

<b>DOCKET NO. UWY-CV-23-6068929</b>	:	<b>SUPERIOR COURT</b>
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<b>HIRAM PECK III AND JUNE PECK</b>	:	<b>JUDICIAL DISTRICT</b>
	:	
	:	<b>OF WATERBURY</b>
<b>VS.</b>	:	
	:	
<b>TOWN OF WOODBURY ZONING BOARD OF APPEALS, ET AL</b>	:	<b>MAY 24, 2024</b>

**MEMORANDUM OF DECISION**

**FACTS AND PROCEDURAL HISTORY:**

This is an appeal from a decision of the Woodbury Zoning Board of Appeals (Woodbury ZBA) to approve a special permit application allowing a change from one non-conforming use to another non-conforming use at real property located at 858 Main Street North in Woodbury (Property). Plaintiffs Hiram and June Peck (plaintiffs) own a parcel which abuts the Property. The defendants Husky Energy And Propane LLC and Ted Mannello sought a special permit from the Woodbury ZBA to conduct a heating, ventilation and air conditioning (HVAC) business on the Property. The Woodbury ZBA approved the special permit at their meeting on December 19, 2022 over the objections of the plaintiffs. The plaintiffs then appealed the foregoing approval to this court. The court held a hearing on May 15, 2024.

STATE OF CONNECTICUT  
SUPERIOR COURT  
2024 MAY 24 A 10:52  
JUDICIAL DISTRICT  
OF WATERBURY

**STANDARD OF REVIEW:**

This matter is an administrative appeal from a town zoning board pursuant to the provisions of Section 8-8 of the General Statutes. Upon appeal, the court is to review the record to determine whether the board acted fairly, with proper motives and upon valid reasons. Courts are not to substitute their judgment for that of the board unless the board's decision is unreasonable in view of the applicable law and the substantial evidence in the record. On appeal, the burden of proof is upon the plaintiff to establish that the board acted improperly in view of the applicable law and the substantial evidence in the record. *Bloom v. Zoning Board of Appeals*, 233 Conn. 198, 205-206, 658 A. 2d 559 (1995).

“When a zoning board states its reasons for action, ‘the question for the court . . . is . . . whether the reasons . . . are reasonably supported by the record and whether they are pertinent to the [appropriate] considerations which the [board] is required to apply under the zoning regulations.’” *Chevron Oil Co. v. Zoning Board of Appeals*, 170 Conn. 146, 152-153, 365 A. 2d 387 (1976). If the board does not state the reasons for their action, the court is to review the record “to discover [whether] a sufficient reason to support the board’s decision [exists].” *Manchester v. Zoning Board of Appeals*, 18 Conn. App. 69, 71, 556 A.2d 1026, cert. denied, 212 Conn. 804, 561 A.2d 946 (1989).

**ANALYSIS:**

The defendants conceded aggrievement, both classical and statutory. Further aggrievement is apparent since the plaintiffs have a residence on an abutting parcel and opposed the special permit for a non-conforming use of the Property. The plaintiffs participated in the Woodbury ZBA hearing below and timely appealed to this court.

The following facts are uncontested. The Property is located in Woodbury's OS-60 residential zone district but has been used in a non-conforming manner since before the zoning regulations were adopted. The Property is approximately two acres located on Route 6 in Woodbury and comprises a barn-type building. A stream is located on the Property, although the defendants' application to the Woodbury ZBA indicated that there was no watercourse on the Property. In 2017 the Woodbury ZBA approved a non-conforming use for the Property which consisted of woodworking, proto-type furniture manufacture and reconditioning and furniture storage. The 2017 approval was challenged and appealed to this court, but this court dismissed the appeal as moot finding that the tenant decided not to proceed with the use.<sup>1</sup> For some substantial time prior to 2017 the Property had been used for woodworking and antique furniture warehousing. On December 19, 2022 the Woodbury ZBA approved use of the Property by the defendants to operate an HVAC business over the plaintiffs' objections. The approved HVAC

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<sup>1</sup> The approval was recorded on the land records by the Property owner/landlord at the time but the tenant ultimately did not proceed with the tenancy as proposed.

business includes (i) parking of a large propane delivery truck filled with propane outside, (ii) storage and use of at least one 55-gallon drum of methanol, (iii) loading and unloading of commercial vehicles with HVAC equipment and supplies, (iv) parking of some commercial vehicles outside, (v) receipt, storage and distribution of propane tanks, and (vi) office work concerning the business. The plaintiffs' residence is located on a parcel which abuts the Property.

The Woodbury ZBA has regulations which provide in relevant part as follows:

9.6.2.3 – Each application for a Special Permit shall provide ... (B) Site plans and drawing **depicting current and proposed use** at scale **and** in sufficient detail to describe the proposal ...

9.2.3 – Generally requires that the applicant submit to the Woodbury ZBA a license issued by the Inland Wetlands Commission if the site contains wetlands and activity which is regulated under the inland wetlands regulations is going to occur. [Emphasis added].

