Town of Washington, CT
P.O. Box 383
Washington Depot, CT 06794
ZONING COMMISSION
MINUTES
Special Meeting
August 28, 2018

6:30 p.m. Main Level Meeting Room

MEMBERS PRESENT: Mr. Solley, Mr. Reich, Mr. Werkhoven, Mr. Averill, Mr. Armstrong

ALT. PRESENT: Ms. Radosevich, Ms. Lodsin

STAFF PRESENT: Ms. Hill, Ms. White

ALSO PRESENT: Atty. Zizka, Atty. Fisher, Atty. Kelly, Atty. McTaggart, Ms. Purnell, Mr. & Mrs. Solomon, Mr. Rogness, Mr. Barnet, Ms. Giampetro, Ms. Van Tarwijk, Members of the Public

CALL TO ORDER:

Chairman Solley called the meeting to order at 6:30 pm.

He stated that this meeting is the continued deliberations of the application for 101 Wykeham Road, LLC, 101 Wykeham Road for a Revision of a Special Permit for an Inn dated November 13, 2017, amended by replacing rendering A & B dated 1-7-13 with Exhibit T (4 pgs.) and Exhibit U (2 pgs.) and to replace overall site plan prepared for Erika and Mathew Klauer dated 7-8-11, revised 12-17-12 with Site Development Plan 101 Wykeham Rd, LLC, dated 12-2-16 by A.H. Howland as well as Plan Set by H & R Designs dated 7-14-17.

Mr. Solley noted that Louise Van Tartwijk, representing Charter Communications CT-192 in Newtown, is making the video record of this town public hearing because the Town of Washington does not have a Washington reporter who covers these events. He explained that the videos will be used as a public information service and historical documentation.

Seated: Mr. Solley, Mr. Reich, Mr. Averill, Mr. Werkhoven, Mr. Armstrong

DELIBERATIONS

Mr. Solley stated that there is an administrative application on the floor as well. He asked that Atty. Zizka explain what the Zoning Commission needs to consider when dealing with the administrative application and how it weighs in with their decision regarding the modified Special Permit and Site Plan application.

Atty. Zizka explained the two applications that are properly before the Commission tonight; an application for a modification of the special permit and an application for a zoning permit. He

explained the applicant's legal position that they have not changed the use of the property which was agreed upon with the Settlement Agreement and the Special Permit, approved with conditions, on January 7, 2013. The zoning permit is to allow the actual building of the inn to commence (applicant refers to as administrative permit).

Atty. Zizka stated that it is the applicant's position that the Zoning Commission should only consider the modest modifications to the site plan which include the addition of some concrete landings required for fire safety and a small amount of grading. They feel that the interior sub-uses of the proposed buildings are consistent with the use of an inn per the Town of Washington Zoning Regulations. Atty. Zizka explained that the Commission is not sure that the applicant agrees that it is within the Commission's duties to consider the interior layout and the uses as part of the review of the special permit modifications (see Attachment A).

Atty. Zizka then explained the opponents' position. The opponents believe that Renderings A & B from the ProCon plans referenced in the 2013 Settlement Agreement were directly related to the height and total floor area. They believe there have been significant changes to the size of the buildings, site plan and the floor plans indicate sub-uses that were not agreed to in the Settlement Agreement and therefore the Commission should deny this application.

Atty. Zizka informed the Commissioners that it is his opinion that the Town is leaning more toward the opponents' position but does not entirely agree with the opponents' views. He cited cases from the Connecticut Superior Court and the Appellate Court that substantiate the view that the Commission does have the right to consider both the site plan and the interior floor plans of the buildings included in the site plan. Atty. Zizka stated that he has advised the Commission to treat this application as a special permit application, it should be considered under the special permit standards and therefore be considered as part of the first application.

Atty. Zizka explained that if the Commission agrees with him, the administrative application ends up being an easy decision. If the Commission decides to approve the request for modification of the special permit application as submitted, with no changes to any of the plans, then they can approve the administrative application. He then explained that if the Commission approves the request for modification of the special permit application with conditions, then the applicant would have to come back with the modified plans, showing that they meet the conditions before a zoning permit could be issued (please see Attachment A for more details).

Mr. Solley noted that Ms. Hill, himself, Atty. Zizka and some of the other Commissioners came up with a Draft Motion of Denial and possible reasons for the denial of the modified special permit application and a Motion of Approval with possible conditions to the approval (Attachment B). There was a brief discussion regarding how to proceed with the deliberations and review the different motions with the additions. Atty. Zizka discussed the thinking behind the draft motions and advised the Commissioners how to review both the Draft Motion of Denial with the list of reasons and Approval with the list of conditions.

Mr. Werkhoven offered to make a motion for the Commissioners to consider:

MOTION: I move that the application of 101 Wykeham Rd, LLC. For approval of a modified special permit be approved with the following conditions:

This approval remains subject to all the conditions and limitations set forth in the Settlement Agreement approved by the Commission of January 7, 2013, together with the conditions of the approval that were incorporated into the Commission's motion for approval of that Settlement Agreement.

He then listed the conditions by number from Attachment B:

2, 3, 4, 5, 6, 7, 9, 11, 12, 13, 15, 17, 19, 21, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35 and he suggested number 36 to be:

No passenger drop offs by buses or vans carrying 15 passengers or more.

The Commission finds that all the foregoing conditions must be met in order for the proposed use to be successfully accommodated on the chosen site in accordance with the applicable Washington Zoning Regulations. Therefore, if a court should determine that any of the foregoing conditions are invalid or unlawful, this approval shall be null and void.

Atty. Zizka explained the purpose of the last paragraph of the suggested motion and how it affects the court's ruling considering the chosen conditions.

Mr. Werkhoven requested a second but informed the Commissioners that he was open for discussion.

Mr. Reich seconded the motion but said that he does not agree with all of the conditions that Mr. Werkhoven included.

Mr. Solley stated that conditions 1-5 basically deal with Common Interest Ownership and the Commission must consider whether this is consistent with the use of an "inn."

Mr. Reich stated that he thinks including 1-5 would cover all the bases and that the Commission should be very careful with the condominium ownership aspect of this application.

Mr. Werkhoven stated that condition #1 deals with individual ownership of the units and #2 allows individual ownership but it the "inn" is managed by one entity.

Mr. Solley stated that he does not like the fact that #2-5 would involve the Zoning Commission having to deal with, basically, every potential deed transaction of every unit. He feels that the Zoning Commission might not want to have to take this on.

Atty. Zizka explained the differences in choosing #2 – 4. He stated that choosing #2 would prohibit individual unit owners renting out the unit and that there would be one individual entity that would manage the rentals. In addition, this management plan must be reviewed and approved by the Zoning Commission. He said #3 basically states that before the "inn" starts operating the management entity must come to the Zoning Commission with an agreement accepting legal responsibility and describing how the units will be managed as well as how this can be enforced by the Commission and its agent. This puts the burden on the

applicant to prove how this arrangement will work. Atty. Zizka stated that #4 is something that he believes the applicant has already offered to do by only allowing occupancy of a unit for no more than 30 days. He then explained what residency tends to involve.

Mr. Averill stated that the Town of Washington has many residences that are not inhabited on a regular basis and he does not agree that these units are not residences. He continued to explain that they may not be primary residences but they are still residences. He does not feel that #4 is relevant.

Atty. Zizka acknowledged Mr. Averill point of view and stated that the Commissioner was not required to agree with the meaning of residence.

Atty. Zizka explained that #5 requires that notice of every condition of approval must be incorporated into every deed for each unit. He stated that the Commission has the ability to decide whether this Common Interest Ownership is part of their understanding of what the use of an "inn" is and includes and it must be stated in the motion.

