

Town of Cromwell Zoning Board of Appeals

***PUBLIC HEARING AND MEETING
6:30 P.M. TUESDAY, MARCH 14, 2017
ROOM 224/225 CROMWELL
TOWN HALL, 41 WEST STREET***

AGENDA

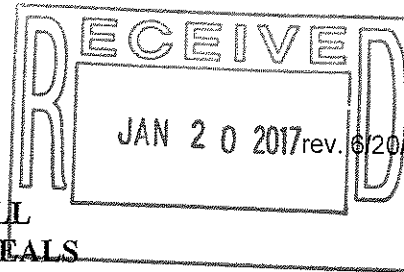
1. Call to Order
2. Roll Call
3. Seating of Alternates
4. Approval of Agenda
5. Public Comments
6. New Business:
7. Public Hearing:

a. Application #17-02: Request for a Motor Vehicle Location approval under Section 10.5 of the Zoning Regulations at 201 Main Street. Timothy Anderegg is the Applicant and S & S Partners Inc. is the Owner.

8. Approval of Minutes:
 - a. February 14, 2017
9. Adjourn

RECEIVED FOR FILING
3/7 2017 at 8:52 AM.
TOWN CLERK'S OFFICE
CROMWELL, CONN.

Gloria Prendergast, Asst
TOWN CLERK



17-02

TOWN OF CROMWELL
ZONING BOARD OF APPEALS

APPLICATION FOR VARIANCE, ZONING APPEAL, DMV LOCATION APPROVAL,
OR CHANGE OF NON-CONFORMING USE SPECIAL PERMIT

| | |
|--|--|
| Address: 201 Main Street | PIN #: 00015800 / 00015810 |
| Zoning District: IND | Volume/Page: 412 / 142 |
| Applicant: Timothy Anderegg | Property Owner: S & S Partners, Inc. |
| Home or Business Address: 22 Harlan Place East Hampton, CT 06424 | Home or Business Address: P.O. Box 734 Old Lyme, CT 06371 |
| Phone #: 860 478-0494 Email: timplace22@yahoo.com | Phone: 860 625-5974 |
| <i>I hereby certify that the information presented is to the best of my knowledge true and accurate, and that should such information be proved to be inaccurate or misleading, any permit issued on the basis of this information may be revoked.</i> Signature: | <i>I hereby consent to the Applicant acting as my agent for the purpose of this application.</i> Signature: |
| Type of Application (check one): <input type="checkbox"/> Variance from Section _____ of the Zoning Regulations. <input type="checkbox"/> Appeal from ZEO Decision dated _____ <input type="checkbox"/> Change of Non-Conforming Use Special Permit. <input checked="" type="checkbox"/> Application for Motor Vehicle Location Approval (attach copy of your completed DMV Form K-7) | |
| Description of Request: This is a request for Motor Vehicle location approval at 201 Main Street in Cromwell. This would be a new truck and equipment repair service business to operate as Bridgeview Truck & Auto, LLC, which LLC is in the process of being established. | |

Justification for Request:

If Applying for a variance, state the hardship and explain why the variance is required.


If Appealing a decision of the ZEO, explain why you feel the ZEO is wrong.

If Applying for a change in non-conforming use Special Permit, explain how the new use will be less non-conforming than the current use.

If Requesting DMV Location Approval, state the date of the original Public Hearing (if any).

Please see attached letter of justification with exhibits.

1. I will send written notice of this application to the owners of property within 100' of the site not less than 14 days before the public hearing. I will submit the "certificate of mailing" not less than 10 days before the hearing.
2. I will post a sign on the property not less than 14 days before the public hearing per Section 8.10.H. of the Cromwell Zoning Regulations. I will submit an affidavit of posting at the hearing.
3. If my request is dimensional in nature, I have submitted a site plan prepared by a surveyor in accordance with Sec. 10.4.B.2 of the Cromwell Zoning Regulations.



applicant

January 20, 2017
date

Salvatore J. Petrella, attorney for owner/applicant

Law Office of Salvatore J. Petrella, LLC
Attorneys At Law

Salvatore J. Petrella

Julie C. Petrella

630 Main Street
Cromwell, CT 06416

Tel. (860) 632-8300
Fax (860) 632-7945

January 20, 2017

Zoning Board of Appeals
c/o Stuart Popper, Town Planner
Town of Cromwell
41 West Street
Cromwell, CT 06416

Dear Zoning Board of Appeals Members:

RE: Application to Zoning Board of Appeals for Location Approval for Department of Motor Vehicle Licensed Facility, Industrial Property at 201 Main Street in Cromwell, CT 06416, S & S Partners, Inc., Owner, Timothy Anderegg, Applicant.

I am Attorney Salvatore J. Petrella and I represent the owner of the property, S&S Partners, Inc. and Timothy Anderegg, the applicant for the Department of Motor Vehicles Repairer's License to be located on the industrial land at 201 Main Street in Cromwell. Arthur E. Sibley, Sr., is the principal of S&S Partners, Inc.

The property at 201 Main Street, Cromwell, is located at the extreme southern section of Route 99 where it junctions with Connecticut State Route 9. It abuts the Mattabassett District Water Pollution Control Facility as well as railroad property owned by the State of Connecticut Department of Transportation. The parcel is approximately 3.24 acre in size with about one acre being commercially developed. There is a large industrial building on the property, which has been owned or leased to a number of companies over the years, including Arrigoni Construction, Suzio Concrete and Recycle Rescue, LLC. The parcel also houses Daniel's Propane Gas facility and a cellular communication tower.

For more than a half century, the industrial building has been used as a repair shop for trucks and equipment associated with the businesses at the site for the servicing of their business vehicles. The current owner acquired the property in 1989, after having been a tenant occupying the premises for a period of time. He continued to use the property to service and maintain his fleet of truck vehicles at this site.

In July 1995, the property owner applied for, and received, a Special Permit from the Zoning Board of Appeals for a Change of Non-Conforming Use. The permit allowed for the **repair and service of trucks belonging to customers, in contrast with the existing non-conforming use (repair and service of trucks belonging to the property owner).** *Emphasis added.*

The language of this permit denotes that truck service and repair was being conducted on the property prior to the issuance of the Special Permit and would continue to be conducted on the property subsequent to the issuance of the Special Permit.

