DOCKET NO: LLI-CV-19-6023364-S	:	SUPERIOR COURT
	:	
B. METCALF ASPHALT PAVING, INC Et Al	:	JUDICIAL DISTRICT OF
	:	LITCHFIELD
V.	:	
	:	AT TORRINGTON
TOWN OF NORTH CANAAN PLANNING	:	
AND ZONING COMMISSION Et Al	:	APRIL 20, 2020

MEMORANDUM OF DECISION

I

INTRODUCTION

In the 1960s and '70s, to encourage involvement in the swirling social issues of the day, posters plastered on college hallways and dorm bedrooms admonished people that, "Not to Decide is To Decide."[1] Under the facts and applicable law of this case, however, "Not to Decide is to Approve."

II

RELEVANT PROCEDURAL AND FACTUAL HISTORY

This is a tale of two cases. Both cases arise from the response of the defendant Town of North Canaan Planning and Zoning Commission (PZ) to an application that the plaintiff

[1] This quote was attributed to Harvey Cox, currently Hollis Research Professor of Divinity, Emeritus, at Harvard University School of Divinity. What he actually said was "[s]omewhere deep down we know that in the final analysis we do decide things and that even our decisions to let someone else decide are really our decisions, however pusillanimous." Harvey G. Cox, *On Not Leaving It to the Snake,* p. viii (1967).

B. Metcalf Asphalt Paving, Inc. (Metcalf) submitted for modification of a previously approved site plan.

A. The First Case: An Administrative Appeal

The first case, *B. Metcalf Asphalt Paving, Inc.* v. *North Canaan Planning & Zoning Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-18-6018738-S, was an administrative appeal of the actions of the PZ. The amended complaint in the first case made the following allegations. The plaintiff was aggrieved because the PZ, inter alia, acted "illegally, arbitrarily, in abuse of its discretion, exceeded its authority and failed to perform its duty with respect to Plaintiff's Application; . . . [and] failed to act within sixty five (65) days of receipt of the Application . . . ." Plaintiff's Amended Complaint dated November 26, 2018 (#121), ¶ 27 (A) and (B).[2] The plaintiff filed an application to modify or amend the existing 2016 site plan to add a warm mix asphalt plant on or about April 28, 2018. See Pl.'s Amended Compl., ¶ 14. The PZ received this application at its May 14, 2018 meeting. See Pl.'s Amended Compl., ¶ 15. During this meeting, the PZ voted to return Metcalf's check without otherwise ruling on the application. See Pl.'s Amended Compl., ¶ 18 (first and second versions thereof).[3] The PZ did not publish what it did or did not do. See Pl.'s Amended Compl., ¶ 18 (second version). More than sixty-five days passed since the application was received on May 14, 2018. See Pl.'s Amended Compl., ¶ 19. General Statutes § 8-7d (b) provides that a decision on an application for site plan approval must be rendered within sixty-five days of receipt of such site plan. See Pl.'s Amended Compl., ¶ 17 (first version).

[2] This complaint will hereinafter be referred to as "Pl.'s Amended Compl."
[3] The Pl.'s Amended Compl. accidentally included two paragraphs 16, 17 and 18.

The defendant admitted that the plaintiff filed an application to modify or amend the existing site plan to add a warm mix asphalt plant. See Defendant's Answer to Pl.'s Amended Compl., dated May 14, 2019 (#135), ¶ 14.[4] The defendant further admitted that it returned the plaintiff's check, claiming that the use in question did not exist in its regulations. See Def.'s Answer, ¶ 18 (first version). The PZ denied that no action was taken on the application itself. See Def.'s Answer, ¶ 18 (second version). The defendant admitted that more than sixty-five days had passed since the application was received. See Def.'s Answer, ¶ 19.

The issue of whether the PZ took action on the site plan application was, therefore, raised by the plaintiff and denied by the defendant in their respective operative pleadings in the first case.

