

DOCKET NO. FST-CV-08-4015041-S	:	SUPERIOR COURT
	:	
WILLIAM F. POLOYATE, ET AL	:	JUDICIAL DISTRICT OF
	:	STAMFORD/NORWALK
vs.	:	AT STAMFORD
	:	
ZONING BOARD OF THE CITY OF	:	
STAMFORD and the CITY OF STAMFORD	:	September 21, 2009
	:	
	:	AND
	:	
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WILLIAM F. POLOYATE, ET AL	:	JUDICIAL DISTRICT OF
	:	STAMFORD/NORWALK
vs.	:	AT STAMFORD
	:	
ZONING BOARD OF APPEALS OF THE	:	
CITY OF STAMFORD, ET AL	:	September 21, 2009

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF APPEALS

Preliminary Statement

This reply brief is submitted by the plaintiff-appellants in these consolidated zoning appeals to respond to arguments offered by the defendants in their brief dated August 4, 2009 ("Defendants' brief"). As in the plaintiffs' initial brief, references to the record in the first appeal (from the decision of the Stamford Zoning Board) appear herein as "R.1". References to the record in the second appeal (from the decision of the Stamford Zoning Board of Appeals) appear herein as "R.2".

A. Standard of Review

When a Board states its reasons for its actions (as in this case), the court's function is confined to reviewing whether those reasons are sufficient to sustain the decision.

We previously have articulated the proper scope of review of the reasons provided by a commission for its decisions. When a zoning agency has stated its reasons for its actions, a court should not reach beyond those stated purposes to search the record for other reasons supporting the commission's decision.

Harris v. Zoning Com'n of Town of New Milford, 259 Conn. 402, 420 (2002); DeMaria v. Planning & Zoning Commission, 159 Conn. 534, 541 (1970). "Where the board states its reasons on the record we look no further" Smith Bros. Woodland Management, LLC v. Planning and Zoning Com'n of Town of Monroe, 88 Conn.App. 79, 85 (2005). The court "should not attempt to search out and speculate upon other reasons which might have influenced some or all of the members of the commission to reach the commission's final collective decision." DeMaria, 159 Conn. at 541.

"[T]he factual assumptions on which the approval is premised ... must be supported by substantial evidence in the record at the time of the approval." Gerlt v. Planning and Zoning Com'n of Town of South Windsor, 290 Conn. 313, 326 (2009).

B. The Reasons Stated by the Zoning Board in this Case

In the first of the two above-captioned zoning appeals, FST-CV-08-4015041-S, the members of the Zoning Board voting to approve the CAM application stated the reasons for their decision in their deliberations. The defendants concede in their brief that the only reasons discussed and determinative to the board's decision were environmental: **"The record has ample evidence to support the Zoning Board decision that the plaintiffs did not show the two artificial turf fields would constitute unreasonable pollution of coastal resources or the public trust in the air and water."**

Defendant's Brief at 2. Board member Parson, voting to approve, stated:

I guess there is federal also didn't seem to back any of the things that said it would harm human beings. I don't care if they are one or six months or how

old they are, it shouldn't harm anyone.

R.1, Item 41, p. 117. Board member Kaufman, voting to approve, stated:

And I am not sure if the organic turf solution is applicable here because it doesn't actually resolve the fact - - the one issue with geese which actually attributes to pollution of the Long Island Sound.

Id. at 119.

Our science is much better today than it was thirty, forty years ago to the mere fact that – and I say this – people with cancer today are living a lot longer. We are able to solve medical issues today in a much better way than we did thirty, forty, fifty years ago. So maybe it's a little I am generalizing it but I think we know a little bit more on how to manage some of those issues today. So with that. With one caveat here I am going to say, I think that we should do is ask the city to provide some sampling and a program to keep an eye on the fields. We actually can if we approve it – we put conditions of approval on application all the time. So provide some kind of maintenance and sampling.

Id. at 127-28. Board member Nakanian, voting to approve, stated:

[I] did not really see anything in all this 25 tons of paper that made me feel that there was the greater damage from the artificial turf than already exists now. We are not adding anything in my opinion that based upon my reading that makes the situation worse.

Id. at 121.

I have to say I think the benefits of putting the artificial turf on in this case outweighs the very possible, I don't mean to say – all right, the possibility that I don't think is very great of their being any environmental impact. And I think that the area already has so much environmental impact from the waste treatment plants, storm drains, industry, cement factories, you name it that one artificial turf field is going to make a great difference. So I am going to vote that way.

Id. at 122. Board Chairman Kapiloff, voting to approve, stated:

I have not been convinced by the intervenors that the artificial turf is going to pollute Long Island Sound to the extent that they say.

Id. at 123.

I think that in all practicality—and maybe I am being naive about this – that if the football owners, the professional football owners of these teams are allowing their players who are probably individually worth a great deal of money to them to play

on artificial turf, not only to play on it but they seem to encourage it, and it made me think that for Stamford perhaps we should be willing to take some risk. I don't think anything in life is risk free. This is one of the things that I think I would be willing to take a risk on.

