DOCKET NO. LND HHD CV-19-6119135-S:		SUPERIOR COURT
BROOKLYN SAND & GRAVEL, LLC, ET AL.	:	JUDICIAL DISTRICT OF
V.	:	HARTFORD
PLANNING AND ZONING COMMISSION OF THE TOWN OF BROOKLYN	:	DECEMBER 2, 2020

MEMORANDUM OF DECISION

The plaintiffs, Brooklyn Sand & Gravel, LLC ("BS&G"), Wayne Jolley and Leslie Jolley, appeal from the decision of the Brooklyn Planning and Zoning Commission (the "Commission") on July 2, 2019. That decision approved a special permit, but contained a condition ("Condition 4") which prohibited the importation of any offsite material. The parties have filed briefs and a remote hearing occurred on August 25, 2020.[1]

Statement of Facts

BS&G is a Connecticut limited liability company of which Wayne Jolley and his wife, Leslie Jolley, are members. The Jolleys own the property on which BS&G operates, which is comprised of three parcels totaling approximately 64 acres located east of Wauregan Road and west of the Quinebaug River in Brooklyn, Connecticut, known as 530 Wauregan Road and designated by the Brooklyn Assessor's Map 30 Lot 97, Lot 97-1, and Lot 97-2 (collectively, the "subject property").

[1] The time between the filing of the last brief, February 21, 2020, and the date of the hearing was due to the COVID-19 pandemic and its restrictions on in-person court proceedings.

The subject property is located in a residential-agricultural ("RA") zone. Section 3.4.4.4 of the Brooklyn Zoning Regulations allows gravel banks in the RA zone subject to special permit approval. ROR 45 at 21.

The Brooklyn Zoning Regulations concerning gravel banks provide:

> 13.5.4 - The commission may allow the processing of sand and gravel on the site. Processing shall be restricted to screening, washing, crushing and sorting. Material processed on site shall be:
>
> > 13.5.4.1 - Material that is excavated on site, and
> >
> > 13.5.4.2 - Material excavated off-site and transported to the subject site for processing provided that the annual quantities of same does not exceed that processed and mined on site.

The subject property has been used for the operation of a sand and gravel bank and processing facility since the 1950s, before the adoption of zoning regulations in Brooklyn. After the town adopted zoning regulations, a special permit was required for sand and gravel operation. Prior to 2019, BS&G operated under a special permit that required annual renewals and allowed for the removal of a specified amount of gravel. When the specified amount of material was close to being exhausted BS&G applied for a new permit on March 5, 2019.

Condition 6b in the 2017 and 2018 permit renewals provided that "[t]he quantity of imported material may not exceed mined material in accordance with the Brooklyn Zoning Regulations Sec. 13.5.4.2 as measured by truckloads and converted to cubic yards." ROR 65. The permits required that BS&G file quarterly reports which indicated the truckloads imported and the record indicates that BS&G had filed quarterly reports in compliance with the permits.

The March 5, 2019 application for a new special permit (the "Application") requested continued excavation and processing of both excavated and imported material. The Application

requested removal of 218,000 cubic years of sand and gravel at the subject property in three phases.[2]

In the same time frame as the Application, BS&G also obtained a Wetland Permit for "Continuation of gravel excavation and processing operations" with no changes proposed within regulated areas. ROR 13 at 1; ROR 31 at 7. BS&G also applied to the Brooklyn Zoning Board of Appeals ("ZBA") for a number of variances relating to the operation of the sand and gravel bank at the subject property. One of the variances sought permission to increase the amount of imported material.

