Ridgway application

Williams, Joseph <JWilliams@goodwin.com>

Tue 11/28/2023 11:40 AM

To:Land use <landuse@cornwallct.gov>
Cc:ianingersoll@gmail.com <ianingersoll@gmail.com>

3 attachments (398 KB)

Miskimen v Biber.pdf; Fox v Zoning Bd of Appeals of Town of West Hartford.pdf; 1-1 Words and phrases Construction of statutes.pdf;

Karen,

Attached please find legal references for you to please share with the P&Z Commission and include in the record on this application. I am submitting them on behalf of my client, Ian Ingersoll, who resides at 136 Town Street, immediately abutting 142 Town Street, and who is opposed to the proposed Ridgway cidery project at that location.

As I explained at the first night of public hearing, for a use to be accessory to the principal use, it must be dependent on or subordinate to the principal use. Here, the principal use is farming, however, the farm raises livestock; produces maple syrup; and grows vegetables. By the applicant's own admission, they do not have an established apple orchard. If the cidery is established before the planting of apples, then the apple orchard will be incidental to the cidery, which is not permitted.

"An accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use." *Fox v. Zoning Bd. of Appeals of Town of W. Hartford*, 146 Conn. 70, 74 (1958). "Accessory uses are, by definition, uses 'located on the same lot, and must be subordinate and customarily incidental to, the principal use.'" *Miskimen v. Biber*, 85 Conn. App. 615, 623 (2004) (*quoting D & J Quarry Products, Inc. v. Planning & Zoning Commission*, 217 Conn. 447, 456 (1991)).

Further, the definition of "Agriculture" set forth in General Statutes § 1-1(q) and adopted by the Cornwall Zoning Regulations includes the processing of produce where it is incidental to ordinary farming operations. Here, producing cider is not incidental to the ordinary operations of the Ridgway farm because the farm does not grow apples. In fact, the Application specifies that cider will not be made from apples grown on the farm until 2028. As such, cider making cannot be subordinate to growing apples on the farm and Section 10.5.f.1 of the Zoning Regulations cannot be satisfied until 2028 at the earliest.

Thank you.

Joe Williams

Joseph P. Williams
Shipman & Goodwin LLP
Partner
JWilliams@goodwin.com
[www.shipmangoodwin.com]www.shipmangoodwin.com

New Haven Office
265 Church Street - Suite 1207
New Haven, CT 06510-7013
Tel: (203) 836-2804
Cell: (860) 306-0429

Hartford Office
One Constitution Plaza
Hartford, CT 06103-1919
Tel: (860) 251-5127
Cell: (860) 306-0429

Shipman & Goodwin LLP is a 2022 Mansfield Certified Plus Firm

Disclaimer: Privileged and confidential. If received in error, please notify me by e-mail and delete the message.

Ridgway application

Williams, Joseph <JWilliams@goodwin.com>

Tue 11/28/2023 11:40 AM

To:Land use <landuse@cornwallct.gov>
Cc:ianingersoll@gmail.com <ianingersoll@gmail.com>

3 attachments (398 KB)

Miskimen v Biber.pdf; Fox v Zoning Bd of Appeals of Town of West Hartford.pdf; 1-1 Words and phrases Construction of statutes.pdf;

Karen,

Attached please find legal references for you to please share with the P&Z Commission and include in the record on this application. I am submitting them on behalf of my client, Ian Ingersoll, who resides at 136 Town Street, immediately abutting 142 Town Street, and who is opposed to the proposed Ridgway cidery project at that location.

As I explained at the first night of public hearing, for a use to be accessory to the principal use, it must be dependent on or subordinate to the principal use. Here, the principal use is farming, however, the farm raises livestock; produces maple syrup; and grows vegetables. By the applicant's own admission, they do not have an established apple orchard. If the cidery is established before the planting of apples, then the apple orchard will be incidental to the cidery, which is not permitted.

"An accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use." *Fox v. Zoning Bd. of Appeals of Town of W. Hartford*, 146 Conn. 70, 74 (1958). "Accessory uses are, by definition, uses 'located on the same lot, and must be subordinate and customarily incidental to, the principal use.'" *Miskimen v. Biber*, 85 Conn. App. 615, 623 (2004) (*quoting D & J Quarry Products, Inc. v. Planning & Zoning Commission*, 217 Conn. 447, 456 (1991)).

Further, the definition of "Agriculture" set forth in General Statutes § 1-1(q) and adopted by the Cornwall Zoning Regulations includes the processing of produce where it is incidental to ordinary farming operations. Here, producing cider is not incidental to the ordinary operations of the Ridgway farm because the farm does not grow apples. In fact, the Application specifies that cider will not be made from apples grown on the farm until 2028. As such, cider making cannot be subordinate to growing apples on the farm and Section 10.5.f.1 of the Zoning Regulations cannot be satisfied until 2028 at the earliest.

Thank you.