During argument and in its pre-hearing briefing, relying on facts reflected in the administrative record and on a more in-depth review of the applicable statutory and case law, the plaintiff refined its argument. The administrative record reflected that the application was received at the PZ's May 14, 2018 meeting. During the meeting, based upon the purported advice of town counsel, the commission refused to hear the application and voted to return the plaintiff's check, claiming that the use was not found in its regulations. No other official action was taken besides the PZ's vote to return the check. Based upon this set of facts, the plaintiff contended that the PZ did not comply with General Statutes §§ 8-3 (g) (1) and § 8-7d (b).

Section 8-3 (g) (1) provides in relevant part: "[a] site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning . . . regulations. Approval of a site plan shall be presumed *unless a decision to deny or modify it is rendered*

[4] This answer will hereinafter be referred to as "Def.'s Answer."

within the period specified in section 8-7d." (Emphasis added.) Section 8-7d (b) provides in relevant part: "whenever the approval of a site plan is the only requirement to be met or remaining to be met under the zoning regulations for any . . . use . . . a decision on an application for approval of such site plan shall be rendered not later than sixty-five days after receipt of such site plan." The plaintiff argued that the plain language of these statutes, read together, called for presumed approval of its site plan because the PZ did not approve, deny or modify the site plan application.

The defendant's argument and brief did not directly contradict these facts or the plaintiff's legal argument. Rather, the defendant sought to mount a collateral attack.

The defendant maintained that the special permit benefitting the plaintiff that was in existence at the time of the site plan application did not include an important use contemplated in the site plan application. Specifically, the defendant argued that the existing special permit only allowed cold asphalt processing, while the site plan application sought approval for warm or hot asphalt processing. The defendant further claimed that, because the town's zoning regulations are permissive, any use, such as the hot asphalt processing use proposed in the site plan application, that was not expressly permitted was prohibited. As a result, according to the defendant, were the court to rule that the automatic approval provisions of §§ 8-3 (g) (1) and 8-7d (b) applied to the site application, such action would constitute an improper amendment of the town's zoning regulations by implication.

The court (*Shaban, J.*) conducted argument on the administrative appeal in the first case on May 14, 2019. The parties reiterated the arguments set forth in the preceding paragraphs that day in front of Judge Shaban. Judge Shaban issued his memorandum of decision (#136) on

July 10, 2019.

After considering these arguments, the court recognized a threshold issue involving subject matter jurisdiction. As a result, it stated that "[t]he court does not reach the parties' substantive arguments concerning the merits of the appeal[5] because it holds that regardless of whether the defendant's actions at the May 14, 2018 meeting constitute a decision or inaction, the court has no jurisdiction over the subject matter." *B. Metcalf Asphalt Paving, Inc.* v. *North Canaan Planning & Zoning Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-18-6018738-S (July 10, 2019, *Shaban, J.*), p. 5. However, notwithstanding this statement, and after having considered both parties' arguments concerning automatic approval due to inaction, the court also found that "the record, which consists solely of undisputed evidence, clearly shows that the defendant took no action in the present case that could constitute an appealable decision." (Footnote omitted.) Id., 12. More fulsomely, the court found that, "[b]ased on this evidence, the defendant expressly did not take action on the application but, rather, tried to 'return' it. This is not permissible under the statutory framework because the defendant lacked the discretion to determine whether it received the application because an application is statutorily received at the first regular meeting after its filing, which, in this case, was the May 14, 2018 meeting. General Statutes § 8-8 (c). As such, a planning and zoning commission has no discretion in receiving applications. Id. Furthermore, there was no approval, approval and modification, or denial of the application. Therefore, the defendant issued no decision on the plaintiff's site plan application." Id., 13. Finally, the court found that,

[5] Judge Shaban deemed the first case to be a zoning appeal brought under General Statutes § 8-8 (b). See *B. Metcalf Asphalt Paving, Inc.* v. *North Canaan Planning & Zoning Commission*, Superior Court, judicial district of Litchfield, Docket No. CV-18-6018738-S (July 10, 2019, *Shaban, J.*), p. 5.

