

July 16, 2021

Carson Fincham
Chair, Zoning Board of Appeals
Town of Ridgefield
c/o Kelly Ryan, Paralegal/Administrator
66 Prospect Street
Ridgefield, CT 06877

707 Summer Street
Stamford, CT 06901

RE: Appeal #21-019 (63-67 Prospect Street, Ridgefield)

Dear Chair Fincham and members of the Board:

Our firm represents Pierandri Realty LLC and The Giardini Limited Partnership (the “Property Owners”), the owners of property known as 63-67 Prospect Street, Ridgefield, Connecticut (collectively, the “Property”). In this matter, the Property Owners appeal the May 17 decision of the Zoning Enforcement Official (“ZEO”) to repeal a Zoning Permit issued for the Property. This letter details (1) the history of this development project and (2) the Property Owners’ position in support of their appeal.

I. PROJECT HISTORY

On May 15, 2007, the Ridgefield Planning & Zoning Commission (the “P&Z Commission”) approved a site plan (#2007-038-SPA) for the construction of 21 dwelling units with associated parking and site improvements on the Property (the “Site Plan Approval”). On March 22, 2016, the Commission extended the expiration date of the Site Plan Approval to May 15, 2021.¹ Public Act 20-7, § 18, clarified that such approval “shall not expire if the applicant has obtained all the necessary building permits and commenced construction on or before the expiration date.”²

As you know, the past year has been marked by the covid-19 pandemic. On March 10, 2020, Governor Lamont declared a state of emergency in response to the Covid-19 pandemic. On May 6, 2020, the Governor issued Executive Order 7JJ(3), which in part declared that land use approvals issued pursuant to Chapter 124 of the General Statutes (such as the Site Plan Approval), that remained valid as of March 10, 2020, “shall not lapse or otherwise expire during the state of emergency, and the expiration date of the approval shall toll during the state of emergency.”³

This development’s construction has been historically delayed due to the long life of an individual with a life estate interest in the Property. With development recently able to move forward, despite the Covid-19 pandemic and the issuance of Executive Order 7JJ(3), the Property Owners worked diligently towards obtaining a building permit and commencing construction. All such efforts

¹Copies of the Site Plan Approval and extension approval are appended as **Exhibit A**.

²A copy of Public Act 20-7, § 18 is appended as **Exhibit B**.

³Copies of Executive Orders 7JJ and 12B (setting June 30, 2021 as the expiration date of EO 7JJ(3)) are appended as **Exhibit C**.

were appealed by an abutting property owner. First, on March 9, 2021, the P&Z Commission approved a final landscape plan pursuant to condition #1 of the Site Plan Approval. That decision was appealed to the Superior Court by an abutting property owner on or around March 16, 2021. That appeal remains pending as Docket No. DBD-CV21-6039073-S.

On April 9, 2021, in connection with the Site Plan Approval, the ZEO issued a Zoning Permit (Z-21-316) for “additions and renovations to existing residence to add an additional apartment in the rear” at 63 Prospect Street (the “Zoning Permit”). The same abutting property owner appealed the issuance of this Zoning Permit to the ZBA on April 20, 2021. That ZBA appeal remains pending.

On May 17, 2021, the ZEO issued an order finding that the Site Plan Approval expired on May 15, 2021, and that the Zoning Permit is hereby revoked, null and void (“May 17 ZEO Order”). This appeal to the ZBA followed.

II. POSITION IN SUPPORT OF APPEAL

The ZEO revoked the Zoning Permit on his finding that the underlying Site Plan Approval expired on May 15, 2021. That determination was incorrect. On that date, the expiration date of the Site Plan Approval was tolled (1) pursuant to Executive Order of the Governor and (2) due to an appeal of a condition of the Site Plan Approval to the Superior Court. In addition, (3) due to the appeal of the Zoning Permit to the ZBA by an abutting owner, the Property Owners were prohibited from moving forward with construction by State statute. For these reasons, the decision of the ZEO was inappropriate and should be reversed. Further details are as follows:

