HARWINTON ZONING COMMISSION
MONDAY, SEPTEMBER 10, 2018
TOWN HALL 7:00 P.M.

Present: Chairwoman Michelle Rewenko, Cynthia Kasey, Daniel Thurston, Matthew Szydlo, Deborah Kovall, Alternate Member Don Truskauskas, Alternate Member Theodore Root, Alternate Member Nancy Schnyer and Land Use Coordinator Polly Redmond
Also Present: Town Counsel Michael D. Rybak

PLEDGE OF ALLEGIANCE

PUBLIC HEARING #1 - CONTINUED

1. **OPEN HEARING – ESTABLISH QUORUM.**
   Chairwoman Rewenko called the hearing to order at 7:00 p.m. All regular members present are seated.

2. **BUMPER BROOK ESTATES, LLC – PETITION TO AMEND ZONING REGULATIONS, DATED 11/20/17, SECTION 2.3 DEFINITION OF ELDERLY HOUSING AND SECTION 9.9 ELDERLY HOUSING. HEARING OPENED 8/27/18. 35TH DAY TO KEEP HEARING OPEN: 9/30/18.**
   Atty. William J. Tracy, Furey, Donovan, Tracy & Daly, P.C., Bristol, CT is present to represent the applicant and states that the Commission held this hearing open in case the Commission had additional questions. At this time he has nothing else to present but will be happy to answer questions. Chairwoman Rewenko asks town counsel Atty. Michael D. Rybak to answer the question the Commission had on whether the proposed definition for Elderly Housing must include wording taken from the Federal Fair Housing Act that states housing for the elderly are intended for, and solely occupied by persons ages 62 or over, or intended and operated for occupancy by persons 55 years of age or older and occupied by at least one person who is 55 years of age or older. Atty. Rybak states that LUC Redmond did ask him for his opinion for what is necessary to comply. To answer, he submits a copy of §3607 Religious organization or private club exemption and notes that Atty. Tracy put this into the record at the public hearing for the first submission of proposed text amendments and Atty. Rybak notes that the reason this is important is because age restrictions violate the Fair Housing Act amendments to the Civil Rights Law. In order to age restrict housing being offered to the public, anywhere in the country not just in Connecticut, you have to fall within any one of the safe harbors that's in the definition. He reviews what the safe harbors are and as highlighted in the submission.

   The following Sections are highlighted and read by Atty. Rybak: (b)(1) "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons." (2) "As used in this section, "housing for older persons" mean housing—" (2)(A) "provided under any State or Federal program that the Secretary [of HUD] determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program) [and that, Atty. Rybak explains, would be Wintergreen, the town-sponsored elderly housing and why Wintergreen has the age restriction of age 62, because it was a HUD approved project]. The second safe harbor is (2)(B) "intended for, and solely occupied by, persons 62 years of age or older; or", (2)(C) "intended and operated for occupancy by persons 55 years of age or older, and –", (2)(C)(i) "at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;" (2)(C)(ii) "the housing facility or community publishes and adheres to policies and procedures that

demonstrate the intent required under this subparagraph; and", (2)(C)(iii) "the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall --," (iii)(I) "provide for verification by reliable surveys and affidavits; and" and (iii)(II) "include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification." Atty. Rybak states that there is more but it's not necessary to get into that detail at this time. What the Commission needs to understand is 1) any exceptions to the Civil Rights Act through the Fair Housing Act amendments are strictly construed and 2) the burden of proof is on the person claiming the exemption to prove that they didn't violate the Civil Rights Act and that would put the burden on the developer, owner or operator of the facility.

Atty. Rybak also submits a copy of §11E:5 Housing Discrimination Law and Litigation to explain the various sections, each highlighted, of the previous submission's requirements. He states this should be in the record to support whatever decision is made and that it's very important to know, among other things, the age 62 section. If you only had the age 62 requirement one of the problems you'd run into is that only persons 62 and over can occupy the units, such that if a 62 year old person would apply and qualify but had a younger spouse, they wouldn't be able to occupy the unit. If somebody dies leaving a younger spouse, you would have to evict the younger spouse, though that's probably not enforced, especially in a public housing setting. But the bottom line on this is the Commission really doesn't want to limit the regulation on age 62 and older because there is no leeway or exceptions. With the 55 and older, one of the things you can do is to require that all of the units be occupied by at least one person that is 55 and older. You don't have to adopt the 80%, leaving 20% that could be just anybody, so the Commission could tighten in that area and still be within the safe harbor of the Civil Rights Act. **(See below also.) Atty. Rybak states that a couple of other things to note; the 80% rule doesn't mean that a development may set aside 20% of the units for younger persons. For one thing, this would be inconsistent with the basic statutory mandate that 55 and older housing be intended and operated for persons in that age group. The reason Congress allowed for less than 100% occupancy by this age group was to accommodate persons such as surviving spouses under the age of 55, nurses and other personnel who may care for the elderly as live-in companions. Furthermore, as a practical matter, a development cannot be assured of maintaining this exception if it allows a full 20% of the units be occupied by younger people because the exemption would then be lost as a result of a single turnover or the death of an over 55 resident with a younger spouse. Housing providers of 55 and over housing would be well advised to stay well above the 80% floor. Indeed nothing in the Fair Housing Act prevents that all of their residents be 55 years of age and over.
(**See below for exact highlighted wording in the submission.)

