AGGRIEVEMENT AND STANDING IN LAND USE APPEALS

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Introduction

"The terms 'aggrievement' and 'standing' have been used interchangeably throughout most of Connecticut jurisprudence. . . . Although these two legal concepts are similar, they are not, however, identical." *Gladysz v. Planning & Zoning Commission*, *infra*. If you are *aggrieved*, then you have *standing* to bring the appeal. Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted). *Huck v. Inland Wetlands and Watercourses Agency*, 203 Conn. 525, 530 (1987) quoting *O'Leary v. McGuinness*, 140 Conn. 80, 83 (1953). You could have standing without being aggrieved only if you are a "party". You may lack "standing" because the cause of action is not one which you are authorized to bring. "Standing" is the right to raise the legal and factual issues before the court so that they may be adjudicated and implicates the court's subject matter jurisdiction. *Mystic Marinelife Aquarium, Inc. v. Gill*, 175 Conn. 483, 509 (1978). Standing is essential to subject matter jurisdiction. *D. S. Associates v. Planning and Zoning Commission*, 27 Conn. App. 508, 511 (1992).

I. Standing to bring an administrative appeal to Superior Court of a municipal Land Use Decision.

To invoke the judicial review of a municipal land use decision, the plaintiff must have standing. Standing is achieved by (1) being an aggrieved party in fact or at law or (2) being a party to the proceeding. See below re Conn. Gen. Stats. §§ 22a-19 and 22a-19a.

A. Aggrievement In Fact or Classical Aggrievement

Aggrievement created by judicial decisions which define persons with a sufficient interest in the outcome to litigate zealously and fully. Both Conn. Gen. Stats. §22a-43 and 8-8 state that a "person" may bring an appeal, so does that mean that *multiple* persons cannot? That claim rejected in *Mingo v. East Lyme Conservation Commission*, Docket No. CV-08-4007998 (J. D. of New London, April 25, 2008, Abrams, J.)

1. Planning/Zoning:

This includes actions by a planning commission, zoning commission, combined planning and zoning commission, or zoning board of appeals. Governed by Conn. Gen. Stats. § 8-8(a)(1), the definition of "aggrieved person".

The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision as distinguished from a general interest, such as is the concern of all the members of the community as a whole. Second, the party claiming

aggrievement must successfully establish that the specific personal and legal interest has been specifically and injuriously affected by the decision.

Harris v. Zoning Commission, 259 Conn. 402, 410 (2002). See, also, *Primerica v. Greenwich Planning and Zoning Commission*, 211 Conn. 85, 92-93 (1989).

The owner of property within a zone affected by a text amendment affecting that zone is aggrieved. *Harris, supra; Wilson v. Zoning Commission*, 30 Conn. L. Rptr. 181 (July 23, 2001, Superior Court, J. D. of New London at New London); *Compformio v. Greenwich Planning & Zoning Commission*, 32 Conn. L. Rptr. No. 2, 55 (June 10, 2002, Superior Court at Stamford); but see *Stauton v. Madison Planning and Zoning Commission*, 271 Conn. 152 (2004). This is true for an "overlay zone" as well as a conventional zone, at least where the value of the property is affected. *Hall v. Planning and Zoning Commission of Newtown*, 28 Conn. L. Rptr. No. 17, 621 (March 5, 2001). The holder of an easement for access to a lake has standing to appeal a variance granted to the owner of the fee simple interest. *Ashwillet Beach Association v. North Stonington ZBA*, Docket No. CV 05 4102262 (J. D. of New London at Norwich, April 7, 2006, Jones, J.). But see the contrary result for the owner of property subject to a utility easement because the proposed activity within the easement (cutting of trees and installation of red lights) was within the scope of the easement and therefore not producing harm to the owner. *Civie v. Connecticut Siting Council*, 157 Conn. App. 818 (2015). This was a UAPA case, but still a good discussion of the interest "specifically and injuriously affected."

The owner(s) of property *not* located within the area of a proposed zone change from residential to commercial are aggrieved by the "creeping" commercialization of their neighborhood. *Wick v. PZC of Watertown*, 64 Conn. L. Rptr. 650 (6-2017).

The possessor of property pursuant to a bond for deed has standing to bring a declaratory action concerning the jurisdiction of a wetlands agency. *Chapdelaine v. Town of Eastford*, 52 Conn. L. Rptr. No. 16, 606 (12-12-11).

A shareholder in a closely-held corporation cannot appeal a decision concerning corporate property. *Handsome, Inc. v. Planning and Zoning Commission*, 317 Conn. 515 (2015). Standing for the corporation was also denied because the property had been taken by foreclosure before the disputed decision was made. The sole member of an LLC can file an application for LLC property and appeal the denial thereof. *Haggett v. Plainfield PZC*, 57 Conn. L. Rptr. No. 11, 397 (3-31-14).

The holder of a long-term billboard lease can appeal regulation changes to reduce the minimum separating distances between billboards. *Independent Outdoor III, LLC, v. Hartford Planning and Zoning Commission*, 55 Conn. L. Rptr. No. 24, 938 (July 15, 2013).

The owner of an over-sized lot can appeal the amendment of a zoning regulation that would prohibit the further division of that lot is aggrieved, even though there is a deed restriction prohibiting further division of that lot. *Glass v. Fairfield Planning and Zoning Commission*, 59 Conn. L. Rptr. No. 10, 362 (3-9-15).

