Funding, LLC v. Zoning Board of Appeals, 270 Conn. 447, 455 (2004).

B. Site Plans

1. A site plan is a physical plan which shows the layout and design of the proposed use on a particular site together with the information that the regulations require for that use. See, e.g., SSM Associates Limited Partnership v. Planning and Zoning Commission, 211 Conn. 331 (1989).
 - i. A site plan is all the documents submitted by the applicant that are used by the agency to determine whether the proposal conforms with the applicable regulations. Id.
2. Site plans are used to review conformity with regulations prior to the issuance of a building permit. Id.
 - i. Like special permits, site plan review allows an agency to determine whether proposed development plans comply with the applicable zoning regulations.
3. Unlike a special permit, a site plan application by itself is for a use already permitted “as of right” in the particular area so long as it meets the standards required by the regulations. See Barberino Realty & Development Corp. v. Planning and Zoning Commission, *supra*, 222 Conn. 607.

- i. Standards must be explicit as to what is reviewed to determine compliance. See, TLC Development Inc. v. Planning and Zoning Commission, 215 Conn. 527 (1990).
 - ii. Agency decision must be based on the standards set forth in the regulations. See Allied Plywood, Inc. v. Planning and Zoning Commission, 2 Conn. App. 506 (1984).
4. Site Plan review is authorized under General Statutes § 8-3(g):

General Statutes § 8-3(g):

- i. The zoning regulations may require that a site plan be filed with the commission or other municipal agency or official to aid in determining the conformity of a proposed building, use or structure with specific provisions of such regulations A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning or inland wetlands regulations A decision to deny or modify a site plan shall set forth the reasons for such denial or modification.
 - ii. In C&H Management LLC v. Shelton, 140 Conn. App. 608 (2013), the official charged with approving site plans for residences was the city engineer. He refused to sign off on a site plan and gave no reason. The developer brought a successful mandamus action and forced him to approve the site plan. The subsequent claim of a taking failed because the developer did not bring that action arising from the same facts when he brought the mandamus action.
5. A site plan may be required as part of special permit application to assist the agency in determining whether the physical plan conforms with special permit requirements and applicable zoning regulations.
- i. An agency must adopt site plan regulations before it can engage in site plan review. See Konigsberg v. Board of Alderman, 283 Conn. 553 (2007). In Konigsberg, the New Haven Board of Education sought revisions to New Haven's RH-1 zone to allow expansion of schools. Upon receiving approval of text changes from the Board of Aldermen, the Board of Education submitted a site plan for a school at 691 Whitney Avenue in conformance with the newly amended regulations. The trial court threw out the text changes and the site plan approval, noting with respect to the site

plan approval that it did not meet the “intent” of certain zoning regulations. On appeal, the Supreme Court reversed these decisions holding the text changes were proper. It then concluded that “after making the threshold determination that the site plan met the applicable zoning requirements the [New Haven] plan commission was required according to § 8-3(g), to approve the application. Upon examination of the record, we find no proper reason for the trial court to have overturned that decision.” Id. at 597.

6. If application is denied, the agency must state its reasons for the denial, and such reasons must be connected to a specific standard. See Kosinski v. Lawlor, 177 Conn. 420 (1979).
 - i. An agency cannot rely on general standards to deny application but may use such reasons to modify a site plan. TLC Development Inc. v. Planning and Zoning Commission, supra, 215 Conn. 527.
 - ii. An agency cannot deny the application for subjective reasons which have no relationship to the zoning regulations. See, R & R Pool & Patio, Inc. v. Zoning Board of Appeals of Town of Ridgefield, 257 Conn. 456 (2001).
7. If a site plan involves a regulated activity in a regulated area, § 8-3(g) requires the applicant to submit an inland wetlands permit application at the same time.
 - i. Decisions on site plan applications cannot be made by the reviewing agency until it receives a final report from the inland wetlands agency.
8. “It is axiomatic that review of a site plan is an administrative function...”
Clifford v. Planning & Zoning Commission, 280 Conn. 434, 440 (2006), citing to Norwich v. Norwalk Wilbert Vault Co., 208 Conn. 1 (1988).
Thus, review of site plans is a ministerial process. Westover Park, Inc. v. Zoning Board of City of Stamford, 91 Conn. App. 125 (2005). See also

