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ORIGINAL

Via email

Michael Klemens, Chairman
Planning & Zoning Commission
Town of Salisbury
Town Hall
P.O. Box 548
27 Main Street
Salisbury, Connecticut 06068

Re: _Application for special permit approval for a twelve unit residential community development of real property known as 11 Holley Street, Lakeville Village Center, Salisbury, Connecticut, with an Assessor's designation of Map 45; Lot 2 ("Application")._

Applicant: Salisbury Housing Committee, Inc. ("Applicant" or "SHC").

Dear Chairman Klemens and Members of the Commission:

As you are aware, the undersigned Firm represents the Salisbury Housing Committee, Inc. ("Applicant" or "SHC"), concerning the above-referenced Application. The Application pertains to real property known as 11 Holley Street, which is located in the Lakeville Village Center, Salisbury, Connecticut, and has an Assessor's designation of Map 45, Lot 2 ("subject property").

A number of alleged legal issues have been raised by parties opposed to the Application. SHC would like to address them at this juncture.

I. Section 22a-19 intervention pleading.

First, the burden of proof to establish the allegations in a Section 22a-19 intervention pleading is upon the intervenors. If the intervenors establish that the conduct associated with the subject proposal "is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state", based upon substantial expert evidence, then "no conduct shall be authorized or approved which does, or is reasonably like to, have such effect as long as, …, there is a feasible and prudent alternative consistent with the reasonable

requirements of the public health, safety and welfare." See Sections 22a-19(a)(1) and 22a-19(b) of the Connecticut General Statutes. If a reviewing authority does not find that the conduct "is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state", then the reviewing authority need not address whether there are "feasible and prudent alternatives". See *Paige v. Town Plan & Zoning Commission*, 235 Conn. 448, 462-63 (1995).

Second, the Courts have held that a land use agency, in particular a wetlands commission, may consider adjacent property owned by the same party that owns the property that is the subject of an application for a wetlands permit after the commission finds that the proposed conduct will result in an adverse impact to a wetlands, and when then considering "feasible and prudent alternatives", as provided by Section 22a-41 of the Connecticut General Statutes. See discussion in *Grimes v. Conservation Commission of the Town of Litchfield*, 49 Conn. App. 95, 101-104 (1998); *cert. denied* 247 Conn. 903 (1998). This makes sense especially when, for example, considering the mitigation or elimination of adverse wetland impacts associated with an accessway bridge, when another accessway may be available from adjacent property owned by the same owner that reduces or eliminates adverse impacts to the wetlands. However, the undersigned is not aware of authority in our State that allows a municipal land use agency to deny an application for site development on a property under Section 22a-19, based upon the agency's belief that the owner should build their proposed site development on another property in town owned by the same party as a perceived "feasible and prudent alternative" to the proposed development. Such would effectively deny the owner, or SHC in this matter as an option holder, of the right to use their property. I respectfully refer the Commission to *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595; 133 S. Ct. 2586; 186 L.Ed. 2d 697 (2013), where the United States Supreme Court took issue with a commission that denied what was essentially a wetlands permit, because the applicant refused to place a portion of its property in a conservation easement, or, in the alternative, perform wetlands mitigation to another wetlands located miles from the property that was the subject of the wetlands application. Such conditions, if imposed, or, as in *Koontz*, proposed by the commission but refused by the applicant, constitute impermissible exactions in violation of the Fifth Amendment of the U. S. Constitution. Similarly, as suggested by the intervenors, for the Commission to deny the subject application based upon a claim that a "feasible and prudent alternative" would be for the applicant to build their twelve units of affordable housing elsewhere in town, for example on property adjacent to the town's transfer station, would be improper under the *Koontz* holding.

II. Valid, legal parking nonconformities allegedly associated with other neighboring properties.

Claims have been made that neighboring properties are allegedly nonconforming as to parking and that patrons of businesses located on these properties sometimes park on the property that is the subject of this twelve dwelling affordable housing community proposal. Therefore, the subject property should not be developed because such would result in these properties becoming "more nonconforming" as to parking requirements provided by the Commission's Regulations. Another

claim is that a pizza shop obtained special permit approval for its pizza shop use based, in part, upon an alleged satellite parking approval.

First, a valid, legal zoning nonconforming is a vested right that runs with the property associated with the nonconformity. The nonconformity must have been valid and existed at the time of the land use approval that is associated with the particular property, or existed with the property prior to the adoption of the zoning regulation that made the property nonconforming. See *Petruzzi v. Zoning Board of Appeals*, 176 Conn. 479, 482-484 (1979). How does this work? If shopping center "A" was approved for a shopping center when only 100 spaces were required for the square footage of the shopping center, but since such approval the parking regulations have changed where now 150 spaces would be required for the shopping center if built today, then shopping center "A" has a valid, legal nonconformity as to the parking requirements provided by the zoning regulations. Let's presume that shopping center "B" is adjacent to shopping center "A" and has 150 spaces where only 120 spaces are required for the current tenant uses. The owner of shopping center "B" decides to add a new restaurant tenant that requires an additional 30 spaces, which would be permitted under the regulations (150 spaces required, 150 spaces provided). The owner of shopping center "A" has no basis in law to appear before the reviewing land use authority and claim that shopping center "B" can't add the restaurant tenant because the patrons of the tenants in shopping center "A" sometimes use the parking lot in shopping center "B". If the commission approved the new restaurant tenant in shopping center "B", that doesn't legally make shopping center "A" more nonconforming. Shopping center "A" remains nonconforming as to 50 spaces (has 100 spaces when 150 spaces are required). In addition, the reviewing authority would have no legal authority to deny shopping center "B" its restaurant application based upon shopping center "A's" claim that shopping center "A" needs center "B's" parking. That's not how the law of nonconformities in this State works.