To note: Highlighted sections of this submission by Atty. Rybak include the following: The Fair Housing Act exempts "housing for older persons" from its prohibitions against familial status discrimination. The law's definition of "housing for older persons" includes three separate categories of housing: (1) Housing provided under any state or federal program that HUD determines is "specifically designed and operated to assist elderly persons", (2) Housing "intended for, and solely occupied by, persons 62 years of age or older", and, (3) Housing "intended and operated for occupancy y persons 55 years of age or older" which is defined as housing that has at least 80% of its units occupied by at least one person 55 or older, that complies with HUD rules for verification of such occupancy by reliable surveys and affidavits, and that publishes and adheres to policies and procedures that demonstrate an intent to provide housing for persons

55 or older. Defendants who claim the benefit of the "housing for older persons" exemption have the burden of establishing that their housing meets the requirements of one of these three categories. However, a defense against monetary damage awards is provided for those persons who "reasonably relied, in good faith, on the application of [this] exemption." "In addition, the exemption does not permit a housing provider to operate a "dual purpose" facility, where specified units or sections are designated for older persons and other units or sections are open to everyone."

§11E:6. The exemption for housing for older persons – State and federal elderly housing programs. "The first of the three categories of housing for older persons that is exempt from the Fair Housing Act's prohibitions against familial status discrimination is housing "provided under any State or Federal program that the Secretary [of HUD] determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program). This provision recognizes that housing for the elderly that is developed under government programs may be custom-tailored to the special needs of this group and may therefore legitimately exclude younger persons." "An example of such a program is §202 of the Housing Act of 1959, which provides federal financial assistance to private sponsors who provide housing for elderly or disabled persons."

§11E:7. The exemption for housing for older persons – "62 or over" housing.
"The second of the three categories of housing for older persons that is exempt from the Fair Housing Act's prohibitions against familial status discrimination is housing "intended for, and solely occupied by, persons 62 years of age or older." "To qualify under this exemption, *all* residents of the housing development must be at least 62 years old." "This means, for example, that if a qualifying retirement community with all older residents receives an application from a husband aged 62 and a wife aged 59, it would have to reject this application because of the wife's age in order to maintain its "62 or over" exemption. The exemption would also be lost if the community allowed one of its current residents to occupy a unit with a new spouse or other person who is under 62. The community could, however, accept a younger resident and still be exempt if it qualifies for the "55 or over" exemption." "The HUD regulations recognize only one exception to the rigid rule that all occupants must be at least 62 years old. According to HUD, units in the development may be occupied by under-62 employees and their families without jeopardizing the exemption, so long as these employees "perform substantial duties directly related to the management of maintenance of the housing." "This exception was prompted by HUD's recognition that having managers and maintenance workers live at a retirement community is a common practice that frequently benefits the community's older residents and should not be discouraged."

§11E:8. The exemption for housing for older persons – "55 or over" housing.
"The third of the three categories of housing for older persons that is exempt from the Fair Housing Act's prohibition against familial status discrimination is housing intended and operated for occupancy by persons 55 years of age or older, and – (i) at least 80% of the occupied units are occupied by at least one person who is 55 years of age or older; (ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and (iii) the housing facility or community complies with rules issued by the Secretary [of HUD] for verification of occupancy." "This provision was enacted in 1995 to replace the original definition of "55 or older" housing set forth in the 1988 Fair Housing Amendments Act."

Under this same section, §11E:8. The exemption for housing for older persons – "55 or over" housing, is highlighted for the following: "Compared with the simple but rigid requirements of "62 or over" housing, the "55 or over" exemption is more flexible but somewhat more complex. It is more flexible because only one person per unit needs to be 55 or older and only 80% of the occupied units need to have such a resident. Thus, the presence of only one younger resident in a retirement community would not make the community ineligible for the "55 or over" exemption the way it would for the "62 or over" exemption. In exchange for this flexibility, however, the statute requires more of "55 or over" housing in the way of age verification techniques and formal policies and procedures than it does for the "62 or over" exemption. Still, the additional requirement of the "55 or over" exemption would generally be met by all true retirement communities. Indeed, most of the communities that intend to qualify for the "62 or over" exemption would be well advised to try also to satisfy the requirements of "55 or over" housing, so that they may rely on the "55 or over" exemption as a "fall back" position. Otherwise, they may find themselves in the unhappy position of having to evict a favorite tenant who has married a younger person."