From 2000 to 2004, a portion of the building was occupied by First Line Emergency Service, Inc., a Department of Motor Vehicles licensed repair facility. First Line performed major mechanical repairs to fire trucks and ambulances. Bill Sullo, the owner of First Line Emergency Services, Inc., held Department of Motor Vehicles Repairers License R4767 at 201B Main Street in Cromwell.

Since 2004, there have been other lessees who have used portions of the building to conduct repairs to diesel engines. Paul St. Amand operated Commercial Diesel Services out of the premises at 201 Main Street, repairing diesel engines in large boats and other water craft until sometime in 2008 or 2009. Cory Wagner then operated a boat and jet-ski engine repair facility at the premises. A DMV license was not required for those types of repairs.

The owner currently has a lessee who now wants to open up a licensed facility for diesel truck and equipment repair. The lessee, Timothy Anderegg, who plans to operate as Bridgeview Truck and Auto, LLC, needs a Department of Motor Vehicles Repairers License in order to repair diesel trucks and automobiles. No license is needed to operate an **equipment** repair facility at this location.

Zoning approval is a prerequisite to DMV licensing, which is the reason this application is being submitted. Cromwell has adopted a zoning regulation, Section 6.4.D 5, that restricts **new** motor vehicle repair facilities from opening up within 2,600 feet of an existing repair facility. There is an existing repair facility within 2,600 feet of 201 Main Street, namely Cromwell Automotive at 263 Main Street in Cromwell.

The Purpose of this particular regulation, set forth at Section 6.4.A specifies the intent to provide for public garages "within certain zoning districts in the Town of Cromwell while minimizing environmental and aesthetic effects of through (sic) careful design, siting and screening." This is an existing facility in an industrial area designed and intended for vehicle repair work.

The prohibition in this regulation does not apply to the instant application as this is **not** a new motor vehicle repair facility. The property has been used as a repair facility for over fifty plus years, long before the adoption of this regulation. The intent to continue to use the property for such purposes was never abandoned by the present owner. All of his actions in using and leasing the property clearly indicate an attempt to continue this type of use.

The Zoning Board of Appeals should grant DMV location approval for a repair facility based upon all of the factors in this application, including its historic use, the previous Special Permit issued in 1995 for S&S Partners, Inc., and the previous DMV location approval in 2000 for First Line Emergency Services Inc. Alternatively, the use of this property as a repair facility should be grandfathered in, as that use existed and continued both prior to the adoption of the zoning regulations and prior to the adoption of the spacing regulation. Moreover, this is the most appropriate use of this property based upon the design, construction, historic and current use of the property.

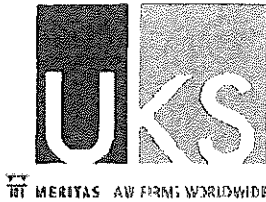
On behalf of the applicant and owner, I am asking that the Zoning Board of Appeals approve this application for location approval for Department of Motor Vehicles Repairers License. Additional supporting material such as photographs and testimony will be presented at the public hearing on this matter.

A Notice of Public Hearing sign will be posted on the premises more than fourteen days prior to the scheduled hearing date on this matter and all abutters will be notified by certified mail of the pending application and hearing date. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Petrella', written over a horizontal line.

Salvatore J. Petrella
Attorney for the Owner and Applicant



Richard D. Carella
(t) 860.548.2681
(f) 860.346.4580
rcarella@uks.com

March 6, 2017

Mr. Stuart B. Popper
Director of Planning & Development
Town of Cromwell
41 West Street
Cromwell, CT 06416

Re: 201 Main Street, Certificate of Approval of Location

Dear Mr. Popper:

Thank you for the opportunity to provide this letter memorandum to both you and to the Town Attorney regarding the application of Timothy Anderegg for a Motor Vehicle Location Approval for the above location at 201 Main Street.

Per Section 10.5 of the Cromwell Zoning Regulations, and Connecticut's caselaw regarding Conn. Gen. Stat. §14-54, the Zoning Board of Appeals acts as an agent of the State of Connecticut Department of Motor Vehicles, and not in a zoning capacity. See Cromwell Zoning Regulations 10.5.C. See also, Mason v. Board of Zoning Appeals of the City of Bridgeport, 143 Conn. 634 (1956), which holds, "In receiving and hearing and, eventually, in denying the application, the defendant was not functioning under either the municipal zoning ordinance or the zoning statutes. . . . It was acting in a special capacity. It was serving as the local agency named by the General Assembly to determine whether a certificate of approval should be issued. *Id* at 637. (Citations Omitted).

Such is the case here, where the Cromwell ZBA is the local authority vested by Conn. Gen. Stat. §14-54 to approve or deny the proposed location of this motor vehicle repair use. In reviewing the application Cromwell ZBA has established criteria set forth in Section 10.5.C of the Zoning Regulations which states,

As an agent of the State of Connecticut the Board serves solely to determine whether a Certificate of Location Approval should be issued based upon such considerations as:

1. Whether the use is permitted in the zoning district
2. The suitability of the location in view of traffic, intersecting streets, width of highway, effect on public travel, and other conditions;
3. The relationship of the proposed use or operation with respect to schools, churches, theaters, playhouses or other places of public gathering
4. Whether the proposed use of the location would imperil the safety and welfare of the public
5. Whether the proposed use of the location would have a detrimental effect on the value of nearby properties and development thereof, or

6. Whether there has been a material change in the conditions which might reverse a decision of granting or denying a previous application

These criteria should be used as a guide and they are not exclusive. The ultimate question in reviewing the application, and to be decided by the ZBA, is whether the proposed use would imperil safety of the public. That decision should be made in the context of what exists today, and not based upon, as the applicant argues, a prior existing use. "Whether or not a location for repairing automobiles and for dealing in use cars should be approved is to be determined upon the basis of the situation actually existing when the certificated of approval is sought. The ultimate question before the commissioner was whether the proposed use would or would not "imperil the safety of the public."" Charchenko v. Kelley, 140 Conn. 210, 212 (1953). (Emphasis Added)

The applicant's argument that a previous approval for a repair facility existed in 1995 is not controlling. Testimony from the public hearing showed that such use has not been in place since 2004. Since that time the conditions of the surrounding property and of the property itself have changed dramatically. Expansion of the Mattabasset treatment facility to the north and, more dramatically to the south on the property, the creation of a propane bulk distribution facility adjacent to the garage proposed to be used for the repairing facility, now exist. The issue is not whether a similar repairer's license had existed in this location in the past. The issue is whether, given the current existing conditions, the proposed use would or would not imperil public safety.

