

MEMORANDUM

TO: Mayor Dominique S. Thornton
FROM: Office of the City Attorney
DATE: October 8, 2003
RE: Legal Opinion – Substantial Change – Special Exception Applications

As the result of researching the issues raised by the Planning and Zoning Commission as to the current status of the law regarding the definition of what constitutes a substantial change between special exception applications filed on the same project, the following guidance is offered.

1) **Does the Planning and Zoning Commission have the authority to vote in the affirmative for a subsequent special exception application on the same project when it has denied a previous one?**

The answer to this inquiry is yes. With respect to the “prior application rule”, the Court has historically held that, “[F]rom the inception of zoning to the present time, we have uniformly held that a zoning board should not ordinarily be permitted to review its own decisions and revoke action once duly taken. Otherwise, as we have repeatedly said, there would be no finality to the proceeding and the decision would be subject to change at the whim of the board or through influence exerted on its members. The power of a zoning board to reconsider under some circumstances has, however, never been denied. We have consistently recognized its right to exercise that power (1) when a change of conditions has occurred since the prior decision of the board or (2) when other considerations materially affecting the merits of the subject matter have intervened and no vested rights have arisen.” *Mitchell Land Co. v. Planning and Zoning Board of Appeals of Town of Greenwich et al.* 140 Conn. 527, 533 (1953). Case law has held that these exceptions to the “prior application rule”, cited hereinabove, apply to variance applications, which, by their nature, allow an owner to use the property in a manner forbidden by the zoning regulations because failing to allow the owner to use the property in this manner presents practical difficulty or imposes unnecessary hardship upon the property owner.

In 1947, special exception applications were first recognized as a method of zoning by the Connecticut State legislature. A special exception or permit, in contrast to a variance, allows a property owner to put the property to a use the zoning regulations expressly permit so long as the use meets the conditions for the granting of the special exception set forth in the regulations. Because a special exception or permit is a permitted use under the zoning regulations, when the conditions of the regulations for the granting of that special exception are met, case law recognizes another circumstance when it is appropriate for a Commission to approve a subsequent application for a special exception after having denied a previous one. “An additional situation arises when the owner

requesting an exception files a subsequent application altering the plan under which he previously sought the exception, in order to meet the reasons for which the board denied the prior one." *Mitchell* at 534. "If, therefore, upon a second request for a special exception, there is a substantial change in the manner of use planned by the owner, the board is faced with an application materially different from the one previously denied. It may well be that the new plan, by reason of the changes made therein, will succeed, where the former failed, in satisfying the conditions enumerated in the regulations. Under such circumstances, the board is not precluded from granting the second application merely because it denied the first." *Mitchell* at 534. Therefore, any of the three circumstances discussed herein would allow a Commission to grant a special exception application, which has previously been denied.

2) What is considered a substantial change when considering a subsequent special exception application?

Case law does not specifically provide a definition of a substantial change. However, the case law does support that a determination of a substantial change will be made on the facts and circumstances provided in each case. For example, *Consiglio v. Board of Zoning Appeals of the City of New Haven*, 153 Conn. 433, 217 A.2d 64 (1966) involved a special permit to expand an existing gasoline station. The Court there overturned the Board's granting of a subsequent application after denial of the first. The Court said that replacing a driveway 40 ft. from the nearest residence; changing the lighting plan so that all light stayed within the confines of the subject property; and adding extensive fencing and landscaping to provide a buffer along the northern property line did not constitute substantial change thereby meriting the approval of the application.

In *Whiting v. The Board of Zoning Appeals of the City of New Haven*, 1994 WL60056 (Conn.Super.), the Court reversed the Board's approval of a subsequent application for elderly housing which it had previously denied because of 1) project density; 2) traffic; 3) parking conditions; and 4) the appropriateness of the location in regard to safety. The Court held that the addition of 15,240 square feet of land to the project; a report from the New Haven Department of Traffic and Parking studying the possibility of traffic signalization; the possibility of a paved bus stop landing; and an agreement between the applicant and a neighbor for use of a parking lot directly across the street did not constitute a substantial change, which would warrant the granting of the application. The Court said that "[B]eyond the above numbered findings, it appears to the court that the applicant submitted considerable new information at the second hearing which addressed the objections that had been raised at the first hearing but which constituted neither changed conditions nor a changed application." *Whiting*, 1994 WL 60056 at 4(Conn. Super.) In the *Whiting* decision, the Court provided some examples of what it considered to be a substantial change when addressing a subsequent application that had been denied based upon a traffic generation issue. The examples cited were the construction of a new road or a modification of the application so as to produce less traffic. *Whiting* at 3.