Id. at 123-24.

ARGUMENT

I

THE DEFENDANTS CANNOT ESCAPE A FINDING THAT BOTH ZONING TRIBUNALS IN THESE APPEALS LACKED SUBJECT MATTER JURISDICTION TO ENTERTAIN THE APPLICATIONS BEFORE THEM.

The eleven plaintiffs in these appeals pointed out in their first brief that both the Stamford Zoning Board and the Zoning Board of Appeals lacked subject matter jurisdiction to entertain the applications submitted to them herein. Plaintiff's Brief in Support of Appeals dated June 18, 2009 ("Plaintiff's Brief") at 16-20.

The two zoning agencies lacked jurisdiction because the Charter of the City of Stamford directed that no City agency had power to act until the municipal improvement proposal which is the subject of these appeals was "referred to the Planning Board for a report." Stamford City Charter, § C6-30-13.

"Where the municipal charter prescribes a particular procedure by which a specific act is to be done or a power is to be performed, that procedure must be followed for the act to be lawful." (Internal quotation marks omitted.) *New Haven v. Local 884, Council 4 AFSCME, AFL-CIO*, supra, at 769, 694 A.2d 417.

Alexander v. Retirement Bd. of City of Waterbury, 57 Conn.App. 751, 759 (2000).

Moreover, there is only one legal way to make such a referral for a municipal improvement project located within the coastal boundary: Conn. Gen. Stat. § 22a-105(b)(5) mandates that any such "referral" be made as a coastal site plan application under the Coastal Management Act.

The defendants admit in their brief that that they never filed a coastal site plan with the Stamford Planning Board -- all the defendants ever did vis-à-vis the Planning Board was ask it to approve a capital budget request for the project:

Mr. Casolo indicates that he went before the Planning Board twice (8/21/07 and 11/13/07) in order to obtain approval for the money for the artificial turf contracts.

Defendants' Brief at 9.

The defendants in their brief engage in legal gymnastics in the hope that this court will not notice the obvious jurisdictional defect in this case:

1. They argue that two of the eleven plaintiffs, because they were "intervenor" before the boards below, could only raise "environmental issues" then and now, and have no right to question the subject matter jurisdiction of the two zoning boards. Defendants' Brief at 16-17.
2. They argue that because the applicant made a capital budget request of the Planning Board, appearing twice and answering many questions posed by the Planning Board, this court should ignore the fact that the defendants never referred the project, as mandated by the City Charter, to the Planning Board for a report. Defendants' Brief at 18-23.

A. The Two Intervenor Plaintiffs have the Right to Ask this Court to Declare that the Boards Below had no Subject Matter Jurisdiction to Entertain the Defendants' Applications.

Two of the eleven plaintiffs ("Save West Beach Park" and Karen Murphy) appeared before the Boards below to oppose the defendants' applications. They did so as intervenors under Conn. Gen. Stat. § 22a-19(a). But doing so did not prevent them from challenging the jurisdiction of the tribunals, nor does it bar them from bringing that fatal jurisdictional defect to this court's attention now.

The Stamford City Charter stated that the City was empowered to take "no action" on its municipal improvement proposal until it had "been referred to the Planning Board for a report." Stamford City Charter, § C6-30-13. Notwithstanding this command, both

boards below proceeded with action that the Charter stated they were not authorized to exercise.

It is axiomatic that a tribunal must have jurisdiction over the subject-matter it hears and that subject matter jurisdiction is the power of the tribunal to hear and determine cases to which the proceedings in question belong. Figueroa v. C & S Ball Bearing, 237 Conn. 1, 4, 675 A.2d 845 (1996). " 'Administrative agencies ... are tribunals of limited jurisdiction'"

Keegan v. Aetna Life and Cas. Ins. Co., 42 Conn.App. 803, 805-806 (1996).

The lack of subject matter jurisdiction of a tribunal may be raised at any time -- even in an appeal from that tribunal:

[I]t is well established that "[t]he subject matter jurisdiction requirement ... may be raised ... by the court sua sponte, at any stage of the proceedings, including on appeal." *Peters v. Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005).

First Connecticut Capital, LLC v. Homes of Westport, LLC, 112 Conn.App. 750, 756 n. 6 (2009).

A good analysis of the right -- of anyone -- to challenge the subject matter jurisdiction of a tribunal was articulated by Judge Silbert in Sosin v. Scinto, 2000 WL 38756 (Conn.Super.)(**Exhibit 1**).