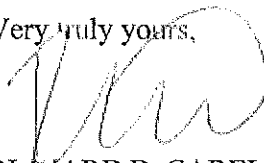
A similar case can be found in Ferreira v Zoning Board of Appeals of the City of Shelton, 48 Conn.App. 599 (1998). There, the proposed location on Bridgeport Avenue in Shelton had been previously approved for a DMV dealer/repairer license in 1959, but had not been used for several years. During the interim time, the conditions of the neighborhood changed and traffic has increased on Bridgeport Avenue. The ZBA denied the application because the site was no longer suitable for the proposed use. The State Appellate Court upheld the ZBA's decision, stating that the board had correctly considered, ". . . the current amount of traffic, the number of businesses in the immediate vicinity. . . , and the congestion that could develop as a result of opening the proposed business in that location." Id at 604. (Citations Omitted, Emphasis Added)

Given the current heavy industrial uses of the property and the surrounding properties, the limited and winding access to the site, and the inherent dangers of a potential mix of propane with sources of ignition commonly found in repair garages, the ZBA should strongly consider denying this application, as the proposed use would likely imperil the public's safety.



Mr. Stuart B. Popper
March 6, 2017
Page | 3

Very truly yours,



RICHARD D. CARELLA, ESQ.
UPDIKE KELLY & SPELLACY, PC



140 Conn. 210
Supreme Court of Errors of Connecticut.

CHARCHENKO

v.

KELLEY.

July 28, 1953.

Appeal from action of Commissioner of Motor Vehicles in refusing to issue to plaintiff a certificate of approval for a used car dealer's and a repairer's license. The Court of Common Pleas, Litchfield County, Devlin, J., in trial to the court, entered judgment dismissing the appeal, and plaintiff appealed. The Supreme Court of Errors, O'Sullivan, J., held that the commissioner had not abused his discretion.

No error.

West Headnotes (3)

[1] Automobiles

Licenses and Taxes

Whether location for repairing automobiles and for dealing in used cars should be approved is to be determined upon basis of situation actually existing when certificate of approval is sought, and ultimate question is whether proposed use would imperil safety of public, and important considerations in resolving such question include general character of neighborhood, grades and degrees of curvature of roadway, existence of blind spots on roadway which interfere with good observation for approaching motorists, and daily presence of pedestrians on traveled portion of roadway. Gen.St.1949, §§ 2393, 2394, 2396.

1 Cases that cite this headnote

[2] Administrative Law and Procedure

Arbitrary, Unreasonable or Capricious

Action; Illegality

Automobiles

Licenses and Taxes

Determination of propriety of utilizing premises as location for used car and automobile repair business is an administrative matter which cannot be vested in judiciary under guise of appeal, and court on appeal from administrative determination could go no further than to decide whether such determination was illegal, arbitrary or an abuse of discretion. Gen.St.1949, §§ 2393, 2394, 2396.

4 Cases that cite this headnote

[3] Automobiles

Licenses and Taxes

Commissioner of motor vehicles did not abuse discretion in refusing to issue certificate approving certain premises as proper location for used car and automobile repair business. Gen.St.1949, §§ 2393, 2394, 2396.

1 Cases that cite this headnote

Attorneys and Law Firms

*210 **916 Michael V. Blansfield, Waterbury, with whom was Irving W. Pasternak, Waterbury, for appellant (plaintiff).

Louis Weinstein, Asst. Atty. Gen., with whom, on the brief, was George C. Conway, Atty. Gen., for appellee (defendant).

Before BROWN, C. J., and BALDWIN, INGLIS, O'SULLIVAN and CORNELL, JJ.

Opinion

*211 O'SULLIVAN, Associate Justice.

This case came to the Court of Common Pleas as an appeal from the action of the commissioner of motor vehicles in refusing to issue a certificate approving the plaintiff's premises on Hamilton Avenue, Watertown, as a proper location for repairing automobiles and for dealing in used cars. The court decided the matter on the transcript of proceedings before the commissioner and after personally

Charchenko v. Kelley, 140 Conn. 210 (1953)
98 A.2d 915

He thus applied the test prescribed by statute. His conclusion was one to which he might reasonably and logically have come in the light of the circumstances surrounding the use of the plaintiff's premises.

There is no error.

In this opinion the other Judges concurred.

All Citations

140 Conn. 210, 98 A.2d 915

Footnotes

- 1 'Sec. 2393. Location of business to be approved. No place of business for the sale of * * * used motor vehicles * * * or repairing shall be established or maintained unless the person establishing or maintaining such place of business shall have procured from the commissioner of motor vehicles a certificate stating that, in the opinion of said commissioner, the location of such place of business would not imperil the safety of the public. * * *

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143 Conn. 634
Supreme Court of Errors of Connecticut.

Joseph MASON

v.

BOARD OF ZONING APPEALS
OF THE CITY OF BRIDGEPORT.

July 24, 1956.

Proceeding to review action of board of zoning appeals in refusing to issue certificate approving garage owner's premises as suitable location for motor vehicle repair business. The Court of Common Pleas, Fairfield County, Meyers, J., dismissed the appeal, and garage owner appealed. The Supreme Court of Errors, O'Sullivan, J., held that under statute which provided that board of zoning appeals should not issue certificate of approval to garage owner for repair shop until location had been found suitable for the business, board, in denying new license because of conduct of previous owner in operating same business, abused its discretion.

Error; judgment directed.