Mr. Averill stated that just because it has the word "inn" in its name, does not make it an "inn."

There was a brief discussion regarding the difference between an inn and a resort and the history of inns in the Town of Washington.

Atty. Zizka reminded the Commission that per the Settlement Agreement this inn was approved with a large main building, spa, restaurant, tented events, etc., but if the Commission were to make a different decision in the future, it would have to explain why it is making that decision. He added that the Zoning Commission always has the right to add a definition of an "inn" in the zoning regulations. Atty. Zizka informed the Commission that they could go with condition #1 or #2-5 or a selection of #2-5.

Mr. Solley stated that there is an argument that if the Zoning Commission includes so many conditions in an approval why would the application not be denied. He asked if there were any Commissioners leaning toward denial in regards to the Common Interest Ownership aspect of this application.

Mr. Averill stated that he thinks anything that requires the Zoning Commission or the ZEO to have any kind of ongoing monitoring of the business is hugely problematic to him. He believes the condition requiring the applicant to come back to the Commission with a plan is putting the Zoning Commission back into a negotiation situation. Mr. Averill stated that he does not like the Common Interest aspect of this application and the fact that there is no case law in Connecticut. He does not feel it would be a good idea to set a precedent that they and the Zoning Commissions of the future are going to have to monitor on a continuous basis.

The Commission briefly discussed what other parts of the Town of Washington's government that continually monitor buildings. Mr. Averill noted that the Fire Marshall inspects public buildings twice a year and the Building Inspector monitors the initial building but does not revisit unless there is a complaint.

Mr. Armstrong expressed his discomfort with the vague language in #2. He does not see how someone would pay this amount for a unit and not have the ability to control their return on investment. He believes that the unit owners would be protecting their own interests and the management company would try to accommodate the owners but also want to maximize return on investment with the restaurant and other commonly owned spaces. Mr. Armstrong does not see how #2, 3, & 4 are enforceable.

Mr. Solley discussed the history of the ban of condominiums as an allowable single family dwelling unit in the Town of Washington.

There was a brief discussion on the process of amending the original motion.

Atty. Zizka explained that a motion to amend the main motion would be necessary and suggested that the Commission review the other proposed conditions first.

Mr. Werkhoven asked Commissioners Averill and Armstrong if they would consider approving without including conditions 3, 4, & 5 or are they set with their decision.

Mr. Armstrong responded that he does not see how these conditions are enforceable.

The Commissioners debated on the issue of what makes a multifamily unit and what is considered cooking facilities.

Mr. Solley stated that he feels that there are two "camps" with the first being #2, 3, 4 and 5 and the second being just condition #1 which is the only out as he sees it because the separate ownership is inconsistent with the use of an inn.

Mr. Averill stated that he will not be approving this application and he sees multiple issues with including conditions to an approval that alter what was submitted by the applicant. He does not feel it is up to the Zoning Commission to rearrange what was presented to them. Mr. Averill believes that the floor plans that show ballrooms, suites with sitting rooms, etc. are far beyond what was agreed to in the Settlement Agreement. He disagrees that the Commission should be voting on anything other than what was submitted.

There was a brief discussion regarding whether the applicant can appeal the conditions. Atty. Zizka stated that the applicant could appeal the conditions that they do not like to the Superior Court which is why he included the last paragraph in the draft motion of approval after the list of conditions. He explained that the last paragraph would allow the court to send the possible condition in question back to the Commission asking them to reconsider or adjust it instead of throwing it out completely.

The Commissioners went through draft conditions #6 through #16. There was a brief discussion regarding the size difference of a 3 cubic foot refrigerator and a 4 cubic foot refrigerator. Atty. Zizka explained the difference between #15 and #16. He told the Commissioners that they could require the applicant to change the ballroom space to something else.

Mr. Armstrong stated that they would still have the 2,000 sf. He feels that the space would require more parking and there would be congestion issues on the facility property as well as

Wykeham Rd and that no matter what the space is labelled it increases the intensity of use. He feels that the management company has incentive to maximize the use of the space to produce income.

The Commissioners debated whether the parking would affect the number of people on the property.

The Commissioners agreed to include #6, 7, 9, 11, 12, 13. And, not to include #8, 10, 14. All but Mr. Averill and Mr. Armstrong agreed to include #15 and not #16.

Atty. Zizka explained that the use of a ballroom can be eliminated but the space will remain. It is up to the applicant to decide what to do with that space.

The Commissioners agreed not to include conditions #17 & 18 which will eliminate the use of meeting rooms. Removing #17 would be a possible amendment to the original motion.

The Commissioners agree to condition #19 that would allow use of emergency accessways only for emergencies. The Commissioners agreed not to include #20. There was a brief discussion regarding lot coverage. The Commissioners agreed to include #21 requiring submission of as-built drawings to the Commission upon completion of the foundations and framing.

The Commissioners discussed the hours and days of construction and the route in which the heavy equipment would travel to the site.

The Commissioners discussed performance bonds on any of the construction of this property. Atty. Zizka stated under State Law performance bonds are usually limited to public improvements not private improvements. He stated that a performance bond is mentioned in the Settlement Agreement but does not specifically state what it is for. Atty. Zizka explained that the Inland Wetlands Commission can set bonds for sediment and erosion controls.

Regarding conditions #26 and 27: Mr. Solley displayed sheet SD.1 and pointed out where the elevations are indicated for 4 out of the 5 floor levels. The Commission discussed the number of levels and agreed that there are 5 levels.

8:41 pm: Commissioner Solley announced a break

8:48 pm: Meeting is back in session.

It was noted that #28 is a reminder that the zoning regulations regarding lighting must be adhered to.

The Commission agreed to include #22 through #28.

The Commission opted out of included #29.

The Commissioners reviewed #30-35

Mr. Solley stated that during the Settlement Agreement discussions the site plan indicated 2 floor levels in the cottages but in Atty. Kelly's letter dated 7-19-18, Exhibit B suggests that there are 3 floor levels. The Commissioners agreed to add #30 limiting the cottages to 2 floors.

The Commissioners agreed to include #31-33.

There was a brief discussion regarding #34. All Commissioners agreed to include it as well as #35.

There was a brief discussion regarding the added condition #36 by Mr. Werkhoven. Atty. Zizka advised that the could not limit buses on the roads but they could limit drop offs on the property.

Atty. Zizka tried to address Mr. Armstrong's and Mr. Averill's concerns. He informed them that enforcement is usually complaint driven. He feels the concerns are legitimate and has tried to address the possible concerns with the suggested conditions. It was agreed that the number of people being dropped off from a bus could be limited.

There was a discussion regarding a guest room units and guest rooms attached to one unit having access to a public hallway.

Atty. Zizka stated that the applicant is entitled to 54 guest room units.

The Commissioners agreed that each suite or unit will be referred to as a guest room unit. They agreed to reference plans in condition #35. Atty. Zizka stated that he could create a list of the drawings while the Commissioners discuss the other suggested amendments

The Commissioners discussed the definition of a dwelling unit and what is a cooking facility. They agreed to keep #11

Mr. Werkhoven stated that he had reservations regarding condition #5 and feels that it influences the applicant's business plan.

Mr. Averill explained how he feels that these conditions are not even close to addressing the big issues and he could not vote to approve this application. He doesn't agree with the fact that this property will have to be continuously monitored.

Mr. Solley stated that the Commission has come a long way to make sure these guest suites could not be used as dwelling units.

The Commissioners debated whether to include #1 or #2, 3, 4 & 5. Mr. Solley stated that #1 is the cleanest way to address the separate ownership issue.