**Already noted by Atty. Rybak above, this highlighted section reads: "The 80% rule does not mean that a development may "set aside" 20% of its units for younger persons. For one thing, this would be inconsistent with the basic statutory mandate that "55 or over" housing be "intended and operated for" persons in this age group. The basic reason that Congress allowed for less than 100% occupancy by this age group was to "accommodate persons such as surviving spouses under the age of 55 and nurses and other personnel to care for the elderly." "Furthermore, as a practical matter, a development cannot be assured of maintaining its exemption if it allows a full 20% of its units to be occupied by younger people, because the exemption could then be lost as a result of a single turnover or the death of an over-55 resident with a younger spouse. Housing providers of "55 or over" housing would therefore be well advised to stay well above the 80% floor. Indeed, nothing in the Fair Housing Act prevents such developments from requiring that *all* of their residents be 55 or older." "The other requirement of "55 or older" housing is that it publish and adhere to policies and procedures that demonstrate an intent to provide housing for this age group. This means that the housing "must in its marketing to the public and in its internal operations, hold itself out as housing for persons aged 55 or older." **

Atty. Rybak submits a copy of a Supreme Court decision, Deer Hill Arms II v. Planning Commission of the City of Danbury, 1996 and notes that the regulations that we are relying on, the Federal Regulations, has not changed so this is good law. He briefly explains the case stating there were two units on a piece of land set up as condominiums. One of them fell under the old rules and one would have been under the newer regulations and went into foreclosure. Danbury Savings and Loan took over the project with the 55 and over requirement and that requirement was "no children". The bank was trying to get the court to decide was the rule invalid and thrown out with no restrictions so the units could be sold with no restrictions. The Supreme Court ruled that it did not violate the exemption that said at least one person 55 and over and no children could reside in the units. Atty. Rybak states that it's a pretty strict rule but whether it's a wise decision or not is up to this Commission. Overall, the Commission asked if they could go with just 62 and over for everybody and it is his belief that would be a mistake. The Commission should operate within the framework of those Fair Housing Act exceptions to the Civil Rights Act. Also to bear in mind, if the Civil Rights Act is violated, you end up with not only a court order saying "correct the problem", you also end up with treble damages and attorney's fees.

Atty. William Tracy talks of the history of the Fair Housing Act originally adopted in 1968 that didn't have any provision in it of familial status, meaning age and children. When the act was passed back then, communities could organize as adult-only and to rule "no children" wasn't something prohibited by the act. That came about in 1988 with an amendment that added the familial status definition which talks about persons under the age of 18 related in the family unit. At that time they also added the "housing for older persons" exceptions, as phrased in the statute, allowing the two exemptions that he and Atty. Rybak were talking about. There were some amendments to the 55 and over exemption in 1995 where they dealt with some of the record-keeping and service provisions, sections of it they didn't tinker with the basic definitions or rules. He thinks the key to the 55 and older exemption seems to be that the language is intended for occupancy. You're required to have at least 80% fit into that category but the language in the act is really built around the safety valve so if there is one spouse over 55 and one under, and the eligible spouse passes away you don't have to evict the other one. The developer of the facility, under the language intended and operated for, the policy restricted the availability of units based upon the existing mix so if something like that does happen, they don't lose their exemption. It also allows for, what is fairly common these days, the child taking care of an elderly parent who might live alone. So that's some of the reasoning why we asked to have that definition built into the regulations.

Atty. Tracy states that the Commission was looking at the more physical aspects of the project and that's something the Commission will look at when it gets to the special permit stage of the process; the size of the units, which are relatively small, a two-bedroom limit, the parking ratio, these are the kinds of things that we don't have the community or the facility saying they're going to discriminate, but the facility itself making it not attractive to the market we are not trying to reach,