Connecticut Health Facilities, Inc. v. Zoning Board of Appeals, 29 Conn. App. 1, at 6 (1997).

i. When making a decision on a site plan application, the agency acts in a ministerial capacity and it has no independent discretion other than determining whether the plan complies with the applicable regulations. See Westover Park, Inc., supra, and see Torsiello v. Zoning Board of Appeals, 3 Conn. App. 47 (1984); and Allied Plywood, Inc. v. Planning and Zoning Commission, supra, 2 Conn. App. 513.

ii. When making a determination whether a use is accessory, the Commission is limited by the words of its existing zoning regulations. See e.g. Loring v. Planning & Zoning Commission, 287 Conn. 746 (2008) (North Haven Planning & Zoning Commission's denial for an adult bookstore because it found that 15 video booths was an accessory use overturned. In that case, the Supreme Court found the applicant's attorney's unsworn statement before the Commission to be competent evidence and the only expert testimony given on the topic. Id. at 758.)

9. A public hearing is not required for site plan applications. See Clifford v. Planning & Zoning Commission, 280 Conn. 434, 438-444 (2006) for an in depth discussion of why public hearings are not required in the site plan application context. See also Connecticut Health Facilities, Inc. v. Zoning Board of Appeals, supra, 29 Conn. App. 6.

i. Regulations may mandate site plan review or may allow a commission to hold a hearing at its discretion. See October Twenty-Four, Inc. v. Planning and Zoning Commission, 35 Conn. App. 599, 603 (1994).

10. Conditions: The statute expressly provides the agency with the ability to modify a site plan so that the plan conforms with the regulations.

i. Modifications are permitted only if the plan does not comply with the zoning regulations.

III. TIME LIMITS FOR AGENCY ACTION

A. Special Permits

1. Public hearing required under General Statutes § 8-3c(b) and decision must be decided within time periods set forth in § 8-7d(a). General Statutes § 8-7d(a) provides:

In all matters wherein a formal petition, application, request or appeal must be submitted to a zoning commission, planning and zoning commission, zoning board of appeals under this chapter, planning commission under chapter 126 or inland wetlands agency under chapter 440 and a hearing is required or otherwise held on such a petition, application, request or appeal, such hearing shall commence within sixty-five days after receipt of such petition, application, request, or appeal and shall be completed within thirty-five days after such hearing commences, unless a shorter period of time is required under this chapter or chapter 126 or chapter 440. 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 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. 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 the land shall be the owner indicated on the tax map or on the last completed grand list, as of the date such notice is mailed. All applications and maps and documents relating thereto shall be open for public inspection. At such hearing, any person or persons may appear and be heard and may be represented by agent or by attorney. All decisions on such matters shall be rendered within sixty-five days after completion of such hearing unless a shorter period of time is required pursuant to this chapter, chapter 126 or chapter 440. The petitioner or applicant may consent to one or more extensions of any period specified in this subsection, provided the total extension of all such periods shall not be for longer than sixty-five days, or may withdraw such petition, application, request or appeal.