Joe Williams

Joseph P. Williams
Shipman & Goodwin LLP
Partner
JWilliams@goodwin.com
[www.shipmangoodwin.com]www.shipmangoodwin.com

New Haven Office
265 Church Street - Suite 1207
New Haven, CT 06510-7013
Tel: (203) 836-2804
Cell: (860) 306-0429

Hartford Office
One Constitution Plaza
Hartford, CT 06103-1919
Tel: (860) 251-5127
Cell: (860) 306-0429

Shipman & Goodwin LLP is a 2022 Mansfield Certified Plus Firm

Disclaimer: Privileged and confidential. If received in error, please notify me by e-mail and delete the message.

commission, when a violation results in special damage to an individual, the injured party has a right to seek relief. *Schomer v. Shilepsky,* 169 Conn. 186, 194, 363 A.2d 128, (1975). The requirement of special damages serves to differentiate individuals specifically and materially damaged by a zoning ordinance violation from members of the general public who do not have standing. The plaintiffs are not members of the general public. They are adjacent homeowners who have shown specific and material damage as a result of the violation.

The defendants argue that the present case is moot because of the separate pending public action. In essence, the defendants argue for the application of the exhaustion doctrine. The exhaustion doctrine does not apply. "Under our exhaustion of administrative remedies doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum.... In the absence of exhaustion of that remedy, the action must be dismissed." (Internal quotation marks omitted.) *George v. Watertown,* 85 Conn.App. 606, 609–10, 858 A.2d 800 (2004). As previously stated, the plaintiffs allege special damages, and we adhere to the rule that "[i]f the plaintiffs have suffered special damages as alleged in their complaint, the court has equitable jurisdiction and may grant injunctive relief." (Internal quotation marks omitted.) *Reynolds v. Soffer,* 183 Conn. 67, 70, 438 A.2d 1163 (1981). "The relief sought and the issues raised are distinctly equitable in nature. To hold that the plaintiffs had an adequate remedy at law which required that they exhaust their administrative remedies before the zoning board of appeals is to ignore the claims made and the nature of the action." (Internal quotation marks omitted.) Id., at 69–70, 438 A.2d 1163. For those reasons, the court did have subject matter jurisdiction.

4 With respect to count three, the court also determined that the musical festivals conducted on the campground resulted in objectionable noise in violation of the zoning regulations. The defendants subsequently filed a motion to open the judgment and to modify the injunctive relief regarding the objectionable noise regulation. The court granted the motion to open and to vacate. Thereafter, we ordered the parties to appear sua sponte. We dismissed as moot the portion of the appeal challenging the injunctive relief as to the noise regulations.

5 The defendants also claim that the court improperly granted injunctive relief enjoining them from selling music festival tickets to members of the general public. The defendants argue that the court failed to make any finding in its memorandum of decision that the plaintiffs would suffer irreparable harm or special damages from the defendants' alleged violation of the zoning regulations. Because we determine in part I that members of the general public are barred from festivals, we need not address that claim.

6 The court and the parties refer to "campers" and "members of the general public" by various names. "Campers" are occasionally referred to as "regular campers" or "overnight campers." "Members of the general public" are often referred to as "nonregular campers," "noncampers," "day campers," "not registered campers" or "outsiders." For the sake of clarity, we will refer to those two categories only as "campers" and "members of the general public."

7 We take judicial notice of the court's decision in *Miskimen v. Zoning Board of Appeals,* supra, Superior Court, Docket No. 123420, 2003 WL 22133863, brought by the present plaintiffs against the zoning board of appeals of the town of Preston. The present private action was brought before the zoning action was commenced. The appeal in the present case was pending before the resolution of the zoning action. We denied certification to appeal with respect to the zoning action.

8 Nothing in this opinion precludes the defendants from properly applying for a special permit under § 15.13 of the zoning regulations, which is entitled, "Commercial Recreation Facilities," to conduct musical festivals that are open to the general public.

9 Contiguous is defined in relevant part as: "Literally, in actual contact, an actual touching...." Ballentine's Law Dictionary (3d Ed.1969).

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

"The theory upon which a case is tried in the trial court cannot be changed on review, and an issue not presented to or considered by the trial court cannot be raised for the first time on review. Moreover, an appellate court should not consider different theories or new questions if proof might have been offered to refute or overcome them had they been presented at trial." *Ritcher v. Childers,* 2 Conn.App. 315, 318, 478 A.2d 613 (1984).

The issue of whether the zoning ordinance bars members of the general public from all activities was not presented to or ruled on by the trial court. The court's articulation states: "The trial court *clearly* ruled that sale of tickets to [members of the general public] for music festivals violated the zoning regulations. The court did not order [campers] barred for all activities." (Emphasis added.) That statement in the court's articulation ***626** sets forth what the court did and *did not* rule on. ****813** Because that issue was not ruled on by the court, we cannot review the issue for the first time on appeal.

V

The plaintiffs claim on cross appeal that the court improperly concluded that parking on the excess land was a proper accessory use. Because we must review the zoning ordinance, our review is plenary. *Doyen v. Zoning Board of Appeals,* supra, 67 Conn.App. at 604, 789 A.2d 478.