Atty. Tracy refers to Scott Bayne, S&W Custom Home Builders, Bristol, CT, who is in the audience, stating that Mr. Bayne has a 55 and older community in Bristol that is similar in that all residents are 55 and older and have no children. These are the people who are interested in these types of facilities and it can be done without taking the position that could be discriminatory. Atty. Tracy states that he believes there are some risks with getting too restrictive with the regulation and the two words he heard listening to Atty. Rybak were, "allow and require". The definition that is proposed by the applicant allows for either of those two federal exemptions to be used and doesn't have the condition or the position of requiring either one, or requiring a different twist by one or the other, even though perhaps under the Deer Hill Arms case it might get by a court. He believes this to be important and refers to a court case Gibson v. County of Riverside, CA, 2002, which Atty. Tracy submits for the record, where the County of Riverside adopted regulations that required a more restrictive setting than the federal law and somebody challenged it and they tried to fit within the 55 and over exemption by saying that their regulation allowed for at least one person in the community, as regulated, to be 55 and over. The problem was the county itself was not keeping the records that were required under the federal law. They weren't doing the verification test or annual surveys and they didn't have the policies or procedures to ensure that people moving in and out of the zone met the criteria. So the court said they couldn't qualify under the exemption because they were ignoring those requirements. The court put the affirmative burden on the Zoning Commission because they were requiring certain things, not allowing them, and he's not sure this Zoning Commission wants to be in that position. Atty. Tracy states that if the Zoning Commission says the developer can use either one of the federal exemptions, then the burden of verification and policies falls on the developer and not the town or the Commission.

D. Kovall questions whether the units will be bought or rented with Atty. Tracy stating they will be rented. They will have a single owner who will have the ability to do all the record keeping. M. Szydlo questions if the owner will be legally required to keep record with Atty. Tracy replying, yes.

D. Truskauskas states that Section (B) (*intended for, and solely occupied by, persons 62 years of age or older*) doesn't have that requirement, only Section (C) (*intended and operated for occupancy by persons 55 years of age or older*) does with Atty. Tracy stating that is correct. D. Truskauskas states then that with Section (B) there is no requirement with Atty. Tracy stating that all residents would have to be 62 and over and there will be a mix of people above and below that age who are interested in these communities. He refers to Wintergreen Housing that was not a Section (B), it was a Section (A) HUD sponsorship that had that requirement in it and those programs varied over the years.

D. Truskauskas asks if Atty. Tracy agrees with Atty. Rybak that the town could require this to be 100% 55 and older. He states it was suggested and that Atty. Rybak suggested that we could require 100% as opposed to 80%. Atty. Tracy states it is why he submitted the Gibson case for the record because if the town required that of the developer, the town takes on the responsibility that you don't really want to get involved in, you'd want the developer to do that. M. Szydlo questions what if they didn't meet the requirements, would they then lose their exemption with Atty. Tracy replying, yes.

Chairwoman Rewenko states, with the way the current town-sponsored elderly housing is written, she asks if these requirements also apply to the town sponsored elderly housing. Atty. Tracy states that if the town were going to sponsor a (C), 55 and older, the town would be responsible for that record-keeping. But if the town were to proceed under (A) (*provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal Program)*), it would have the requirements that come along with that particular program.

D. Truskauskas refers to proposed Regulation 9.9.16 which is the proposal binds the project to elderly housing for at least twenty (20) years. He believes twenty years to be a short time and that he'd like to see something permanent or extended to a longer time if possible. Atty. Rybak states that twenty years is a suggested period of time by Atty. Tracy. He is not aware of any legal requirement for length of time requirement. He recalls bringing this up during the public hearing of the first submission of the proposed regulation amendments that accompanied a zone change. He states, if you change the zone, you can't condition zone changes so his concern was, if this was to be automatic affordable housing, how would you know it would stay that way, so that's why he suggested a restrictive covenant. Now that it's become a special permit process, the Commission can condition a special permit and a special permit must be recorded in the land records. There is some authority that says a special permit was granted and unless the permit is violated it remains in effect and runs with the land, so it has nothing to do with ownership, it has to do with use. If someone wanted to change the special permit they would have to come back before this Commission for a modification of the special permit. As for the twenty years, Atty. Rybak states that he does think the time frame is a little short. D. Truskauskas questions whether proposed Section 9.9.16 is needed at all with Atty. Rybak stating that a restrictive covenant probably isn't needed in this case with Atty. Tracy stating he is looking at it in the same way because this will be a permanent use by special permit. If anyone wanted to change it to something other than that, the Commission would have to find it in their regulations in order to grant the modification so there is protection there in that you can't change the use. Atty. Rybak states that the Commission has much more control and believes proposed Regulation

9.9.16 isn't needed if you have the special permit. Atty. Tracy states that he proposed 9.9.16 because of discussions held during the public hearings of the first submission for proposed text amendments. He states he is not opposed to having it removed from the proposals and agrees that the Commission has more control without it.