Atty. Zizka stated that there is no case law on this State Statute. He does not believe that this statute applies to this use. He feels it applies to the buildings and not the use. He feels that the Commission has the discretions to do what they feel is right with this application.

Mr. Reich agrees with Mr. Solley and agrees that #1 should replace #2, 3, 4, 5.

After discussing the difference in heights in the ProCon Plans and the submitted Wykeham plans the Commissioners agreed to add condition #26. Mr. Solley stated that the applicant must meet the height restrictions in the zoning regulations.

Atty. Zizka read all of the proposed amendments to the original motion made by Mr. Werkhoven.

MOTION: To accept the suggested amendments to the first motion made by Commissioner Werkhoven, by Mr. Reich, seconded by Mr. Werkhoven, passed unanimously.

(Note: In the motion below the conditions are renumbered and do not match the draft motion)

MOTION: I move that the application of 101 Wykeham LLC for approval of a modified special permit be approved with the following conditions:

1. This approval remains subject to all of the conditions and limitations set forth in the Settlement Agreement approved by the Commission on January 7, 2013, together with the conditions of approval that were incorporated into the Commission's motion for approval of that Settlement Agreement.
2. The Commission finds that the separate ownership of guest room units is inconsistent with its interpretation of the word "inn" as used in the Zoning Regulations. An "inn" is a lodging facility owned and managed by a single ownership entity, with rooms available for transient occupancy by lessees. Therefore, a condition of approval is that the "inn" must be owned as an undivided property. Guest rooms units, however they may be designated, may not be separately owned.
3. No guest room units shall have a kitchen
4. No guest room unit shall contain a refrigerator having a capacity larger than 4.0 cubic feet.
5. No guest room unit shall have a stove, stove top, oven or convection oven.
6. No guest room unit shall have any cooking facilities, including microwave ovens.
7. No guest room unit shall have a dishwasher.
8. No guest room unit shall have a washing machine or dryer.
9. The interior floor plans shall be modified to eliminate the ballroom, because that use was neither contemplated nor approved in 2013 and [, without reductions in the uses actually approved in 2013,] would expand or extend the nonconforming nature of the principal use. In addition, the applicant failed to prove that 100 parking spaces allowed under the 2013 approval would be adequate to accommodate the additional use.
10. The emergency accessway shall be used for emergency purposes only and shall not be used to service the pool, poolhouse, or tented events.
11. As-built drawings shall be submitted to the Zoning Commission upon the completion of the foundations and again upon the completion of framing. The as-built drawings must be approved by the Commission or its authorized agent(s) before commencement of further construction. The Commission shall, at the expense of the applicant, refer such drawings to a professional engineer and/or surveyor for review.
12. Outside construction may take place only between 7:00 a.m. and 5:00 p.m. Monday through Friday and between 8:00 a.m. and 4:00 p.m. Saturday and Sunday. No blasting, no operation of heavy equipment, and no site work are permitted on Saturday or Sunday, before 8:00 a.m. Monday through Friday, and on Memorial Day, Fourth of July, and Labor Day.
13. In accordance with Section 13.4 of the Zoning Regulations, a performance bond, in the form of a cash bond or an irrevocable letter of credit from a financial institution with offices in Connecticut, in an amount and for items to be determined by the Commission in consultation with the Commission's attorney and/or by an engineer approved by the Commission and paid for by the applicant, shall be secured before disturbance of the site begins.

14. No day passes or memberships of any kind may be issued for the spa, which is to be used by overnight guests only.
15. No day passes or memberships of any kind may be issued for the pool, which is to be used by overnight guests only.
16. The finished floor levels for the main inn building shall not exceed those shown on Sheet SD.1, revised to 12/17/12 as was approved in the 1/7/2013 Settlement Agreement.
17. The main inn building is limited to 5 levels; 2 underground and 3 above ground.
18. Outdoor lighting must comply with the requirements of Section 12.15 of the Washington Zoning Regulations. A plan for all such lighting must be submitted to and approved by the Zoning Commission prior to the commencement of any construction.
19. All cottages shall be limited to two floors only per Sheet SD.1, revised to 12/17/12.
20. There shall be no kitchen in the poolhouse.
21. Written approval by the Fire Marshal shall be submitted to the Commission prior to the issuance of the special permit.
22. Written approval by the DEEP of the final septic plans shall be submitted to the Commission prior to the issuance of the special permit.
23. Written approval by Aquarion Water Company of the final plans for the water supply shall be submitted to the Commission prior to the issuance of the special permit and shall include (a) determination that the water supply is adequate to serve the "inn" and sprinkler systems, and (b) a statement of how many additional wells will be needed and where they will be located. The applicant must also provide the Commission with a signed statement that it agrees to pay for all required system improvements. (See 6/27/18 letter)
24. Any further modifications to any of the approved plans:

    H & R Design, Inc. Plan Set for Wykeham Rise, Sheets: Skz-A, Skz-B, Skz-100, Skz-101, Skz-102, Skz-103, Skz-104, Skz-105.1, Skz-106, Skz-107, Skz-109, Skz-110, Skz-111, All dated 04/13/18.

    Arthur H. Howland & Associates plan set titled "Site Development Plan for Wykeham Project" Sheets: C.1, dated 02/14/18, EC.1, dated 04/16/08, EC.2, dated 04/16/08, RM.1, dated 02/14/18, OSD.1, OSD.2, OSD.3, dated 12/02/16, SD.1, SD.2, dated 12/02/16, SEQ.1a, SEQ.2, SEQ.3, SEQ.4, dated 02/14/18, PL.1, PL.2, PL.3, PL.3, PL.5, PL.6, dated 12/02/16, SES.1, dated 02/14/18, D.1, D.2, D.3, D.4, D.5, D.6, dated 02/14/18.

    must be submitted to and approved by the Zoning Commission prior to implementation.

25. No passenger drop offs by buses carrying 15 passengers or more.

The Commission finds that all of the foregoing conditions must be met in order for the proposed use to be successfully accommodated on the chosen site in accordance with the applicable Washington Zoning Regulations. Therefore, if a court should determine that any of the foregoing conditions are invalid or unlawful, this approval shall be null and void, By Mr. Werkhoven, passed by 3-2 vote, Mr. Averill and Mr. Armstrong voted against.

MOTION: To deny the administrative application from 101 Wykeham Rd, LLC, 101 Wykeham Rd, to build and inn, by Mr. Solley, seconded by Mr. Averill, passed unanimously.

MOTION: To adjourn at 10:20 pm, by Mr. Reich, seconded by Mr. Werkhoven, passed unanimously.

Respectfully submitted,

By: _____
Shelley White, Land Use Clerk
September 4, 2018
(Revised September 5, 2018)

Attachment A

HALLORAN SAGE

MEMORANDUM

To: Washington Zoning Commission

From: Michael A. Zizka

Date: August 23, 2018

Re: Application of 101 Wykeham Road

This memo is intended to assist the Commission in rendering a decision on the two pending applications from 101 Wykeham Rise (sometimes referred to as "Wykeham" in this memo). Unfortunately, because of the complex history of the present applications, as well as the wide variety of evidence and arguments the Commission has heard, the memo is quite lengthy. Please bear with it!!

In the following sections, we will be describing, as a matter of fairness, what we understand to be the applicant's and opponents' positions on various major issues. Janet Hill's "Comparison Work Sheet" dated 8/7/18, which was previously distributed to the Commission, actually provides an even more detailed and comprehensive presentation of the opposing points of view and should be reviewed again by the Commission members before they render their decision. It is possible we may have misunderstood one or more of the competing positions; if Commission members have different recollections or views of the position each side presented, please feel free to raise them in your deliberations. Also, we recognize that the various persons who spoke in opposition to the applications are not monolithic. In citing the "opponents' positions," we are intending to refer primarily to the principal views expressed by those citizens who were collectively represented by their legal counsel.