The Commission accepted the Application on March 6, 2019. It was advised by Jana Roberson, the Town Planner ("Roberson"), that BS&G had applied for four variances to be heard by the ZBA on March 26, 2019. The Commission decided to postpone the public hearing on the Application until after the ZBA had ruled on the variances. In addition, the Commission decided to submit a memorandum to the ZBA in an attempt to influence the decision on BS&G's variances. One member of the Commission, Austin Tanner, opposed the memorandum based on previous advice by the Town counsel, which had stated that the ZBA and the Commission were two separate entities and should not interfere with each other's proceedings. However, the remaining Commission members including the Commission chair, Michelle Sigfridson ("Sigfridson"), favored attempting to influence the ZBA's decision.

Sigfridson labeled the variance concerning the importation of material as an attempt to obtain a permit for stand-alone processing: "to me, requesting this variance seems like they're trying to completely bypass our regulations that we've specifically discussed whether or not we want to allow

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2 The amount of cubic feet to be excavated ultimately decreased from the amount sought in the initial form of the Application.

stand-alone processing facilities and decided as a Board that we don't." ROR 81 at 4. Sigfridson signed the memorandum to the ZBA dated April 23, 2019. The memorandum was six pages long and advised the ZBA that the variances sought by BS&G were not "in harmony with the general purpose and intent of the Zoning Regulations." ROR 83 at 3.

Rather than sending the memorandum to the ZBA, the Commission had one of its members, Vice Chair, Carlene Kelleher, appear at the ZBA hearing and read the memorandum into the record. The ZBA listed the memorandum as one of the deciding factors in its denial of all of BS&G's variances.

The public hearing on the Application commenced on May 21, 2019. David Held, P.E., BS&G's civil engineer, presented the Application for BS&G. He explained that 112,000 cubic yards of material could be extracted from the subject property in two phases. Phase one was expected to be completed in 2019 and phase two would be completed by the end of 2020. Held provided evidence showing that BS&G had complied with existing permits. It kept all truck traffic off of Maynard Road and maintained a tree buffer between the adjacent properties. BS&G submitted quarterly reports which documented the number of truck trips per quarter and the volume of imported material brought to the site. These reports demonstrated compliance with the previous permit's requirement that the average number of truck trips per day not exceed 60, with 80 truck trips per day as a maximum. Roberson confirmed that BS&G had complied with the truck reporting requirements and also noted that the "zoning regulations specifically allow the importation of material for processing." ROR 41 at 27. Roberson also told the Commission that the Town Engineer had reviewed the 2019 application and noted only a few questions, which Held addressed.

After Held's presentation, the public was allowed to comment on the Application. There was

strong neighborhood opposition to the Application. Thirty-two neighbors signed a petition of opposition. The petition provided, in part, the following:

> We the residence[sic] of Rt 205, also known as Wauregan Road Brooklyn Connecticut, feel that Brooklyn Sand and Gravel LLC has overstayed their welcome. We are opposed to any continuation of this operation.
>
> Mr Jolly[sic] has totally disregarded the zoning regulation pertaining to the amount of material that is allowed to be imported.
>
> Allowing Brooklyn Sand and Gravel to continue to operate will diminish our property values and make it difficult if not impossible to sell our homes for fair market value. No one will want to purchase a house so close to a commercial processing gravel operation, and we doubt that the town of Brooklyn would be willing to compensate the nearby residence[sic] with a tax reduction.

ROR 22.

Several people stated that on certain dates they had counted more truck traffic than the previous permit allowed. In light of these statements, Held suggested that BS&G would pay for an outside consultant to count trucks. Town Planner Roberson agreed that truck counters would be a solution to ascertaining the accurate number of truck trips:

> If you really want to know what the truck traffic is, you have to count the trucks and it maybe something this Commission wants to consider. And I put this on my guidance document that you could potentially as a condition of approval require continuous traffic counters at the entrance of the site so we would know for sure because certainly it's going to vary considerably from day to day.

ROR 43 at 10, 29.

However, Sigfridson dismissed the option of truck counters during the public hearings and during deliberation, the Commission declined BS&G's offer to pay for a formal truck count and there were no formal truck counts done. The record contains no expert testimony concerning truck trips and no other evidence to support the claims in the neighbors' petition that the plaintiffs had

"totally disregarded the zoning regulation pertaining to the amount of material that is allowed to be imported." See p. 5 *infra* and ROR 22.