2. No automatic approval of special permits if the agency does not decide within the statutory time period. See, e.g., Center Shops of East Granby, Inc. v. Planning & Zoning Commission of Town of East Granby, 253 Conn. 183 (2000); Leo Fedus and Sons Construction Co. v. Zoning Board of Appeals, 225 Conn. 432 (1993); and Carr v. Woolrich, 7 Conn. App. 684 (1986).
 - i. Exception: If special permit application is for a permitted use for which no hearing is required, is inseparable from site plan and the regulations so state, an agency's failure to act on the site plan within the sixty-five day statutory period [§ 8-3(g) and 8-7d(b)] results in the automatic approval of both. See Lauver v. Planning & Zoning Commission, 60 Conn. App. 504 (2000); and Center Shops of East Granby, Inc. v. Planning & Zoning Commission of Town of East Granby, supra, 253 Conn. 183 for this general proposition, but not as examples of where it was approved as neither case contained facts that resulted in automatic approvals.
 - ii. In New England Road, Inc. v. Planning and Zoning Commission of the Town of Clinton, 308 Conn. 180 (2013), the Connecticut Supreme Court upheld the dismissal of an administrative appeal challenging conditions to a special permit and coastal site plan review. The plaintiff failed to include a summons or a citation with its complaint. The trial court dismissed the case because of this procedural defect. The high court upheld the dismissal saying this type of mistake is a substantive defect and is not amendable under C.G.S. Section 52-72. *Id.* at 182. The cautionary tale for plaintiffs is to use the 15-day appeal period to ensure that a summons or citation are included. The role of planners or town clerks who are served is to note if a summons or citation was included and point that out to the town attorney.

B. Site Plans

1. Site plan application automatically approved if agency fails to act within statutory time period. General Statutes § 8-3(g) and § 8-7d(b). See, e.g., Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission of

Ansonia, 278 Conn. 408 (2006). Connecticut Health Facilities, Inc. v.

Zoning Board of Appeals, supra, 29 Conn. App. 6.

2. General Statutes § 8-3(g):

Approval of a site plan shall be presumed unless a decision to deny or modify it is rendered within the period specified in § 8-7d.

3. General Statutes § 8-7d(b):

Notwithstanding the provisions of subsection (a) of this section, whenever the approval of a site plan is the only requirement to be met or remaining to be met under the zoning regulations for any building, use or structure, a decision on an application for approval of such site plan shall be rendered within sixty-five days after receipt of such site plan. Whenever a decision is to be made on an application for subdivision approval under chapter 126 on which no hearing is held, such decision shall be rendered within sixty-five days after receipt of such application. Whenever a decision is to be made on an inland wetlands and watercourses application under chapter 440 on which no hearing is held, such decision shall be rendered within sixty-five days after receipt of such application. The applicant may consent to one or more extensions of such period, provided the total period of any such extension or extensions shall not exceed sixty-five days or may withdraw such plan or application.

4. If a public hearing is required under the regulations, the time limits in § 8-7d(a) apply.

5. If no public hearing is required, time constraints in § 8-7d(b) apply. See, e.g., October Twenty-Four, Inc. v. Planning and Zoning Commission, supra, 35 Conn. App. 603.

i. Even if public hearing held at discretion of the commission, § 8-7d(b) applies. Id.

6. When an agency decision on a site plan is appealed to a zoning board of appeals, the time restraints in § 8-7d(a) do not apply. Leo Fedus and Sons Construction Co. v. Zoning Board of Appeals, supra, 225 Conn. 432.

However, see discussion of Public Act 02-74 herein, amending §8-8(b), which states that appeals from decisions on site plans may be appealed directly to Superior Court. Such direct appeals must be served within 15 days of the notice of decision rendered by the agency.

7. The fact that an applicant revises a site plan application and submits it during the initial sixty-five day period for commission review neither tolls the sixty-five day period to act nor sets a new sixty-five day period for the commission to act. Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission of Ansonia, 278 Conn. 408 at 424 (2006). The Jalowiec Court cites with approval the reasoning set forth in University Realty, Inc. v. Planning Commission, 3 Conn. App. 556, 561 (1985). Jalowiec Realty Associates, L.P., supra at 423.
8. In Dean-Moss Family Ltd. P'ship v. Five Mile River Works, Inc., 130 Conn. App. 363 (2011), the plaintiff sought an injunction enjoining the defendant from preventing it from acting on its approved coastal site plan applications. The defendant alleged that the permit had lapsed by virtue of the plaintiff's failure to act on the applications. For the plaintiff to act on the application, the plaintiff had to enter onto the defendant's property to effectuate the parking easement involved in the applications. The court concluded that the approval did not lapse because of the defendant's conduct in challenging the validity and enforceability of the easement; the time limitation in the zoning regulation was tolled. Id. at 373-75.

