TOWN OF RIDGEFIELD
Planning and Zoning Department

To: Carson C. Fincham, Chairman
Cc: Kelly Ryan, ZBA Administrator
Patricia Sullivan, Counsel
William Hennessey, Esq.
Peter Olson, Esq.

From: Richard S. Baldelli, Director, Planning and Zoning, ZEO

Re: Revocation Appeal, Zoning Permit Z-21-316

Date: July 14, 2021

Memorandum in support of appeal dismissal

For background and additional familiarity regarding the 63 Prospect Street premises, Exhibit 1 provides the Zoning District Map and Zoning Regulation histories of the former R-5 Zone, which R-5 Zone predates the existing MFDD Zone designation.

For your reference Exhibit 2 provides the 63 Prospect Street, Site Plan Approval and Zoning Permit timelines.

In response to the claims in Attorney Hennessy's "Description of Appeal", I offer the following information and response to the Board:

Addressing Item 1 I point out to the Board that Attorney Hennessy's position, that because of Executive Orders 7JJ and 11, the permit revocation was improperly performed; it is this writer's opinion that this claim is not supported by the Executive Orders.
A reading of the Executive Order7JJ and 11, Exhibit 3, shows that the Orders are limited to ensuring that *Building and Land Use Permit Holders* are allowed to continue their activity. The Orders were specifically written for the protection and continuation of, and are solely limited to *issued permits.* The Orders do not grant any extensions to the timelines, expiration dates, etc. of Site Plan Approvals as they are stated within the CGS.

There is a very clear distinction between a Site Plan Approval and a Permit. It is important to emphasis that a Site Plan Approval or a Subdivision approval is not a permit. A Site Plan Approval or Subdivision approval are approvals, that once granted (typically by a PZC or ZBA), authorize the holder thereof, to be able to apply for a permit.

66 Prospect Street • Ridgefield, CT 06877
Phone: (203) 431-2766 • Fax: (203) 431-2737

www.ridgefieldct.org

Executive Order 7I.19a. Exhibit 3a, referenced within Executive Order 7JJ, states that the *Covered Laws* are limited to Timelines regarding Notices, holding Public Meetings and Appeals.

Exhibit 3b, Executive Order 7I.19h. clarifies that the above-cited subsection a. reference to Appeals, is strictly limited to the *service process* of Appeals.

I ask that the Board take note that CGS 8-3(m), Exhibit 4 provides that a site plan approval shall expire if all or part of the work in connection with the site plan is not completed within fourteen (14) years of the site plan approval, and
Per PA 20-7-18, for a Ridgefield PZC site plan approved on May 15, 2007, unless a Building Permit has been issued, *and* construction has started on or before May 15, 2021, the site plan shall expire on May 15, 2021.

Exhibit 4a provides three (3) common definitions of Site Plan

If the Governor had intended to extend CGS timelines, expiration dates, etc. of Site Plan Approvals, the CGS timeline extension, expiration dates, etc. would have been clearly spelled out in an Executive Order.

The Site Plan Approval expiration date that is very clearly stated in CGS 8-3(m) and PA20-7-18 is not addressed by, stated within, or afforded any protection from the Executive Orders.

• • • • •

Addressing Item 2 of Attorney Hennessey's claim that the adjoining property owners appeal of a March 9, 2021, PZC action tolls the May 15, 2007, Site Plan Approval expiration date, I bring to your attention as Exhibit 5 the PZC March 9, 2021, Legal Notice that resulted in the cited March 16, 2021, Superior Court appeal.

A reading of the Legal Notice reveals that the appealed PZC action, is limited to – the PZC review of condition #1 within the Site Plan Approval, and it is limited to and *solely pertains to the PZC review of the Landscape Plan* for 63 Prospect Street.

The PZC landscape plan review, and the appeal thereto, do not in any manner, impact the Site Plan Approval. This evidenced by:

1. On April 5, 2021, **after** the neighbor's appeal to the Superior Court of the PZC review of the landscaping plan, and pursuant to the May 15, 2007, Site Plan Approval, Attorney Hennessey's clients' made the formal submission of a Zoning Permit application to the Land Use Office for the purpose of receiving a Building Permit and starting construction as authorized by the May 15, 2007, Site Plan Approval,
2. As a preamble to receiving the Zoning Permit, the property owner performed the physical action of installing the Erosion & Sedimentation Controls on the premises, and
3. The fact that the May 15, 2007, Site Plan Approval condition #1 *only required the PZC to review the landscape plan.* Whether the PZC decided to make a *decision to approve, deny or take no action* on the landscaping plan review, the *results of the PZC review has no impact on the May 15, 2007, Site Plan Approval*. The PZC authority was limited to a review of the landscape plan.

Exhibit 6 CGS 8-8 (h) clearly states that filing an appeal with the court does **not stay proceedings**, unless the court grants a restraining order: (h) The appeal shall state the reasons on which it has been predicated and shall not stay proceedings on the decision appealed from. However, the court to which the appeal is returnable may grant a restraining order, on application, and after notice to the board and cause shown.

Exhibit 7 ASL Associates v. Proch, although a Superior Court decision, it has been cited thereafter multiple times, states: General Statutes 8-8 (b) specifically provides that an appeal shall not stay "proceedings upon the decision appealed from, but the court to which such appeal is returnable may, on application, on notice to the board and on cause shown, grant a restraining order.":

The intent of the legislature, clearly expressed in 8-8 (b), is that an appeal would not stay plaintiff's right to proceed in the exercise of the rights conferred on it by the granting of the special permit. Such rights, which include the right to proceed with construction, were subject to the zoning regulations including the nine-month time limit imposed by Article Seven (A)(7).

> Even though plaintiff could have proceeded with construction, as pointed out, it would have been imprudent for it to do so with litigation pending.
>
> Under such circumstances, plaintiff could have proceeded under 8-8 (b) for an order protecting itself from the nine-month limit of Article Seven(A)(7). If this procedure had been followed, the rights of the parties could have been reasonably considered and if good cause were shown an order tolling its nine-month period could have been issued.

Considering all of the above, it must be concluded that under the law of this state pending litigation did not automatically toll the running of the nine-month limitation imposed by Article Seven (A)(7) of the regulations .

The court is definitively stating in the above decision that, the only that way for an appeal to the Superior Court to stay any proceeding, is by requesting that the court grant such a protective order.

Exhibit 7a Simko v. ZBA Fairfield, as highlighted below, the Connecticut Supreme Court states that CGS 8-8(b) very clearly articulates its intended directions and purpose:

We find no ambiguity on the face of § 8-8 (b), as amended. The statute clearly mandates that both the zoning board and the clerk of the municipality be named parties to a zoning appeal. Additionally, a review of the relevant legislative history regarding Public Acts 1985, No. 85-284, § 3, supports a e. Iliteral construction of its language

Where, as here, the language of the `statute is clear and unambiguous, courts may not by construction supply omissions in a statute, or add exceptions merely because it appears to them that good reasons exist for doing so

At the time that the instant zoning permit was revoked, I was not aware of any court issued restraining order that institutes a stay of proceedings in this matter.

Pursuant to CGS 8-3(m) and PA 20-7-18, as a matter of law, the May 15, 2015, Site Plan Approval File #2007-038-SPA expired on May 15, 2021, Accordingly, the 63 Prospect Street zoning permit (Z-21-316), which zoning permit was issued pursuant to, and by the authority of, Site Plan Approval File #2007-038-SPA approved on May 15, 2007, was properly revoked.

•••••

Addressing Item 3 of the appeal, wherein the claim is being made that - based on the April 20, 2021, filing of an appeal to the Board of the issuance of the April 9, 2021, zoning permit, (Z-21-316), Exhibit 8; the appeal stays all proceedings in the action appealed from pursuant to General Statutes 8-7, the claimant overstates the authority of CGS 8-7, Exhibit 9.

In the April 20, 2021, Notice of Appeal filed with the Zoning Board of Appeals by Attorney Olson on behalf of his client Paul Jaber and Suzanne Jaber, Attorney Olson states that he is appealing the April 9, 2021, issuance of a zoning permit (Z-21-316).

The CGS 8-7 stay does not reach out to, nor have any authority over, a Site Plan Approval, Special Permit or Special Exception, or any other CGS, including 8-3(m). The **stay of proceedings** authorized by CGS 8-7 is strictly **limited to the item of instant appeal**.

In this case, as noted in Exhibit 8 the **item of appeal** is zoning permit Z-21-316. This appeal is not, and pursuant to the CGS cannot be, an appeal of the May 15, 2007, Site Plan Approval.

It is important to note that the CGS 8-7 stay does not, and does not have the authority to have, any impact on, or effect upon, a Building Permit application. There were no zoning roadblocks that prohibited the applicant from receiving a Building Permit, and starting construction prior to the May 15, 2021, deadline.

•••••

In summary, the Executive Orders do not address, or have any impact on CGS 8-3(m) and PA 20-7-18, accordingly, the Executive Orders do not provide the timeline relief as put forth by Attorney Hennessey.