Held was present when a site walk was conducted by the Commission on May 29, 2019. During the walk, the Commission members observed only one truck enter the BS&G facility. While several neighbors had testified about noise from the gravel operation, Jana Roberson reported that during the site walk:

> I think there was a general agreement that the sound of the processing equipment was not very loud, especially from where we were standing. This was the nearest house.

ROR 42 at 3.

Jean Fleming was one of the neighbors who voiced his opposition to BS&G's continued operations and in particular, the continued importation of material. He spoke several times at the public hearing on May 21, 2019. After Mr. Fleming spoke a second time, Sigfridson acknowledged on the record that Fleming was her father. She went on to assure the audience that the Commission intended to disallow processing of imported material by BS&G. Sigfridson stated, "I'm thinking about additional conditions or curtailing the importation somewhat if not entirely." ROR 43 at 27.

The Commission met on July 2, 2019, to deliberate on the Application. Sigfridson stated:

> I just want to mention too, there's been some discussion amongst the members of this Commission as to how a motion should be structured if your feeling is that you do not want to approve an application, whether it's even appropriate to do a motion to deny. I think we've for the most part been operating under the assumption that a motion to deny works and is fine. A vote not to approve has the same effect, doesn't it?

ROR 44 at 2.

Roberson, the town planner, presented a draft motion to approve a special permit, which was

based on the 2018 renewal and on a gravel special permit granted to another applicant. Like the 2018 renewal permit, the draft allowed for the importation of material for processing as long as it did not exceed the amount of excavated material. Condition 4 of the draft provided:

> The quantity of imported material may not exceed mined material in accordance with the Brooklyn Zoning Regulations as measured by truckloads and converted to cubic yards. Material excavated on-site will be counted in the year that it is excavated. Imported material will be counted in the year that it is brought on site. Stockpiled material shall not be counted towards the excavation or importation volume.

ROR 47 at 1. Condition 7 of the draft provided:

> A continuous vehicle counter shall be installed along the entrance on Wauregan Road to monitor vehicle trips. Daily vehicle trip reports shall be included in the quarterly monitoring reports. The average shall not exceed 60 trips per day and the maximum daily trips shall not exceed 80 trips per day.

ROR 47 at 2. Roberson explained that the truck counters were a feasible method of ensuring compliance with the above conditions. Other Commission members began to discuss the implementation of truck counts. Sigfridson suggested that rather than worry about truck counts, the Commission merely prohibit the importation of materials.

One Commission member, Tanner, stated that the approval of the permit allowing excavation of 112,000 cubic yards "would have achieved the goal of giving an end date to the business." ROR 44 at 6. However, Sigfridson insisted that allowing processing of imported material encouraged BS&G to continue its business. Commission member D'Agostino suggested that the Commission allow phase one fully, prohibit phase two to enable BS&G to sunset its business gently. Sigfridson's response to that suggestion was to replace the condition 4 proposed by Roberson:

> #4 is the condition that would relate to imported material and how it would be counted. I would proposed that that be stricken and replaced by something that says that no material shall be imported to the site . . . .

Id. at 22.

Ultimately, Condition 4 was redrafted to state: "Material excavated on site may be processed, but no off-site material shall be imported to the site for processing or other uses after August 1, 2019." ROR 28. The proposed Condition 7 was eliminated.

The Commission voted 5-1 to approve the permit with Condition 4. The Commission did not accompany its decision with a formal statement of the reasons for imposing Condition 4. The decision was published in the newspaper on July 12, 2019, and recorded on August 7, 2019. This appeal was timely commenced by service on the Brooklyn Assistant Town Clerk on July 29, 2019.