9. Public Act 11-5 makes any site plan (and subdivision and wetlands) permit approved before July 1, 2011, which has not yet expired, effective for nine years from the date of approval. The applicant can also still obtain a five-year extension on top of that. This law became effective upon passage on May 9, 2011.
10. Public Act 11-79 allows the applicant/developer to exercise discretion over the use of a surety bond for improvements as part of a site plan (or subdivision) approvals. The commissions must accept whichever form of bond an applicant chooses to provide. For site plan modifications, a bond cannot exceed 10% more than the values of the modifications. For any site plan (or subdivision) approved in phases, each phase is to be treated as a separate approval for bonding purposes. No longer can commissions securitize the maintenance of roads, streets or other improvements associated with site plans or subdivisions. Commissions must either release bonds (or portions of bonds) within thirty days of a request for the release or provide in writing a detailed list of what remains undone and is required prior to the bond being released. This law becomes effective October 1, 2011.

IV. APPEALS OF AGENCY ACTION

A. Special Permits

1. When reviewing special permit applications, an agency acts in an administrative capacity. Connecticut Health Facilities, Inc. v. Zoning Board of Appeals, supra, 29 Conn. App. 6.
2. On appeal, a court can only reverse an agency decision on a special exception if the agency action was illegal, arbitrary, or an abuse of its discretion. See, e.g., Torsiello v. Zoning Board of Appeals, supra, 3 Conn. App. 50.
3. Review of an agency decision is based only on whether reasons assigned for the decision are reasonably supported by the record and whether such reasons are relevant to the considerations applicable under the zoning regulations. See, e.g., Housatonic Terminal Corp. v. Planning & Zoning Board, 168 Conn. 304, 305 (1975).
 - i. Courts can review the reasonableness of an agency's decision. Daughters of St. Paul Inc. v. Zoning Board of Appeals, supra, 17 Conn. App. 53.
4. Even if one of the reasons given by the agency is sufficient to support its decision, the reviewing court must uphold the agency's decision. Id.
5. If the agency fails to give reasons for its action, the court must search the record to find a reason sufficient to support the decision. R. Fuller, Land Use and Practice, Volume 9A, §33.4, p. 160 (1999).

6. An Appellate Court case aptly details the scope of judicial review of special permits as discussed above. See Oakbridge/Rogers Avenue Realty, LLC v. Zoning Board of City of Milford, 78 Conn. App. 242, 246-48 (2003).
7. The Supreme Court decided a case regarding the scope of judicial review of special permits, and held that the Appellate Court, in reversing the judgment of the trial court, improperly substituted its judgment for the judgment of the board, which had denied an application for a special exception to permit the location of a drug treatment center for adolescents. See Municipal Funding, LLC v. Zoning Board of Appeals, supra, 270 Conn. 447. The Court held that there was substantial evidence that the proposed facility posed a threat to public safety in the neighborhood surrounding the facility. Id. at 455.
8. Jewett City Savings Bank v. Franklin, supra, 280 Conn. 274 teaches that an adverse decision may need to be appealed first to the local ZBA (depending on the text of the local zoning regulations) rather than directly to court. If a litigant neglects this step and goes directly to court the appeal may be dismissed for failure to exhaust administrative remedies. For an in-depth understanding of the doctrine known as “failure to exhaust administrative remedies,” see River Bend Associates, Inc. v. WPCA of Simsbury, 262 Conn. 84 (2002).