No one has standing to appeal a <u>failure or refusal</u> to act (as with zoning or other code enforcement). *P.R.I.C.E., Inc. v. Canterbury*, Docket No. 93-0047479 (Superior Court, J.D. of Windham at Putnam, March 21, 1995, Potter, J.); *Bradley Air Parking v. Town of Windsor Locks*,

1990 WL 265737 (Conn. Super. J. D. of Hartford/New Britain at Hartford, Stengel, J.); *Pierotti v. Palladino,* 1994 WL 43451 (Conn. Super., February 3, 1994, J.D. of Stamford/Norwalk at Stamford, Lewis, J.) Same if it is the planning and zoning commission which decides not to enforce. *Gordon v. Zoning Board of Appeals of Easton,* 31 Conn. L. Rptr. No. 5, 159 (2-11-02). Same result for a Building Inspector, *West Haven Academy of Karate v. Town of Guilford,* 28 Conn. L. Rptr. No. 2, 53 (November 13, 2000). Enforcement or non-enforcement is a discretionary function of local government, and a municipality cannot be compelled, even by contract, to commence enforcement action against a violation. *Reardon v. Zoning Board of Appeals,* 311 Conn. 356 (2014); *accord Oygard v. Town of Coventry,* 30 Conn. L. Rptr. No. 7, 252 (October 1, 2001). But when is a refusal to enforce a "decision" which *is* appealable to the Zoning Board? See *Nixon v. ZBA of Old Lyme,* Docket No. LND-13-6045938S, the ZEO declined to prosecute an illegal shed after the violator put wheels on it and made it a "vehicle," and the ZEO told the complaining neighbor that was the reason for her refusal to act. Held that was an appealable decision.

What about appeals of a staff decision concerning the *planning* power, i.e. subdivisions? See *Mandable v. Westport PZC,* 58 Conn. L. Rptr. No. 19 (November 10, 2014) where the ZEO/Town Planner made a determination of a lot line adjustment as not being a subdivision event; plaintiff asked the PZC to review the staff decision, and they declined, so plaintiff appealed to Superior Court, On a motion to dismiss, the Court held that there could be no appeal of a *subdivision* decision to the *zoning* board of appeals, and a direct appeal to the Superior Court was proper.

Query whether the same rule would apply where the agency declined to act on an application due to claimed procedural flaws. *Town of Preston v. Department of Social Services,* 32 Conn. L. Rptr. No. 4, 133 (June 24, 2002) (Ruling under APA: State agency refused to act on application, claiming application was vague/ambiguous. Held that remedy was application for Mandamus, not administrative appeal). Similar holding in *Steroco, Inc. v. Szymanski,* 55 Conn. L. Rptr. No. 22, 865 (July 21, 2013).

There is apparently no standing for third parties to appeal a decision to enter into a stipulation in a pending appeal. *Brookridge District Association v. Planning & Zoning Commission of Greenwich,* 259 Conn. 607 (2002); *Torrington v. Zoning Commission,* 261 Conn. 759 (October 15, 2002) (Absent bad faith or collusion, no standing to intervene to challenge stipulated judgment.) And no standing to appeal a recommendation by a planning and zoning commission under Conn. Gen. Stats. § 8-24 for a public works project. *Fort Trumbull Conservancy, LLC v. Planning and Zoning Commission,* 32 Conn. L. Rptr. No. 7, 247 (July 15, 2002); *Panek v. Town of Southington,* 60 Conn. L. Rptr. No. 21, 824 (November 9, 2015).

No standing to appeal a municipal demolition order, issued per Conn. Gen. Stats. § 29-266(a). *Schultz v. Building Board of Appeals of Town of East Hartford,* 32 Conn. L. Rptr. No. 7, 260 (July 15, 2002).

Intervention in a pending appeal: While an abutting owner is Statutorily aggrieved and can appeal the *approval* of an application that they oppose, the Statute is silent about whether the abutter has standing to appeal a *denial*. The weight of case law indicates that allowing intervention by an abutter in the case of a denial is discretionary with the court. See the excellent discussion in *Walker v. Branford Planning & Zoning Commission,* 50 Conn. L. Rptr. No. 18, 654 (January 10, 2011, Corroadino, J.T.R.); see also *301 Eagle Street, LLC v. Zoning Board of Appeals,* 52 Conn. L. Rptr. No.

5, 187 (September 19, 2011) (intervention by abutter to defend commission denial allowed). The intervention petition is decided on the allegations it contains; there is no evidentiary hearing or discovery. *Ahuja Holdings, LLC v. Zoning Board of Appeals*, 55 Conn. L. Rptr. No. 24, 928 (July 15, 2013).

2. Inland Wetlands and Watercourses: Governed by Conn. Gen. Stat. § 22a-43: Can still have classical aggrievement. See discussion above.

Dissenting members of a wetlands agency who voted on a regulation amendment lack standing to appeal that amendment. *Munhall v. Inland Wetlands Commission*, 221 Conn. 46, 51 (1992). Presumably, the same rule would apply for planning or zoning commission members.

While the Statute would suggest that a statutorily aggrieved party must be within 90 feet of the wetland or watercourse involved, the Superior Court has accepted as aggrieved parties who own within 90 feet of *the property* involved in the application, even if more than 90 feet from the wetland or watercourse. *Serdechny v. Griswold Inland Wetlands & Watercourses & Conservation Commission*, 59 Conn. L. Rptr. No. 1, 35 (1-5-15).

3. Zoning Board of Appeals: A planning and zoning commission has standing to appeal the granting of a variance by the ZBA. *Plainfield Planning & Zoning Commission v. Plainfield Zoning Board of Appeals*, Docket No. HHD-LND-19-6113153 S. Also, see discussion above. ^

4. Historic District Commission. Aggrievement in fact is the only one available for historic district appeals because they aren't governed by Conn. Gen. Stats. §8-8. *Mayer v. Historic District Commission*, 325 Conn. 925 (2017).