D. Truskauskas refers to proposed Regulation 9.9.2 which he believes should be amended to read, "On-site parking shall be provided, using the ratio of **at least** one and one-half parking spaces per dwelling unit." **It is noted that at the opening of the public hearing on 8/27/18, page 1 of those minutes, last line, Atty. Tracy stated he would replace the word "spaces" to "cars".* D. Truskauskas refers to proposed Regulation 9.9.15 that he believes should be amended to add "and/or" when speaking of "protecting property values, and to preserve "**and/or**" improve the appearance and beauty of the community."

M. Szydlo refers to proposed Regulation 9.9.4 that notes maximum lot coverage shall not exceed 35% whereas lot coverage in Section 5 of the Zoning Regulations under Town Residential zones the maximum is 15%. Atty. Tracy addresses this stating it would be a reason in the multi-family situation to have greater site coverage than for single family use in the same zone and the reasons are that the multi-family use is more congregated and it's a denser kind of use so you need a greater density ratio to account for that. There has to be a certain degree of density and a certain number of units for economic viability too or it's just not going to happen and that's where the 35% came from. Primarily to recognize the multi-unit development is far different that the single family home in the same zone and that's why it's here, to only override the table in Section 5, in this situation.

D. Truskauskas states that proposed Regulation 9.9.8 allows the town to do something other than what a private developer can do and he is concerned with the legal aspect of that because, as it was mentioned earlier, that we are not concerned with ownership we are concerned with the use. So we could have a developer come in and argue that it's okay for the town but not for them. D. Truskauskas asks how we could answer that with Atty. Rybak stating, because we are the town. For example, Atty. Rybak states, in speculating if the town wanted to expand Wintergreen Housing, the whole purpose of that section is to safe-guard the one elderly housing project the town has. In this case, municipal elderly housing, sponsored by the municipality, is different than the investor elderly housing because the town may want to place elderly housing in another area of town and this keeps the door open for the municipality to have flexibility.

Chairwoman Rewenko states that the public hearing can remain open until September 30, 2018 (35th day without requested extensions by the applicant) so the Commission can continue the hearing to their next meeting scheduled for September 24, 2018 if they wish to. Atty. Rybak suggests keeping the hearing open as the Commission may want further guidance on the 55/62 and older matter. The Commission may also need further guidance from him and if the hearing remains open, Atty. Tracy can respond.

Chairwoman Rewenko opens the floor for public comment at this time to which there is none.

3. **CONTINUE OR CLOSE HEARING.**

D. Kovall **motioned** to continue the public hearing to the next Zoning meeting on September 24, 2018. C. Kasey seconded the motion and it passed unanimously.

PUBLIC HEARING #2 - CONTINUED

1. **OPEN HEARING – ESTABLISH QUORUM.**
   Chairwoman Rewenko called the hearing to order at 8:40 p.m. All regular members present are seated.

2. **BUMPER BROOK ESTATES, LLC – PETITION FOR A ZONE CHANGE FROM LIGHT INDUSTRIAL TO A TOWN RESIDENTIAL ZONE, TWENTY–FOUR BUMPER ROAD, ASSESSORS MAP NOS. A8-03-0003, A8-03-0004 AND A8-03-0006, HEARING OPENED 8/27/18. 35TH DAY TO KEEP HEARING OPEN: 9/30/18.**
   Atty. William J. Tracy, Furey, Donovan, Tracy & Daly, P.C., Bristol, CT is present to represent the applicant and requests that the public hearing be continued and followed in the same path as the first public hearing for proposed text amendments.

   Chairwoman Rewenko opens the floor for public comment at this time to which there is none.

   Atty. Rybak states that he assumes it's the applicant's intent that if the first hearing that was kept open is a rejection that he would want to withdraw the application to change the zone from Light Industrial to Town Residential. Atty. Rybak wants to clarify that if the applicant is tying the two applications together, they will rise and fall together.

   Atty. Tracy states yes, that is why they kept the zone change public hearing open so that if that happened, if either of those two situations described happened, they can decide independently on whether to continue with the zone change decision or keep the zone the way it is.

3. **CONTINUE OR CLOSE HEARING.**
   C. Kasey **motioned** to continue the public hearing to the next Zoning meeting on September 24, 2018. D. Thurston seconded the motion and it passed unanimously.

REGULAR MEETING

1. **OPEN MEETING – ESTABLISH QUORUM.**
   Chairwoman Rewenko called the meeting to order at 8:47 p.m. All regular members present are seated.

2. **APPROVE MINUTES OF PREVIOUS MEETING: 8/27/18**
   D. Thurston **motioned** to approve the minutes of the previous meeting, seconded by D. Kovall. Motion passed unanimously.

3. **PUBLIC COMMENT.**
   None.