1. Site Plan Approval Tolled Pursuant to Executive Order 7JJ

When the ZEO issued the May 17 ZEO Order, the expiration date of the Site Plan Approval was tolled pursuant to Executive Order 7JJ(3) of the Governor (“EO 7JJ). First, the ZEO is incorrect that EO 7JJ(3) does not apply to the Site Plan Approval. EO 7JJ(3) applies in part to “an approval or permit issued by a municipal land use agency or official pursuant to the ‘Covered Laws’ as defined in Section 19 of Executive Order 7I.” Section 19 of Executive Order 7I defines “Covered Laws” in its preamble as:

“ . . . in order to further prevent the potential health threat and spread of COVID-19 to any person who might otherwise participate in the process of submitting, reviewing, hearing, discussing, deciding, or appealing any municipal decision or action regarding any petition, application or other proposal, or in the adoption or amendment of any municipal plan, regulations or ordinances, under specific Sections of Connecticut General Statutes Chapters 14, 97a, 98, 103, 124, 126, 246, 368k, 440, 444, 446i, and the repealed Section 14-55, if and to the extent such repealed section is revived by current judicial action, and any related special act(s), and municipal charter, ordinance, resolution, or regulation (all such state and municipal laws and regulations being, collectively, the “Covered Laws”).”

The Site Plan Approval is a municipal decision pursuant to CGS Chapter 124 and related zoning regulations and is, accordingly, a “Covered Law” and subject to Executive Order 7JJ(3).

Despite the contention of both the ZEO and the abutting property owner, Public Act 20-7, § 18, did not bestow the Site Plan Approval with special status outside the scope of Executive Order 7JJ(3). First, that Public Act did *not* mandate an expiration date of May 15, 2021. Rather, that Public Act provided in full:

Notwithstanding the provisions of subsection (m) of section 8-3 of the general statutes, any site plan approval granted by the Ridgefield Planning and Zoning Commission at its meeting held on May 15, 2007, and further extended by said commission, for the construction of residential multi-family structures, and any modifications to such site plan, shall not expire if the applicant has obtained all the necessary building permits and commenced construction on or before the expiration date.

This Act does not set a specific expiration date; rather, the term is entirely open-ended. This is likely because it was enacted during the state of emergency and in recognition of Executive Order 7JJ(3). Second, the definition of “Covered Laws” includes applications that were submitted, heard, decided, etc. pursuant to Chapter 124 of the General Statutes. This Public Act does not change the fact the Site Plan Approval was originally submitted, heard and approved pursuant to Chapter 124 of the General Statutes. Third, Executive Order 7JJ(3) applies to “any approval or permit *issued* by a municipal land use agency pursuant to the ‘Covered Laws.’” Again, nothing about the Public Act abrogates the fact the Site Plan Approval was issued pursuant to a Covered Law. Executive Order 7JJ(3) applies.

Executive Order 7JJ(3) ordered in part that approvals such as the Site Plan Approval “shall not lapse or otherwise expire during the state of emergency, and the expiration date of the approval shall toll during the state of emergency.”⁴ In other words, pursuant to this Order, the Site Plan Approval was both (1) protected from expiration while the Order was in effect, and (2) was “tolled” during the state of emergency, which is defined as “to stop the running of,”⁵ or in other words, the term of the permit was paused. The permit holder is thereafter afforded a reasonable time thereafter to vest the approval. Executive Order 7JJ(3) recently expired on June 30, 2021.⁶ Accordingly, the tolling period has now ended, however the Property Owners now should have a reasonable time period to vest the approval.

2. Appeal of Zoning Permit Stayed Construction Pursuant to General Statutes § 8-7

The neighbor’s appeal of the Zoning Permit stayed “all proceedings” in the action appealed from pursuant to General Statutes § 8-7.⁷ In other words, by statute, the Property Owners are

⁴Exhibit A, § 3.

⁵Blacks Law Dictionary (9th Ed.).

⁶See Executive Order 12B.

