DOCKET NO. LND CV-14-6055381-S	:	SUPERIOR COURT
COLLEEN BIELITZ, ET AL.	:	LAND USE LITIGATION DOCKET
V.	:	AT HARTFORD
WEX-TUCK REALTY, LLC, ET AL.	:	DECEMBER 13, 2019

MEMORANDUM OF DECISION

On August 30, 2018, this court issued a memorandum of decision on the parties' cross motions for summary judgment concerning a special exception issued by the codefendant, the Newington town plan and zoning commission (commission), for a Firestone Complete Auto Care Center (Firestone facility) at 2897 Berlin Turnpike in Newington. As noted in that decision, this litigation involves three cases and multiple decisions, primarily issued by the court, *Mottolese, J.T.R.*, which were incorporated by this court. Now, this court incorporates its August 30, 2018 memorandum of decision in ruling on the plaintiffs' revised complaint, filed April 5, 2017, seeking a permanent injunction. Thus, the court will not repeat the history of this litigation.[1]

The August 30, 2018 memorandum of decision discussed–but did not adjudicate[2]–the last

[1] It is noted, however, that two of the coplaintiffs, Colleen Bielitz and Laura Bielitz, are no longer parties to the litigation. As they no longer own or reside at 2110 Main Street in Newington and in light of the parties' stipulation filed on July 3, 2019, the court granted the defendants' motion to dismiss the action as to these two coplaintiffs on August 1, 2019. Nevertheless, the court allowed them to testify at the August 21, 2019 hearing.

[2] Instead, the court scheduled a hearing allowing evidence to be presented on the issue of irreparable harm.

290.00

issue remaining in this case, i.e., whether a private party seeking injunctive relief must prove irreparable harm when the zoning process and the resulting special exception have been adjudicated to be void. Our land use law has addressed some aspects of this question, but it has never confronted the exact question particular to the facts of this case.

The plaintiffs assert that the defendants' permit is void and, therefore, the plaintiffs need not prove irreparable harm under *Wellswood Columbia, LLC* v. *Hebron*, 295 Conn. 802, 824, 992 A.2d 1120 (2010). In *Wellswood Columbia*, the court held, "When a municipality has acted in excess of its delegated powers, the plaintiff is not required to show that he has been irreparably harmed by the ultra vires act or that damages are not available in order to obtain relief. Rather, ultra vires acts by municipalities are void ab initio."[3] Id.

The defendants counter that the plaintiffs are required to prove irreparable harm. They cite *Steroco, Inc.* v. *Szymanski*, 166 Conn. App. 75, 89, 140 A.3d 1014 (2016). In *Steroco*, the court held that "[i]n addition to establishing standing to seek injunctive relief in a private enforcement action, a plaintiff in such an action must establish: (1) that injury from failure to grant an injunction is imminent; (2) the injury is substantial; (3) the injury is irreparable and there is a substantial probability that unless an injunction is issued the party seeking it will suffer irreparable harm." (Internal quotation marks omitted.) Id. Additionally, they assert that the void action of the commission does not excuse the plaintiffs from having to prove irreparable harm.

---

[3] See also *Center Shops of East Granby, Inc.* v. *Planning & Zoning Commission*, 52 Conn. App. 763, 775, 727 A.2d 807 (1999) ("[O]ur Supreme Court has recognized that when action by a municipal entity is subsequently found to be invalid, it is as if that entity never met or voted. . . . In other words, the meeting was void ab initio–'[f]rom the beginning' or 'from the first act.'" [Citations omitted; internal quotation marks omitted.]), rev'd on other grounds, 253 Conn. 183, 757 A.2d 1052 (2000).

This court does not take issue with the traditional recitation of law set forth in *Steroco*; however, because of the factual predicate of this case, *Wellswood* applies. On January 21, 2014, in *Modern Tire Recapping Company, Inc.* v. *Newington Town Plan and Zoning Commission*, Superior Court, land use docket at Hartford, Docket No. LND CV-12-6035007-S (57 Conn. L. Rptr. 525), Judge Mottolese held that the regulations, upon which the defendants' special exception was based, were invalid and void ab initio. The defendants did not file a petition for certification. Hence, it is established law in this case that there is a zoning violation. See *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 322, 63 A.3d 896 (2013) ("[t]he law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided" [internal quotation marks omitted]). Further, it is undisputed that the Firestone facility was constructed and that the use was commenced and continues without a valid special exception.[4]

