DOCKET NO. CV 05 4012350 S	: SUPERIOR COURT
KONIGSBERG, ET AL	: JUDICIAL DISTRICT OF NEW HAVEN
V.	: AT NEW HAVEN
CITY OF NEW HAVEN BOARD OF ALDERMAN, ET AL	: APRIL 27, 2006

DOCKET NO. CV 05 4014153 S	: SUPERIOR COURT
KONIGSBERG, ET AL	: JUDICIAL DISTRICT OF NEW HAVEN
V.	: AT NEW HAVEN
NEW HAVEN CITY PLAN COMMISSION, ET AL	: APRIL 27, 2006

MEMORANDUM OF DECISION

STATEMENT OF THE CASE

These two captioned matters have been consolidated for trial and disposition. The plaintiffs appeal various actions of the defendants whereby the City of New Haven enacted a series of planning and zoning changes affecting real property at 691 Whitney Avenue.

The appellants allege statutory aggrievement and irreparable injury and harm. They all own real property located within a radius of 100 feet of 691 Whitney Avenue on Everit Street.

A brief recitation of the activities and events preceding the protested zone changes is essential to an understanding of the dispute.

The City intends to utilize this site to erect a new "K-8 Worthington Hooker School," utilizing the existing church structure as part of the complex. With this as its goal, the City acquired the subject property, apparently anticipating also acquiring the adjacent American Red Cross Headquarters. When this acquisition proved to be impossible, the "fall-back" position became the 691 parcel alone.

The disputed parcel is one of several "institutional" designations so described along Whitney Avenue. This area of Whitney Avenue, from Edwards Street north to the city line, is one of high residential density but also one of the City's most expensive and desirable sections.

The City has long recognized the unique character of the area by according it great deference and creating along Whitney Avenue the only RH-1 zone in the City.

The actions of the City with respect to 691 Whitney Avenue (zoned RH-1) and the amendments affecting the RH-1 zone are at the core of this dispute. These amendments were attacked and justified by the parties in the planning and zoning amendment process, with the City arguing it was all consistent with the City Plan and would stabilize the neighborhood. The property owners, on the other hand, point to the expansion of the RH-1 one as "spot zoning and deplore the present project as well as what they claim will be the result of the changes enacted.

STANDARD OF REVIEW

In reviewing the decision of a zoning commission, a court can not substitute its judgment for that of the board or commission. The question is not whether the trial court would have reached the same conclusion but whether the record supports the decision. (Citations omitted).

It necessarily follows that the sheer weight of numbers in opposition to the decision does not carry the day. Similarly, the plight of school children waiting for a promised solution to their temporary deployment is not controlling, despite there being no group more appealing than school children.

DISCUSSION

I

Aggrievement

At the commencement of the hearing of these consolidated appeals, the parties stipulated that the plaintiffs named herein have an ownership interest in the stated real property parcels and those parcels are within a 100 feet radius of 691 Whitney Avenue (691) and are aggrieved. They are found to be statutorily aggrieved.

II

The Amendments Enacted

Prior to the enactment of the amendments now in dispute, 691 was classified in two zoning districts. The front portion facing Whitney Avenue was in the RH-1 zone

mentioned above and the rear portion, fronting on Everit Street, was zoned RS-1. Only a portion of the existing church structure was in the RS-1 zone.

The feature of the disputed enactments is the re-zoning of this rear portion of 691 from RS-1 to RH-1. This is the first incursion of this zone onto Everit Street and the deepest penetration of the zone into the RS-1 zone. In fact, this is the first time the RH-1 zone has been extended so as to have actual frontage on any street in the RS-1 zone other than Whitney Avenue. (RR-126).

Accompanying the actual zoning change was a textual amendment to Section 15, "Special High Density" Districts. (RR2). The pronounced purpose of this amendment, as set forth in the request for the change to the Board of Aldermen by the City Plan Department, is :

> ".... To allow properties in the RH-1 zone which are already in use for institutional purposes to be reused for certain other institutional uses. Specifically, the proposal amends the ordinance to make it clear that existing institutional properties may be used as-of-right for elementary and secondary schools, religious institutions and pre-school programs subject to the proposed building requirements. The RH-1 zone is limited to the northerly portion of the Whitney Avenue corridor from Edwards Street to the New Haven City Limits." (RR-2).

In an accompanying letter to the Board, also on Feb 1, 2005, the City Planner states, in addressing the zoning map amendments of 691 from RS-1 to RH-1:

> "This application is related to an application submitted in the RH-1 district herewith for text amendment to clarify that properties currently in use for institutional purposes may be re-used for certain other institutional purposes. ...