5. Pending Appeals. *Daylor CT Properties, LLC v. Town of North Stonington*, 32 Conn. L. Rptr. No. 13, 483 (August 26, 2002): Pending appeal: neighbor could intervene in developer's appeal of conditions imposed by the commission because, if not for the conditions imposed, neighbor could and would have appealed the approval. See cases under "Settlement" section by Robert A. Fuller, Esq. For similar holding in a wetlands appeal, see *Wissinger v. Matthies*, 7 Conn. Ops. 1367 (Dec. 3, 2001) (Foley, J.).

6. Other Land-Related Decisions. For a discussion of standing to challenge a municipal decision to purchase land, see *Roe v. Town of New Fairfield*, 53 Conn. L. Rptr. No. 10, 374 (April 23, 2012) (Roe lacked standing to seek injunction of purchase, but may have standing to compel a town meeting on the subject). For the capacity of a WPCA to sue and be sued, see *Zahrijczuk v. Brandford Water Pollution Control Authority*, 53 Conn. L. Rptr. No. 18, 665 (June 18, 2012). For an odd one, see *Emerick v. Commissioner of Public Health*, 147 Conn. App. 292 (2014), where the plaintiff sought a declaratory judgment that the town had wrongfully removed a diving board from a public swimming pool; held that he lacked standing to bring the action.

B. Aggrievement At Law, or Statutory Aggrievement

Aggrievement created by Statute, not by judicial decisions. If you satisfy the Statutory criteria, you have standing. Period. "Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case." *Lewis v. Planning & Zoning Commission*, 62 Conn. App. 284, 288 (2001), citing *Cole v. Planning and Zoning Commission*, 30 Conn. App. 511, 514-515 (1993) (amendment to allow saw mills affects owners within, or within 100 feet of, the subject zone even though no sawmill application filed yet).

1. Planning/Zoning:

Per Conn. Gen. Stats. § 8-8(a)(1), persons "owning land that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board." Statutory Aggrievement is based on being within 100 feet of the property involved in the challenged activity, not the activity itself. *City of Hartford v. Town of West Hartford*, 32 Conn. L. Rptr. No. 19, 695 (October 7, 2002). Compare to an Inland Wetlands and Watercourses appeal (below), where Conn. Gen. Stats. § 22a-43(a) uses the phrase "owning or occupying land." Does this mean that "occupying" land is not enough for a zoning appeal, but *is* enough for a wetlands appeal?

See *HOCAP Corp. v. Bridgeport ZBA*, 54 Conn. L. Rptr. No. 2, 57 (August 13, 2012) where defendant divided his land *after* the appeal was filed such that plaintiff was no longer within 100 feet of the parcel upon which the activity was proposed. Held that plaintiff remained aggrieved. Note the issue of an easement versus fee simple ownership that arose in the context of a UAPA appeal, *Citizens Against Overhead Powerline Construction v. Connecticut Siting Council*, 51 Conn. L. Rptr. No. 23, 882 (8-1-2011) (owner of property subject to utility easement lacked standing to appeal activity that was within the scope of the easement.)

Note also that the 100-foot distance need not be in Connecticut to confer standing, *Mordechai Abel v. Planning & Zoning Commission of New Canaan*, 297 Conn. 414 (2010) (owner of property in New York has standing if that property is within 100 feet of the subject property.) *See, also, Old Mine Associates, LLC v. Planning & Zoning Commission of Trumbull*, holding that a condominium owner whose *unit* was more than 100 feet from the subject property was still aggrieved because condominium owners have an undivided interest in the entire property; and also measuring the 100 feet from the centerline of the highway, relying on the common law rule that adjacent property owners own to the centerline of a roadway absent deeds to the contrary.

As a general rule, the statute defines "Aggrieved person" as including "any officer, department, board or bureau of the municipality charged with the enforcement of any order, requirement or decision of the board." Conn. Gen. Stat. § 8-8 (a)(1). Therefore, a Zoning Enforcement Officer has standing to appeal Zoning Board of Appeals decision on an appeal of his/her decision. *Bouvier v. Zoning Board of Appeals of Town of Monroe*, 28 Conn. Sup. 278, 283 (1969). Note, the *Bouvier* case appears to allow Zoning Enforcement Officers to appeal all decisions of Zoning Boards of Appeal, even variances. However, Judge Maloney has decided two East Hartford cases where the body charged with enforcement of the regulations, in this case, the Planning and Zoning Commission, appealed the granting of a variance. In both instances, he held that the Commission lacked standing. *East Hartford Planning and Zoning Commission v. Zoning Board of Appeals, Town of East Hartford*, 02-CBAR-1211, CV 01 0808097 S, Judicial District of Hartford at

Hartford, May 17, 2002; *East Hartford Planning and Zoning Commission v. Zoning Board of Appeals, Town of East Hartford*, 02-CBAR-1212, CV 01 0804348 S, Judicial District of Hartford at Hartford, May 17, 2002. Judge Maloney specifically found the holding of *Bouvier* to be too broad. The East Hartford decisions were not appealed, so a final determination by an appellate-level court will need to wait some time longer. See *Caruso v. Meriden Zoning Board of Appeals*, 51 Conn. L. Rptr. No. 23, 876 (8-1-2011) (zoning enforcement officer and director of planning and statutorily aggrieved parties to appeal a ZBA decision.) But Caruso was the City Planner *of Meriden*. See *Wallingford v. Meriden ZBA*, where Wallingford argued that as a "municipality" it had statutory standing to appeal decision of ZBA of Meriden. Held that *Wallingford* wasn't the "municipality concerned" under CGS 8-8 for the ZBA of *Meriden.*

Husband cannot bring *pro se* appeal of zoning decision for property in his wife's name, even though he was a beneficiary under a revocable trust that included that land. *Mucha v. Hamden Zoning Board of Appeals*, 50 Conn. L. Rptr. No. 9, 334 (October 25, 2010).

