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VIA EMAIL to *Justin.Dorsey@newbritainct.gov* and U.S. MAIL

May 18, 2023

The Hon. Erin Stewart, Mayor
Justin Dorsey, Chief of Staff, Mayor's Office
Jack Benjamin, Director, Planning and Development
Sergio Lupo, Director, Licenses, Permits and Inspections
Gennaro Bizzarro, Corporation Counsel
City of New Britain
27 West Main Street
New Britain, CT 06051

Re: ***600 East Street, New Britain***

Dear Mayor Stewart, Mr. Dorsey, Mr. Benjamin, Mr. Lupo, and Attorney Bizzarro:

We represent Chamberlain Square, LLC and its principal James Sanders. As you know, Chamberlain Square is the owner of 600 East Street, which is an existing building, and the paved lot at 86 Woodland Street, across the street from 600 East Street.

The 600 East Street property has been operated as a storage warehouse facility since at least 1955. Chamberlain Square now has a contract to sell both properties to Steven Foley of the Foley Management Group of Palm City, Florida, which intends to establish an Extra Space Storage facility on the property. In recent months, Mr. Sanders, Mr. Foley, and broker Luke Massirio of OR&L have discussed with City officials whether the Extra Space Storage facility, a climate-controlled self-storage business, may be established and operated at 600 East Street as a non-conforming use, based on storage warehouse use having been allowed by the City's zoning rules, and in continuous existence, as of 2017 when the property was rezoned from I-2 Industrial to TOD-EM-1, which does not expressly allow storage as a use. Chamberlain Square has asked for our opinion about whether the Extra Space Storage is a permitted nonconforming use. Our conclusion is that such use is clearly allowed; the purpose of this letter is to explain why.

The existing building[1] was constructed in 1917, and was the Chamberlain School until 1951. Starting in 1955, Amodio Moving and Storage operated a storage warehouse for commercial and personal property. Permits were issued in 1961 and 1971 for additional buildings onsite in connection with the Amodio business. That operation included a customer's ability to access individual storage space through the Amodio staff.

In 1986, John C. Dahle purchased the property; his use through 1989, when he sold it to Siracusa Moving and Storage, is unclear, but it is clear that Siracusa either resumed or continued the storage warehouse use, which was the same type of operation as Amodio. Siracusa continued this storage warehouse use through 2008, when Chamberlain Square purchased it. Since that time, continuously, Chamberlain Square has operated the property as a storage warehouse for both commercial and personal storage. Each customer has had access to individual storage units within the building.

The 600 East Street property is 1.9 acres, and the building is 107,000 (gross) square feet, with 71,000 s.f. of "Living Area" according to the City's property card.

In 2016, Chamberlain Square obtained a permit to renovate 2,900 s.f. of the building for the New Britain YMCA as office and educational space. In addition, 1,800 s.f. is general office space. The remaining 96 percent of the building has continued as a storage warehouse from 2016 to the present.

In 2017, the City Zoning Commission rezoned 600 East Street from I-2 to TOD-EM-1. Importantly, the pre-2017 Zoning Regulations listed "storage" and "warehouse" as permitted uses, without further specification. The City has more specific regulations regarding motor vehicle storage, but not general warehouse storage.

As a result, at 600 East Street, storage warehouse is a permitted nonconforming use. This use was permitted under the Zoning Regulations in 2017 when the rezoning occurred; it was in actual existence at that time; and it has continued to the present time.

The conversion of the property to an Extra Space Storage franchise would clearly be within the scope of the property's nonconforming use right. In a recent letter to Chamberlain Square, Director Lupo asserted that the I-2 allowed use was "not open to the public," whereas a self-storage facility would provide "unlimited public access." However, the pre-2017 Zoning Regulations made no such distinction; they permitted "storage" and "warehouse" use without access limits. In addition, Chamberlain Square's operation has allowed customers – the public – access to individual storage units, albeit with appropriate security protocols. (Mr. Lupo's letter also refers to provisions about warehouses in Title 42a of the General Statutes which is the

[1] This history has been compiled from both City records and conversations with former Amodio and Siracusa employees, along with Mr. Sanders' personal knowledge.