> Under current conditions, the site is used for a religious institution. The main structure is located primarily in the RH-1 portion of the parcel fronting on Whitney Avenue, while a paved parking lot occupies almost the entire RS-1 (rear) portion of the parcel along Everit Street.
>
> The proposed map amendment is consistent with the Comprehensive Plan of Development which identifies institutional use as the most desirable use for the entire parcel located at 691 Whitney Avenue (without distinction for the portion of the parcel located within the RS-1 zone). The Comprehensive Plan of Development also anticipates that 691 Whitney Avenue will be used for educational purposes. Therefore, City Plan requests that this parcel be rezoned so that planning for this property is conducted under a single zoning designation: RH-1." (RR 3).

While the use of "institutional purposes" and "institutions" occurs throughout the code dealing with the RH-1 an RS-1 sections, there is no definition of these terms in the code. In the absence of definitions, one must resort to the generally accepted usage of the term.

Ballentine's Law Dictionary (3rd Edition) offers this definition:

> "**institution.** The act of instituting or establishing something. Something that has been established, particularly a place where an educational or charitable enterprise is conducted. Trustees of Kentucky Female Orphan School v. Louisville, 100 Ky 470, 36 SW 921. A school, library, hospital, or auditorium, provided by a municipal corporation. 38 Am J1st Mun Corp §§ 559 et se."

Id. at p. 640.

Many of the "institutional uses" on Whitney Avenue in this RH-1 zone are neither educational nor charitable. For example, we have a City Fire Station and the New Haven

County Medical Society. At least two other uses are questionable as "institutional," the Whitney Arts Center and Planned Parenthood, for example.

With these factors in mind, we turn to consideration of the petitioners' objections, though not necessarily in the precise order they were presented.

III

Adherence To The Master Plan

A.

While the City argues all of the disputed changes are consistent with its Master Plan of Development, the court has difficulty in accepting that premise when the changes are scrutinized.

The comprehensive plan is to be found in the scheme of the zoning regulations themselves. Beker v. Planning and Zoning Commission, 212 Conn. 471, 483 (1989). A zone change must be in accordance with the comprehensive plan. First Hartford Realty Corporation v. Planning and Zoning Commission, 165, Conn. 533, 541 (1973).

As the court noted above, this expansion of RH-1 zone is the first and only such zone created with frontage on any street but Whitney Avenue. It is also the deepest extension of RH-1 into any RS-1 zone.

These changes also appear to be in direct conflict with the zoning code treatment of the SR-1 zones. In Section 11, the preface reads in part:

> **"Section 11. RS-1 Districts: Special Single-Family.**
>
> *Description and purpose.* These districts exist for the protection of certain fully developed single-family areas of

relatively small total size but of unique and irreplaceable value to the community as a while. The specific purpose of these districts is to stabilize and preserve the low-density residential character of these areas to the maximum possible extent. To this end the use of land and buildings within these areas is limited primarily to single-family homes. The particular character, size and surroundings of these areas create little need for the location within their boundaries of further such non-residential uses as generally support a low-density residential area, and the location of any further such uses within these areas would undesirably limit or diminish the number of homes in them. It is hereby found and declared that these regulations are necessary for the protection of these areas and that their protection is essential to the maintenance of a balanced community of sound residential areas of diverse types."

The City's long standing concern and attention to this area of the City is re-enforced in the preface to Section 15, the RH-1 zone:

"Section 15. RH-1 Districts: Special high density.

Description and purpose. These districts exist for the protection of certain multi-family areas of relatively small total size but of unique and irreplaceable value to the community as a whole. The specific purpose of these districts is to stabilize and preserve the existing residential character of these areas to the maximum possible extent. To this end, the use of land and buildings within these areas is limited primarily to relatively high density residential uses, as the particular character, size and surroundings of these areas create little need for the locations within their boundaries of further other such non-residential uses as generally support a residential area. Moreover, these areas are found especially along major streets traversing large residential sections of the city, and the outward movement of office or other commercial uses along these streets would constitute a serious threat to the residential quality of the areas to either side of them. Encroachment of office or other commercial uses along these streets would violate the spirit of this ordinance and its general purpose and intent and, any other

> provision of this ordinance to the contrary notwithstanding, no variance shall be granted for such uses in these districts. It is hereby found and declared that these regulations are necessary to the protection of these areas and that their protection is essential to the maintenance of a balanced community of sound residential areas of diverse types.

The Return of Record (RR 10G) contains a photo-image of the completed site. Examining that submission, prepared by Mr. James Nowak, one is struck by the sheer mass of the project in light of the description and purpose of the RS-1 district.

Again recalling the limits of the court's review, this represents such a drastic departure for the re-zoned section of 691 that the Court must conclude the RS-1district will be neither protected, stabilized nor retain its character. The RS-1 district, a key element of the Master Plan, is being compromised.

B.