Lack of subject matter jurisdiction may be raised at any time. *Baldwin Piano & Organ Co. v. Blake*, 186 Conn. 295, 297 (1982). It may be noticed at any time and cannot be waived by the silence of the parties. *Simmons v. State*, 160 Conn. 492, 503 (1971). A court may act on its own motion when a want of jurisdiction is brought to its attention. *Park City Hospital v. Commission on Hospitals & Health Care*, 14 Conn.App. 413, 417 (1988). "It is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time." (Emphasis added.) *Lewis v. Gaming Policy Board*, 224 Conn. 693, 698, 620 A.2d 780 (1993).

Id. at *2.

The cases cited above which allow and even mandate subject matter jurisdiction to be raised at any time **and by anyone**, however, suggest that subject matter jurisdiction defects, if they exist ab initio, can not be cured by the mere passage of

time. If courts are required to address jurisdictional issues sua sponte even when they are not raised by the parties, perhaps it may be that once the issue is raised and found to have been meritorious as of the time the action was initiated, the case ought to be dismissed nunc pro tunc.

Id. (emphasis added).

If anyone at any time may bring to this court's attention that the two zoning boards below lacked subject matter jurisdiction to entertain the defendant City's applications, then certainly the two intervenor plaintiffs may do so at this time.

B. The Nine Non-Intervenor Plaintiffs have the Right to Ask this Court to Declare that the Boards Below had no Subject Matter Jurisdiction to Entertain the Defendants' Applications.

Nine of the eleven plaintiffs in these appeals are not intervenors. They are owners of properties that abut the land involved in the decisions of the two boards, and accordingly, they have standing under Conn. Gen. Stat. § 8-8 to raise in this appeal any and all errors by the tribunals below, including their exercise of jurisdiction when none existed. These plaintiffs did not have to appear in the proceedings below to do this; in fact, they need not even have any "personal interest in the outcome of the litigation" to appeal on this or any ground. Aitken v. Zoning Board of Appeals, 18 Conn. App. 195, 198 (1989).

C. No Amount of Dialogue with the Planning Board by the Applicant Could Suffice as a Proper Referral for a Report under the Charter Without Filing an Application for Coastal Site Plan Review to the Planning Board.

At pages 18 through 23 of their brief, the defendants go to great lengths to attempt to evade the jurisdictional requirement (that the City make sure that its municipal improvement proposal -- as a first order of business -- be "referred to the Planning Board for a report") by setting up a straw man and then knocking him down. They argue that

the plaintiffs had stated rhetorically at the September 8, 2008 hearing that the Planning Board had been left out "in the cold."¹ Then they assert how lengthy a dialogue the applicant had had on the two dates that he appeared before the Planning Board.

As stated, Conn. Gen. Stat. § 22a-105(b) establishes a mandatory requirement that a "referral of a proposed municipal project to a planning commission in accordance with section 8-24 or with any special act" **shall be defined as a coastal site plan.**²

It is our opinion that any time any site plans, plans and applications are submitted for any or all of the five situations listed in § 22a-105(b) for activities within the coastal boundary, they shall become coastal site plans, **and must be appropriately reviewed under § 22a-105(a) and § 22a-106.**

1985 Conn. Op. Atty. Gen. 308, 1985 WL 258102, *2 (Conn. A. G.)(emphasis added)(**Exhibit 2**).

The jurisdictional infirmity in this case is not that the Planning Board was left "out in the cold." The jurisdictional infirmity is that, by never pursuing coastal site plan review with the Planning Board, the applicant never legally referred the proposal to the Planning Board for a report, which is a jurisdictional prerequisite set out in § C6-30-13 of the City Charter.

The Planning Board never received a coastal site plan for review nor did it conduct the extensive review that is part of the process under Conn. Gen. Stat. §§ 22a-105 and 22a-106. The City admits that it had submitted nothing more than a "capital

¹ The defendants fail to accurately identify where in the transcript that rhetorical statement appeared.

² The provision in Section C6-30-13 of the City Charter requiring a referral of municipal improvement projects to the Planning Board for a report is in fact a requirement of a special act. See Special Act No. 619 of 1953.

budget request" to the Planning Board. Defendant's Brief at 22.³ Because "referral of a proposed municipal project to a planning commission" is listed in Conn. Gen. Stat. § 22a-105(b), coastal site plan review by the Planning Board was mandatory before any further steps could be taken by any City agency with respect to the project.

No amount of dialogue in a capital budget request to the Planning Board by the applicant is an appropriate jurisdictional substitute for what is mandated by the Connecticut General Statutes and the City Charter.

D. A "Failure to Report," had the City Actually Referred the Proposal to the Planning Board, would not have Constituted an "Approval."

The defendants make the following argument referable to a "failure to report" on the part of the Planning Board:

Even if the court agrees with the argument that the vote of the Planning Board to add the 1.7 million dollars for the artificial turf contract was not a "report," both the Charter and C6-30-6 state the consequence of failure of the Planning Board to report: failure means approval.

Defendants' Brief at 23.