Nature of the Applications

Oddly enough, the first issue for the Commission to consider is, what is the nature of the applications; e.g., what has the applicant actually requested? There are two "physical" applications: an application for a modification of the special permit and an application for a zoning permit (what the applicant has described as an "administrative permit").

Applicant's Position

The applicant's position, as we understand it, is that the 2013 Settlement Agreement was intended to resolve all issues relating to the size and "sub-uses"[1] of the proposed

---

[1] Under the 2013 approval, the overall use of the site was characterized as an "inn." However, the overall use involved several different types of activities and facilities, such as guest rooms, restaurant, etc. In this memo, we use the term "sub-uses" to refer to those different activities and facilities.

facilities. Therefore, in the applicant's view, the only items for which the 2013 special permit needs to be modified are (1) the modest addition of some concrete landings required or requested by the Fire Marshal and (2) a small amount of grading, which, Wykeham contends, are the only changes to the site plans approved in 2013. They applicant further argues that matters that were not specifically addressed in the Settlement Agreement or the 2013 motion for approval, such as building heights and total floor area, must be determined solely by reference to the general dimensional standards of the Zoning Regulations. In the applicant's view, all of the interior sub-uses of the proposed buildings, though not expressly identified on the 2013 site plan, are consistent with an "inn," as that term is used in the Zoning Regulations. Wykeham argues that, since the word "inn" is not defined in the Regulations, the term should be interpreted to be consistent with the Mayflower Inn, which includes many or all of the same interior sub-uses.

Since the applicant believes the foregoing issues have been resolved by the Settlement Agreement, it also contends that the revised site plan, subject to the Commission's review of the concrete landings and grading changes, should be handled as an administrative application – i.e., as an application for a zoning permit, the type of application that normally can be decided by the zoning enforcement officer. Therefore, its second application is, on its face, an application for a zoning permit.

We are not certain whether the applicant has agreed that the Commission is entitled to consider and decide upon the modified architectural design as a matter of special permit review. We think it has agreed to that point, although it also contends that the height and interior floor layout are not "architectural design" issues and, therefore, are beyond the Commission's current ability to review as special permit issues. Rather, we understand the applicant to contend that, even if the Commission has the ability to consider the interior layout and uses, it can do so only as part of the zoning permit application – not as part of the special permit application.

Opponents' Position

The opponents contend that Renderings A and B from the Settlement Agreement were directly related to the height and total floor area represented in the so-called "ProCon plans." They also point to the applicant's counsel's comments at the January 7, 2013, Commission meeting, to the effect that the "physical plant, the drainage, the structures, the traffic, the lighting, everything that is on the table as a site plan for this Inn is the same as what was approved by this commission and the Wetlands commission as a school." As a result, they argue that the Commission has a right (perhaps a duty) not to allow any increase in total floor area or building volume than the ProCon plans would have allowed. They also argue that the uses the applicant is currently proposing go beyond what was approved in the Settlement Agreement and, therefore, cannot be allowed because they would constitute an expansion of a previously approved, but now nonconforming, use. If the opponents are correct, the Commission is not only entitled to consider, but must consider, as part of the special permit – nonconforming use review process, the height, total floor area, and interior use spaces represented by the current floor plans. (The nonconforming use issue is discussed in more detail below).

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

Threshold Question

Given the two very different positions discussed above, the threshold question for the Commission is, which view of the applications is correct? If the Commission believes the applicant's view is correct, the only issues for the Commission on the current special permit application are the exterior changes to the overall site layout (i.e., the "footprint" layout) and, perhaps, the revised architectural design. The interior floor plans would then be reviewed only as part of the zoning permit application (i.e., the "administrative application"). However, if the Commission believes the opponents' view is correct, the Commission must consider many other factors in connection with the special permit and zoning permit applications.

Our View

For several reasons, our view is closer to that of the opponents, although we do not agree with all of their views. Our main reasons are as follows:

First, the Connecticut Supreme Court has held that, when a site plan is approved in connection with a special permit, changes to the site plan should be considered under the special permit criteria. A major case on this point was *Barberino Realty & Develoment Corp. v. Planning & Zoning Commission*, 222 Conn. 607, 610 A.2d 1205 (1992), and some of the language the Court used in its decision is very instructive:

> When considering an application for a special permit, the commission is called upon to make a decision as to whether a particular application . . . would be compatible with the particular zoning district, under the circumstances then existing. That determination can only be made after a thorough examination of the specific site plan submitted. As in *SSM Associates Limited Partnership v. Plan & Zoning Commission*, 211 Conn. 331, 334, 559 A.2d 196 (1989), the Farmington zoning regulations render site plans "inseparable from and part and parcel of [the related] special permit application." As such, review of a special permit application is necessarily dependent on a thorough review of the proposed site plan because, in fact, the grant of the special permit is usually contingent upon approval of the site plan.
>
> Consequently, any application to revise such a site plan must be evaluated in light of the conditions set out in the special permit regulations. To conclude otherwise would not only thwart the purpose of a specially permitted use, but also the general purposes of zoning, which include the protection of the public health, safety and welfare, the regulation of the density of the population, the location and use of buildings and the limitation of development of "certain classes or kinds of buildings, structures or uses of land." General Statutes § 8-2; see also Farmington Zoning Regs., art. I. [Underlining added for emphasis.]

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

As in Farmington, Washington's Zoning Regulations make site plans instrumental to the consideration of a special permit. Section 13.1.C requires that the Commission can approve a special permit only if it finds, among other things:

> 1. That the proposed use and any building or other structure in connection therewith are consistent with the objectives of the Plan of Conservation and Development for the Town of Washington, and the intent and requirements of the Zoning Regulations as such documents may be amended.
>
> 2. That the location, type, character, size, scale, proportion, appearance, and intensity of the proposed use and any building or other structure in connection therewith shall be in harmony with and conform to the appropriate and orderly development of the Town and the neighborhood and will not hinder or discourage the appropriate development and use of adjacent property or substantially or permanently impair the value thereof.
>
> . . . .
>
> 5. That the lot on which the use is to be established is of sufficient size and adequate shape, dimension, and topography to permit conduct of the proposed use and any building or other structure in connection therewith in such a manner that will not be detrimental to the neighborhood or adjacent property.
>
> . . . .
>
> 8. That the proposed use and any building or other structure in connection therewith will not create a nuisance such as noise, fumes, odors, bright lights, glare, visual obstructions, vibrations, or other nuisance conditions at or beyond the property line.

Section 13.4 of the Regulations requires a site plan to be submitted in connection with any special permit application. The Regulations don't define the term "site plan," but the Connecticut Appellate Court has provided the following guidance, in a case entitled *R and R Pool and Patio, Inc. v. Zoning Bd. of Appeals of Town of Ridgefield*, 257 Conn. 456, 778 A.2d 61 (2001):

> The specific materials that comprise a "site plan" are not set forth in the statute, but Connecticut courts have determined that the site plan includes "the entire package of documents submitted to a zoning 'commission or other municipal agency or official to aid in determining the conformity of a proposed ... use ... with specific provisions of such [zoning] regulations.' " *SSM Associates Ltd. Partnership v. Plan & Zoning Commission*, 15 Conn. App. at 566, 545 A.2d 602.