In a Connecticut court decision addressing this very issue, a judge ruled that "self-storage" and "warehousing" are the same thing, and a "distinction between storage of personal items and business items is an arbitrary and meaningless one." See *JMM Enterprises, LLC in Hamden Planning & Zoning Commission,* 36 Conn. L. Rptr. 878 (Super. Ct., 2004) (Tanzer, J.) (*copy attached*).

The use of the 600 East Street building as an Extra Storage Space franchise would involve only minor renovations not affecting the footprint of the building, and thus would be compliant with the City's Zoning Regulations concerning permissible modifications to a nonconforming use, see Zoning Regulations, §§ 260-10-20, 260-20-30, and 260-20-50, with no variance required.

Additional reasons to maintain the storage warehouse use at 600 East Street are that the current building is outfitted for that use; physical conversion to a TOD-EM-1 use would be cost-prohibitive; and there is no apparent market for conversion to an office use.

As to 86 Woodland (0.9 ac.) it is our understanding that the contract purchaser Mr. Foley and his company are willing to explore with the City a TOD-EM-1 compliant use on that property.

For these reasons, it is our professional opinion that an Extra Space Storage facility may be established at 600 East Street, New Britain, requiring only a building permit.

We would be happy to meet in person or online to discuss this opinion in more detail. We respectfully request a response by Monday, June 5, 2023.

Thank you for your attention.

Very truly yours,

Timothy S. Hollister

cc: Luke Massirio, OR&L Integrated Services
Stephen Foley
James Sanders
Andrea Gomes

2004 WL 1098684

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

JMM PROPERTIES, LLC, et al.
v.
TOWN OF HAMDEN PLANNING & **ZONING** COMMISSION.

No. CV030283697S.
|
April 20, 2004.

Attorneys and Law Firms

Falcone Vincent R Law Offices of LL, West Haven, for JMM Properties LLC and Joseph Moruzzi.

Hamden Corporation Counsel, Hamden, for Town of Hamden Planning & **Zoning** Commission.

Opinion

TANZER, Judge.

***1** This is an appeal from a decision of the planning & **zoning** commission of the town of Hamden denying plaintiff's application for site plan approval of an indoor **storage** facility. The plaintiff, JMM Properties, LLC (JMM), is the owner of property known as 785 Sherman Avenue, Hamden, Connecticut. On November 25, 2002, JMM submitted an application for site plan approval with the defendant, the planning & **zoning** commission of the town of Hamden (the Commission). The application sought the Commission's approval to convert an existing building on the property into an indoor self-**storage** facility. The property is located within the town of Hamden's manufacturing district, M-1 District. Section 552.1 of the **zoning** regulations of the town of Hamden provides that "**warehousing** and wholesaling with indoor **storage**" are uses permitted by right in the M-1 District. There is no dispute that the commission had previously interpreted § 552.1 of the regulations to allow self-**storage** in the M-1 District. There is also evidence in the record that, prior to JMM's instant application, the Commission had changed its interpretation and decided that self-**storage** was not a permitted use under § 552.1. Letter of Town Planner dated January 24, 2003. (ROR 42.) See, *1315 Hamden, LLC v. Town of Hamden Planning and **Zoning** Commission,* Superior Court, judicial district of New Haven at New Haven, No. CV 02-0471309S (August 11, 2003, Radcliffe, J.) (35 Conn. L. Rptr. 316) ("Land use agencies in the Town of Hamden, prior to May 14, 2002, consistently interpreted the provisions of § 552.1 to include self-**storage**, within the language of '**warehousing** and wholesaling with indoor **storage**' ").

The Commission held a public meeting with respect to JMM's application for site plan approval for "indoor **storage**" on January 28, 2003. The Commission denied the application for the reasons that "it is not a manufacturing use and the prior ruling established this **zone** for the purpose of industrial related business ." The record also reflects that the Commission considered "self-**storage**" to involve **storage** of items for individual personal use and "**warehousing**" to involve **storage** of items for resale of wholesale and retail goods. Notice of the Commission's decision was published on February 2, 2003. By complaint dated February 10, 2003, JMM appealed from the denial of its application for site plan approval to this court. I find that JMM is aggrieved by the ruling of the Commission on JMM's site plan.