The court determined that "[t]he parking of recreational vehicles, automobiles and recreational activities west of Pierce Road are valid accessory uses to a recreational campground." The court found that there was no special exception for the excess land and made its determination by focusing on whether the activity on the excess land was a proper accessory use. The court stated that it would be "customary for parking and recreation users to be incidental to a campground, and the defendants offered testimony that such uses commonly accompany campgrounds. Without Strawberry Park, the accessory uses would not occur. Therefore, the uses west of Pierce Road are valid accessory uses." The court, however, failed to address the threshold question of whether the excess land west of Pierce Road *could properly be* considered for an accessory use. Section § 23.2 defines an accessory use as "a use or a building customarily incidental and subordinate to the principal use or building and located on the same lot as such principal use or building, or on a contiguous lot under the same ownership." Because the excess land is located on the west side of Pierce Road, and Strawberry Park is on the east side, it cannot be disputed that the excess land is not "located on the same lot" or "a contiguous lot under the same ownership."[9] ***627** On the basis of the specific language of the zoning regulations, the excess land west of Pierce Road cannot be considered for accessory use. Our Supreme Court in *Adley v. Paier,* 148 Conn. 84, 86, 167 A.2d 449 (1961), held that if parking is to be considered an accessory use, "it can only be so if it was on the same lot as the principal use." Accordingly, the court improperly determined that parking on the excess land was a proper accessory use.

On the defendants' appeal, the judgment is affirmed. On the plaintiffs' cross appeal, the judgment is reversed only as to the determination that parking on the excess land was a proper accessory use and the case is remanded with direction to render judgment enjoining the defendants from allowing such use.

In this opinion the other judges concurred.

All Citations

85 Conn.App. 615, 858 A.2d 806

Footnotes

1 The defendants are Hyman Biber, Strawberry Park Resort Campground, Inc., Strawberry Farms, LLC, Strawberry Park, Inc., and Volin, LLC.

2 The plaintiffs are four homeowners who live adjacent to or near the Strawberry Park campground, which is located in the town of Preston.

3 As a threshold matter, we address the defendants' argument that the court lacked subject matter jurisdiction. "Any person specifically and materially damaged by a violation of the zoning ordinances which has occurred or is likely to occur on another's land may seek injunctive relief restraining such violation." *Karls v. Alexandra Realty Corp.* 179 Conn. 390, 401, 426 A.2d 784 (1980). Although the primary responsibility for enforcing zoning regulations rests with the zoning

because the defendants allow members of the general public to attend.

In the present case, we agree with the court that music festivals can be a proper accessory use provided they are subordinate to the principal use of the property ***623** as a campground. We also agree that music festivals are not a valid accessory use when members of the general public are allowed to attend. Accessory uses are, by definition, uses "located on the same lot, and must be *subordinate* and *customarily incidental* to, the principal use." (Emphasis added.) *D & J Quarry Products, Inc. v. Planning & Zoning Commission,* 217 Conn. 447, 456, 585 A.2d 1227 (1991). Attendance by members of the general public at music festivals is not subordinate and customarily incidental to the principal use of the property as a campground. The court properly determined that the "[members of the general public who] use the facility on [a] day-to-day basis" exceeded the dimension of subordinate and incidental use.

Accordingly, the court correctly determined that the sale of music festival tickets to members of the general public constitutes a violation of the zoning regulations.[8]

II

The defendants claim that the court improperly concluded that they did not present the special defenses of estoppel and municipal estoppel. Specifically, the defendants argue that the court improperly concluded that they pursued only the special defenses of unclean hands and laches. We disagree.

The defendants filed a motion for articulation with respect to the trial court's ruling on its special defenses of estoppel and municipal estoppel. They specifically requested that the court articulate its decision in the following areas: "1. Whether the defendants proved the elements of municipal estoppel. 2. Whether the plaintiffs would be estopped from enforcing zoning regulations where the town and its officials were estopped ***624** from enforcing the zoning regulations." On October 16, 2003, the court denied the defendants' motion for articulation. The defendants did not file a motion for review of the court's denial of their request for articulation.

****812** "[W]here a party is dissatisfied with the trial court's response to a motion for articulation, he may, and indeed under appropriate circumstances he must, seek immediate appeal ... to this court via the motion for review.... Our rules provide a procedure for clarifying the record when rulings of the trial court are unclear.... In addition, our rules provide a procedure for reviewing the adequacy of the trial court's response to a motion for articulation....

"Even if we assume the validity of this claim, proper utilization of the motion for articulation [and the motion for review] serves to dispel any such ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal.... The burden of securing an adequate record for appellate review of an issue ... rests with the ... appellant.... Because it is the ... appellant's responsibility to provide this court with an adequate record for review ... we will not remand a case to correct a deficiency the ... appellant should have remedied.... Without an adequate record, we can only speculate as to the basis for the trial court's decision. Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court." (Citations omitted; internal quotation marks omitted.) *Lambert v. Donahue,* 78 Conn.App. 493, 510–11, 827 A.2d 729 (2003). The defendants failed to file a motion for review of the court's denial of their motion for articulation and have foisted on this court a claim without a record. Accordingly, we decline to address the question of whether the court improperly concluded that the defendants did not present ***625** the special defenses of estoppel and municipal estoppel.

