DOCKET NO: CV-23-6028119-S	:	SUPERIOR COURT
THE TOLLAND HISTORICAL SOCIETY,	:	JD OF TOLLAND
INC., et. aL		
v.	:	AT ROCKVILLE
TOWN OF TOLLAND, et. al.	:	MAY 22, 2024

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION TO DISMISS

Before the court is the defendants' motion to dismiss the plaintiffs' single count complaint (entry at Docket No. 114). The issue presented is whether the decision of a legislative body, in this case the Tolland town council, to approve a municipal improvement project pursuant to General Statutes § 8-24, is an appealable planning decision pursuant to General Statutes § 8-30a and § 8-8. For the reasons stated below, the court finds that it is not, and the defendants' motion to dismiss is granted.

BACKGROUND

The plaintiffs, the Tolland Historical Society, Inc., the French-Canadian Genealogical Society of Connecticut, Inc, and the Tolland Red and White, LLC, seek to appeal to this court the decision of the Tolland town council approving the construction of a new ADA compliant sidewalk on the Tolland town green. The plaintiffs possess property abutting the town green and claim they are aggrieved parties pursuant to § 8-8, with a right to appeal the town council's decision as the decision of a final planning authority within the meaning of § 8-30a.

General Statutes Chapter 126 authorizes the establishment of municipal planning commissions. General Statutes § 8-30a states that appeals from the

STEVEN PAPPAS
ASSISTANT CLERK

Notice of memorandum sent on 5-22-2024 to:
- Reporter of Judicial Decisions
- All counsel of record; JDNO

received
5-22-2024

decisions of a municipal planning commission or other final planning authority shall be governed by § 8-8. Said statute sets forth the process by which aggrieved persons may appeal the decisions of municipal land use boards, including zoning commissions, planning commissions, combined planning and zoning commissions, and zoning boards of appeal. Tolland has a combined planning and zoning commission.

General Statutes § 8-24 specifically relates to municipal improvement projects and states in relevant part that, "[n]o municipal agency or legislative body shall (1) locate, accept, abandon, widen, narrow or extend any street, bridge, parkway or other public way . . . until the proposal to take such action has been referred to the [planning] commission for a report. . . . In the case of the disapproval of the proposal by the [planning] commission the reasons therefore shall be recorded and transmitted to the legislative body of the municipality. A proposal disapproved by the [planning] commission shall be adopted by the municipality . . . .only after the subsequent approval of the proposal by (A) a two thirds vote of the town council . . . ."

Pursuant to § 8-24, the Tolland town council referred the town green sidewalk plans to the Tolland Planning & Zoning Commission (PZC) for its review on June 27, 2023. On August 28, 2023, the PZC disapproved the plans. On September 12, 2023, the town council voted by a more than two thirds vote of 5 to 1 to approve the plans. The plaintiffs filed this appeal on October 5, 2023. Defendants argue that there is no right to appeal the town council's decision approving the sidewalk and therefore, this court lacks subject matter jurisdiction.

LEGAL STANDARD

A motion to dismiss is used primarily to challenge the jurisdiction of the court. See *Wilcox* v. *Webster Ins. Inc.*, 294 Conn. 206, 213, 982 A.2d 1053 (2009). Practice Book § 10-30 (a) lists four grounds for dismissal including lack of

jurisdiction over the subject matter. Subject matter jurisdiction refers to the power of court to hear and determine cases of the general class to which the proceedings in question belong. See *Southern New England Telephone Co.* v. *Dept. of Public Utility Control*, 261 Conn. 1, 21, 803 A.2d 879 (2002). Subject matter jurisdiction cannot be conferred on the court by an agreement or a waiver. See *Jolly, Inc.* v. *Zoning Board of Appeals*, 237 Conn. 184, 192, 676 A.2d 831 (1996).

The Supreme Court, in *Conboy* v. *State*, 292 Conn. 642, 651-54, 974 A.2d 669 (2009), elaborated on the scope of review for a jurisdictional issue, depending on when in the course of the proceedings the issue is raised. A pretrial motion will be decided on the basis of the complaint alone. The court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. Id., 651. The plaintiff bears the burden of proving subject matter jurisdiction whenever it is raised. See *Fort Trumbull Conservancy* v. *City of New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003); *Wilcox* v. *Webster Ins. Inc.*, supra, 294 Conn. 213-14.