In order for the Commission to consider the "location, type, character, size, scale, proportion, appearance, and intensity of the proposed [special permit] use and any

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

building or other structure in connection therewith," as required by Section 13.1.C of the Regulations, interior floor plans would presumably be quite significant. Although such plans were not presented to the Commission in 2013 when the Settlement Agreement was discussed and approved, they are presently before the Commission and, as such, should be deemed to be part of the "site plan," as defined by the Appellate Court. Therefore, we believe the Commission has the right to consider them as part of the special permit application. Indeed, we believe the "administrative" zoning permit application cannot be properly approved unless and until the interior floor plans are considered under special-permit review.[2]

Application of Special Permit Standards to Interior Plans

If the Commission should determine that the interior floor plans and revised architectural drawings are subject to special permit review, the question still remains, how much of the proposed uses should be deemed to have been already approved by the Settlement Agreement?

Applicant's Position

The applicant contends that the Settlement Agreement is specific as to the features of the "inn" that were intended to be limited, and that total floor space was not among them. Since Washington's zoning regulations don't define an "inn," Wykeham argues that one must be guided by what has been allowed at other local "inns." The applicant notes that the Mayflower Inn has all of the same amenities and "sub-uses" that Wykeham is currently proposing. Consequently, in its view, those amenities and "sub-uses" did not need to be specifically identified in the Settlement Agreement; they are simply a normal function of an "inn." The applicant's engineer has also opined that the 100 parking spaces allowed under the Settlement Agreement would be sufficient to accommodate all of the "sub-uses" now shown on the applicant's plans.

The applicant also claims that the minutes and transcript of the January 7, 2013, meeting at which the Commission approved the Settlement Agreement indicate that Renderings A and B were provided solely to respond to questions about what the general architectural style would be – not to lock the applicant into the ProCon interior floor plans or any other plans that were not specifically referenced by the 2013 approval. Just as the Commission took the trouble to include Renderings A and B in its 2013 decision, it could have included the ProCon floor plans if it deemed them significant. The applicant also argues that the 2013 decision could not have been intended to incorporate the school floor layout because that layout included "sub-uses" that would have been wholly irrelevant to an inn. In Wykeham's view, the only

---

[2] The applicant might argue that the Commission is not entitled to consider the interior floor plans as part of the special permit process because its special permit application involved only the changes to the "footprint" plan and, perhaps, the architectural design. However, such an argument would not benefit the applicant in the long run if, as we believe, the interior floor plans require special permit review. The applicant would then be required to submit a new special permit application, and the "administrative" application would have to be denied.

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

dimensional items with which the Commission was concerned were represented by the "footprint" plan.

Opponents' Position

The opponents argue, among other things, that the Mayflower Inn should not be deemed to represent the Commission's idea of an "inn" (i.e., the type of facility that was contemplated when the pertinent use regulations were adopted). They note that the Mayflower has a long history of existence and development, much of which occurred before the Commission's regulations were adopted. They also argue that, even if the Mayflower would be deemed to be an "inn" under Washington's Zoning Regulations, the Commission has the right to establish different limitations for the Wykeham project because it is a special permit use and, thus, is subject to site-specific review and conditions. They note that the Mayflower is on a state road, while the Wykeham facility is on a Town road that is narrower and curving, requiring different consideration.

The opponents also argue that, if the sub-uses (e.g., ballroom, meeting rooms) Wykeham now proposes were not part of the original Settlement Agreement, they cannot now be added to the plan. In a sort of mirror-image of Wykeham's argument, they claim that if Wykeham wanted to obtain approval of specific sub-uses and floor areas in 2013, Wykeham had the opportunity to do so, and did not. They also point to the parking requirements, which they claim would be exceeded if all of the sub-uses are allowed. They also claim that, to the extent the sub-uses exceed those uses expressly set forth in the Settlement Agreement, and to the extent the total floor area would exceed the floor area of the plans on which Renderings A and B were reportedly based, the current proposal would constitute an unlawful expansion of a non-conforming use.

Our View

We do not agree entirely with either the applicant's or the opponents' positions. We believe that, when read in its proper context, the Settlement Agreement cannot be said to establish the only limitations that the Commission would ever be entitled to place on the proposed uses. However, we believe that the Commission may exercise a degree of discretion in determining whether, and the extent to which, the Settlement Agreement was intended implicitly to allow certain sub-uses and whether, and the extent to which, it was intended to limit the total floor area.

In explaining our view, we start by noting the following language from the "Now, therefore" paragraph on the first page of the Settlement Agreement:

> the undersigned Parties hereby agree that the following covenants and restrictions become binding and legally valid if and when the Property is approved for use as an Inn by the Zoning Commission and the Connecticut Superior Court pursuant to Section 8-8(n) of the Connecticut General Statutes, (the "Approval") and no appeal, validly maintained or otherwise, of the Approval is pending.

(Underlining added for emphasis). Although a signature line for the Commission was included in the Settlement Agreement, it would be nonsensical to interpret the word

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

"Parties" in the quoted sentence to include the Commission. The result would be, effectively, as follows: "the Commission agrees that the following covenants and restrictions will become binding if the Commission agrees to them." Such an "agreement," obviously, would have been worthless. Consequently, the quoted passage must be logically deemed to have represented the agreement of the private parties to the Agreement.

The numbered list of restrictions, in turn, leads to the following sentence: "the foregoing covenants and restrictions are binding on and enforceable against Wykeham and its successors and assigns by Federer, the Commission, and Peacocke, and their respective heirs, successors and assigns." (Underlining added for emphasis). In other words, the Commission, the Federers, and Atty. Peacocke could hold Wykeham to the agreed-upon restrictions, but Wykeham did not retain any authority to hold the Commission to anything: the Commission was free to accept the conditions, add to them, or reject the Settlement Agreement in total.[3]

The underlined language demonstrates two points. First, the Commission was not committing itself to be limited to the numbered restrictions in the Settlement Agreement. Rather, those restrictions constituted only the baseline restrictions that were required by the other private parties to the Agreement. The Agreement expressly acknowledged that those restrictions would only become effective only if the Commission approved the special permit for the inn. That meant that the Commission had the right to add restrictions as part of its decision on the special permit or to reject the entire proposal for an inn. Second, the restrictions were expressly stated to be binding against Wykeham by the Commission, but not by Wykeham against the Commission.

Therefore, in our view, the conditions in the Settlement Agreement and those added by the 2013 approval cannot be viewed as a commitment by the Commission to limit itself to those conditions. It is equally possible that the Commission approved those conditions as a baseline – a sort of "phase 1" site plan – with the understanding that, under Section 13.1 of the Regulations, any material change or addition to the full "site plan" (i.e., to "the entire package of documents submitted to a zoning 'commission or other municipal agency or official to aid in determining the conformity of a proposed ... use ... with specific provisions of such [zoning] regulations") would require additional special permit approval.

For these reasons, we believe the Commission may exercise its factual discretion in determining the extent to which the interior floor plans and specifically named sub-uses go beyond what the Commission approved in 2013 or, in contrast, the extent to which that decision may have been intended to allow the applicant a degree of flexibility to design the interior spaces and incorporate additional sub-uses.

The Nonconforming Use Issue

When determining whether a particular development proposal would constitute an unlawful expansion or extension of a nonconformity, the courts have distinguished

---

[3] Of course, if the Commission had rejected the Settlement Agreement, or added conditions that Wykeham or the private parties found unacceptable, the Agreement would not have been consummated.

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

between nonconforming uses and nonconforming buildings or structures. A nonconforming use may be deemed to be expanded or extended if the area devoted to that use is increased or if the use is changed in a substantial manner. In contrast, a nonconforming structure would normally be deemed to be unlawfully extended or expanded only if that expansion caused a new portion of the building to exceed a dimensional limitation in the current regulations. For example, a building that was nonconforming as to a setback regulation (e.g., 25 feet from a property line), but that contained a conforming use, could lawfully be extended or expanded in an area that complied with the setback regulation (e.g., 30 feet from the property line).