"[c]onstruing the facts alleged in the operative complaint in the light most favorable to the plaintiff, tempered by the undisputed evidence in the record, the defendant took no action at the May 14, 2018 regular meeting that could constitute a decision on the plaintiff's application. *Conboy* v. *State*, [292 Conn. 642, 651-52, 974 A.2d 699 (2009)]." Id., 14.

Based upon these findings, the court held that "[a] zoning appeal pursuant to § 8-8 (b) must be from a 'decision.' The plaintiff has failed to meet its burden of pleading and proving facts that establish jurisdiction and consequently the court lacks subject matter jurisdiction." Id., 14. Therefore, the court found clearly that the defendant did not issue a decision concerning the site plan application.

The court then, in an abundance of caution, found an alternative reason for which it lacked subject matter jurisdiction. Using the subjunctive voice, the court found that, even were the PZ's inaction to have constituted some kind of "de facto denial, i.e., a decision under § 8-8 (b)" the PZ's failure to publish this "'decision'" (air quotes in original) would render such "'decision'" null and void, thereby stripping the court of subject matter jurisdiction. See id.

After articulating each of these findings, the court concluded by stating: "The court lacks jurisdiction to hear this matter as the defendant planning and zoning commission failed to render a decision from which an appeal could be taken. Even if the acts of the commission constituted a decision, neither party published notice of any such decision in an applicable publication. As a result, any decision of the defendant was void. Accordingly, the court, bound by statute and precedent, must dismiss the action." Id., 17. The court then dismissed the case for lack of subject matter jurisdiction.

The memorandum of decision also stated that the plaintiff needed to bring a mandamus action to vindicate its rights to receive automatic approval under §§ 8-3 (g) (1) and 8-7d (b). Id., 5.

This court reads the decision in the first case as holding that (1) the defendant failed to render a decision as required by General Statutes §§ 8-3 (g) (1) and 8-7d (b), but were a higher court to have disagreed with that conclusion, (2) the defendant's failure to publish this "decision" would provide an alternative basis for a lack of subject matter jurisdiction. However, the memorandum of decision in the first case left the door open a crack for the arguments raised by the PZ in this case. That memorandum of decision stated that "[t]he court does not reach the parties' substantive arguments concerning the merits of the appeal because it holds that regardless of whether the defendant's actions at the May 14, 2018 meeting constitute a decision or inaction, the court has no jurisdiction over the subject matter." Id.

B. The Second Case: A Mandamus Action

In response to Judge Shaban's decision in the first case, the plaintiffs[6] filed the instant case as a mandamus action. The allegations fell into three categories. The complaint first set forth the same factual allegations that were made in the previous case leading up to the return of the plaintiff's check by the PZ. The complaint then referred to Judge Shaban's decision stating that the plaintiffs could only vindicate their rights by means of a mandamus action. The

[6] The plaintiffs in this case are Metcalf and the property owner, 235 East Canaan Road, LLC. The defendants are the PZ and "John Doe, The Zoning Enforcement Officer of the Town of North Canaan." Counsel for the PZ informed the court that there is no present person in that position and, when vacant, the PZ assumes the duties of the zoning enforcement officer (ZEO). See Defendant's Memorandum in Opposition to Mandamus dated October 28, 2019 (#111), p. 1, n.1. Because the PZ is now serving as the ZEO, the court will refer to the defendants in the singular.

complaint proceeded to aver that the PZ, despite demand by the plaintiff, continues to refuse to issue the certificate of approval of the application through the date of the filing of this case. On the same date as they filed the complaint, the plaintiffs filed a motion for temporary injunction (#100.36). On September 18, 2019, this court (*J. Moore, J.*) set the motion for temporary injunction down for a hearing for October 7, 2019. Neighbors of the plaintiff's plant filed a motion to intervene (#103) on September 27, 2019. As a result, the court continued the hearing date to allow the court to rule on the motion to intervene. The court denied the motion to intervene (#103.10) on October 18, 2019. The defendant answered the complaint on October 28, 2019 (#112). The defendant admitted many of the factual allegations concerning the filing and timing of the site plan application, and the fact that the PZ voted to return the plaintiff Metcalf's check. The defendant, however, denied that the application appeared on the May 14, 2018 PZ meeting agenda and that said application was thereby accepted, and that the application sought only a site plan approval. The defendant further denied, in contravention of a fact found by the court in the first case, that the only action taken by the PZ was to return the plaintiff Metcalf's check.