West Headnotes (4)

[1] Zoning and Planning

⇌ Sales and service

Board of zoning appeals in receiving and hearing application for certificate approving garage owner's premises as suitable location for repairing motor vehicles, was not functioning either under municipal zoning ordinance or zoning statutes but was acting as local agency of General Assembly to determine whether certificate of approval should be issued. Gen.St.1949, § 2395; §§ 2392-2394, as amended Gen.St.Supp.1955, §§ 1308d-1310d.

8 Cases that cite this headnote

[2] Zoning and Planning

⇌ Sales and service

Under statute which provided that no certificate of approval of location of motor vehicle repair business should be issued until location had been found suitable for the business, board of zoning appeals, in denying new license because of conduct of previous owner in operating same business, abused its discretion. Gen.St.1949, § 2395; §§ 2392-2394, as amended Gen.St.Supp.1955, §§ 1308d-1310d.

9 Cases that cite this headnote

[3] Zoning and Planning

⇌ Effect of determination in general: res judicata and collateral estoppel

Where a board of zoning appeals issued a certificate of approval for conduct of garage repair business on certain premises and later refused issuance of a certificate to a successor owner, board, in absence of any change in circumstances, acted illegally in reversing itself. Gen.St.1949, § 2395; §§ 2392-2394, as amended Gen.St.Supp.1955, §§ 1308d-1310d.

4 Cases that cite this headnote

[4] Constitutional Law

⇌ Licenses, permits, franchises, and other privileges

A licensee has no vested right to renewal of license to conduct a business.

Cases that cite this headnote

Attorneys and Law Firms

*634 **921 Max Frauwrith, Bridgeport, for appellant (plaintiff).

John V. Donnelly, Bridgeport, for appellee (defendant).

Before INGLIS, C. J., and BALDWIN, O'SULLIVAN, WYNNE and DALY, JJ.

to find the test for the defendant to apply in reaching its determination.

[2] Section 2395 provides that '[n]o such certificate shall be issued until * * * such location has been found suitable for the business intended, with due consideration to its location in reference to schools, *638 churches, theaters, traffic conditions, width of highway and effect on public travel.' The defendant could legally go no further than to apply the test incorporated in the statute. It was authorized, and therefore obligated, to issue the certificate of approval to the plaintiff if the 'location' **923 was found 'suitable.' This meant that, under the statute, the defendant was to give or refuse to give its approval of a geographical site and not, for example its approval of the manner in which a previous owner may have conducted a repair business thereon. The record discloses that the evidence submitted to the defendant dealt exclusively with Frank's conduct of the business and of the annoyances to which he put his neighbors. Although the minutes of the executive session of the defendant, held after the conclusion of the public hearing, are silent as to the reason for denying the petition, the clear indication is that the refusal to issue the certificate was due to the manner in which the previous owner had run the business. Since this was the basis of the decision of the defendant, it utilized a test which it had no right to employ, and therefore the appeal should have been sustained.

[3] [4] There is, however, another ground requiring the same conclusion. On the facts which the record contains, the board should not have reversed its former holding, rendered on May 3, 1950, as to the suitability of the location. To be sure, a repairer's license expires annually on the last day of February. General Statutes,

Cum.Sup.1955, § 1308d. And a licensee has no vested right to its renewal. See Dadukian v. Zoning Board of Appeals, 135 Conn. 706, 709, 68 A.2d 123. However, when a business has been launched and continuously operated on a site officially declared suitable by a zoning *639 board of appeals, the status of suitability should normally continue. This conforms to the rule of law that, after an administrative agency has made a decision relating to the use of real property, it is ordinarily powerless to reverse itself, although it may do so if a change in circumstances has occurred since its prior decision, or other considerations materially affecting the merits of the subject matter have intervened and no vested rights have arisen. Hoffman v. Kelly, 138 Conn. 614, 616, 88 A.2d 382. Since there is nothing in the record to show any change of circumstances or the intervention of other considerations, the defendant acted illegally in reversing itself.

Since the only reasonable conclusion to which one may come upon the record is that the plaintiff was entitled to receive the certificate of approval, the defendant should be directed to issue it. Executive Television Corporation v. Zoning Board of Appeals, 138 Conn. 452, 457, 85 A.2d 904; Colonial Beacon Oil Co. v. Zoning Board of Appeals, 128 Conn. 351, 355, 23 A.2d 151.

There is error, the judgment is set aside and the case is remanded with direction to render judgment sustaining the appeal and ordering the defendant to issue the certificate of approval.

In this opinion the other Judges concurred.

All Citations

143 Conn. 634, 124 A.2d 920

KeyCite Yellow Flag - Negative Treatment
Distinguished by Ferreira v. Stratford Bd. of Zoning Appeals,
Conn.Super., September 10, 2003

48 Conn.App. 599
Appellate Court of Connecticut.

Antonio FERREIRA
v.
ZONING BOARD OF APPEALS
OF the CITY OF SHELTON.

No. 16932.

|
Argued Jan. 27, 1998.

|
Decided May 5, 1998.

Applicant sought review of decision of city zoning board of appeals denying application for certificate of approval for location of used car dealership. The Superior Court, Judicial District of Ansonia-Milford, Philip E. Mancini, J., sustained applicant's appeal and, sua sponte, granted zoning variance. Board appealed. The Appellate Court, Francis X. Hennessy, J., held that trial court improperly substituted its judgment for that of the board.

Reversed and remanded with direction.

West Headnotes (8)

[1] Zoning and Planning

↔ Grounds for grant or denial in general

When determining whether to issue a certificate of approval, zoning board of appeals must consider if the location is suitable for the proposed business; board must consider the proximity of schools, churches, and theaters to the proposed business, as well as traffic conditions such as the width of the highway and the effect on public travel. C.G.S.A. § 14-55.

2 Cases that cite this headnote

[2] Zoning and Planning

↔ Nature of proceedings; legislative, judicial, or administrative action

Zoning board of appeals acts as an agent of the state when it undertakes the consideration of a certificate of approval, and, therefore, it is governed by the Uniform Administrative Procedure Act (UAPA). C.G.S.A. § 14-55.

2 Cases that cite this headnote

[3] Zoning and Planning

↔ Decisions Reviewable

Actions of zoning board of appeals are appealable to the Superior Court.