If Newington had instituted this litigation, it could have relied on Judge Mottolese's decision that the regulations and the special exception were void. It would have undisputedly had

---

[4] In a letter dated January 17, 2013; counsel for the plaintiffs wrote to the commission in connection with the possible ramifications of a void legislative and administrative decision (pleading [pl.] # 260.00, pp. A-30-A-31). In a letter dated July 31, 2014, counsel urged the commission to require the defendants to seek a new permit (pl. # 260.00, pp. A-171-A-173). The subject property was conveyed to the defendants in August of 2014, and the plaintiffs sent another letter, dated September 3, 2014, requesting action by the commission (pl. # 260.00, pp. A-176-A-178). The defendants executed a ground lease on October 1, 2014, and construction commenced on November 10, 2014 (pl. # 278.00, pp. 2, 5).

Notwithstanding the plaintiffs efforts to have a restraining order issued, a hearing in the present case was not held until March, 2015. On the second page of Judge Mottolese's October 20, 2015 decision, the court noted that "the defendants elected to proceed with the construction of the facility to completion during the pendency of this litigation at their own risk and so by completion of the trial, the facility was ready to open for business." The court did not address, however, the instant issue.

no burden to prove irreparable harm. "The rationale underlying [the] rule that the complainant is relieved of his burden of proving irreparable harm and no adequate remedy at law is that the enactment of the statute by implication assumes that no adequate alternative remedy exists and that the injury was irreparable, that is, the legislation was needed or else it would not have been enacted." (Internal quotation marks omitted.) *Conservation Commission* v. *Price*, 193 Conn. 414, 429, 479 A.2d 187 (1984). This reasoning does not change simply because the plaintiffs are private persons.

In the present case, the legislation is the town's comprehensive plan. See General Statutes § 8-2; see also *First Hartford Realty Corporation* v. *Plan & Zoning Commission*, 165 Conn. 533, 542, 338 A.2d 490 (1973) ("[t]he comprehensive plan is to be found in the scheme of the zoning regulations themselves"). Newington's comprehensive plan required a special exception for motor vehicle uses such as the Firestone facility. Without a special exception, one cannot build and operate such a use. Because the defendants constructed the facility and are operating it without a valid permit, it is illogical to require the plaintiffs to prove that they are irreparably harmed because of the defendants' illegal activities. The sole fact that the defendants have no permit and are thus operating unlawfully is sufficient proof of irreparable harm.[5] To require more,

---

[5] "[O]ur case law is clear that nearby property owners specifically and materially damaged by the violation of zoning regulations may bring private zoning enforcement actions directly to the Superior Court, without first applying to municipal zoning authorities." (Internal quotation marks omitted.) *Steroco, Inc.* v. *Szymanski*, supra, 166 Conn. App. 88. In the present case, certain plaintiffs were not parties to the appeal of the special exception, but were involved in the administrative process. Nevertheless, as the initial administrative action was declared void, this is an exception to the collateral attack rule. See *Upjohn Co.* v. *Zoning Board of Appeals*, 224 Conn. 96, 104-105, 616 A.2d 793 (1992) ("[T]here may be exceptional cases in which a previously unchallenged condition was so far outside what could have been regarded as a valid exercise of zoning power that there could not have been any justified reliance on it, or in which the continued maintenance of a previously unchallenged condition would violate some strong

defeats the land use regulatory scheme by allowing a party, such as the operator in this case, and the municipality to flout a decision of the court. Newington and the defendants cannot ignore the court's ruling and violate the comprehensive plan.