After conducting a status conference with counsel, by means of order (#108), the court decided to conduct a trial on the mandamus action as opposed to a temporary injunction hearing. This order, issued on October 7, 2019, read in relevant part: "On or before 10/28/19, counsel shall file briefs on the mandamus issue. Upon receipt and review of those briefs, the court shall schedule the mandamus issues for a hearing." In compliance with this order, the plaintiffs filed a brief in support of the issuance of mandamus (#110, coded as "Plaintiff's trial Brief") and the defendant filed a memorandum in opposition to mandamus (#111). The trial took place on December 11, 2019.

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court finds the following facts and makes the following conclusions of law. The facts found are supported by the persuasive, admitted trial evidence in this case, including the facts stipulated to at trial, as well as by certain facts found in the memorandum of decision in the first case. The court has also considered the credibility of the witnesses who testified.

235 East Canaan Road, LLC owns the real property known as 235 East Canaan Road, North Canaan, which is sited as an industrial zone. Metcalf is located at this address. Article VI of the North Canaan Zoning Regulations permit "MANUFACTURING OPERATIONS" and permit "QUARRY/GRAVEL [PROCESSING] AND CEMENT MIXING" by special permit in an industrial zone. This section of the regulations authorizes asphalt processing by special permit in a sited industrial zone. On January 25, 2016, Metcalf applied for a special permit from the PZ. In this special permit application, Metcalf identified one current and past use as "[p]rocessing equipment to utilize millings." Benjamin Metcalf, the president of Metcalf, testified credibly that the processing of millings is a warm mix processing of asphalt. The application also indicated that proposed uses under the special permit were to include "[p]rocessing of asphalt, brick and concrete." On February 8, 2016, Metcalf received a special permit and site plan approval from the commission for "earth materials processing and removal" (prior approval). The prior approval runs with the land and authorizes the processing of asphalt.

On April 28, 2018, Metcalf filed with the PZ an application to modify or amend its previously approved site plan and included a revised site plan for the purpose of adding a "Green Mix Warm Asphalt Plant" on the premises. The application was received by the PZ at its May 14, 2018 meeting. Metcalf only sought site plan approval. At that meeting, the PZ took no action

but to vote to return Metcalf's check, claiming that the proposed use was not in the zoning regulations. Counsel for Metcalf was not permitted to speak at the May 14, 2018 regular meeting nor was he allowed to make any presentation. No action was taken on the merits of the application within sixty-five days from the time it was received by the PZ at the May 14, 2018 regular meeting. In fact, the PZ has taken no action to the date of this hearing on the site plan application. Moreover, the PZ never published its response to the site plan application.

At the beginning of the trial, the plaintiff argued its motion in limine, essentially claiming that the defendant was collaterally estopped from challenging any of the necessary findings in the memorandum of decision in the first case, having had a full and fair opportunity to litigate those issues in that case. Among these necessary findings are the facts set forth above about the 2018 application for site plan approval, including (1) its filing date and the date on which it came before the PZ, (2) the fact that all the PZ did was vote to return the plaintiff's check, and (3) the fact that the PZ did not approve, approve with modification or deny the site plan application within the statutorily-required time period. Another necessary finding was that the site plan application was, then, pursuant to the relevant statutes, deemed approved.

The court did not grant the motion in limine, but noted on the record that certain facts found by the court in the first case constituted necessary and threshold findings for said court to have made before it decided that it lacked subject matter jurisdiction. As a result, the court would not re-litigate these facts or issues. These facts included that the PZ received the site plan application at its May 14, 2018 hearing, that the defendant took no action on this application other than to return the plaintiff's check, and that the PZ did not approve, approve with modifications or deny site plan application in timely fashion under General Statutes §§ 8-3 (g) (1) and 8-7d (b). At that time, the court deemed open the issue of whether or not the 2018 site

plan application was merely a site plan application, to which the presumption of approval would apply if the PZ did not deny or modify it within sixty-five days. As set forth above, the defendant argued that the 2018 site plan application was, in fact, an application for amendment of the special permit granted in 2016 because the proposed warm or hot mix use set forth in the 2018 application was novel. After considering more carefully the arguments advanced by the defendant in the first case, however, the court now finds that the doctrine of collateral estoppel applies in this case.