DISCUSSION

"[W]ith respect to administrative appeals generally, [t]here is no absolute right of appeal to the courts from a decision of an administrative agency . . . Appeals to the courts from administrative [agencies] exist only under statutory authority . . . Appellate jurisdiction is derived from the . . . statutory provisions by which it is created . . . and can be acquired and exercised only in the manner prescribed . . . In the absence of statutory authority . . . there is no right of appeal from [an agency's] decision . . . [T]he failure to comply strictly with the provisions of § 8-8 (b) render[s] a zoning appeal subject to dismissal." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *New England Road, Inc.* v. *Planning & Zoning Commission of Clinton*, 308 Conn. 180, 183-84, 61 A.3d 505 (2013).

"It is fundamental that appellate jurisdiction in administrative appeals is created only by statute and can be acquired and exercised only in the manner prescribed by statute." *Munhall* v. *Inland Wetlands Com.*, 221 Conn. 46, 50, 602 A.2d 566 (1992); see also *Cremona* v. *Washington Inland Wetlands Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-05-4002132-S (April 27, 2006, *Bozzuto, J.*) (appeal is subject to dismissal for failure to strictly comply with statutory provisions which created right of appeal).

Thus, the issue presented is one of statutory interpretation. General Statutes § 1-2z provides that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Where the legislature uses different terms, they are presumed to have different meanings. See *Plourde* v. *Liburdi*, 207 Conn. 412, 416, 540 A.2d 1054 (1988) ("[T]he use of different words [or the absence of repeatedly used words in the context of] the same [subject matter] must indicate a difference in legislative intention" [internal quotation marks omitted]).

It is well established that there is no right to appeal a planning or planning and zoning commission's decision to approve or disapprove a municipal improvement project that has been referred to it pursuant to § 8-24. "The plaintiff correctly concedes that a report issued by a planning and zoning commission pursuant to a § 8-24 referral is purely advisory and not appealable." *Fort Trumbull Conservancy, LLC* v. *Planning & Zoning Commission*, 266 Conn. 338, 359, 832 A.2d 611 (2003). The question becomes whether there is a separate right to appeal the decision of a municipal legislative body giving final approval to a municipal improvement project under § 8-24.

The use of the term "legislative body" in § 8-24 as distinct from "planning commission" or "final planning authority" in § 8-30a must indicate a difference in legislative intent. These words must be given different meaning. Nowhere in § 8-24 or Chapter 126 is there a right to appeal the decision of a "legislative body." Nowhere in the statutes is a "planning commission" defined as including a "legislative body." Indeed, every statute that refers to a "planning commission" defines it as a planning and zoning commission created pursuant to § 8-4a or planning commission created pursuant to § 8-19. See General Statutes § 8-187 and § 22a-93(9). Notably, § 32-222 defines both "planning commission" and "legislative body." Again, "planning commission" is defined as "a planning and zoning commission designated pursuant to § 8-4a or a planning commission created pursuant to section 8-19." Whereas "'legislative body' means (1) the board of selectman . . . . or, (2) the council, board of alderman, representative town meeting, board of selectman or other elected legislative body . . . ." Thus, the legislature recognizes that planning commissions and legislative bodies are distinct and different entities.

If the legislature intended to provide a right to appeal the decision of a legislative body approving a municipal improvement project under § 8-24, it could have clearly stated so in many different ways. For example, it could have stated in § 8-24 that "the decision of a legislative body to approve a municipal improvement project under this section shall be appealable in the same manner as a final decision of a planning commission pursuant to § 8-30a." Or, "the decision of a legislative body to approve a municipal improvement project under this section shall be considered the decision of a final planning authority for the purposes of an appeal pursuant to § 8-30a." Or, it could have included language in § 8-30a itself such as "[t]he provisions of § 8-8 shall apply to appeals from planning commissions, other final planning authorities or a legislative body acting pursuant to § 8-24." There are

any number of ways the legislature could have clearly provided a right to appeal the decision of a legislative body under § 8-24. Yet, it did not.