No matter how you look at them, neither of the cited appeals, the appeal of the PZC landscape plan review to the Superior Court, or the appeal to the Board of the issuance of a zoning permit, has any effect on the CGS 8-3(m) and PA 20-7-18 mandated expiration date of the May 15, 2007, Site Plan Approval. The appeal before the Board of the zoning permit revocation is a misguided attempt to request a relief from the CGS 8-3(m) and PA 20-7-18 Site Plan Approval expiration date, that is not within the statutory authority of the Board to grant.

I again point out to the Board that pursuant to CGS 8-3 (m) and PA 20-7-18, that because a Building Permit has not been issued, and construction was not started, and that, as the statute and PA requires compliance with both items, 1. the issuance of a Building Permit, and 2. construction being started; the failure to meet either one of said requirements would result in the Site Plan Approval statutorily expiring on May 15, 2021. In this instance there is no question that both items, the Building Permit not being issued, and that construction was not started, are factual matters that cannot be disputed.

Because the Site Plan Approval has lapsed, the zoning permit thereto is no longer valid.

During the fourteen (14) years from May 15, 2007 to May 15, 2021, there is nothing generated by, or from the Land Use Office that prohibited Attorney Hennessey's client from procuring a Building Permit and starting construction. Choosing to not proceed thru the Building Permit application process to its conclusion, and start construction during the Site Plan Approval's statutory fourteen (14) time frame was a deliberate choice that was made by the property owner.

Based on the above, I respectfully request that the Board dismiss the appeal.

Richard S. Baldelli
Director, Planning and Zoning, ZEO

TOWN OF RIDGEFIELD
Planning and Zoning Department

Exhibit 1

Zoning District Map History
63 Prospect Street

1946 – Split zoning districts of: R1 (residential one-acre) and R2 (residential 10,000 sq.ft.)

1964 – R-5 (15 units per acre)

2007 – R-5 was deleted from the zoning map

2007 – MFDD (6 units per acre, or 8 units per acre if 15% are affordable)

R-5 Zoning Regulation History

1964 - The R-5 Zoning regulation was in effect

1970 – The R-5 Zone was abolished

1970 thru to **2007** the following notation was within the R-5 Zoning Regulations –

Editor's note—A planning and zoning commission regulation of October 27, 1970, abolished the Residence R-5 classification but further provided that the regulations as to the Residence R-5 Zones would continue in effect to those locations classified as Residence R-5.

1994

-- --

May 1, 2007 - the Zoning Regulations were completely rewritten, and all references to the R-5 Zone were deleted from the regulations.

66 Prospect Street • Ridgefield, CT 06877
Phone: (203) 431-2766 • Fax: (203) 431-2737

www.ridgefieldct.org

TOWN OF RIDGEFIELD
Planning and Zoning Department

Exhibit 2

Site Plan Approval and Zoning Permit Timeline
63 Prospect Street

Site Plan application submitted – April 17, 2007

Site Plan application approved – May 15, 2007

Site Plan approval extension granted – March 22, 2016

Site Plan approval extension construction completion date – May 15, 2021

Site Plan Approval PZC review of condition number #1 – February 19, 2021

Site Plan Approval PZC condition #1 review decision effective date – March 9, 2021

Site Plan PZC condition #1 review Appealed to the Superior Court – March 17, 2021

Development Application Zoning Permit submitted – April 5, 2021

Development Application Zoning Permit issued – April 9, 2021

Zoning Permit issuance Appealed to ZBA – April 20, 2021

Zoning Permit revoked – May 17, 2021

Zoning Permit revocation Appealed to ZBA – May 28, 2021

66 Prospect Street • Ridgefield, CT 06877
Phone: (203) 431-2766 • Fax: (203) 431-2737

www.ridgefieldct.org

TOWN OF RIDGEFIELD
Planning and Zoning Department

Exhibit 3

STATE OF CONNECTICUT BY HIS EXCELLENCY NED LAMONT EXECUTIVE ORDER NO. 7JJ
PROTECTION OF PUBLIC HEALTH AND SAFETY DURING COVID-19 PANDEMIC AND RESPONSE –
MUNICIPAL GOVERNANCE MEASURES AND AUTHORIZATION FOR DEEP TO CONDUCT PROGRAMS THROUGH DISTANCE LEARNING

3. Tolling of Land Use and Building Permits. In order to ensure that land use and building permit holders may continue to diligently pursue permitted activities after the state of emergency, 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, or by a municipal building official pursuant to Connecticut General Statutes Chapter 541 and 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. To the extent that any such approval contains or is subject to conditions, the agency or official may waive such conditions if an approval holder is not able to abide by the conditions as a result of the COVID-19 pandemic or protective measures taken in response to it, provided that such waiver shall not be unreasonably withheld. This section shall not apply to an approval or permit whose holder was in violation of the terms and conditions of the approval as of March 10, 2020 or who violates such terms and conditions during the state of emergency

---

STATE OF CONNECTICUT BY HIS EXCELLENCY NED LAMONT EXECUTIVE ORDER NO. 11
PROTECTION OF PUBLIC HEALTH AND SAFETY DURING COVID-19 PANDEMIC – EXTENSION OF SELECTED COVID-19 EXECUTIVE ORDERS

1. Extension of Selected COVID-19 Orders to May 20, 2021. The following Executive Orders are extended through May 20, 2021:

7JJ, Sections 2 and 3

66 Prospect Street • Ridgefield, CT 06877
Phone: (203) 431-2766 • Fax: (203) 431-2737

www.ridgefieldct.org

TOWN OF RIDGEFIELD
Planning and Zoning Department

Exhibit 3a

Executive Order 7I

19. Suspension, Modification and Clarification of Certain Municipal Procedural Requirements and Time Limitations Regarding Notice, Commencement and Holding of Public Hearings, Decisions, and Appeals

a. Any time deadlines contained in the Covered Laws that may pass or expire during the public health and civil preparedness emergency declared by me on March 10, 2020 ("state of emergency") are extended by an additional 90 days for any and all of the following circumstances: the commencement or completion of any public hearing; the rendering of any decision required to be made within a particular period; and the submission or reporting by any municipality to any agency or quasi-public agency of the State; provided, however, that such preceding 90-day extension shall not apply to any time extensions that are already expressly allowed by the Covered Laws, meaning that, for example, a decision for which the statute already allows up to a total of 65 days of extension (such as site plan decisions) may be further extended by no more than an additional 90 days, for a total of 155 extension days (in this example); and further provided that each individual petition, application, or other proposal, or adoption or amendment of any municipal plan, regulations, or ordinance shall only obtain one 90-day extension period in total, which may be allocated, in part, by an applicant or municipality or agency, for each deadline period, and not multiple 90-day extensions for each time deadline related thereto.

66 Prospect Street • Ridgefield, CT 06877
Phone: (203) 431-2766 • Fax: (203) 431-2737

www.ridgefieldct.org

TOWN OF RIDGEFIELD
Planning and Zoning Department

Exhibit 3b

Executive Order 7I

h. Any Covered Law prescribing the procedure for commencement of an appeal of a decision to the Superior Court and associated service of process is suspended and modified to permit any such appeal to be commenced by a proper officer by electronic mail notice on the designated municipal clerk (including any town, city, borough, or district clerk). The time period to commence said appeal shall remain unchanged. Municipalities shall clearly post the email address to be used for the electronic service on their website. Notwithstanding C.G.S. Section 6-32, the damages clauses which may result from a state marshal's failure to duly comply with any service requirements of section 6-32(a), to the extent such requirements conflict with this Section 19 of this order are suspended.

66 Prospect Street • Ridgefield, CT 06877
Phone: (203) 431-2766 • Fax: (203) 431-2737

www.ridgefieldct.org

TOWN OF RIDGEFIELD
Planning and Zoning Department

Exhibit 4

CGS SITE PLAN APPROVAL/EXPIRATION TIME FRAME

CGS 8-3 - (m) Notwithstanding the provisions of this section, any site plan approval made under this section prior to July 1, 2011, that has not expired prior to May 9, 2011, except an approval made under subsection (j) of this section, shall expire not less than nine years after the date of such approval and the commission may grant one or more extensions of time to complete all or part of the work in connection with such site plan, provided no approval, including all extensions, shall be valid for more than fourteen years from the date the site plan was approved.

Public Act 20-7 § 18 — RIDGEFIELD PLANNING AND ZONING COMMISSION SITE PLAN APPROVAL EXTENSION

The act extends indefinitely a site plan approval the Ridgefield Planning and Zoning Commission granted on May 15, 2007, and subsequently extended for the construction of residential multifamily structures. Under the act, the approval, including any modifications to the site plan, does not expire as long as the applicant has obtained all of the necessary building permits and started construction by the approval's expiration date.

The act's extension applies regardless of the law that makes certain land use approvals valid for between nine and 14 years (CGS § 8-3(m)).