The Woodbury ZBA regulations clearly required the defendants to submit a site plan as part of their application for a special permit concerning the proposed non-conforming use. The requirement to submit a site plan was not contingent upon whether or not physical alterations to the Property were proposed. Although the Woodbury ZBA had the ability to waive the foregoing requirement they made no waiver in this matter. At the December 2022 Woodbury ZBA meeting, Mr. Peck specifically noted the lack of a site plan and requested one. See the first full paragraph on page 23 of the December 2022 meeting transcript. The lack of a site plan materially interfered with the process that should have occurred in several ways. First, a site plan

is important in assessing the nature of the non-conforming use and its impact upon the neighbors and the area because the site plan, as required by the regulations, would have depicted where the proposed activities, particularly the outside activities would occur. The proposed use here makes the foregoing particularly important because it includes hazardous activities such as the storage of commercial quantities of propane, the storage and use of bulk quantities of methanol which is highly flammable, the parking of commercial vehicles including a propane delivery truck, and the loading/unloading of HVAC equipment. The location of these activities on the site is obviously materially important in understanding the nature of the proposed non-conforming use. Second, the site plan would have shown the location of the stream which is on the Property and any restricted wetlands area in relation to the foregoing proposed activities. Only with this relative spacial understanding would one be able to accurately judge whether or not the proposed activities posed danger to the stream. Third, the Woodbury ZBA ambiguously ordered a buffer of trees or a fence to be installed. However, because of the lack of a site plan, the transcript of the meeting evidences material imprecision in what was being required in this regard and where on the site it was required. See pages 51-55 of the transcript of the December 19, 2022 meeting of the Woodbury ZBA. For all of the foregoing reasons it was a material error for the Woodbury ZBA to not require a site plan, or to at least expressly waive the requirement and explain why the site plan was not necessary.

In their application to the Woodbury ZBA for a special permit the defendants expressly represented that no watercourse was present on the Property. This representation was materially

inaccurate.<sup>2</sup> This misrepresentation was compounded by the fact that the Woodbury ZBA did not require a review of the proposal by the Inland Wetlands Commission. As a result, we now have a relatively small Property, consisting of only about two acres, with a stream on it and hazardous activities, including the storage and handling of both propane and methanol, being conducted on it with no consideration of the potential danger to the stream. The foregoing is a clearly material error by the Woodbury ZBA.

The special permit at issue allows the Property to transition from one non-conforming use to another. It is clear that the Woodbury ZBA's obligation in reviewing an application for a special permit for transitioning from one non-conforming use to another is to ensure that the proposed non-conforming use does not improperly expand the previously allowed non-conforming use. In judging whether a new proposed non-conforming use expands upon the previous use one must consider not only the quantity but the quality or character of the new use in comparison to the past. Here the Woodbury ZBA focused on the quantity differences such as the number of hours of operation and the intensity of the activity on the site. However, the Woodbury ZBA do not appear to have considered the relative quality or character of the use.<sup>3</sup>

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<sup>2</sup> This material misrepresentation alone would justify and require a remand to the Woodbury ZBA, particularly since it is clear that the Woodbury ZBA did not fully consider the potential danger to the stream.

<sup>3</sup> Although these comparisons are primarily questions of fact, the absence of substantial discussion concerning the significant differences in the quality or character of use leads the court to conclude that this aspect was not fully considered by the Woodbury ZBA.

The past uses, whether as approved in 2017 or prior to that, all involved woodworking and low volume furniture manufacture, refurbishment and storage.<sup>4</sup> The previous uses did not involve the storage, handling and use of hazardous substances other than in normal household quantities.<sup>5</sup> In contrast, this proposed use involves the storage, handling and use of propane and methanol, both hazardous substances, in bulk quantities. The Woodbury ZBA's decision does not appear to have properly considered the foregoing difference in quality or character of the use.

Due in significant part to the absence of a site plan, the Woodbury ZBA's meeting and approval of this special permit ended with a bit of chaos and uncertainty. As part of the approval, the Woodbury ZBA required the "installation of some buffer, be it trees or a fence along the property line as discussed, as well as --- what was the second one?". See December 19, 2022 meeting transcript at page 52, lines 7-9. Thereafter in the transcript, it is clear that the Woodbury ZBA ordered some type of buffer to be installed, but what the buffer was to be, exactly where it was to be installed and the extent of it are quite unclear.

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<sup>4</sup> Woodworking, furniture refurbishment and antiques are uses which are consistent with the surrounding uses in this area.

<sup>5</sup> The 2017 approval specifically prohibited the storage or use of chemicals in 55-gallon drums. In the current use at least one 55-gallon drum of methanol will be stored, handled and used. Further, propane in bulk quantities will be stored and handled outside.

In view of the foregoing the court finds that the plaintiff has established that the defendant Woodbury ZBA's decision was affected by material error of law. Further, the plaintiff has established that the defendant Woodbury ZBA's decision was unreasonable in view of the applicable law and the substantial evidence in the record. Accordingly, the court must sustain the appeal.


**ORDER:**

The court hereby remands this matter to the Woodbury ZBA with the following instructions:

1. The Woodbury ZBA is directed to either require the applicant to submit a site plan which is customary and consistent with the applicable regulations and to properly consider it, or to specifically waive such requirement and explain on the record why a site plan is not required for the Woodbury ZBA to make a reliable and lawful decision concerning the special permit application in this matter.
2. The Woodbury ZBA is directed to either require the applicant to have its proposed activities reviewed by the Inland Wetlands Commission, or to state on the record why such review is not required despite the presence of a stream and the storage and handling of hazardous materials.



3. The Woodbury ZBA is directed to specifically consider the quality and character of the proposed use, including the storage of hazardous materials, and to explain on the record why the character of the new proposed use is or is not an inappropriate expansion of the previously allowed non-conforming uses.
4. The Woodbury ZBA is directed to specifically describe on the record the construction, location and extent of the buffer that it required to be installed.

  
John L. Cordani, Judge

5/24/2024 Decision entered in accordance with the foregoing. Judicial Notice Sent. Copy emailed to the Reporter of Judicial Decisions.

  
Assistant Clerk