4. **DISCUSSION/POSSIBLE DECISION - THE EDISON GRILL, LLC, 178 BIRGE PARK ROAD – APPLICATION TO MODIFY A SPECIAL PERMIT GRANTED BY THE ZONING COMMISSION ON APRIL 8, 2013 AND SPECIFICALLY CONDITION (3) IN ORDER TO ALLOW FOR LIVE ENTERTAINMENT. PUBLIC HEARING CLOSED 8/13/18. 65TH DAY TO MAKE A DECISION WITHOUT EXTENSIONS: 10/16/18.**

The Commission calls on Atty. Rybak to give his guidance on the possible decision and conditions that the Commission discussed and which LUC Redmond typed a draft of for review tonight. They are as follows:

The following decision to grant the modification to the Special Permit of April 8, 2013 was made.

To allow indoor live music and entertainment until 9:00 p.m. with noise levels not to exceed 55 decibels and outdoor live music and entertainment to have the following conditions:

1. Live music and entertainment shall not exceed 55 decibels.
2. Live music and entertainment will cease at 9:00 p.m.
3. Live music and entertainment will be allowed only between the months of May through September.
4. Live music and entertainment will be allowed up to a maximum of eight (8) times during the months noted in Item 3 above.

Atty. Rybak states that he wasn't at the public hearings the Zoning Commission held for the Edison Grill application and wasn't asked to attend. He has only read the minutes that LUC Redmond had recently emailed to him. He states that there's a misunderstanding that the town attorney has the decision drawn up for the Commission and that is not true, he only advises the Commission. The draft decision is drawn up by the Commission and sent to him for his review. He states he is here tonight to give legal advice to the Commission but is not adding facts to the record.

He submits to the Commission a copy of §8-2 Regulations and a copy of §22-18 Conditions imposed on applications; conditional approvals – Special permits. He also submits to the Commission a copy of an Appellate Court case "Parillo Food Group, Inc. v. Board of Zoning Appeals of the City of New Haven, 2016" that he believes is relevant. He finds this case important because in Parillo, it involved a restaurant operator, in a mixed use zone in the city, and the Commission, after hearing the testimony from the neighborhood, felt it was necessary to protect property values and the quality of the neighborhood to impose restrictions on hours of operation and in particular, closing hours of the operation. So tighter hours were set, tighter than what the state liquor control would allow, and when the judge heard the case, he said no, that's no good, state law preempts local law and the hours of liquor control governed. This was overturned by the Supreme Court which said if the Commission found evidence that could support their ruling the Commission could reasonably restrict the hours of closing of the restaurant, which had an alcohol service permit. Atty. Rybak states that he gave the Commission a copy of Section 8-2 of the Statutes, which is something they should always go back to when dealing with a special permit or a regulation, and reads from the statute, "All such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district, and may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, whichever commission or board the

regulations may, notwithstanding any special act to the contrary, designate, subject to (with Atty. Rybak emphasizing that the following is the important part) standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values." So, Atty. Rybaks states, as discussed in the first public hearing tonight, that's the whole idea of a special permit, so you can condition an application to tailor it to its location in the neighborhood and in keeping with the goals of zoning to protect property values, public health and safety.

In looking at the Draft decision, Atty. Rybak states that he had questions that he posed to LUC Redmond in an email and are as follows:

1) Was the 2013 special permit, and the owner's agreement to the conditions (hours, no live entertainment, etc.) made part of the record?
   - LUC Redmond replies, yes. The application is for a modification to the 2013 special permit and therefore, the 2013 file goes hand in hand with the application for modification and is in the record.
2) Was a copy of the owner's current restaurant permit made part of the record?
   - LUC Redmond replies, no.
3) Is the owner applying for a cabaret permit from Liquor Control or keeping the restaurant permit?
   - LUC Redmond replies that it is unknown.
4) Did the owner stipulate to these "additional" conditions for the special permit modification?
   - LUC Redmond states her belief that the applicant does not have to.
5) Is there support for these conditions in the Zoning Regulations? The relevant sections and supporting evidence should be referenced in the decision.
   - Atty. Rybak states that the Commission's decision is a little thin and that the problem is, a Zoning Commission decision will be upheld on a decision for a special permit if there's substantial evidence in the record to support their decision. Also, if there are no reasons for the Commission's decision, and he did not see any reasons for the Commission's decision in the draft decision, that that is something required. If the Commission doesn't state reasons for their decision and there is an appeal, you force the court to search the record to try and uphold your decision. Atty. Rybak advises not to put that on the court, so give good reasons for your decision. The Zoning Commission's decision will be upheld if only one of those reasons is considered to be a good decision. If you put conditions on a special permit, you need to do two things; one, you need to find support in the regulations. You just can't make them up. You have to tie them back to the regulations even if it's something generic as to protect public safety, health and welfare. And two, tie it to some piece of evidence in the hearing.
     With the condition that noise levels stay under 55 decibels, he wondered where that came from and so he reviewed the minutes and found reference to Thomas Stansfield's, TAHD, letter stating a 55 decibel level is a permissible limit. If this is the only source the Commission can rely on, then that's the source you have to rely on.
6) Is the floor space expanding?
   - LUC Redmond replies, no.
7) Is the parking expanding?
   - LUC Redmond replies, no.
8) Will the outdoor lighting change? Does the site plan indicate any change for outdoor lighting?
   - LUC Redmond replies, no, adding that there is no site plan.