There are special rules for floating zones, which are adopted into the zoning *text*, but not initially depicted on the zoning *map*. The possible zone "floats" over the municipality until an applicant seeks to "land" the zone in a particular location. The general rules seems to be that if the floating zone floats over the entire municipality, no single property owner can be aggrieved until it lands and they can prove aggrievement at that location. *Schwartz v. Board of Alderman*, 278 Conn. 500 (2006.) On the other hand, if the floating zone is restricted to particular areas, persons within those areas, or within 100 feet of them, can be statutorily aggrieved. *Hayes Family Ltd. Partnership v. Planning & Zoning Commission*, 98 Conn. App. 213, 222 n.9 (2006), cert. den., 281 Conn. 903 (2007;) *Douglas v. Planning & Zoning Commission*, 127 Conn. App. 87 (2011.)

See the unique case of an appeal brought under Conn. Gen. Stats. §8-8(d) to challenge the relocation of a public street, where statutory aggrievement is conferred on any "person affected" by such decision, as opposed to any "person aggrieved" by such decision. Held that "affected" is narrower that "aggrieved" and confers jurisdiction only on record owners or mortgage holders of property depicted on the street relocation map. *Bushnell Tower Condominium Association v. Hartford PZC*, 61 Conn. L. Rptr. No. 3, 112 (1-4-16, Berger, J.).

2. Inland Wetlands and Watercourses

Governed by Conn. Gen. Stat. § 22a-43: Note that for wetlands appeals, it is not 100 feet, but ninety (90) feet, and it is "any person owning or occupying land which abuts or any portion of land or is within a radius of ninety feet of *the wetland or watercourse involved in* any regulation, order, decision or action . . ." (Emphasis added). Therefore, a person owning or occupying land along the Connecticut River could, theoretically, be aggrieved by a decision of the Suffield Inland Wetlands and Watercourses Commission along the River. There is conflicting case law on this interpretation at the Superior Court level: *Wysocki v. Ellington Inland Wetlands Agency/Conservation Commission*, 29 Conn. L. Rptr. No. 4, 141 (April 23, 2001) (land within 90 feet upstream or downstream of affected watercourse are aggrieved); *Hathaway v. Orange Inland Wetlands Commission*, 3 Conn. L. Rptr. 426 (1991) (implies that party must own land within 90 feet of the portion of the wetland or watercourse affected by the order, decision or action of the commission). One Superior Court applied the 90-foot distance to the *property* upon which the wetland/watercourse existed, in addition to the distance from the wetland itself, *Civitano v. Conservation Commission*, 52 Conn. L. Reptr. No. 18,

676 (1-2-2012).

Note also that the Commissioner of the Connecticut Department of Environmental Protection is a party designated to have standing to appeal.

Recipient of a cease & desist order can appeal to Superior Court even if the decision was not published. *Newberry Road Enterprises, LLC v. East Windsor Inland Wetlands & Watercourses Agency*, 50 Conn. L. Rptr. No. 3, 101 (September 13, 2010).

3. Historic District Commissions.

Note the special case for appeals from historic district decisions as compared to zoning appeals. Conn. Gen. Stats. §7-147i says that appeals from a historic district commission shall follow the procedures of Conn. Gen. Stats. §8-8 for zoning and other land use appeals. Section 8-8 creates statutory aggrievement for abutters and owners of property within one hundred feet of the property that is the subject of the proceeding, in addition to any common law aggrievement. In *Mayer v. Historic District Commission of the Town of Groton*, 325 Conn. 765 (2017) it was held that an appeal from a historic district commission requires pleading and proof of common law aggrievement; there is no statutory aggrievement for owners of property adjacent to or within 100 feet of the subject property.

4. Mootness Claims

For mootness based on passage of a General Statute, see, generally, *Commissioner of Correction v. Freedom of Information Commission*, 129 Conn. App. 425 (2011).

Re challenge to conditions of approval, see *Kobyluck Bros., LLC v. Planning and Zoning Commission*, 51 Conn. L. Rptr. No. 19, 696 (7-4-2011) (applicant challenged conditions of approval, one of which said that if any were violated, special permit would be void; condition allegedly violated, so commission moved to dismiss appeal as moot since permit was void already; held no, court retains jurisdiction to consider validity of the conditions being appealed.)

Re appeal from a denial, filing of a subsequent application for the same property as mooting the pending appeal: Good discussion in *Zappone v. Inland Wetlands and Watercourses Agency*, 55 Conn. L. Rptr. No. 18, 678 (6-3-13).

Appellant may lack standing if the remedy sought would violate State law. *See, "Q"-Lungian Enterprises v. Planning & Zoning Commission of Windsor Locks*, 2019 WL 546108 (Berger, J.) where appellant had sought to add live entertainment, including sexually explicit dances, along with the service of alcohol and the Commission denied the application. On appeal, the Court granted the Commission's motion to dismiss for lack of standing because State law prohibits sexually explicit entertainment along with the service of alcohol, so the Court could not order the Commission to approve something that would violate that State law.

II. Status as a party without aggrievement

A. Parties set forth by Statute

As noted above, the Commissioner of the Connecticut Department of Environmental Protection is a party having standing in any local Inland Wetlands and Watercourses decision, per Conn. Gen. Stats. § 22a-43(a).

B. Parties by intervention, Conn. Gen. Stats. §§ 22a-19 (environmental) and 22a-19a (historic)

We now know that a person who files a Notice of Intervention per Conn. Gen. Stats. § 22a-19 (and, by implication, Conn. Gen. Stat. § 22a-19a) has standing to file an appeal. *Branhaven Plaza, LLC v. Inland Wetlands Commission*, 251 Conn. 269, 276, n.9 (1999). Intervention cannot expand the jurisdiction of the agency, so no standing to appeal decisions based on considerations outside that agency's jurisdiction. *Nizzardo v. State Traffic Commission*, 259 Conn. 19 (2002) (State Traffic Commission has no environmental authority and cannot acquire any just because an intervention is filed.) Presumably the same rules would apply to Conn. Gen. Stats. § 22a-19a for historic interventions.