The primary case relied on by the plaintiffs, *West Hartford Interfaith Coalition* v. *Town Council*, 228 Conn. 498, 636 A.2d 1342 (1994), is readily distinguishable. That case involved the town council's decision denying an application for a zone change to allow the construction of affordable housing. The plaintiffs appealed under the affordable housing appeal statute. The decision had nothing to do with legislative approval of a municipal improvement project under § 8-24 and that statute is not even referenced in the decision.

Similarly, *I. R. Stich Associates, Inc.* v. *Town Council of West Hartford*, 155 Conn. 1, 229 A.2d 545 (1967), is also not on point. In that case, the plaintiff appealed from the town council's denial of its subdivision application. At that time, planning and zoning in West Hartford was governed by a special act of the General Assembly adopting its town charter. Pursuant to the town charter, if the town council did not approve of any planning decision made by the planning and zoning commission, it could take up and proceed to act on the matter "as if it were constituted as the planning authority." Id., 547. After the planning and zoning commission approved the plaintiff's subdivision plan, the town council exercised its authority to constitute itself as the town planning authority, held hearings and rejected the application. The court held that, so long as the plaintiff could demonstrate aggrievement, it could appeal the town council's decision because the council was acting as a planning authority.

At best, *West Hartford Interfaith Coalition* and *I.R. Stitch* stand for the proposition that when a town council is acting as a planning or zoning authority by hearing and deciding zone change applications, subdivision plans or other planning or zoning applications, the applicant or other aggrieved party may appeal. Neither address the right to appeal a town council's decision, acting as a legislative body

under § 8-24, to approve a municipal improvement project. In fact, *I.R. Stitch* demonstrates and supports the historic distinction between a town council acting as a legislative body versus a planning authority and the legislature's understanding of those terms. It was only by affirmatively choosing to act as a "planning authority" and hearing and deciding the subdivision application that the right to appeal was triggered.

Invest II v. *Town of Fairfield*, Superior Court, judicial district of Fairfield, Docket No. CV-10-6010937-S (August 4, 2011, *Dooley, J.*), is also distinguishable on its facts and legal claims. In that case, the town of Fairfield entered into a contract to transfer certain town property to a third party. The plaintiffs claimed to have a legal interest in and title to the property. They filed a complaint seeking an adjudication of the parties' interest in the property and an injunction until such time as each of the parties' rights to the property was resolved. In support of the injunction, they also cited to the town's failure to comply with § 8-24 in that the proposed sale was not referred to the planning commission for review. The court granted the injunction until such time as the right, title and interest of all of the parties was adjudicated. As for the plaintiff's claim that the town violated § 8-24, the court stated "[w]hile this court has found that the plaintiffs will likely prevail on their claim that the town failed to follow the statute and code, the issue of whether such conduct is beyond the authority of the municipality to act is left to the trial court." Id. Thus, this case did not decide whether an abutting property owner has a right to appeal, under § 8-30a, the decision of a legislative body approving a municipal improvement project under § 8-24.

To be sure, there are cases where a party has challenged a town council's actions under § 8-24. In *Panek* v. *Town of Southington*, Superior Court, judicial district of New Britain, Docket No. CV-15-6030083-S (Aug. 11, 2015, *Abrams, J.*) (60 Conn. L. Rptr. 824) the plaintiffs filed a complaint seeking to enjoin the construction of a solar array and electric generation plant on town property. The

defendant sought to dismiss the complaint on the grounds that the plaintiff's exclusive remedy was a land use appeal under § 8-8 and not a claim for injunctive relief. Citing *Fort Trumbull Conservancy, LLC*, the court pointed out that there is no right to appeal a planning commission's report under § 8-24. Because the town council's actions in approving the project under § 8-24 were at issue, a claim for injunctive relief was appropriate. "Because the town initiated the approval process under § 8-24, the action of the PZC was not appealable under § 8-8 because it was merely advisory; the Town could approve the Project even if the PZC withheld its approval . . . . The action at issue was, in fact, the approval by the Town Council, not the PZC, and such actions are appropriately subject to actions seeking injunctive relief." (Citation omitted.) Id.