In the present situation, the proposed uses are now entirely nonconforming because an inn must now be located on a state highway. However, the evidence as we understand it indicates that the proposed buildings are nonconforming only as to one setback requirement. Consequently, the current plans would involve an expansion of a nonconforming building only if those plans showed an increase in the area, volume, or percentage of the structure within the prescribed setback area. That is a factual determination the Commission must decide based upon the evidence in the record.

As noted above, the opponents have argued that, by referring to Renderings A and B when approving the special permit, the Commission effectively locked the applicant into the full set of plans (including interior floor plans) from which Renderings A and B were reportedly derived (i.e., the ProCon plans). We do not believe that the record supports that position. In our view, the record supports the applicant's position that Renderings A and B were submitted solely in response to a question about the proposed buildings' architectural design. Since the motion for approval of the special permit referred to several specific plans and drawings, we think it unlikely a court would conclude that other, unreferenced plans were implicitly tied to the approval. We also agree with the applicant that the interior floor plans for a school are almost certainly bound to be different than those for an inn. Because the current architectural plans appear to show buildings that are very similar to those shown in Renderings A and B, we think it unlikely a court would conclude that the proposed buildings were being unlawfully expanded.

The principal issue, as we see it, is whether the approved principal use (including all relevant sub-uses) is being expanded or extended. In that regard, we consider the parking issue to be one of the most relevant aspects of the inquiry. The 2013 special permit limited the parking area to 100 spaces. It must be presumed that the Commission did not intend to require a parking area that was smaller than necessary to accommodate what it was approving. Rather, the Commission presumably believed 100 spaces would properly accommodate what was then before it.

Section 15.2 of the Zoning Regulations contains a table prescribing minimum parking standards, subject to certain potentially overriding factors set forth in Section 15.3.[4] The

[4] Under Section 15.3.1, the minimums set forth in the table may be reduced if the Commission, "upon review of a site plan and other information supplied by the applicant," finds that "adequate public parking facilities exist within 600 feet of the use, or if the applicant demonstrates to the Commission's satisfaction that the use can be served adequately by fewer parking spaces, or if the Commission determines on its own that the use can be served adequately by fewer parking spaces, or if a similar use in the same area has historically been served adequately by a comparable number of spaces." We have

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

table would require a minimum of 54 spaces for the 54 guest rooms allowed under the special permit; plus at least 6 spaces for each 1,000 square feet of the proposed restaurant. Depending on whether the Commission agrees with the opponents' view that the "restaurant" area must include the plating kitchen,[5] the parking required under the current floor plans would be either 12 or 18 spaces, for a subtotal of 66 or 72 spaces. If the fitness center was not to be reserved for on-site guests, that use would arguably require an additional 22 spaces as a "personal services" use. Presumably, that is the reason the "no day passes" condition became part of the approval.

Therefore, under the most minimal view of the needs that would be created by the uses explicitly approved under the 2013 special permit, a maximum of 34 spaces (or as few as 28 spaces) would be available for uses other than the guest rooms and the restaurant. In theory, the Commission, in 2013, would be presumed to have concluded that those 34 or 28 spaces would be adequate, except for "unusual circumstances," to serve attendees at the weddings and other "paid for events" mentioned in the Settlement Agreement.[6] Thus, we believe the Commission is entitled to consider whether the sub-uses now expressly indicated in the more detailed floor plans, but not expressly mentioned in the Settlement Agreement or special permit conditions, would overtax the 100 available parking spaces. If so, the allowance of those sub-uses might, indeed, be considered to "expand or extend" the incipient nonconforming use.

Nevertheless, we do not agree with the opponents' view that allowing any sub-uses not expressly listed in the Settlement Agreement or special permit conditions would necessarily constitute an unlawful extension or expansion. As suggested above, the approval of a special permit can be conditioned in such a way that the impacts of various sub-uses are reduced or minimized, allowing the overall mix of uses to "fit" the site. For example, it would be conceivable for a commission to conclude that a particular site could accommodate either: (1) an inn with a large restaurant and meeting rooms, but no ballroom, fitness center or spa; or (2) an inn with a small restaurant and dance floor plus a spa; or (3) an inn with no restaurant or spa, but a large space for meeting rooms and a seating area for catered lunches; but not an inn with a restaurant, meeting rooms, ballroom, spa, and fitness center.

The initial question, then, is whether the Commission deems the particular sub-uses now proposed by the applicant to be customary and incidental (i.e., normal accessory uses) to an inn. To decide that a sub-use is customary and incidental to an inn would not mean that such sub-uses are necessary for an inn; it would only mean that such uses are not outside the Commission's basic concept of an inn. As an example, a garage may be considered customary and incidental to a single-family dwelling, but not every single-family dwelling needs to have a garage. The main limitation on the

---

not seen any evidence that the Commission made such a finding as a basis for approving the special permit in 2013.

[5] We think the "restaurant" area should be deemed to include the plating kitchen, since the total parking requirement would logically have recognized the need for staff.

[6] Section 15.1 of the Regulations provides, "Parking facilities shall be designed to accommodate normal usage, not maximum possible usage during unusual circumstances, unless modified by the Commission pursuant to Section 15.3."

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

Commission's discretion today is that it cannot "undo" the discretion the 2013 Commission exercised when it agreed to the sub-uses that were specifically mentioned in the Settlement Agreement. Those were as follows:

1. 54 guest room units.
2. 100 parking spaces.
3. Restaurant (singular) with 68-seat maximum capacity "during normal operations, excluding weddings or "paid for events," and no more than 30 of the 68 seats may be outdoors.
4. Spa and fitness center limited to area designated "Fitness Building" and no larger than 11,400 square feet.
5. Single exercise room in Main Building, no more than 3,800 sq. ft. and containing only exercise equipment.
6. If exercise room is in Main Building, total floor area of exercise room plus spa and fitness center must be no more than 11,400 sq. ft.
7. No treatment rooms in Main Building; treatment rooms in spa & fitness center not usable for overnight stays. No "day passes" for any spa, fitness or exercise use.
8. Pool house – may serve alcohol but no grill or cooking equipment.
9. Up to 24 tented events.

Since the foregoing sub-uses were approved by the Commission for an "inn," it follows that such uses were accepted at that time as legitimate accessory uses.[7] It does not, however, follow that a ballroom, meeting rooms, or other sub-uses that were not expressly mentioned in the Settlement Agreement must also be deemed acceptable as accessory uses. That decision requires the Commission's exercise of discretion; i.e., whether it accepts the applicant's argument that any sub-uses carried on at the Mayflower should be deemed to be a normal (albeit not necessary) function of an "inn." If the answer is that those uses are not acceptable accessory uses for any inn,[8] then they cannot be approved for this applicant. However, if the Commission determines that such sub-uses are customary and incidental (albeit not necessary) to an "inn," then the fact that they were not identified in the Settlement Agreement does not mean that the Commission must consider them to be unacceptable today. Rather, the Commission should consider the currently proposed mix of uses to determine whether they materially change the nature of what the Commission approved in 2013. Again, that involves the Commission's exercise of its fact-finding discretion (and, again, we think that the parking question may be one key to resolving the issue).

If the Commission finds that the floor plans and sub-uses currently proposed by the applicant would "extend or expand" the principal use approved in 2013, it should

---

[7] The Commission need not continue to accept that interpretation for future applications. However, if it would reach a different conclusion, it would be best for the Commission to adopt a detailed definition for the word "inn."