Since 1962, the City has protected these SR-1 zones, anticipating the time when the non-conforming but permitted uses would seek to expand by enacting the following under Section 11, III-4:

> "When in existence on the effective date of the RS-1 District provisions, items in subsection 11.(b)(2)b. may be further developed and expanded as follows:
>
> 1. Property owned by such an institution in an area designated as an RS-1 District on the effective date of such designation may be used and further developed by the institution owning it for its own religious or educational purposes, as of right, regardless of any other provision of this section 11. by special exception, such property may be used and developed by another religious or educational institution as described above, provided that such other institution shall not be allowed to expand under clauses 2. and 3. below."

This long standing element of the Master Plan is another feature these changes will nullify. These SR-1 property owners will lose the benefit of having an applicant meet the special exception requirements. As argued by the petitioner, they will incur the risk of present users swapping their "as of right" status to a successor. The court can find no provision in the Master Plan or Zoning Code that permits this anywhere else.

C.

One must also question the claim that this site has long been consistent with the Master Plan.

The City Planner proposed the RH-1 textual changes and expansion "to make it clear that existing institutional properties may be used-as-of right..." (See RR 2, supra) and to "clarify that properties currently in use for institutional purposes may be re-used for other institutional purposes." (See RR 3, supra).

Thus, even the City was in doubt as to what the Master Plan meant for the Whitney Avenue RS-1 and RH-1 zones.

Actually, though this selection and planning process took several years, there has been nothing offered by the City to support the suggestion that this end product is a "carved in stone" element of the Master Plan.

It is the modified Zoning Code and Master Plan because the City has adopted the changes to so designate it. And, one cannot overlook the fact that in the early stages of the process, 691 was only a portion of the parcel which was being discussed for this zoning makeover.

Further, prior to enacting the amendments complained of, the City had applied for approval of a "Planned Development District," (PDD). This proposal would also have permitted the implementation of the proposed school project.

After an adverse Appellate Court decision involving another PPD application, this application was withdrawn.

This history further clouds the issue of what Master Plan the City claims designated 691 for a public school and when this "plan" evolved.

The court finds it intriguing that the city relies on the actual texts under attack to argue their validity.

D.

The "institutional uses" located along Whitney Avenue and described above are all non-conforming uses.

Section 67 of the Zoning Code of the City addresses their status as follows:

> **"Section 67. Nonconforming uses, structures and lots.**
>
> (a) *Statement of purpose.*
> (1) A nonconforming ***use, structure*** or ***lot*** is one which existed lawfully, whether by variance or otherwise, on the date this Zoning Ordinance or any amendment thereto became effective, and which fails to conform to one or more of the applicable regulations in the Zoning Ordinance or such amendment thereto.
>
> (2) Such nonconformities are incompatible with and detrimental to permitted ***uses, structures,*** and ***lots*** in the zoning districts in which they are located; they cause disruption of the comprehensive land use pattern of the city; they inhibit present and future development

> of nearby properties; and they confer upon their owners and users a position of unfair advantage.
>
> (3) It is a fundamental principal of zoning law that nonconformities are not to be expanded, and that they should be abolished or reduced to conformity as quickly as the fair interests of the parties will permit. This principle is declared to be the intent of this ordinance.
>
> (4) It is the further intent of this ordinance that existing nonconformities shall not cause further departures from the Zoning Ordinance, and therefore the existence of any present nonconformity anywhere in the city shall not in itself be considered grounds for the issuance of a variance of any other property.

Section 3, above, pronounces the objective of the City's code and plan. Such uses are not to be expanded and should be abolished. Notwithstanding this clear statement, these zoning amendments do the reverse.

The new test for RH-1 zones permits new elementary and secondary schools, religious institutions and pre-school programs as of right on the existing institutional properties. Then, by re-zoning the rear of 691 from S-1 to Rh-1, that area fronting on Everit Street is opened up for then newly created RH-1 use.

The court has commented above on the City's failure to respect the purpose of the RS-1 zone. Those purposes are further neutralized by these textual changes in that they pose a threat for the future.

The RH-1 zone is now deeper into RS-1 than before. This intrusion is inconsistent with the stabilization and preservation of the area, both because of the present plan and

the likelihood of future intrusion, made more likely because of this one. No consideration appears to have been given to these issues.

IV

Spot Zoning

Spot Zoning is the "reclassification of a small area of land in such a manner as to disturb the tenor of the surrounding neighborhood." (Morningside Assn. v. Planning & Zoning Board, 162 Conn. 154, 161 (1972). To constitute spot zoning, the change must contain a small area of land and the change must be out of harmony with the comprehensive plan adopted to serve the needs of the community as a whole. (First Hartford Realty v. Plan and Zoning Commission, 165 Con. 533, 542 (1973).