CGS 8-3 (m) & Public Act 20-7 Site Plan Approval (for 63 Prospect Street) has a Building Permit issuance and Construction Start - drop-dead date of – May 15, 2021

---

66 Prospect Street • Ridgefield, CT 06877
Phone: (203) 431-2766 • Fax: (203) 431-2737

www.ridgefieldct.org

TOWN OF RIDGEFIELD
Planning and Zoning Department

Exhibit 4a

Site Plan definitions:

Site Plan: A site plan is an architectural plan, landscape architecture document, and a detailed engineering drawing of proposed improvements to a given lot. A site plan usually shows a building footprint, travelways, parking, drainage facilities, sanitary sewer lines, water lines, trails, lighting, and landscaping and garden elements. Such a plan of a site is a "graphic representation of the arrangement of buildings, parking, drives, landscaping and any other structure that is part of a development project". A site plan is a "set of construction drawings that a builder or contractor uses to make improvements to a property. Counties can use the site plan to verify that development codes are being met and as a historical resource. Site plans are often prepared by a design consultant who must be either a licensed engineer, architect, landscape architect or land survey".

Site Plan: means a scaled drawing prepared to illustrate the relation between the lot lines and the uses, buildings or structures existing or proposed on a lot, including such details as parking areas, walkways, landscaped areas, lighting, building areas, minimum yards, floor areas, easements, drainage contours, and areas for special uses.

Site Plan: A **site plan** or a **plot plan** is a type of drawing used by architects, landscape architects, urban planners, and engineers which shows existing and proposed conditions for a given area, typically a parcel of land which is to be modified. Sites plan typically show buildings, roads, sidewalks and paths/trails, parking, drainage facilities, sanitary sewer lines, water lines, lighting, and landscaping and garden elements.[1]

Such a plan of a site is a "graphic representation of the arrangement of buildings, parking, drives, landscaping and any other structure that is part of a development project".[2]

A site plan is a "set of construction drawings that a builder or contractor uses to make improvements to a property. Counties can use the site plan to verify that development codes are being met and as a historical resource. Site plans are often prepared by a design consultant who must be either a licensed engineer, architect, landscape architect or land surveyor".[3]

Site plans includes site analysis, building elements, and planning of various types including transportation and urban. An example of a site plan is the plan for Indianapolis[4] by Alexander Ralston in 1821.

The specific objects and relations are shown are dependent on the purpose for creating the plot plan, but typically contain: retained and proposed buildings, landscape elements, above-ground features and obstructions, major infrastructure routes, and critical legal considerations such as property boundaries, setbacks, and rights of way.

66 Prospect Street • Ridgefield, CT 06877
Phone: (203) 431-2766 • Fax: (203) 431-2737

www.ridgefieldct.org

TOWN OF RIDGEFIELD
Planning and Zoning Department

Exhibit 5

Notice of Decision for Tuesday, March 9, 2021 Published on March 11, 2021 on Website: www.ridgefieldct.org

---

LEGAL NOTICE Notice is hereby given that the Planning and Zoning Commission of the Town of Ridgefield, at its meeting of March 9, 2021, took the following actions:

Item I: APPROVED: #2020-080-REV(SP): Revision to Special Permit Application per Section 9.2 of the Town of Ridgefield Zoning Regulations, to install ground mounted solar system for a property located at 900 Ridgebury Road (Boehringer-Ingelheim Pharmaceuticals) in RAA zone. Owner: Boehringer-Ingelheim Pharmaceuticals. Applicant: Louth Callan Renewables, LLC.

Item II: 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. Owner/Applicant: The Giardini Limited Partnership and Pierandri Realty LLC. Authorized Agent: Meaghan Miles.

Item III: ADOPTED: #A-21-1: Regulation amendment Application per Section 9.2.B of the Town of Ridgefield Zoning Regulations to amend Section 3.3.B.e.i and 3.3.B.2.ii proposing expanding Accessory Dwelling Unit opportunities. Commission initiated. Effective: 3/12/2021

PLANNING AND ZONING COMMISSION
Rebecca Mucchetti, Chair

66 Prospect Street • Ridgefield, CT 06877
Phone: (203) 431-2766 • Fax: (203) 431-2737

www.ridgefieldct.org

Exhibit 6
(1 of 5 pages)

Sec. 8-8. Appeal from board to court. Mediation. Review by Appellate Court. (a) As used in this section:

(1) "Aggrieved person" means a person aggrieved by a decision of a board and includes any officer, department, board or bureau of the municipality charged with enforcement of any order, requirement or decision of the board. In the case of a decision by a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, "aggrieved person" includes any person owning land in this state that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board.

(2) "Board" means a municipal zoning commission, planning commission, combined planning and zoning commission, zoning board of appeals or other board or commission the decision of which may be appealed pursuant to this section, or the chief elected official of a municipality, or such official's designee, in a hearing held pursuant to section 22a-250, whose decision may be appealed.

(b) Except as provided in subsections (c), (d) and (r) of this section and sections 7-147 and 7-147i, any person aggrieved by any decision of a board, including a decision to approve or deny a site plan pursuant to subsection (g) of section 8-3 or a special permit or special exception pursuant to section 8-3c, may take an appeal to the superior court for the judicial district in which the municipality is located, notwithstanding any right to appeal to a municipal zoning board of appeals under section 8-6. The appeal shall be commenced by service of process in accordance with subsections (f) and (g) of this section within fifteen days from the date that notice of the decision was published as required by the general statutes. The appeal shall be returned to court in the same manner and within the same period of time as prescribed for civil actions brought to that court.

(c) In those situations where the approval of a planning commission must be inferred because of the failure of the commission to act on an application, any aggrieved person may appeal under this section. The appeal shall be taken within twenty days after the expiration of the period prescribed in section 8-26d for action by the commission.

(d) Any person affected by an action of a planning commission taken under section 8-29 may appeal under this section. The appeal shall be taken within thirty days after notice to such person of the adoption of a survey, map or plan or the assessment of benefits or damages.

(e) The proceedings of the court for an appeal may be stayed by agreement of the parties when a mediation conducted pursuant to section 8-8a commences, provided any such stay shall terminate upon termination of the mediation.

(f) Service of legal process for an appeal under this section shall be directed to a proper officer and shall be made as follows:

(1) For any appeal taken before October 1, 2004, process shall be served by leaving a true and attested copy of the process with, or at the usual place of abode of, the chairman or clerk of the board, and by leaving a true and attested copy with the clerk of the municipality. Service on the chairman or clerk of the board and on the clerk of the municipality shall be for the purpose of providing legal notice of the appeal to the board and shall not thereby make the chairman or clerk of the board or the clerk of the municipality a necessary party to the appeal.

(2) For any appeal taken on or after October 1, 2004, process shall be served in accordance with subdivision (5) of subsection (b) of section 52-57. Such service shall be for the purpose of providing legal notice of the appeal to the board and shall not thereby make the clerk of the municipality or the chairman or clerk of the board a necessary party to the appeal.

(g) Service of process shall also be made on each person who petitioned the board in the proceeding, provided such person's legal rights, duties or privileges were determined therein. However, failure to make service within fifteen days on parties other than the board shall not deprive the court of jurisdiction over the appeal. If service is not made within fifteen days on a party in the proceeding before the board, the court, on motion of the party or the appellant, shall make such orders of notice of the appeal as are reasonably calculated to notify the party not yet served. If the failure to make service causes prejudice to the board or any party, the court, after hearing, may dismiss the appeal or may make such other orders as are necessary to protect the party prejudiced.

(h) The appeal shall state the reasons on which it has been predicated and shall not stay proceedings on the decision appealed from. However, the court to which the appeal is returnable may grant a restraining order, on application, and after notice to the board and cause shown.

(i) Within thirty days after the return date to court, or within any further time the court allows, the board shall transmit the record to the court. The record shall include, without limitation, (1) the original papers acted on by the board and appealed from, or certified copies thereof, (2) a copy of the transcript of the stenographic or sound recording prepared in accordance with section 8-7a, and (3) the written decision of the board including the reasons therefor and a statement of any conditions imposed. If the board does not provide a transcript of the stenographic or the sound recording of a meeting where the board deliberates or makes a decision on a petition, application or request on which a public hearing was held, a certified, true and accurate transcript of a stenographic or sound recording of the meeting prepared by or on behalf of the applicant or any other party shall be admissible as part of the record. By stipulation of all parties to the appeal, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for additional costs. The court may require or permit subsequent corrections or additions to the record.

(j) Any defendant may, at any time after the return date of the appeal, make a motion to dismiss the appeal. If the basis of the motion is a claim that the appellant lacks standing to appeal, the appellant shall have the burden of proving standing. The court may, on the record, grant or deny the motion. The court's order on the motion may be appealed in the manner provided in subsection (o) of this section.

(k) The court shall review the proceedings of the board and shall allow any party to introduce evidence in addition to the contents of the record if (1) the record does not contain a complete transcript of the entire proceedings before the board, including all evidence presented to it, pursuant to section 8-7a, or (2) it appears to the court that additional testimony is necessary for the equitable disposition of the appeal. The court may take the evidence or may appoint a referee or committee to take such evidence as it directs and report the same to the court, with any findings of facts and conclusions of law. Any report of a referee, committee or mediator under subsection (f)

of section 8-8a shall constitute a part of the proceedings on which the determination of the court shall be made.