[8] The Commission is not obliged to accept the applicant's argument that the Mayflower Inn is an "inn" as intended by Washington's Zoning Regulations. The fact that the Mayflower has been allowed to carry on some of its sub-uses may be due to the peculiar history of that facility.

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

consider whether any additional conditions of approval might reduce the impacts of the overall use to a point at which they may not be considered an extension or expansion. As an example of how this might work, the Commission might conclude that the ballroom or meeting rooms would be an acceptable accessory use if they were restricted to guests occupying rooms at the inn, and perhaps a limited number of outsiders, but were not available for general use by other people or groups. Another possibility would be reducing the availability of tented events (i.e., "trading" the ballroom for the tented events). Again, these are intended only as examples of what the Commission might consider, not as suggestions of what it should do.

In summary, then, the Commission would need to consider, first, whether the previously unnamed sub-uses are permissible accessory uses of any inn; second, if such sub-uses are potentially permissible, whether such uses should be permitted (or should be deemed to be already permitted) as part of the mix of Wykeham's facility; and third, whether adjustments could, or would have to, be made to any of the proposed sub-uses (including the number of guest rooms) so that the overall nature and community impacts of the "final product" would not constitute an "expansion or extension" of the use as permitted in 2013.

The Common-Interest Community Issue

The elephant in the room is the common-interest-community issue. Although the issue is not one that, legally speaking, must be addressed in the context of the present applications, we believe the Commission should make its position clear today, inasmuch as an appeal of whatever decision it makes may be inevitable, and it would be preferable to have the court review that issue together with any other issues, rather than in a separate lawsuit.

Applicant's Position

Connecticut General Statutes Section 47-205 provides, "No zoning, building code, subdivision or other real property use law, ordinance or regulation may prohibit the conversion of any building to the common interest ownership form of ownership." The applicant contends that that statute expressly requires the Commission to accept the common interest form of ownership for its proposed inn. It has also agreed to limit owner occupancy and the size of cooking facilities to preclude any real "residential" use.

Opponents' Position

The opponents contend that CGS Sec. 47-205 deals only with buildings, not with permissible uses. Therefore, they argue, the question is really whether an "inn" is a type of use that, by definition, can involve separate ownership of rooms (just as a "single family dwelling," by definition, cannot involve multiple owners of separate spaces in the dwelling). They believe that, by allowing individual units to be owned by different persons or entities, the "guest rooms" effectively become dwelling units, making the overall facility a multifamily housing use, which is not permitted in the relevant zoning district. And, while the applicant has agreed not to have full refrigerators or stoves in the units, the opponents argue that even microwaves are "cooking facilities," so that the guest units would be "dwelling units" under Section 21.1.22 of the Zoning Regulations.

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

Our View

If the use of the guest rooms by individual owners was unrestricted, we would agree completely with the opponents. It would be difficult to distinguish a separately owned guest unit from a "dwelling unit," as defined in the Regulations, under those circumstances. However, since the definition in the Regulations is of a "Dwelling Unit or Residence" (underlining added), the Commission could conceivably conclude that, by restricting the permissible occupancy of the owner to a relatively short period of time each year, the use is not "residential" in nature and, therefore, is permissible. We do agree with the opponents, however, that such a restriction may be very difficult to enforce. In the absence of any compelling legal precedent, this issue truly involves the exercise of the Commission's discretion.

Summary of Issues to Be Decided

Is the special permit application, as presented, limited to the minor changes in the original site plan and the revised architectural design, or does it necessarily involve consideration and approval of the additional documents (interior floor plans and elevations) and the newly defined sub-uses?

If the special permit application is limited to the minor changes in the original site plan and the revised architecture, should the interior floor plans be approved for a zoning permit?

If the interior floor plans and revised architectural plans require special permit review, do they involve any material change in design and uses from what the Commission approved in 2013?

If the interior floor plans involve a change in the design or uses approved in 2013, would any of the currently proposed buildings or uses constitute an impermissible expansion or extension of the uses approved in 2013?

If the currently proposed uses would constitute an impermissible expansion or extension of the uses approved in 2013, is there an effective way of conditioning those uses so that they would not impermissibly extend or expand the uses allowed in 2013?

If the currently proposed uses would be approvable if properly conditioned, what conditions should be added?

Reasons for Denial/Conditions of Approval

With the foregoing discussion in mind, we have prepared a draft motion for denial and a draft motion for approval with conditions for Commission members' review and discussion in the deliberations. Those documents are being sent separately.

One Goodwin Square, 225 Asylum Street, Hartford, CT 06103 860 522-6103 Fax 860 548-0006 www.halloransage.com
Hartford / Danbury / Middletown / New Haven / New London / Westport / Washington, D.C.

Attachment B

DRAFT MOTION FOR DENIAL

(NOTE: the items that follow the basic motion are options, which the Commission may choose to accept or reject. The options sometimes create alternatives, so that choosing one option would automatically eliminate another option)

I move that the application of 101 Wykeham LLC for approval of a modified special permit be denied for the following reasons:

1. The proposed uses would no longer be permissible under the Washington Zoning Regulations and therefore, the applicant may not extend or expand the use beyond those uses approved by the Commission on January 7, 2013.

2. The proposed revised architectural drawings indicate that the principal building would be increased in height and volume in a designated setback area, which would increase the nonconforming nature of the building.

3. All of the uses the Commission approved on January 7, 2013, were expressly listed in the Settlement Agreement. The applicant is now proposing additional uses, including a ballroom and meeting rooms, that would constitute an extension or expansion of what the Commission approved in 2013.

4. All of the uses the Commission approved on January 7, 2013, were expressly listed in the Settlement Agreement. The applicant is now proposing additional uses, including a ballroom and meeting rooms, which the Commission does not deem to be incidental and customary accessory uses for an inn, as the Commission interprets that term.

5. The 2013 approval limited the applicant to 100 on-site parking spaces. Although those spaces may have been adequate to accommodate the uses specifically described in the Settlement Agreement the Commission approved in 2013, the applicant did not submit evidence sufficient to prove that those parking spaces would be sufficient to accommodate all of the additional uses shown on the current plans.

6. The applicant's current plans are based on separate ownership of guest rooms. The Commission finds that such separate ownership is inconsistent with the nature of an "inn," which the Commission interprets to be a facility owned by a single entity, with rooms being rented to transient lessees. The Commission finds that separate ownership of guest rooms would convert the inn to a multifamily development, which is not permitted in the R-1 Zone.

DRAFT MOTION FOR APPROVAL

(NOTE: the prospective conditions of approval that follow the basic motion are options, which the Commission may choose to accept or reject. The options sometimes create alternatives, so that choosing one option would automatically eliminate another option. The proposed conditions that do not have space before them (i.e., the first and last conditions) are conditions that counsel believes the Commission should adopt regardless of its decision on any other options)

I move that the application of 101 Wykeham LLC for approval of a modified special permit be approved with the following conditions:

This approval remains subject to all of the conditions and limitations set forth in the Settlement Agreement approved by the Commission on January 7, 2013, together with the conditions of approval that were incorporated into the Commission's motion for approval of that Settlement Agreement.

1. The Commission finds that the separate ownership of guest rooms or suites is inconsistent with its interpretation of the word "inn" as used in the Zoning Regulations. An "inn" is a lodging facility owned and managed by a single ownership entity, with rooms available for transient occupancy by lessees. Therefore, a condition of approval is that the inn must be owned as an undivided property. Guest rooms or suites, however they may be designated, may not be separately owned.