Cases that cite this headnote

[4] Administrative Law and Procedure

↔ Substantial evidence

Role of the Superior Court is not to substitute its judgment on questions of fact for that of the agency where substantial evidence exists on the record to support the agency's decision. C.G.S.A. § 4-183(j).

2 Cases that cite this headnote

[5] Administrative Law and Procedure

↔ Substantial evidence

Administrative agency can find that substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred.

2 Cases that cite this headnote

[6] Zoning and Planning

↔ Evidence and fact questions

Zoning board of appeals' knowledge acquired through personal observation is proper evidence to be considered, when determining whether to issue certificate of approval. C.G.S.A. § 14-55.

Cases that cite this headnote

[7] **Administrative Law and Procedure**

Scope

When reviewing the trial court's decision reviewing administrative agency's action, Appellate Court seeks to determine whether decision comports with the Uniform Administrative Procedure Act (UAPA); Appellate Court looks to see if the trial court acted unreasonably, illegally, or in abuse of discretion. C.G.S.A. § 4-183(j).

2 Cases that cite this headnote

[8] **Zoning and Planning**

Sales and service

Trial court improperly substituted its judgment for that of the zoning board of appeals, with respect to application for certificate of approval for location of used car dealership, which board had denied; though court agreed with the board that the property was on a busy highway and that many businesses were located in the area, the court disagreed with the board on the size of the lot, and sustained the applicant's appeal without a finding that the board acted unreasonably, illegally, or in abuse of discretion. C.G.S.A. §§ 4-183(j), 14-55.

Cases that cite this headnote

Attorneys and Law Firms

****424 *600** Thomas J. Welch, with whom, on the brief, was John H. Welch, Jr., Shelton, for appellant (defendant).

William J. Ryan, Jr., Shelton, for appellee (plaintiff).

Before LAVERY, SPEAR and FRANCIS X. HENNESSY, JJ.

Opinion

FRANCIS X. HENNESSY, Judge.

The defendant zoning board of appeals of the city of Shelton (board) appeals from the trial court's judgment

sustaining the plaintiff's appeal from the board's denial of his application for a certificate of approval for the location of a used car dealership and the trial court's granting, sua sponte, a zoning variance to the plaintiff. The board claims that the judgment should be reversed because the trial court improperly (1) substituted its judgment for that of the board when it found that the proposed use of the site as a used car dealership complied with General Statutes § 14-55, and (2) granted a variance sua sponte when the only relief requested on appeal was the issuance of a certificate of approval for the location pursuant to General Statutes § 14-54. We reverse the judgment of the trial court.

The following facts are necessary to resolve this appeal. On July 18, 1996, the plaintiff, Antonio Ferreira, applied to the board for a certificate of approval to operate a used car dealership at 78 Bridgeport Avenue in Shelton pursuant to General Statutes § 14-53.¹ The proposed location is adjacent ****425** to a restaurant and ***601** across the street from an ice cream parlor and a medical office. In accordance with § 14-55,² the board gave notice of a public hearing on the application.

On August 20, 1996, the plaintiff attended the regular meeting and public hearing of the board. The following information was presented. In 1959, the proposed location was approved and licensed as a car sales place. The location had not been used for that purpose for several years, during which time, according to board member Matthew Gallo and based on his observations, the conditions on Bridgeport Avenue had changed considerably.

During the hearing, the board inquired concerning both the current and proposed uses of the property, with particular attention to the percentage of space utilized, available frontage area and the impact on traffic. The plaintiff testified that he planned to display ***602** approximately sixteen cars at a time and that parking for the public would be situated along the front of the building. Incidental to his business, the plaintiff intended to perform minor repairs on the cars he intended to sell. The board chairman, Gerald Glover, concerned about traffic, said, "I think it's a very congested place to have people possibly slowing down to find or look at used cars." Glover also expressed concern about the size of the property and its ability to support two businesses, the existing restaurant and the proposed used car business. The plaintiff did not present any testimony to rebut the

board members' statements regarding the current amount of traffic or the increase in it if the dealership opened, nor did he introduce maps indicating the division of property between the existing business and his proposed one.

The board unanimously voted to deny the plaintiff's application concluding that the proposed location was not suitable for use as a used car dealership and that the business would impede the flow of traffic on Bridgeport Avenue. The plaintiff appealed this decision to the Superior Court by writ and complaint. The plaintiff requested that the trial court direct the board to grant his application and award reasonable fees and expenses pursuant to General Statutes § 4-184a (b).

On January 21, 1997, the parties appeared before the trial court, *Mancini, J.*, where testimony and oral argument from counsel were presented. On February 7, 1997, the trial court issued its memorandum of decision wherein it reversed the board and granted the plaintiff a variance for the use requested.³ The trial court reasoned that, because **426 the proposed use was permitted by *603 existing zoning laws of the city of Shelton, it was presumed to be suitable. Further, on the basis of a personal inspection of the site, the court concluded that "there is a suitable amount of land necessary to conduct said business with limitations."⁴ The board now contests that judgment on appeal.

[1] When determining whether to issue a certificate of approval pursuant to § 14-55, the board must consider if the location is suitable for the proposed business. *New Haven College, Inc. v. Zoning Board of Appeals*, 154 Conn. 540, 543-44, 227 A.2d 427 (1967). The board must consider the following factors when making its decision: the proximity of schools, churches, and theaters to the proposed business, as well as traffic conditions such as the width of the highway and the effect on public travel. *Id.* The board asserts that, when the trial court concluded that the proposed site met the requirements of § 14-55, it ignored the appropriate standard of review; to wit, that trial court must uphold the board's decision as long as it is supported by the record.

[2] [3] [4] As a preliminary note, the board acts as an agent of the state when it undertakes the consideration of a certificate of approval, and, therefore, it is governed by the Uniform Administrative Procedure Act (UAPA). Its actions are appealable to the Superior Court. See *Mason*

v. Board of Zoning Appeals, 143 Conn. 634, 637, 124 A.2d 920 (1956). The role of the Superior Court is not to substitute its judgment on questions of fact for that of the agency where substantial evidence exists on the record to support the agency's decision. *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 587, 628 A.2d 1286 (1993); *604 see General Statutes § 4-183(j)(5).⁵ The board claims that it had ample evidence before it to deny the application for a certificate of approval.