III

The defendants claim that the plaintiffs are estopped from enforcing the same zoning regulations that the town was estopped from enforcing. Because the defendants have failed to provide an adequate record on the underlying claim of whether the town was estopped from enforcing the zoning regulations, we are unable to determine whether the plaintiffs should be estopped as well. Accordingly, we decline to review the defendants' claim.

IV

The plaintiffs, on cross appeal, claim that the court improperly determined that the zoning ordinance does *not* bar members of the general public from *all* activities. We do not address that claim because the issue was not decided by the trial court.

camping seasons, Strawberry Park presents what it calls "music festivals," which occur several times a year and are usually two to three day long concert events. The majority of festival tickets are sold *620 to campers. The park, however, also sells tickets to the general public.[6]

When a large number of visitors come to the campground, the excess land west of Pierce Road serves as a parking area for recreational vehicles and as a waiting area for campers and members of the public who are entering or leaving the park. Those critical intake days occur when musical festivals are held during the peak camping season, primarily on Saturdays and Sundays. The excess land is also used **810 for volleyball, walking, horseback riding and other recreational activities.

I

The defendants claim that the court improperly determined that §§ 23.35 and 15.11.18 of the zoning regulations bar the sale of festival tickets to members of the general public. We disagree.

Our review of zoning regulations presents a question of law requiring plenary review. *Doyen v. Zoning Board of Appeals,* 67 Conn.App. 597, 604, 789 A.2d 478, cert. denied, 260 Conn. 901, 793 A.2d 1088 (2002). The language in § 23.35 of the zoning regulations provides in relevant part that campgrounds are to be used "for the parking of camper units or the establishing of *overnight* living quarters such as tents or other temporary shelters, and primarily occupied by family groups engaged in travel, recreation or vacation." (Emphasis added.) Section 15.11.16 provides, inter alia, that "the owner and/or operator of any campground shall be responsible for the maintenance of an accurate register at such camp ground in which the following information shall *621 be recorded: name and permanent address of each occupant of any vehicle, date of arrival and departure." The ordinance also permits accessory uses of the campground. Section 15.11.18 provides: "Permitted as an accessory use to a recreational camp ground and for *camper use only,* but not permitted as a princip[al] use, there may be: a grocery store with grocery and camper provisions and gifts, snack bar, swimming pool, golf course of any kind, tennis courts, recreation pavilion, horseback riding, and any other appropriate activities, even though some of the activities by their nature are performed off the premises, but all activities must originate on premises." (Emphasis added.) A use of campground property that is not permitted by §§ 23.35 and 15.11.18 is a violation of the zoning regulations.

"A court must interpret a statute as written ... and it is to be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation.... The language of the ordinance is construed so that no clause or provision is considered superfluous, void or insignificant.... Common sense must be used in construing the regulation, and we assume that a rational and reasonable result was intended by the local legislative body." (Internal quotation marks omitted.) *Blakeman v. Planning & Zoning Commission,* 82 Conn.App. 632, 639, 846 A.2d 950, cert. denied, 270 Conn. 905, 853 A.2d 521 (2004).

The court correctly found that the "main principal and dominant use of Strawberry Park is a recreational campground." The court found that "an increasing number of [members of the general public], use the facility on [a] day-to-day basis, which is a completely different type of use than contemplated by the regulations." The court found that "on several days, 600 to 800 tickets were sold to people who were not campers." To place that number in context, when the camp originally *622 opened, there were only 104 campsites and no festivals. The court determined that "[i]n addition, to the extent that a music festival is a valid accessory use for a recreational campground under § 15.11.18, such uses may be only offered to campers registered at the campground. Where [members of the general public] are invited, this is not consistent with the definition in § 23.35 and is an illegal violation of the record of the regulations."

Moreover, in a related case decided after the trial court decided the case presently appealed, **811 *Miskimen v. Zoning Board of Appeals,* Superior Court, judicial district of New London, Docket No. 12340, 2003 WL 22133863, the same trial court upheld a cease and desist order banning music festivals entirely as a nonpermitted use.[7] In *Miskimen,* the trial court determined that "[t]he record established that people purchase ticket bracelets in advance or at the entrance of the campground for the sole purpose of attending the music festival and that the campground treats these individuals as ticket purchasers and not as campers.... The record unequivocally establishes that the campground is holding music festivals for campers and [members of the general public] and is, therefore, in violation of zoning regulation § 15.11." The court in that case, accordingly, held that the festivals are not a valid accessory use to the campground

85 Conn.App. 615
Appellate Court of Connecticut.

Robert MISKIMEN et al.

v.

Hyman BIBER et al.

No. 22879.
|
Argued April 30, 2004.
|
Decided Oct. 19, 2004.

Synopsis

Background: Nearby homeowners brought action on three counts for private enforcement of town zoning regulations, on the basis that operators of campground improperly sold tickets to music festivals to the general public, resulting in overflow parking on a parcel of land across the street from campground. The Superior Court, Judicial District of New London at Norwich, D. Michael Hurley, Judge Trial Referee, held bench trial and entered judgment in part for homeowners and in part for operators. Operators appealed and plaintiffs cross-appealed.