This case is complicated by the fact that the commission has not taken any action as to the illegal permit or use.[6] It is the commission's function to protect the public interest. *Rommell* v. *Walsh*, 127 Conn. 16, 21, 15 A.2d 6 (1940) ("under most, if not all, of our municipal charters, the function of protecting and advancing the public interest in establishing and maintaining a proper and adequate zoning system is entrusted to certain boards, which, in that respect, exercise a large discretion"); see also *Andross* v. *West Hartford*, 285 Conn. 309, 331, 939 A.2d 1146 (2008) ("[t]his court has suggested that, when injury is shared by the community, the proper party to vindicate public interests may be the attorney general, the state's attorney or the town itself"). Commencing a traditional enforcement action is discretionary under our law. *Greenfield* v. *Reynolds*, 122 Conn. App. 465, 472-73, 1 A.3d 125 ("[i]n sum, we conclude that the specific relief sought by the plaintiff, namely, the enforcement of zoning regulations, being an act that is to be performed wholly for the 'direct benefit of the public' and not in a 'prescribed manner without the exercise of judgment or discretion as to the propriety of the action'. . . is a discretionary and not ministerial act" [citation omitted]), cert. denied, 298 Conn. 922, 4 A.3d 1226 (2010). As Newington has decided not to enforce its comprehensive plan; the plaintiffs have taken on that burden. See *Wheeler* v. *Bedford*, 54 Conn. 244, 249, 7 A. 22 (1886) ("But suppose the

---

public policy. It may be that in such a case a collateral attack on such a condition should be permitted.").

[6] This court notes that the commission recently amended its regulations concerning motor vehicle uses. Exhibit 500.

authorities are unwilling to institute proceedings. Where, then, will be the ample remedy? They are not bound to redress the plaintiffs' private grievances. They act solely for the public, induced by public considerations, when they act at all. 'Adequate remedy at law' means a remedy vested in the complainant, to which he may, at all times resort, at his own option, fully and freely, without let or hinderance. This has been held many times by the Superior Court."); see also *Schomer* v. *Shilepsky*, 169 Conn. 186, 194, 363 A.2d 128 (1975) ("[t]hough the primary responsibility for enforcing zoning regulations rests with the zoning commission, where a violation results in special damage to an individual, the injured party has a right to seek injunctive relief").

"The requirement of a comprehensive plan is generally satisfied when the zoning authority acts with the intention of promoting the best interests of the entire community." (Internal quotation marks omitted.) *Konigsberg* v. *Board of Aldermen*, 283 Conn. 553, 585, 930 A.2d 1 (2007). The plaintiffs are members of the community which the zoning regulations are designed to protect. As the plaintiffs have standing, they should be able to rely on the court's holding that the regulations and the special exception are void–without more.

Additionally, Newington's inaction does not negate the general purpose of General Statutes § 8-12. The statute, in relevant part, provides that "[i]f any building or structure has been erected, constructed, altered, converted or maintained, or any building, structure or land has been used, in violation of any provision of this chapter or of any bylaw, ordinance, rule or regulation made under authority conferred hereby, any official having jurisdiction, in addition to other remedies, may institute an action or proceeding to prevent such unlawful erection, construction, alteration, conversion, maintenance or use or to restrain, correct or abate such violation or to prevent the occupancy of such building, structure or land or to prevent any illegal

act, conduct, business or use in or about such premises. . . ."

Further, it is not a question, as suggested by the defendants, of allowing just any person to commence litigation[7] without some nexus to the zoning violation. In the present case, the plaintiffs are aggrieved as indicated by the evidence of noise in the February 3, 2017 stipulation and the resulting judgment (pls. ## 249.00 and 249.86) and the testimony received at the August 21, 2019 hearing concerning the impacts of the building's lights. Such evidence, including the testimony concerning noise created by tire removals, meets the required burden to prove injury and irreparable harm.

Though the plaintiffs have proven the elements for a permanent injunction, it is almost of no moment. For regardless, the court must resolve the question of what to do about a building and a use that continues to have no valid special exception. It must be noted that the plaintiffs are not seeking an order that the defendants' building be demolished or that the configuration of the garage doors be modified–something they might properly seek if the issue was simply a violation of a lawfully issued permit. Even if they were, an order making specific structural changes such as the permanent closure of the garage doors facing the plaintiffs' residences would not resolve the issue of the lack of a valid special exception.

It is this lack of a lawful permit that dictates the remedy. While certain changes have been made recently to the regulations, the defendants must apply for and obtain approvals that will satisfy the regulations. Accordingly, the subject business must close within sixty days of this

---

[7] This is allowed, however, in any matter concerning some aspect of a liquor license and a zoning application. *Jolly, Inc.* v. *Zoning Board of Appeals*, 237 Conn. 184, 186-87, 676 A.2d 831 (1996) ("[i]n accordance with existing precedent, any taxpayer in a municipality has automatic standing to appeal from a zoning decision involving the sale of liquor in that community").

decision and remain closed until the defendants have obtained the required zoning permits.

Berger

Berger, J.T.R.