In accordance with the mandates of § 14-55, a certificate of approval cannot be issued until the board finds that the location is suitable for the proposed use. One of the primary considerations of the board must be the effect of the business on traffic. See General Statutes § 14-55. The plaintiff argued on appeal to the Superior Court that the record was void of substantial evidence from which the board could consider the factors required by the statute. We disagree.

[5] [6] An administrative agency can find that substantial evidence exists if "the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred." (Internal quotation marks omitted.) *Connecticut Building Wrecking Co. v. Carothers*, 218 Conn. 580, 601, 590 A.2d 447 (1991). The record shows that the members of the board inspected the proposed location, considered the current amount of traffic, the number of businesses in the immediate vicinity of the location and the congestion that could develop as a result of the opening of the proposed business in that location. The board considered the evidence presented by the plaintiff addressing those factors, the knowledge gained by personal observation and the information from proponents and opponents at a public hearing. The board's knowledge acquired through personal observation is proper evidence to be considered. See *Atlantic Refining Co. v. Zoning Board of Appeals*, 150 Conn. 558, 562, 192 A.2d 40 (1963); *Dubiel v. Zoning Board of Appeals*, 147 Conn. 517, 522, 162 A.2d 711 (1960).

**427 [7] *605 "When reviewing the trial court's decision, we seek to determine whether it comports with the [UAPA]. *Griffin Hospital v. Commission on Hospitals & Health Care*, 200 Conn. 489, 496, 512 A.2d 199, appeal dismissed, 479 U.S. 1023, 107 S.Ct. 781, 93 L.Ed.2d 819 (1986). We look to see if the court reviewing the administrative agency acted unreasonably, illegally, or in

abuse of discretion.” *Vicino v. Zoning Board of Appeals*,
28 Conn.App. 500, 506-507, 611 A.2d 444 (1992).

[8] We conclude that the trial court agreed with the board that the property is on a busy highway and that many businesses are located in the area. The trial court disagreed, however, with the board on the size of the lot. It is not the role of the trial court to substitute its judgment for that of the board. The trial court did not find that the board acted “unreasonably, illegally, or in abuse of discretion”; *id.*; and, accordingly, should have dismissed the plaintiff’s appeal. We conclude that the trial court

improperly substituted its judgment for that of the board contrary to § 4-183(j).

The judgment is reversed and the case is remanded with direction to dismiss the plaintiff’s appeal.

In this opinion the other judges concurred.

All Citations

48 Conn.App. 599, 712 A.2d 423

Footnotes

- 1 General Statutes § 14-53 provides in relevant part: “Location of business to be approved. No place of business for the sale of new motor vehicles or used motor vehicles or for repairing shall be established or maintained unless the person establishing or maintaining such place of business has procured from the commissioner a certificate stating that, in the opinion of said commissioner, the location of such place of business would not imperil the safety of the public. The commissioner may revoke any such certificate whenever, in his opinion, such place of business will, by reason of its location, imperil the safety of the public....”
- 2 General Statutes § 14-55 provides in relevant part: “Hearing. In any town, city or borough the local authorities referred to in section 14-54 shall, upon receipt of an application for a certificate of approval referred to in said section, assign the same for hearing within sixty-five days of the receipt of such application. Notice of the ... hearing shall be published.... All decisions on such certificate of approval shall be rendered within sixty-five days of such hearing.... The reasons for granting or denying such application shall be stated by the board or official. Notice of the decision shall be published in a newspaper having a general circulation in such town, city or borough and sent by certified mail to the applicant within fifteen days after such decision has been rendered. Such applicant shall pay a fee of ten dollars, together with the costs of publication and expenses of such hearing, to the treasurer of such town, city or borough. No such certificate shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel. In any case in which such approval has been previously granted for any location, the local authority may, in its discretion, waive the requirement of a hearing on a subsequent application. In addition, the local authority may, in its discretion, waive the requirement of a hearing on an application wherein the previously approved location of a place of business is to be enlarged to include adjoining or adjacent property.”
- 3 The variance restricted the number of cars allowed on the property to twenty and the business to that of the resale of cars. Furthermore, the trial court required the plaintiff to erect a fence between the restaurant and the used car dealership.
- 4 The trial court used the term “variance” when it set conditions to be met by the plaintiff before a certificate of approval could be granted. A variance was not requested by any of the parties in this case nor was it a subject of discussion at the board hearing or trial court hearing. It was first introduced into the proceedings by the trial court in its decision.
- 5 General Statutes § 4-183(j) mandates that the trial court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are ... (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record....”



**Town of Cromwell
Zoning Board of Appeals**

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***PUBLIC HEARING AND MEETING
6:30 P.M. TUESDAY, FEBRUARY 14, 2017
ROOM 224 CROMWELL TOWN HALL, 41 WEST STREET***

Minutes and Record of Votes

Present: Chairman Joseph Morin, Brian Fisk, John Keithan, John Whitney, Stephen Wygonowski and Mark Zampino.

Absent: Vice Chairman Dan Delisle

Also Present: Director of Planning and Development Stuart Popper

1. **Call to Order** – The meeting was called to order by Chairman Joseph Morin at 6:41 pm.
2. **Roll Call** – The presence of the above members was noted.
3. **Seating of Alternates**

A motion was made by John Keithan and seconded by Mark Zampino to seat Alternates Brian Fisk and John Whitney. *All were in favor; the motion passed.*

4. **Approval of Agenda**

A **motion** was made by Brian Fisk and **seconded** by John Keithan to approve the agenda. *All were in favor; the motion passed.*

5. **Public Comments** – None.

6. **New Business:**

7. **Public Hearings:**

A **motion** was made by John Keithan and **seconded** by Mark Zampino to open the public hearings. *All were in favor; the motion passed.*

- a. Application #17-01: Request for Variances from Section 2.2.B Bulk Requirements of the Zoning Regulations (Front Yard Setback and lot coverage ratio) to allow for the construction of deck in the rear of 29 New Lane. Taylor Scot Gilman is the Applicant and the Owner.