Aggrievement and Ruling

The Jolleys own the subject property and BS&G is the applicant for the special permit to which Condition #4 is attached. Therefore, BS&G and the Jolleys are statutorily aggrieved as a matter of law under Connecticut General Statutes § 8-8. *Goldfield* v. *Planning & Zoning Commission*, 3 Conn. App. 172, 176, 486 A.2d 646 (1985). Because Condition 4 adversely impacts the Jolleys' and BS&G's investment and interest in the property, they are also classically aggrieved. *West Farms Mall, LLC* v. *West Hartford*, 279 Conn. 1, 13, 901 A.2d 649 (2006).

The standard for judicial review of administrative decisions made by municipal planning and zoning commissions is whether the agency acted illegally, arbitrarily, or in abuse of its discretion. *Gagnon* v. *Municipal Planning Commission*, 10 Conn. App. 54, 56-57, 521 A.2d 589, cert. denied, 203 Conn. 807, 525 A.2d 521 (1987). "When considering an application for a special exception, a zoning authority acts in an administrative capacity, and its function is to determine whether the proposed use is expressly permitted under the regulations, and whether the standards set forth in the regulations and statutes are satisfied." *Daughters of St. Paul, Inc.* v. *Zoning Board of Appeals*, 17

Conn. App. 53, 56, 549 A.2d 1076 (1988).

The plaintiffs have presented a number of reasons why the Commission's imposition of Condition 4 was illegal. While the court will address all arguments, it finds that one argument is sufficient to vitiate the imposition of Condition 4: the Chair of the Commission had a conflict of interest and not only failed to recuse herself, but used her influence and clear predisposition against the Application to gain approval of Condition 4 even when there were viable alternatives.

During the public hearing, Sigfridson's father, Mr. Fleming, who lives across the street from the BS&G facility, voiced his opinion that the Commission should prohibit the importation part of the permit. Sigfridson acknowledged that she had grown up across the street from the facility. She failed to recuse herself. Instead, she continued, not as a passive member of the Commission, but as the leading proponent of the Commission's unusual course of influencing the actions of the ZBA with respect to the plaintiffs' variance requests. While the BS&G and the Town Planner, Roberson, as well as various Commission members, suggested that the importation of material could be effectively monitored by various means such as truck counts, Sigfridson continually steered the Commission away from compromise and towards her father's position, which wanted to end BS&G's business and saw the prohibition on importing material as the best way to do so.

"[Connecticut General Statutes] Section 8-11 provides that no member, directly or indirectly interested in a personal or financial sense in 'any matter' coming on for a decision or hearing of the commission may participate in that hearing." *Thorne* v. *Zoning Commission*, 178 Conn. 198, 202, 423 A.2d 861(1979). A personal interest is defined as:

> A personal interest is either an interest in the subject matter or a relationship with the parties before the zoning authority impairing the impartiality expected to characterize each member of the zoning authority. A personal interest can take the form of

> favoritism toward one party or hostility toward the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness which a zoning official in our state is required to possess.

Anderson v. *Zoning Commission*, 157 Conn. 285, 290-91, 253 A.2d 16 (1968).

"This prophylactic rule serves the salutary purposes of promoting public confidence in the fairness of the decision-making process and preventing the public official from placing himself in a position where he might be tempted to breach the public trust bestowed upon him." *Gaynor-Stafford Industries, Inc.* v. *Water Pollution Control Authority*, 192 Conn. 638, 649-50, 474A.2d 752, cert. denied, 469 U.S. 932, 105 S. Ct. 328, 83 L. Ed. 2d 265 (1984). "It is axiomatic that the appearance of impropriety created by a public official's participation in a matter in which he has a pecuniary or personal interest is alone sufficient to require disqualification." *Brunswick* v. *Inland Wetlands Commission*, 29 Conn. App. 634, 639, 617 A.2d 466 (1992).