In *Shippee v. Zoning Board of Appeals of the Town of Old Lyme*, 39 Conn.Supp. 436, 466 A.2d 328 (1983), an abutting landowner brought an action appealing the Zoning

Board of Appeal's grant of a special exception to a property owner to construct an alternate energy system wind turbine tower. The board had first denied the application for the special exception listing the following four reasons: 1) the plans did not provide for any screening; 2) there were no safeguards to prevent the climbing of the tower; 3) the plan did not indicate whether setback requirements were met; and 4) the application contained conflicting information concerning the tower's height. The applicant appealed this decision to the Superior Court and, while the appeal was pending in the Superior Court, submitted a new application for the tower. The new application addressed the reasons for denial by 1) proposing a line of trees along the abutting owners boundary and shrubbery around the base of the tower to meet the Board's screening objections; 2) proposing the erection of an anti-climbing device made of three-quarter inch plywood and galvanized steel around the base of the tower as a protection against climbing; and 3) precisely specifying the tower's height and including an engineering map indicating that the structure would comply with the applicable open space yard, setback requirements. The Court upheld the Board's decision approving the second application holding that "[a] zoning board has the power to consider a second application for a special exception involving the same subject matter when the applicant files a subsequent plan which has been substantially changed to address the objections raised by the board in denying the original application." (Cites Omitted) *Shippee* at 438.

In *Mitchell Land Co. v. Planning and Zoning Board of Appeals of Town of Greenwich*, 140 Conn. 527, 102 A.2d 316 (1953), the applicant sought a special exception permitting the applicant to build and operate an asphalt mixing plant in a general business zone. Most of the surrounding area was devoted to industrial uses, although the land across the street from the subject property had single and double residences. The Board denied the first application and the applicant appealed. A second application was submitted while the appeal was pending. The reasons cited to support the denial included but were not limited to concerns that a large number of trucks would enter and exit the subject property daily creating a dangerous traffic situation and concerns that the unloading of sand and gravel, together with the truck movement, would cause a great deal of dirt and dust in the residential neighborhood. On rehearing the new application, it was determined that a large industrial use had been permitted on adjoining property since this denial and that the plan had been redesigned to provide entrance and exit ways for trucks and for on-the-lot parking while waiting for loads. Evidence was also introduced to show that the sand and gravel unloaded and used in the business would not cause dust and that lime dust would be bagged. The applicant also offered to wet down these materials and to confine them to bins and to oil the ground on the property to minimize the amount of dust generated by the truck traffic and materials. The Court held that the above changes to the original special exception application met the objections raised to the first application stating that "[i]f, therefore, upon a second request for a special exception, there is a substantial change in the manner of use proposed by the owner, the board is faced with an application materially different from the one previously denied." *Mitchell* at 534. "Since the alterations under which the company renewed its application were different from those under which it formerly sought an exception and since they met the objections prompting the previous denial, the board was justified in taking the action that it did." *Mitchell* at 535.

In conclusion, while the court has held that “[a] subsequent [permit] application made in order to bring a prior application into compliance with applicable regulations, no matter how minor the work involved may be, is clearly not minor in regard to its significance and effect. (Internal quotation marks omitted.) *Koepke v. Zoning Board of Appeals*, 230 Conn. 452, 458 (1994), the Court has always held that a Zoning Board does and may exercise discretion in determining whether a revised permit application complies with the applicable regulations. *Grasso v. Zoning Board of Appeals of the Groton Long Point Association, Inc. et al.* 69 Conn.App.230, 237 (2001). Therefore, the Commission, with the guidance of the abovementioned case law, must decide whether the applicant has submitted an application that has been substantially changed to address the objections raised by the Commission to the previous applications.

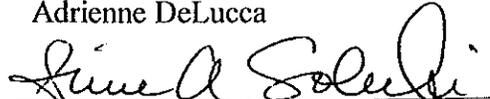
3) Should the Commission limit its comparison to the Nohl Crest 3 special exception application or should it go back to earlier applications and review the cumulative change?

In *Powers v. Madison Zoning Board of Appeals*, CV01-0454233, a 2002 Superior Court decision, the applicant requested a variance to build a house in excess of the 10% building coverage allowed by the zoning code in the Town of Madison and requested a significantly smaller setback along one property line where a 20 foot setback was required. The applicant submitted three applications beginning with a building coverage of 2,576.65 square feet as outlined in his first submission and ending with a building coverage of 1,984.91 square feet in the final application. The Board recognized the cumulative changes relating back to the first application as an appropriate consideration, when reviewing the third application, in supporting its approval of the final variance application and the Court agreed. There were no cases found addressing this same issue with respect to a special exception application. Therefore, without any law to the contrary, there is authority for the Commission in the instant case to review all of the prior applications concerning the subject property in the aggregate and not limit the Commission’s review of the instant application to only the Nohl Crest 3 application.

4) Do the changes in the four applications submitted to the Commission on the subject property constitute a substantial change?

This is not a question of law but one of fact for the Commission to decide based upon the law that has been cited to you. This is a decision solely within the jurisdiction of the Commission to decide. In making that decision, you should be guided by the fact that the Commission needs to decide whether the applicant has addressed the objections of the Commission supporting its reasons for the denial of these applications in the past. The Commission has the discretion to decide whether the applicant has addressed these objections and therefore meets the conditions for the granting of this special exception set forth in the zoning regulations.


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