⁷General Statutes § 8-7 provides in relevant part: “An appeal shall not stay any such order, requirement or decision which prohibits further construction or expansion of a use in violation of such zoning regulations except to such extent that the board grants a stay thereof. *An appeal from any other order, requirement or decision shall stay all proceedings in the action appealed from unless the zoning commission or the officer from whom the appeal has been taken certifies to the zoning board of appeals after the notice of appeal has been filed that by reason of facts stated in the certificate a stay would cause imminent peril to life or property, in which case proceedings shall not be* {S7318436}

prohibited from moving forward with the improvements permitted by the Zoning Permit until resolution of the neighbor's appeal by the ZBA. Here, commencing construction pursuant to the Zoning Permit would have been in direct violation of statute.

The ZEO improperly distinguishes the Zoning Permit from the Site Plan Approval, and he is incorrect that “[t]here were no zoning roadblocks that prohibited the applicant from receiving a Building Permit, and starting construction prior to the May 15, 2021, deadline.” First, following Site Plan Approval, the Property Owners could not obtain a Building Permit and commence construction without a valid Zoning Permit. For example, the Zoning Regulations provide that the “the erection or alteration of any building or structure is commenced in any zone” requires a Zoning Permit.⁸ The two approvals are dependent and an appeal of the Zoning Permit effectively froze the development as whole. Second, to the extent the ZEO is contending that the Property Owners could have simply moved forward with construction despite pending ZBA review of the Zoning Permit, without any objection from the zoning department, such activity would have been in direct violation of state statute. The Property Owners would have simply been opening the door to a cease and desist order and, even more likely, further litigation from the abutting property owner.

3. Appeal to Superior Court Tolled Expiration Date of the Site Plan Approval

Regardless of Executive Order 7JJ(3) and the appeal of the Zoning Permit, the expiration date of the Site Plan Approval is tolled due to an appeal to the Superior Court concerning compliance with Condition #1 of the Site Plan Approval. I first note the ZEO is correct that, unlike a ZBA appeal, an appeal to Superior Court does not automatically stay all proceedings and a permit holder can build at its own risk during the pendency of an appeal absent a court order otherwise. The Property Owners do not contend that the appeal imposed a stay on all proceedings. Rather, it is the Property Owner's position that generally an appeal of a land use approval will *tolled the expiration date of the approval* until resolution of the appeal.⁹ This is for equitable reasons, because Courts acknowledge that “to have begun construction during the pendency of the appeal might have been considered ‘reckless conduct’ on the part of the landowner”¹⁰ due to a risk of losing the appeal.

The ZEO improperly based his decision on *ASL Associates v. Proch* (1990), a Superior Court decision, to support his position. That decision was later rejected by the Appellate Court in *Fromer v. Two Hundred Post Associates*, 32 Conn. App. 799, 810 (1993). The Court in *Fromer* held that the expiration date of an underlying wetlands approval was tolled until resolution of all related appeals, including appeal

stayed, except by a restraining order which may be granted by a court of record on application, on notice to the zoning commission or the officer from whom the appeal has been taken and on due cause shown.” (Emphasis added.)

⁸Zoning Regulations § 9.1.A.1.a.; *see also* General Statutes § 8-3(f) (“no building permit shall be issued, in whole or in part, for a building, structure or use subject to the zoning regulations of a municipality without certification in writing by the official charged with the enforcement of such regulations that such building, structure or use is in conformity with such regulations or is a valid nonconforming use under such regulations.”).

⁹*See, e.g., Fromer v. Two Hundred Post Associates*, 32 Conn. App. 799 (1993) (wetlands permit tolled until resolution of all related appeals, including appeal of related site plan/coastal site plan approvals); *Dean-Moss Family Ltd P'ship v. Five Mile River Works, Inc.*, 130 Conn. App. 363 (2011) (coastal site plan approval tolled during period of litigation concerning validity of underlying parking easement for ten spaces approved in connection with plan); and *Bochanis v. Sweeney*, 148 Conn. App. 616, cert. denied, 311 Conn. 949 (2014) (wetlands permit tolled during appeal of related variance approvals); *see also* 9B R. Fuller, Connecticut Practice Series: Land Use Law & Practice § 24:10 (“an appeal to the superior court tolls the time limitations in local regulations or a condition of approval imposed by a land use agency.”)