The determination as to whether an interest is sufficient to disqualify is a factual one. *Thorne*, *supra*, at 205. In *Thorne*, the chair of a zoning commission moderated the public hearing and voted in favor of the zoning change at issue. The chair's parents and sister owned and lived in property adjacent to the plaintiffs' property and benefitted from the zone change. On appeal, the defendant claimed that § 8-11 did not apply to zoning changes and that the chair's interest was too remote to require disqualification under that section. The court disagreed, stating:

> There was . . . no error in the judgment of the trial court finding that Byrne was "directly or indirectly," in a "personal or financial sense," interested in the decision of the commission redesignating the plaintiffs' property from a business to a residential zone. *Section 8-11 of the General Statutes clearly requires that a member of the zoning commission or board shall disqualify himself when the decision of the zoning authority could inure to his benefit, and forbids a member of a zoning commission or board of appeals from participating in any matter in which he has a personal interest in the outcome. . . .* While we make it clear that there is no evidence that Byrne exercised any improper influence upon the commission, and we impute

> no such impropriety to him, we conclude that, *in view of the chairman's interest in the zone change, as evidenced by the close proximity of his parents' and sisters' residences to the plaintiff' property and by his interest on their behalf in maintaining the residential character of the locality, the court did not err in holding the commission's action a nullity as to the plaintiffs' property.*

(Emphasis added.) *Thorne, supra,* at 204-205.

In this case, Sigfridson's personal interest was virtually identical to that of the chair in *Thorne* and, by itself, would warrant her disqualification. However, unlike the chair in *Thorne*, Sigfridson clearly exercised improper influence upon the Commission, including her encouragement that the Commission take the extremely unusual and, arguably improper, action to influence the ZBA and her repeated refusal to even consider measures suggested by other Commission members and the town planner which would have obviated the need for Condition 4.

The defendant argues that § 8-11 should not disqualify Sigfridson because the plaintiffs did not demand her disqualification at any hearing. However, Connecticut courts allow raising a conflict of interest claim for the first time on appeal to the Superior Court. See *Nazarko* v. *Conservation Commission*, 50 Conn. App. 548, 553, 717 A.2d 850, cert. denied, 247 Conn. 941, 723 A.2d 318 (1998); *Fruscianti* v. *Westbrook Zoning Board of Appeals*, Superior Court, judicial district of Middlesex, Docket No. 60825, 1992 WL 91670 (April 7, 1992, *Higgins, J.*) (6 Conn. L. Rptr. 298); *East Street Residential Partnership* v. *East Granby Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. 366173, 1990 WL 284338 (May 22, 1990, *Smith, J.*) (1 Conn. L. Rptr. 653).

As stated above, unlike the chair in *Thorne*, who had a disqualifying conflict of interest, but did not seek to improperly influence the Commission, Sigfridson was the chief antagonist with respect to the Application. The record shows that she had predetermined to prohibit importation

before the public hearing commenced.

"The law does not require that members of zoning commissions must have no opinion concerning the proper development of their communities. It would be strange, indeed, if this were true." *Furtney* v. *Zoning Commission*, 159 Conn. 585, 594, 271 A.2d 319 (1970). The decisive question in determining whether a commission member was predisposed for or against something is whether she had actually made up her mind prior to the public hearing without hearing any arguments. This involves a question of fact as to which the plaintiffs have the burden of proof. *Cioffoletti* v. *Planning and Zoning Commission*, 209 Conn. 544, 555, 552 A.2d 796 (1989).