Holdings: The Appellate Court, Schaller, J., held that:

music festival at campground was not valid accessory use, when tickets were sold to general public, and

parking across the road was not proper accessory use.

Affirmed in part, reversed in part, and remanded with direction.

Attorneys and Law Firms

****808** Thomas J. Londregan, with whom, on the brief, was Jeffrey T. Londregan, New London, for the appellants-cross appellees (defendants).

Lloyd L. Langhammer, with whom, on the brief, was Mark E. Block, Norwich, for the appellees-cross appellants (plaintiffs).

FOTI, SCHALLER and MIHALAKOS, Js.

Opinion

SCHALLER, J.

***617** The defendants[1] appeal and the plaintiffs[2] cross appeal from the judgment of the trial court rendered in part in favor of the plaintiffs. The plaintiffs had commenced a three count action against the defendants seeking private enforcement of the zoning regulations of the town of Preston and other relief.[3] With ***618** respect to count one, the court concluded that the use of eighty acres (excess land) in Preston, directly across Pierce Road in Preston from Strawberry Park, was a valid accessory use to a recreational park, except that the use of such land in connection with the sale of music festival tickets to members of the general public was not permitted under the town's zoning regulations. The ****809** court resolved count two in favor of the defendants, concluding that the plaintiffs had not established a claim of nuisance. With respect to count three, the court held that the zoning regulations bar the sale of ***619** festival tickets to members of the general public.[4] On appeal, the defendants claim that (1) the court improperly determined that the zoning regulations bar the sale of festival tickets to members of the general public, (2) the court improperly concluded that the defendants did not present the special defenses of estoppel and municipal estoppel and (3) the plaintiffs are estopped from enforcing zoning regulations that the town was estopped from enforcing.[5] On cross appeal, the plaintiffs claim that the court improperly concluded that (1) members of the general public should not be barred from Strawberry Park for all purposes and (2) parking on the excess land was a proper accessory use. We agree with the plaintiffs that the court improperly concluded that parking on the excess land was a proper accessory use. In all other respects, however, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our disposition of these appeals. Strawberry Park is a campground located on the east side of Pierce Road in the town of Preston. The defendants received a special exception for a "recreation campground" from the zoning board of appeals in 1973. In 1974, the campground opened with 104 campsites. It currently has 480 campsites.

Strawberry Park offers a full range of recreational and entertainment activities that run during the spring, summer and fall camping seasons. On several occasions during the

146 Conn. 70
Supreme Court of Errors of Connecticut.

Frank W. FOX et al.

v.

ZONING BOARD OF APPEALS OF TOWN OF WEST HARTFORD et al.

Dec. 24, 1958.

Synopsis

Appeal from action of Zoning Board of Appeals granting special exception under zoning regulations. Action was brought to Court of Common Pleas in Hartford County by transfer from Superior Court and tried to the court, Leipner, J., who rendered judgment dismissing appeal and plaintiffs appealed. The Supreme Court of Errors, King, J., held that where structure proposed to be constructed in residential district was clearly intended to be erected as a business venture with first floor dental quarters and second floor residence apartment, there was no evidence as to fair rental value of dental quarters or apartment, plans did not show floor area of apartment and there was nothing to indicate that area would be as great as area of dental offices, determination of Board that proposed building was office building within exception to zoning law permitting location in any district of office building was not improper, arbitrary or illegal and granting of exception for construction of building was proper.

No error.

Attorneys and Law Firms

***71** ****473** Arthur M. Lewis, Hartford, for appellants (plaintiffs).

Peter B. Sullivan, Hartford, for appellee (defendant Bailey-Gates), with whom was Samuel Freed, Assistant Corporation Counsel, Hartford, for appellee (named defendant).

Before ***70** DALY, C. J., and BALDWIN, KING, MURPHY and MELLITZ, JJ.

Opinion

KING, Associate Justice.

Dr. Charles S. Bailey-Gates, a dentist, desired to erect a building in West Hartford. He intended to use the first floor for dental offices, at least in part for his own practice, and the second floor as a four or five-room residence apartment which he did not intend personally to occupy. A two-family dwelling house, presently on the property, is a nonconforming use in a residence B zone[1] and is to be demolished, and the new building is to be ***72** erected in its place. The plaintiffs own property one lot away. Dr. Bailey-Gates applied to the zoning board of appeals for a special exception to permit the erection of the proposed structure. The board granted the application 'in accordance with plot plans, floor plan of proposed dental offices, and front elevation of building on file,' stating in its decision: 'After viewing these premises, the Board feels that granting this exception will be in the interest of public convenience and welfare, and will not substantially injure the surrounding property.' The plaintiffs appealed from the action of the board in granting the special exception.