The plaintiffs are not claiming that the Planning Board "failed to report" after receiving a proper referral; *no proper referral was ever made to the Planning Board in the first instance*. Had the City filed a coastal site plan with the Planning Board and initiated the detailed process of coastal site plan review that was mandatory under Conn. Gen. Stat. §22a-105(b), the Planning Board might well have heard evidence or made

³ The City Engineer represented that on the first of the two dates that he appeared before the Planning Board, August 21, 2007, he had "discussed" the "upcoming" synthetic turf field projects and had reviewed "preliminary drawings" with the Planning Board at that time for three unidentified sites. R.1, Item 24.a. at p. 1. But then he admitted that he had really only presented the Westhill (High School) synthetic turf field project to the Planning Board on that first date. R.1, Item 24.b. The City Engineer also represented that on the second of the two dates that he appeared before the Planning Board, November 13, 2007, he had "discussed" the same upcoming proposals. R.1, Item 24.a. at p. 2. But the transcript of that discussion reveals that he presented no drawing, no plan, and only a handful of details to the Planning Board at that time. See R. 1, Item 24.b.

findings that would have led it to criticize or reject the project, which in turn might have influenced the City to pursue other alternatives.

Parenthetically, the defendants' statement that, had a proper referral been made, and the Planning Board failed to report, this would have constituted an "approval," is not correct. It might have been true in another context, but it is not true for projects such as this one within the coastal boundary. The Connecticut General Assembly changed this general rule of law for projects within the coastal boundary in 1979 when it enacted the Coastal Management Act:

If such board or commission fails to render a decision within the time period provided by the general statutes or any special act for such a decision, the coastal site plan shall be deemed rejected.

Conn. Gen. Stat. § 22a-105(f).

The following argument of the defendants also makes little sense:

Even a negative report (which isn't the case here since the Planning Board approved the capital budget project) means that there must be a two-thirds majority vote by the Board of Representatives to approve. Here that super majority was met -- the vote on March 3, 2008 was 31 in favor, 8 opposed.

Defendants' Brief at 23. How can the defendants possibly know what would have happened to the project if they never allowed the Planning Board to weigh in with the proper jurisdictional prerequisite of a coastal site plan review? Are the defendants seriously suggesting that the Board of Representatives might have approved a capital budget project that could never be built (because coastal site plan approval had been denied by the Planning Board)?

II

THE ZONING BOARD FAILED TO EVALUATE THE NON-ENVIRONMENTAL GOALS AND POLICIES OF THE COASTAL MANAGEMENT ACT

The plaintiffs in their initial brief point out that:

(1) Before it could approve a coastal site plan, the Zoning Board was required to "follow all applicable goals and policies stated in section 22a-92" See Conn. Gen. Stat. § 22a-106(b)(3);

(2) A number of the goals and policies in Conn. Gen. Stat. § 22a-92 do not deal with pollution or contamination of the environment;

(3) The Zoning Board -- from the time of its initial notice of its hearing -- restricted its consideration **ONLY** to determining whether the proposed project would result in unreasonable pollution;

(4) the Zoning Board did not discuss or consider the non-environmental goals and policies of Conn. Gen. Stat. § 22a-92;

(5) Therefore, the Zoning Board issued a completely unsubstantiated written finding that the City's proposal was "consistent with all applicable goals and policies set forth in the CAM Act."

Plaintiffs' Brief at 10-12.

The defendants in their brief make no attempt to refute this argument. They admit that the Zoning Board confined its deliberations and determination to whether unreasonable harm would result to the environment:

The record has ample evidence to support the Zoning Board decision that the plaintiffs did not show the two artificial turf fields would constitute unreasonable pollution of coastal resources or the public trust in the air and water.

Defendant's Brief at 2. They then argue that all *environmental* policies of the CAM Act had been satisfied. Defendant's Brief at 5-11. *Nowhere* in the Defendant's Brief do the defendants assert – nor could they assert -- that the Zoning Board ever attempted to evaluate whether the City's proposal was consistent with the following three non-

environmental policies of the CAM Act:

1. Whether the proposed project (new soccer fields) was "dependent upon proximity to the water or the shorelands immediately adjacent to marine and tidal waters" and whether, therefore, it should be given "high priority and preference." Conn. Gen. Stat. §22a-92(a)(3).

2. Whether the proposed project (new soccer fields) would "encourage public access to the waters of Long Island Sound." Conn. Gen. Stat. §22a-92(a)(6).

3. Whether the project (new soccer fields) was among "facilities and resources which are in the national interest as defined in section 22a-93," and if so, whether it should be "excluded" because it "may reasonably be sited outside the coastal boundary." Conn. Gen. Stat. §22a-92(a)(10).

The required finding by the Zoning Board under Conn. Gen. Stat. § 22a-106(e)(1) that the proposed activity was "consistent with all applicable goals and policies in section 22a-92" is not supported by substantial evidence; the non-environmental policies in § 22a-92 were never even taken up for discussion by the board.