In *Marmah, Inc.* v. *Greenwich*, 176 Conn. 116, 405 A.2d 63 (1978), the Supreme Court upheld the trial court's finding that "the commission acted with predisposition and predetermination" and its "actions were capricious, unreasonable and illegal" when it denied the plaintiff's site plan application. In *Marmah*, the commission initially denied the plaintiff's site plan application to construct a post office. Shortly thereafter it scheduled a public hearing on a proposed amendment to the zoning regulations to delete the use sought by the plaintiff. The commission then declined to consider the site plan application based on a pretext that there was no quorum and then scheduled the plaintiff's hearing on the same night as the hearing to amend the regulations. The court further found:

> The commission's overt consideration of the site plan [was] casual and perfunctory. The commission appeared to be favoring opponents of the application throughout the public meeting at which it was discussed. Representatives of the [plaintiff] were not permitted to question the representative capacity, or the technical credentials, of those who spoke or wrote in opposition to the application. There was no expert testimony about traffic, architectural design or building design, other than the approvals of [the plaintiff's] application by the defendant town's traffic department, architectural review board, and building department. Nonetheless, the commission voted to disapprove the site plan on the grounds of increased traffic and unsatisfactory parking

layout, as well as the absence of a request for new facilities by the postal authorities. *Marmah, supra*, at 118.

The behavior of the Commission here, under Sigfridson's leadership was similar to that of the commission in *Marmah*. The Commission repeatedly rescheduled the special permit hearing to await the ZBA's decision on BS&G's variance applications. The Commission improperly sought to influence the decision of the ZBA as set forth above. After the Commission had guided the ZBA to deny all variances, including the one which requested an increase in imported material, Sigfridson aggressively promoted the prohibition of importation as part of the special permit.

While this court believes that the conflict of interest discussed above is sufficient to invalidate Condition 4 of the permit, it will address the other arguments raised by the plaintiffs. The plaintiffs argue that the imposition of Condition 4 was arbitrary and illegal in that the Commission violated the prior application rule, the imposition of the Condition was not based on substantial evidence and the imposition of the Condition terminated a pre-existing, nonconforming use. The court agrees.

"There is a well-established concept in the administrative law of this state that prohibits an administrative agency from reversing its prior decision unless the facts and circumstances that resulted in the decision have sufficiently changed to affect materially the reason that produced and supported the decision and no vested rights have intervened." *Grace Community Church* v. *Planning & Zoning Commission*, 42 Conn. Supp. 256, 270-71, 615 A.2d 1092 (1992). An administrative agency that has acted on a special permit application is not allowed to reverse itself unless there has been a substantial change of circumstances that affects the merits of the case. *Id.*, citing *Rocchi* v. *Zoning Board of Appeals*, 157 Conn. 106, 111, 248 A.2d 922 (1953); see also

Laurel Beach Assn. v. *Zoning Board of Appeals*, 66 Conn. App. 640, 646, 786 A.2d 1169 (2001).

It appears from the record that the 2019 BS&G application was substantially the same as the 2017 and 2018 applications. The reason why the 2019 application involved a new special permit was that the limit on the amount of material under the previous permit had been exhausted. In both the 2017 and 2018 renewals, the Commission allowed BS&G to import the same amount of material as it excavated. In 2017, BS&G requested removal of 100,000 cubic yards, but removed only 53,000 cubic yards. The 2018 renewal allowed BS&G to remove the remaining 47,000 cubic yards. The 2019 Application requested removal of 112,000 cubic yards over the course of two years, substantially the same relief as the 2017 and 2018 applications.

The 2017 and 2018 permits allowed importing material at a ratio of one to one, as permitted in the Regulations (13.5.4.2). The neighbors who spoke against the Application cited truck traffic and noise. However, notwithstanding the Commission's arguments to the contrary, there was ample evidence that BS&G had complied with the truck trip requirements with respect to the 2017 and 2018 permits. Moreover, in the face of purely anecdotal reports of excess truck trips, BS&G and its engineer offered several times to hire and pay for professional counters, but those offers were rejected. As the Application proposed removing a substantially similar amount of material as the previous permits allowed, the truck traffic would not be substantially different from that allowed in 2017 and 2018.