9) What kind of sound control barriers are proposed to protect the surrounding residential properties?
   - LUC Redmond replies, none have been proposed.

10) Who will be monitoring the off-premises sound levels with a decibel meter?
   - Atty. Rybak states that the reason he asks is that sporadic noises during the day are permissible and must be put up with but things that occur in the evening and after hours, those are something that can be regulated. The problem is getting someone out to a property after-hours who knows how to calibrate and set up a decibel meter. Torrington Area Health used to monitor but they no longer do but they will rely on the state's sound regulations although he's not sure who will be enforcing them. So this is something where you can have a condition but it has to be enforceable.

Atty. Rybak states that the Commission needs to look at these conditions and ask themselves if they are taken from the record and are they tied into the Regulations.

C. Kasey states that the Commission can discuss reasons at this time to support a decision and perhaps start with Regulation 4.5.7 Performance Standard – Noise. Atty. Rybak questions whether 4.5.7 only applies to special permits in the Light Industrial zone where this regulation is found and not 4.4 which is the Retail Service zone special permits, where this property is located. He states that Regulation 9.1.1 General Performance Standards, though admittedly broadly worded, may help find the basis for a decision. He adds that State Statutes do have statutes on noise and the Commission can use those. He also notes that the Torrington Area Health District should have those statutes on their website.

D. Kovall states that one of the reasons we are leaning toward supporting the change is it being a normal condition of business to have live entertainment and it seems to be an across the board standard that was brought up and cited several times. LUC Redmond states that the problem being is that the Zoning Regulations don't speak of music and they only address noise in a Light Industrial zone and there is nothing about live entertainment. Should the Commissioners be looking at "what is expressly not permitted is prohibited" as stated in Regulation 1.3.1.? How do we base it on a regulation of there isn't one?

Atty. Rybak states that he read in the Zoning minutes that Martin Connor, AICP, offered an opinion during the hearing that he believed music, and Atty. Rybak believes he was referring to indoor music, to be an "accessory use" to a restaurant and meaning it's secondary to the primary use. So as LUC Redmond said, it's going to take a long time to find something in the regulations and suggests going back to the minutes, the Zoning Regulations and testimony in the minutes. The Commission wants to make a decision that's going to stand up if there is a challenge. Commissioners agree that they will review the conditions and come back to the next meeting with a revised draft motion.

C. Kasey **motioned** to continue discussion to the next Zoning meeting on September 24, 2018, seconded by D. Kovall. The motion passed unanimously.

*65th day to make a decision without extensions: 10/16/18.

5. **DISCUSSION/POSSIBLE DECISION – BUMPER BROOK ESTATES, LLC – PETITION TO AMEND ZONING REGULATIONS, DATED 11/20/17, SECTION 2.3 DEFINITION OF ELDERLY HOUSING AND SECTION 9.9 ELDERLY HOUSING.**
No discussion.

6. **DISCUSSION/POSSIBLE DECISION – BUMPER BROOK ESTATES, LLC - PETITION FOR A ZONE CHANGE FROM LIGHT INDUSTRIAL TO A TOWN RESIDENTIAL ZONE, TWENTY-FOUR BUMPER ROAD, ASSESSORS MAP NOS. A8-03-0003, A8-03-0004 AND A8-03-0006.**
No discussion.