Mr. Gilman addressed the Board saying that he wished to construct a deck to replace the existing back porches that have fallen into disrepair. He said that the deck would not be any closer to the street than the house itself.

Mr. Popper referred the Board members to the map attached to the copy of the application showing the location of the proposed deck. He noted that this is an older house that sits on a corner lot and therefore has two front yards. Mr. Popper said that due to its age and location the house is non-conforming to the current zoning setbacks and that the variance was for the front yard setback and the lot coverage ratio.

The Board members discussed the location of the house and the deck and surrounding neighborhood.

Chairman Morin asked if any members of the public wished to address the Board regarding this application. There were none. Mr. Popper said he had received two phone calls from the public and after he explained the application to them they appeared to have had all their concerns addressed.

A motion was made by John Keithan and **seconded** by Brian Fisk to close the public hearing for Application #17-01. *All were in favor; the motion passed.*

A motion was made by Brian Fisk and **seconded** by John Keithan to approve Application #17-01. *All were in favor; the motion passed.*

Chairman Morin explained that after the legal notice is published there is a fifteen 15 day appeal period. He said after the appeal period is over the applicant will receive the variance form to file on the land records. Chairman Morin said if the applicants have any questions they should contact Mr. Popper.

b. Application #17-03: Request for Variance from Section 4.2.D.3 Flood Plain Variance Procedures of the Zoning Regulations to allow for the reconstruction of a portion of Willowbrook Road. The Town of Cromwell is the Applicant and the Owner.

Mr. Jon Harriman Town Engineer said the Town has received a grant from the State of Connecticut and is moving forward with plans to reconstruct a portion of Willowbrook Road. He explained that the area in the vicinity of Willowbrook Plaza is located in a Special Flood Hazard Area and is subject to Section 4.2 of the Zoning Regulations. Mr. Harriman said the cut and fill activity proposed for the reconstruction involves the placement of 1,150 yards of fill within the flood plain and there is no place within the work area to compensate the proposed filling activity. He noted that Section 4.2.DD.3 allows for the granting of a variance for new construction and the project engineer has certified that there would be an immeasurable effect on the 100 year regulatory floodway from this fill activity.

Mr. Harriman and the Board members discussed the location and extent of the improvements proposed for Willowbrook Road by the project.

Chairman Morin asked if any members of the public wished to address the Board regarding this

application.

Helen Barnaby of 21 Sunridge Lane asked if the Town and the State ever looked at combining Country Squire Road and Willowbrook Road to make it safer. Mr. Harriman said that it was looked at but the issue was the existing grades in the area and that you would have needed to take the land from 1 Willowbrook to construct such a road.

Loretta Carigan of 23 Sunridge Lane said she was concerned about accessing Country Squire Road during the construction process. Mr. Harriman said the work would start at the upper end of Willowbrook Road and will take about one hundred sixty five days (165) and there would always be one lane open.

Beth Drake of 23 Sunridge Lane asked how many nearby roads in Cromwell have separate right turning lanes. Mr. Harriman said Coles Road and Berlin Road.

A **motion** was made by John Keithan and **seconded** by Brian Fisk to close the public hearings for Application #17-03. *All were in favor; the motion passed.*

A **motion** was made by John Keithan and **seconded** by Mark Zampino to approve Application #17-03. *All were in favor; the motion passed.*

c. Application #17-02: Request for a Motor Vehicle Location approval under Section 10.5 of the Zoning Regulations at 201 Main Street. Timothy Anderegg is the Applicant and S & S Partners Inc. is the Owner.

Attorney Sal Petrella said he was here tonight representing the Applicant Timothy Anderegg and noted that the owners Mr. Arthur Sibley senior and Mr. Arthur Sibley junior are also here tonight. Attorney Petrella summarized the application before the Board tonight, he described in detail the property, the uses at the site, the building and the location of the proposed garage. He also described the abutting properties and land uses.

Attorney Petrella explained that in 1995 the property owner applied for and received a Special Permit from the Zoning Board of Appeals for a Change of Non-Conforming Use. The permit allowed for the repair and service of trucks belonging to customers, in contrast with the existing non-conforming use (repair and service of trucks belonging to the property owner).

Attorney Petrella noted that from 2000 to 2004, a portion of the building was occupied by First Line Emergency Service, Inc., a Department of Motor Vehicles licensed repair facility. First Line performed major mechanical repairs to fire trucks and ambulances. Bill Sullo, the owner of First Line Emergency Services, Inc., held Department of Motor Vehicles Repairers License R4767 at 201B Main Street in Cromwell.

Attorney Petrella said since 2004, there have been other lessees who have used portions of the building to conduct repairs to diesel engines. Paul St. Amand operated Commercial Diesel Services out of the premises at 201 Main Street, repairing diesel engines in large boats and other water craft until sometime in 2008 or 2009. Cory Wagner then operated a boat and jet-ski engine repair facility at the premises. A DMV license was not required for those types of repairs.

Attorney Petrella explained that the owner currently has a lessee who now wants to open up a licensed facility for diesel truck and equipment repair. The lessee, Timothy Anderegg, who plans to operate as Bridgeview Truck and Auto, LLC, needs a Department of Motor Vehicles Repairers License in order to repair diesel trucks and automobiles. No license is needed to operate an equipment repair facility at this location.

Attorney Petrella said that zoning approval is a prerequisite to DMV licensing, which is the reason this application is being submitted. Cromwell has adopted a zoning regulation, Section 6.4.D 5, that restricts new motor vehicle repair facilities from opening up within 2,600 feet of an existing repair facility. There is an existing repair facility within 2,600 feet of 201 Main Street, namely Cromwell Automotive at 263 Main Street in Cromwell.

Attorney Petrella noted that the Purpose of this particular regulation, set forth at Section 6.4.A specifies the intent to provide for public garages “within certain zoning districts in the Town of Cromwell while minimizing environmental and aesthetic effects of through (sic) careful design, siting and screening.” This is an existing facility in an industrial area designed and intended for vehicle repair work.