III

THE ZONING BOARD FAILED TO FOLLOW THE ENVIRONMENTAL GOALS AND POLICIES OF THE COASTAL MANAGEMENT ACT

Conn. Gen. Stat. § 22a-106(b)(3) required the Zoning Board, as part of its coastal site plan review, to "follow all applicable goals and policies stated in section 22a-92." One of those goals and policies was to "insure" that development would proceed "without significantly disrupting the natural environment." Conn. Gen. Stat. § 22a-92(a)(1). Another was to give "preference" to uses that "minimize adverse impacts on natural coastal resources." Conn. Gen. Stat. § 22a-92(a)(4).

The plaintiffs have pointed out that replacement of natural earth with 600,000 pounds of tire crumbs is a significant disruption of the natural environment. Plaintiffs' Brief at 12-13. They have also pointed out that, for a number of reasons, natural grass -- more so than artificial turf -- would minimize adverse impacts on natural coastal resources. Plaintiff's Brief at 13-14.

The defendants respond, once again, by attacking a straw man. This time the straw man is the existing natural grass fields at West Beach Park. In their brief, the defendants go to extraordinary lengths to argue that "the *current* natural grass fields have greater impact upon coastal resources than the planned artificial turf fields." Defendants' Brief at 10. They state, "there are no natural grass fields which work *in Stamford*." *Id.* at 15.

No one who appeared before the Zoning Board denied that the *current* fields at West Beach Park could be improved. The plaintiff agreed that the methods used by the City to maintain those natural turf fields were not appropriate, and offered substantial expert evidence that with changes in installation and maintenance practices by City at West Beach Park, natural turf could be both durable and environmentally safe. R.1, Item 28, Exhibit "g"; R.1, Item 41, at pp. 92-97, 100-104, 110-11.

With proper management and balanced use, natural turf grass fields have been proven to withstand and accommodate multiple sports team usage.

R.1, Item 28, Exhibit "g", at p. 2 (emphasis added).

With proper management, the playability of a natural grass field, with a consistent and uniform playing surface, can be maintained year after year for a fraction of the cost of an artificial turf surface over its projected life expectancy.

Id. (emphasis added).

A well-maintained natural grass field may require water, fertilizer, pest management and mowing, but at significantly lower levels than often claimed by artificial turf sales people.

Id. (emphasis added).

In addition, the short shrift the defendants afford to the heat issue grossly ignores the § 22a-92(a)(4) policy of giving "preference" to uses that "minimize adverse impacts on natural coastal resources." As pointed out in the plaintiffs' initial brief, at the Zoning Board the plaintiffs submitted evidence that on a hot summer day, an artificial turf field at West Beach Park would get to be as hot as 180 degrees Fahrenheit; the City's expert countered by saying that he had measured the temperature of artificial turf on such a day at 158 degrees Fahrenheit. Plaintiff's Brief at 7-8.⁴

The defendants respond to these facts with two arguments:

1. "No one has ever complained" about the heat of one or more artificial turf fields in Stamford, and the one at Stamford High School has been in existence for 10 years.⁵
2. A posed photograph that Mr. Casolo submitted to the Zoning Board shows children, some of them barefoot, standing on an artificial turf field.

The fact that no one (to Mr. Casolo's knowledge) has ever complained about the heat of the fields is not evidence of anything. In terms of evidentiary value, "silence amounts to nothing, unless it is that of one upon whom rests a duty to speak." Keifer v. City of Bridgeport, 68 Conn. 401, 409 (1896).

⁴ Until his own experts commented on the subject, Mr. Casolo tried to dissuade the Zoning Board from considering the heat issue altogether. He did so by suggesting that "heat is not an environmental issue, since its affect upon air temperature is only momentary" (referring the Board's attention to a "health fact sheet" that did not even mention the heat issue). R.1, Item 30, p. 8 Cave dwellers centuries before Copernicus knew that the summer sun remains in the sky for more than a moment.

⁵ Of course, everyone in Stamford knows that the Stamford High School field, albeit made of artificial turf, is not a tire crumb field like the ones slated for West Beach Park, which measure as high as 180 degrees Fahrenheit in the summer. In addition, all the pre-existing artificial turf fields in Stamford are located at schools, where they are not intended for use during the hottest days of the summer.

Moreover, the photo reveals on its face that it was taken on a day where the air temperature was only 73 degrees. R.1, Item 30, at p. 11.

In the face of testimony by plaintiffs' and defense experts that tire crumb fields exceed 150 degrees Fahrenheit in the summertime, (1) testimony that "no one has ever complained" about the heat and (2) a photo of children standing on an artificial turf surface when it was 73 degrees outside *do not constitute "substantial evidence" that choosing artificial turf over natural turf would be the "preference" that would "minimize adverse impacts on natural coastal resources" at West Beach Park.*⁶

Adherence to the goals and policies in Conn. Gen. Stat. § 22a-92 requires a municipality to make choices. But comparing a proposed artificial turf field with what was *currently* being utilized at West Beach Park is an unfair comparison because it presents a false choice. A decision to grant the applicant's request for coastal site plan, requiring the installation of new natural turf fields (as done by the Town of Fairfield, R.1, Item 23, Exhibit 5), would have truly respected the policies of non-disruption of the natural environment (§ 22a-92(a)(1)) and giving preference to the choice that minimized adverse impacts on coastal resources (§ 22a-92(a)(4)).