Second, the claim by the pizza shop that SHC's application for twelve affordable housing dwellings should be denied because of an alleged right to use the subject property for "satellite parking" is simply not supported by the Record. The pizza shop's application for approval in 2006 that is part of the Record of this proceeding indicates that five spaces are required for the use, and four are located on site and one on the street in front of the shop. Therefore, the pizza shop use doesn't even require any off-site or satellite parking. More importantly, the Commission's Regulations mandate, as do most if not all municipalities in our State with satellite parking provisions, that if an applicant requests approval of satellite parking for a zoning application, then "[t]he applicant *shall* provide a *written agreement with the owner of the satellite parking space* for the use of such parking space. The validity of a satellite parking permit shall be dependent upon maintaining the required number of satellite parking spaces." (Emphasis added.) Section 703.7, entitled "Satellite Parking", of the Commission's Zoning Regulations. There is no evidence whatsoever that the owner of the property that is the subject of the SHC special permit application, the Town of Salisbury, contracted with the pizza shop, or any other property owner in Salisbury, to lease spaces on the subject property to such owners. What's interesting is that the claimants fail to mention that such satellite parking is not necessary to comply with the applicable parking requirements of the Zoning Regulations since additional parking is not required for the pizza shop use, as discussed above. Finally, the owner of one

property cannot bind the owner of another property to satellite parking by simply claiming satellite parking on the second property without a written agreement, as mandated by Section 703.7. Similarly, the Commission cannot bind the owner of a property to satellite parking by approving a satellite parking plan associated with a special permit application for another property; at least not without such owner's permission. Such would not only be in contravention of the Commission's Regulations, but in contravention of land use and perhaps constitutional law in our State.

Therefore, for the aforementioned reasons, if the Commission approves SHC's application for twelve affordable housing dwellings, the Commission will not be impermissibly increasing or creating any zoning parking nonconformities relative to any properties in the Town of Salisbury, nor committing an undefined "regulatory taking" of any other property in the Town of Salisbury as claimed by the intervenors.

III. Potential legal issues with rights-of-ways with other properties.

There has been a claim that SHC's proposal may violate undefined rights-of-ways with other properties. First, the site design doesn't adversely impact egress or ingress to any adjacent property. Second, it is well-established land use law in our State that property rights or property disputes between owners of properties are not proper consideration for a municipal land use commission when evaluating a proposed land use application. See *Moscowitz v. Planning and Zoning Commission*, 16 Conn. App. 303, 311-312, n. 8 (1988); and *Gagnon v. Municipal Planning Commission,* 10 Conn. App. 54, 58-59 (1987).

IV. Donation of monies for the purchase of the subject property by the Town of Salisbury.

There has been a false claim that SHC's proposed use of the subject property is in contravention of the desires of the donor who provided monies to the Town for the purchase of the subject property. First, this is not an appropriate consideration for the Commission when reviewing and acting upon the pending special permit application, as discussed in the previous section III, above. Second, this is simply a false statement. Specifically, the donor's letter from B. M. Belcher to the Board of Selectmen of the Town of Salisbury, dated December 20, 1967, that is part of the Record, explicitly provides that: "(1) The Town of Salisbury agrees that the present structure will be entirely removed within nine months of acquiring title. (2) The Town of Salisbury agrees that if building construction is not started on the property within a year after acquiring title thereto, the site will be cleared, graded and landscaped for a Town park, or attractively landscaped for a parking area, and will be maintained in a neat and attractive fashion. (3) The Town of Salisbury agrees that if any buildings are ever erected on the cleared land [as proposed with the SHC special permit application], such buildings shall have exterior design in keeping with the Federal or early Eighteenth Century image of our villages. The Town of Salisbury further agrees that the exterior design for such buildings shall be designed by a registered architect and be subject to the approval of the majority of the Selectmen of the Town of Salisbury." [Language in brackets added.] There is simply nothing in this language that

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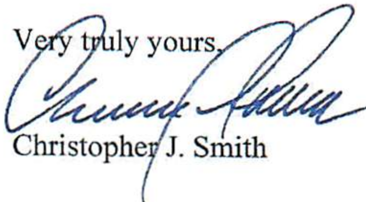
precludes or prohibits the use of the subject property as proposed by SHC for twelve affordable housing dwellings.

SHC and the undersigned will address these issues more fully at the continued public hearing next Wednesday, April 14, 2021.

Thank you for your anticipated cooperation and assistance concerning this matter.

As always, best regards.

Very truly yours,



Christopher J. Smith

cc: Salisbury Housing Committee, Inc.