Note that preemption issues may prevent standing to challenge based on environmental grounds: *Burton v. Dominion Nuclear Connecticut, Inc.*, 300 Conn. 532 (2011) (plaintiff lacked standing to challenge, under Conn. Gen. Stats. § 22a-16, radioactive discharge of nuclear power plant because such emissions are preempted by Federal law).

Note that for zoning text or map amendments, an intervenor can only raise environmental, not procedural irregularities (but see *Diamond 67, LLC* below for contrary holding re a stipulated judgment), and must somehow demonstrate that the mere changing of the zoning text or map constitute "conduct" that is "reasonably likely to have the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water, or other natural resources of the state." Conn. Gen. Stats. §22a-19(a). This has proven to be a difficult burden. *Pond View, LLC v. Planning & Zoning Commission*, 288 Conn. 143 (2008.) This burden is especially difficult for floating zones. *Douglas v. Planning & Zoning Commission*, 127 Conn. App. 87 (2011.)

The intervenor can intervene in a *judicial* proceeding under Conn. Gen. Stats. §22a-19. What if intervenor intervenes in an administrative appeal after it is pending, and the original plaintiff(s) withdraws the appeal? One Superior Court says that intervenor has standing to continue the appeal. *Federer v. Inland Wetlands Commission of the Town of Washington*, 50 Conn. L. Rptr. No. 14, 519 (December 6, 2010). However, where a stipulated judgment had already been entered, an intervention filed one week later was too late. *Griswold v. Camputaro*, 61 Conn. L. Rptr. No. 15, 529 (3-21-16).

For a complex situation involving an intervention in two related actions, see *Diamond 67, LLC v. Planning & Zoning Commission*, 117 Conn. App. 72; and, after remand, 127 Conn. App. 634 (2011).

III. Establishing Aggrievement in an Appeal

A. Pleading Aggrievement/Standing

The basis for aggrievement must be stated in the complaint. *Harris v. Zoning Commission, supra*, p. 409. It is not enough to merely prove it at trial. However, it is not necessary to recite the

magic words that the plaintiff is aggrieved as long as the complaint contains sufficient *facts* to establish aggrievement. *Corsini v. Guilford Planning & Zoning Commission*, 49 Conn. L. Rptr. No. 14, 508 (6-14-2010, Corradino). Compare to *Wucik v. Planning & Zoning Commission*, 113 Conn. App. 502 (2009) where the plaintiff pled that it was aggrieved without any supporting factual allegations; held, failure to adequately plead aggrievement.

Could an appeal commenced by a plaintiff lacking standing be saved by substituting a party who did have standing per Conn. Gen. Stats. §52-109? Held yes, but it was a foreclosure case, not a land use appeal. *J.E. Robert Company v. Signature Properties, LLC*, 51 Conn. L. Rptr. No. 1, 4 (2-28-2011.) See *Vivian Simons* case below.

It is axiomatic that the decision being appealed has to actually *be a decision.* See *Allstar Sanitation, Inc., Substituted for Greenwood Manor, LLC v. Bridgeport Planning & Zoning Commission*, 55 Conn. L. Rptr. No. 4, 127 (February 25, 2013) where a party tried to appeal a "consensus vote" in a preliminary, public information hearing about many possible zoning amendments, only one of which was the plaintiff's parcel and none of which were yet proposed for actual change of zone. Held no aggrievement.

B. Proving Aggrievement/Standing

May be at time of trial, but may also be earlier where defendant files a Motion to Dismiss per Conn. Gen. Stats. § 8-8(i). That Motion triggers plaintiff's "burden of proving his or her standing". A comparable provision is found at Conn. Gen. Stats. § 22a-43(b) for Inland Wetlands and Watercourses appeals.

1. Proving the facts of Aggrievement at the time of trial or hearing

Proof of aggrievement is "an essential prerequisite to the court's jurisdiction of the subject matter of the appeal". *Gladysz v. Planning and Zoning Commission of Town of Plainville*, 256 Conn. 249. 256 (2001); *R & R Pool & Home, Inc. v. Zoning Board of Appeals*, 43 Conn. App. 563, 568 (1996). Standing cannot be waived. *Id.* The standard for aggrievement is "rather strict". *Id.*, p. 257. Aggrievement cannot be established based on the record because a person does not become aggrieved until after the board has acted. *Fox v. Zoning Board of Appeals of City of Stamford*, 146 Conn. 665, 667 (1959). The Court must hear actual testimony. *Campformio v. Greenwich Planning and Zoning Commission*, 02-CBAR-0851, CV 99 0170237 S, Judicial District of Stamford/Norwalk at Stamford, April 19, 2002.

That testimony must establish that the plaintiff was aggrieved throughout the entire course of the appeal. *Goldfield v. Planning and Zoning Commission of Town of Greenwich*, 3 Conn.App. 172, 176-177 (1985); *Crawford v. Ledyard ZBA*, 51 Conn. L. Rptr. No. 15, 560 (6-6-2011.) A plaintiff having sufficient interest when the appeal is taken can lose the interest by conveyance of the interest prior to trial. *Town of Southbury v. American Builders, Inc.*, 162 Conn. 633, 634 (1972). Where there is a gap in ownership or the interest upon which aggrievement is predicated, aggrievement is lost. *Goldfeld* at 177. However, an expired purchase agreement may suffice if both parties treat it as remaining in force. *Bethlehem Christian Fellowship, Inc. v. Planning and Zoning Commission of*

Morris, 58 Conn. App. 441 (2000) (distinguishing *Goldfeld* because that involved an option agreement, not a purchase agreement). See also, *Green Falls Associates, LLC v. Montville ZBA*, 51 Conn. L. Rptr. No. 2, 75 (March 17, 2011) where purchase contract had expired before zoning application, but there was no "time is of the essence" clause and parties did later close on the property. Compare to *JZ, Inc., Dunkin Donuts v. Planning & Zoning Commission*, 119 Conn. App. 243 (2010), where agreement had expired by its terms; and also *Optiwind v. Goshen PZC*, Docket NO. LLI-CV-08-4007819-S (whether agreement was a "lease" and if it had expired.)