At the outset it must be borne in mind that this case involves, not a variance, but an exception. '[T]he conditions permitting an exception must be found in the [zoning] regulations themselves, and these conditions, if any, may not be altered.' Service Realty Corporation v. Planning & Zoning Board of Appeals, 141 Conn. 632, 636, 109 A.2d 256, 259. '[A] variance is authority extended to the owner to use his property in a manner forbidden by the zoning enactment, while an exception allows him to put his property to a use which ****474** the enactment expressly permits.' Ibid.; Mitchell Land Co. v. Planning & Zoning Board of Appeals, 140 Conn. 527, 531, 102 A.2d 316. The authority of the defendant board to grant exceptions is found in § 18(A) of the zoning ordinance, which provides: 'When in its judgment the public convenience and welfare will be substantially served and the appropriate use of neighboring property will not be substantially or permanently injured, the Board of Appeals may in a specific case, after public notice and hearing and subject to appropriate conditions and safeguards, authorize special exceptions to the regulations herein established as ***73** follows: * * *.' Of the five listed subdivisions, but two are pertinent. These are subdivision (3), under which the board acted, and subdivision (5), which the plaintiffs claim precluded action under subdivision (3).[2]

The zoning ordinance, including, of course, § 18(A) thereof, providing for special exceptions, is a local legislative enactment, and in its interpretation the question is the intention of the legislative body as found from the words employed to make its intention manifest. The actual intention,

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

as a state of mind, of the members of a legislative body is immaterial, even if it were ascertainable. Park Regional Corporation v. Town Plan and Zoning Commission, 144 Conn. 677, 682, 136 A.2d 785. An ordinance 'ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.' State ex rel. Rourke v. Barbieri, 139 Conn. 203, 211, 91 A.2d 773, 776.

The plaintiffs claim that § 4 of the ordinance, relating to permitted uses in a residence zone, controls § 18(A), relating to the granting of special exceptions. In the first place, there would be no ***74** occasion to apply for an exception if a use was in conformity with the general regulations governing permitted uses in the zone in question. Secondly, subsection (B) of § 4, by its express terms, applies only to residence zones other than 'AAA,' 'AA,' 'A' and 'B,' and since the property in this case is located in a residence B zone, subsection (B) can have no application to this case. Even if that subsection is susceptible of an interpretation which in certain factual situations might lead to a result inconsistent with that reached under subdivision (3) of § 18(A), we would not be warranted in adopting a construction which would distort the clear meaning of § 18(A). The remedy, if any is needed, is in a clarification of the language of the ordinance.

The plaintiffs' main claim seems to be that if subdivision (3) of § 18(A) is construed as authorizing the granting of an exception to permit an office building in any zone, then any exception which could be authorized under subdivision (5) could also be authorized under subdivision (3), so that subdivision (5) would serve no purpose whatsoever. This claim involves a patent non sequitur and is unsound. Section (5) applies only to a building of which the main, principal and dominant use is residential but which has an accessory use as an office of a professional person who resides in the building. The ****475** subject matter of subdivision (5) is not professional uses of an office building but professional accessory uses of a residence building. 58 Am.Jur. 969, § 46. An accessory use is a use which is customary in the case of a permitted use and incidental to it. 1 Yokley, Zoning Law & Practice (2d Ed.) § 64 & Ann.Cum.Sup. An accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use. 58 Am.Jur. 969, § 46, & Ann.Cum.Sup. ***75** In other words, subdivision (5) is applicable only where the permitted use of the building involved is residential and the accessory use is made by a resident of the building. It has no application to this case, and the board could not have legally acted under it, since Dr. Bailey-Gates has no intention of residing in the building. On the other hand, an office building has not, and in its inherent nature cannot have, as its main, principal and dominant use, that of a residence building. Its main, principal and dominant use must be for offices. Otherwise, it would not be an office building. An office building, not a residence building, is embraced within the provisions of subdivision (3). Whether a building is an office building or a residence building is a question of fact, and under certain circumstances may be a close question. But the mere fact that a building contains both offices and an occupied residential apartment does not, alone, conclusively establish that the building is not an office building. See note, 55 A.L.R.2d 398, 408. The main, principal and dominant use of a building determines its character.

The basic issue before the court below was whether the plaintiffs proved that the action of the board of appeals was illegal. Guerriero v. Galasso, 144 Conn. 600, 606, 136 A.2d 497; Jaffe v. State Department of Health, 135 Conn. 339, 353, 64 A.2d 330, 6 A.L.R.2d 664. Necessarily involved in the board's decision was its finding that the proposed structure, notwithstanding the second-floor residence apartment, was an office building. Since Dr. Bailey-Gates had no intention of living in the proposed building, clearly it was to be erected as a business venture. There was no evidence as to the fair rental value of the contemplated first-floor dental quarters or the contemplated second-floor residence apartment. This being so, it ***76** cannot be said that the board could not reasonably conclude, as it obviously did, that the chief source of return on the investment would be the first-floor dental offices, whether personally used by Dr. Bailey-Gates or rented in whole or in part to other dentists, and that the rental value of these offices would substantially exceed that of the second-floor residence apartment. This would go far to indicate that the main, principal and dominant use of the building was as an office building. The plans do not show the floor area of the second-floor apartment and there is nothing to indicate that this area would be substantially greater than, or even as great as, the area of the dental offices. This also is consistent with the conclusion of the board as to the main, principal and dominant use of the building. The plaintiffs claim that a residence is customarily occupied twenty-four hours a day each day of the week, whereas an office is customarily occupied eight hours or less on any one day and on no more than five days in any one week. From this they argue that any building containing offices and one or more residences must have, as its main, principal and dominant use, that of a residence. The plaintiffs' argument is more ingenious than persuasive. Its invalidity is especially obvious where, as here, the owner intends to use no part of a building for a home, and its erection is a business venture. The board was not required

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

to determine the character of this building solely on the basis of the percentages of time the office and residence portions would probably be occupied by human beings.