A **zoning** commission's authority in ruling on a site plan is limited. A site plan is "filed with a **zoning** commission or other municipal agency or official to determine the conformity of a proposed building, use or structure with specific provisions of the **zoning** regulations." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (2d Ed.1999) § 2.2, p. 18. "In ruling upon a site plan application, the planning commission acts in its ministerial capacity, rather than its quasi-judicial or legislative capacity. It is given no independent discretion beyond determining whether the plan complies with the applicable regulations." (Internal quotation marks omitted.) *Berlin Batting Cages, Inc. v. Planning & **Zoning** Commission,* 76 Conn.App. 199, 221, 821 A.2d 269 (2003).

***2** "Generally, it is the function of a **zoning** board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion whether a particular section of the **zoning** regulations applies to a given situation and the manner in which it does apply ... In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its decision will not be disturbed unless it is found to be unreasonable, arbitrary or illegal." (Citations omitted; internal quotation marks omitted.) *Spero v.*

Zoning Board of Appeals, 217 Conn. 435, 440, 586 A.2d 590 (1991); see also *Irwin v. Planning & Zoning Commission*, 244 Conn. 619, 627-28, 711 A.2d 675 (1998).

"The burden of proof to demonstrate that the board acted improperly is upon the party seeking to overturn the board's decision." (Internal quotation marks omitted.) *Pleasant View Farms Development, Inc. v. Zoning Board of Appeals*, 218 Conn. 265, 269-70, 588 A.2d 1372 (1991).

JMM argues that the Commission could not ignore its prior interpretations of the zoning laws when considering JMM's application, in particular that "self-storage" was a permitted use in the M-1 District pursuant to § 552.1. The Commission rightly argues, however, that the germane question is not how § 552.1 was interpreted in the past, but rather what the correct interpretation is at present. Generally, it is the function of a zoning commission to decide whether a particular section of the zoning regulations applies to a given factual situation. *Double I Limited Partnership v. Plan & Zoning Commission*, 218 Conn. 65, 72, 588 A.2d 624 (1991); *Schwartz v. Planning & Zoning Commission*, 208 Conn. 146, 152, 543 A.2d 1339 (1988). This court must decide whether the Commission correctly interpreted § 552.1 of the regulations and must determine if the commission's interpretation goes beyond the fair import of the language of the regulations. See *J & M Realty Co. v.. Board of Zoning Appeals*, 161 Conn. 229, 233, 286 A.2d 317 (1971). It is for the trial court to determine whether the commission correctly interpreted the section. *Id.* Thus, it is for this trial court to determine whether the commission has correctly interpreted its regulations and applied them with reasonable discretion to the facts. *Pascale v. Board of Zoning Appeals*, 150 Conn. 113, 117, 186 A.2d 377 (1962).

The Commission's prior interpretation of the regulation and its change in interpretation, however, are not without significance in making that determination because they bear on issues of whether the regulation is ambiguous and whether the Commission's decision is arbitrary. The following principles are pertinent to deciding this appeal:

" 'Ambiguous' " ... has often been defined to mean that which is susceptible of more than one interpretation. See, e.g., *Continental Casualty Co. v. Borthwick*, 177 So.2d 687, 690 (Fla.App.1965) (of uncertain meaning and that which may be fairly understood in more ways than one) ..." (Citations omitted; internal quotation marks omitted.) *Lopinto v. Haines*, 185 Conn. 527, 538, 44 A.2d 151 (1981).

***3** Where a regulation is capable of two constructions, courts adopt "the one that renders the enactment effective and workable and reject any that might lead to unreasonable or bizarre results." *Planning & Zoning Commission v. Gilbert*, 208 Conn. 696, 706, 543 A.2d 826 (1988); see also *State v. Williams*, 206 Conn. 203, 210, 536 A.2d 583 (1988).