(l) The court, after a hearing thereon, may reverse or affirm, wholly or partly, or may revise, modify or remand the decision from which the appeal was taken in a manner consistent with the evidence in the record before it. In an appeal from an action of a planning commission taken under section 8-29, the court may also reassess any damages or benefits awarded by the commission. Costs shall be allowed against the board if the decision appealed from is reversed, affirmed in part, modified or revised.

(m) Appeals from decisions of the board shall be privileged cases and shall be heard as soon as is practicable unless cause is shown to the contrary.

(n) No appeal taken under subsection (b) of this section shall be withdrawn and no settlement between the parties to any such appeal shall be effective unless and until a hearing has been held before the Superior Court and such court has approved such proposed withdrawal or settlement.

(o) There shall be no right to further review except to the Appellate Court by certification for review, on the vote of three judges of the Appellate Court so to certify and under such other rules as the judges of the Appellate Court establish. The procedure on appeal to the Appellate Court shall, except as otherwise provided herein, be in accordance with the procedures provided by rule or law for the appeal of judgments rendered by the Superior Court unless modified by rule of the judges of the Appellate Court.

(p) The right of a person to appeal a decision of a board to the Superior Court and the procedure prescribed in this section shall be liberally interpreted in any case where a strict adherence to these provisions would work surprise or injustice. The appeal shall be considered to be a civil action and, except as otherwise required by this section or the rules of the Superior Court, pleadings may be filed, amended or corrected, and parties may be summoned, substituted or otherwise joined, as provided by the general statutes.

(q) If any appeal has failed to be heard on its merits because of insufficient service or return of the legal process due to unavoidable accident or the default or neglect of the

officer to whom it was committed, or the appeal has been otherwise avoided for any matter of form, the appellant shall be allowed an additional fifteen days from determination of that defect to properly take the appeal. The provisions of section 52-592 shall not apply to appeals taken under this section.

(r) In any case in which a board fails to comply with a requirement of a general or special law, ordinance or regulation governing the content, giving, mailing, publishing, filing or recording of any notice either of a hearing or of an action taken by the board, any appeal or action by an aggrieved person to set aside the decision or action taken by the board on the grounds of such noncompliance shall be taken not more than one year after the date of that decision or action.

Exhibit 7
(1 of 8 pages)

December 21, 1990. MEMORANDUM OF DECISION

PURTILL, J.

This is an administrative appeal taken under the provisions of General Statutes 8-8 by the owner of real property in the town of Marlborough from the action of the zoning board of appeals of that town in declaring void a permit issued by the building inspector.

The controversy between the parties has been the subject of much controversy but the underlying facts are not greatly in dispute and may be summarized as follows:

On November 26, 1985 plaintiff applied to the Marlborough Zoning concussion for a zone change, a special permit and a site plan to allow construction of sixty-four condominium units. On June 5, 1986 the applications were approved and appeals were commenced to the Superior Court on July 1, 1986. The appeal was dismissed on August
26, 1986. The dismissal was appealed but on January 5, 1987 the appellate court affirmed the dismissal.

In addition to the above litigation, on June 4, 1987 an action seeking to enjoin the zoning authority from issuing a building permit to plaintiff was instituted. The injunction was denied on July 22,1987. Other unsuccessful actions were instituted in an attempt to prevent plaintiff from proceeding under the special permit.

The special permit approved on June 5, 1986 was issued to plaintiff on September 2, 1986. *4685

Article Seven (A)(7) of the Marlborough Zoning Regulations, which applies here, provides as follows:

7. Special Permit Becomes Void:

> Construction or operation shall commence, and a building permit issued where required, within nine (9) months from date of issuance of the Special Permit or the Special Permit becomes void. A notice shall be recorded on the land record that the Special Permit is void.

The nine month period provided under the above section expired on June 2, 1987. On June 1, 1987, one day before the expiration of the time limit, plaintiff applied for a building permit.

On June 11, 1987 the Planning Coordinator having reviewed plaintiff's plans for the condominium informed the Building Inspector, in writing that he had approved the plans.

The building permit, No. 6278, was issued on June
29, 1987 for building No. 1.

Article Seven (A)(7) above quoted is the source of the problem here since, although plaintiff applied for a building permit one day before expiration of the nine month period provided under the regulation, the building permit was not issued until after the nine month period had expired. If the plain language of Article Seven (A)(7) were followed, it would result in the special permit becoming void at the expiration of nine months.

On, or about, November 19, 1987 a question was raised before the Planning and Zoning Commission as to whether or not the special permit was still valid because of non-compliance with the nine month requirement of Article Seven (A)(7).

In an attempt to resolve the question, an action seeking a declaratory judgment was instituted in the superior court. The matter was reserved to the appellate court which by decision released June 6, 1989 declined to grant the relief sought. ASL Associates v. Zoning Commission, 18 Conn. app. 542 (1989).

On June 22, 1989 plaintiff amended the original permit to a foundation only permit.

On July 24, 1989 plaintiff submitted an application for a full permit for Building No. 1. This permit was issued by the zoning officer on August 28, 1989 and construction of the building was started and completed.

Defendant Proch, an adjoining property owner, on September 13, 1989 appealed to the defendant Zoning Board of Appeals the action of the zoning officer in granting the full permit of August 28, 1989. Defendant Zoning Board of Appeals has authority to consider such appeals under the provisions of General Statutes 8-6 and Article Thirteen A2 of the Marlborough Zoning Regulations. After a public hearing, on October 25, 1989, defendant board issued its decision that the special permit was void because of "Section 7A7" therefore "no zoning permit could be issued."

The present action is an appeal from that decision.

The publication of all statutory notices appears to have been made in accordance with the law and the public hearing was held in accordance with General Statutes 8-7.

Plaintiff has instituted this action under the provisions of General Statutes 8-8 which limits such appeals to parties aggrieved by the decision

> appealed from. The evidence indicates that plaintiff is the owner of the property covered by the permit and that this permit, which the decision appealed from has rendered void, was issued to it. It must be concluded then that if the decision of the defendant board stands, plaintiff will be unable to develop its land as proposed and the status of the building on the premises will be jeopardized. From such facts, it must be found that plaintiff is aggrieved and has standing to prosecute this appeal under 8-8. Tazza v. Planning and Zoning Commission, 164 Conn. 187, 190 (1972)
>
> In appeals such as this, the local board's conclusions must be upheld if they are reasonably supported by the record. Burnham v. Planning Zoning Commission, 189 Conn. 261, 265 (1983). It is a fundamental proposition that decisions of zoning authorities are to be overruled only when it is found that they have not acted fairly, with proper motives, and upon valid reasons. When it appears that an honest judgment has been reasonably and fairly exercised after a full hearing, courts should be cautious about disturbing the decision of the local authority. The burden of overthrowing the decision of the board rests squarely on plaintiff. Goldreyer v. Board of Zoning Appeals, 144 Conn. 641, 646 (1957).

I

The first claim raised by plaintiff is that defendant Proch had no right to appeal the action of the zoning officer to the Zoning Board of Appeals
4687since such appeal was not taken within *4687 the time allowed by law.

Except in those cases where the local regulations provide otherwise, General Statutes 8-7 requires that appeals to zoning boards of appeals, such as that taken by defendant Proch must be taken within thirty days. Since Marlborough had not adopted its own time limit for such appeals, the statutory thirty days would apply. Compliance with the statutory time was mandatory since a statutory right of appeal may be taken advantage

of only by strict compliance with the statutory provisions by which it is created. Fidelity Trust Co. v. Lamb, 164 Conn. 126, 132 (1972).

Plaintiff does not claim that defendant Proch brought his appeal more than thirty days after the permit on August 28, 1989. It is plaintiff's claim, however, that the real issue which Proch was raising was the validity of the special permit based upon the zoning enforcement officer's interpretation of Article Seven (A)(7). Plaintiff contends that on or about June 11, 1987 the zoning enforcement officer decided that the special permit was still valid and that this resulted in the permit of June 29, 1987. This action was not appealed to the Zoning Board of Appeals and more than thirty days elapsed between such action and the appeal to the board on September 13, 1989. It does not appear, however, that the validity of the special permit was considered in connection with the permit of June 29, 1987. The validity of the special permit was not questioned until November 1987.

Plaintiff claims that the internal letter of June 11,
1987 constitutes a decision that the special permit was valid. This letter, which was more of an opinion to the Building Inspector than an appealable action, stated as follows:

> Please view this letter as an acknowledgement that I have reviewed the application and plans submitted for phase I, Building 1 of the Sachem Village Condominium. Project, Hodge Road. The plans and detail submitted indicate no apparent conflict with the plans approved in the Special Permit Application by the Marlborough Zoning Commission on June 5, 1986. I hereby approve the above referenced plans.

This letter cannot be construed as a finding that the special permit was still valid. The letter simply states that the plans submitted conform to the special permit. Although in issuing the building permit of June 29, 1987 the zoning officer must have assumed that the underlying special permit was then still valid, the question of its validity was not raised Plaintiff also argues that allowing Proch to contestthe validity of the special permit in connection with the permit for Building No. 1 was unreasonable and not contemplated by the law since it could mean that in substantial developments, where construction in stages would be reasonable, each time a new permit was applied for an opponent could force relitigation of the underlying special permit as successive building permits were sought. It is doubtful, however if successful relitigation of the same issue, as feared by plaintiff, would be possible or allowable under the law.