In *Mason* v. *Board of Zoning Appeals*, 143 Conn. 634, 124 A.2d 920 (1956), the board denied the new owner of a car repair business a certificate of premises suitability. A similar certificate had been issued to a previous owner for the same location. Neighbors' complaints of noise, smoke and traffic were the reason for the denial. In reversing the action of the board, the court

stated:

> When a business has been launched and continuously operated on a site officially declared suitable by a zoning board of appeals, the status of suitability should normally continue. This conforms to the rule of law that, after an administrative agency has made a decision related to the use of real property, it is ordinarily powerless to reverse itself, although it may do so if a change in circumstances has occurred since its prior decision, or other considerations materially affecting the merits of the subject matter have intervened and no vested rights have arisen.

Id. at 838-39.

In *Grace Community Church*, *supra*, the court noted that "[f]or material changes to exist since the prior application, there should be some evidence of changed conditions in the immediate vicinity of the subject property connected with the reason for disapproval of the second application." *Id.* at 271. In *Grace Community Church,* there was no evidence of a change in traffic conditions between the time of the first approval and the denial of the second application. The court held that in "the absence of factual findings by the Commission as to how the application was different from the previous one, it should not have denied the special permit.... This is particularly true where the applicant was willing to consider reasonable controls and improvements to prevent traffic problems." *Id.* at 272.

Like *Grace Community Church*, there was no evidence in this case or findings by the Commission that there were any changes in conditions between the 2018 permit and the 2019 Application.

The plaintiffs argue that the imposition of Condition 4 was not supported by substantial evidence. The court agrees. The Commission relied on complaints by neighbors about excessive truck traffic, but refused the plaintiffs's repeated offers to verify the number of trucks. The Commission also gave credence to neighbors' claims that the plaintiffs had not complied with their

previous permit applications when the record clearly shows that town officials had found compliance. Martha Frankel, the Town's Zoning and Wetlands Agent, noted that "volumes as reported for the past year are compliant with the permit." ROR 70. The Town Planner, Roberson, confirmed that BS&G had complied with the truck reporting requirements. ROR 41 at 27.

The neighbors claimed that allowing BS&G to continue operating would diminish property values because "no one will want to purchase a house so close to a commercial processing gravel operation." Defendant's Brief at 6-7 and ROR 22. Since these neighbors had all purchased their properties 8-35 years ago, when the plaintiffs were already operating the gravel pit, it should have been difficult to credit their testimony that no one would buy a property due to the plaintiffs' operation. There was nothing that showed that the plaintiffs' continued operation and importation would change their property values as the importation amounts requested in 2019 were the same as in 2017 and 2018.

A special permit may be denied only for failure to meet specific standards in the regulations, and not for vague and general reasons. *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission,* 285 Conn. 381, 431, 941 A.2d 868 (2008). It is an abuse of discretion to deny a special permit application based on unsubstantiated evidence. *Norwalk Yacht Club Corp.* v. *Zoning Commission*, Superior Court, judicial district of Stamford, Docket No. CV-06-4008012-S, 2010 WL 1667281, at *7 (March 31, 2010, *Adams, J.*). In *Norwalk Yacht Club*, a yacht club applied for a special permit to remodel its clubhouse. The local homeowner's association opposed the application on the grounds that the club's summer sailing program and increase in the club's membership would generate increased traffic. The zoning commission denied the special permit on the grounds, among other things, that there would be an increase in traffic from the summer sailing

program.

On appeal, the court found that there was no evidence in the record that the renovation of the clubhouse would have any effect on traffic. The court stated that most of the traffic complaints from neighbors involved traffic related to the club's youth sailing program, which the proposed renovations would not affect. The court determined that it would be "unfair and arbitrary to deny a permit when the project applied for would have no adverse effect on the condition complained of." *Id.* at p. 7.