The rear portion of 691 which is the subject of the zone change from RS-1 to RH-1 measures about 200 feet by 250 feet. It is certainly a small piece of the SR-1 area which occupies several blocks on both sides of Whitney Avenue. The new RH-1 parcel is surrounded on both sides and across the street by an SR-1 zone.

With this change, new institutional uses will be permitted. As noted above, this ignores the non conforming character of the institutional uses and the purpose of Section 11, to stabilize and protect the SR-1 zones. This language of Section 11 is relevant:

> "The particular character, size and surroundings of these areas create little need for the location within their boundaries of further such non-residential area, and the location of any further such uses within these areas would undesirably limit or diminish the number of homes in them. It is hereby found and declared that these regulations are necessary for the protection of these areas and that their protection is essential

> to the maintenance of a balanced community of sound residential areas of divers types. (Emphasis added).

In general, to constitute "spot zoning," the ordinance must pertain to a single parcel or a limited area, ordinarily for the benefit of a particular property or specially interested group and must be inconsistent with the city's comprehensive plan. 83 Am Jur. 2d, § 110, page 136.

The court concludes the enacted provisions violate these standards and the change of zone of 691 rear from SR-1 to SH-1 is spot zoning.

V

The City argues that it has "satisfied all applicable zoning regulations," leaving the Plan Commission no alternative but to approve the site plan. As noted above, this is premised in part on the rezoning of the rear of 691, a subject of this appeal.

However, that aside, as the defendant cites in its brief, "A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning ... regulations." (Citing R&R Pool & Patio, Inc. v. Zoning Board of Appeals, 257 Conn. 469 (2001). And the court recognizes the liberal discretion vested in a planning and zoning commission.

However, as noted above the site plan ignores the intent of three vital sections of the zoning code, riz. Sections 11, 15, and 67. Without the questioned zone change, it could not do on the rear of 691 what it proposes to do.

Further, significant testimony as to the impact of this site plan approval and zone change on the neighborhood was presented at the public hearings.

Norman Cole, Planner for the City of Stamford, testified for the plaintiffs. He stated that the changes "will seriously impact other policies and goals expressed in the Master Plan regarding the protection of existing neighborhoods and will directly conflict with other expressed purposes within the RH-1 district." (RR 43).

James W. Nowak presented voluminous material on a variety of subjects, including the site selection process employed by the City. He addressed the impact on the neighborhood in detail. (RR 10, 111-114).

This data was all apparently ignored on the premise that the proposed use of the parcel for a school was a permitted use and thus none of the potential consequences were factors to consider.

This position is contrary to what our Supreme Court has said in numerous decisions, stating that property whose use constitutes a permitted use is not immune from regulation under the laws of nuisance or other applicable statutes..." Friedman v. Planning and Zoning Commission, 222 Conn. 262, 266 (1992).

The court does not accept the defendants' argument that this is a permitted use and the plaintiffs' objections have no place in the proceedings.

In addressing the concerns expressed over traffic issues, the Commission apparently accepted the City's response that they would be "finalized in close concert with the City and the traffic department."

Yet, an examination of the City's traffic studies and accompanying charts indicates that one may expect a substantial surge of motor vehicle activity at this site if this school were built. (RR 54).

The anticipated "new vehicle trips" total 290 for the morning "school peak hour period" and 285 for the afternoon. This is traffic which would enter the school site, drop off students and emerge onto Whitney, less the 40 cars of staff and visitors. No school bus traffic is anticipated and apparently there will be no deliveries or service vehicles.

Those figures are frightening to contemplate and when one adds rain, snow and sleet to the picture, the spectacle is alarming. It is particularly alarming when you realize that the proposed zoning amendment would permit existing institutional properties to be used as of right for elementary and secondary schools, religious institutions and pre-school programs.

One is left to ponder how these traffic issues involving the conservative projections in the study will be "finalized in close concert with the City and the traffic department."

The City has also argued that this project represents a permitted use under the existing zoning regulations. Section 11, III-4, quoted above does not indicate that to be so.

While the institutional use already in existence can be further developed for "its own religious or educational purposes," such property may be used and developed by another religious or educational institution by special exception.

This would appear to be a section the proposed amendments would by-pass.

These changes portend an "open season" for Whitney Avenue and the residential properties located in the RS-1 and RH-1 zones. The court views this disregard of Sections 11, 15 and 67 as violations of the zoning regulations.

CONCLUSION

These consolidated appeals are hereby sustained.

1. The decision of the defendant Board of Aldermen granting the application of the defendant City Plan Department is declared null and void and is vacated.

2. The decision of the defendant City Plan Commission granting the application of the defendant Board of Education is declared null and void and is vacated.

Anthony V. DeMayo,
Judge Trial Referee