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MEMORANDUM

TO: VIRGIL DE LA CRUZ AND CHARLES PIA, JR.
CO-CHAIRS
C/O VALERIE T. ROSENSON

FROM: WILLIAM J. HENNESSEY

DATE: JULY 19, 2018

RE: LAND USE-URBAN REDEVELOPMENT COMMITTEE
BOARD OF REPRESENTATIVES
MEETING AND PUBLIC HEARING, JULY 18, 2018
AGENDA ITEM LU30.015
ANALYSIS OF CASE LAW CITED BY ATTORNEY EDWARD P. MCREERY
AND RESPONSE TO ARGUMENTS

During the course of the Meeting and Public Hearing held on July 18, 2018, a number of legal issues were raised with respect to special exception procedures, namely conditions that may be attached with respect to a special permit application. These legal issues arose in the context of the text change language providing for a "Gymnasium or Physical Culture Establishment" by special exception in the C-D District. In particular, Attorney Edward P. McCreery directed the Committee's attention to two cases, *Beckish v. Planning and Zoning Commission*, 162 Conn. 11 (1971), and *Mead v. Planning Commission*, Superior Court, Docket No. CV-98-0333461-S (Dec. 3, 1999, *Radcliffe, J.*) 1999 WL 1212244.

Relying on these two cases, Attorney McCreery raised two propositions, one of which is misleading and the other of which is patently false.

First of all, Attorney McCreery stated: "You can't willy nilly attach conditions to a permit unless they're spelled out in the regulations." Our Supreme Court has stated that "[a] special permit, as requested by the plaintiffs, permits an applicant to put his property to a use which is expressly permitted under the regulations so that the condition under which a special exception is allowed must be found in the regulations . . . ." *Beckish, supra*, 162 Conn. at 15.

The specific details in *Beckish* concerned a special permit seeking the expansion of a legally existing non-conforming retail establishment within the existing floor area of an existing main building. The planning and zoning commission in that case granted the special permit but attached eighteen (18) separate conditions including requiring the applicant to remove two pre-existing legally non-conforming outdoor signs. Our Supreme Court then specifically stated:

> There is nothing in the zoning regulations, however, which gives the defendant commission any authority to require the discontinuance of a preexisting use of undisputed legality, ***as distinguished from a proposed use***, so as to impose such a requirement in the nature of a condition before it will agree to grant the expansion of a nonconforming use of the remainder of the floor area in the building.

(Emphasis added.) *Id.* This is critical language. The issue in *Beckish* was that the condition had fundamentally no relationship to the proposed use under the special permit. Our Supreme Court then summarized:

> The commission could not lawfully require the removal of the signs as a condition to the granting of the special permit in the present case. The plaintiffs' application was requested for the purpose of expanding their nonconforming use to include the unoccupied floor area in the building. ***The signs did not bear any relation to the plaintiffs' application for the proposed use of the building.*** The existence of the signs was brought into the public hearing on the application tangentially, no clear evidence was adduced and the discussion was not within the purpose of the meeting.

(Emphasis added.) *Id.* at 17.

Attorney McCreery rattled off a litany of "proposed uses," e.g., outdoor pools or enclosed pools, soccer fields, and outdoor basketball—he then claims that these are not addressed in the regulations, and as a consequence, there would be no ability to submit conditions on these uses (for example, an "***enclosed*** pool") or conditions related to any proposed uses. This is simply false. As *Beckish* details, the condition needs to bear relation to the application for the ***proposed use***. The Stamford Zoning Regulations at issue have extensive standards and procedures concerning special exceptions in general under Section 19.3, as well in the C-D District specifically under Section 9.BBB-3. The text change language would even further add to these standards and procedures for a "Gymnasium and Physical Culture Establishment" in the C-D District.

The standards for a special exception require that the special exception "shall be granted by the reviewing board only upon a finding that the proposed use or structure or the proposed extension or alteration of an existing use or structure is in accord with the public convenience and welfare" and then directs the Zoning Board to numerous considerations. *See* Section 19.3 of the Stamford Zoning Regulations. Indeed, if these standards are not met, the Zoning Board can simply deny the application.

Attorney James Minor, Special Counsel for the Stamford Law Department, has already submitted a well-reasoned legal opinion to the Zoning Board, dated May 18, 2018, in which he states: "The Zoning Board has discretion to determine whether a special exception application meets both specific and general standards." Attorney Minor proceeds to highlight extensive case law on the matter, which clearly demonstrates that the Zoning Board has ample discretion to determine any special exception application advanced as a consequence of the text change. Simply, the text change would permit outdoor uses, such as a pool, but there is no dispute that the Zoning Board can still subsequently determine that an outdoor pool as proposed in size,

location, or otherwise, does not meet the standards for a special exception, and even determine that in this particular location an outdoor pool is not appropriate at all. That would be up to the Zoning Board at a later time.

Second of all, Attorney McCreery stated that the Zoning Board cannot require off-site improvements. Notably, the case cited by Attorney McCreery, *Mead, supra*, 1999 WL 1212244, determined that you cannot condition approval of a ***subdivision*** application on off-site improvements. This is based upon Connecticut General Statutes § 8-25, which deals expressly with subdivision applications. The *Mead* Court concluded, "there is nothing in § 8-25 authorizing a planning commission to require a developer to improve an existing public highway, except where subdivision roads intersect with town accepted roads." There is a long history, however, that ***special exceptions*** may be conditioned on off-site improvements. *See Lurie v. Planning & Zoning Commission*, 160 Conn. 295, 302–303 (1971) (zoning commission was permitted to condition special permit on off-site traffic improvements). Simply, the Zoning Board would always be able condition approval of a special permit on off-site improvements such as off-site traffic improvements related to the ***proposed use*** of the property.