9. An applicant for a special permit must maintain its interest in the subject real property through ensuing litigation. In JZ, Inc., Dunkin Donuts v. Planning and Zoning Commission of the Town of East Hartford, 119 Conn. App. 243, cert. denied 296 Conn. 905 (2010), a contract purchaser had its case dismissed for lack of aggrievement because its purchase contract expired during the pendency of its court action against the East Hartford Planning and Zoning Commission.
10. Beware of entering stipulated judgments that provide further discretionary reviews. In Przekopski v. Zoning Bd. of Appeals of the Town of Colchester, 131 Conn. App. 178, appeal denied, 302 Conn. 946 (2011), the plaintiff owned property used for a variety of industrial activities, including the excavation and processing of sand and gravel, soil manufacturing, recycling of earth materials and the bulk storage of manure. The Town's ZEO issued a cease and desist order directing the plaintiff to not conduct those activities on his property until a zoning permit for such activities had been obtained. The parties entered into a stipulated judgment in which the plaintiff was required to file an application for a special exception to, among other things, conduct those activities. The Commission denied the application on the grounds that it did not meet the standards for a special exception. On appeal, the court found that because the plaintiff entered into the stipulated judgment, he waived his right to argue that (1) his activities constitute preexisting, nonconforming uses and

(2) his activities constitute uses permitted as of right under the zoning regulations. Id. at 180-88.

11. In Villages LLC v. Enfield Planning & Zoning Commission, 149 Conn. App. 448 (2014), the Appellate Court found that the Commission, through the actions and statements of one of its members, was biased, engaged in impermissible ex parte communications that were not waived and that the Commission member influenced others by dominating the discussion in deliberations. Id. at 466-67.
12. In North Haven Holdings, Ltd. Partnership v. Planning & Zoning Commission, 146 Conn. App. 316 (2013), the decision of the North Haven Planning & Zoning Commission to grant a special permit was overturned by the trial court because the only traffic study submitted showed an adverse impact. The Appellate Court reversed and found that the trial court improperly substituted its own judgment instead of looking at the totality of the record. Id. at 335.

B. Site Plans

1. A commission acts in its ministerial capacity when reviewing a site plan and its discretion is limited to determining if the proposed site plan complies with the application regulations. See, e.g., Clifford v. Planning & Zoning Commission, 280 Conn. 434 (2006); Westover Park, Inc. v. Zoning Board of the City of Stamford, 91 Conn. App. 125 (2005). In Gerlt v. Planning & Zoning Commission, 290 Conn. 313 (2009), the

Supreme Court held that a site plan premised on what was ultimately determined to be an invalid regulation concerning general plans of development must also be overturned and remanded to the Commission to reconsider the site plan without taking into account a now invalid zoning regulation.

However, an agency may condition a site plan approval of the footprint on later submissions of architectural drawings of elevations, if locations, square footage, height, parking, color scheme and landscaping are approved at the same time footprint is approved. Nonetheless, the Commission may not ignore its own specific regulations. See John F. Fedus v. Zoning and Planning Commission of the Town of Colchester, 112 Conn. App. 844, cert. denied, 292 Conn. 904 (2009).

2. An agency can exercise some discretion regarding compliance with regulations, and commission members may use personal knowledge of the site in their determination. See Torsiello v. Zoning Board of Appeals, 3 Conn. App. 47 (1984). However, individual reasons given by certain commission members do not amount to formal collective official statement of commission. Smith-Groh, Inc. v. Planning and Zoning Commission of Town of Greenwich, 78 Conn. App. 216 (2003).

Commission members must give specific statements and their personal knowledge must be based on facts known to them rather than on speculation in order for their statements to be considered by reviewing

courts. See, e.g., Loring v. Planning & Zoning Commission, 287 Conn. 746, 760 (2008).

3. Reviewing courts cannot reverse an agency decision unless the decision is arbitrary, illegal, or an abuse of discretion. Id. The trial court cannot substitute its judgment for the factual findings of the agency. See R & R Pool & Patio, Inc. v. Zoning Board of Appeals of Town of Ridgefield, supra, 257 Conn. 456.
4. In subsequent proceedings, the Appellate Court held that the trial court exceeded its authority when it ordered that the board grant the property owners' application for site plan approval. See R & R Pool & Patio, Inc. v. Zoning Board of Appeals of the Town of Ridgefield, 83 Conn. App. 1, cert. denied, 271 Conn. 921 (2004). The Appellate Court concluded that once the trial court decided to reverse the board's decision, it should have gone no further than to sustain the plaintiff's appeal. Id. at 9. "The court's overbroad order directing the board to grant the plaintiffs' application deprived the board of its discretionary authority." Id. A subsequent case involving some of the very same parties got into a debate about the definition of fine furniture. In R & R Pool & Patio v. Zoning Board of Appeals of the Town of Ridgefield, 129 Conn. App. 275 (2011), a tenant obtained a variance to conduct retail sales limited to "oriental rugs, fine furniture, and art." A second tenant leased the property and the owners of the property submitted a site plan application on behalf of the