7. **COMPLAINTS/ENFORCEMENT ACTIONS.**
FOLLOW UP ON COMPLAINTS: RALPH JOHNSON, 508 HILL ROAD
FERNANDO NIEVES, 222 WOODCHUCK LANE

Commissioners take up for discussion the matter of the Nieves complaint at this time. Atty. Rybak is asked to remain for discussion pertaining to the Nieves complaint and is shown pictures of two trucks and a trailer owned by Nieves Home Improvement (owner of the business is Fernando Nieves, owner of the property is Theresa Nieves) that are parked on the Nieves lot that is at the corner of Meadowview Drive and Woodchuck Lane. The pictures were sent to the Land Use office by Richard Faitella, a resident of Meadowview Drive. There is no report from the ZEO but past correspondence from him states that he finds no violations taking place as the trucks are not commercial vehicles, do not have commercial license plates, and do not exceed the 19,500 pound vehicle weight found in Zoning Regulation 6.20 that would constitute them as commercial vehicles.
Six neighbors who live on Meadowview Drive are present and believe that a business is operating out of the residential property because of these vehicles being parked there. They ask for clarification on wording found in Zoning Regulation 6.19 Use of Home for Personal Business that states "a reasonable neighbor would not know that such an [business] operation is taking place." Atty. Rybak questions what the Zoning Enforcement Officer has reported? LUC Redmond states that the ZEO found no violation. Chairwoman Rewenko reads Zoning Regulation 6.19 and asks if Atty. Rybak has or knows of any definition for "a reasonable neighbor". Atty. Rybak states that he doesn't know what the reasonable neighbor standard is and that he doesn't like Zoning Regulation 6.19 stating "reasonable neighbor". It is a very subjective test and gives the enforcement officer leverage to a neighbor. It should be up to the Commission to make that determination. He states that what makes running a business out of a home is more than parking of one or two non-commercial vehicles. Just because there is a name on the trucks doesn't constitute a business being conducted out of the home. There are other things to look at such as, is there a business registered in the location with the Secretary of State, are licenses held at this location, is there advertising with this address listed to come to this location, are there employees that come to this property in the morning, is personal property declared at this location on the Grand List. You can't say just because there's a couple of trade vans brought home or a pickup truck with a ladder on it that there's a business being run out of the home. People have the right to use their property and you have to be careful you don't step on those rights. You have to make sure that the Zoning Regulations and the evidence supports the enforcement act and the only way to do this is for the ZEO to do research, give his report to the Commission, and then the Commission determines if a cease and desist order should be sent. It would then be up to the owner to ask for a hearing in front of the Zoning Board of Appeals as to whether the ZEO's decision should be upheld or not.

Atty. Rybak refers to Zoning Regulation 6.20 Parking of Commercial Vehicles Overnight in a Residential District where it gives the weight of a vehicle that would be in violation. Atty. Rybak states that the Commission needs a detailed report from the Enforcement Officer in case this matter goes to court. Atty. Rybak also suggests that the ZEO should speak to the property owner and have him attend a meeting so this can be worked out. If trucks are being parked on the property, perhaps the property owner would be willing to shield them.

Mark McCullough, a resident of Meadowview Drive who lives directly across from the yard where the trucks are being parked, addresses the Commission stating that he spoke to the Nieves at their home who said they are willing to eventually shield the area but they have just moved in and funding is not available at this time. Mr. McCullough was also informed by the Nieves that Nieves Home Improvement employs one other employee and that employee takes a truck home.

Commissioners agree that more research is required by the ZEO as to where vehicles are registered, where the business is registered, that the Grand List in the Assessor's office be looked at to see if personal property is located at that address and being used as a business.

It is noted that ZEO Tom Mitchell was instructed to issue a Notice of Violation to Mr. & Mrs. Nieves for driveway construction without a permit but he felt it wasn't warranted as the stone placed down beyond the 10 foot paved apron was instructed to be done by the Highway Supervisor to prevent silt runoff into the road and that a driveway was not actually constructed.

Complaint against Ralph Johnson, 508 Hill Road, is taken up for discussion. Commissioner Nancy Schnyer states that she read in the IWWC minutes that Mr. Johnson reported that a road bed was always down below and behind his house. She states that the property in question was in her family for many years and she is familiar with the land and that no road bed ever existed behind the property. She states that Mr. Johnson has dumped process in that area over the years and that the area is in close proximity to wetlands. Commissioners agree that ZEO Tom Mitchell needs to do further research on this property as well and report back to the Commission.

8. **ANY OTHER BUSINESS.**
   LUC Redmond reports that she signed off on a Zoning application presented by HYSA for 8' x 16' addition to concession stand for a 2-stall bathroom at the Recreation Fields, Bentley Drive.

9. **CORRESPONDENCE.** None.

10. **INVOICES.** None.

11. **ADJOURN.**
    C. Kasey **motioned** to adjourn the meeting at 9:00 p.m., seconded by D. Kovall. Motion passed unanimously.

Respectfully submitted,

Polly Redmond, Land Use Coordinator

RECEIVED FOR RECORD AT HARWINTON CT
ON 9/11/18 AT 11:20am
ATTEST NANCY E. ELDRIDGE TOWN CLERK