Furthermore, when more than one interpretation of the language in a regulation is possible, "restrictions upon the use of land are not to be extended by implication ... [D]oubtful language will be construed against, rather than in favor of, a restriction." *Farrior v. Zoning Board of Appeals*, 70 Conn.App. 86, 90, 796 A.2d 1262 (2002). "The practical construction placed over the years upon ambiguous language in legislation by those charged with its administration becomes weighty evidence of what the law is." *Clark v. Town Council*, 145 Conn. 476, 485, 144 A.2d 327 (1958); *McDonald's System, Inc. v. Zoning Board of Appeals*, 28 Conn.Sup. 181, 186, 225 A.2d 862 (1968).

The Commission claims that its interpretation of § 552.1 was reasonable and should be accorded great deference by the court. It argues that "[a]lthough prior Commissions may have interpreted this provision to allow for self-storage facilities, the present Commission's interpretation is support[ed] [by the] clear and unambiguous language of the regulation." The problem with this argument is that the Commission's changing interpretation of § 552.1 does not connote clear and unambiguous language. The Commission contends that although the plaintiff's proposal could arguably be considered warehousing, the proposed activity must include both "warehousing" and "wholesaling" to come within the meaning of § 552.1 because the regulation uses the conjunctive word "and" between warehousing and wholesaling. Such an interpretation is not supported as reasonable when the regulation is viewed as a whole. Other uses permitted by right contain the conjunctive but it would be contrary to reason and experience to interpret the regulations to require that one of those uses must be conducted with the other. For instance, "Radio *and* TV Stations" are permitted as of right in the M-1 District.

The Commission also argues that since the M-1 District is a manufacturing district, the "warehousing/wholesaling envisioned in the zoning regulations presumably would

be in conjunction with manufacturing and would not be a stand-alone use totally unrelated to any manufacturing use. Under the regulations, however, '[t]he purpose of the Manufacturing M-1 District is to provide for a broad range of industrial and commercial uses in an open setting that will not have environmentally objectionable influences on adjoining residential and business districts.' " Use of property in the M-1 District to afford **warehouse** or **storage** space for hire, whether related or unrelated to manufacturing, is a commercial use consistent with the stated purpose of the regulations. Moreover, the regulations permit by right other uses which are neither industrial nor related to manufacturing. They include office buildings, business schools, TV and radio stations, and computer and data processing centers. Manufacturing is listed as a separate permitted use. Section 552.1. Uses permitted by Right. Thus, the reasons stated by the Commission for denying the site application for indoor self-**storage**-"it is not a manufacturing use and [not] for the purpose of industrial related business"-are not based on a fair and reasonable reading of the regulations pertaining to permitted uses in the M1 District and are not valid reasons for denying JMM's application for site plan approval.

4** This, however, does not end the inquiry as to whether self-**storage** falls within the meaning of "**warehousing**." At the public hearing that took place on January 28, 2003, the Commission made a distinction between the definition of "**warehousing**" and "self-**storage**." According to them, **warehousing** involves the resale and wholesale of retail goods, while self-**storage** is for individual personal use. The term "self-**storage**" is not mentioned in the regulations and the term "**warehousing**" is not defined in the regulations. The Connecticut Supreme Court has stated that the term "**warehouse**," as used in the law, "ordinarily means a building for the reception and keeping of goods and, in a more restricted sense, a building where goods of others are stored for hire." *Fisher v. Board of **Zoning, 143 Conn. 358, 363, 122 A.2d 729 (1956). It is a place where others pay to store and keep goods. This would clearly encompass the common definition of "self-**storage**," which is "of relating to, or being a commercial facility where customers can rent space to store possessions: *a self-**storage** **warehouse***." (Emphasis in original.) The American Heritage Dictionary of the English Language (4th Ed.2000). It is beyond the plain meaning of the term "**warehouse**" to suggest that it excludes a place where goods are stored for private or personal use and only applies to a place where goods are stored for resale or commercial use. Even if that were so, the record reflects that self-**storage** units are used by commercial entities such as pharmaceutical companies, antiques dealers, landscapers and are used by professionals for document **storage**. (ROR 45 and 56.) When analyzed further, the distinction between **storage** of personal items and business items is an arbitrary and meaningless one. A retired couple having downsized and using "self **storage** units" to store their antiques for resale is hardly distinguishable from an antique dealer storing items for resale. It is a distinction that is illogical and unworkable. Courts should reject interpretations of statutes (and regulations) that produce bizarre or illogical results. See *State v. Uretek, Inc.*, 207 Conn. 706, 719, 543 A.2d 709 (1988). Additionally, **zoning** regulations, which are in derogation of common-law property rights, should not be construed to include or exclude by implication matters that are not clearly within their expressed terms. *Planning & **Zoning** Commission v. Gilbert, supra,* 208 Conn. at 705. The term "self-**storage**" does not appear in the regulations of the town of Hamden and the regulations should not be construed to exclude that use unless expressed. "Where more than one interpretation of language is permissible, restrictions upon the use of lands are not to be extended by implication ... doubtful language will be construed against rather than in favor of a [restriction]." (Internal quotation marks omitted.) *Daughters of St. Paul, Inc. v. **Zoning** Board of Appeals,* 17 Conn.App. 53, 66, 549 A.2d 1076 (1988), quoting *Basset v. Pepe,* 94 Conn. 631, 637, 110 A. 56 (1920).