We find nothing to indicate that the board of appeals acted improperly, arbitrarily or illegally in deciding that the **476 proposed building was an office building as that term is used in subdivision (3) of *77 § 18(A) of the ordinance. This being so, the board, in granting any special exception, would necessarily be acting under subdivision (3) and would have no concern with subdivision (5).

The plaintiffs also claim that § 18(A) was unauthorized by the special act from which the town derived its zoning powers and in any event did not confer on the board of appeals original jurisdiction to grant a special exception. Section 18(A) clearly gives that jurisdiction to the board. Section 1 of the special act authorizes the town council to 'regulate * * * the use of buildings, structures and land for trade, industry, residence or other purposes.' 19 Spec.Laws, p. 934. Section 4 states in part: 'Said town council shall provide for the manner in which such regulations * * * shall be respectively enforced and established and amended or changed.' 22 Sp.Laws, p. 473, § 172. Section 8 provides that the board of appeals shall 'hear and decide all matters referred to it or upon which it shall be required to pass' under a zoning ordinance. 19 Sp.Laws, p. 936. These provisions, taken together, authorized the enactment of the sections of the ordinance, dealing with special exceptions, here involved. See Bishop v. Board of Zoning Appeals, 133 Conn. 614, 620, 53 A.2d 659. There is nothing in Kelley v. Board of Zoning Appeals, 126 Conn. 648, 650, 13 A.2d 675, upon which the plaintiffs place great stress, nor in Mitchell Land Co. v. Planning & Zoning Board of Appeals, 140 Conn. 527, 102 A.2d 316, and Service Realty Corporation v. Planning & Zoning Board of Appeals, 141 Conn. 632, 636, 109 A.2d 256, also relied upon by them, requiring a contrary conclusion.

There is no error.

In this opinion the other Judges concurred.

All Citations

146 Conn. 70, 147 A.2d 472

Footnotes

1 '[West Hartford Zoning Regs. (1951)] Section 4. Residence District. Permitted Uses.

'A. Within an 'AAA', 'AA', 'A' and 'B' area district no building or premises shall be used and no building shall be erected or structurally altered which is arranged, intended or designed to be used for other than a single family residence together with such other buildings as are ordinarily appurtenant thereto.

'B. In any other residence district, no building or premises shall be used, and no building shall be erected or structurally altered which is arranged, intended or designed to be used, for other than one or more of the following uses: * * * (7) Within a D area district only, the office of a physician, dentist or surgeon whether or not said office is an accessory use in the dwelling or apartment used by such physician, dentist or surgeon as his private residence, provided said office shall be confined to the first floor of any building and provided further that no more than two such designated professional men shall engage in practice in any one building.'

2 'Section 18. Review by Board of Appeals. A. Special Exceptions. * * * (3) The location in any use district of a state or municipal building, church, school, college building, railway, farming, nursery, greenhouse, truck gardening, private club, philanthropic or eleemosynary institution, boat house, office building, public utility, ice storage, aviation field, public park or playground, public recreation building, stadium or athletic field, golf course, polo field, cemetery, penal institution, sanitarium for the insane or feebleminded, water supply, sewage disposal or treatment plant, garbage disposal plant, refuse dump, stone quarry, gravel pit or sand pit; * * * (5) In a residence district, except a D area district, the location of the office of a physician, dentist or surgeon as an accessory use in the dwelling or apartment used by such physician, dentist or surgeon as his private residence, and in any residence district the location of the office of any other professional person as an accessory use in the dwelling or apartment used by said professional person as his private residence.'

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

(t) The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed.

(u) The passage or repeal of an act shall not affect any action then pending.

(v) All provisions of the statutes relating to annual town meetings or elections shall be applicable to biennial meetings or elections unless a contrary intent appears.

(w) "Correctional institution", "state prison", "community correctional center" or "jail" means a correctional facility administered by the Commissioner of Correction.

(x) Whenever a title which denotes gender is applied to an individual the title shall suit the gender of the individual.

(y) "Deposit account" includes a share account of a savings and loan association.

(z) If a statute refers to another statute of this state, the reference includes any amendments to the referenced statute unless a contrary intent is clearly expressed.