In *Yario* v. *Town of South Windsor*, Superior Court, judicial district of Hartford, Docket No. CV-11-6021042-S (Aug. 17, 2017, *Moukawsher, J.*), the plaintiffs brought a complaint against the town, seeking to shut down the town's dog park. In addition to alleging that the park created a private and public nuisance, they sought a permanent injunction prohibiting the town from operating or allowing the public to use the park because the town council had not complied with § 8-24 when it approved the park. Indeed, the town did not refer the park plan to the planning and zoning commission prior to its approval. The court found that, because the town extended water to the park and installed lighting, § 8-24 applied and the town council was required to refer the plan to the planning and zoning commission for a report.

The court noted the severe remedy being requested by the plaintiff in shutting down a public dog park that had been in operation for many years, as compared to the nature of the alleged statutory violation. "[E]veryone agrees that building the park wasn't beyond South Windsor's power . . . The town could have built the park regardless of what the report said. . . . So violating the statute may not automatically void the town's decision to build a dog park. . . . the issue is about a non-binding report." (Citation omitted.) Id. The court ordered the town to submit the dog park

plan to the planning and zoning commission for a report under § 8-24. "Any report issued will have the significance of any other report under General statutes § 8-24 and this decision neither expands nor contracts that significance. In particular, this order creates no right to appeal the report's findings or to seek further redress from the court based on it." Id.

Finally, in *Trivalent Realty Co.* v. *Westport*, 2 Conn. App. 213, 477 A.2d 140, cert. dismissed, 194 Conn. 807, 482 A.2d 712 (1984), the plaintiffs, who were property owners in Westport's business district, challenged the town's imposition of betterment assessments to fund a public garage where the town allegedly violated § 8-24 in approving the garage. The court found that the town had violated § 8-24 in approving the garage because the lot actually built differed substantially from the proposal submitted and reviewed by the planning and zoning commission. Because the law authorizing betterment assessments required strict compliance with all statutory and legal requirements, the court determined that the failure to strictly comply with § 8-24 rendered the assessments invalid. It is important to note that the issue did not involve a challenge to the town's approval or building of the garage itself, but its authority to impose betterment assessments to offset the cost.

Panek, *Yario*, and *Trivalent* suggest that, rather than bring a land use appeal under § 8-30a and § 8-8 as the plaintiffs have in this case, the proper action would be one for injunctive relief if there is a colorable claim that the town council violated the provisions of § 8-24. Injunctive relief may be available if the town council either failed to refer the sidewalk plan to the planning and zoning commission or ultimately approved a plan that differed substantially from the one that was referred. In the present case, although the complaint alleges that the council changed the sidewalk plan before referring it to the planning and zoning commission, it appears that the plan the council referred to the commission, was the same plan it then approved by the requisite two thirds vote. Even if a town legislative body fails to comply with § 8-24, the only remedy suggested by the precedent is an injunction pending a "do

over." As the court in *Yario* pointed out, the planning and zoning commission's report is purely advisory.

That the legislature distinguishes between the decision of a town legislative body approving a municipal improvement project versus an appealable planning and zoning decision makes sense. When a town legislative body decides what municipal improvement projects to pursue, it is making a policy decision on behalf of the residents of the town. It is a decision about how to use town property and invest town funds. Within that process, there is opportunity for public comment and input. Just as in this case, there were several public town council and planning and zoning commission meetings with opportunity for public comment. The remedy if residents do not support the town council's decision is a political one. Many towns have a petition process whereby residents can seek to overturn a decision of the legislative body. The ultimate remedy is, of course, the ballot box.

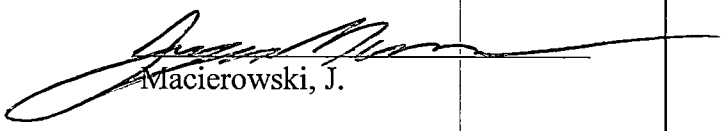
The court also notes that the town of Tolland, as is its right, exempts town property from zoning regulations. To interpret § 8-30a, as the plaintiff suggests, would effectively nullify that town law by subjecting every municipal improvement project to possible challenge and appeal as if it were a planning and zoning decision.

For the foregoing reasons, the court finds that, under the plain language of the relevant statutes and legal precedent, the decision of a town council acting as a legislative body under § 8-24 to approve a municipal improvement plan is not a decision of a final planning authority and, therefore, there is no right to appeal that legislative decision under § 8-30a or § 8-8 as incorporated therein.

The defendant's motion to dismiss is granted.

SO ORDERED:

BY THE COURT



Macierowski, J.