***5** While a local **zoning** commission, "is in the most advantageous position to interpret its own regulations and apply them to situations before it ... [t]he court is not bound by the legal interpretation of the ordinance by the [commission]." (Citations omitted; internal quotation marks omitted.) *Doyen v. **Zoning** Board of Appeals,* 67 Conn.App. 597, 603, 789 A.2d 478, cert. denied, 260 Conn. 901, 793 A.2d 1088 (2002). A **zoning** commission acts arbitrarily and unreasonably when it interprets the applicable regulatory language in a manner that is contrary to the natural and usual meaning of its terms. See *Farrior v. **Zoning** Board of Appeals, supra,* 70 Conn.App. at 95 (overturning a **zoning** board's decision that "motor homes" were included in the **zoning** regulations' prohibition of "mobile homes"). **Zoning** regulations, which are in derogation of common-law property rights, should not be construed to include or exclude by implication matters that are not clearly within their expressed terms. *Planning & **Zoning** Commission v. Gilbert, supra,* 208 Conn. at 705.

In *Concord Food Festival, Inc. v. Planning & Zoning Commission,* Superior Court, judicial district of Hartford-New Britain at West Hartford, Docket No. CV 920506080 (March 24, 1993, Scheinblum, J.), the plaintiff was denied a special use permit to sell liquor based on the defendant's reinterpretation of its zoning regulations. The court held that a denial of the plaintiff's similar application was arbitrary and an abuse of discretion because it "has lead to the bizarre result of permitting only some restaurants with identical service styles to serve beer and wine, while permitting others from doing the same." *Concord Food Festival, Inc. v. Planning & Zoning Commission, supra,* Superior Court, Docket No. CV 92 0506080. In the present case, the Commission's denial of JMM's site application leads to the bizarre result that some self-storage facilities are allowed by right in the M-1 zoning district, while other self-storage facilities, including JMM's, are prohibited. See *Id.;* see also *Hardisty v. Woodbury Zoning Commission,* Superior Court, judicial district of Waterbury, Docket No. CV 95 0128499 (May 2, 1996, Flynn, J.) (17 Conn. L. Rptr. 108, 109)(May 2, 1996, Flynn, J.) (17 Conn. L. Rptr. 108, 109) (noting that when a zoning board "departs from a settled interpretation of [an] ordinance it used in other similar applications it might indicate an arbitrary exercise of authority").

The Commission, in denying JMM's application for site plan approval, failed to correctly interpret § 552.1 of the zoning regulations and failed to apply that section in a consistent and reasonable manner to the facts and circumstances of the application. The decision of the Commission was not legal and was arbitrary.

For the reasons expressed above, JMM's appeal is sustained.

All Citations

Not Reported in A.2d, 2004 WL 1098684, 36 Conn. L. Rptr. 878

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