2. The Commission finds that an inn, within the meaning of the Washington Zoning Regulations, requires that the rental of guest rooms be managed by a single entity, and that rentals of individual rooms by different owners would create a category of use (i.e, a multiple dwelling or a "multiple inn") that is neither contemplated nor permitted by the Regulations. Therefore, if guest rooms or suites, however designated, are sold to separate owners as units pursuant to the Common Interest Ownership Act or similar statutory provisions, the owners of individual units shall not be permitted to arrange the rental of their respective units. Rather, the rental of rooms shall be handled by a single management entity for the inn. That management entity must submit to the Commission a written and signed agreement and understanding that it shall be responsible, and have legal liability, for all zoning matters, including all zoning violations, that may occur on or related to the property, including on or within the individual units, and that all official notices, correspondence and orders from the Commission or its authorized agent regarding any such matters may be directed to the management entity. The written agreement and understanding must be approved by the Commission in consultation with its attorney before any units are conveyed. Nothing in this condition shall be deemed to prohibit the Commission or its authorized agent from providing additional orders or notices to individual unit owners, who shall also be liable for any violations occurring within their respective units.

3. If guest rooms or suites, however they may be designated, are to be sold to separate owners as units pursuant to the Common Interest Ownership Act or similar statutory provisions, the applicant must submit to the Commission, and the Commission must approve, a legally binding agreement under which the Commission shall be assured of having an opportunity to conduct such inspections or obtain such information as it may reasonably deem necessary to ensure that it can enforce the conditions of this approval.

4. If guest rooms or suites, however they may be designated, are to be sold to separate owners as units pursuant to the Common Interest Ownership Act or similar statutory provisions, the owners of any such unit shall not be allowed to occupy that unit for more than [30 / ___] days in any calendar year. At all other times, the rooms must be available for rental and occupancy by the general public.

5. If guest rooms or suites, however they may be designated, are to be sold to separate owners as units pursuant to the Common Interest Ownership Act or similar statutory provisions, notice of every condition of this approval that is applicable to the units, including but not limited to the occupancy and rental restrictions and the inspection requirements, shall be incorporated into each deed for a unit, and each such deed shall reserve the right to the Commission to enforce such restrictions against the

respective owners. The language used for such notice and enforceability provisions must be acceptable to and approved by the Commission, in consultation with its attorney, prior to the sale of any unit.

6. No guest room units shall have a kitchen.
7. No guest room or suite shall contain a refrigerator having a capacity larger than 4.0 cubic feet.
8. No guest room shall have a refrigerator or freezer.
9. No guest room or suite shall have a stove, stove top, oven or convection oven.
10. No guest room or suite may have more than one microwave oven.
11. No guest room unit shall have any cooking facilities, including microwave ovens.
12. No guest room shall have a dishwasher.
13. No guest room shall have a washing machine or dryer.
14. No guest unit shall contain more than one bedroom.
15. The interior floor plans shall be modified to eliminate the ballroom, because that use was neither contemplated nor approved in 2013 and [, without reductions in the uses actually approved in 2013,] would expand or extend the nonconforming nature of the principal use. In addition, the applicant failed to prove that 100 parking spaces allowed under the 2013 approval would be adequate to accommodate the additional use.
16. The ballroom shall be restricted to use by persons occupying guest rooms on the evening of such use [except as follows: if the guest rooms are not fully booked for the evening of a day on which the ballroom is to be used for an event, an additional [four/___] persons who are not occupying guest rooms shall be allowed to attend the event]. The inn's management entity shall be responsible for notifying the persons who are authorized to hold an event in the ballroom of this use restriction. If this restriction is determined to have been violated on more than one occasion, the Commission may revoke the inn's authorization to use the ballroom.
17. The interior floor plans shall be modified to eliminate the meeting rooms, because that use was neither contemplated nor approved in 2013 and [, without reductions in the uses actually approved in 2013,] would expand or extend the nonconforming nature of the principal use, and because the applicant failed to prove that the 100 parking spaces allowed under the 2013 approval would be adequate to accommodate the additional use.
18. The meeting rooms shall be reserved for use by persons occupying guest rooms on the day of or before such use [except as follows: if the guest rooms are not fully booked for the evening before a day on which the meeting rooms are to be used for a meeting or other gathering, an additional [four/___] persons who are not occupying guest rooms shall be allowed to attend the gathering]. The inn's management entity shall be responsible for notifying the persons who are authorized to hold a meeting or other event in the meeting rooms of this use restriction. If this restriction is determined to have been violated on more than one occasion, the Commission may revoke the inn's authorization to use the meeting rooms for events involving any persons not occupying a guest room on the day of or before such event].
19. The emergency accessway shall be used for emergency purposes only and shall not be used to service the pool, poolhouse, or tented events.
20. The stone terrace along the front of the main inn building shown in proposed Rendering A, but not on Sheet SD.1 revised to 7/2/18, is not approved. That area shall be a grassed surface.
21. As-built drawings shall be submitted to the Zoning Commission upon the completion of the foundations and again upon the completion of framing. The as-built drawings must be approved by the Commission or its authorized agent(s) before commencement of further construction. The Commission shall, at the expense of the applicant, refer such drawings to a professional engineer and/or surveyor for review.
22. Outside construction may take place only between 7:00 a.m. and 5:00 p.m. Monday through Friday and between 8:00 a.m. and 4:00 p.m. Saturday (and Sunday???) No blasting, no operation of heavy equipment, and no site work are permitted on Saturday or Sunday, before 8:00 a.m. Monday through Friday, and on Memorial Day, Fourth of July, and Labor Day.

23. In accordance with Section 13.4 of the Zoning Regulations, a performance bond, in the form of a cash bond or an irrevocable letter of credit from a financial institution with offices in Connecticut, in an amount and for items to be determined by the Commission in consultation with the Commission's attorney and/or by an engineer approved by the Commission and paid for by the applicant, shall be secured before disturbance of the site begins.
24. No day passes or memberships of any kind may be issued for the spa, which is to be used by overnight guests only.
25. No day passes or memberships of any kind may be issued for the pool, which is to be used by overnight guests only.
26. The finished floor levels for the main inn building shall not exceed those shown on Sheet SD.1, revised to 12/17/12 as was approved in the 1/7/2013 Settlement Agreement.
27. The main inn building is limited to 5 levels; 2 underground and 3 above ground.
28. Outdoor lighting must comply with the requirements of Section 12.15 of the Washington Zoning Regulations. A plan for all such lighting must be submitted to and approved by the Zoning Commission prior to the commencement of any construction.
29. Curtains, shades, and/or blinds shall be installed on the large windows on the ground floor level (level 2 on Sheet Skz-102, dated 4/13/18) of the main inn building (and used when the lights in those rooms are on at night???)
30. All cottages shall be limited to two floors only per Sheet SD.1, revised to 12/17/12.
31. There shall be no kitchen in the poolhouse.
32. Written approval by the Fire Marshal shall be submitted to the Commission prior to the issuance of the special permit.
33. Written approval by the DEEP of the final septic plans shall be submitted to the Commission prior to the issuance of the special permit.
34. Written approval by Aquarion Water Company of the final plans for the water supply shall be submitted to the Commission prior to the issuance of the special permit and shall include (a) determination that the water supply is adequate to serve the inn and sprinkler systems, and (b) a statement of how many additional wells will be needed and where they will be located. The applicant must also provide the Commission with a signed statement that it agrees to pay for all required system improvements. (See 6/27/18 letter)
35. Any further modifications to any of the approved plans must be submitted to and approved by the Zoning Commission prior to implementation.
36. No passenger drop offs by buses carrying 15 passengers or more.

The Commission finds that all of the foregoing conditions must be met in order for the proposed use to be successfully accommodated on the chosen site in accordance with the applicable Washington Zoning Regulations. Therefore, if a court should determine that any of the foregoing conditions are invalid or unlawful, this approval shall be null and void.