> The procedure which plaintiff argues against is not unreasonable and is in accordance with General Statutes 8-3 (f) which requires that before a building permit may be issued the appropriate zoning officer must

certify in writing that the proposed building is in conformity with the regulations. If the special permit upon which the building permit is based is void, then the zoning officer cannot properly certify that any proposed building would be in conformity with the regulations. If a building permit is issued under such circumstances, an aggrieved person has a right to appeal such action to the zoning board of appeals under the provisions of General Statutes
8-6 within the time limited by 8-7.

Here it must be found that Proch's appeal to defendant board was taken within the time allowed by law.

II

The second claim advanced by plaintiff is that the decision of defendant board was illegal since pending litigation tolled running of the nine month requirement of Article Seven (A) 7.

Plaintiff recites the dilemma facing a developer when its special permit is challenged in court. Assuming that financing could be arranged, if it

went ahead with the project, obtained building permits and completed construction and the special permits were ruled invalid, it could face revocation of the permits which could mean abandoning the project with great loss. Graham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 4 (1953). Proceeding with construction while litigation contesting the right to construct was pending could be considered reckless conduct on the part of plaintiff. McGavin v. Zoning Board of Appeals, 26 Conn. Sup. 251, 255 (1965).

In the situation which plaintiff found itself, there was no explicit automatic relief from the provisions of Article Seven (A)(7) either under the statutes or the local regulations. Plaintiff argues that to follow the literal wording of Article Seven (A)(7) would work a great injustice. Since such a result could not have been intended by the law, the
9zoning regulations *4689 should be interpreted so as to provide an automatic stay of the nine month provision of Article Seven (A)(7) while litigation was pending.

No Connecticut case, directly in point, has been cited by either party. Plaintiff has cited a number of cases from other jurisdictions in support of its position that the running of the nine month requirement was tolled by the litigation contesting the validity of the special permit. Plaintiff relies on cases from other jurisdictions primarily, Tantimonoco v. Zoning Board of Review, 232
A.2d 385, 388 (R.I. 1967); Wentworth Hotel, Inc. v. Town of New Castle, 287 A.2d 615, 619 (N.H.
1972); Gala Homes, Inc. v. Board of Adjustment,
405 S.W.2d 165, 166 (Tex. 1966); and Belfer v. Building Commissioner, 294 N.E.2d 857 (Mass.
1973).

Of these cases, neither Wentworth (which involved a time restriction contained in a condition attached to the decision under appeal) nor Gala (which involved an amendment to the regulation enacted after the decision of the local board) are in point. The Tantimonoco case and

Belfer appear to be based upon a "common sense" approach. This approach requires interpolation of the law rather than interpretation.

Gold v. Kamin, 524 N.E.2d 625 (Ill. 1988), cited by defendants is a more appropriate guide to the law of this state. In Gold the court reviewed both Tantimonoco and Belfer and found that while the decisions reached therein might have been appropriate in Rhode Island and Massachusetts, they would not be in Illinois since a mechanism for staying the running of the time period existed by statute. Such a procedure exists in this state also.

General Statutes 8-8 (b) specifically provides that an appeal shall not stay "proceedings upon the decision appealed from, but the court to which such appeal is returnable may, on application, on notice to the board and on cause shown, grant a restraining order."

The intent of the legislature, clearly expressed in 8-8 (b), is that an appeal would not stay plaintiff's right to proceed in the exercise of the rights conferred on it by the granting of the special permit. Such rights, which include the right to proceed with construction, were subject to the zoning regulations including the nine month time limit imposed by Article Seven (A)(7).

Even though plaintiff could have proceeded with construction, as pointed out, it would have been imprudent for it to do so with litigation pending.
Under such circumstances, *4690 plaintiff could have proceeded under 8-8 (b) for an order protecting itself from the nine month limit of Article Seven(A)(7). If this procedure had been followed, the rights of the parties could have been reasonably considered and if good cause were shown an order tolling its nine month period could have been issued.

Considering all of the above, it must be concluded that under the law of this state pending litigation did not automatically toll the running of the nine
month limitation imposed by Article Seven (A)(7) of the regulations

III.

Plaintiff also argues that defendant board erred by misinterpreting the meaning of Article Seven (A) (7) and failing to recognize that it had satisfied the requirements of that Article.

It is undisputed that plaintiff applied for a building permit on June 1, 1987 two days before the end of the nine month period imposed by the article. The permit was not issued until June 29, 1987. Plaintiff claims that in applying for the permit within the nine month period it had complied with the article since in applying, it did everything that it could do to comply with the zoning regulations. It is argued that the municipal delay in processing the application should not be allowed to cause a forfeiture of the special permit.

Article Seven (A)(7) provides in effect that construction should commence and a building permit issued within nine months from the date of the special permit or the special permit becomes void. To conclude that the regulations intended "issuance" to mean the same as "application" would require a procrustian interpretation of the article which would be improper. Words used in zoning regulations are interpreted in accord with their natural and usual meaning and should not be extended by implication to include more than is within their expressed term. Schwartz v. Planning and Zoning Commission, 208 Conn. 146, 153 (1988).

The time taken by the zoning authority before issuing the building permit was not excessive. That officer had a duty to verify that construction authorized by the permit requested would be in accordance with the zoning regulations and the special permit. This could not be done at once. For example, it was not until June 11,

1987 that the Building Inspector received the letter of approval from the Planning Coordinator. The time taken was also within the thirty days provided by General Statutes 29-263.

Another problem, not specifically mentioned by the parties must be noted. Building Permit No. 6278 was issued on June 29, 1987. Some site work appears to have been done under that permit. No real construction was undertaken until the "full" building permit of July 24, 1989 was issued. Article Twelve D. of the zoning regulations entitled "Expiration of Building Permit" provides that "[i]f work described on any Building Permit has not been substantially completed within two (2) years from the date of issuance thereof, said permit shall expire . . . "

Although the permit was amended on June 22, 1989, if this permit was valid in 1987 it may well be that it expired in 1989 by virtue of Article Twelve D.

Upon review, it cannot be found that defendant board improperly interpreted the regulations as claimed.

IV.

Plaintiff claims also that the doctrine of res judicata precludes defendant Proch from raising any claim about the validity of the special permit as well as the building permit and prevented defendant board from considering the same.

The basis of this claim is the equitable action instituted by Proch in June 1987 in which he sought an injunction against the town to prevent the issuance of the building permit applied for on June 1, 1987. Although judicial notice was not taken on the file in that case (No. 332417 Colburn et al v. Marlborough, et al) the Memorandum of Decision in the case (Wagner, J.), dated July 22, 1987, was appended to defendants' brief.

A review of the Memorandum of Decision indicates that the issues actually raised in the case were environmental. The zoning regulations and questions involving the validity of the special permit granted to plaintiff were matters not before the court in the injunction action. Plaintiff, however, relies on the law as enunciated in

Connecticut Water Co. v. Beausoleil, 204 Conn. 38 (1987) and argues that the issues of this appeal could have been raised in the injunction action.

In the Connecticut Water Co. case at page 43, the court stated that "res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made."

The question as to is whether the zoning issue could properly have been raised in the injunction 2action is a matter *4692 which the court must consider. There is another issue which must be considered to determine if res judicata applies.

In the equitable action Mr. Proch and other adjoining land owners, most of whom are not parties to this case, sought an injunction to restrain the town of Marlborough from issuing building permits to plaintiff. For the doctrine of res judicata to apply, the party claimed to be barred by it should have been a party to the first action in the same capacity that as in the second. Lechner v. Hulmberg, 165 Conn. 152, 256 (1973).

In the former case, the town of Marlborough was a defendant. There is nothing to indicate that the town was before the court in its zoning capacity. Certainly the zoning board of appeals was not involved since that board had no interest or jurisdiction in the matter until the appeal was brought and was filed on September 13, 1989.

Also in the former case the town was defending the validity of the building permit against environmental claims, assuming that it had authority to do so, it is unrealistic to further assume that the town would plead that the underlying special permit was void. This issue did not come into being until the zoning board of appeals acted.

Although the town could not raise the validity of the special permit in the former case, could Proch, as a plaintiff contesting the issuance of building permits, have expanded the case by raising the zoning issue. This question must be answered in the negative. The correct procedure, as followed here, was to submit the issue to the local board of appeals and then to the court under General Statutes 8-8. Country Lands, Inc. v. Swinnerton, 141 Conn. 27 (1963).

It must be concluded then that the parties to this action are not the same or in the same capacity as in the former action and it cannot be found that the zoning issue could have been raised in the equitable action.

It is also claimed that defendant board had no authority to declare either the special permit or the building permit void because plaintiff has vested rights in the permits based upon substantial expenditures made in reliance on them. In this claim, plaintiff relies to a large extent on the trial court's decision in Parker-Quaker Corporation v. Young, 23 Conn. Sup. 401 (1962).