IV

THE ZONING BOARD FAILED TO FOLLOW THE CONNECTICUT ENVIRONMENTAL PROTECTION ACT (CEPA) BECAUSE IT FAILED TO OPT FOR A FEASIBLE AND PRUDENT ALTERNATIVE

The plaintiffs have never opposed the replacement of the fields at West Beach

⁶ It should be noted that none of the artificial turf fields in Stamford prior to the ones slated for West Beach Park are within the coastal boundary. Hence, none of them had to satisfy the Conn. Gen. Stat. § 22a-92 policies of non-disruption of the natural environment and giving preference to choices that minimize adverse impacts.

Park. But they have consistently advocated the installation of new natural turf fields as a feasible and prudent alternative to artificial turf. Plaintiffs' Brief at 15-16.

The defendants argue that “the Zoning Board did not find any risk of unreasonable pollution.” Defendants’ Brief at 11. This is not an accurate statement. Board member Cosentini did find a risk of unreasonable pollution and voted to implement the alternative of natural turf. R.1., Item 41, at 113. Board Chairman Kapiloff conceded that there might be a risk of unreasonable pollution, but stated that it was “one of the things (she) would be willing to take a risk on.” *Id.* at 124. As for Board member Kaufman, he stated that “there is a lot going on here that we just don’t understand,” *Id.* at 119, but then seemed comfortable with the fact that if anyone did get cancer, “people with cancer today are living a lot longer. We are able to solve medical issues today in a much better way than we did thirty, forty, fifty years ago.” *Id.* at 127.

However, even if the Zoning Board had actually found “no risk of unreasonable pollution,” the defendants misstate the law when they suggest that absent a finding of “risk of reasonable pollution,” the board would not have to consider a feasible and prudent alternative. As the defendants themselves point out, Conn. Gen. Stat. § 22a-19 requires that a municipality opt for a feasible and prudent alternative when the project involves conduct likely to cause "unreasonable pollution, impairment, or destruction of a natural resource," citing Evans v. Planning and Zoning Comm. of Town of Glastonbury, 73 Conn. App. 647, 657 (2002). Defendants' Brief at 11.

Conn. Gen. Stat. § 22a-19 ("CEPA") thus presents a three-pronged test, requiring the municipality to assess the presence of (1) pollution, (2) impairment or (3) destruction of a natural resource. The defendants erroneously argue that the Zoning Board's

assessment of only one of the three prongs of the required test was sufficient to ignore the need for a feasible and prudent alternative:

It is important to note that the Zoning Board did not need to reach the issue of a "feasible and prudent alternative" since the Zoning Board did not find any risk of unreasonable pollution.

Defendants' Brief at 11.

The plaintiffs have pointed out that the proposed displacement of over four acres of park land, soil and grass with 600,000 pounds of shredded used tires would constitute an "impairment" or "destruction" of a natural resource, which brings into play the second and third prongs of the CEPA test. Plaintiffs' Brief at 15-16. Moreover, nowhere in the defendants' brief do they even attempt to refute that land, soil and grass are natural resources. Nowhere do they attempt to refute that displacement of over four acres of park land, soil and grass with 600,000 pounds of shredded used tires constitutes an unreasonable "impairment" or "destruction" of a natural resource.

The defendants then ask this court to believe the absurd suggestion that "because natural turf fields cannot compete with artificial turf fields," there are 28 artificial turf fields in Fairfield County and 37 in the State of Connecticut. Defendants' Brief at 13. The number of natural turf athletic fields in Connecticut outnumber the 37 identified by the defendants by many thousand. Moreover, dozens of communities in Connecticut are opting for natural turf over artificial, including Fairfield (R.1, Item 23, Exhibit 5), Ridgefield (R.1, Item "n", at p.2) and Greenwich, which has retained the plaintiffs' expert, Chip Osborne:

The Town of Greenwich, Connecticut, just engaged Osborne Organics to assist the Park Department in the conversion of sixty-nine acres of sport fields from a conventional program to a natural approach.

R.1, Item "i", at p. 2; see also R.1, Item "n", at p.2. The UConn Huskies have also rejected an artificial turf alternative in favor of natural turf at Rentschler Field in East Hartford. R.1, Item "n", at p.2.

Conn. Gen. Stat. § 22a-19(b) does not mandate an "equal alternative," a "comparable alternative," nor does it mandate "just as cheap an alternative." It mandates selection of a "feasible and prudent alternative."