second tenant to sell certain furniture. Id. at 277. At issue was the term “fine furniture,” which was not defined by the zoning regulations. The Appellate Court reversed the decision of the Superior Court, concluding that the term fine furniture does not mean “good quality furniture,” but instead means “furniture of a high quality,” and with that determination of what fine furniture means the Appellate Court directed that the trial court remand the matter back to the Board. Id. at 290-91, 96.

5. If a commission’s decision is reasonably supported by the record, a court cannot substitute its judgment for that of the agency. Roraback v. Planning and Zoning Commission, 32 Conn. App. 409 (1993).
 - i. If any reasons support the agency’s decision, the court must affirm the decision. See Goldberg v. Zoning Commission, 173 Conn. 23 (1977).
 - ii. Courts cannot speculate on whether other reasons not given influenced the agency’s decision. See Marmah v. Greenwich, 176 Conn. 116 (1978).
 - iii. However, courts should allow in additional evidence pursuant to Section 8-8(k)(2) of the General Statutes where evidence of prior site plan approvals were not made part of the record in the pending site plan application because no public hearing was held. Clifford v. Planning & Zoning Commission, 280 Conn. 434, 445-449 (2006).
6. A site plan cannot be denied based upon off-site traffic conditions and inconvenient location of parking. Although valid grounds for modification, they could not serve as grounds for disapproval. See TLC Development, Inc. v. Planning and Zoning Commission of Town of Branford, 215 Conn. 527, 532 (1990).

7. In Avalon Bay Communities, Inc. v. Zoning Commission of the Town of Stratford, 130 Conn. App. 36 (2011), after the Commission initially denied the plaintiff's site plan applications regarding its proposed affordable housing development, the plaintiff submitted revised site plan applications to the Commission regarding the same. *Id.* at 41-42. The proposed site plan included (1) reducing the number of residential units; (2) reducing the number of buildings; (3) relocating one building; (4) improving access to the rear of the buildings; (5) increasing the width of the driveway; (6) increasing the number of parking spaces; and (7) purchasing an abutting parcel for use as a secondary emergency access to the site. *Id.* at 42. The Commission denied the revised plan. The trial court upheld the Commission's denial. *Id.* at 39. The Appellate Court reversed on lack of substantial evidence grounds. *Id.* at 49-50. It also determined that the revised site plan did not differ so greatly from the original site plan as to require a new assessment of regulated wetland activity. *Id.* at 68.
8. It should be noted that an Appellate Court decision has held that approval of a site plan by a zoning commission amounted to zoning enforcement. Borden v. Planning and Zoning Commission of Town of North Stonington, 58 Conn. App. 399 (2000), cert. denied 254 Conn. 921 (2000). In that case the zoning regulations provided that if the action of the zoning board was enforcement an appeal had to be taken to the Zoning Board of Appeals prior to the Superior Court.

9. A 2002 statutory amendment, however, has resolved the issue by stating that appeals from decisions on site plans may be appealed directly to the Superior Court. Public Act 02-74, § 2, amending § 8-8(b). This Act, however, does not apply to special permits or special exceptions. See Jewett City Savings Bank v. Franklin, supra, 280 Conn. 274.

CONCLUSION

- A. Special permit and site plan application review provide two important mechanisms to land use agencies that enables them to address certain categories of uses in a special manner:
- B. The utilization of special permits, special exceptions and site plan applications still provides viable options for commissions to control particular uses more than other general uses. Careful attention to ongoing changes to the enabling legislation and local zoning regulations is required. A continuous review of emerging case law is also mandatory as this remains a dynamic area of contention that is hotly litigated.