Assuming that the equitable issue is properly before the court in this statutory appeal, the general rule on the issue was stated in Fitzgerald v.
4693 Merard Holding Co., Inc., 110 Conn. 130, *4693
141 (1929).

> The rule is well established that the possession of a permit to build, commencement of work (especially when the building is not substantially in course of construction) or the fact that contracts entered into with third persons may be affected, does not constitute a vested right the invasion or deprivation of which by an enactment of general application, and in a valid exercise of the police power, invalidates the latter on constitutional grounds.

See also Graham Corporation v. Board of Appeals, 140 Conn. 1, 4-5 (1953).

This case differs from Parker-Quaker Corporation in that the special permit becomes invalid by operation of law under the regulations not because

of any change of position by a zoning officer. Plaintiff's failure to act in accordance with the regulations, created the problem.

VI.

Plaintiff claims that failure of the zoning authority to file a notice in the Land Record as required by Article Seven (A)(7) after the nine month period validated the special permit. No legal authority is cited for this proposition and does not appear to be sound.

From all of the above, it cannot be found that

Plaintiff has moved for an order restraining the running of the five year site plan time period as set forth in General Statutes 8-3 (i) until final action by this court or any other appellate level court.

For cause shown in the record, this motion is granted pursuant to General Statutes 8-8 (b).

Accordingly, judgment is rendered in favor of defendants affirming the decision of defendant board appealed from. Plaintiff's motion for restraining order is granted.

PURTILL, J.

defendant board or any of its officers abused its discretion or acted upon invalid reasons in taking the action which is the subject of this appeal.

JEANNETTE S. SIMKO ET AL.
v.
ZONING BOARD OF APPEALS OF THE TOWN OF FAIRFIELD ET AL.[*]

(13193)

Supreme Court of Connecticut.

Argued October 6, 1987.
Decision released December 1, 1987.

PETERS, C. J., SHEA, CALLAHAN, GLASS and HULL, JS.

Vincent M. Simko, with whom was *Bruce L. Elstein,* for the appellants (plaintiffs).

James F. Stapleton, with whom were *Roy H. Ervin, Jr.,* and, on the brief, *Donal C. Collimore,* for the appellees (defendants).

CALLAHAN, J.

The plaintiffs, Jeannette S. Simko and Valerie Varga, filed this appeal from a judgment of the trial court, *Meadow, J.,* dismissing their administrative appeal from a decision of the zoning board of appeals 414*414 of the town of Fairfield (hereinafter the board). The issue presented is whether the trial court erred in dismissing the appeal for the plaintiffs' failure to name the clerk of the municipality in the appeal citation. We find no error.

The relevant facts are not in dispute. On August 1, 1986, the board granted a variance, subject to certain conditions, to the defendant Roy Henry Ervin, trustee for certain property located at 909-911 Fairfield Beach Road in Fairfield.[1] Simko and Varga, the owners of the contiguous parcels known as 901 Fairfield Beach Road and 919 Fairfield Beach Road respectively, appealed the board's decision to the Superior Court pursuant to General Statutes § 8-8 (a) and (b) on August 20, 1986.[2] 415*415 The plaintiffs filed a complaint, an application for a temporary injunction and order to show cause, a citation, a summons, an order of service and a recognizance with surety.

The citation directed the sheriff to summon the board and Ervin to appear before the Superior Court within and for the judicial district of Fairfield at Bridgeport on September 19, 1986, by leaving with or at the usual place of abode of the chairman or clerk of that board, and Ervin, a true and attested copy of the complaint and of the citation.[3] The citation and the other appeal papers failed to mention the clerk of the municipality. Despite this deficiency, Deputy Sheriff Donald W. Mattice personally served not only the board and Ervin, but also Evelyn L. Hiller, the Fairfield town clerk.

Thereafter, the board entered an appearance and filed an answer on September 5, 1986. Ervin also filed an appearance on September 2, 1986, but thereafter 416*416 moved to dismiss the appeal, pursuant to General Statutes § 8-8 (d)[4] for the plaintiffs' failure, inter alia, to have named the clerk of the municipality in the citation as required by § 8-8 (b). The trial court, *Meadow, J.,* granted the motion to dismiss the appeal and held that "[a] proper citation is essential to the validity of an administrative appeal and the jurisdiction of this court."

Additionally, the court held that "[t]he service made by the sheriff constituted `mere extra judicial delivery of copies of appeal papers and has no legal effect.'"

The plaintiffs, upon having been granted certification, have challenged the trial court's dismissal of their appeal. They argue that the citation issued here complied with the requirements of § 8-8 (b) since the board, the only necessary party intended by the legislature, had been cited and properly served. Alternatively, the plaintiffs argue that the alleged defect in the citation is merely a circumstantial defect that does not raise an issue of subject matter jurisdiction and can be cured by amendment pursuant to General Statutes § 52-128.[5]

417*417 I

The plaintiffs first argue that "in a zoning appeal brought pursuant to General Statutes § 8-8 (b) the Zoning Board is the [only] necessary party, and where a citation has been issued citing said zoning board, [the citation] is sufficient." We disagree.

The determination of who is a necessary or a proper party in a proceeding to review the actions of an administrative agency is primarily governed by statute. See 2 Am. Jur.2d § 742, Administrative Law, p. 641. Prior to October, 1985, General Statutes (Rev. to 1985) § 8-8 (b) provided in pertinent part: "Notice of such appeal shall be given by leaving a true and attested copy thereof with, or at the usual place of abode of, the chairman or clerk of said board, *or* by serving a true and attested copy upon the clerk of the municipality." (Emphasis added.) Clearly the statute required service upon the chairman of the zoning board or the clerk of the municipality, but not upon both. Thereafter, the legislature amended General Statutes § 8-8 (b), effective October 1, 1985, to provide: "Notice of such appeal shall be given by leaving a true and attested copy thereof with, or at the usual place of abode of, the chairman or clerk of said board, *and* by serving a true and attested copy upon the clerk of the municipality." (Emphasis added.) Public Acts 1985, No. 85-284, § 3.

We find no ambiguity on the face of § 8-8 (b), as amended. The statute clearly mandates that both the zoning board and the clerk of the municipality be named parties to a zoning appeal. Additionally, a review of the relevant legislative history regarding Public Acts 1985, No. 85-284, § 3, supports a e. Iliteral construction of its language In commenting on the purpose for the 1985 amendment to § 8-8 (b), Senator John Consoli stated: "The bill would also make it *mandatory rather than* 418*418 *optional* to serve notices of appeals from the zoning board of appeals and the planning commission to the town clerk." (Emphasis added.) 28 S. Proc., Pt. 9, 1985 Sess., p. 2928. Further, in the House of Representatives, Representative Vincent Chase stated: "They're [sub-sections 3 and 4 of Public Acts 1985, No. 85-284] of a technical nature, which would require that when an appeal is filed on a planning and zoning board, that the appeal notice also be served on the town clerk of the municipality.... This would insure that the town clerk and the administrator of the board were aware in sufficient time, that an appeal may have been served."[6] 28 H.R. Proc, Pt. 13, 1985 Sess., pp. 4773-74.

It is clear that under Public Acts 1985, No. 85-284, § 3, the clerk of the municipality has become a statutorily mandated, necessary party to a zoning appeal. Where, as here, the language of the `statute is clear and unambiguous, courts may not by construction supply omissions in a statute, or add exceptions merely because it appears to them that good reasons exist for doing so. See *Johnson* v. *Manson,* 196 Conn. 309, 314, 493 A.2d 846 (1985), cert. denied, 474 U.S. 1063, 106 S. Ct. 813, 88 L. Ed.2d 787, reh. denied, 475 U.S. 1061, 106 S. Ct. 1290, 89 L. Ed.2d 597 (1986); *Murach* v. *Planning & Zoning Commission,* 196 Conn. 192, 197 n.10, 491 A.2d

1058 (1985). Therefore, we hold that the clerk of the municipality is under the statute 419*419 a necessary party who must properly be served for a zoning appeal brought pursuant to General Statutes § 8-8.

II

The issue then becomes whether the failure to cite the clerk of the municipality constitutes a jurisdictional defect rendering the appeal subject to dismissal. The plaintiffs argue that such a defect does not destroy the subject matter jurisdiction of the trial court because the failure to name the clerk of the municipality in the citation is merely a circumstantial defect that can be cured as of right in accordance with General Statutes § 52-128. We disagree.

"We note at the outset that appeals from administrative agencies exist only under statutory authority. *Farricielli* v. *Personnel Appeal Board,* 186 Conn. 198, 201, 440 A.2d 286 (1982). `A statutory right to appeal may be taken advantage of only by strict compliance with the statutory provisions by which it is created.'" *Chestnut Realty, Inc.* v. *CHRO,* 201 Conn. 350, 356, 514 A.2d 749 (1986); see also *Basilicato* v. *Department of Public Utility Control,* 197 Conn. 320, 322, 497 A.2d 48 (1985). We have repeatedly held that statutory appeal provisions are mandatory and jurisdictional in nature, and, if not complied with, the appeal is subject to dismissal. *Basilicato* v. *Department of Public Utility Control,* supra, 322, 324; *Royce* v. *Freedom of Information Commission,* 177 Conn. 584, 587, 418 A.2d 939 (1979); *Norwich Land Co.* v. *Public Utilities Commission,* 170 Conn. 1, 6, 363 A.2d 1386 (1975).