Two Superior Court cases indicate that in an affordable housing appeal under Conn. Gen. Stats. § 8-30g, the plaintiff may present evidence that conditions of approval have a "substantial adverse impact" on the viability of the affordable housing project if there was no evidence concerning such impact on the record. *Saranor Apartments v. Planning & Zoning Board of Milford*, 1997 WL 746385 (Conn. Super., 1997); *Caserta v. Milford Planning & Zoning Board*, Docket No. CV 010507693S (Conn. Super. at New Britain, 2001).

The parties cannot, by stipulation, confer jurisdiction on the Court. *Hughes v. Town Planning and Zoning Commission of Town of North Haven*, 156 Conn. 505, 509 (1968). It is not necessary to provide certified copies of a deed as long as the plaintiff testifies to ownership of land sufficient to confer aggrievement. *Wilson v. Zoning Commission, supra*.

Mere generalizations and fears are insufficient to establish aggrievement. *Walls v. Planning and Zoning Commission*, 176 Conn. 475, 478 (1978). Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest has been adversely affected. *Huck v. Inland Wetlands and Watercourses Commission*, 203 Conn. 525, 530 (1987); *Pomazi v. Conservation Commission*, 220 Conn. 476, 483 (1991).

As association can have standing, but only if it's individual members would have standing on their own. *Alliance to Preserve Somers Center, Inc., v. Zoning Commission of Town of Somers*, 7 Conn. Ops. 945 (August 20, 2001) (Sullivan, J.) (none of the members of the plaintiff corporation could prove either classical or statutory aggrievement, hence the association was not aggrieved and lacked standing).

Typical pattern of testimony at aggrievement hearing:

" I am the [plaintiff/officer of the plaintiff/etc.] and I am the [owner, by virtue of a deed/contract purchaser by virtue of this agreement/etc.]. I had this interest at the time that the original application was filed and have maintained it continuously throughout this proceeding through today."

Note the importance of *continuous*: *Vivian Simons v. Weston Planning & Zoning Commission*, 55 Conn. L. Rptr. No. 4, p. 124 (February 25, 2013) (abutter brings administrative appeal and, while appeal is pending, transfers all interest in her property to an LLC of which she is the sole member; motion to dismiss granted for lack of aggrievement. Good discussion of case law.)

2. Proving the facts necessary to support a claim of intervention

Where there is a Conn. Gen. Stats. § 22a-19 intervention, the intervenor must prove actual adverse impacts for the challenged decision "and not merely under some hypothetical set of facts as

yet unproven". *Queach Corporation v. Inland Wetlands Commission*, 258 Conn. 178, 190 (2002). Cited to support finding of lack of aggrievement where plaintiffs challenged a zoning text change based on traffic impacts for development for which no application had even been filed. *Stauton v. Madison Planning and Zoning Commission, supra*, p. 395.

IV. Standing to File an Administrative Application

This topic is far less clear than the preceding. The Statutes are silent. The Supreme Court has said that the test to establish standing before an administrative agency is "less stringent" than before a Court. *Gladysz, supra*, p. 257.

A. Ownership/Control of the Subject Property

Some local regulations actually state, expressly, that the applicant must either own the subject property or have some form of written permission from the owner to file such an application. However, in many cases the Regulations are silent, and the only indication is a signature line on the application form for "owner" or "owner's representative".

See *Gladysz v. Planning and Zoning Commission of Town of Plainville*, 256 Conn. 249 (2001) concerning whether the applicant has a sufficient interest in property to allow it to apply for a permit. Essentially, as the *Gladysz* court explained, standing tests whether the applicant is the true party at interest. A partnership applied for a subdivision for land they did not own but would be developing. The commission approved the subdivision with conditions. The partnership appealed the conditions. Abutters appealed the approval generally citing the fact that the partnership did not have an ownership interest. The eventual result of which was that two separate superior court judges ruled separately that the partnership had standing to apply for the permit but not aggrievement to appeal the conditions: Judge Handy ruled that the partnership's failure to demonstrate any legal interest in the property left it without aggrievement to appeal the imposition of the challenged conditions. However, Judge McWeeny was not bound by Judge Handy's decision on aggrievement for his ruling on whether the partnership had standing to file the application and could properly find that the partnership had adequate standing to file the application thereby overruling the neighbors' appeal. The Supreme Court found that this apparent inconsistency was perfectly correct.

See also, *Richards v. Planning and Zoning Commission of Town of Wilton*, 170 Conn. 318 (1976),the Wilton Board of Ed applied to build a storage area for school buses, a bus maintenance facility and equipment, even though it did not own the land. The land was owned by the "Town of Wilton" and designated for municipal use. The *Richards* court framed the following question:

> The issue, then, is whether the Wilton board of education, although not the titleholder to the property, possesses a sufficient interest in it and in the granting of the special permit to constitute the legal interest required to make the present application.

Richards at 321.

That is the heart of what it means to have *standing*. To elaborate further, the court stated:

> Whether the applicant is in control of the property, whether he is in possession or has a present or future right to possession, whether the use applied for is consistent with the applicant's interest in the property, and the extent of the interest of other persons in the same property, are all relevant considerations in making that determination.