[W]e defined "feasible" to mean "'as a matter of sound engineering.'" (Citations omitted). We construed "prudent alternative" as "those which are economically reasonable in light of the social benefits derived from the activity."

Samperi v. Inland Wetlands Agency of City of West Haven, 226 Conn. 579, 594 (1993).

Modern, natural turf fields -- which are every bit as well drained as artificial turf -- are clearly feasible under practices of sound engineering. Were they not, they would not be seen being installed in Fairfield, Ridgefield and Greenwich today.

In terms of a "prudent alternative," *where does protecting children from 150+ degree playing surfaces and the ability to preserve all-purpose open space fall on the spectrum of "social benefits?"* Natural turf is an alternative that is "economically reasonable in light of the social benefits derived" for any one of three reasons: (1) it is usable on even the hottest days of the summer, (2) it is usable by those who love West Beach Park for all kinds of open space use -- as it is currently used, (3) it may require re-seeding, but will never have to be ripped out and replaced because its "useful life" will come to an end.

New, well-drained, organically maintained natural turf fields are as much a feasible and prudent alternative in this case as they were in Fairfield in 2007. R.1, Item

23, Exhibit 5, at p. 13. Had the Stamford Zoning Board selected them for installation, the § 22a-19 requirements of preventing impairment and destruction of the natural resources of land, soil and grass would have been satisfied at West Beach Park.

V

THE PLAINTIFFS WERE DEFINITELY DENIED THE FUNDAMENTAL RIGHT OF CROSS-EXAMINATION BEFORE THE ZONING BOARD

The plaintiffs in their initial brief point out that when their counsel attempted to cross-examine the Mr. Casolo -- who was acting both as the applicant and the chief witness for the applicant -- the Zoning Board chairman interrupted him and refused to permit him to ask a single question. Plaintiff's Brief at 8-9. The plaintiffs cite authorities that point out that "no one may be deprived of (this) right" before a zoning board. Plaintiff's Brief at 22-23. See also Huck v. Inland Wetlands and Watercourses Agency of Town of Greenwich, 203 Conn. 525, 536 (1987).

The defendants counter by citing an incomplete reference from Judge Fuller's treatise on Land Use Law and Practice, which in turn cites the 1953 case of Parsons v. Board of Zoning Appeals of City of New Haven as authoritative. Defendants' Brief at 24-25.

Parsons dealt with a single issue, specifically, whether *unsworn* testimony before a zoning board constituted competent evidence.

The basis of (the plaintiffs') exception is that the only evidence of (material) facts was an unsworn statement made at the hearing before the board by counsel for the defendants.

Parsons v. Board of Zoning Appeals of City of New Haven, 140 Conn. 290, 292 (1953).

No one in Parsons asked or tried to cross-examine anyone. Holding that unsworn

statements did indeed constitute competent evidence before a zoning board, the court in

Parsons stated:

The only requirement is that the conduct of the hearing shall not violate the fundamentals of natural justice. That is, there must be due notice of the hearing, and at the hearing **no one may be deprived of the right to** produce relevant evidence or **to cross-examine witnesses produced by his adversary** or to be fairly apprised of the facts upon which the board is asked to act.

Parsons, 140 Conn. at 292-93.

Moreover, in this case the denial of the right of cross-examination was particularly prejudicial to the plaintiffs. Mr. Casolo was the chief witness for the applicant. He occupied the floor of the debate longer than any other witness who testified at the hearing. Proof of a number of material facts depended on his testimony alone.

For example, had the plaintiffs been able to cross-examine Mr. Casolo, they could have proven error on the part of the applicant in failing to (1) adequately study the application's impact on shellfish and (2) submit the application to the Stamford Shellfish Commission for review and comment. The first page of the application required the applicant to "check off" coastal "policies" and coastal "resources" that were affected by the project. R.1, Item 2, at p. 1a. Neither "shellfish concentration areas" nor "shellfish concentration" were checked off in this application.

A member of the Shellfish Commission pointed out to the applicant that he wanted to bring the application before his Commission for review and comment. R.1, Item 16. What was the applicant's response? To say that the "map (of shellfish concentration areas) purportedly in use by the Shellfish Commission is not found on file with the Zoning Office, Town Clerk, or Health Department."

The plaintiffs should have been permitted to explore with Mr. Casolo the extent of his true knowledge of the shellfish concentration areas near West Beach and why he had seen fit to NOT identify shellfish concentrations as being "affected" on his CAM application dated July 10, 2008. The plaintiffs should have been permitted to explore with Mr. Casolo why he had told the State Bureau of Aquaculture that "all runoff" was going to be distributed into "underground infiltration units," R.1, Item 24, Exhibit bb, when he knew full well that only the runoff from the parking lot next to the 4+ acres of artificial turf was proposed to flow through infiltration units. R.1, Item 2, p. 4 ("The stormwater quality structure will assist in the removal of silt/sediment, floatable debris, and hydrocarbons associated with site runoff, *specifically from the proposed parking lot.*").