¹⁰*Fromer, supra*, 32 Conn. App. at 806.

of related site plan and coastal site plan approvals. In so doing, the Court rejected the holding of *ASL Associates* for the following reason: “We reject this reasoning because there is a myriad of agencies from which many property owners must obtain approval, and, in many instances, one permit is dependent on another, as in this case. . . . There is no legislative history to § 8–8 as originally passed in 1925 before the advent of the myriad of land use regulatory bodies that exist today. We hold that the statute provides in cases covered by § 8–8a means for an appellant to stay any action on the approved application until the appeal is decided. Since there is a void in the statutory scheme for the protection of the appellee developer in this case, we hold that on the facts of this case the time limitations on the permit are tolled until this litigation is terminated.” Such is clearly the situation here.

Despite the ZEO’s contention otherwise, the results of the P&Z Commission’s review of the landscape plan (which now serves as the subject of the Court appeal) *did* directly relate to the Site Plan Approval and impact commencing construction. Specifically, the Site Plan Approval was conditioned upon further review and approval of the landscape plan by the P&Z Commission at Condition #1. Last March, the final decision of the P&Z Commission on the landscape plan, as noticed, provided: “APPROVED: #MISC-21-2: *Review of condition #1 of #2007-038-SPA* pertaining to final landscaping plan for a property located at 63-67 Prospect Street in MFDD Zone.” (Emphasis added.) In addition, equitable tolling of expiration dates has been extended by the Appellate Court to “all litigation” related to approvals, not merely an appeal of the underlying approval.¹¹

In addition, triggering a stay under CGS § 8-7 by appealing the Zoning Permit underscores why these administrative and legal proceedings have tolled the expiration date. If there was no equitable tolling, an opposing landowner can simply appeal an administrative zoning decision (such as a zoning permit or building permit) and delay proceedings in order to run out the clock on the underlying land use approval. As detailed by the Appellate Court, “[t]he regulatory process is not designed to be a spider’s web, snaring one who follows all the regulations and statutes, obtains all the necessary permits, and successfully defends a series of appeals, but then loses his right to proceed because the passage of time has caused the permits to expire.”¹² That is exactly the situation here and underscores why the expiration of the Site Plan Approval is currently tolled.

III. CONCLUSION

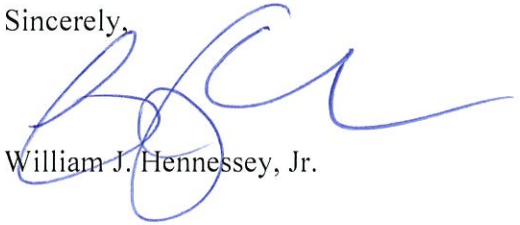
Real estate development for the past year has been subject to the constraints of the covid-19 pandemic and the expiration dates of all land use approvals, accordingly, were tolled pursuant to Executive Order of the Governor. Despite this, all recent efforts by the Property Owners to secure required permits and commence construction pursuant to the Site Plan Approval have been appealed, such that the Property Owners were either (1) barred by statute from proceeding and/or (2) to be considered “reckless” by a Court for proceeding with construction. The expiration date of the Site Plan Approval is, accordingly, tolled.

¹¹See e.g., *Dean-Moss Family Ltd P’ship*, supra, 130 Conn. App. at 375 (coastal site plan approval tolled during period of property rights litigation concerning validity of underlying parking easement for ten spaces approved in connection with plan.).

¹²*Fromer*, supra, at 811.

For these reasons, the Property Owners respectfully request that the decision of the ZEO to revoke the Zoning Permit be reversed.

Sincerely,



William J. Hennessey, Jr.

cc: Thomas Pierandri
Nancy Reidy
Richard Baldelli, ZEO
Patricia Sullivan, Esq.