Richards at 323 - 324.

Since the zoning regulations did not require the applicant to be the owner, and the Town was not contesting the Board's right to apply, and the Board was charged with providing transportation for its students, the Court held that the Board had standing. A school bus parking lot was close enough to a school use for the court's purposes. Query: What if the Regulations *did* require actual ownership or consent of the owner? For a similar situation, see *Patty v. Wilton Planning & Zoning Commission*, 64 Conn. L. Rptr. No. 8, p. 311 (July 10, 2017) where a youth football league filed a zoning application for land owned by the town to replace a grass field with artificial turf. The league had sponsored events at the town field for 50 years and had written consent from the town to file the application, but the town itself was not an applicant. *Held* that the league had standing to file the application. See also Murphy v. Zoning Board, 63 Conn. L. Rptr. No. 12, p. 486 (2-20-17), where an application was filed by a corporate officer on behalf of a corporation and held valid where (1) no one objected at the hearing; (2) the officer was, in fact, authorized to act on behalf of the corporation; and (3) the owner was a closely held corporation.

For an interesting twist, see *Huse v. Zoning Commission of New Milford*, 59 Conn. L. Rptr. No. 18, 689 (May 4, 2015) where an owner of a commercial condominium unit filed an application which required the use of commonly-owned parking spaces in front of the subject unit. Standing to file the application (and claim the right to use the parking) was challenged, but standing was found.

See also, *Spezzano v. North Branford Zoning Board of Appeals*, 62 Conn. L. Rptr. No. 17, 630 (September 26, 2016) where the tenant of a parcel claimed to have a legal nonconforming excavation and thus appealed a Cease & Desist Order from the ZEO to the ZBA. The owner expressly refused to sign the appeal form, which had a blank for the property owner's signature, and the property owner further denied that any nonconforming excavation was on the property. The Board upheld the Cease & Desist Order and the tenant appealed to Superior Court. The Board moved to dismiss for lack of standing, but the Superior Court held that the tenant's interest was sufficient to support standing to appeal the Cease & Desist Order, and that while the ZBA application *form* required the owner's signature, there was no zoning regulation requiring such a signature. Query what if the regulations *did* require an owner's signature? Would that deprive the tenant of standing to appeal the Order?

B. <u>Zoning Board of Appeals: Appeals of decision of Zoning Enforcement Officer within 30 days.</u>

Conn. Gen. Stats. § 8-7 provides that an aggrieved party may appeal the decision of a Zoning Enforcement Officer to the local Zoning Board of Appeals within thirty (30) days of the issuance of such decision, unless the Board, by resolution, adopts some other time period. For the recipient of the order, the thirty-day period obviously commences upon receipt. But what about a neighbor? There

is no requirement to publish notice of Certificate of Zoning Compliance or other permits or decisions made by a Zoning Enforcement Officer. In *Munro v. Zoning Board of Appeals of Branford*, 261 Conn. 263 (August, 2002), the Supreme Court held that the thirty-day period could not commence until the aggrieved party receives actual notice (in that case, when construction commences). The impact which this decision has on finality of Zoning Enforcement Officer decisions is considerable, affecting financing of almost every land development. Note the different result where the plaintiff did have notice of the decision and still waited more than thirty days before filing an appeal. *Hoffer v. Zoning Board of Appeals of Town of Oxford*, Docket No. CV 00-0071916S (Conn. Super., J.D. of Ansonia/Milford at Derby, 2002). PA 03-144 amended Conn. Gen. Stats. §8-3(f) and 8-7 to allow (but not require) recipients of a Certificate of Zoning Compliance to publish a notice thereof and trigger the 30-day appeal period.

Certificate of Zoning Compliance issued at the Certificate of Occupancy stage can only challenge the compliance of the building as constructed with the buildings as approved at the building permit stage; cannot challenge the compliance of the building as compared to the original approval, which issue was determined when the Certificate of Zoning Compliance was issued at the Building Permit stage. *Langmoor v. Zoning Board of Appeals of Barkhamstead*, 33 Conn. L. Rptr. No. 1, 34 (October 21, 2002). *Accord, Eyles v. Stonington Zoning Board of Appeals*, 2010 WL 1666292 (Superior Court, New London). Compare to *Chase v. Montville Zoning Board of Appeals*, 61 Conn. L. Rptr. No. 19 (April 25, 2016) where the neighbor timely appealed the initial zoning approval to the ZBA and then to court at the building permit stage, and while that appeal was pending the builder finished the building and obtained a zoning permit for a C.O., which neighbor did not appeal. Builder then filed a motion to dismiss the pending appeal, claiming that it was moot because the zoning approval at the C.O. stage had been granted and not appealed. Held (Judge Bates) that there was no need to appeal the second zoning approval because builder proceeded at his own risk in constructing the building and it could be torn down if the neighbor prevailed in his appeal. Judge Bates essentially confirmed that the second zoning approval merely confirms that what was built conforms to what was approved initially, and (as in *Eyles*) does not constitute a new finding of zoning compliance.

In *Watrous v. ZBA*, 61 Conn. L. Rptr. No. 2, 61 (12-21-15), the Superior Court (citing to *Washington Zoning Commission v. Washington Zoning Board of Appeals*, Docket Nos. 061041 and 061233 (J.D. of Litchfield, August 25, 1993) held that there is no statutory right of appeal to a zoning board of appeals, so a neighbor who was an abutter had to rely on classical aggrievement.

See *Spezzano v. North Branford Zoning Board of Appeals, infra*.