Although this issue has not been addressed in connection with § 8-8 (b), the courts of this state have consistently held that, in appeals from administrative decisions, the failure to include the name of a necessary party or defendant in the citation is a jurisdictional defect that renders the appeal subject to dismissal even 420*420 where, as here, that party was served or provided with copies of the appeal papers. See *Sheehan* v. *Zoning Commission,* 173 Conn. 408, 413, 378 A.2d 519 (1977); *Village Creek Homeowners Assn.* v. *Public Utilities Commission,* 148 Conn. 336, 339, 170 A.2d 732 (1961); *Nanavati* v. *Department of Health Services,* 6 Conn. App. 473, 474, 506 A.2d 152 (1986); *Atkins* v. *Bridgeport Hydraulic Co.,* 5 Conn. App. 643, 645-46, 501 A. 2d 1223 (1985); *State* v. *One 1981 BMW Automobile,* 5 Conn. App. 540, 544, 500 A.2d 961 (1985); *Newtown* v. *Department of Public Utility Control,* 3 Conn. App. 416, 419, 488 A.2d 1286 (1985); *Daniels* v. *New Haven Police Department,* 3 Conn. App. 97, 99, 485 A.2d 579 (1985); *Board of Education* v. *State Board of Education,* 38 Conn. Sup. 712, 716-17, 461 A.2d 997 (1983). The underlying rationales for this rule of law have been (1) the unique statutory nature of an administrative appeal previously discussed, and (2) the character of the citation.

"`A citation is a writ issued out of a Court of competent jurisdiction commanding a person therein named to appear on a day named to do something therein mentioned.' " *Sheehan* v. *Zoning Commission,* supra, 412; see also *State* v. *One 1981 BMW Automobile,* supra; 1 E. Stephenson, Connecticut Civil Procedure § 18. "The citation, signed by competent authority, is the warrant which bestows upon the officer to whom it is given for service the power and authority to execute its command.... Without it, the officer would be little more than a deliveryman.... [Additionally, the] citation is a matter separate and distinct from the sheriff's return and is the *important legal fact upon which the judgment rests....* [Thus, a] proper citation is essential to the validity of the appeal and the jurisdiction of the court.... A citation is not synonymous with notice." (Emphasis added.) *Village Creek Homeowners Assn.* v. *Public Utilities Commission,* supra; *Atkins* v. 421*421 *Bridgeport Hydraulic Co.,* supra, 645-46; *State* v. *One 1981 BMW Automobile,* supra; see also *Chestnut Realty, Inc.* v. *CHRO,* supra; *Sheehan* v. *Zoning Commission,* supra, 412-13.

Because of the failure to name the clerk of the municipality in the citation, the sheriff had no authority to command the clerk's appearance for any purpose. Therefore, contrary to the plaintiffs' claim, the delivery to the clerk of the papers comprising the appeal was of no legal significance.

Accordingly, we hold that the failure to name a statutorily mandated, necessary party in the citation is a jurisdictional defect which renders the administrative appeal subject to dismissal. Thus the trial court properly dismissed the appeal below.

There is no error.

In this opinion PETERS, C. J., GLASS and HULL, Js., concurred.

SHEA, J., dissenting. In arriving at the conclusion that the amendment to General Statutes § 8-8 (b) effectuated by Public Acts 1985, No. 85-284, § 3, made it essential to include the town clerk in the citation as a necessary party defendant in a zoning appeal, in addition to making service upon him, as the plaintiffs did, the majority opinion conveniently ignores a significant part of the legislative history upon which it purports to rely. The complete remarks of Representative Vincent Chase, who sponsored the amendment, at the time it was approved by the House of Representatives, were as follows: "[The amendment is] of technical nature, which would require that when an appeal is filed on a planning and zoning board, that the appeal notice also be served on the Town Clerk of the Municipality. *I'm offering this amendment as a result of the discussions that I've had concerning an appeal being served on a* 422*422 *zoning official who may be at [sic] vacation and no one realizing that the board had been served because it was just stuck in a mailbox.* This would insure that the Town Clerk and the administrator of the Board were in sufficient time, [sic] that an appeal may have been served."[1] (Emphasis added.) 28 H.R. Proc, Pt. 13, 1985 Sess., pp. 4773-74.

These remarks indicate that the purpose of the amendment was to ensure that notice of the appeal would always be received in hand by a town official who is ordinarily available at the town office building and thus to avoid the uncertainties of abode service upon a part-time chairman or clerk of a zoning board, who may be absent for a considerable period of time after notice of an appeal has been delivered to his residence. See General Statutes §§ 8-8 and 52-57 (b).

It is difficult to conceive of any useful purpose to be accomplished by making the town clerk a party to a zoning appeal in addition to the zoning board, whose action is the subject of the appeal, other than to provide additional notice of the appeal so that the board may properly defend it. Neither the majority opinion nor the legislative history suggest any other objective. A town clerk in his individual capacity would have no judicially cognizable interest in the controversy and his presence as a party to the appeal would be superfluous. This court should reject a construction of a statute 423*423 that produces "bizarre results." *State* v. *Parmalee,* 197 Conn. 158, 165, 496 A.2d 186 (1985).

The legislative history is completely silent about any intention to include as a party the town itself, for which the town clerk is a statutorily designated agent for service. General Statutes § 52-57 (b). If such a change in our long standing practice with respect to zoning appeals were contemplated by the legislature, it is probable that some comment upon it would appear. It is plain that prior to the adoption of the 1985 amendment to § 8-8 (b) the town clerk was designated as an alternative agent for service upon a zoning board and did not become a party to the appeal merely because the complaint had been served upon him. The change in the conjunction from "or" to "and" effectuated by the amendment was never intended to modify this status but merely to provide additional

assurance that the board would receive notice of an appeal by requiring service upon two persons as agents for the board.

In addition to the legislative history, the majority opinion relies upon several cases supporting the proposition that, "in appeals from administrative decisions, the failure to include the name of a necessary party or defendant in the citation is a jurisdictional defect which renders the appeal subject to dismissal even where, as here, that party was served or provided copies of the appeal papers." This principle, by its terms, applies only to necessary parties and it would not apply in this case unless the amendment was intended to make the town clerk a necessary party rather than an agent for service as formerly. None of the cases relied upon supports the proposition that the failure of a citation to name the agent for service who has been actually served constitutes a jurisdictional defect.

Accordingly, I dissent.

[*] The plaintiffs filed a motion for reconsideration that was granted. See *Simko* v. *Zoning Board of Appeals*, 206 Conn. 374, 538 A.2d 202 (1988).

[1] The variance granted to Roy Henry Ervin, trustee, provided for the following: (1) a reduction in the setback requirement of § 7.5 of the Fairfield zoning regulations from seven feet to six feet; (2) a reduction in the required sum of setbacks of § 7.5.1 of the Fairfield zoning regulations from twenty-five feet to thirteen feet; and (3) the demolition of an existing one story nonconforming structure to be replaced with an enlarged two story nonconforming dwelling which was to contain a rental unit. The variance, as granted, contained the following conditions: "(a) No occupancy of third floor; (b) Maximum height to be 30 ft. from existing grade to peak of roof; (c) Minimum one year lease; and (d) House to stay within the footprint."

[2] "[General Statutes] Sec. 8-8. APPEAL FROM BOARD TO COURT. REVIEW BY APPELLATE COURT. (a) Any person or persons severally or jointly aggrieved by any decision of said board, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of said board, or any officer, department, board or bureau of any municipality, charged with the enforcement of any order, requirement or decision of said board, may, within fifteen days from the date when notice of such decision was published in a newspaper pursuant to the provisions of section 8-3 or 8-7, as the case may be, take an appeal to the superior court for the judicial district in which such municipality is located, which appeal shall be made returnable to said court in the same manner as that prescribed for civil actions brought to said court.

"(b) Notice of such appeal shall be given by leaving a true and attested copy thereof with, or at the usual place of abode of, the chairman or clerk of said board, and by serving a true and attested copy upon the clerk of the municipality. The appeal shall state the reasons upon which it has been predicated and shall not stay proceedings upon the decision appealed from, but the court to which such appeal is returnable may, on application, on notice to the board and on cause shown, grant a restraining order."

[3] The citation issued provided as follows:

"To any proper officer:

"CITATION

"By authority of the State of Connecticut, you are hereby commanded to summon the Zoning Board of Appeals of the Town of Fairfield, and ROY HENRY ERVIN, Trustee, of the Town of Fairfield, County of Fairfield, State of Connecticut, to appear before the Superior Court within and for the Judicial District of Fairfield at Bridgeport on September 19, 1986, then and there to answer unto the foregoing complaint of JEANNETTE S. SIMKO of 901 Fairfield Beach Road, and VALERIE VARGA of 919 Fairfield Beach Road, Fairfield, Connecticut, by leaving with or at the usual place of abode of the Chairman or Clerk of that Board, and ROY HENRY ERVIN, TRUSTEE a true and attested copy of the complaint and of this Citation at least twelve days before the return date.