In *Martland* v. *Zoning Commission*, 114 Conn. App. 655, 971 A.2d 53 (2009), the court affirmed the trial court's decision that "the requirement of [a] restoration condition was improper," because the record did not contain substantial evidence to support the Commission's imposition of the condition. *Id.* at 667. The condition required the applicant to restore an existing berm, which the Commission found had acted as a noise and physical barrier. The court concluded that the evidence before the Commission that the berm acted as a noise buffer was not substantial because "it is not supported by anything other than speculation and conjecture on the part of those objecting to the plaintiff's proposed activities." *Id.* at 665-66. The court highlighted the absence of "scientific data" comparing the noise levels in the area with and without the berm and stated, "Even if we assume arguendo that the noise level would increase as a result of the changes to the berm, the record is devoid of any evidence indicating how much of a noise increase would be permissible before the public health, safety, convenience or property values would be impacted." *Id.*

The plaintiffs further argue that the imposition of Condition 4 improperly terminated a valid, pre-existing, non-conforming use of the property. "It is a fundamental zoning precept in Connecticut . . . that zoning regulations cannot bar uses that existed when the [zoning] regulations were adopted."

Cioffoletti v. *Planning & Zoning Commission*, 24 Conn. App. 5, 8, 284 A.2d 1200 (1991). "Once a nonconforming use is established, the only way it can be lost is through abandonment." *Taylor* v. *Zoning Board of Appeals*, 65 Conn. App. 687, 696, 783 A.2d 526 (2001).

The Brooklyn Zoning Regulations were adopted in 1972. Held, a representative of the plaintiff BS&G, testified that the gravel operation had existed since the 1950s. ROR 41 at 12. One of the neighbors, Dessert, testified that over fifty years ago he had attended a hearing where Mr. Jolley discussed the importation of material for his processing plant. The importation of material was a pre-existing, non-conforming use. The imposition of Condition 4 interfered with that use based on insufficient evidence and was unreasonable.

The defendant argues that Condition 4 is an essential component of the special permit and, therefore, if it is invalidated, the whole permit should be invalidated. This is difficult to accept in light of the record. Roberson, the Town Planner, presented the Commission with a draft approval of the Application in which condition 4 provided:

> The quantity of imported material may not exceed mined material in accordance with the Brooklyn Zoning Regulations as measured by truckloads and converted to cubic yards. Material excavated on-site will be counted in the year that it is excavated. Imported material will be counted in the year that it is brought on site. Stockpiled material shall not be counted towards the excavation or importation volume.

ROR 47 at 1.

The defendant has failed to cite any cases to support its argument that Condition 4 is an essential component of the Application. "The imposition of a void condition . . . does not necessarily render the whole decision illegal and inefficacious. If the decision is otherwise supported by sufficient grounds as found by the board, a modification of the decision may be decreed with a view toward ending further litigation." *Parish of St. Andrew's Protestant Episcopal Church* v. *Zoning*

Board of Appeal, 155 Conn. 350, 354-55, 232 A.2d 916 (1967); see also *Pecora* v. *Zoning Commission*, 145 Conn. 435, 443-44, 144 A.2d 48 (1958). Under Connecticut General Statutes § 8-8 (l), the court is allowed to "affirm, wholly or partly, or revise, modify or remand the decision from which the appeal was taken in a manner consistent with the evidence in the record before the court." See also R. Fuller, 9A Connecticut Practice Book Series: Land Use Law and Practice (4th Ed. 2015) § 35:1.

For the foregoing reasons the Condition 4 of the special permit is null and void. The court sustains the plaintiffs' appeal and directs the Commission to approve the special permit adopting the Condition 4 contained in the proposed special permit approval (see p. 18 *infra*), which provides:

> The quantity of imported material may not exceed mined material in accordance with the Brooklyn Zoning Regulations as measured by truckloads and converted to cubic yards. Material excavated on-site will be counted in the year that it is excavated. Imported material will be counted in the year that it is brought on site. Stockpiled material shall not be counted towards the excavation or importation volume.

By the court,

/s/ 402017
Aurigemma, J.