"Collateral estoppel, or issue preclusion, prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action. *Ashe* v. *Swenson,* 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970); *State* v. *Hope,* 215 Conn. 570, 584, 577 A.2d 1000 (1990), cert. denied, 498 U.S. 1089, 111 S. Ct. 968, 112 L. Ed. 2d 1054 (1991); *In re Juvenile Appeal (83-DE),* 190 Conn. 310, 316, 460 A.2d 1277 (1983). 'For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment.' *Virgo* v. *Lyons,* 209 Conn. 497, 501, 551 A.2d 1243 (1988). The doctrine of collateral estoppel is 'based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate.' *In re Juvenile Appeal (83–DE),* supra, 318." *Aetna Casualty & Surety Co.* v. *Jones*, 220 Conn. 285, 296, 596 A.2d 414 (1991).

"In order for collateral estoppel to bar the relitigation of an issue in a later proceeding, the issue concerning which relitigation is sought to be estopped must be identical to the issue decided in the prior proceeding. 'To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether

the [party] is attempting to relitigate those facts in the second proceeding.' *State* v. *Hope*, supra, 584." Id., 297.

"Whenever collateral estoppel is asserted . . . the court must make certain that there was a full and fair opportunity to litigate. The requirement of full and fair litigation ensures fairness, which is a 'crowning consideration' in collateral estoppel cases. *Griffin* v. *Parker*, [22 Conn. App. 610, 621, 579 A.2d 532 (1990), rev'd on other grounds, 219 Conn. 363 (1991)]; *Read* v. *Sacco*, [49 App. Div. 2d 471, 375 N.Y.S.2d. 371 (1975)]. In determining whether there was full and fair litigation, the seriousness of the allegations or the criminal charge at the prior hearing is a factor to be considered. See *Griffin* v. *Parker*, supra, 22 Conn. App. 621 n. 4; *Merritt* v. *Quaker Oats Co.*, [538 F. Supp. 24 (S.D. Miss. 1981)]; *Teitelbaum Furs, Inc.* v. *Dominion Ins. Co.*, [58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962), cert. denied, 372 U.S. 966, 83 S. Ct. 1091, 10 L. Ed. 2d 130 (1963)]; *Aetna Life & Casualty Co.* v. *Johnson*, [207 Mont. 409, 673 P.2d 1277 (1984)]. If the offense charged is of a minor or trivial nature, a defendant might not be sufficiently motivated to challenge the allegations made at trial. In such a case, it might be unfair to allow collateral estoppel to be asserted later against him. Similarly, if the nature of the hearing carries procedural limitations that would not be present at a later hearing, the party might not have a full and fair opportunity to litigate." Id., 306.

The doctrine of collateral estoppel applies here because the defendant had a full and fair opportunity to present legal arguments in the first case, but lost. In the first case, the defendant briefed and argued the same arguments that it did in this case to attempt to convince the court that it should not presume approval due to a lack of action on the plaintiff's application. As set forth previously, these arguments included that the special permit benefitting the plaintiff in existence at the time of the site plan application did not include using the premises for warm or

hot asphalt processing, but only for cold asphalt processing. The defendant further asserted legal and policy arguments, including that, because the town's zoning regulations are permissive, any use, such as the hot asphalt processing use proposed in the site plan application, that was not expressly permitted was prohibited. As a result, according to the defendant, were the court to apply the automatic approval provisions of §§ 8-3 (g) (1) and 8-7d (b) to the site application, such action would constitute an impermissible amendment by the court of the town's zoning regulations by implication. These arguments failed.