VI

THE ZONING BOARD DEFINITELY VIOLATED CONN. GEN. STAT. § 7-131n IN THIS CASE

The plaintiffs in their initial brief point out that:

- (1) The existing natural turf fields at West Beach Park are currently used for a variety of uses, soccer and non-soccer, athletic and non-athletic;
- (2) The most recent (2002) Master Plan designated the subject area at West Beach Park as all-purpose open space, never restricting it to athletic use. R.1, Item 28, Exhibit "d".
- (3) The City admits that the proposed artificial turf fields at West Beach Park will be used for soccer only.
- (4) The City never conducted a Conn. Gen. Stat. § 7-131n hearing or provided comparable replacement land for what is now being taken for soccer use alone.

Plaintiff's Brief at 3-4, 23-24.

The defendants in their brief do not deny that no § 7-131n hearing has ever been

held; rather, they argue that none is necessary because (1) replacing natural grass with artificial turf is not taking land for "another use" and (2) two new soccer fields are contemplated for West Beach Park in the 1997 Master Plan and were ostensibly approved by the Board of Representatives. Defendants' Brief at 23-24. Both of these arguments reveal a misunderstanding of the law.

Conn. Gen. Stat. § 7-131n does not mandate a hearing when land is taken and devoted to "another use." It mandates a hearing when land is taken and devoted to "other recreational ... purposes." The defendants do not deny -- and offered no evidence to the Zoning Board to refute -- that the existing natural grass fields at West Beach Park are used for a broad spectrum of recreational purposes, both athletic and non-athletic. See Plaintiffs' Brief at 3-4.

The defendants purposely do not mention that the 1997 Master Plan to which they refer called for the installation *natural turf* fields -- R.1, Item 27e at 2 (See line item for "topsoil and seeding") -- which would have perpetuated the multi-purpose recreational uses of these fields. But maintaining artificial turf fields in the future simply for "recreational soccer," see Plaintiff's Brief at 23-24, R.1, is taking and restricting the land to "other recreational purposes," which may not be done in the absence of a § 7-131n hearing and a provision for comparable replacement land.

It is irrelevant to Conn. Gen. Stat. § 7-131n that new fields were approved in a Master Plan or by the Board of Representatives. Conn. Gen. Stat. § 7-131n provides that if such approvals occur, then *before* a municipality may take the land for "other recreational" purposes, a § 7-131n hearing must be held. Ironically, had such a hearing been held, the non-environmental policies in Conn. Gen. Stat. § 22a-92(a)(3), (6) and

(10)(e.g., Are soccer fields depended upon proximity to the shorelands? Will new soccer fields encourage public access to Long Island Sound? Are new soccer fields in the national interest?) would have been discussed.

VII

THE DECISION IN MURPHY v. STAMFORD IS IMMATERIAL TO THESE ADMINISTRATIVE APPEALS

The defendants in their brief cite the case of Murphy v. Stamford, CV 08-4024500 (**Exhibit 3**), stating that in it, Judge "Frankel issued a memorandum of decision granting the City's motion to dismiss, finding no taxpayer standing, and no classical aggrivement because no adverse environmental impact was shown." Defendants' Brief at 27-28. This statement is extremely misleading.

In Murphy v. Stamford the only reason "no adverse environmental impact was shown" was because the second plaintiff in the case, the entity named "Save West Beach," *made a tactical decision to assert standing only as a taxpayer, choosing not to present any evidence to the court on the issue of environmental impact:*

The plaintiffs in these two cases have failed to establish their standing as taxpayers and failed to demonstrate that the allegedly improper municipal conduct causes them to suffer some pecuniary or other great injury.

Exhibit 3 at *4.

In Save West Beach the plaintiffs are making a claim of an adverse environmental impact. **However, there was no evidence presented to the court on this issue** For all the reasons stated above the defendant's Supplemental Motions to Dismiss in both cases, are granted.

Id. (emphasis added).

The decision by the Appellate Court affirmed the dismissal of a case for lack of standing; there was no judgment on the merits. The findings of both the trial and

Appellate Court are not part of the record in this case. The evidence in the records of the two above-captioned zoning appeals is different; it includes voluminous information regarding environmental impacts and compelling evidence on the reasonableness of natural turf as a feasible and prudent alternative.⁷

CONCLUSION

The decisions of both Boards in the above-captioned zoning appeals should be reversed.

THE PLAINTIFFS

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⁷ Parenthetically, the only financial issue before the court in Murphy v. Stamford dealt with the expense of maintaining "the present surface," not the feasibility of the alternative suggested by the plaintiffs to the Zoning Board. Murphy, 115 Conn. App. at 678-79.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief was sent via First Class

Mail, postage prepaid, this 21st day of September, 2009, to:

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