"JEANNETTE S. SIMKO as principal and HENRY ELSTEIN, 6 Shell Street, Milford, as surety are recognized in the sum of Two Hundred Fifty ($250.00) Dollars to prosecute this appeal to effect and comply with the orders and decrees of this Court.

"Hereof fail not, but of this writ with your doings thereon make due service and return.

"Dated at Bridgeport, Connecticut, this 19th day of August, 1986."

[4] General Statutes § 8-8 (d) provides: "The court, upon the motion of the person who applied for the board's decision, shall make such person a party defendant in the appeal. Such defendant may, at any time after the return date of such appeal, make a motion to dismiss the appeal. At the hearing on such motion to dismiss, each appellant shall have the burden of proving his standing to bring the appeal. The court may, upon the record, grant or deny the motion. The court's order on such motion shall be a final judgment for the purpose of the appeal as to each such defendant. No appeal may be taken from any such order except within seven days of the entry of such order."

[5] "[General Statutes] Sec. 52-128. AMENDMENT OF PLEADINGS BY PLAINTIFF; COSTS. The plaintiff may amend any defect, mistake or informality in the writ, complaint, declaration or petition, and insert new counts in the complaint or declaration, which might have been originally inserted therein, without costs, within the first thirty days after the return day and at any time afterwards on the payment of costs at the discretion of the court; but, after any such amendment, the defendant shall have a reasonable time to answer the same."

[6] Contrary to the claim made by the minority in the dissenting opinion, the majority did not ignore the portion of Representative Vincent Chase's statement cited by the minority and the plaintiffs. Rather, the majority did not find it persuasive in light of: (1) the preceding and subsequent statements made by Chase; 28 H.R. Proc, Pt. 13, 1985 Sess., pp. 4773-74; (2) the statements made by Senator John Consoli; 28 S. Proc., Pt. 9, 1985 Sess., p. 2928; (3) the clear wording of the statute; and (4) the fact that a change from the disjunctive to the conjunctive was made in the statute. Additionally, we cannot find that the sentence relied upon by the minority supports the proposition that the clerk of the municipality is merely an "agent for service" who is not a necessary party.

[1] The references in footnote 6 of the majority opinion to the "preceding and subsequent statements made by [Representative] Chase" apparently relate to the first and third sentences of these quoted remarks, since Representative Vincent Chase made no other comments pertaining to this legislation. The first sentence indicates merely that the amendment was intended to make service upon the town clerk mandatory rather than optional, as does also the statement of Senator John Consoli relied upon by the majority. The third sentence is an amplification of the second sentence, which has been omitted from the majority opinion. Nothing in the legislative history indicates that the requirement of service upon the town clerk was for the purpose of making him a necessary party to the appeal.

LAND USE & CONSERVATION COUNSEL

PETER S. OLSON
ATTORNEY AT LAW
polson@luacc.com
MOBILE: 203.521.6789

Exhibit 8
(2 pages)

ORIGINAL

April 20, 2021

Glenn R. Smith
Chair, Zoning Board of Appeals of the Town of Ridgefield
400 Main Street
Ridgefield, CT 06877

Richard S. Baldelli
Zoning Enforcement Officer of the Town of Ridgefield
66 Prospect Street
Ridgefield, CT 06877

RE: Appeal of Zoning Permit dated April 9, 2021
63 Prospect Street

NOTICE OF APPEAL

Dear Mr. Smith and Mr. Baldelli:

This firm represents Paul N. Jaber and Suzanne Jaber, the owners and residents of property located at 12 Sunset Lane, Ridgefield, Connecticut, which property directly abuts the above captioned subject property. On April 9, 2021, the Zoning Enforcement Officer issued a zoning permit to The Giardini Limited Partnership and Pierandri Realty, LLC for certain construction activities, including, but not limited to, the construction of an addition to the existing structure on the subject property (the "Zoning Permit"). Pursuant to General Statutes § 8-7 and Ridgefield Zoning Regulations § 9-5 (B), Mr. and Mrs. Jaber hereby appeal the issuance of the Zoning Permit to the Zoning Board of Appeals.

A completed Zoning Board of Appeals application form is appended hereto, together with the required application fee of $375.00.

Should you have any questions, please feel free to give me a call.

Sincerely yours,

Peter S. Olson

ZONING PERMIT

Planning & Zoning Department - Town Hall Annex
66 Prospect Street Tel. (203) 431-2766 Fax: (203) 431-2737
Town of Ridgefield

Permit No.:	Z-21-316
Permit For:	Additions/Alterations
Property Owner:	GIARDINI LIMITED PARTNERSHIP,THE AND PIERANDRI REALTY, LLC
Owner's Address:	63 PROSPECT ST RIDGEFIELD, CT 068774605
Property Address:	63 PROSPECT ST
Zone:	R-5 **Lot Size:** 1.14 **Lot No:** E14-0190

Project Description:
Additions and Renovation to existing residence to add an additional apartment in the rear

Conditions of Approval:

- Erosion and Sediment Control measures shall be maintained in strict adherence to the 2002 Guidelines for Soil Erosion Control, DEEP Bulletin 34, as amended, and the Town of Ridgefield Modified Erosion Control standards, effective September 1, 2018, and shall remain in place until all work is complete and the site is fully stabilized.
- A Class A-2 Zoning Improvement survey showing the installed foundation shall be submitted to the Planning and Zoning Department prior to any work being started on the building walls.
- Prior to the Certificate of Zoning Compliance being issued, a Class A-2 "As-built" survey, prepared by a Connecticut licensed surveyor, showing the completed project, all buildings, structures, stormwater management system, and all site improvements shall be submitted to the Planning and Zoning Department.
- The surveyor shall state the Lot Coverage of all buildings in percentage.
- The surveyor shall state the Building Height.
- The surveyor shall state the Impervious Surfaces coverage in square feet.

Compliance with the June 4, 2007, #2007-038-SPA approval.
- Certification from a Connecticut licensed engineer that the stormwater management system applicaible to this zoning permit has been properly installed and is functioning as designed.
- Certification from a Connecticut licensed landscape architect that the landscaping applicable to this zoning permit has been installed according to the approved landscaping plan.

Richard S Bartlett, III — April 9, 2021

Zoning Enforcement Official — **Date**

Exhibit 9
(1 of 2 pages)

Sec. 8-7. Appeals to board. Hearings. Effective date of exceptions or variances; filing requirements. The concurring vote of four members of the zoning board of appeals shall be necessary to reverse any order, requirement or decision of the official charged with the enforcement of the zoning regulations or to decide in favor of the applicant any matter upon which it is required to pass under any bylaw, ordinance, rule or regulation or to vary the application of the zoning bylaw, ordinance, rule or regulation. An appeal may be taken to the zoning board of appeals by any person aggrieved or by any officer, department, board or bureau of any municipality aggrieved and shall be taken within such time as is prescribed by a rule adopted by said board, or, if no such rule is adopted by the board, within thirty days, by filing with the zoning commission or the officer from whom the appeal has been taken and with said board a notice of appeal specifying the grounds thereof. Such appeal period shall commence for an aggrieved person at the earliest of the following: (1) Upon receipt of the order, requirement or decision from which such person may appeal, (2) upon the publication of a notice in accordance with subsection (f) of section 8-3, or (3) upon actual or constructive notice of such order, requirement or decision. The officer from whom the appeal has been taken shall forthwith transmit to said board all the papers constituting the record upon which the action appealed from was taken. 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 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. The board shall hold a public hearing on such appeal in accordance with the provisions of section 8-7d. Such board may reverse or affirm wholly or partly or may modify any order, requirement or decision appealed from and shall make such order,

requirement or decision as in its opinion should be made in the premises and shall have all the powers of the officer from whom the appeal has been taken but only in accordance with the provisions of this section. Whenever a zoning board of appeals grants or denies any special exception or variance in the zoning regulations applicable to any property or sustains or reverses wholly or partly any order, requirement or decision appealed from, it shall state upon its records the reason for its decision and the zoning bylaw, ordinance or regulation which is varied in its application or to which an exception is granted and, when a variance is granted, describe specifically the exceptional difficulty or unusual hardship on which its decision is based. Notice of the decision of the board shall be published in a newspaper having a substantial circulation in the municipality and addressed by certified mail to any person who appeals to the board, by its secretary or clerk, under his signature in any written, printed, typewritten or stamped form, within fifteen days after such decision has been rendered. In any case in which such notice is not published within such fifteen-day period, the person who requested or applied for such special exception or variance or took such appeal may provide for the publication of such notice within ten days thereafter. Such exception or variance shall become effective upon the filing of a copy thereof (A) in the office of the town, city or borough clerk, as the case may be, but, in the case of a district, in the offices of both the district clerk and the town clerk of the town in which such district is located, and (B) in the land records of the town in which the affected premises are located, in accordance with the provisions of section 8-3d.