Although the plaintiff did not get the reward it sought in the first action, namely presumed approval of the site plan, the court found that, "[c]onstruing the facts alleged in the operative complaint in the light most favorable to the plaintiff, tempered by the undisputed evidence in the record, the defendant took no action at the May 14, 2018 regular meeting that could constitute a decision on the plaintiff's application." *B. Metcalf Asphalt Paving, Inc.* v. *North Canaan Planning & Zoning Commission*, supra, Superior Court, Docket No. CV-18-6018738-S, p. 14. This holding constitutes the necessary factual predicate for the court to apply presumed approval under the operation of §§ 8-3 (g) (1) and 8-7d (b). The only reason the prior court did not do so was because it found that it lacked subject matter jurisdiction over the first case, because said case was an administrative appeal under § 8-8 over a non-decision. However, as previously discussed, the court indicated that the plaintiff needed to pursue its relief under a plenary mandamus action.

Even were collateral estoppel not to apply, the plaintiff would still succeed under the found facts. As previously found, the North Canaan Zoning Regulations permit "MANUFACTURING OPERATIONS" and permit "QUARRY/GRAVEL [PROCESSING] AND CEMENT MIXING" by special permit in an industrial zone such as the one in which

Metcalf has its operations. See North Canaan Zoning Regulations, Article VI. Benjamin Metcalf testified credibly that the warm or hot mix asphalt operation was a manufacturing operation, and would, therefore, be permitted in the industrial zone. Moreover, quarry and gravel processing was also allowed by special permit in the industrial zone. Therefore, the town's regulations authorize asphalt processing by special permit in a sited industrial zone. In its January 25, 2016 application for a special permit, Metcalf identified one current and past use as "[p]rocessing equipment to utilize millings." Benjamin Metcalf, the president of Metcalf, testified credibly that the processing of millings involves a warm asphalt mix processing. This application also indicated that proposed uses under the special permit were to include "[p]rocessing of asphalt, brick and concrete." The plaintiff did not limit its request to cold asphalt processing. On February 8, 2016, Metcalf received a special permit and site plan approval from the commission for "earth materials processing and removal." The prior approval runs with the land and authorizes, generally, and without limitation to cold processing, the processing of asphalt.

As a result, the 2018 site plan application was simply that: a site plan application. It was not garnished with a special permit twist.

Therefore, the 2018 site plan application fell clearly within the ambit of §§ 8-3 (g) (1) and 8-7d (b). Under similar statutory provisions, our Supreme Court held that "[t]he commission shall approve, modify and approve, or disapprove any subdivision . . . application or maps and plans submitted therewith . . . within sixty-five days after the public hearing thereon or, if no public hearing is held, within sixty-five days after the submission . . . . Failure by the commission to act within this time frame results in the approval of the subdivision application by operation of law." *Viking Construction Co.* v. *Planning Commission*, 181 Conn. 243, 246, 435

A.2d 29 (1980) (analyzing General Statutes §§ 8-26 and 8-26d).[7] The defendant's failure to approve, modify or deny the application within sixty-five days results in approval. In other words, "Not to Decide is to Approve."

Viking Construction Co. also reinforces the conclusion reached in the first case that a mandamus action is the appropriate remedy for the plaintiff to have pursued when an administrative body fails to issue an application approval mandated by statute. Indeed, in *Viking Construction Co.* our Supreme Court concluded that "under the statute the plaintiff had a clear legal right to the issuance of a certificate to that effect, the trial court was justified in rendering a judgment of mandamus. *Milford Education Assn.* v. *Board of Education*, 167 Conn. 513, 518, 356 A.2d 109 (1975)." Id., 248.

IV

CONCLUSION

For all of the abovementioned reasons, the court grants the plaintiffs' claim for mandamus and orders the PZ to issue an approval of the 2018 site plan application.

SO ORDERED.

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The Hon. John D. Moore

[7] In *Viking Construction Co.*, our Supreme Court also swatted away the argument made by the defendant in the first case as to when this site plan application was received by terming receipt of an application by an administrative body the "performance of a ministerial act." Id., 247.