C. Does standing to invoke the local administrative process require standing to invoke a subsequent judicial appeal?

Example of an appeal of the decision of a Zoning Enforcement Officer to the Zoning Board of Appeals: Suppose the Zoning Enforcement Officer issues a permit for an activity on Blackacre. The owner of Whiteacre, located across town, seeks to file an appeal of that permit to the Zoning Board of Appeals. Regardless of the Board's decision on the merits, Whiteacre would not have standing to appeal the Board's decision except for his status as the "applicant" in the appeal. Does Whiteacre have standing to file the appeal to the Board when he is neither statutorily nor factually aggrieved? Does Whiteacre have standing to file an appeal of the Board's decision when he is neither statutorily

nor factually aggrieved by the underlying permit merely because he filed the original appeal with the Board?

Similar situation in *Gladysz*, discussed above.

D. Other standing issues before administrative agency:

1. Corporations: Apparently, the rule that a corporation cannot appear *pro se* in court does not apply to administrative proceedings where a corporate officer can represent his/her corporation. *Briteside, Inc. v. Department of Health*, 31 Conn. L. Rptr. No. 5, 162 (February 11, 2002).

2. Out of town speakers: Except in the case of intervenor, there is no case law about non-residents of the municipality having "standing" to *speak* at public hearing. My recommendation: It's all one country so let non-residents speak and avoid an appealable issue of first impression.

V. Standing in Enforcement Proceedings

The normal rule on exhaustion of administrative remedies would apply to collateral attacks on enforcement actions. See *River Fitness, LLC v. Town Planning and Zoning Commission of Farmington*, 55 Conn. L. Rptr. No. 3, p. 109 (2-18-2013), where violator tried to enjoin issuance of citations by the ZEO, claiming an appeal from the hearing officer would have been futile because the commission was biased against them. Held that they had to appeal the hearing officer's determination anyway. See also, *Ackerman v. Mayor and Board of Burgesses of Naugatuck*, 57 Conn. L. Rptr. No. 2, 70 (1-27-14), where a demolition order was appealed to the local Building Code Appeals Board, and then (per local ordinance) to the Mayor and Board of Burgesses, but then appealed directly to the Superior Court instead of appealing to the State Codes and Standards Committee per Conn. Gen. Stats. §29-266(b). Appeal dismissed for failure to exhaust that administrative remedy.

But compare *Studioso v. Bridgeport PZC*, 64 Conn. L. Rptr. No. 7, p. 256 (3-3-17), where the plaintiff timely appealed the denial of a special permit to allow two pool tables in her restaurant. While the appeal was pending, the ZEO issued a Cease & Desist Order to remove the pool tables and the plaintiff sought a restraining order against the enforcement proceeding. The Commission argued that plaintiff had to exhaust her administrative remedies by appealing the Order to the ZBA. The Superior Court disagreed, holding that since plaintiff had appealed the denial of the special permit that formed the subject of the claimed violation, enforcement could and should be restrained until the appeal was decided. The Court distinguished cases of collateral attacks on stays of enforcement where no appeal was pending on the underlying issue.

See also, *Pfister v. Madison Beach Hotel, LLC*,64 Conn. L. Rptr. 59 (5-29-17) where the plaintiff brought a private zoning enforcement action because the ZEO refused to act. Held that since you *can't* appeal a ZEO's refusal to enforce a regulation, there was no administrative remedy to exhaust.

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Amended November 18, 2002; November 20, 2002; amended September 8, 2010; amended November 29, 2010 to add several cases; amended January 17, 2011 to add *Walker* case. Updated April 21, 2011 to add *Douglas* and related floating

zone cases. Updated June 7, 2011 to add *Burton* case. Rev. August 15, 2011 to add *Commissioner of Corrections* and *Kobyluck Bros.* Cases. Rev. September 2, 2011. Rev. November 9, 2011 to add *301 Eagle Street, LLC, Diamond 67, LLC* and *Abel.* Rev. December 30, 2011 to add *Chapdelaine* case. Rev May 7, 2012 to add *Civitano* case. Rev. July 24, 2012 to add *Roe* and *Zahrijczuk* cases. Revised September 13. 2012 to add *HOCAP* case. Rev. March 22, 2013 to add *River Fitness* case, *Vivian Simons* case, and *Allstar Sanitation* case. Rev. April 4, 2013 to add *Handsome, Inc.* case. Rev. August 9, 2012 to add *Zappone* case. Rev. August 16, 2013 to add *Ahuja Holdings*, *Steroco,* and *Independent Outdoor III, LLC.* Rev. 11-24-13 to add *Wallingford v. Meriden ZBA.* Rev. 1-20-14 to add *Emerick* case. Rev. 3-23-14 to add *Ackerman* case. Rev. 4-29-14 to add *Haggett* case. Rev. 11-18-14 to add *Nixon* and *Mandable* cases. Rev. 1-12-15 to add *Serdechny* case. Rev. 6-1-15 to add *Huse* case and *Glass* case. Rev. 6-29-15 to add *Civie* case. Rev. 8-18-15 to update *Handsome* case. Rev, 12-29-15 to add *Panek* case. Rev. 2-18-16 to add *Watrous* and *Bushnell Tower Condominium* cases. Rev. 4-13-16 to add *Griswold* case. Rev. 5-4-16 to add *Chase* case. Rev. 10-18-16 to add *Spezzano.*Rev. 6-21-17 to add *Mayer* case. Rev. 7-6-17 to add *Studioso* decision. Rev. 7-7-17 to add *Patty* case. Rev. 9-12-17 to add *Wick* case. Rev. 6-4-18 to include site for *Mayer* case and add the *Pfister* case. Rev. 10-15-20 to add the *Plainfield PZC v. ZBA* case. Updated 10-23-20 to add *Old Mine Associates, LLC, "Q"-Lungian Enterprises, Inc,* cases.