Credits

(1949 Rev., §§ 3639, 8873, 8890; 1955, Supp. §§ 1700d, 1701d; 1957, P.A. 13, § 1; 1959, P.A. 28, § 78; 1959, P.A. 152, § 1; 1961, P.A. 130, § 1; 1963, P.A. 642, § 1; 1967, P.A. 152, §§ 9, 10, eff. May 25, 1967; 1969, P.A. 297; 1969, P.A. 828, § 214, eff. Oct. 1, 1971; 1971, P.A. 154, § 1; 1973, P.A. 73-436; 1974, P.A. 74-127; 1975, P.A. 75-366; 1976, P.A. 76-186; 1978, P.A. 78-121, § 87, eff. Jan. 1, 1979; 1981, P.A. 81-269; 1986, P.A. 86-186, § 1; 1987, P.A. 87-282, § 1; 1990, P.A. 90-24; 1992, P.A. 92-26; 1995, P.A. 95-79, § 1, eff. May 31, 1995; 1996, P.A. 96-77, § 15, eff. Oct. 1, 1996; 2001, P.A. 01-20, § 1; 2009, P.A. 09-57, § 2, eff. May 20, 2009; 2014, P.A. 14-122, §§ 61, 62; 2019, P.A. 19-18, § 3, eff. Oct. 1, 2019; 2021, June Sp.Sess., P.A. 21-1, § 143, eff. July 1, 2021.)

Notes of Decisions (938)

Footnotes

1 C.G.S.A. § 8-1 et seq.

C. G. S. A. § 1-1, CT ST § 1-1

The statutes and Constitution are current with all enactments of the 2023 Regular Session enrolled and approved by the Governor on or before July 1, 2023 and effective on or before July 1, 2023. Some sections may be more current than others, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

(k) The words "person" and "another" may extend and be applied to communities, companies, corporations, public or private, limited liability companies, societies and associations.

(*l*) The words "preceding", "following" and "succeeding", when used by way of reference to any section or sections, mean the section or sections next preceding, next following or next succeeding, unless some other section is expressly designated in such reference.

(m) Except as provided in section 7-452, "legislative body" means: (1) As applied to unconsolidated towns, the town meeting; (2) as applied to cities and consolidated towns and cities, the board of aldermen, council or other body charged with the duty of making annual appropriations; (3) as applied to boroughs and consolidated towns and boroughs, the board of burgesses; and (4) as applied to all other districts and associations, the district committee or association committee or other body charged with the duty of making annual appropriations.

(n) "Ordinance" means an enactment under the provisions of section 7-157.

(o) "Voters" means those persons qualified to vote under the provisions of section 7-6.

(p) Repealed. (1976, P.A. 76-186.)

(q) Except as otherwise specifically defined, the words "agriculture" and "farming" include cultivation of the soil, dairying, forestry, raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, including horses, bees, the production of honey, poultry, fur-bearing animals and wildlife, and the raising or harvesting of oysters, clams, mussels, other molluscan shellfish or fish; the operation, management, conservation, improvement or maintenance of a farm and its buildings, tools and equipment, or salvaging timber or cleared land of brush or other debris left by a storm, as an incident to such farming operations; the production or harvesting of maple syrup or maple sugar, or any agricultural commodity, including lumber, as an incident to ordinary farming operations or the harvesting of mushrooms, the hatching of poultry, or the construction, operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for farming purposes; handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market, or to a carrier for transportation to market, or for direct sale any agricultural or horticultural commodity as an incident to ordinary farming operations, or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market or for direct sale. The term "farm" includes farm buildings, and accessory buildings thereto, nurseries, orchards, ranges, greenhouses, hoophouses and other temporary structures or other structures used primarily for the raising and, as an incident to ordinary farming operations, the sale of agricultural or horticultural commodities. The terms "agriculture" and "farming" do not include the cultivation of cannabis, as defined in section 21a-420. The term "aquaculture" means the farming of the waters of the state and tidal wetlands and the production of protein food, including fish, oysters, clams, mussels and other molluscan shellfish, on leased, franchised and public underwater farm lands. Nothing herein shall restrict the power of a local zoning authority under chapter 124.[1]

(r) Repealed. (1969, P.A. 828, § 214.)

(s) When a statute repealing another is afterwards repealed, the first shall not be revived without express words to that effect.

Connecticut General Statutes Annotated
Title 1. Provisions of General Application
Chapter 1. Construction of Statutes

C.G.S.A. § 1-1

§ 1-1. Words and phrases. Construction of statutes.

Effective: July 1, 2021
Currentness

(a) In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.

(b) The phrase "railroad company" shall be construed to mean and include all corporations, trustees, receivers or other persons, that lay out, construct, maintain or operate a railroad, unless such meaning would be repugnant to the context or to the manifest intention of the General Assembly.

(c) The term "banks" shall include all incorporated banks.

(d) The term "savings banks" shall include savings banks, societies for savings and savings societies.

(e) The term "public buildings" shall include a statehouse, courthouse, townhouse, arsenal, magazine, prison, community correctional center, almshouse, market or other building belonging to the state, or to any town, city or borough in the state, and any church, chapel, meetinghouse or other building generally used for religious worship, and any college, academy, schoolhouse or other building generally used for literary instruction.

(f) Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular.

(g) Words importing the masculine gender may be applied to females and words importing the feminine gender may be applied to males.

(h) Words purporting to give a joint authority to several persons shall be construed as giving authority to a majority of them.

(i) The word "month" means a calendar month, and the word "year" means a calendar year, unless otherwise expressed.

(j) The word "oath" shall include affirmations in cases where by law an affirmation may be used for an oath, and, in like cases, the word "swear" shall include the word "affirm".

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.