Attorney Petrella explained that the prohibition in this regulation does not apply to the instant application as this is not a new motor vehicle repair facility. The property has been used as a repair facility for over fifty plus years, long before the adoption of this regulation. The intent to continue to use the property for such purposes was never abandoned by the present owner. All of his actions in using and leasing the property clearly indicate an attempt to continue this type of use.

Attorney Petrella closed by saying that the Zoning Board of Appeals should grant DMV location approval for a repair facility based upon all of the factors in this application, including its historic use, the previous Special Permit issued in 1995 for S&S Partners, Inc., and the previous DMV location approval in 2000 for First Line Emergency Services Inc. Alternatively, the use of this property as a repair facility should be grandfathered in, as that use existed and continued both prior to the adoption of the zoning regulations and prior to the adoption of the spacing regulation. Moreover, this is the most appropriate use of this property based upon the design, construction, historic and current use of the property.

Mr. Arthur Sibley Senior P.O. Box 734 Old Lyme, Connecticut addressed the Board. Mr. Sibley summarized the history of the property this included the development by the previous owner and all of Mr. Sibley’s efforts to improve the property. He spoke in length about the history of the previous automotive uses at the property and the proposed new tenant. Mr. Sibley noted that his son Arthur Sibley Junior and co-owner of the property is here this evening.

Mr. Timothy Anderegg of 22 Harlem Place East Hampton, Connecticut addressed the Board. Mr. Anderegg described the proposed automotive repair business he wishes to open at 201 Main Street. He summarized his work experience and his thoughts on Attorney Petrella’s position on the grandfathered use a garage at the site. Mr. Anderegg explained how his proposed use fits the site and questioned the motives of those here in opposition this evening.

Chairman Morin asked if there was anyone who wished to address the Board either in favor or against the application.

Mr. Rodney Bitgood owner of Cromwell Automotive at 263 Main Street Cromwell addressed the Board. He said he was here to speak in favor of Section 6.4.D.4 of the Zoning Regulations which requires that automotive uses be at least 2,600 feet apart. Mr. Bitgood noted that the last licensed motor vehicle operation left 201 Main Street in 2004 and therefore any new motor vehicle facility would be subject to the 2,600 foot rule.

Mr. Michael Slifer of 205 Pondview Drive Cromwell addressed the Board. He summarized the history of the 2,600 foot separation distance explaining that when the Planning and Zoning Commission updated the Zoning Regulations in 2011 they upped the separation distance from 1500 feet to 2,600 feet. Mr. Slifer said the goal was to limit the concentration of automobile uses so that certain streets in town would not become gasoline alleys so to speak. He said that given the history of the automotive uses at the site the new applicant should be subject to the required separation distance.

Attorney Richard Carella of Updike Kelly and Spellacy at 179 Main Street in Middletown addressed the Board. He said he was here to represent Mr. Bitgood. Attorney Carella raised a number of concerns he had regarding the operation of an automotive repair facility at 201 Main Street. He noted that the addition of a garage at the same location with the Daniels Propane facility may not be a safe match and the issue of the location of the building in the Special Flood Plain Zone has not been addressed. Attorney Carella also raised the issue of sharing the only access way in to the site with the existing Mattabassett Sewer facility and questioned where the location for the parking needed for the garage was.

Mr. Nicholas Anderegg of 16 Coe Avenue Portland addressed the Board. He said he is here in support of his father's application and He noted that some of these comments were self-serving and questioned the legitimacy of such comments.

Mr. Popper read a series of letters in opposition to the application. These included letters from:

Mr. Arthur Simonian Executive Director of the Mattabassett District 245 Main Street Cromwell raised concerns about traffic, vehicles on the shared driveway with the District and the use of the Mattabassett property and easement by vehicles and parking of equipment.

Mr. John Natale owner of C.A.R.S. LLC at 160 Sebethe Drive Cromwell in support of the current regulations.

Mr. Greg Godston owner of Ultimate Automotive at 551 Main Street Cromwell raised concerns about traffic at the site and supporting the current regulations.

Ed Bartolotta President and CEO of Cromwell Growers 419 Main Street said he was in support of Mr. Bitgood's comments regarding the last time and automotive use was at 201 Main Street and supports the current regulations.

Mr. Popper said given the question raised by Attorney Petrella as to whether or not the automotive use is grandfathered I think we need to ask the Town Attorney for her opinion. He recommended that the public hearing on Application # 17-02 be continued to the March 14, 2017 meeting. Mr. Popper said we should have the Town Attorney's opinion by then.

Chairman Morin agreed.

Attorney Petrella asked to address the Board regarding these comments. He again explained his position regarding the previously granted special permit for the operation of a repair facility. Attorney Petrella stated that none of the speakers against the application have been able to prove that the operation of a motor vehicle repair facility has been abandoned.

Mr. Arthur Sibley Senior addressed the Board. Mr. Sibley again discussed the history of the property and responded to the Mattabassett District concerns and Attorney Carella's comments.

Mr. Arthur Sibley Junior addressed the Board and responded to the comments about safety at Daniels Propane and parking and the Mattabassett District concerns.

Mr. Timothy Anderegg addressed the Board. Mr. Anderegg again explained how his proposed use fits the site and questioned the motives of those here in opposition this evening.

A **motion** was made by Mark Zampino and **seconded** by Brian Fisk to continue the public hearing until the next regular scheduled meeting which will be on Tuesday March 14, 2017 at 6:30 pm. All were in favor; the motion passed.

7. Commissioners Comments:

8. Approval of Minutes:

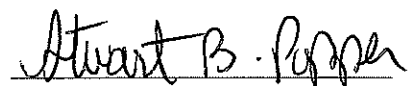
a. December 13, 2016

Chairman Morin noted that he was not present for that meeting and neither was John Whitney. A motion was made by Brain Fisk and **seconded** by John Keithan to approve the minutes. Joseph Morin and John Whitney abstained. *All others were in favor; the motion passed.*

9. Adjourn

A **motion** was made by John Whitney and **seconded** by Brian Fisk to adjourn at 8:40 pm. *All were in favor; the motion passed.*

Respectfully Submitted



Stuart B. Popper, Director of Planning and Development
Acting Clerk